PURCHASING POWER AND BUYERS' CARTELS

OECD Competition Policy Roundtable Background Note

OECD

Please cite as: OECD (2022), Purchasing Power and Buyers' Cartels, OECD Competition Policy Roundtable Background Note, www.oecd.org/daf/competition/purchasing-power-and-buyers-cartels-2022.pdf.

Foreword

This background note considers purchasing power and competition policy, with a particular focus on buyers' cartels. First, it considers how purchasing power interacts with the potential goals of competition policy, introducing the concepts of monopsony and bargaining power and their potential effects on social welfare.

Next, it considers how competition authorities treat purchasing power when it is derived from co-ordination between firms. In particular, it discusses the treatment of buyers' cartels and joint purchasing agreements, covering the relevant legal frameworks and recent trends. Further, it introduces the debate on whether there is a case for more focus in the area of buyers' cartels.

Finally, the note considers enforcement against buyers that exercise purchasing power unilaterally, exploring the different types of regimes that authorities employ. It notes that here, compared to approaches to co-ordinated conduct, there are significant differences between jurisdictions.

This note was prepared by Richard May and Junheon Lee of the OECD Competition Division, with helpful comments and inputs from: Carolina Abate, Antonio Capobianco and Ori Schwartz of the OECD Competition Division. It was prepared as a background note for discussions on "Purchasing Power and Buyers' Cartels" taking place at the June 2022 session of the OECD Competition Committee, *https://www.oecd.org/daf/competition/purchasing-power-and-buyers-cartels.htm*. The opinions expressed and arguments employed herein are those of the authors do not necessarily reflect the official views of the Organisation or of the governments of its member countries.

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1 Introduction

Competition law often focuses on the selling side of markets. Most high profile competition cases concern conduct on the supply side and authorities continue to take the majority of their cases against sellers. However, competition, the process of rivalry between parties, does not only take place between sellers.

Competition can also take place between purchasers, or buyers, for the acquisition of goods.[1] This competition will affect the prices charged by suppliers upstream, but also has the potential to affect prices and quantities in downstream markets. This is particularly evident when sellers must deal with a single buyer, known as a monopsonist, or a number of sellers coordinating to behave as one. However, even in the absence of a full monopsony, buyers may possess significant purchasing power[2], and this will similarly affect outcomes in markets.

For example, it has been estimated that a large buyers' cartel in the US meatpacking industry in the early 20th century had the effect of raising prices and lowering volumes downstream (Huang, 2021[1]). The research also suggested that whilst the conduct did result in harm to consumers (through higher downstream prices), the losses of farmers were substantially higher than those of consumers.

The OECD Competition Committee last considered the relationship between purchasing power and competition policy in detail in the 2008 roundtable on Monopsony and Buyer Power (OECD, 2008[2]). The 2019 hearing on Competition Issues in Labour Markets and subsequent OECD paper (OECD, 2020[3]) also addressed issues relating to purchasing power, albeit focused on labour markets. Where relevant, the note will refer to those previous papers in order to minimise duplication.

Since the OECD Competition Committee last considered this monopsony detail, there has been an increased awareness of purchasing power in some jurisdictions, notably the United States and the European Union. Further, this appears particularly true in relation to labour markets, not least the increased enforcement over the past decade in relation to wage fixing and no-poach agreements. However, not every jurisdiction has experienced similar increases in enforcement in relation to purchasing power.

One of the main drivers of the relative low prioritisation of enforcement against purchasing power might be a scepticism that it harms consumers or economic efficiency. Indeed, it is sometimes argued that purchasing power be pro-competitive, particularly in the context of merger control.

The appropriate level of enforcement against purchasing power is currently under discussion, with several prominent scholars stating this as an area that requires increased attention.[3] An important part of this debate is the ongoing discussion around the ultimate goal of competition policy and the appropriateness of the consumer welfare standard.[4] Consumers are not direct recipients of competition from purchasers; by definition consumers buy rather than sell. However, if market outcomes are altered through purchasing power, this may impact all parties, including consumers. This paper explores how purchasing power may affect market outcomes and how this interacts with differing potential goals of competition policy.

This paper will also consider enforcement on purchasing power by competition authorities. Purchasing power can arise when buyers co-ordinate, for example by forming cartels. Buyers' cartels conspire to lower prices below competitive levels, for example directly agreeing to fix input prices or by seeking to lower the competitive pressure that they face. Not all collaboration between purchasers will fall foul of competition law however. There is broad recognition that under some circumstances, allowing cooperation between purchasers can be beneficial to society. For example, joint purchasing arrangements between smaller

purchasers could allow them to benefit from cost savings that they pass on to consumers through lower prices.

Unlike buyers' cartels, individual buyers that possess significant purchasing power appear to rarely fall foul of traditional competition law. However, several jurisdictions have enhanced or specific regulations to address the behaviour of buyers in certain circumstances. The final section of the paper considers how authorities approach enforcement against buyers that exercise purchasing power unilaterally.

This paper focusses on the enforcement of co-ordinated and unilateral purchasing power, rather than the acquisition of it by merger control. Nonetheless, authorities could also address unilateral purchasing power through merger control, even if it is more regularly considered as a potential countervailing factor to increased supplier concentration.

In labour markets, suppliers are employees that supply their labour to employers, the purchasers. Purchasing power in labour markets is an area of significant interest and has been the focus of much of the recent enforcement action relating to purchasing power. This paper covers a range of markets where purchasing power may be of interest, rather than the application to labour markets directly.

This paper is structured as follows:

- Section 2 discusses the relevance of purchasing power to antitrust and competition policy, providing an overview of some relevant economic concepts, including monopsony and bargaining power.
- Section 3 focusses on coordinated conduct, largely centred on a discussion of buyers' cartels. As well as considering the legal treatment of buyers' cartels and their recent developments, this section also considers joint purchasing agreements and when they can, or should, be distinguished from buyers' cartels.
- Section 4 considers unilateral purchasing power. In particular, it discusses how traditional competition law and other regulation are used to address abuse of purchasing power by firms.
- Section 5 provides a conclusion.

2 Purchasing power and competition policy

This section considers the relevance of purchasing power to competition policy, including when, and why, there may be reasons for competition authorities to intervene in relation to purchasing power. An integral part of this debate regarding the appropriate level of enforcement against purchasing power is the ultimate goal of competition policy. In particular, the choice and interpretation of the "welfare standard" that authorities employ when assessing the merits of intervention can have an impact on the decisions taken. Section 2.1 introduces relevant parts of the debate, without seeking to resolve it.

Monopsony power and bargaining power are not always clearly defined. They can sometimes be used interchangeably and monopsony power can be used more broadly, for instance in the context of labour markets (OECD, 2020[3]). Bargaining power can also be described as countervailing power (Kirkwood, 2014[4]) or bargaining leverage (Hemphill and Rose, 2018[5]).[5] Nonetheless, it is an important distinction when considering the effect of purchasing power. Sections 2.2 and 2.3 discuss the distinction between monopsony power and bargaining power, and summarises how each might result in outcomes contrary to competition policy.

2.1. Welfare standards and harm

Many jurisdictions apply a "consumer welfare standard". Under this standard, intervention is generally only justified when it prevents harm, or promotes benefits, to consumers. The precise definition of the consumer welfare standard is not always clear. Indeed, this has been one of the criticisms levelled at it by commentators, see for example (Steinbaum and Stucke, 2020[6]) and (Hovenkamp, 2018[7]). For the purposes of this paper, we will use the term to refer to the promotion of long-run consumer surplus. Harm, in this context, refers to the loss of consumer surplus due to specific market conduct, such as a cartel, compared to a competitive counterfactual.

Another criticism of the consumer welfare standard is its sole focus on consumers, ignoring effects on other parties, such as workers or small businesses. Some have argued that ignoring such effects has a long-term detrimental effect on society (Stiglitz, 2018[8]). Further, some have noted that the consumer welfare standard, or at least its application, has failed to sufficiently protect competition (Stiglitz, 2018[8]), (Steinbaum and Stucke, 2020[6]), (Shapiro, 2001[9]).Others take the view that a true interpretation of the consumer welfare standard does not preclude considering effects on other actors in the economy, noting for example that all workers are also consumers (Hovenkamp, 2018[7]).

Another relevant part of the ongoing debate is whether antitrust should focus on protecting the process of competition, rather than specific welfare effects. For example, commentators have suggested that antitrust should hold a presumption that competition in itself leads to better social welfare in most situations, for example it could use an "Effective Competition Standard" or a "Protecting and Promoting Competition standard" (Steinbaum and Stucke, 2020[6]) (Shapiro, 2001[9]). The essence of these proposals is that antitrust should seek to preserve competitive market structures that protect individuals, purchasers, consumers and producers.

Another potential welfare standard is the total welfare standard, which considers the effects of competition on overall surplus. Such a standard ignores transfers that do not result in any deadweight loss or dynamic inefficiencies, including transfers from consumers to firms. This essentially rules out distributional assessments.[6] The consumer welfare standard also rarely takes into account distributional effects beyond an interest in the surplus of all consumers (Lianos, 2019[10]).

Such debates clearly have the potential to influence antitrust enforcement going forward. In practice, few jurisdictions explicitly adopt bright-lined welfare standards, but nor does every authority strictly apply the exact consumer welfare standard. For example, many jurisdictions have measures that allow public interest considerations beyond competition.[7]

Two overarching questions from the debate are of particular relevance to purchasing power:

1. Whose welfare does competition policy seek to protect? Could this include workers or even distributional concerns, or only consumers?
2. To what extent is there a presumption of harm regarding restrictions on the competitive process? In other words, to what extent should it be necessary to prove harmful effects to welfare in the context of purchasing power?

The rest of this section considers when purchasing power is likely to be have effects on both consumer and societal welfare.

2.2. Monopsony power

The term monopsony appears to originate from Joan Robinson's "The Economics of Imperfect Competition", where it was used in parallel to the term 'monopoly' to indicate the existence of a single buyer of a specific good or service**.** The monopsonist faces a large number of sellers, which take the market price for their supplies.

Monopsony is often considered in the context of labour markets, as there is typically a large number of sellers (workers) and, at least for some professions, relatively few buyers (employers). However, in the context of labour markets, the term is often used more broadly than in this paper, where the focus is on the case of a single, or small number, of powerful buyers facing a large number of sellers (Hemphill and Rose, 2018[5]).

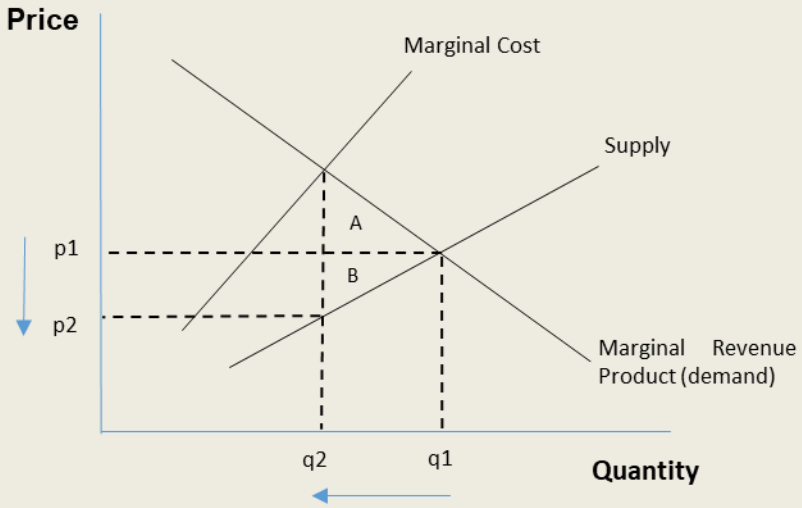
In its classical form, a monopsony results in harm to overall economic efficiency as it induces deadweight loss, symmetrically to a monopoly. Whilst a monopolist raises price and output falls, a monopsonist lowers prices and output decreases as a result (OECD, 2008[2]). This flows from another key aspect of the monopsony power which is that purchasers face an upward sloping supply curve, meaning they face increasing marginal input costs as volumes increase (Kirkwood, 2014[4]). Box 1 illustrates the monopsony issue, demonstrating the importance of the upward sloping supply curve.

A condition for monopsony power is that at least some suppliers must have some form of economic rent (OECD, 2008[2]). At first glance, this might appear a contradictory statement. However, in practice it merely notes that in order for suppliers to face harm, they must have something to lose. To be more precise, there are three kinds of rents that suppliers could face, Ricardian, quasi or monopoly (Noll, 2004[11]).

Of these, the most relevant to consider are Ricardian rents. These occur when the factors of production are differentiated by productivity (OECD, 2008[2]).[8]Quasi rents refer to the ability of suppliers to charge a surplus over their short run marginal cost, or short run avoidable cost. However, this "profit" is required to finance fixed, or sunk, costs. As such, attempts by a monopsonist to extract these rents will ultimately induce the exit of suppliers in the long run (OECD, 2008[2]).[9]Monopoly rents occur when, as the name implies, the supplier is a monopolist and hence has rents to extract. However, in such circumstances, it is perhaps more likely that the situation will be characterised by a bilateral negotiation. This is discussed in more detail in the next section.

Box 1. Illustration of monopsony on product demand

The diagram below illustrates the effect of a monopsonist purchaser on an input compared to competitive demand. In the latter case, price and quantity clears where supply equals demand, p1 and q1. With a single buyer however, the monopsonist will face the dilemma that each additional unit purchased, whilst profitable individually compared to its cost, will induce an effect on all other units. As a result, the monopsonist restricts demand for the input such that the marginal revenue product of the input equals its marginal cost. Price and quantity therefore fall to p2 and q2. The deadweight loss from the reduction in quantity is the area of A + B. This corresponds to lost volumes of input where the marginal revenue product exceeds its individual cost.



Firms may not be pure monopsonists. Instead there may be a few large buyers facing many smaller suppliers. In such circumstances, the buyers could be considered oligopsonists, the parallel to the oligopolists on the selling side. Analogously, if those firms are able to suppress output to lower the prices, they can be considered to have some monopsony power.

The amount of monopsony power depends on the number of firms and the elasticity of supply. Whereas the pure monopsonist can act in isolation of competing purchasers, oligopsonists will set their demand based on the expected action of other firms, but not taking into account the externalities that their purchases place on other firms (OECD, 2008[2]). As such, oligopsonists do not purchase the volume expected in a competitive purchasing market, but will also not fully maximise the profits of purchasers collectively by restricting output to the monopsony level.

A requisite for monopsony power is for the purchaser to control a sufficiently large share of sales to decrease the prices it faces by reducing its demand. This will clearly not be the case if sellers have alternative destinations to sell their products or services. If they did, others could offset the reduction in quantity from the purchaser. As with competition on the supply side, the closeness of different alternatives matters. Box 2 considers market definition in purchasing markets.

Given the conditions for monopsony power, namely the need for a number of small sellers with upward sloping supply curves, due to increasing marginal costs, it has been argued that it is relatively likely that monopsony power will be limited to certain kinds of industries, such as those in agriculture, natural resources or labour markets (Kirkwood, 2012[12]).

Box 2. Market definition for purchasing markets

The hypothetical monopsonist test

Defining the relevant market can assist in the assessment of competitive effects in purchasing markets. The hypothetical monopsonist test, the reverse of the hypothetical monopolist test used for defining selling markets, provides a helpful tool for defining the relevant buying market. Starting with a candidate set of purchases, the test considers whether a hypothetical monopsonist over those purchases could profitably execute a small but significant non-transitory decrease in price (SSNDP). This would be the case if suppliers to the hypothetical monopolist have limited alternatives for selling their product, even if prices dropped a small amount.

As with market definition on the supplier side, quantitative and qualitative evidence can be helpful in applying the hypothetical monopsonist test. The ultimate goal is to enhance the competition assessment by understanding the closeness of potential alternatives for suppliers to the candidate purchasing market in question. The product and geographic dimensions of the market need to be considered.

The relationship between purchasing and downstream markets

Purchasing markets need not be symmetrical to related downstream selling markets. For example, competing buyers of a particular input might participate in separate downstream markets, and the relevant geographic or product purchasing market will be wider than the downstream markets for the final product.

The opposite could also occur, with buyers facing narrower geographic markets for purchasing inputs than those downstream. For example, buyers of perishable inputs may use those inputs to manufacture a product that is less perishable, and so compete over a wider geographic market when selling than buying. Another example could be the labour market, where restrictions in worker mobility could imply significantly narrower geographic markets for workers than faced by their employers downstream.

2.2.1. Welfare effects of monopsony power

Monopsony power reduces prices and volumes.[10] This harms sellers compared to effective purchasing competition, but an obvious question is what it means for consumers and welfare overall.[11]

Whether monopsony power ultimately leads to harm to consumers depends on the extent to which there is also downstream market power. If the firm with monopsony power has market power downstream, then the reduction in output at the upstream level will correspond to further reduced output downstream, and higher prices for consumers. This is in spite of the lower prices acquired by the monopsonist. As with a monopsonist, if oligopsonists also possess market power in the relevant downstream markets, the monopsony power can lead to an increased reduction in output and harm to consumers (Ferrer, 2013[13]).[12]

If not however, then competitors downstream can replace the reduced output and downstream prices will be unaffected (Jacobson, 2013[14]). As some scholars have pointed out though, there may be a small effect downstream as production shifts to rivals which otherwise would have produced less, potentially implying lower levels of efficiency (Blair and Harrison, 2010[15]) (Noll, 2004[11]).

The implication is that while monopsony power should raise concerns on most welfare standards of antitrust, due to the inefficiency of the deadweight loss, the strength of the argument for intervention may vary. In particular, when the monopsony power does not correspond to downstream market power, justifying intervention may require a strong presumption for the importance of competition in not distorting

economic markets[13] or for weight to be given to the loss of surplus by sellers over the gains from purchasers (for example if workers surplus were considered part of consumer surplus).

The extent of overall harm to different parties will depend upon the level of monopsony power. Some scholars have argued that there is potential for buyers to exercise market power over suppliers even if they possess relatively modest shares of purchases, noting that by definition buyers are the party that has discretion over when to purchase and where from (Carstensen, 2010[16]).

The elasticity of supply will be an important factor in the degree of monopsony power and the effect it has impacts on markets (OECD, 2008[2]). Inelastic supply, or steep supply curves, mean that relatively small decreases in withheld demand could result in large reductions in price. This suggests the potential for monopsony power with relatively modest shares. Conversely, the effect on quantity may be lower as only small changes in demand are required to obtain lower prices.

While the above analysis is likely to hold for most instances of monopsony power, some specific circumstances could change these results. Firstly, as noted previously, if the purchaser can discriminate, then there may be no reduction in volumes and the analysis above will not hold. Secondly, if monopsonists are able to offer suppliers an "all or nothing" deal, the harm will fall entirely onto suppliers and consumers may even benefit from lower prices (OECD, 2008[2]).[14] Such instances will only be possible if purchasers can credibly threaten zero purchases if the offer is not accepted. It may also only work in the short-term, especially if the offer pushes sellers below their average long-term total costs (Blair and Harrison, 2010[15]).[15]

2.2.2. Collusive monopsony

Collusion amongst purchasers, collusive monopsony, can provide purchasers with monopsony power, leading to the suppression of prices and the same effects on social welfare (Blair and Harrison, 2010[15])

Collusion is an economic and legal concept, and there is an important legal distinction between tacit and explicit collusion, with the former being less likely to fall foul of competition law (OECD, 2017[17]). Explicit collusion often refers to cartels. The focus of this discussion will be on buyers' cartels and therefore explicit collusion.[16]

There may be limits to the monopsony power derived from collusion, for example if some purchasers do not participate or it is only possible to sustain a partially collusive outcome. The latter could occur, for example, if it were difficult to sustain coordination on some aspects of purchase competition, such as the delivery terms or quality. In such circumstances, while the potential profitability of the cartel would be lower to the participants, the overall effects on social welfare would likely remain the same (Blair and Harrison, 2010[15]).

As well as the effects on purchasing markets, competition authorities will also be aware of the potential for collusion between purchasers to increase the risk of collusion downstream, if firms compete, or might compete, in both input and downstream markets. This is particularly the case if the upstream collusion involves an input that corresponds to a large proportion of the overall costs of the downstream product and collusion is on prices and volumes.

Any cartel must solve an initial problem and an ongoing one. The initial challenge is to agree on the terms of the cartel. The second challenge is to keep this agreement in force over time. These stages have been described by some scholars as agreement, implementation and monitoring (Blair and Harrison, 2010[15]).

Buyers' cartels will have the objective of lowering purchasing costs. Purchase costs can be complex, with multiple dimensions, such as delivery charges, financing terms or specific component based charges. The more complex the charges, the more difficult it will be for purchasers to agree on a fixed outcome, particularly if there is differentiation between them (e.g. if their delivery or financing needs differed).[17]

To be sustainable, the net present value of the expected benefits of cartel membership must outweigh the costs. The expected benefits will include reduced input prices, but the costs may include missing out on profits that could be obtained from extra volume.[18] (Cartensen, 2021[18]) argues that buyers' cartels are easier to maintain than sellers' cartels, due to the lower incentives to deviate. For a purchaser considering whether or not to deviate from a cartel agreement, the principal appeal will be to purchase additional volumes from suppliers. However, these will come at a higher price. Such a deviation could be attractive if it allowed the purchaser to significantly increase volumes in a downstream market and thereby increase profitability. However, the extra volumes would be through increased input costs, potentially for all units. The key here is whether the increase in volumes from a deviating purchaser would be sufficiently small so as to not materially affect either the input price (due to an increase in volume) or the value of the marginal product of the input. The smaller the effect of the extra volumes from a potential deviator, the higher the incentives to cheat (Blair and Harrison, 2010[15]).

The incentive to cheat will diminish the higher the probability of detection. The fewer the buyers and the simpler the trading environment, the easier it will be to detect. (Blair and Harrison, 2010[15]) offer four factors that they consider are more conducive to facilitating buyers' cartels:

- Few buyers
- Purchased product homogeneity
- Sealed bids that are opened publically
- Inelasticity of supply

In addition, entry conditions for alternative purchasers will be relevant. Monopsony profits may attract entry, if these are visible. It is possible that compared to market power on the selling side, it will be harder for prospective entrants to observe the exercise of collusive monopsony, as the affected prices are likely to be in input markets where prices may be less transparent on average.

Finally, in the context of antitrust enforcement, the potential for detection of a buyers' cartel, and associated penalties, should increase the expected costs for involvement. This assumes that would be cartelists are aware that the conduct carries potential penalties and assumes that they attach a positive probability of being caught.

2.3. Bargaining Power

When there are few purchasers and sellers and there is some degree of market power[19] on both sides, the terms of supply will likely be determined through bilateral negotiations and can be analysed through the lens of bargaining frameworks from economic theory. Even sellers with some market power can face buyers who possess significant purchasing power over them.[20] In these circumstances, purchasing power is better described as bargaining power rather than monopsony power.

Unlike when purchasers hold monopsony power, with bargaining power it is the threat of a reduction in demand which is used in negotiations to lower prices (OECD, 2008[2]). The threat of reducing demand offsets the market power of suppliers, lowering prices without the need to withhold demand. Thus, broadly speaking, if monopsony power is likely to be considered harmful on most conceivable welfare standards, bargaining power may be considered beneficial in many circumstances, at least at first glance. However, as discussed below, bargaining power can also lead to situations where there are harms to welfare, even if defined on a consumer welfare standard.

2.3.1. Welfare effects of bargaining power

Bargaining power, all else equal, shifts surplus between buyers and sellers due to the reduction in purchase prices. This effect is unlikely to concern many advocates for competition policy, unless there are reasons to object to distributive outcomes.[21]

An important starting point when considering the welfare effects of bargaining power is whether lower input prices will be passed on downstream. This is particularly likely to be the case if bargaining power lowers marginal costs in downstream markets (Mills, 2013[19]).[22] However, whether these cost reductions are passed through will depend on the circumstances (RBB Economics, 2014[20]). In general, reductions to fixed, rather than marginal costs, are less likely to result in lower costs to consumers.

Another factor to consider is the efficiency of contracting. If contracting is efficient, for example two-part tariffs are used rather than linear pricing, then marginal cost pricing should be possible irrespective of the bargaining position of parties. In such circumstances, bargaining power would increase the surplus for purchasers, but realised through fixed components of tariffs rather than at the margin.

There are several ways in which bargaining power can cause potentially harmful effects beyond transferring surplus from suppliers to buyers (OECD, 2008[2]). [23] If these occur, then the weaker the link between bargaining power and downstream prices, the stronger any case for intervention is likely to be.

If purchasers have the ability to impose many of the terms of trade, this has the potential to alter market outcomes, which could also affect consumers. For example, bargaining power may allow buyers to impose restraints on suppliers. Such vertical restraints, which are often considered in the context of being supplier driven, have the potential to affect competition upstream and downstream. For example, purchasers with bargaining power may insist that their suppliers do not supply other firms.[24] This is an example of a vertical restraint that induces input foreclosure.[25] In general, reductions in competition in the downstream market is unlikely to be justifiable under most welfare standards.

Beyond vertical restraints, suppliers have an incentive to reduce the bargaining power of purchasers by supporting downstream competitors to large purchasers through lower wholesale prices (Chen, 2003[21]). However, in some situations, large purchasers may be able to use their bargaining power to reduce their input prices and subsequently increase input prices of their rivals. The latter is known as a “waterbed effect” and the former an “anti-waterbed effect”.[26] Which is most likely to occur has been the subject of significant debate by scholars (Zhao, 2019[22]).

Increased costs for downstream rivals could occur if bargaining power leads to upstream consolidation, or if decreased costs are passed through and allow the purchaser to capture market share from rivals, lowering their bargaining power (OECD, 2008[2]). Whether this ultimately results in higher downstream prices will depend upon whether the incentive for downstream rivals to raise prices in the face of higher costs outweighs the incentive to lower them in the face of lower prices from a rival. Waterbed effects are more likely to result in overall harm to consumers when suppliers can price discriminate based on supplier size, discounts are given to marginal costs and may be a particular concern when it occurs due to acquisition rather than organically (Inderst and Valletti, 2011[23]).[27]

Another potential harm to consider from bargaining power is its potential effect on supplier’s ability and incentives to innovate. This is more likely to be the case when purchasers possess substantial bargaining power over sellers. For example, purchasing power may affect dynamic efficiency by reducing product profitability (Cartensen, 2021[18]).

Further, a purchaser with bargaining power could use its position to transfer risks onto sellers or make the terms of trade unpredictable. Several competition authorities have observed this dynamic between grocery retailers and their suppliers.[28] In those situations, bargaining power was used to transfer risks onto suppliers, even where these risks were optimally controlled by retailers themselves (such as stock

wastage). Such inefficient allocation of risk could ultimately lead to an overall increase in costs and a reduction in economic efficiency.[29]

Increased uncertainty for suppliers reduces their ability to predict the likely return from their investments. This may reduce their ability and incentive to innovate. Therefore, bargaining power that allowed purchasers to act in unpredictable ways, such as refusing to honour previously agreed orders or demanding retrospective discounts, could have reduced innovation and product quality. This would ultimately affect consumers.[30] Scholars have noted the potential of bargaining power to lead to reduced innovation and diversity or choice, for example (Kirkwood, 2014[4]) .

Clearly, the effects of bargaining power will depend on the circumstances, and whether or not there is a strong case for intervention will also depend on the welfare standard employed. Nonetheless, even though there are potential beneficial effects to consumer and total welfare from lower prices, bargaining power is not unambiguously beneficial in either. Further, all else equal, bargaining power will worsen outcomes for suppliers, which may be relevant in some circumstances, and also has potential to distort the competitive process both upstream and downstream.

2.3.2. Conditions affecting the bargaining power of purchasers

The relative bargaining power between two parties is likely to be a core part of any assessment of the strength of bargaining power. An important insight bargaining theory is that outcomes are bound by the outside options available to both parties. A key part of this assessment will the alternative purchase options available to sellers. If there are a wide range of options, purchasers are unlikely to have substantial bargaining power. However, if sellers have limited options to sell significant volumes elsewhere, and purchasers know this, bargaining power may be high. For example, if purchasers provide exclusive ways for a product to reach the end consumer, this will likely provide strong bargaining power for the purchaser.

As with monopsony power, the elasticity of supply will also be relevant when considering bargaining power. The less responsive costs are to the level of output, or the lower the ability for output levels to change, the more vulnerable suppliers will be to bargaining power from purchasers (Carstensen, 2010[16]). In such instances, costs are largely incurred independently of sales and so failure to realise any will result in substantial losses.

An assessment of the outside option of sellers will also need to consider whether there are any costs in switching to alternative options, the risks involved and whether it is a partial or full alternative. In some circumstances, there could be uncertainty regarding the outside option that a party holds.[31] The level of uncertainty and the willingness of parties to take on these risks should therefore form part of the assessment of relative bargaining power.

The extent to which partial outside options will meaningfully influence the outcome of bargaining situations will depend upon a number of factors, including the economics of supply. If suppliers benefit from substantial economies of scale, for example, the threat of switching even relatively modest purchases away could act as an effective bargaining tool, strengthening purchaser bargaining power.

3 Co-ordinated conduct between purchasers

As described in section 2.2.2, coordination between purchasers that allows them to act in concert will lead to similar outcomes as a single large buyer. Buyers' cartels, explicit agreements to coordinate between purchasers, are an obvious examples of this. However, not all coordination between purchasers can be considered akin to monopsony. For example, joint purchasing agreements between small numbers of buyers in a market are likely to be permissible, and can allow those buyers to benefit from lower prices, enhancing downstream competition.

This section first considers buyers' cartels, summarising some of the relevant legal frameworks and recent trends. It then briefly touches on the debate regarding historical enforcement and whether there could be a case for more focus in the area.

It then discusses joint purchasing agreements, considering their potential costs and benefits, before summarising their legal status, including how, and if, they are distinct from buyers' cartels. The section closes with a short discussion on collective boycotts by purchasers.

3.1. Buyers' cartels

By agreeing to act in a coordinated manner, purchasers forming cartels reduce competition between them. This could provide the cartel with monopsony or bargaining power, depending upon the form of the cartel and the nature of the interaction with suppliers.

Buyers' cartels harm sellers compared to a counterfactual where the cartel members competed. The conduct also clearly violates the competitive process (Stiglitz, 2018[8]). Research suggests that the median estimated undercharge for buyers' cartels, amongst those that have been empirically estimated, is 19.7% (Connor, 2021[24]).[32]

Several scholars have argued that the level of enforcement of buyers' cartels is not as high as it should be (Cartensen, 2021[18]) (Blair and Harrison, 2010[15]). Such arguments point to the relative lack of enforcement of buyers' cartels compared to those of sellers. It is undeniably the case that there are fewer examples of enforcement action against buyers' cartels compared to those against sellers. However, by its very nature, we cannot observe the true prevalence of buyers' cartels. To date, there appears to be limited research estimating their underlying prevalence worldwide.

Despite the comparable lack of enforcement action against buyers' cartels, there are plenty of examples of wide range of authorities taking action against them. The earliest known example of a prosecuted buyers' cartel was over 2 millennia ago (Connor, 2021[24]). Athenian grain merchants, in response to fears of price increases were accused of conspiring to set maximum prices that they would offer for grain (Dunham, 2008[25]).

The next section provides an overview of the legal framework in place regarding buyers' cartels.

3.1.1. Legal framework for buyers' cartels

As already noted, there is significantly less case law on buyers' cartels in comparison to seller's cartels (Zaslavsky, 2021[26]). However, many jurisdictions have taken enforcement action against buyers' cartels. Similarly to sellers' cartel, there is a distinction between hardcore agreements and other agreements.[33]

A review of the different regimes for buyers' cartels highlights that many jurisdictions treat buyers' and sellers cartels symmetrically. As a conspiracy against the competitive process, many jurisdictions do not require analysis of the effect of a buyers' cartel to find an infringement, as the effects are presumed to be harmful by law. This includes Singapore, where the cartel provisions under section 34 can be breached by both buyers and sellers.

Generally, the treatment of buyers' cartels as a *per se* or *by object* infringement appears to be unrelated to whether or not the buyers also competed as sellers, with the focus in most jurisdictions being on the forming of an agreement for the purposes of fixing prices or other parameters of competition.

For example, in the United States, it is clear from the case law that price fixing by buyers is considered a *per se* breach of the Sherman Act and a number cases have been taken against purchasing cartels. This includes a number of actions in labour markets, including wage-fixing and no-poach agreements. Box 3 discusses no-poach agreements, highlighting a recent application of cartel provisions against buyers.

In the United States it is also clear that participants in buyers' cartels can be liable for criminal charges, and the Department of Justice (DOJ) has successfully prosecuted a number of individuals. This has included collusion in real estate auctions and auctions for federal assets (see Box 4). In 2016, the DOJ publicly announced that it would criminally investigate some buyers' cartels in the labour market, and has since instigated a number of proceedings.[34]

Another example can be seen from Korea, where buyers' cartels are treated the same as sellers' cartels. The provisions were applied in a recent buyers' cartel decision by the Korea Fair Trade Commission regarding iron scrap purchasing collusion, which resulted in substantial fines and consideration of criminal proceedings.[35]

Similarly, in the European Union, Article 101 of the Treaty of Functioning of the European Union prohibits arrangements that directly or indirectly fix purchase or selling prices. The European Commission has similarly undertaken a number of cases against buyers' cartels, including recent cases in the car battery recycling and ethylene purchasing market. Box 5 further below summarise two recent examples of enforcement against buyers' cartels by the European Union.

Despite this, not all jurisdictions treat cartel conduct by buyers' as the equivalent of a *per se* or *by object* infringement. For example, in 2009, changes were made to Section 45 of the Canadian Competition Act to exclude the word "purchase", so that it now only applies to sellers (Margison and Spilette, 2021[27]). As such, buyers' cartels would have to be assessed under section 90, which is a civil only provision that has a "likely to substantially lessen or prevent" competition test.[36]

As well as differences in the presumption of illegality for buyers' cartels, there are also some jurisdictions where the legislation excludes some sectors from competition laws. This appears most likely to apply to labour markets, where, as noted above, there has been a significant increase in enforcement action in recent years.[37]

Box 3. No-Poach agreements

No-Poach agreements are a form of buyers' cartel between employers. They are the mirror image of customer allocation cartels between suppliers. Under no-poach agreements, employers agree not to hire or solicit each other's employees. As with other forms of buyers' cartels, the aim of the agreement is to reduce the prices paid for purchases, in this case wages. The agreements achieve this aim by reducing the competition that employers face for their current employees. No-poach agreements, as well as wage fixing, has received increased attention in recent years as a number of jurisdictions have increased their scrutiny of competition in labour markets.

This is perhaps most true in the United States where there have been several high profile cases in the past decade, including against companies such as Google, Apple, Disney and eBay amongst others. The Department of Justice even launched its first criminal proceedings in relation to no-poach agreements in January 2021, having launched similar proceedings in the context of wage fixing in December 2020.

The United States has not been alone in taking enforcement action against employers regarding no-poach agreements however. Other countries, including Brazil, Turkey, Hungary, France, Croatia, the Netherlands and Spain, amongst others, have either taken enforcement action or experienced with the conduct. Some jurisdictions have also released public statements or documents on the topic, such as the European Union, Japan, Hong Kong, China and Portugal. However, many jurisdictions still appear to have taken neither public enforcement action nor provided clear statements of their intent to do so.

No-poach agreements have been detected in a wide range of industries, from digital markets, movie production, medical and healthcare markets, to information technology services, flooring production, railways and fast-food franchises.

Sources: A summary of the Department of Justice's approach to no-Poach agreements can be found on their website at: https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach. Regarding public papers and statements, see for example: Autoridade da Concorrência, Labour Market Agreements and Competition Policy, Issues Paper - Final Version, September 2021; https://www.concorrencia.pt/sites/default/files/Issues%20Paper_Labour%20Market%20Agreements%20and%20Competition%20Policy.pdf Further, see speech by M. Vestager at the Italian Antitrust Association Annual Conference "A new era of cartel enforcement", 22 October 2021, at: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-m-vestager-italian-antitrust-association-annual-conference-new-era-cartel-enforcement_en

3.1.2. Trends in Buyers' Cartels and Recent Developments

Buyers are diverse and, much like sellers that fall foul of anti-cartel laws, many different methods have been used by buyers to conspire to lower purchase costs, whether through the reduction in direct prices or through other means.

It is helpful for authorities to consider the history of past buyers' cartels, including in other jurisdictions, as it may provide indications of potential infringements in the future. However, only cartels that are detected can be observed; those that remain undetected and never come to light are, by definition, hidden. As such, the underlying distribution of all buyers' cartels can never be truly known. Instead, inferences must be sought from those that are discovered.

Connor's research covering estimates of cartel overcharges suggests that buyers cartels' are largely discovered in the food, tobacco, raw materials and services industries (Connor, 2021[24]). In addition, over 70% of the over-charge estimates of buyers' cartels reviewed were in relation to bid-rigging schemes. This prevalence is supported by evidence from the United States, where it is noted that between 1997 and 2006, all of the criminal cases brought by the Division against buyer cartels involved collusion amongst auction bidders (Phelan, Folio and Elson, 2021[28]). This included examples of police auctions and did not

always involved intermediate markets for the purchase of inputs. Box 4 contains some examples of buyers' cartels involving bid rigging and real estate.

For example, in 2004 and 2005 respectfully, the European Commission issued decisions against purchasers of raw tobacco in Spain and Italy for engaging in prohibited horizontal practices.[38] In both instances, processors of raw tobacco sought to reduce the prices paid for raw tobacco, through the exchange of information and agreements regarding maximum prices to be paid or the delivered prices of the good. Interestingly, over the same period there appears to have been infringements from producers of raw tobacco through confederations and organisations of suppliers.

Connor's research also notes that buyers' cartels appear to be slightly more orientated towards domestic membership (Connor, 2021[24]), although it is difficult to know whether this reflects the underlying nature of such cartels or just previous enforcement history.

Box 4 Real estate and bid rigging buyers' cartels

The majority of buyers' cartels relate to the purchase of inputs. However, an interesting dynamic of buyers' cartels is that they may not all relate to intermediate goods markets, and can instead involve customers.

Buyers' cartel for residential real estate in New Zealand

In September 2019, the High Court of New Zealand ordered Ronovation Limited to pay a penalty after it admitted to price fixing in the residential real estate market in Auckland. Ronovation was a property investment group where members would receive advice on property investment. As its membership grew, the members found themselves competing for the same properties. In response, Ronovation developed a set of rules to ensure members did not compete against each other. Members were encouraged to tag themselves as interested in the property on a group for members on a social media platform, with the first member to do so having priority over other members.

Under the country's competition law, the Act prohibits conduct that has the purpose, effect, or likely effect, of price-fixing between competitors in respect of the supply or acquisition of goods or services in New Zealand. The New Zealand Commerce Commission took enforcement action against the owner of the investment group and the action represented the first action against a buyers' cartel in New Zealand.

United States real estate cases

As of August 2021, the United States Department of Justice's Antitrust Division had laid charges against 140 individuals, with 124 guilty pleas and 12 convictions at court, for entering into bid rigging agreements at auctions for foreclosed real estate. Under some of the arrangements, the conspirators nominated a bidder to bid at the private auction, and then held a second private auction to determine who owned the property. In such events, the prices for the real estate were lowered.

United States Online Auctions for Government equipment

Similarly, the owner of a computer reselling and recycling company in Texas pleaded guilty in April 2019 to a bid rigging agreements for online public auctions for surplus government equipment. The online auctions were held to sell-off surplus assets of the government and the conspirators agreed not to compete against each other in bids by designating which would win a particular lot.

Sources: Commerce Commission, Ronovations Limited: https://comcom.govt.nz/case-register/case-register-entries/ronovations-limited-and-others. US Department of Justice press release, 6 August 2021, Real Estate Investor Pleads Guilty to Rigging Bids at Foreclosure Auctions, https://www.justice.gov/opa/pr/real-estate-investor-pleads-guilty-rigging-bids-foreclosure-auctions

As a purchaser, perhaps the simplest way to increase profitability is to collectively ensure lower prices when buying. However, when faced with complex situations, and perhaps even differing level of awareness of the legality of certain conduct, buyers have used many different ways to exercise their influence on prices.

For example, in a 1965 case involved the US National Macaroni Manufacturers Association, producers of macaroni agreed to a uniform recipe for their product, which appeared to have the intention of reducing overall demand for durum wheat and lowering its price.[39] The FTC found that this was the purpose and effect of the agreement.

Prices themselves can be complex. For example, in the German car steel purchasing cartel, an agreement was reached between purchasers, car producers, and a variety of suppliers on how surcharges for long steel products would be calculated. [40]

Reducing prices could also be achieved by reducing competition for inputs in other ways, for example by agreeing not to compete for the purchase of products or services from certain sellers. The analogy for sellers' cartels would be allocating markets for selling products, for instance by agreeing not to solicit customers outside of a particular geographic area or agree the allocation of customers ahead of time. Perhaps the most current example of such an arrangement is in the context of no-poach agreements, which were discussed in Box 3 above.

Box 5. Recent approach to fines in European buyers' cartels

2017 Car Battery Recycling

In 2017, the European Commission issued an infringement decision against three recycling companies, which included fines totalling more than EUR 67 million. The investigation started following a leniency application by one of the cartel members. The recycling companies purchased recycled car batteries from scrap dealers or collectors to extract recycled lead, which they sold.

From 2009 to 2012, four companies, including the leniency applicant, exchanged information and agreed target and maximum prices to be paid for scrap batteries in Germany, France, Belgium and the Netherlands. They also agreed on the volumes to purchase from suppliers. The majority of the information exchange took place between senior managers, through email, text messages or calls, sometimes also using a code, such as referring to the weather conditions to communicate how the purchasers should act.

In this case, the Commission used its discretion to apply a surcharge of 10% to the fines of the offending companies, in order to provide a fine of sufficient weight for deterrence purposes. This is because, unlike sellers' cartels, buyers' cartels likely result in lower prices being paid. As such, fines based on the value of purchases were likely artificially lowered by the cartel. This approach was ultimately upheld by the General Court.

2020 Ethylene Merchant Market

In 2020, the European Commission issued another infringement decision against a buyers' cartel, this time against purchasers on the Ethylene merchant market. Ethylene is a chemical used in the production of materials, such as PVC. Three companies were fined, with a fourth being granted immunity as a leniency applicant.

An interesting aspect of this case was that ethylene is often purchased under supply contracts that include pricing formulas based on an industry price reference called the "monthly contract price". Between 2011 and 2017, the purchasers coordinated strategies when dealing with ethylene sellers in

order to decrease the monthly contract price. This included exchanging pricing information during negotiations with sellers.

As with the Car Battery Recycling case, the Commission used its discretion to apply a 10% increase for fines for the three companies, to avoid under-deterrence due to artificially lowered purchase values.

Source: European Commission Case AT.40018 – Car battery recycling, correcting decision October 2017. European Commission Case AT.40410 – Ethylene, decision July 2020.

3.1.3. Debate on under-enforcement

There has been debate over whether the treatment of buyers' cartels has been overly lenient by competition authorities, and whether they have been traditionally under enforced compared to the socially optimal level. For example, Carstensen has argued that the relatively low level of enforcement against these cartels is in contrast to economic theory which suggests they may in fact be more prevalent (Cartensen, 2021[18]). Others have argued that part of the reason driving the relative infrequency of enforcement is the mistaken belief that buyer power forces down prices to the benefit of consumers (Blair and Harrison, 2010[15]).

It is clear that competition authorities are likely to be concerned with purchasing power in at least some circumstances, as evidenced by the fact that the majority of authorities appear to treat buyers' cartels in the same manner as sellers' cartels. An argument that there is under enforcement in relation to buyers' cartels therefore appears unlikely to rest in their legal treatment.

Instead, the key question would appear to be whether enforcement has received sufficient priority. It is clear, as noted above, that there is significantly more enforcement against sellers' cartels than buyers' cartels. Other than under enforcement, this difference could be the result of buyers' cartels being substantially less harmful or generally less prevalent. If there were to be under enforcement, there would be a disproportionally higher percentage of undetected, and unprosecuted, harmful buyers' cartels.

As discussed in Section 2, while buyers' cartel might not be viewed as harmful as sellers' cartel, there are a number of reasons that purchasing power can affect overall welfare, including for consumers. This includes when the purchasing power is derived from collusive arrangements.

A key question is therefore whether or not the prevalence of buyers' cartels is significantly lower than that of sellers' cartels. It is unclear whether theory would predict buyers' cartels to be more or less prevalent overall, although there appears to be little reason to expect them to be significantly less so. Indeed, as mentioned above, it has been argued by some scholars that the incentives to deviate from collusive agreements between buyers is lower than that between those of sellers, implying such agreements may be more pervasive and long-lasting (Carstensen, 2010[16]).

There appear to be few estimates of the underlying prevalence of buyers' cartels. A survey of cartel overcharge estimates suggests that between 3% to 8% of all previously detected international cartels that have been studied for overcharge estimates related to buyers' cartels (Connor, 2021[24]). However, this reflects the detection of buyers' cartels and may not reflect their underlying prevalence. Further, as this estimate is based on studies of overcharges, it will be influenced by academic interest which could lead to biases. On this latter point, Connor notes that the proportion of undercharge estimates before 1990 was 0, but this rose to above 8% after (Connor, 2021[24]). Such a shift would appear to reflect increased interest in buyers' cartels, but whether this recent data now reflects the true underlying prevalence is unknown.

Recent experience from the United States, and others, on buyers' cartels in labour markets provides an example of where recent increased enforcement prioritisation has led to a significant increase in cases. However, it is unclear whether this implies that there were a disproportionally large number of undetected

such cartels prior to prioritisation. Even if that were to be the case, whether such a finding would apply to buyers' cartels in general, rather than just a subset of them, cannot be certain.

Nonetheless, given the potential for harm from buyers' cartels and the relative lack of enforcement, it is an area that likely warrants further consideration.

3.2. Joint purchasing agreements

Joint purchasing agreements, also known as buyers' or bargaining groups or buying collaborations, refer to arrangements between buyers to pool their purchases. Joint purchasing agreements have been a feature of the antitrust framework for some time, but are perhaps most commonly associated with grocery retailing and the United States healthcare sector.

Broadly, the aim of joint purchasing agreements is for members to benefit from lower purchasing costs. Two of the main distinctions between them and buyers' cartels are that they are usually transparent and involve a genuine joining of purchasing activity (Carstensen, 2010[16]). They also typically involve smaller firms in the market with lower combined market shares.

3.2.1. Potential costs and benefits of joint purchasing agreements

Joint purchasing agreements can lead to genuine cost savings. These cost savings can be grouped into two categories: reductions to overall system costs and negotiations of lower costs from sellers.

Genuine reductions in overall system costs are beneficial to all. By cutting costs, prices should fall and output expand, increasing social welfare. Cost savings from a joint purchasing agreement could occur if suppliers benefit from economies of scale. By collaborating, purchasers can commit all of their purchases to one supplier, allowing them to increase volumes and lower their average costs. Economies of scale could be available from production or distribution, for example if combining orders allows increased utilisation of delivery trucks or more efficient warehousing.

A key distinction between joint purchase agreements and buyers' cartels is that agreements involved the combination of multiple purchasers into a more streamlined purchasing function (Carstensen, 2010[16]). This has the potential to reduce transaction costs for both the suppliers and purchasers. Examples of the transaction costs that could be saved include reducing the need to duplicate tasks that have a relatively fixed cost, such as contracting, negotiations and billing services.

The second category of cost savings for purchasers comes from reducing prices via a lower margin for the supplier. This will shift surplus from suppliers to purchasers. As noted in section 2, where sellers have market power, the exercise of bargaining power by purchasers in some situations is likely to result in welfare enhancing reductions in price. In this sense, the bargaining power exercised collectively by the joint purchasing agreement is countervailing the market power of the seller.

As discussed above, an important consideration for authorities may be the extent to which cost savings are passed through to consumers, which is most likely when reductions are to marginal rather than fixed costs.[41] This will be influenced by the level of competition downstream.

Empirical evidence on the overall effects of joint purchasing agreements on prices appears limited. However, there is some empirical evidence to suggest that increases in buyer power can lead to lower consumer prices, although this is limited to specific types of agreement and it is unclear how widely applicable this finding is (Colen, 2020[29]).

While potentially beneficial, an immediate question that may come to mind is whether joint purchasing agreements are meaningfully distinct from buyers' cartels. Both combine the purchasing of multiple buyers. Some have argued that this distinction is blurred, see for example (Carstensen, 2010[16]).

If the share of purchases covered by a joint purchasing agreements is high, there is clear potential for the agreements to infer monopsony or bargaining power. In these circumstances, a joint purchasing agreement will be largely indistinguishable from a cartel or situation where there is unilateral purchasing power. In such circumstances, the analysis of section 2 will be relevant.

Further, as with buyers' cartels, joint purchasing agreements may increase the ability for firms that buy the same products or services to coordinate to reduce competition in downstream markets. This could be the case if the agreement provides volume information or if it uniformly sets the price of a significant input. Information exchange may also facilitate downstream collusion.

Research has also suggested that joint purchasing agreements can lead to a reduction in product variety in a retail setting (Allain, Avignon and Chambolle, 2020[30]). Such a reduction may be harmful to consumers who value a range of products.[42]

3.2.2. Legal status of joint purchasing agreements

For most jurisdictions, joint purchasing agreements are not subject to similar legal provisions as buyers' cartels, often treated under a "rule of reason" or "by effect" standard. For example, in the United States, the Supreme Court confirmed that the rule of reason should apply in 1985. Under these standards, authorities assess whether the agreements are likely to have had a significant effect on competition, rather than this being assumed.

This assumes that the joint purchasing agreement is not in fact a disguised cartel, that has the intent to fix prices or engage in otherwise prohibited conduct. However, this distinction can sometimes be subtle as joint purchasing agreements will likely involve at least some agreement on prices.[43]

Assessments of the competitive effects of joint purchasing agreements usually consider the share of purchases covered by the agreement as an important indicator of the likelihood of detrimental effects. Further, some jurisdictions provide clear guidance on safe harbours that are likely to apply. Box 6 provides examples of guidance provided from the United States and European Union.

Box 6. Guidance on treatment of joint purchasing agreements

European Commission guidelines on horizontal co-operation agreements

The European Commission's guidelines on the applicability of Article 101 of the Treaty of the Functioning of the European Union to horizontal co-operation agreements contains guidance for firms on the treatment of joint purchasing agreements.

The guidelines highlight that there are two relevant markets for the consideration of joint purchasing agreements: the purchasing market(s), and any markets downstream where the purchasers are sellers. The guidelines note that competition concerns may result from market power in both upstream or downstream markets, while also stating that competition concerns are less likely to arise if there is no market power in selling markets.

The guidelines stipulate that while there are no absolute thresholds for determining market power, it is unlikely to arise if parties to a joint purchasing agreement hold a combined share of less than 15% in the relevant purchasing and selling markets. Beyond this, an assessment is required to determine whether the agreement gives rise to restrictive effects on competition.

The guidelines indicate that a number of factors are likely to be relevant to whether or not such an agreement might lead to restrictive effects on competition. These include the share of purchases and sales of the relevant firms, as well the intensity of links between the firms. In particular, the risks of collusion downstream should be assessed, including commonality of costs and the market structure.

Further, the guidelines note that competing purchasers that are not in the same selling market are unlikely to restrict competition, unless they have a position to harm the competitive position of other players in the relevant selling markets.

Finally, the guidelines note that joint purchasing agreements can give rise to efficiency gains that can be assessed under Article 101(3), providing that there is no elimination of competition in either purchasing or selling markets. These gains must be passed on to consumers to a sufficient extent to outweigh any restrictions on competition.

United States Safety Zones Collaborations Among Competitors

The joint Antitrust Guidelines for Collaborations Among Competitors of the Federal Trade Commission and the U.S. Department of justice (the Agencies) provides guidance on how buying collaborations will be treated.

The guidelines note that absent extraordinary circumstances, the Agencies do not challenge collaboration when the market shares of the collaboration and its participants in the relevant markets are no more than 20%. As within the European Union, these safety zones do not apply to conduct that is per se illegal.

Separate provisions exist in the United States for joint purchasing agreements amongst health care providers, given the large number of agreements in this sector. The rules note that absent extraordinary circumstances, agreements will not be challenged if they account for less than 35% of purchases and the cost of those purchases account for less than 20% of sales. The purpose of these two requirements is to assess whether the arrangement may drive down prices below competitive levels or result in standardised costs. The guidance continues to be applied in prospective agreements.

Sources: Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN. Antitrust Guidelines for Collaborations Among Competitors, Issued by the Federal Trade Commission and the U.S. Department of Justice, April 2000, available at https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf. Statements of Antitrust Enforcement Policy in Health Care, Issued by the U.S. Department of Justice and the Federal Trade Commission, August 1996: https://www.ftc.gov/system/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf. On applicability, see for example recent letter from the U.S. Department of Justice to the American Optometric Association and the AOAExcel in relation to their proposal to extend the scope of their group purchasing activities (January, 2020): https://www.justice.gov/atr/page/file/1235051/download

Some jurisdictions have authorisation regimes that allow firms to apply for authorisation for collective bargaining, which could include a joint purchasing agreement. For example, Australia and New Zealand provide firms with the opportunity to apply for authorisation of arrangements that would otherwise fall foul of competition law. The intention of these provisions is to provide an avenue for arrangements that result in overall public benefits, despite reducing competition. The process is more common in Australia and there are several cases of it being used by purchasers.[44]

Further, from June 2021, Australia has had a class exemption for collective bargaining for small businesses.[45] Under this class exemption, businesses that meet certain criteria, such as turnovers below AUD 10 million (approximately USD 7.3m), can notify the ACCC that they are forming a collective bargaining group. The ACCC granted this exemption because it notes that it has found that it rarely finds a substantial lessening of competition when considering the forming of bargaining groups between small businesses and they are likely to result in public benefits.

Another consideration for the legal treatment of joint purchase agreements is the treatment of collective boycotts. Collective boycotts are joint decisions to refuse to do business with a firm or set of firms. A joint boycott by horizontal competitors is a form of coordinated action that, like price fixing, would usually be

considered a breach of cartel laws in many jurisdictions, although the treatment of collective boycotts under antitrust laws is not always clear (Rogers, 2016[31]).[46]

For purchasers, a joint boycott would be the collective decision not to purchase from a particular supplier. Such a decision could be because the seller offered unfavourable terms, with the aim of restricting the sales of the seller substantially and so force them to offer better terms. For example, retailers in a joint purchasing agreement could threaten to delist a supplier as part of the negotiation process.

The ability to act collectively is likely to be essential for a successful joint purchasing agreement. Indeed, if the group is unable to take collective action through its purchases, such as through a collective boycott, then the group may struggle to gain the benefits of joint purchasing. For example, ACCC guidance for small businesses on collective bargaining notes that collective boycotting can be a useful negotiation tool that brings other parties to the table to restart negotiations.[47]

As with other joint purchase agreements, whether or not collective boycotting is an acceptable part of a joint purchasing agreement will likely be subject to a detailed assessment by competition authorities, unless it concerns a sufficiently low proportion of purchases. In general, joint purchasing agreements that contain collective boycott provisions will be more likely to have the potential to affect competition than those that do not. For example, the ACCC's class exemption for collective bargaining, described above, specifically excludes agreements concerning collective boycotting from the class exemption. Purchasers wishing to engage in collective boycotting in Australia therefore need to apply for authorisation if they want to benefit from immunisation from prosecution.

The assessment will need to consider the potential exclusionary effects of any boycotts, including the effects of this on overall competition (Khemani, 1998[32]). Boycotts that are mandatory for all members of the agreement, rather than advisory, are more likely to have a negative impact on competition. Further, the more that a boycott appears to have the intention of reducing competition, rather than being a legitimate part of the collective bargaining process, the less likely it is to be permissible as part of a broader agreement. For example, collective boycotting of suppliers in response to their dealings with downstream competitors of the agreement members may be more difficult to justify than selecting a better offer from an exclusive supplier.[48]

Box 7. Joint purchasing agreements between supermarkets in Europe

French investigation into joint purchasing alliances

The French Autorité de la Concurrence began several investigations in July 2018 on the joint purchasing agreements between supermarkets. The Autorité was notified of the agreements in the months prior.

The first agreement investigated, between Casino, Auchan, Metro and Schiever, concerned a range of own-brand label products. After imposing interim measures, the Autorité accepted commitments in October 2022 from the retailers to amend the joint purchasing agreement by excluding some products from the agreements, notably agricultural products and those from struggling sectors. The commitments also included reducing purchase volumes for other products captured by the agreements to below 15%. In the press release following the commitments, the Autorité noted that the result will improve the market situation in upstream markets and that it:

"aims to avoid these agreements from adversely affecting suppliers' ability to invest and to offer innovative products and then maintain a sufficiently diversified product range of retailers' own-brand labels for consumers"

In December 2020, the Autorité accepted commitments in relation to a second joint purchasing agreement between Carrefour and Tesco on the purchase of their own-brand label. The agreement covered the calling of tenders for around 130 families of products, with a view to the joint production of the own-brand label products However, the agreements were found to threaten the conditions of suppliers upstream, which included many small and medium sized enterprises (SMEs). In particular, as with the first agreement, the concern was the risk of reduced ability or incentives for suppliers to invest and innovate. The press release noted that this may affect the welfare of consumers in the downstream retail market, Interestingly in this case, Tesco did not have any stores in France. The commitments reduced the scope of the products covered by the agreements and ensured that small and medium SMEs would be able to tender for supply contracts.

Source: Autorité de la Concurrence, press release, 22 October 2020 : https://www.autoritedelaconcurrence.fr/en/press-release/purchasing-offices-autorite-accepts-commitments-proposed-casino-auchan-metro-and Autorité de la Concurrence, press release, 17 December, 2020 :https://www.autoritedelaconcurrence.fr/en/press-release/autorite-issues-new-decision-concerning-purchasing-offices-and-makes-commitments-made

4 Unilateral exercising of purchasing power

As discussed in section 2, purchasing power has the potential to lead to harm contrary to several plausible goals of competition policy. This is the case whether the purchasing power is acquired through co-ordination, as discussed in section 3, or held by a single firm.

This section discusses how authorities approach enforcement against buyers that exercise purchasing power unilaterally, for example as a monopsonist or holder of significant bargaining power. Unlike in the previous section, there are significant differences in approach between jurisdictions. Many continue to rely on traditional competition laws, whilst others have introduced regulations that give more attention to concepts such as fairness and the imbalance of power (Choi and Fuchikawa, 2010[33]). In regard to traditional competition laws, these appear to be very rarely applied to unilateral purchasing power.

Interestingly, many of these alternative regimes still apply competition standards, suggesting that in many cases there is a presumption that if competition has been reduced, harm has occurred. This relates back to the discussions in section 2.1. However, unlike traditional competition law, these regimes do not require an authority to demonstrate that the firm holds a dominant position for abuse to be prohibited.

A further distinction can be drawn between regimes that apply economy wide versus those do not. For example, some regulations concerning purchasing power target specific industries or firms, such as mandatory codes of conduct for grocery retailers or sector wide regulations.

In addition, in some countries there are prohibitions on specific types of conduct by purchasers in some circumstances, without the need to demonstrate effects of that conduct. These regimes are often linked to concepts of fairness when dealing with other businesses when there is an imbalance of bargaining power. Such regimes may not be considered in the realms of competition law, but are included here as examples of how purchasing power can be addressed.

Finally, there are examples of market studies being used to assess the level of purchasing power in a sector and propose remedies. This suggests that market studies may provide a way to study, and potentially tackle, unilateral holding of purchasing power in a market if this is leading to outcomes inconsistent with effective competition.

4.1. Economy wide regimes

The section below discusses the application of regimes that concern purchasing power. Competition law generally applies to firms operating in an economy, and the discussion starts by considering its application to unilateral purchasing power.

As noted in the introduction, merger control is out of the scope of this paper. However, purchasing power can clearly be influenced by the concentration of rival purchasers, as stronger unilateral purchasing power may increase the potential for abuses and anticompetitive effects that impact sellers and consumers

(Anchustegui, 2018[34]), (Hemphill and Rose, 2018[5]). Box 8 provides two examples of the treatment of purchasing power in mergers.

Other regimes that apply economy wide are those that establish the ability to penalise firms for conduct when there is an imbalance of power, even if they do not have a position of dominance. After considering traditional competition law, the sections below discuss two types of such regimes, those that apply to firms that hold a superior bargaining position and those that concern situations of economic dependence.

Box 8. Examples of purchasing power considerations in merger control

EU scrap copper purchasers

In May 2020, the European Commission approved Aurubis' acquisition of Metallo, both large purchasers of scrap copper. Scrap copper is a by-product of industrial processes and recycling of old products. Although the Commission approved the merger, the case provides some insight into potential concerns that authorities may have regarding buyer power in mergers.

The Commission investigated whether the merger might lead to increased buyer power for the merged entity and lower prices for scrap copper. It noted that if this happened, then it would be the equivalent to an increase in production costs for those that produced scrap copper as part of other production processes. Such an increase in costs could negatively affect downstream markets. Further, the Commission noted that acquired buyer power could lead to lower abilities and incentives to invest in, or collect, scrap copper by suppliers.

The Commission considered that the acquisition was unlikely to lead to a significant impediment to effective competition, noting the moderate market share of the merged entity post transaction, the existence of a large number of alternative purchasers and the fact that the parties did not appear to compete closely for purchases prior to the transaction.

United States sow purchasers

In July 2014 in the United States, Tyson Foods proposed to acquire The Hillshire Brands Company. Both parties competed to procure sows from farmers, either directly or through subsidiaries, and combined accounted for around a third of all sows purchased from farmers in the United States. Sows are female pigs that are raised for the purpose of breeding and then sold to packers or marketers to be slaughtered, often for sausage meat. The Department of Justice opposed the merger as they believed it would eliminate actual and potential competition between the two entities, resulting in lower prices for farmers for their sows. This led to Tyson divesting its sow purchasing business before the transaction could proceed.

Sources: European Commission, Case M.9409, Aurubis and Metallo Group Holding, 2020. https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9409 ; U.S., et al. v. Tyson Foods, Inc. and The Hillshire Brands Company | ATR | Department of Justice, available at: https://www.justice.gov/atr/case/us-et-al-v-tyson-foods-inc-and-hillshire-brands-company

4.1.1. Abuse of Market Dominance

Traditional competition law, referring to the fields of abuse of dominance, merger control and cartel enforcement, generally applies to the whole economy.[49] In general, most competition authorities regulate abuse of market power through abuse of dominance powers. Such provisions do not penalise a firm for

holding a dominant position in itself, but instead prohibit certain types of conduct by firms holding such positions.

Similar to provisions against cartels, many jurisdictions appear to have abuse of dominance provisions that would apply equally to sellers and buyers. For example, UK guidance on abuse of a dominance position makes clear that buyers can possess dominant positions.[50] However, unlike cartel provisions, few cases are taken against purchasers for abuse of dominance.

An abuse of dominance by purchasers, like the abuse of dominance by sellers, could be classified into exploitative abuse, that transfers wealth from suppliers to buyers, or exclusionary abuse, which hinders competition by excluding potential rivals from competing effectively (OECD, 2020[35]).

With exploitative abuse, a purchaser holding a dominant position might set a price that is excessively low. There appear to be very few instances of such cases (Anchustegui, 2018[36]). One such case in 1985, involved allegations from a French collecting society of Television content, CICCE, that three French public television companies were imposing unfairly low licence fees for its content.[51] While the case was not successful, the European Commission acknowledged that an undertaking in a dominant position could abuse such a position by imposing unfair purchase prices, and that this depended on the relationship between the cost and the economic value.[52]

Exploitative abuse could also cover conduct other that just excessively low prices. For example, in what appears to be a rare example of successful enforcement against exploitative abuse by a purchaser holding a dominant position, in 2011 in Serbia, two leading dairy companies were fined for abusing their dominant position on the market for the purchasing of raw milk from dairy farms (Svetlicinii, 2011[37]). The dairy companies had abused their position with provisions in their contract, including terms that stated the milk quality had to be determined at their laboratory, the purchaser had a right to terminate at any time and that the purchaser would receive compensation for any breaches by the farms. Further, prices were determined by price lists set by the purchaser, without the ability for the farms to terminate if they disagreed with the prices.[53]

Exclusionary abuse from dominant purchasers would be conduct that excluded rival purchasers from the market, presumably with the intention of reducing competitive pressures which otherwise lead to price increases. For example, a dominant purchaser might insist upon an exclusive supply agreement that compels suppliers to sell exclusively to them, restricting competitors' ability to enter. As noted in section 2, reduced competition between purchasers has the potential to infer monopsony or bargaining power, which may be detrimental to the goals of competition policy. There appears to be few cases of exclusionary conduct from dominant purchasers that have not also had a focus on the effect of exclusion on downstream markets, such that the cases could equally be characterised as abuses of dominance by suppliers (Anchustegui, 2018[36]).[54]

An example of an attempt, albeit unsuccessful, to challenge exclusionary conduct by sellers can be seen from the United States in Camellia City Telecasters v. Tribune Broadcasting.[55] In this case, the allegation was that Tribune tied its purchases of television programming in New York and Chicago, where it had dominant market power, to purchases in Denver, in order to prevent a rival station from establishing a competitive position. Despite recognising the monopsony tying theory, the court granted summary judgment to the defendant because Camellia failed to adequately support its claims (Blair and Harrison, 2010[15]). [56]

Another example of conduct by purchasers that may amount to abuse of dominant position is predatory purchasing or bidding. Unlike predatory pricing by sellers, where the concern is over prices being too low such that competing suppliers cannot compete, predatory pricing by sellers would be purchasing at a price that is higher than competitive levels. By doing so, the intention would be foreclose rival purchasers of the good by or service by increasing their costs, in order to benefit from reduced competition for purchases in the long-run from a key input (OECD, 2008[2]).

A seminal case in the context of predatory pricing by purchasers in the United States is Weyerhaeuser Co. v Ross-Simmons Hardwood Lumber Co, 127 S. Ct. at 1078 (Blair and Haynes, 2012[38]). The case concerned allegations by that Weyerhauser had attempted to increase the prices of sawlogs in order to eliminate competitors, and that this was a breach of Section 2 of the Sherman Act. The case was ultimately appealed at the US Supreme Court, in which the Court held that the standard of predatory pricing for sellers should be applied to predatory bidding by buyers, as the two types of predation are analytically similar.[57]

4.1.2. Abuse of Superior Bargaining Power

Beyond dominance, some jurisdictions have legislation that allows the investigation of practices by businesses that hold a superior bargaining power. Examples include Hungary, Poland, Japan and Korea. Superior bargaining positions relate to the relative power of firms compared to others, and those that are deemed to hold it are prohibited from imposing certain terms on their counterparties. For example, the competition laws of Korea and Japan contain a provisions relating to unfair business practices from entities that hold a superior bargaining position.[58]

The exact provisions differ by jurisdiction. However, broadly speaking, abuse of superior bargaining power provides a means to challenge conduct by purchasers that may not be dominant, or where it might be difficult to prove dominance. For example, some have argued that since the requirements to prove an abuse of dominance in Korea are strict, there has been a tendency to use superior bargaining power provisions in relation to purchasing power (Choi and Fuchikawa, 2010[33]).

For example, in Korea, holders of a superior bargaining position cannot unilaterally impose various disadvantageous terms. Examples of such terms could include forcing the provision of a benefit from the supplier or imposing conditions on the terms of trade, such as quality or prices. Box 9 contains an example of enforcement action taken under superior bargaining legislation in Korea. Further, in Korea and Japan, authorities must prove the unfairness of individual transactions, but are not required to analyse the overall effects on competition. Here, unfairness refers to the harming, or possible harming, of fair competition through the use of improper competitive means. For example, other than through the cost and quality of service or goods. Further, unfairness could refer to the undermining the foundation of fair trade by placing other parties involved in trade at a competitive disadvantage or hampering their ability to make decisions freely without encumbrance.[59] To determine a superior bargaining position, the relative positions of trading parties matters (ICN, 2008[39]).

Box 9 Example of abuse of superior power from Korea

Overview

In 2020, the Korean Fair Trade Commission (KFTC) imposed a fine of KRW 468 million (approximately USD 400,000) along with a corrective order on Yogiyo, a food delivery platform, following its conduct in relation to operating a lowest price guarantee obligation with restaurants.

Yogiyo is an online platform that facilitates transactions between restaurants and consumers by providing them with information on restaurants, as well as passing consumer order information to restaurants. Yogiyo is the second largest delivery app operator in Korea, with around 27% of sales through delivery apps.

Conduct

Under the lowest price guarantee obligation, restaurants were prevented from selling meals at lower prices elsewhere than the Yogiyo app, such as direct phone orders or competitor delivery platforms. If a restaurant was found to have breached this obligation, it often resulted in a termination of contract. From July 2013 to December 2016, Yogiyo caught 144 restaurants violating the system and demanded correction, terminating the contract if they did not comply.

Judgement of KFTC

The KFTC found that, first, Yogiyo, as the second largest operator, had superior power for delivery restaurants. Further, based on the survey results, it was found that consumers had a strong tendency to use only one delivery app, meaning that Yogiyo had an exclusive route for delivery restaurants to access consumers who used its app.

Second, the KFTC ruled that determining one's own selling price is a major part of management activity. Therefore, Yogiyo's conduct constituted an act of interfering with management activities by limiting the free price decision right of restaurants. The conduct was therefore deemed unfair and an abuse of superior power.

Source: KFTC (2020) Press Release, Abuse of Superior Power (in Korean): http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rpttype=1&report_data_no=8574

4.1.3. Economic Dependency

In a similar vein, some countries regulate business practices of purchasers through economic dependence provisions. Such regimes are prevalent in Europe, for example in France and Germany.[60] As with a superior bargaining position, under economic dependency provisions the conduct of firms that do not hold dominant positions can be addressed.

The abuse of an economic dependency is a legal notion that refers to a situation in which one party to a transaction abuses their relative power over the other. The purpose is to protect weaker parties from abuse by stronger parties.

For example, in France, Article 420 of the Commercial Code prohibits the abusive exploitation of undertakings under a state of economic dependence.[61] Enforcement generally requires the authority to prove the anticompetitive object or effect of the conduct, as the Code applies only to conduct that affects the structure or function of competition. Examples of conduct that could fall foul of these provisions include refusals to sell, tying, discriminatory practices, or range restriction agreements. As another example, in

Germany, the Act against Restraint of Competition (ARC) stipulates the prohibition of unfair conduct, which includes operators with relative power.[62]

An example of enforcement under economic dependency can be seen from the 2018 case against retailer EDEKA in Germany. In this case, the Federal Court of Justice upheld the Bundeskartellamt's decision to prohibit EDEKA's abuses regarding demands for alignments of conditions and payment terms.[63] The Supreme Court judged that suppliers had a dependent relationship with EDEKA. To recognise a superior position, the Supreme Court held that it was sufficient for transactions to account for a considerable proportion of the counterparty's total sales, and that the counterparty's alternatives were limited. It also confirmed the illegality of powerful retailers shifting excessive amounts of risk to manufacturers.

4.2. Industry or firm specific approaches

In addition to provisions that apply generally to all firms in an economy, some countries also regulate purchasing power in specific sectors or on firms with particular characteristics. The scope of such provisions varies significantly, but tend to aim to regulate the trading practices of firms that possess an imbalance of power, for example as between certain retailers and their suppliers.

4.2.1. Codes of conduct and market studies

Some countries, including the United Kingdom and Australia, have adopted industry specific Codes of Conduct in the Grocery retail sector. These codes largely followed market studies or market investigations in the sector and had the principal aim of protecting suppliers from the bargaining power of retailers.

While the codes in question relate to specific markets, they demonstrate the potential for market studies to allow competition authorities to study purchasing power and its effects on competition within a particular market. Market studies could therefore provide an alternative means to address the competitive effect of purchasing power, particularly if the effects relate to the market in general rather than specific conduct of any one particular firm.

To date the codes of practice share a number of similarities with the sector specific regulations discussed above.

For example, the Groceries Supply Code of Practice (GSCOP) of the United Kingdom was enacted in 2010 after a market investigation by the then Competition Commission of the United Kingdom.[64] The Competition Commission found that there were aspects of the grocery supply market that had a negative impact on competition, including the use of buyer power by grocery retailers. This was evidenced by their supply chain practices that transferred excessive risks and unexpected costs to suppliers. GSCOP details how the retailers should manage their relationships with suppliers, and applies to 14 designated grocery retailers. An Adjudicator position was created with the power to arbitrate, investigate and fine. The code regulates behaviours that expose suppliers to unnecessary risks and expenses, as well as actions that affect supplier quality, innovation and investment. For example, in 2015, during an investigation into Tesco, the adjudicator confirmed that delays in payment by Tesco violated the code and issued recommendations for improvement.[65]

As another example, in Australia, the Food and Grocery Code is a voluntary code prescribed under the *Competition and Consumer Act 2010* (CCA).[66] Similar to in the UK, it regulates the conduct of retailers in dealing with their suppliers. Finally, in March 2022, the New Zealand Commerce Commission released the final report of its market study into the retail grocery sector. The report included a recommendation on the introduction of a mandatory code of conduct to address the imbalance of bargaining power between retailers and their suppliers.[67] The New Zealand Government has indicated that it will seek to progress work based on these recommendations, including exploring how a code of conduct could be developed.[68]

4.2.2. Laws and guidelines for fair trading in the retail sector

Several jurisdictions have specific provisions that regulate the purchasing power of retailers. These provisions illustrate how some of the effects of purchaser power, the result of ineffective competition between purchasers, have been addressed through means considered quite differently than competition law. Examples of laws that apply only in the retail sector can be seen in Korea, Japan, the Czech Republic and Slovakia.

In general, rather than relying on a determination of market power or strong bargaining position, the provisions apply to retailers of a particular size, based on their turnover. Retailers that have turnovers greater than set out in the relevant legislation, are prohibited from engaging in certain types of conduct. In addition, in many of the regimes, whether conduct is prohibited tends to focus on unfairness of the act itself rather than the impact on competition.

Unfair conduct generally relates to the imposition or coercion of commercial terms and the assessment can depend on the context. Examples of unfair conduct by retailers may include the unjust return of goods, coercing reductions in prices after purchase or refusing to accept the delivery of previously ordered goods. Therefore, these laws can establish conduct by purchasers to be *per se* illegal without analysing the anti-competitive effect, as is the case in Korea. Box 10 discusses the EU Directive on unfair trading practices in agricultural and food supply chains, which provides another example of specific regulations relating to purchasers. [69]

Box 10 EU Directive on unfair trading practices

The European Union introduced Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationship in the agricultural and food supply chain (Directive (EU) 2019).

The Directive is related Article 102 of the Treaty on the Functioning of the European Union (TFEU) and provides protections to the sales of agricultural and food products by smaller suppliers which have an annual turnover not exceeding EUR 350M (Article1).

The Directive establishes a distinction between black and grey practices. Grey practices are permissible if the supplier and their customer agree on them in advance in a clear and unambiguous manner. Black practices are prohibited regardless of the circumstances.

There are ten examples of black practices, such as making payment later than 30 days after receiving perishable agricultural and food products, paying later than 60 days for other agri-food products, short-notice cancellations of orders for perishable agri-food products, and a buyer imposing unilateral contract changes.

Further, there are six different types of grey practices including the return of unsold products, and payments by the supplier for marketing and advertising.

Source: European Commission, Unfair Trading Practices in the agricultural food supply chain: https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/market-measures/agri-food-supply-chain/unfair-trading-practices_en

As another example, Japan and Korea have additional laws to regulate unfair trade practices in the retail industry.[70] In these regimes, the presence or absence of relative bargaining power is determined based on the retailer's turnover. In other words, only large-scale retailers with sales of KRW 100 billion (approximately, 100 million USD) or more in Korea and JPY 10 billion (approximately, 100 million USD) or more in Japan are covered. A number of specified acts are prohibited, and it is illegal if only the appearance

of the act exists without the need to analyse its anti-competitive effect. It does not take into account the positive effects of buyer power or effects on consumer welfare. In essence, the assessment of the relative gains from bargaining power have been made a priority.

In Korea, large-scale retailers can be subject to the superior bargaining position provisions and the Act on Fair Transactions in Large Retail Business. In other words, if a retailer commits a violation of the superior bargaining power provisions and a violation of the Act on Fair Transactions in Large Retail Business, both laws could be applied. Box 11 provides an example of this.

Box 11 Coupang case (2021), a violation of retail sector specific law and competition law

Coupang, a large retailer in the e-commerce market, violated the Monopoly Regulation and Fair Trade Act (MRFTA) and the Act on Fair Transactions in Large Retail Business from 2017 to 2020 by forcing suppliers to raise sales price of competitive online malls, selling advertisement to suppliers to compensate for Coupang's margin losses, transferring all promotional expenses to suppliers, and receiving sales incentives without an agreement.

The first conduct corresponds to management interference that limits the supplier's free decision making against the will of the counterparty, under MRFTA. The second and third conducts are those prohibited by the Act on Fair Transaction in Large Retail Business. Any review of competition restrictions is not required to determine whether this law is violated.

The Korean Fair Trade Commission (KTFC) decided to impose a fine of KRW 3 billion (approximately USD 3 million) along with a corrective order for Coupang's conduct. In order to apply the Act on Fair Transactions in Large Retail Business, only the turnover needs to be checked. Coupang's 2020 sales amounted to KRW 14 trillion, which met the standard. However, in order to apply the MRFTA, KFTC had to determine whether Coupang had a superior power. The basis for the judgment is that first, Coupang is the first operator in the online distribution market, second, it is difficult for suppliers to secure an alternative retailer, and third, Coupang is in a position to set deals' conditions in its favour.

This case recognises that online retailers, like offline distributors, such as department stores or, supermarket chains, can have superior power even with respect to large suppliers.

Source: KFTC (2021) Press Release, Coupang case (in Korean): http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rpttype=1&report_data_no=9221

5 Conclusion

This paper has considered purchasing power and buyers' cartels. Despite the increase in focus on purchasing issues in recent years, particularly in relation to labour markets, it is still the case that issues related to suppliers in the competition world overshadow purchasing issues. While this may reflect the underlying prevalence of relevant conduct, it could also be at least partly explained by the prevalence of the consumer welfare standard and a view that purchasing power is less likely to result in harm to consumers. It is also true that purchasing power can offset the market power of suppliers and lead to lower prices to consumers.

However, even with a consumer welfare standard, purchasing power can lead to outcomes contrary to those desired by competition policy. The extent of that harm will depend upon the circumstances of the case, and in particular, whether it is monopsony or bargaining power that is being exercised. While monopsony power is likely to be harmful in most situations, bargaining power also has the potential to lead to adverse outcomes in some cases.

Purchasing power can be exercised in a coordinated or unilateral manner. Buyers' cartels are typically treated similarly to cartels between sellers, although not universally. However, they account for a low percentage of overall cartel enforcement cases, which could suggest cause for increased prioritisation in the future. It is difficult to determine if the true prevalence of buyers' cartels is higher than that suggested by those that are detected, although the recent increase in enforcement action against employers may provide some useful insights.

Despite sharing some attributes with buyers' cartels, joint purchasing agreements are treated quite differently by authorities, as long as they cover a relatively low proportion of overall purchases. Through genuine cost efficiencies, joint purchasing agreements have the potential to raise overall welfare. However, competition authorities appear to be increasingly wary of their potential threat to competition in some circumstances.

The treatment of unilateral purchasing power varies significantly by jurisdiction. Traditional competition laws, such as abuse of dominance provisions, appear to apply to purchasing power in theory, yet have been rarely applied in practice. In contrast, several jurisdictions have used other means to address issues of unbalanced bargaining positions, such as provisions that apply to firms with superior bargaining positions. Others have used market study powers to consider purchasing power, leading to the introduction of industry specific codes that regulate the conduct of purchasers.

Given the clear theoretical basis for harm from monopsony power and, in some circumstances, bargaining power, greater convergence in the treatment of purchasing power may have some merit. This could include, for example, consideration of the appropriate priority to give to the enforcement of buyers' cartels and purchasing power more broadly.

Endnotes

[1] Purchasers, or buyers, compete in buying markets. Sellers, or suppliers, compete in selling markets. Purchasers can often be producers that purchase inputs from sellers of intermediate goods in upstream markets and then use the inputs to produce goods that they sell in downstream markets.

[2] This paper will refer to purchasing, buyer or buying power interchangeably. Loosely, these terms will refer to a degree of market power held by purchasers over sellers.

[3] For example, see (Stiglitz, 2018[8]), (Steinbaum and Stucke, 2020[6]) , (Shapiro, 2001[9]), (Hovenkamp, 2018[7])

[4] The paper refers to competition policy or antitrust policy to refer to the broad approach adopted for implementing competition law in jurisdictions.

[5] John K. Galbraith appears to have introduced the concept of countervailing power in 1952 with his book American Capitalism: The Concept of Countervailing Power (Galbraith, 1952[42]).

[6] For example, being ambivalent between whether a dollar sits with a small business, a large corporation or a low-income consumer, providing there is no harm to economic efficiency. There appear to be few examples of authorities taking into account such factors. A possible exception is the so-called “modified total welfare standard”, which allows for the distributional effects of competition policy to be factored in. The standard has been discussed in the context of authorisation decisions in Australia and New Zealand, and in the context of merger control in Canada. Nonetheless, its use has not been frequent.

[7] Particularly in the context of merger control, although such considerations still appear to be rare.

[8] In other words, some suppliers are able to produce at lower cost than others. As it is assumed that the monopsonist cannot discriminate between suppliers, prices are set at the market level and the same for all. Therefore, suppliers with lower costs are able to earn some economic rent.

[9] As such, extracting these rents would generally be against the interest of purchasers. Nonetheless, information asymmetries may limit the ability of a purchaser to understand how its actions will impact suppliers. Further, if there is more than one large purchaser, there may be an incentive for them to extract quasi rents before the other if they fear there is a risk of the other purchaser doing so.

[10] As noted previously, this analysis assumes that there is no ability for the purchaser to discriminate between suppliers and offer them different prices. If this were the case, the monopsonist might be able to maintain volumes at the competitive level and extract all surplus from suppliers. To do so, the monopsonist

would need to be able to maintain the price (or wage) discrimination and have information on the average supply curves for each supplier.

[11] The purchaser clearly benefits from the reduction in purchasing competition through their decision to lower demand to decrease prices, otherwise they would not do so.

[12] Increased reduction beyond that already likely due to the effects of downstream market power.

[13] For example due to concerns of inefficiency from the distortionary effects of the reduced competition on the upstream input markets.

[14] This gives suppliers two options: supply the competitive level of output at a price that just covers their cost of doing so or supply nothing at all.

[15] Another situation where monopsony power may be beneficial is if there is a monopoly supplier but outcomes are still determined by the market rather than bargaining. In such a circumstance, prices lower and output expands if there is no downstream market power (OECD, 2008[2]). This assumes that the exercise of monopsony power does not spill over into other markets without supplier market power, that negotiations between the two parties are successful and there are no long-run harms to innovation from reduced monopolist profits.

[16] However, it is worth noting that both tacit and explicit collusion could lead to some monopsony power and, given that explicit collusion is usually illegal, tacit collusion may be considered an attractive alternative for purchasers in some situations.

[17] To put it another way, the more complex the situation, the more communication will be required to reach a collusive outcome.

[18] Sellers' cartels must contend against the threat of a member deviating from the agreement by, for example, offering a lower price to capture additional sales. Doing so is in its interest as it will earn a positive margin for those extra sales and, should the deviation be undetected by its rivals, it may suffer no repercussions. If the deviation is detected, then the cartel might break down and the firm may suffer a period of "punishment".

[19] Defined as the ability to have some pricing power, such that prices can be held above marginal costs in the case of sellers, and pushed below marginal revenue product in the case of purchasers.

[20] Bargaining power corresponds to the ability of purchasers to extract favourable terms from their suppliers, in particular compared to smaller suppliers and competitive purchasing markets.

[21] Perhaps, for example, if the suppliers in question are workers or small businesses.

[22] For example, countervailing buyer power in merger control can occur if any resulting increases in market power for suppliers can be offset by the bargaining power of their customers.

[23] Some of the circumstances could also apply to purchasers that hold monopsony power. In such cases, any harms could be in addition to the harm from reductions in output.

[24] Alternatively, they might insist that they only do so under certain conditions, such as on the basis that those rivals are supplied at higher prices or only on the condition if those rivals do not undercut the prices of the larger purchaser downstream.

[25] There is a particular risk of input foreclosure when suppliers have significant economies of scale. Bargaining power can allow purchasers to secure exclusive access to a source of supply. With significant barriers to entry upstream due to the economies of scale, this means that there are likely to be substantial barriers to entry downstream as potential rivals will face limited access to competitively priced inputs.

[26] It is important to note that waterbed effects do not occur simply because of the need for suppliers to recoup profits lost to the large purchaser. If it were profit-maximising to increase prices to other purchasers, this should be the case absent the purchasing power of the large buyer (OECD, 2008[2]).

[27] Size will affect bargaining power if there is a fixed cost of switching suppliers, meaning that purchasers will be indifferent between switching in the face of higher prices as their size decreases. See (Inderst and Valletti, 2011[23]) and (OECD, 2008[2]) for further discussion of the possibility and conditions required for a waterbed effect.

[28] See section 4.2.1 Codes of conduct and market studies

[29] Further, since the cost savings for purchasers may not be marginal cost decreases, reductions in costs may not result in significant savings for consumers. It could be argued that such an outcome would be against the interests of purchasers, although this assumes that they have good information on the effect of their conduct. It could also be that a short term definite cost reduction outweighs the risk of potential longer term inefficiency.

[30] This could be the case even if the consumers are benefitting from lower prices.

[31] For example, a relatively new entrant may have provided a price for a service, but question marks remain on whether it will be able to supply reliably and to a sufficient quality. Similarly, a company may have considered self-supplying an input but it has until it does so cannot know the exact cost and quality this option would provide.

[32] Calculated by surveying the literature of estimates of undercharges for buyers' cartels and calculating the median value of the estimate.

[33] In the case of sellers' cartels, hard-core agreements are those that directly fix the outcomes of markets, such as fixing prices or output, bid-rigging or allocate markets.

[34] See Department of Justice press release, October 2016: https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals

[35] The buyers' cartel involved steelmakers that exchanged key pricing information through regular gatherings, with a view to stabilising the price paid for iron scrap. https://content.mlex.com/#/content/1259456

[36] Canadian Competition Bureau statement on the application of the Competition Act to no-poaching, wage-fixing and other buy-side agreements, November 2020: https://www.canada.ca/en/competition-bureau/news/2020/11/competition-bureau-statement-on-the-application-of-the-competition-act-to-no-poaching-wage-fixing-and-other-buy-side-agreements.html

[37] For example, there appear to be limits to the application of competition laws, including cartel provisions, in labour markets in Australia and New Zealand: See ACCC press release,2015: https://www.accc.gov.au/media-release/accc-on-competition-law-enforcement-in-the-broad-industrial-relations-area and New Zealand Commerce Commission Fact Sheet:

https://comcom.govt.nz/__data/assets/pdf_file/0023/256406/Exceptions-under-the-Commerce-Act-Fact-sheet-June-2021.pdf

[38] European Commission Case AT.38238 - Raw tobacco (ES). Original decision 2004, updated decision with revised fines in 2017. European Commission Case AT.38281 - Raw tobacco (IT), decision 2005.

[39] National Macaroni Manufacturers Association v FTC, 345 F2.d 421, https://casetext.com/case/national-macaroni-manufacturers-v-ftc

[40] In this cartel, the suppliers were also part of the agreement. However, the Bundeskartellamt chose not to pursue fines against them for discretionary reasons. See: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/21_11_2019_Bussgeld_Stahl.html

[41] If contracts are linear, for example with simple unit pricing, then reductions in costs are likely to result in lower marginal costs. This is less likely if contracts are non-linear, although non-linear cost reductions could also result in lower marginal costs in some circumstance, albeit to a lesser extent.

[42] On the other hand, joint purchasing agreements could increase the incentives for innovation, as they compete with other suppliers. They could also increase product variety if they allow smaller retailers to gain access to a wider set of products, such as own-brand label products (Colen, 2020[29]).

[43] For example, the European Commission explains their approach as: “Agreements which involve the fixing of purchase prices can have the object of restricting competition within the meaning of Article 101(1) (1). However, this does not apply where the parties to a joint purchasing arrangement agree on the purchasing prices the joint purchasing arrangement may pay to its suppliers for the products subject to the supply contract. In that case an assessment is required as to whether the agreement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1)”. See paragraph 206 of Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN

[44] For example, in August 2021, the Australian Competition and Consumer Commission (ACCC) granted authorisation for two separate purchasing groups for renewable energy. In its decision, the ACCC noted that the purchasing groups would likely lead to public benefits through transaction cost savings, environmental benefits, and greater investment in and competition for the supply of electricity. The ACCC also noted that since the share of purchases was low, there was unlikely to be a significant risk from allowing the joint purchasing agreements. See ACCC press release: https://www.accc.gov.au/update/accc-authorises-renewable-energy-buying-groups-in-victoria-and-western-australia

[45] The class exemption only covers members below the turnover threshold and does not provide legal protection in the event that information is shared between participants beyond that which is necessary to facilitate the bargaining process. To date there appear to have been over 30 notifications in relation to the exemption, covering businesses such as newsagents, franchises, healthcare services and news businesses. See: https://www.accc.gov.au/public-registers/class-exemptions-register/collective-bargaining-class-exemption-0

[46] For example, guidance from the United States Federal Trade Commission on collective boycotts, largely in the context of suppliers, notes that collective boycotting can be illegal and that this can be the case even in situations where the boycott is not directly linked to price, if the agreement is restricting competition and

has no redeeming justification. US Federal Trade Commission website, viewed April 2022: https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors/group-boycotts

[47] Australian Competition and Consumer Commission, Small business collective bargaining, Notification and authorisation guidelines, December 2018. https://www.accc.gov.au/system/files/1472%20Small%20business%20collective%20bargaining.pdf

[48] Selecting an exclusive supplier such that other suppliers are not to be used, is similar in appearance to the decision to collectively boycott the other suppliers.

[49] With some exceptions depending on the jurisdictions. For example, some regimes might exclude certain sections of the economy from competition laws, such as labour markets.

[50] See paragraphs 4.12 and 4.20, Abuse of a Dominant Position, OFT402, December 2004, subsequently adopted by the Competition and Markets Authority. https://www.gov.uk/government/publications/abuse-of-a-dominant-position

[51] European Commission, Case 298/93, Comité des industries cinématographiques des Communautés européennes (CICCE) v Commission of the European Communities, Competition - Abuse of a dominant position - Broadcasting of cinematographic films on television.

[52] The case appears to have been unsuccessful because the Commission held that, given the need for an assessment between economic value and cost, there would have to be an assessment at the individual firm level, rather than for the average licence fee as put forward by CICCE.

[53] In addition, the abuse also constituted several behaviours that would be considered exclusionary, such as requiring the farms to inform the purchaser if they had any contact with other buyers and to require exclusivity of all milk supply if the dairy company had provided the farmer with financing to purchase any livestock, regardless of the amount.

[54] Such cases have included conduct in relation to rough diamonds, airline tickets through travel agencies and move theatres.

[55] Camellia City Telecasters v. TRIBUNE BROADCASTING 176 F. Supp. 290 (District of.Colombia. 1991),

[56] Interestingly, the judgement notes in a footnote that “although the defendants have not raised the issue, this court is sceptical about the applicability of a tying claim to purchasers rather than sellers. The anticompetitive effects of this type of abuse of monopolistic power may not be present in the context of a monopsony.”

[57] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007) https://supreme.justia.com/cases/federal/us/549/312/

[58] In Korea, Article 45(1)6 of the Monopoly Regulation and Fair Trade Act (MRFTA) specifies the abuse of a superior position as a prohibited conduct since 1981. In Japan, similar provisions can be found in Article 2(9)5 and Article 19 of the Anti-Monopoly Act (AMA) since 1953.

[59] See, for example (in Korean) Guidelines for Assessment of Unfair Trade Practices, KFTC, 2021: https://www.law.go.kr/행정규칙/불공정거래행위심사지침(387,20211222)

[60] In addition, Italy has regulated abuses of economic dependency through Article 9 of Law no. 192 since 1998, and most recently, Belgium introduced abuse of economic dependency as a prohibition clause in its competition law through its revision in 2019, coming into effect in August 2020.

[61] See Code de Commerce :https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000005634379/LEGISCTA000006133184/?anchor=LEGIARTI000038725501#LEGIARTI000038725501

[62] See English version: Act against Restraints of Competition (ARC) (Competition Act – GWB) (gesetze-im-internet.de): https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html . In January 2021, in the 10th amendment to the ARC, the relative market power has been changed, with the removal of the SMEs reservation and the introduction of the idea of intermediation power. The purpose of this revision is to ensure that the abuse provision of ARC is suitable for the digital age. It is expected that the German competition authority will strictly monitor abuses in all fields, including the digital market. Some have suggested concerns that there may be a significant number of cases with the revision (Lauer, Urban and von Schreitter, 2021[43]).

[63] Bundeskartellamt press release on EDEKA case, 29 January 2018: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/29_01_2018_EDEKA_BGH_Entscheidung.html

[64] UK Groceries Supply Code of Practice: https://www.gov.uk/government/publications/groceries-supply-code-of-practice/groceries-supply-code-of-practice

[65] UK Groceries Code Adjudicator Investigation into Tesco plc, 26 January 2016: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/494840/GCA_Tesco_plc_final_report_26012016_-_version_for_download.pdf

[66] Australia Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015 (legislation.gov.au): https://www.legislation.gov.au/Details/F2021C00201

[67] New Zealand Commerce Commission, Market study into the retail grocery sector Final report – Executive summary, March 2022: https://comcom.govt.nz/__data/assets/pdf_file/0023/278402/Market-study-into-the-retail-grocery-sector-Executive-summary-8-March-2022.pdf

[68] New Zealand Ministry of Business, Innovation and Employment, press release on Market Study into supermarkets: https://www.mbie.govt.nz/business-and-employment/business/competition-regulation-and-policy/market-studies/market-study-into-supermarkets/#:~:text=On%2017%20November%202020%2C%20the,by%20retailers%20in%20New%20Zealand.

[69] As another example, the Czech Republic monitors potential abuse of purchasing power in the food retail sector with the Significant Market Power Act 2009. Significant market power refers to a buyer's position. Businesses with turnover exceeding CZK 5 billion (approximately, EUR 185M) in the previous 12 months are subject to the Act. Similarly, in Slovakia, an Act on unfair trading practices in the food supply chain regulates abuse in the retail sector. As in many other countries, the authority does not need to investigate the impact on competition to prove the illegality of conduct. Spain also revised the law in December 2021 to improve the food supply chain by reflecting Directive (EU) 2019.

[70] In Korea, the Act on Fair Transactions in Large Retail Business was introduced on 2012. In Japan, the Guidelines Concerning Designation of Specific Unfair Trade Practices by Large-Scale Retailers Relating to the Trade with Suppliers (JFTC Secretary General Notification No.9, 2005) came into effect in 2005. See Japanese Fair Trade Commission, Guidelines Concerning Designation of Specific Unfair Trade Practices by Large-Scale, Retailers Relating to Trade with Suppliers, 2005 https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/guidelines_large_scale_retailers.pdf

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