

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

Purchasing Power and Buyers' Cartels – Note by Business at OECD (BIAC)

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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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1. Introduction

1. *Business at OECD (BIAC)* appreciates the opportunity to contribute to the Competition Committee's roundtable on purchasing power and buyers' cartels. Our comments build upon past consideration of similar topics, most recently in respect of monopsony and buyer power¹ and competition issues in labour markets.²

2. Conventional thinking about competition policy has emphasized the market distortion of seller power, resulting in harm to consumers and to the dynamics of markets. Too narrow a focus on consumer welfare, or even total welfare, risks ignoring the harm done by the exploitation of buyer power. Nonetheless, while the exercise of purchasing power can be problematic in certain circumstances, it can also result in consumer benefit. As such, any intervention aimed at tackling purchasing power, or its exercise, must be targeted with care. It is important for competition authorities and legislators to select the appropriate enforcement and regulatory tools so that any benefits are identified and preserved.

3. BIAC considers that antitrust agencies already possess the tools necessary to enforce against anticompetitive conduct on the buy-side, whether that stems from collusion or the exercise of unilateral monopsony power. Our response therefore focuses, in section II, on tackling the unilateral exercise of buyer power, while sections III and IV focus on antitrust enforcement against collusion in selling and buying markets and on the need for business to have clarity on where the dividing line lies between buyers' cartels and pro-competitive joint purchasing agreements, respectively. Section V provides some concluding remarks and recommendations.

2. Tackling Purchasing Power

4. BIAC fully recognises that competition law applies to both sales and purchasing activities. It supports competition law enforcement when there is clear and compelling evidence of likely anticompetitive harm. Such proof should be subject to appropriately exacting standards and be evidence-based and supported by economic analysis. Absent clear and compelling evidence of likely anticompetitive effects, the potentially positive effects of the exercise of purchasing power may be lost.

5. On the other hand, there is a risk that too narrow a focus on consumer welfare could ignore exploitative harm suffered by suppliers³ and modify the incentives for agencies to intervene. It is because the exercise of buyer power often results in lower input prices,

¹ OECD, Monopsony and Buyer Power, DAF/COMP(2008)38 (Dec. 17, 2009), <https://www.oecd.org/daf/competition/44445750.pdf>.

² OECD, Competition Issues in Labour Markets—Note by BIAC, DAF/COMP/WD(2019)50 (May 28, 2019), [https://one.oecd.org/document/DAF/COMP/WD\(2019\)50/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2019)50/en/pdf).

³ PETER C. CARSTENSEN, COMPETITION POLICY AND THE CONTROL OF BUYER POWER (2017); BUNDESKARTELLAMT, BUYER POWER IN COMPETITION LAW—STATUS AND PERSPECTIVES 13 (Sept. 18, 2008), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Fachartikel/Buyer%20Power%20in%20Competition%20Law.pdf?__blob=publicationFile&v=3.

which in turn may contribute to lower final prices to consumers⁴ that exploitation of suppliers can take on a pro-consumer character, making its harmful characteristics less visible. At the same time, the competition laws cannot serve two masters—i.e., downstream consumers and upstream suppliers—and not all collaborative conduct by middlemen or market intermediaries that drives down input prices can be seen as anticompetitive. In general, this harm will occur where the exploitative conduct by the purchaser results in driving down the supply of inputs to levels below the competitive equilibrium.

6. There is therefore a need for a careful and balanced approach to enforcement. One that is not solely focused on circumstances where the lower input prices lead to lower downstream market prices that decrease the profitability of a buyer's competitors, leading to their exit and an increase in its downstream market power, harming final consumers; or where the lower input prices result in an increase in the wholesale price to other buyers—the so-called waterbed effect—that results in an increase in prices to downstream consumer, both of which scenarios impact consumer welfare.

7. Competition agencies—and legislators—should also be alive to the fact that the exercise of purchasing power can undermine incentives for suppliers to invest,⁵ where a stronger buyer is more likely to hold up the supplier, extracting a larger fraction of the additional profits than the suppliers' upfront investment generates.⁶

8. For this reason, it is important for competition authorities to further develop useful economic theory and modelling, focused on output rather than solely on prices, as well as gain a better understanding of buyer power in particular sectors.

9. BIAC notes⁷ that many jurisdictions deploy economy-wide rules to combat excessive buying power, whether through regulation, abuse of superior bargaining power,⁸ or economic dependence laws, particularly prevalent in Europe.⁹ Agencies can also develop solutions, which address the underlying and sector-specific issues in a tailored and effective manner.

10. An example of such an approach would be the United Kingdom's Groceries Supply Code of Practice introduced in 2010 after a market investigation by the then-UK Competition Commission in order to address perceived problems arising from the use of

⁴ For example, in cases where monopsonists are able to offer suppliers an “all or none” offer, consumers may even benefit from lower prices. *See* OECD, Monopsony, *supra* note 1, at 32.

⁵ *Id.* at 11.

⁶ A good example of this may be the internet economy, in which a few large internet companies extract the benefits from communications networks, while network operators shoulder the investment to meet ever growing capacity demand. Furthermore, without an adequate pricing mechanism there will be no economic incentive to utilise IP transport resources, with volumes increasing at 30%+ per year, more efficiently, thus endangering climate change objectives by failing to keep the industry's environmental impact in check.

⁷ BIAC notes the existence and active enforcement of these laws, without prejudice to the fact that businesses often find them confusing and onerous.

⁸ For example, the competition laws of Korea and Japan contain provisions relating to unfair business practices from entities that hold a superior bargaining position. 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.

⁹ *See, e.g.*, Code de commerce [C. com.] [Commerce Code] art. L420-2 (Fr.); Act against Restraints of Competition (Competition Act – GWB), translation at https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html. 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.

buyer power by grocery retailers.¹⁰ The Groceries Supply Code of Practice offers guidance on how the retailers should manage their relationships with suppliers and regulates behaviours that expose suppliers to unnecessary risks and expenses, as well as actions that affect supplier quality, innovation, and investment.

11. Another example would be Australia’s News Media and Digital Platforms Mandatory Bargaining Code (NMBC), which enables eligible news organisations to bargain individually or collectively for compulsory payment for the inclusion of their news content on digital platforms. This is a mandatory code of conduct which governs commercial relationships between Australian news businesses and ‘designated’ digital platforms who benefit from a significant bargaining power imbalance.¹¹

3. There is No Compelling Evidence of Under-Enforcement Against Collusion in Buying Markets

12. BIAC readily acknowledges that competition law applies to both buying and selling practices. For example, on the purchasing side, it is evident that competition law applies in full to buyer cartels where companies fix purchase or reference prices or, in the context of labour markets, when they collude to fix wages they pay to staff; or when they use so-called “no-poach” agreements as an indirect way to suppress wage levels.¹²

13. It does, however, also consider that it is logical for antitrust agencies to focus enforcement activities on the selling side given the higher likelihood of anticompetitive effects. Buyer collusion or coordination is not always as harmful towards consumers as sellers’ cartels. In order for buyer coordination to harm consumers, the participants need to have market power in the downstream market, otherwise competitors downstream can replace the reduced output and downstream prices will be unaffected, meaning that consumers will not be harmed.¹³

14. The fact that buyers’ cartels may have less obvious anticompetitive effects when compared to sellers’ cartels is reflected by the fact that not all jurisdictions around the world treat buyers’ cartels as strictly as sellers’ cartels. For example, Canada, as a matter of law, treats buyers’ cartels more leniently than sellers’ cartels.¹⁴

15. BIAC notes that the Background Note on Purchasing Power and Buyers’ Cartels suggests that competition authorities should prioritise cases against buyers’ cartels.¹⁵ This

¹⁰ See UK Groceries Supply Code of Practice (2009), <https://www.gov.uk/government/publications/groceries-supply-code-of-practice/groceries-supply-code-of-practice>.

¹¹ See ACCC News Media Bargaining Code 2021, <https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code>.

¹² See Margrethe Vestager, A New Era of Cartel Enforcement, Address Before the Italian Antitrust Association Annual Conference (Oct. 22, 2021), https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-m-vestager-italian-antitrust-association-annual-conference-new-era-cartel-enforcement_en.

¹³ Peter C. Carstensen, *Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy*, 1 WM. & MARY BUS. L. REV. 1 (2010).

¹⁴ See Competition Act, R.S.C. 1985, c. C-34, sec. (Can.).

¹⁵ See OECD, Purchasing Power and Buyers’ Cartels—Background Note, DAF/COMP(2022)4, ¶ 159 (May 2, 2022), <https://www.oecd.org/daf/competition/purchasing-power-and-buyers-cartels-2022.pdf> (“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

appears to stem from a concern that competition authorities are under-enforcing when it comes to buyers' cartels, which account for a low percentage of overall cartel enforcement.

16. BIAC is not aware of any compelling evidence of under-enforcement when it comes to buyers' cartels. Indeed, BIAC is aware of a number of examples of enforcement in relation to buying activities. For example, the European Commission has recently taken enforcement action against a number of purchasing cartels.¹⁶ Competition authorities in a variety of countries have taken enforcement action in the "circular economy," often in relation to the purchase of scrap materials for recycling.¹⁷

17. BIAC, nonetheless, considers that it would be appropriate for competition authorities to take steps to gain a better understanding of the issues in particular sectors. There may be particular scenarios, sectors or market features that are conducive to, and perhaps even peculiar to, collusive outcomes on the buy-side. For example, it appears that a number of buyer cartels involve the circular economy or food production, where the suppliers may be SMEs, and labour markets, characterised by a very large number of suppliers, or workers, facing relatively concentrated buyers, especially for certain job profiles.

18. In doing so, however, antitrust agencies should take great care to distinguish between illicit cartel activity and entirely legitimate and pro-competitive forms of purchasing collaborations, which we address in the following section.

4. Business Needs Clarity on the Distinction Between Joint Purchasing and Buyer Cartels

19. Joint purchasing arrangements are a common business practice found in a variety of economic sectors. They may consist of pooling actual purchases through the joint purchasing arrangement. They can also be limited to jointly negotiating the purchase price, certain elements of the price, or other terms and conditions, while leaving the actual purchases, pursuant to the jointly negotiated price and terms and conditions, to its individual members.¹⁸ The exercise of buying power through a joint purchasing arrangement can lead to lower prices, more variety or better quality products or services

that suggested by those that are detected, although the recent increase in enforcement action against employers may provide some useful insights." (emphasis added)).

¹⁶ See AT.40018 Car Battery Recycling, https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_40018; AT.40410 Ethylene, https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_40410; AT.40547 Styrene Monomers, https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_40547; and AT.40466 Alliance Casino & Intermarché, https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_40466.

¹⁷ See, e.g., (LEAD) 7 steelmakers fined 300 bln won over price collusion, YONHAP NEWS AGENCY (Jan. 26, 2021), <https://en.yna.co.kr/view/AEN20210126003551320>; Germany fines BMW, Daimler, VW over steel cartel, DEUTSCHE WELLE (Nov. 21, 2019), <https://p.dw.com/p/3TU53>; Press Release, Auth. for Consumers & Mkts., ACM imposes fines for price-fixing agreements involving the purchase of used cooking oil, (Oct. 5, 2021), <https://www.acm.nl/en/publications/acm-imposes-fines-price-fixing-agreements-involving-purchase-used-cooking-oil>.

¹⁸ *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [DRAFT]*, ¶ 312 (Mar. 1, 2022), available generally at https://ec.europa.eu/competition-policy/public-consultations/2022-hbers_en [hereinafter *EU Draft Horizontal Guidelines*].

for consumers and it can also allow companies to prevent shortages or address disruptions in the production of certain products, thus avoiding supply chain interruptions.¹⁹

20. As the OECD Competition Committee has noted, “[c]ost reductions arising from efficiencies or from increased bargaining power in negotiations with an upstream monopolist can increase output and reduce final prices for consumers.”²⁰ This increase in output and reduction in final prices for consumers will bring enhanced competition in an output market and ultimately an increase in consumer welfare, the lodestar of antitrust. If a cost reduction comes from something other than a reduction in competition, including increased purchasing power, it should not be condemned. In that regard, the economics are clear: reductions in variable cost are expected to be passed on and reduce downstream prices, while reductions in fixed costs are not.

*Variable costs savings will show up in marginal cost and thus be calculated directly into the post-merger firm’s prices. By contrast, fixed costs do not ordinarily affect the price and thus would not be passed through, at least in the short run.*²¹

21. Joint purchasing arrangements normally do not cause anticompetitive concerns unless there is a significant degree of market power on both the purchasing and the downstream market (the selling market). A few jurisdictions around the world (e.g., the EU and the U.S.) have safe harbours which provide certainty that competition law will not apply when such market power does not exist (using market shares as proxies).

22. Given the beneficial effects flowing from joint purchasing agreements, it is very important for business and consumers to be able to develop and implement joint purchasing even though it involves joint agreement on buying prices.

23. Certain jurisdictions (U.S., EU) take a strict approach to buy side cartels and treat them as per se or “object restrictions” of competition, whereas they analyse joint purchasing agreements under “a rule of reason” standard or as “effects restrictions.” Indeed, there is currently an irreconcilable conflict between the U.S. Department of Justice and Federal Trade Commission *Antitrust Guidelines for Collaborations Among Competitors*²² and the *Antitrust Guidance to Human Resource Professionals*²³ that would treat joint purchasing collaborations of goods under a rule of reason standard, and joint purchasing collaborations of labour services as not only per se, but criminal offenses subject to imprisonment. Given the difference in legal treatment and the fact that (at least some) competition authorities have increased enforcement against buyer’s cartels,²⁴ BIAC believes there is a need for detailed and clear guidance from competition authorities around the world on when relevant arrangements between businesses amount to buyers’ cartels and when they amount to joint purchasing.

24. If cartel treatment of coordinated purchasing behaviour is to be pursued, a clear dividing line is required. In terms of where the dividing line lies, BIAC considers that a

¹⁹ *Id.* ¶ 313.

²⁰ OECD, Executive Summary of the Roundtable on Competition Issues in Labour Markets, DAF/COMP/M(2019)1/ANN2/FINAL, at 2 (Feb. 4, 2021), [https://one.oecd.org/document/DAF/COMP/M\(2019\)1/ANN2/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/M(2019)1/ANN2/FINAL/en/pdf).

²¹ Herbert J. Hovenkamp, *Appraising Merger Efficiencies*, 24 GEO. MASON L. REV. 703, 731 (2017).

²² U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (Apr. 2000), <https://www.justice.gov/atr/page/file/1098461/download>.

²³ U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDANCE TO HUMAN RESOURCE PROFESSIONALS (Oct. 2016), <https://www.justice.gov/atr/file/903511/download>.

²⁴ *See, e.g., supra* note 16.

“restriction by object” or “per se” categorisation should be reserved only for discussions/agreements between competitors on purchase prices which have no connection whatsoever to any conceivable (joint) purchasing initiative and no potential redeeming benefit to downstream consumers. The key difference between legitimate joint purchasing and the buyers’ cartels condemned by competition agencies is that in the latter, there is no actual joint purchasing or joint negotiation, and no conceivable consumer benefit.

25. If there is an element of secrecy, meaning that the joint purchasing arrangement has not made it clear to suppliers that it jointly negotiates and binds its members on terms and conditions of their individual purchases or purchases jointly for them, this could be relevant to the finding of a buyers’ cartel. However, we consider that it would be simplistic to conclude that an element of secrecy is determinative as to the classification of behaviour as a buyers’ cartel as opposed to a joint purchasing arrangement. In other words, secrecy may be relevant for classifying a joint purchasing arrangement as a buyers’ cartel, but it should not itself be determinative of illegality.

26. BIAC commends the pragmatism of the approach put forward in the current draft EU Horizontal Guidelines according to which the following non-exhaustive list of factors may show that an agreement does not amount to a buyer cartel:²⁵

- The joint purchasing arrangement makes it clear to suppliers that it jointly negotiates and binds its members on terms and conditions of their individual purchases or purchases jointly for them.
- The parties to the joint purchasing arrangement define the form of their cooperation, its scope, and its functioning in a written agreement so that its compliance with competition law can be verified ex-post and checked against the actual operation of the joint purchasing arrangement.

5. Concluding Remarks and Recommendations

27. BIAC recognises that conventional thinking about competition policy has emphasized the market distortion of seller power, resulting in harm to consumers and to the dynamics of markets. In line with the current debate on the proper goals of antitrust policy to benefit consumers and society at large, BIAC welcomes the timely focus also on purchasing power appreciating the complexities which can arise in relation to the competition law treatment of purchasing power.

28. While the exercise of purchasing power can be problematic in certain circumstances, it can also result in consumer benefit. There is nonetheless a risk that too narrow a focus on consumer welfare could ignore exploitative harm suffered by suppliers and modify the incentives for agencies to intervene. There is therefore a need for a careful and balanced approach to intervention, one that is not necessarily exclusively focused on consumer harm.

29. BIAC submits that competition enforcement shall be reserved for situations where there is compelling evidence of likely anti-competitive harm or market failure. Given that buyer power issues may frequently reflect inequality of bargaining power, or other issues of fairness/exploitation, we consider that competition authorities should focus on developing economic theory, as well as better understanding markets, sectors, and potentially problematic practices carefully. Industry codes of practice and other ex-ante

²⁵ *EU Draft Horizontal Guidelines*, *supra* note 18, ¶ 319.

economy-wide instruments may in the end prove to be more effective in addressing issues than competition enforcement.

30. Finally, BIAC strongly urges the need for clarity from competition authorities about the boundary between anti-competitive buy-side cartels (which may remain subject to the “per se” or “by object” standard) and genuine, pro-competitive joint buying arrangements (which should be subject to a “rule of reason” or “effects” standard). In this regard, BIAC believes, consistent with the approach of the Draft EU Horizontal Guidelines, that the key difference between legitimate joint purchasing and a buyers’ cartel is that in the latter, there is no actual joint purchasing or joint negotiation. We also consider that guidance for companies on the factors that will be taken into consideration when making this assessment would be extremely helpful to ensure that companies continue to enter into pro-competitive joint buying arrangements.