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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Executive Summary of the roundtable on Purchasing Power and Buyers' Cartels

Annex to the Summary Record of the 138th meeting of the Competition Committee held on 22-24 June 2022

22-24 June 2022

This Executive Summary by the OECD Secretariat contains the key findings from the discussion held during the 138th meeting of the Competition Committee on 22-24 June 2022.

More information related to this discussion can be found at
www.oecd.org/daf/competition/purchasing-power-and-buyers-cartels.htm

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Executive Summary of the Roundtable on Purchasing Power and Buyers' Cartels

By the Secretariat*

The OECD Competition Committee held a Roundtable on Purchasing Power and Buyers' Cartels in June 2022. Based on the background paper prepared by the Secretariat, written submissions from delegates, and the contributions by expert panellists and delegates to the discussion, the following key points emerged.

1. Ineffective competition between purchasers can lead to purchasing or buyer power, pushing down prices or worsening conditions for sellers. In some circumstances this can be pro-competitive, but may also distort market outcomes and lead to harm, including to end consumers.

When firms purchase a product or service, such as a commodity to resell or the labour services of a worker, they compete to do so alongside other purchasers. The roundtable revealed a range of perspectives regarding the relative harm of market power between purchasers and that of sellers. Some considered the two to be more or less equivalent, although others considered seller market power to have significantly more potential for harm.

The harm from purchasing power is clearest when it is through monopsony power, which arises when many small suppliers, acting as price takers as part of an upward sloping supply curve, face a larger purchaser. This purchaser reduces its demand to lower prices, lowering output to create deadweight loss. On the other hand, purchaser power can be bargaining power, which is when outcomes are set by negotiation between two sides with market power. In these circumstances, purchasing power can lead to lower prices that benefit consumers, although it could also lead to losses in dynamic competition if it affects supplier incentives to innovate.

2. Competition authorities are taking an increased interest in purchasing power, often reflecting a desire to preserve consumer welfare. However, in some cases this interest has been driven by authorities broadening their considerations beyond pure consumer welfare, such as harm to workers or small businesses. However, in assessments of purchasing power, a careful analysis of the upstream market is required.

Factors considered in these assessments include the economics of the product or service in question, such as its perishability and elasticity of supply, as well as the ability for the seller to find realistic alternative purchasers if required. In addition, the existence of barriers to exit for suppliers matters, as this increases the ability of buyers to influence the purchase price. Estimating the exact harm of purchaser power to upstream suppliers is unlikely to be possible in many situations. However, by focusing on the nature of conduct and the impact that this has on suppliers, competition authorities can assess potential competition issues.

3. The majority of OECD jurisdictions legally treat buyers' cartels similarly to sellers' cartels. Further, there is increasing experience in buyers' cartels across

* This executive summary does not necessarily represent the consensus view of the Competition Committee. It does however identify key points from the discussion at the Roundtable, including the views of the expert panellists and the participants' oral and written contributions.

jurisdictions, although the enforcement record is substantially smaller than that of sellers' cartels. While there is no robust estimate of the underlying number of buyers' cartels compared to sellers' cartels, there appears to be no strong *a-priori* reason to expect them to be substantially less prevalent.

While not every jurisdiction treats buyers' cartels in the same way as sellers' ones, the majority do. In most cases this includes treating hardcore infringements, such as the fixing of prices, as *per se* illegal if between purchasers (for example conspiring to lower purchase prices). An increasing number of enforcement decisions have been issued relating to buyers' cartels in the last decade. However, the Roundtable identified that there is substantial variation in the level of enforcement across jurisdictions, and in the prominence of buyers' cartels in the priorities of competition authorities. There are many authorities that have either taken no, or few, enforcement decisions against buyers' cartels and, even for the most active authorities, the enforcement record is substantially smaller than for sellers' cartels.

Buyers' cartels should be distinguished from joint purchasing agreements, which although themselves can be anticompetitive, also have the potential to bring significant efficiencies. In practice, it can be difficult to distinguish the two. Joint purchasing agreements occur when purchasers genuinely combine their purchases, as opposed to agreeing with a rival how to purchase individually from a supplier or seller, and are usually public knowledge. Often the effects of such agreements will require careful analysis, although many jurisdictions operate thresholds for the share of market purchases, below which joint purchasing groups are presumed to have no anti-competitive effect.

4. In contrast to the legal treatment of buyers' cartels, the treatment of unilateral abuses of purchasing power varies significantly across jurisdictions. In particular, while traditional abuse of dominance enforcement could be used to tackle purchaser power, its apparent ineffectiveness has resulted in numerous jurisdictions adopting new forms of approach and regulation.

When purchasing power is exercised unilaterally by a buyer, the Roundtable identified significant divergence in approaches. As with buyers' cartels compared to sellers' cartels, in many jurisdictions abuse of dominance provisions could be applied to purchasers with a dominant position that abuse it. However, examples of enforcement against such purchasers were few. One reason for this is the difficulty in establishing dominance for purchasers, where the market shares could provide purchasing power at a level below than usually assumed for sellers.

In response, several jurisdictions have developed alternative approaches to constraining unilateral purchasing power, such as the abuse of a superior bargaining position or an economic dependency. Instead of dominance, these provisions reflect the bargaining position and dependence, between suppliers and purchasers. Many jurisdictions have developed successful records of enforcement with such provisions, or similar ones, with many cases taking place in the retail sector, where some jurisdictions have adapted further provisions to regulate retailer conduct more explicitly with respect to suppliers, especially smaller ones such as farmers. Other jurisdictions have used market studies to assess the effect of purchasing power, and this has sometimes led to the introduction of codes of conduct to regulate the behaviour of purchasers, notably in the supermarket sector.