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**Purchasing Power and Buyers' Cartels – Note by Switzerland**

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More documents related to this discussion can be found at  
<https://www.oecd.org/daf/competition/purchasing-power-and-buyers-cartels.htm>

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## *Switzerland*

1. The COMCO mainly distinguishes between two forms of buyer coordination: When companies buy together in order to achieve efficiencies the COMCO sees a buyer cooperation. If, on the other hand, the coordination does not aim to create efficiencies but to restrict competition, there is a buyers' cartel.

### 1. Buyers' cartels

2. In the opinion of the COMCO, **buyers' cartels can be as harmful as sellers' cartels**. In a case regarding a tariff agreement between insurers for supplementary insurance, the COMCO decided that she would examine agreements on purchase prices under the same legal basis as agreements on sales prices.<sup>1</sup> The COMCO held that the direct or indirect fixing of maximum prices for purchases by a buyers' cartel presumably eliminates effective competition.<sup>2</sup>

3. In a preliminary investigation, the Secretariat assessed the proposition of the association of Swiss health insurers (Santésuisse) for an agreement on customer soliciting and advertising among health insurance companies. The Santésuisse agreement **fixed purchase prices** for services of brokers, agents and other providers of advertising services, and partially boycotted call centres. The agreement did not aim to create countervailing power or induce the sellers to reduce their prices. The sellers had hardly any market power and did not impose unreasonable (i.e. monopolistic) prices or other conditions. Thus, in the opinion of the Secretariat, it was not a purchasing agreement, but a buyers' cartel. Therefore, it was not analysed against the background of the countervailing power theory (see below) and could not be justified according to it.<sup>3</sup> The Secretariat came to the conclusion that the agreement significantly restricted competition.<sup>4</sup>

4. In an investigation into the wholesale of sanitary facilities, the COMCO investigated price and quantity agreements between wholesale sanitary facilities companies. They had *inter alia* reached a joint decision among buyers not to include in their catalogues manufacturers that did not sell their products exclusively through their sales channels (**collective boycott among buyers**). This made it more difficult for the manufacturers concerned to enter the market. The COMCO decided that the group boycott among the buyers was an unlawful quantity agreement.<sup>5</sup>

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<sup>1</sup> See Law and Policy on Competition (hereafter LPC) 2008/4, 544 et seq., *Tarifverträge Zusatzversicherung Kanton Luzern*, the LPC is available in French, German and Italian at [www.weko.admin.ch/weko/en/home/praxis/law-and-policy-on-competition--lpc-.html](http://www.weko.admin.ch/weko/en/home/praxis/law-and-policy-on-competition--lpc-.html) (10.05.2022).

<sup>2</sup> See LPC 2008/4, 544, Rz 75 et seq., *Tarifverträge Zusatzversicherung Kanton Luzern*.

<sup>3</sup> See LPC 2014/1, 153, Rz 125, 129, *Vereinbarung Santésuisse betreffend Kundenwerbung*.

<sup>4</sup> See LPC 2014/1, 153, Rz 171, *Vereinbarung Santésuisse betreffend Kundenwerbung*

<sup>5</sup> See LPC 2019/3a and 3b, 606, *Badezimmer*.

## 2. Purchasing cooperations

5. As purchasing cooperations can give rise to significant efficiency gains such as lower transaction, storage, and transportation costs, the COMCO has a rather positive attitude towards joint purchasing agreements if the parties have low market power. However, for each **individual case**, the Swiss competition authority examines whether there are unlawful anticompetitive agreements, e.g. on purchase prices or quantities.

6. If a purchasing cooperation has an obviously pro-competitive effect, there is no **anticompetitive agreement** in the sense of the Swiss Cartel Act. Purchasing cooperations are evidently pro-competitive if, for example, they enable the participating companies to act as buyers on a certain market in the first place.<sup>6</sup>

7. Recently, the Secretariat assessed the **possible effects of two purchasing cooperations** within the framework of two consultations for the companies involved.<sup>7</sup> The first consultation concerned a planned national purchasing cooperation and the second an international one. The national purchasing cooperation consisted of four companies, some of which were competing on the downstream markets. It was to be operated in the form of a legally independent joint-stock company. However, it would not have purchased any products itself. The supply and contractual relationships would continue to exist between the individual parties and suppliers.<sup>8</sup> The international purchasing cooperation was similarly organised. However, the parties to the international purchasing cooperation were active in different geographic selling markets.<sup>9</sup> Both purchasing cooperations planned joint negotiations on goods-related purchasing conditions: In the national purchasing cooperation, the purchasing managers of the participating companies were directly involved in the central negotiations of goods-related purchasing conditions with the suppliers. In the international purchasing cooperation, the parties agreed on elements of the prices to be paid by them to the suppliers. Consequently, the Secretariat assumed horizontal price agreements.<sup>10</sup>

8. Since horizontal agreements on prices, quantity and territory are generally harmful by their nature, in the Swiss Cartel Act there is a presumption that they eliminate effective competition. In case of a rebuttal of this presumption, the COMCO and its Secretariat have to analyse whether these agreements significantly restrict competition. In a leading case, the Swiss Federal Supreme Court held that such agreements, based on their harmful nature and quality, **in general, significantly restrict competition**.<sup>11</sup> However, agreements that are not harmful by their nature must be subject to a full assessment based on qualitative and quantitative criteria.

9. For example, the **agreement on purchase prices in the context of a purchasing cooperation** does not indicate in itself a significant restriction of competition because it is

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<sup>6</sup> SIMON BANGERTER/BEAT ZIRLICK, in: DIKE Kommentar zum Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen, Zäch et al. (Ed.), Zürich/St. Gallen 2018, Art. 5 para. 569.

<sup>7</sup> See LPC 2020/2, 405 et seq., 408 para. 30, *Einkaufskooperation*; LPC 2022/2, *Internationale Einkaufskooperation* (forthcoming).

<sup>8</sup> See LPC 2020/2, 405 et seq., 408 para. 30, *Einkaufskooperation*.

<sup>9</sup> See LPC 2022/2 *Internationale Einkaufskooperation* (forthcoming), Rz 47.

<sup>10</sup> See LPC 2020/2, 405 et seq., 408 para. 17, *Einkaufskooperation*; LPC 2022/2 *Internationale Einkaufskooperation* (forthcoming), para 50.

<sup>11</sup> Swiss Federal Supreme Court, BGE 143 II 297, c. 5.2.5 and 5.6, *Gaba*.

**not necessarily harmful by its nature.** Thus, in this case, it has to be examined based on qualitative and quantitative criteria if the price agreement significantly restricts competition.<sup>12</sup> Accordingly, the Secretariat stated in its consultations regarding the national and the international purchasing cooperation that agreements on purchase prices – like those on sales prices – constitute qualitatively serious restrictions of competition.<sup>13</sup> However, it looked at the potential effects of the agreement in quantitative terms.

10. When assessing the **effects of a joint purchasing arrangement**, the COMCO analyses the market conditions. Joint purchasing arrangements are unlikely to have restrictive effects on competition if the companies involved have insignificant market positions on the procurement and sales markets. Insignificant market positions are likely in the case of joint market shares of the parties of less than 15 % on both, the procurement and the sales market. In these cases, purchasing cooperations that are not disguised cartels and, accordingly, do not constitute restrictions of competition by their nature or effect are unlikely to constitute agreements to restrict competition within the meaning of the Swiss Cartel Act. Thus, in cases where the market share is above 15 % the Swiss competition authority generally makes an individual case assessment in order to determine whether there is a significant restriction of competition.<sup>14</sup> In doing so, the Swiss competition authority takes into consideration the following guidelines.<sup>15</sup>

11. On the **procurement side**, anticompetitive effects are likely if the companies involved in a purchasing cooperation have a significant degree of market power. In this case, there is indeed the risk that they force suppliers to restrict product quantity, quality, and/or variety as well as innovation activity.<sup>16</sup> Anticompetitive buyer power is likely if a purchasing cooperation involves a large proportion of the total volume on the relevant procurement markets. Thus, it has such a large degree of buyer power that access to the market could be closed to competing buyers.<sup>17</sup>

12. On the **sales side**, joint purchasing arrangements can lead to a collusive outcome if they facilitate the coordination of the parties' behavior on the relevant sales markets. In particular, joint purchasing may lead to substantial cost alignment, for example, if the parties are active in the same sales markets and jointly procure a large proportion of the products offered.<sup>18</sup> If, on the other hand, the jointly procuring companies are active in

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<sup>12</sup> ANDREAS HEINEMANN, Das Gaba-Urteil des Bundesgerichts: Ein Meilenstein des Kartellrechts, in: ZSR 2018 I 103 ff., 110, 112.

<sup>13</sup> See LPC 2020/2, 413, para. 63, *Einkaufskooperation*; LPC 2022/2, para. 85, *Internationale Einkaufskooperation*, (forthcoming).

<sup>14</sup> See LPC 2020/2, 408, 413, para. 24 and 59, *Einkaufskooperation*; LPC 2022/2, para. 40, *Internationale Einkaufskooperation* (forthcoming).

<sup>15</sup> See also EU-COMMISSION, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01, (cited: EC Horizontal Guidelines), para. 208 sq.

<sup>16</sup> See LPC 2020/2, 413, para. 65, *Einkaufskooperation*; LPC 2022/2, para. 87, *Internationale Einkaufskooperation* (forthcoming).

<sup>17</sup> See LPC 2020/2, 413, para. 65, *Einkaufskooperation*; LPC 2022/2, para. 87, *Internationale Einkaufskooperation* (forthcoming).

<sup>18</sup> See LPC 2020/2, 414, para. 66, *Einkaufskooperation*; LPC 2022/2, para. 88, *Internationale Einkaufskooperation* (forthcoming).

different sales markets, anticompetitive effects are unlikely on the sales side.<sup>19</sup> A collusive outcome on the sales side is generally unlikely if possible coordination affects only a small part of the market, and there are disciplining competitors that interfere with such coordination.<sup>20</sup>

13. The **exchange of sensitive business information** between competitors, e.g., on purchase prices and quantities, can facilitate coordination with regard to sales prices and quantities and thus lead to a collusive outcome on the sales markets. If a purchasing committee consists of representatives of the parties, such spillover effects on the sales side cannot be ruled out. Parties can minimize the risk of problematic effects of the exchange of information on the sales markets by limiting it to the necessary minimum and ensuring that the relevant information is only used within the framework of the purchasing cooperation and is not passed on to the companies involved in it.<sup>21</sup>

14. According to the Swiss Cartel Act, agreements that significantly restrict competition are **justified for reasons of economic efficiency** under the following conditions: They are necessary to reduce manufacturing or distribution costs, improve products or production processes, promote research or the dissemination of technical or professional knowledge, or make more rational use of resources *and* they do in no case open up opportunities for the companies concerned to eliminate effective competition.

15. In contrast to Art. 101 para. 3 TFEU<sup>22</sup>, the Swiss provision for a justification for efficiency reasons **does not require to allow consumers a fair share** of the resulting benefit. Nevertheless, whether competition in the relevant market is sufficiently intense, can be measured by the extent to which efficiency gains are passed on downstream. However, efficiency gains for consumers are not only to be seen quantitatively in lower prices but also in qualitative added values such as new or improved products or services. Thus, although the law does not require a fair share for consumers, economic efficiency within the meaning of the Swiss Cartel Act generally also serves the interests of consumers.<sup>23</sup>

16. When assessing whether there are **efficiency gains** the COMCO takes into account that purchasing cooperations may result in scale benefits and that there is a potential for lower purchasing prices as well as lower transaction, transport and, storage costs. The COMCO also takes into consideration that purchasing cooperations can create countervailing bargaining power, which can lead to lower prices or better quality products or services for buyers on the sales side.<sup>24</sup> Furthermore, they may generate qualitative

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<sup>19</sup> See LPC 2020/2, 414, para. 66, *Einkaufskooperation*; LPC 2022/2, para. 88, *Internationale Einkaufskooperation* (forthcoming).

<sup>20</sup> See also OECD, Competition Enforcement in Oligopolistic Markets, 2015, para. 20, DAF/COMP(2015)2.

<sup>21</sup> See LPC 2020/2, 414, para. 67, *Einkaufskooperation*; LPC 2022/2, para. 94, *Internationale Einkaufskooperation* (forthcoming).

<sup>22</sup> Consolidated version of the Treaty on the Functioning of the European Union (TFEU), OJ C 326, 26.10.2012, p. 47 - 390.

<sup>23</sup> ZIRLICK BANGERTER, in: DIKE KG (see Fn 6), Art. 5 para. 259.

<sup>24</sup> See LPC 2020/2, 407, para. 21, *Einkaufskooperation*; *Internationale Einkaufskooperation*, forthcoming in: LPC 2022/2, para. 38; EC Horizontal Guidelines, para. 217 ff.

efficiency gains in the form of incentives for innovation and the market launch of new or improved products.<sup>25</sup>

17. In the case regarding the tariff agreement between insurers for supplementary insurance (see above), the COMCO considered that prior to the tariff agreement between the insurers, all public hospitals of the Canton of Lucerne had jointly negotiated the terms of supplementary insurance with the insurers and had therefore been in a dominant position. By forming negotiation groups, the insurers established **countervailing bargaining power**. Therefore, the tariff agreement was justified for reasons of efficiency.<sup>26</sup> In the case of the Santésuisse agreement (see above) however, the service providers had hardly any market power and the insurers had not intended to generate countervailing power. Thus, in the opinion of the Secretariat, it was not a purchasing agreement, but a buyers' cartel.<sup>27</sup>

18. Restrictions on competition that go beyond what is **necessary to realise the efficiencies** intended by the purchasing cooperation do not meet the requirements for justification on efficiency grounds.<sup>28</sup> For example, it must be examined in the single case, whether an obligation to purchase exclusively within the framework of the purchasing cooperation is necessary to achieve economies of scale. The assessment of whether demand bundling is permissible under Swiss cartel law in order to counteract the negative effects of supply power always requires a careful weighing of the possible positive effects ("efficiencies") with the possible negative effects on competition (see above).

19. In practice, the Secretariat sees a trend towards cooperations of buyers, where the members are actually not buying the products together, but the cooperation is negotiating the on-top condition (the discount) for its members (e.g. retail alliances). In these cases, the cooperation might not only be used to establish countervailing bargaining power vis-à-vis suppliers with market power, but also to create **monopsony power against small suppliers**.

20. Furthermore, the Secretariat notes that retail alliances often operate with **collective threats** in order to increase their bargaining power vis-à-vis the suppliers, such as joint temporary buying stops or delistings. In the opinion of the Secretariat, such collective buying stops or delistings could be qualified as a serious boycott.<sup>29</sup> So far, the COMCO and the Secretariat have not definitely assessed, whether such collective threats amount to horizontal quantity agreements that are harmful by their nature or whether they have to be assessed by effect. The legal situation appears unclear: On the one hand, according to opinions in the doctrine,<sup>30</sup> such collective threats might constitute restrictions of

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<sup>25</sup> See LPC 2015/2, 157 sq., *Beratung betreffend Einkaufsgemeinschaften zur Beschaffung von ATM-Geräten, ATM-Unterhaltsarbeiten und einem ATM-Monitoring-System*.

<sup>26</sup> See LPC 2008/4, 565, para. 121 sq., *Tarifverträge Zusatzversicherung Kanton Luzern*.

<sup>27</sup> See LPC 2014/3, S. 177, Rz 161, *Vereinbarung Santésuisse betreffend Kundenwerbung*.

<sup>28</sup> See also EC Horizontal Guidelines, para. 218.

<sup>29</sup> See LPC 2022/2, para. 44, 100, *Internationale Einkaufskooperation* (forthcoming).

<sup>30</sup> VICTORIA DASKALOVA, Legal framework for national and European retail alliances, in: Retail alliances in the agricultural and food supply chain, Joint Research Center of the European Commission (ed.), 2020, 43, 50 (with further references); available at <https://publications.jrc.ec.europa.eu/repository/handle/JRC120271> (10.5.2022); MICHAEL BAUER, Assessing the competition effects of European retail alliances, in: Trends in Retail Competition: Private labels, brands and competition policy, Institute of European and Comparative Law, University of Oxford (Ed.), 2019, 10 f., available at [https://www.law.ox.ac.uk/sites/files/oxlaw/oxford\\_symposium\\_2019\\_report.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/oxford_symposium_2019_report.pdf) (10.5.2022).

competition by object and, therefore, should not be reviewed based on quantitative criteria.<sup>31</sup> On the other hand, the European Commission, in its recently published draft of the revised EC Horizontal Guidelines states that “[s]uch threats are typically part of a bargaining process and [...] do not usually amount to a restriction of competition by object.”<sup>32</sup> Furthermore, the EC announces that, “any negative effects arising from such collective threats will not be assessed separately but in the light of the overall effects of the joint purchasing arrangement.”<sup>33</sup>

21. The COMCO is currently investigating a trading and service cooperation in the food sector: numerous wholesalers and retailers handle their payment transactions with their suppliers via a payment processor. The provider and several affiliated wholesalers and retailers presumably agreed on collective measures to force the suppliers of the affiliated companies to process the payments via the provider at costs partly being redistributed to the affiliated wholesalers and retailers. The alleged coordinated measures include, in particular, the threat of **collective delisting** of everyday goods. As part of the investigation, the COMCO is examining whether these alleged agreements constitute unlawful restrictions of competition.<sup>34</sup>

### 3. Buyer power in abuse of dominance cases

22. In a case regarding a possible abuse of dominance, the COMCO investigated if the food retailer Coop abused a possible dominant position by generally deducting 0.5 per cent (CoopForte bonus) from the invoice amount of its suppliers. The COMCO's investigation was the first to examine the concept of **dominance in connection with the problem of buyer power**.<sup>35</sup>

23. On 1 January 2022, the **concept of relative market power** was introduced in the Swiss Cartel Act: A corporation is considered to have relative market power if another entity is dependent on it. A dependence is present when there are no sufficient and reasonable options to switch to another corporation. The existing provisions for the abuse of a dominant position now also apply to the abuse of relative market power. However, in contrast to an unlawful abuse of a dominant position, an unlawful abuse of relative market power will not result in a direct sanction.<sup>36</sup>

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<sup>31</sup> See LPC 2022/2, para. 39, 42 and 82 *Internationale Einkaufskooperation* (forthcoming).

<sup>32</sup> European Commission, draft revised Horizontal Guidelines of 01.03.2022, para. 343, available at: [https://ec.europa.eu/competition-policy/public-consultations/2022-hbers\\_en](https://ec.europa.eu/competition-policy/public-consultations/2022-hbers_en); see also RICHARD WHISH/DAVID BAILEY, Horizontal Guidelines on Delineation between purchasing agreements: by object and by effect restriction, available at <https://www.brickcourt.co.uk/news/detail/european-commission-publishes-expert-report-by-whish-and-bailey> (10.05.2022).

<sup>33</sup> EC, draft revised Horizontal Guidelines of 1.3.2022, para. 343.

<sup>34</sup> See COMCO's press statement of 03.09.2020: WEKO untersucht mögliches Kartell von Handelsunternehmen available in French, German and Italian, at <https://www.weko.admin.ch/weko/de/home/medien/medieninformationen.html> (10.05.2022).

<sup>35</sup> See LPC 2005/1, 146 et seq., *Coop Forte*.

<sup>36</sup> See press release of the Swiss Federal Council of 17.09.2021: Indirect counter-proposal to the Fair Prices Initiative enacted, available at <https://www.admin.ch/gov/en/start/documentation/media-releases/media-releases-federal-council.msg-id-85152.html> (10.05.2022).

24. To establish relative market power, the following **evaluation criteria** could play a role: First, one could analyse the revenue of the presumed dependent company as a proportion of its total revenue. Second, one might look at the sales alternatives and any switching costs of the supplier. Thirdly, the agency could analyse the specific investments for the business relationship on the part of the supplier. Fourthly, one could look at the procurement-side and sales-side market shares and, finally, the negotiating position of the buyer.<sup>37</sup>

25. So far, there is **no case practice with the concept of relative market power**. However, we expect that based on this concept, the COMCO will assess more cases of unilateral purchasing or bargaining power in the future.

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<sup>37</sup> Fact sheet and notification form of 6.12.2021 - relative market power, para. 8, available in French, German and Italian at [https://www.weko.admin.ch/weko/de/home/anzeigen/relative\\_marktmacht.html](https://www.weko.admin.ch/weko/de/home/anzeigen/relative_marktmacht.html) (10.05.2022).