Buyer Power in EU Competition Law

A boon or impediment to consumer welfare ?

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INTRODUCTION

The issue of buyer power is not well-known to the general public and raising that issue may leave some perplexed. Buyer power must in fact be distinguished from the concept of purchasing power - which refers to the extent to which consumers or firms have available money or credit for spending and consumption of goods and services -, and from that of market power in the sense of seller power. The latter is defined as a firm's ability to profitably raise the price of a product. The concept of purchasing power is familiar to consumers as it determines their ability to purchase products and services. With regard to the concept of market power, consumers know well the potential negative effect of such power as they often pay directly the consequences of it. In addition, due to some big cases reported by the media involving large companies which abused their market power or colluded with competitors, public opinion is increasingly aware of how harmful the exercise of market power may be.

Market power is, however, not necessarily in the hands of sellers. The concept of market power has in fact two branches: on the one hand, seller power and, on the other hand, buyer power. Sometimes viewed as the mirror image of seller power, buyer power is a firm's ability to exert pressure on its suppliers so as to lower prices or extract other concessions. A good illustration of the exercise of buyer power can be found in the grocery retail sector where large supermarket chains generally hold the whip in the negotiations with their suppliers and are able to dictate the rules when buying products in the upstream buyer market. Whoever has to deal with such customers can indeed tell how strong their buyer power is.

At first sight, buyer power is regarded positively as it is likely to counter sellers' market power and thereby lead to lower prices for consumers. However, concerns are being raised about the potential negative effects of buyer power, especially in the grocery sector. It is indeed argued that some supermarkets' practices lead to the exclusion of smaller competitors and of producers who are unable to cope with excessive pressure put on them by their large customers. In addition, some consider that buyer power is not always used for the benefit of consumers and call therefore for action to restrain such power. Given the controversies surrounding the exercise of buyer power and its effects, it is worth entering the debate on that issue so as to determine whether action is or not needed to constrain that power.

In this thesis, we address the issue of buyer power from the perspective of EU competition law. The objective is hence to ascertain the impact of buyer power on competition in the European Union. Although the exercise of buyer power may bring about lower consumer prices, which is positive from

a competition law point of view, it remains to examine the potential long-term effects of some buyer practices and their impact on other values protected by the competition rules. The potential restrictive effect of buyer power on competition is a central question as it will indicate the policy to be used to address large buyers' market power. Action under the scope of competition policy is indeed only justified if buyer power is likely to jeopardize the objectives pursued under that policy.

Seller power and buyer power are the two facets of the concept of market power. However, this does not necessarily mean that those two types of power emerge in similar circumstances. Factors giving rise to buyer power and inciting buyers to exert it may indeed differ from those defined in seller power cases. The specificities of buyer power should hence lead competition authorities to follow a specific approach when assessing the existence of buyer power and the ability of a firm to distort competition through its conduct in the upstream buyer market. The analysis of EU documents and case law related to the issue of buyer power will show if those specificities are indeed taken into consideration or if new criteria should be defined to assess the lawfulness of buyer practices.

Among the various concepts that intervene in the assessment of competition law cases, such as the concepts of undertaking, relevant market, market power, anticompetitive agreement or abusive conduct, we will focus on those that are likely to require the use of specific criteria to properly measure and assess the impact of buyer power on competition, that is, criteria differing from those used in seller power cases. As such, the focus will be put on defining the relevant buyer market, measuring buyer market power and assessing buyer conduct.

We will start with a general approach, looking at the theory of buyer power in economic and legal terms and at all sectors where buyers are able to exert market power on their suppliers. The scope of our analysis will then gradually be narrowing and focusing on one particular sector, namely the grocery retail sector due to some specificities of that sector which increase significantly buyer's ability and incentive to (ab)use their market power in the upstream buyer market.

To illustrate the exercise of buyer power and its likely effects on the markets, we will therefore mostly refer to the grocery retail sector. Practices used by large supermarket chains in the upstream buyer market are indeed a good example of how buyer power can be exercised. Furthermore, most of the concerns regarding buyer power have in fact been raised in that sector. One may hence wonder whether competition authorities should adopt a cross-sectors approach to address buyer power or instead focus on a specific sector, such as the grocery retail sector, where different factors make buyers more likely to affect competition through their conduct.

The present thesis is divided in three Parts. The **first Part** looks into the concept of market and, in particular, into the specificities of buyer power by pointing out the factors giving buyers the ability and incentive to exert market power in the upstream buyer market. Among the different sectors characterised by a strong buying side, particular attention will be drawn on the grocery retail industry. The general description and illustration of buyer power provided in Part I set in fact the scene of the debate about the positive and/or negative effects of buyer power on competition.

In **Part II**, we will examine how buyer power is addressed in EU law in order to assess whether the specificities of such power are taken into consideration by EU authorities when drafting and enforcing the competition rules. Different initiatives taken by national authorities will also be analysed so as to highlight other ways to address buyer power concerns. Such analysis is meant to determine to what extent the competition rules can be used to tackle the exploitation of buyer power and what policy is favoured to restrain that power.

In **Part III**, we will try to provide answers to all the questions raised with regard to the potential negative impact of buyer power on competition and the type of action to be taken to prevent it. If it turns out that buyer power is likely to undermine the competition law objectives, anticompetitive buyer practices should be pursued under the competition rules. Given the analysis made in Part II concerning the application of the current competition rules in buyer power cases, a new initiative might prove to be needed to protect competition in the European Union. We will suggest a possible action at EU level to prevent anticompetitive use of buyer power. This will imply defining the instrument to be adopted and the criteria to be used to assess buyers' conduct. With regard to the scope of such an instrument, it will have to be decided whether all buyers, whatever the sector they act in, must be tarred with the same brush or whether, given the particularities of the grocery retail sector, action must be limited to that sector.

All these questions regarding the effects of buyer power on competition and the way to effectively address buyer practices are worth being asked and thoroughly examined. The protection of competition in fact depends directly on the adequacy of the answers provided in response to the concerns raised. The objective is, on the one hand, to remedy possible deficiency in the enforcement of the competition rules and, on the other hand, to avoid excessive intervention in business-to-business relationships, as both impede effective competition.

PART I – THE NOTION OF BUYER POWER

Market power is a well-known concept in competition law as it determines the application of the competition rules to a given company. However, that concept has in fact two facets: seller power on the sell-side and buyer power on the buy-side. In EU legislation and other instruments, it is mostly referred to the first facet, namely sellers' market power with regard to their customers. The exercise of buyer power over suppliers has yet drawn less attention, at least in the early years of EU competition law, so that no clear definition has been given to that aspect of market power.

The **first Chapter** is meant to define the concept of buyer power and to draw some distinction between that concept and market power commonly referred to in seller power cases. Buyer power may be defined in different terms depending, in particular, on how it is used, on the structure of the different markets involved and on the degree of market power held by the opposite sellers. We will highlight the main factors giving buyers the ability to exercise buyer power in the upstream procurement market. Such ability to exert pressure on suppliers must yet be distinguished from the incentive to effectively exert it. On that matter, differences between buyer and seller power will also been pointed out so as to show that the incentive for buyers to use their buyer power may be much stronger than the incentive for sellers to exploit their market power in the downstream selling market.

On basis of those distinctions and on the different definitions given to the concept of buyer power, Chapter 1 also addresses the potential effects of some buyer practices. A quick insight into the objectives of EU competition law – which will be more deeply developed in Part III – will lead us to already raise some concerns about the impact of buyer power on the competition process. Although it may be affirmed that the exercise of market power in upstream buyer markets is not *per se* harmful, some buyer practices might bring about undesirable consequences on the markets. The positive and/or negative effects of buyer power will in fact mainly depend on the symmetry/asymmetry of the markets as well as on the degree of market power on each side of the market and on the incentive to exploit it.

The European Commission and most national competition authorities (NCA) have recognized the existence of buyer power, especially in the grocery retail sector where large supermarket chains enjoy significant market power over their suppliers. However, buyer power is also present in other sectors. **Chapter 2** describes some of those sectors so as to illustrate how buyer power emerges and is exercised. This will help provide clear understanding on the different elements that are likely to give rise and reinforce buyers' market power in each sector. Specific attention will be drawn on the

grocery sector where the potential anticompetitive effects of buyer power are increasingly being pointed out, raising the question of the need to take action against that power.

This first Part raises purposely more questions than it answers. The objective is to enter the debate about the impact of buyer power on competition by exposing the different positions that may be encountered in that debate.

CHAPTER 1 – DEFINITION AND IMPLICATION OF BUYER POWER

Market power is a well-known concept which has been examined both in economics and in competition law. **Section I** of this Chapter defines first the notion of market power on the sell-side as well as some concepts related to some extent to that notion, namely the concepts of dominance and economic dependency. These different definitions will then help us to define and understand the concept of buyer power.

Buyer power can in fact manifest itself in different variants depending on the structure of the markets involved. Accordingly, three notions can be distinguished: monopsony power, countervailing buyer power and buyer power. On basis of such a distinction, we will point out different effects that may result from the exercise of market power in upstream buyer market.

However, we will see that the degree of buyer power understood in its broad sense depends less on the horizontal structure of the market than on the vertical relationship between sellers and buyers and on the importance each of them attach to that relationship. Key factors giving buyers the ability but also the incentive to exert market power over their suppliers will as such be developed.

Section 2 provides an insight into the objectives of EU competition law so as to raise some questions with regard to the possible anticompetitive impact of buyer power. The issue of the effects of buyer practices on competition is in fact controversial. The description of the competition goals aims at highlighting in which way buyer practices might adversely affect competition. Such impact on competition is an essential issue as this will determine under which policy action is to be taken to address buyer conduct.

This first Chapter sets in fact the scene by providing a general framework and some keys to understand and assess the concept of buyer power and its possible implication in EU law. The objective is to raise different questions with regard to the effects of buyer power on the markets and on the way such power should be addressed. All those questions will then be further developed and answered in the next parts.

SECTION I – DEFINITION OF BUYER POWER

The reading of the various regulations and other instruments adopted by the Commission in application of EU competition law shows that the focus is mainly put on the danger of sellers' market power to effective competition. One might then assume that buyers lack or are unable to exert market power when purchasing products. However, where that assumption is true as regards

atomistic final consumers in the retail market, the situation may be much different at stages further up the supply chain. In some industries indeed, manufacturers of intermediate products face a limited number of large buyers which detain a strong bargaining power and are sometimes able to dictate terms, conditions and prices to their suppliers. Market power is therefore not an attribute exclusively related to sellers. Market participants may also exercise such power when acting on the buying side, towards their suppliers.

Buyer power generally arises when the level of concentration among buyers is relatively high. However, other factors have in fact much more influence on the degree of buyers' market power. Those sources of power may vary from one sector to another, depending on the characteristics of each market. It is nevertheless possible to describe roughly key elements which are commonly viewed as reinforcing buyers' position in the negotiations.

This Section aims to describe the notion of buyer power and its implication in EU competition law. First of all, the concepts of market power, dominance and economic dependence will be developed. The objective is to provide a general understanding of those concepts, mainly from a buy-side perspective as EU competition law instruments and case law mainly refer to sellers' ability to distort competition when addressing the issue of market power. Secondly, we will turn to the actual concept of buyer power which may be defined slightly differently and whose exercise may bring about various effects depending on the structure of the markets involved. Buyer power results in fact from different factors which strengthen the buyer's position in the upstream market and incite it to take advantage of that power.

A. MARKET POWER, DOMINANCE AND ECONOMIC DEPENDENCE

The notion of market power is central in EU competition law. The rules on that matter are indeed unlikely to be applied to firms lacking market power as those are deemed unable to affect competition on the markets through their conduct. In particular, with regard to single-firm conduct, Article 102 TFEU is aimed at regulating only the behaviour of firms holding a very strong market position or, in other words, a dominant position. Economic dependence is a distinct concept which can take different forms. That concept may be taken into consideration in the assessment of market power and dominance on the buying- and selling-side of the market. It is in particular in buyer power cases that the notion of economic dependence seems to play a determinant role.

1. Market power and dominance

Both sellers and buyers can have market power. However, EU authorities usually refer to that concept to describe supplier market power. In that case, market power can be defined as the ability

profitably to increase prices above the competitive level for a significant period of time.[1] As pointed out in the Commission's Guidance on Article 102 TFEU, the expression "increase prices" is a shorthand for the various ways in which competition can be restricted by a firm such as by limiting output, innovation, the variety or quality of goods or services.[2] In the abstract world of perfect competition, no firm has market power while in a pure monopoly one firm has absolute control of the market.[3] Between these two extremes, firms have some degree of market power which may, in some circumstances, call the attention of competition authorities.

Competition law is concerned with problems that arise when one or more firm(s) detain(s), or will detain after a merger, a certain amount of market power.[4] This is in particular the case under Article 102 TFEU as the prohibition on abusive conduct applies only to firms in a dominant position, that is to firms with substantial market power. The assessment of the firm's degree of market power is hence a first step in the application of that provision. However, the measurement of market power can only be made once the relevant market has been defined. Market definition provides indeed a framework within which competition enforcers assess whether the firm(s) involved possess market power. The objective of defining the relevant market in both its product and geographic dimension is to identify the competitive constraints exerted on the market and to assess whether they are capable of preventing the firm (or the group of firms) in question from behaving independently in that relevant market.[5] In other words, within that framework, the Commission examines whether the firm's degree of market power is sufficient to reach the level of dominance.

Under EU law, a dominant position has been defined as:

> "A position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on that market by affording it the power to

[1] M.Motta, *Competition Policy – Theory and Practices* (2004), at 40-41. "Since the lowest possible price a firm can profitably charge is the price which equals the marginal cost of production, market power is usually defined as the difference between the price charged by a firm and its marginal cost of production."
[2] Communication from the Commission: Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24/02/2009, p.7, at 11.
[3] R.Wish & D.Bailey, *Competition Law* (2012), at 25.
[4] R.Wish & D.Bailey, *ibid.,* at 26. For examples, under Article 101 TFEU, various "*de minimis"* exceptions apply where the parties to the restrictive agreement lack market power; the general block exemption Regulation is not applicable when the parties to an agreement have a market share exceeding a certain threshold; concentration is only prohibited when the merging parties have sufficient market power so as to significantly impede effective competition in the EU.
[5] Commission notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 09/12/1997, p.5, at 2. A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. (at 7) A relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area. (at 8)

> behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers."[6]

In order to measure the degree of market power of a firm, the Commission has thus to assess the degree of competitive constraint in the relevant market.[7] To this end, three issues are relevant.

Firstly, the Commission examines the market position of the dominant firm and its competitors. A key role is attributed to the market share held by the firm under investigation and by its rivals. In general, market shares exceeding 50% raise a presumption of dominance[8] while shares below 40% cannot support a finding of dominance. Between 40% and 50%, additional factors must be considered because such a market share is not conclusive evidence of the presence or absence of dominance.[9] However, even though market shares provide a useful first indication of the market structure and of the relative importance of the various undertakings active on the relevant market, the Commission interpret these data in the light of the relevant market conditions.[10] For example, in industries where production is limited by a crucial input, the current market share of a firm would over-estimate the competitive constraint exerted by that firm on the market if it is established that its reserves will be exhausted in the near future. The degree of excess capacity held by competitors is also a factor that may be taken into consideration. If their supply elasticity is low, that is, their ability to serve new customers in case of an increase in prices is limited, those rivals will not be able to constrain the dominant firm's behaviour.[11]

The second type of competitive constraints examined by the Commission includes constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors. A firm may indeed be deterred from increasing prices if expansion or entry is likely, timely and sufficient.

> "For the Commission to consider expansion or entry likely it must be sufficiently profitable for the competitor or entrant, taking into account factors such as the barriers

[6] Case 27/76, *United Brands Company and United Brands Continental v Commission* [1978] ECR 207, at 65. See also: Case 85/76, *Hoffman-La Roche v Commission* [1979] ECR 461, at 87.
[7] A theoretical measure of market power is given by the *Lerner* index, defined as the difference between the price and the marginal cost as a fraction of the product's price. The *Lerner* index of a monopolistic firm corresponds to the inverse of the elasticity of demand faced by it. See: M.Motta,*op.cit.,* at 116.
[8] See for example: Case 85/76, *Hoffman-La Roche, op.cit.*, at 59; Case 322/81, *Nederlandsche Banden Industrie Michelin (Michelin I) v Commission* [1983] ECR 3461; C-62/86, *Akzo Chemie BV v Commission* [1991] ECR I-3359, at 60; T-30/89, *Hilti AG v Commission* [1991] ECR II-1439, at 92, on appeal C-53/92 P, *Hilti AG Commission* [1994] ECR I-667.
[9] R.O'Donoghue & A.J.Padilla, *The Law and Economics of Article 82 EC* (2006), at 114.
[10] Communication from the Commission: Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24/02/2009, p.7, at 13.
[11] M.Motta, *op.cit.*, at 119-120.

> to expansion or entry, the likely reactions of the allegedly dominant undertaking and other competitors, and the risk and costs of failure. For expansion or entry to be considered timely, it must be sufficiently swift to deter or defeat the exercise of substantial market power. For expansion or entry to be considered sufficient, it cannot be simply small-scale entry, for example into some market niche, but must be of such a magnitude as to be able to deter any attempt to increase prices by the putatively dominant undertaking in the relevant market." [12]

Barriers to entry and expansion are factors that prevent or hinder companies from easily entering a market or expanding in that market.[13] These factors are of particular importance in the assessment of potential competition. They may be legal or administrative barriers, such as state monopolies, authorization or licensing requirements, intellectual property rights, or economic barriers, such as sunk costs of entry. They may also take the form of advantages specifically enjoyed by the dominant undertaking, such as economies of scale/scope, privileged access to key inputs, vertical integration, brand recognition or established distribution and sales network.[14] In addition, care is devoted to a number of impediments faced by customers in switching to a new supplier, such as lock-in effects and network externalities.[15]

Finally, aside from existing and potential competitors, competitive constraints can also be exerted by the firm's customers.[16] A buyer can indeed has a strong bargaining strength and use it to stimulate competition among suppliers. The strong negotiating position of customers, called countervailing buyer power[17], can consequently have a significant influence on the assessment of dominance as it may be sufficient to constrain a supplier's competitive behaviour. Such countervailing buying power may result from the buyer's size or from the large share it accounts for in the supplier's turnover.

[12] Guidance on its enforcement priorities in applying Article 82 of the EC Treaty, *op.cit.,* p.7, at 16.
[13] This is the basic definition of barriers to entry. However, there is some disagreement among economists about what should be considered as a barrier to entry. See: R.O'Donoghue & A.J.Padilla, *op.cit.*, at 117-119.
[14] R.O'Donoghue & A.J.Padilla, *op.cit.,* at 116.
[15] M.Motta, *op.cit.,* at 121. Customers are locked in where they find it costly to switch from one supplier to another. Switching costs also arise if a customer has to purchase follow-on products such as service or repair but find it costly to switch to another supplier. To avoid those costs, he has to buy from the supplier of the original product. Network effects arise when the value of a good increases with the number of users adopting the same good. For example, a telephone user benefits from the fact that other users are connected to the same network. As explained by Sharp and Varian, network effects can also be indirect. Those effects occur when the increased use of one product leads to the increase in the value of a complementary product. For example, the more people purchase the same operating system, the more programs will be created for that system. See: C.Shapiro & H.R.Varian, *Information rules: a strategic guide to the network economy* (1999), at 173. See also: G.J.Werden, *Network effects and conditions of entry: Lessons from the Microsoft case,* 69 Antitrust Law Journal 81 (2001); J.Farrel & P.Klemperer, *Coordination and lock-in: competition with switching costs and network effects,* 3 Handbook of Industrial Organization 1970 (2007).
[16] Guidance on its enforcement priorities in applying Article 82 of the EC Treaty, *op.cit.,* p.7, at 18.
[17] The concept of countervailing buyer power will be further developed in Point B, 1, c), ii of this Section.

However, as it will be further developed below, the degree of buyers' market power mainly depends on their ability to (threaten to) switch quickly to competing suppliers, to promote new entry or to vertically integrate.

Where the competitive constraints, exerted by (potential) competitors or by customers, are not sufficient to prevent a firm from raising prices or affecting competition in one way or another, the firm in question will be subject to the competition rules. With regard to Article 102 TFEU, this means that companies in a dominant position will have a special responsibility not to allow their conduct to impair genuine undistorted competition.[18] That provision covers indeed all abusive conduct that has been defined by the Court of Justice as:

> "An objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition".[19]

As mentioned above, Article 102 TFEU and more generally all competition provisions have mainly been enforced against practices used by sellers to prevent misuse of market power. However, it was already noted in this section that buyers are, in some circumstances, also able to exert market power over their suppliers. Where such buyer power may constitute a countervailing strength and prevent sellers from raising prices, it may also turn itself into a competitive concern when buyers get the ability to fix the conditions of the transaction. In the next section, the various circumstances in which buyer power may arise will be described. Depending on the market structure in the upstream and downstream market, such power may be defined differently.

[18] See : Case 322/81, *Michelin I, op.cit.*, at 57; T-203/01, *Manufacture française des pneumatiques Michelin v Commission (Michelin II)* [2003] ECR II-4071, at 97; T-83/91, *Tetra Pak International SA v Commission* [1994] ECR II-755, at 114; T-228/97, *Irish Sugar Plc v Commission* [1999] ECR II-2969, at 112.
[19] Case 85/76, *Hoffman-La Roche, op.cit.*, at 91.

2. Economic dependence

A situation of economic dependence arises when a supplier (buyer) is economically dependent on a buyer (supplier). This occurs in particular when the former has not alternative to sell (buy) its products and that the proportion of its turnover with the latter is significant (the so-called *risk or threat rate*).[20] The absence of alternative solution and a high risk (or threat) rate constitute the main criteria for the finding of a situation of economic dependence. Indeed, when a firm cannot switch to other trading partners or when the switching costs are very high, it will most probably be dependent on existing customer(s) or supplier(s). This is all the more true if the latter represents a very large share in the firm's turnover as it will be much more difficult for the firm in question to find a comparable trading partner. As a result of the lack of alternatives, the loss of such a large part in its business is likely to threaten the dependent undertaking's viability.

When combined, the absence of alternatives and the high threat rate are two elements which make a market participant strongly dependent on a particular trading partner. In fact, if the loss of a customer or supplier does not affect significantly the undertaking's business activity, the lack of alternative solutions is unlikely to lead to a situation of economic dependence as the other existing business partners will allow the firm in question to cover its costs. On the other hand, the presence of other buyers or sellers may, in some cases, not be sufficient to enable an undertaking to replace a customer or supplier that represents a large share of its business. Indeed, the higher the risk rate, the more difficult it is to find a comparable business partner.[21] The existence of a situation of economic dependence needs therefore to be assessed on a case-by-case basis.

In a case of economic dependence, the buyer or supplier is in a position of superiority with regard to the dependent undertaking. However, this does not mean that the firm in question will be considered as dominant in the whole relevant market in the sense of Article 102 TFEU. Indeed, in seller power cases, factors related to economic dependence of customers only

[20] P.Këllezi, *Abuse below the Threshold of Dominance? Market Power, Market Dominance, and Abuse of Economic Dependence,* in *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?,* M.-O. Mackenrodt, B.Conde Gallego & S.Enchelmaier (eds) (2008), at 69-70. Këllezi defines the *risk* or *threat rate* as the proportion of the business with a particular undertaking. "In the case of buyer power, the risk rate constitutes the share of the supplier's turnover in the product categories accounted for by the new entity, above which there will be a threat to its existence". A threat rate has been used by the Commission in different merger cases to assess supermarkets' buyer power. See on that matter: Part II, Chapter 1, Section II, Point B, 2.

[21] P.Këllezi, *op.cit.,* at 70.

complement the classical analysis of dominance.[22] Unless the other elements taken into consideration in that analysis also attest to the existence of a dominant position, such as a high market share and the lack of competitive constraints exerted by competitors or customers, the Commission is unlikely to apply Article 102 TFEU. The *ABG/Oil* case constitutes an exception to that rule. The Commission held in that case that BP was in a dominant position relative to one of its customers, namely ABG, due to the shortage of oil products, and concluded that Article 102 TFEU was applicable, despite BP's low market share (26%).[23] The situation of economic dependence of BP's customers played therefore an important role in the assessment of dominance in that case. However, the assessment of the Commission was justified by exceptional circumstances related to the oil crisis in the early seventies and the resulting shortage of oil which put customers in a situation of strong economic dependence on oil companies.[24] In other circumstances, EU competition authorities generally consider that buyers' economic dependence on suppliers cannot by itself lead to the finding of a dominant position on the relevant market.[25]

Such an approach applies in seller power cases where customers may be considered dependent on suppliers. In case of buyer power, however, the concept of economic dependence is likely to play a greater role in the competition assessment. Suppliers' dependence on a particular buyer may indeed give the latter significant market power in the procurement market. For example, in the *British Airways* case, the Commission, upheld by the Tribunal and the Court of Justice, found that the dependence of travel agents on British Airways was a factor of particular importance in the analysis of dominance.[26] In fact, British Airways' alleged abusive conduct occurred in the buyer market of air travel agency services.[27] When assessing the firm's market power in that market, it was noted that travel agents were substantially dependent on the income they received from British Airways which was consequently considered as an obligatory business partner. The factors related to economic

[22] See for examples: T-128/98, *Aéroports de Paris v Commission* [2000] ECR II-3929 ; T-229/94, *Deutsche Bahn AG v Commission* [1997] ECR II-1689 ; *Trans-Atlantic Conference Agreement (TACA),* Case No IV/35.134, Commission Decision of 16 September 1998 and *Michelin,* Case No COMP/E-2/36.041/PO, Commission Decision of 20 June 2001.

[23] *ABG/Oil companies operating in the Netherlands,* Case No IV/28.841, Commission Decision of 19 April 1977. The Court of Justice annulled the decision, considering BP had not abused its dominant position but without challenging the approach followed by the Commission regarding the issue of dominance. See: Case 77/77, *Benzine en Petroleum Handelsmaatschappij BV and others v Commission* [1978] ECR 1513.

[24] P.Këllezi, *op.cit.,* at 77.

[25] See for example: Case 26/76, *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875.

[26] *Virgin/British Airways,* Case IV/D-2/34.780, Commission Decision of 14 July 1999. See the decisions of the Tribunal and the Court of Justice: T-219/99, *British Airways v Commission* [2003] ECR II-5917C-95/04P and *British Airways plc v Commission* [2007] ECR I-2331

[27] The *British Airways* case will be further developed in Part II, Chapter 1, Section I, Point B, 2, a), iii.

dependence played a decisive role in the assessment of dominance in that case. Indeed, they were not only used to confirm a finding of dominance on basis of the traditional analysis but constituted an element without which the Commission would not have concluded to the existence of a dominant position due, in particular, to the relatively low market share of British Airways (39.7%).

The central role played by supplier's economic dependence in the assessment of buyer power appears specifically in some merger cases involving supermarket chains. In different decisions, the Commission based indeed its assessment of dominance on the bilateral relationships between the merging retail distributors and their suppliers.[28] Despite the low market share of the merged entities in those cases, it was concluded that the mergers in question would create a dominant position or at least affect competition in the procurement market. The main factor taken into consideration to reach that conclusion was the situation of economic dependence of producers *vis-à-vis* the merging parties.[29]

The importance paid to the bilateral relations between buyers and suppliers in buyer power cases stems from the very definition of the concept of buyer power. The literature on that concept puts indeed the emphasis on all the different elements characterizing a situation of economic dependence when assessing the ability of firms to exercise buyer power.

B. NOTION OF BUYER POWER AND POTENTIAL IMPLICATION ON THE MARKETS

The power held by large buyers over their suppliers is called buyer power. Generally, such power arises when the demand side of a market is sufficiently concentrated so that buyers can exercise market power over sellers.[30]

1. Definition of buyer power

Numerous definitions have been suggested to describe the concept of buyer power. We can distinguish different forms of buyer power whose characteristics are determined by the structure of the upstream/downstream markets and by the (im)balance of power between buyers and sellers. The first case constitutes an example where buyer power is inexistent so that customers lack any

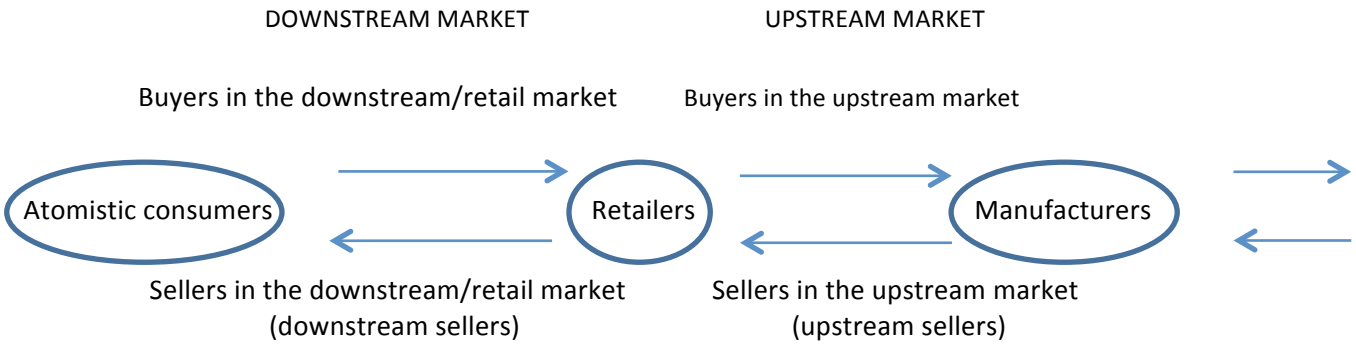
[28] See: *Kesko/Tuko,* Case No IV/M.784, Commission Decision of 20 November 1996; *Rewe/Meinl,* Case No IV/M.1221, Commission Decision of 3 February 1999; *Carrefour/Promodes*, Case No COMP/M.1684, Commission Decision of 25 January 2000. Those decisions will be examined in details in Part II, Chapter 1, Section II, Point B, 2, b), c) and d).

[29] In the *Rewe/Meinl* and *Carrefour/Promodes* decisions, the risk or threat rate was about 22%. The Commission considered that "when a retailer exceeds such a share in the manufacturer's turnover, the latter finds itself de facto in a situation of economic dependence." See: *Rewe/Meinl,* Case No IV/M.1221, at 97-101 and *Carrefour/Promodes*, Case No COMP/M.1684, at 52.

[30] Z.CHEN, *Defining buyer power,* 53 The Antitrust Bulletin 241, at 242 (2008)

bargaining power in negotiations with concentrated suppliers. However, in business-to-business relationships, it is not uncommon for buyers to exercise some "countervailing power" against their suppliers and thereby to mitigate seller market power. This happens in particular when both the upstream seller market and the downstream buyer market are characterised by a high level of concentration. The third situation involves the presence of atomistic suppliers facing a concentrated buying side. In that last case, we can make a further distinction between the exercise of pure "monopsony power" by one or several buyers (collusive monopsony) and the use of "buyer power" in the sense of superior or significant buyer market power.[31]

Figure 1



The figure here above shows the different markets which may be involved in competition law cases. Retailers, such as supermarkets for example, act as sellers in the downstream seller market where they sell products to final consumers. They also act as buyers in the upstream buyer market when they purchase goods from food processing companies or from food producers. Those companies selling to supermarkets also play the role of buyers in other upstream markets further up the supply chain where they buy inputs such as food packaging or agricultural commodities. Depending, in particular, on the structure of those markets and on the number of alternatives available to each market participant, market power may be

[31] Some commentators distinguish only two forms of buyer power: monopsony power and countervailing power. Under that distinction, monopsony power includes the pure monopsony model but also all situations where powerful buyers face a large number of competitive suppliers and are able to negotiate prices below the competitive level, even without reducing their input purchases. On the other hand, countervailing power refer to situations where powerful buyers face relatively few input suppliers which have significant market power. See for examples: Z.CHEN, *Defining buyer power,* 53 The Antitrust Bulletin 241 (2008) and J.B.Kirkwood, *Powerful buyers and merger enforcement,* Seattle University School of Law Research Paper No. 13-04 (2012), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1809985 We prefer to make a distinction between three different forms of buyer power. The first one involves a market interface where buyers reduce their purchases in order to lower input prices. The second and the third ones occur in a bargaining interface but are distinct due to differences with regard to sellers' market power in the upstream market. In case of superior bargaining power, buyers face weak sellers and are hence able to extract prices below the competitive level without input reduction or to obtain other concessions. In contrast, in case of countervailing buyer power, powerful buyers deal with powerful sellers and may therefore use their position to discipline the pricing policy of the latter. See: M.E.Stucke, *Looking at the monopsony in the mirror,* (2012) available at: http://ssrn.com/abstract=2094553

concentrated in the hands of either suppliers or buyers or spread more or less equally between those two parties.

a) Concentrated sellers facing atomistic buyers

In various sectors and possibly at different levels of the supply chain, buyers lack market power when purchasing their products and are, as a result, at the mercy of powerful sellers. This is particularly true as regards individual consumers who face a relatively concentrated seller market for most products/services they purchase and act therefore as passive price-takers. Take for example the food retail sector where in some Member States only three or four supermarket chains account for more than 70% of the market or the energy retail market which remains highly concentrated, if not monopolistic, despite the liberalization process in the European Union. The EU competition rules are well designed to address those situations and ensure consumer protection against improper exploitation of market power. Article 102 TFEU on abuse of dominance is indeed complemented by various instruments which focus on the definition of the relevant market in cases involving seller market power, on the assessment of dominance as well as on the types of abuses powerful sellers may commit.[32] However, where customers are subject in many industries to firms' market power in business-to-consumer (B2C) relationships, we cannot but notice that the situation may be (radically) different in business-to-business (B2B) relationships where producers may compete with each other for the business of a few large potential customers.[33] In such cases, buyers are in fact likely to detain a high degree of market power impacting on the balance of power in the buyer-supplier relationship and possibly turning those large firms into price-setters.

b) Concentrated sellers facing concentrated buyers

When firms interact through bilateral negotiations for the supply of goods, powerful buyers may be in a position to extract a better deal from their suppliers. In case the selling side and the buying side of the market are relatively concentrated for example, one can assume that both sellers and buyers have a particular market power so that they are, to some extent, mutually interdependent. In such a situation, buyers are in fact able to exercise *countervailing power* over their suppliers in order, among other things, to bring prices closer to the competitive level. [34] Take for example the case of a

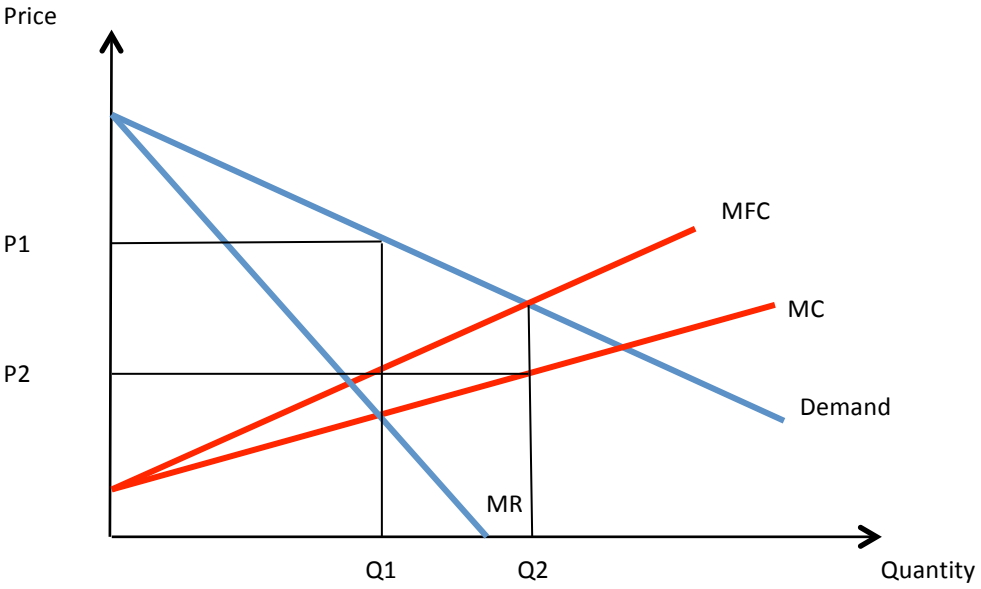
[32] See: Commission notice on the definition of the relevant market for the purposes of Community competition law, O.J. C372 of 09/12/1997; Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 102 of the EC Treaty to abusive exclusionary conduct bye dominant undertakings (Text with EEA relevance), O.J. C 45/7 of 24/02/2009.

[33] B.J.Ruffle, *Buyer countervailing power: A survey of experimental evidence* (2005), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=894664

[34] Z.CHEN, *Buyer Power: Economic Theory and Antitrust Policy,* 22 Research in Law and Economics 17, at 22 (2007). Conversely, when the existence of buyer power is examined, such as in the case of a merger between buyers for example, sellers may be deemed to have countervailing power and hence be able to constrain the

bilateral monopoly which arises when an upstream monopolist faces only one customer, the monopsonist firm. As each of them seeks to maximize profit, the former tempts to set the price-quantity combination where marginal revenue (MR) equates marginal cost (MC), that is (Q1, P1), while the latter is willing to buy inputs up to the point where marginal factor cost (MFC) equates demand (D) which would result in the combination (Q2, P2).[35]

Figure 2



Market power on the buying side is thus used as a way to counter market power on the selling side of the input market. Unlike the other forms of buyer power, countervailing power is exercised

exercise of monopsony or buyer power by the new entity. The concept of "countervailing buyer power" has been first introduced by Galbraith to describe the ability of concentrated buyers to obtain lower prices from suppliers and thereby counteract the adverse effects resulting from the exercise of market power at the supplier level. See: J.K.Galbraith, *American capitalism: the concept of countervailing power* (1952). According to Galbraith, concentration on the buying side and the exercise of countervailing power lead to lower prices on the retail market as it is assumed that price concessions obtains from suppliers are passed on to consumers. The presence of large buyers would therefore be sufficient to restore competitive outcomes on the markets. His theory has however raised some criticisms. (See for examples: G.Stigler, *The economist plays with blocs,* 44 American Economic Review Papers and Proceeding 7(1954) and A.Hunter, *Notes on countervailing power,* 68 Economic Journal 89 (1958)). Although it is commonly recognized that the exercise of countervailing power may bring about benefits to the markets and in particular to consumers as maintained by Galbraith, these are not guaranteed in all circumstances but mainly depend on the level of competition in the downstream market. See for example: P.W.Dobson and M.Waterson, *Countervailing power and consumer price,* 107 Economic Journal 418 (1997) and Z.CHEN, *Dominant retailers and the countervailing-power hypothesis,* 34 RAND Journal of Economics 612 (2003)

[35] R.D.Blair & J.L.Harrison, *Monopsony in Law and Economics* (2010), at 126-127. If the monopsonist faced a competitive upstream seller market, the supply curve would correspond to MC. In case of monopsony, profit-maximizing conduct leads the single buyer to set the quantity purchased where its demand curve and the marginal factor costs curve intersect. See below, Point C on pure monopsony power.

against a similarly strong market participant so that a certain balance of power is established in the bargaining relationship between the buyer and the seller. One may assume that neither the monopolist nor the monopsonist, given their significant market power, will behave competitively so that neither of them will completely dominate the bargaining process and be able to impose one of the two boundary equilibrium price-quantity combinations. Instead, the equilibrium price will lie between P1 and P2 and the parties will share the profit.[36] Negotiation outcomes will in fact vary depending on the relative bargaining strength of each player at a given time and on the strategies each of them will use in order to extract a larger share of that profit.[37] Used as countervailing power, buyer power is likely to benefit consumers and improve economic efficiency because it may offset or at least mitigate the harmful effects of sellers' market power by increasing output and thus lowering prices to consumers.[38] Such a balance of powers may for example takes place in the relationship between a large supermarket chain and a producer of a "must-carry" brand, that is, a leading brand, such as Coca-Cola, that the retailer must have on its shelves at the risk of losing a significant part of its customers.

Buyer power is mostly analysed in terms of countervailing power in the Commission decisions and case law of the European Courts. It has already been noted in Point A of this Section that the existence of countervailing buyer power constitutes a competitive constraint taken into

[36] R.D.Blair & J.L.Harrison, *op.cit.*, at 128-131.

[37] See: R.SCHEELINGS & R.S.WRIGHT, *"Sui Generis"?: an Antitrust Analysis of Buyer Power in the United States and European Union,* 39 Akron Law Review 207, at 219-222 (2006). The share of profits between the two negotiators will mainly depend on the outside options available to each of them. Each party's bargaining strength increases with its outside options. Any change in behavior or market structure that would lead to a wider range of alternative sources of supply available to the buyer or that would reduce the number of sales channels available to the seller will allow the former to gain a larger share of the jointly realized profits, thereby increasing its buyer power. See: R.Inderst & N.Mazzarotto, *Buyer power in distribution,* Chapter prepared for the ABA Antitrust Section Handbook Issues in Competition Law and Policy (2006). The better the alternative pay-off in the event of no agreement, the more credible the threat of resorting to that alternative and the stronger the firm's bargaining power. In order to predict the likely outcome of the process of negotiation, economists use bargaining theory which takes into account the parties' best alternative outcomes (or their fallback positions) in the event of no agreement but also their attitudes to risk and their degree of impatience. Risk aversion adversely affect the player's bargaining power as he is more likely to accept a lower share of surplus in order to minimize the risk of breakdown. A high degree of impatience also weakens the bargaining position. The more eager a firm is to strike a deal, the more incited it is to compromise and to reach an agreement without delay even if it means obtaining a lower share of the surplus. On the basic principle of bargaining theory see: F.Carmichael, *A Guide to Game Theory* (2005), at 238-264 and A.Muthoo, *A non-technical introduction to bargaining theory,* 1 World Economics 145 (2000)

[38] P.W.DOBSON, M.WATERSON & A.CHU, *The Welfare Consequences of the Exercise of Buyer Power,* Research paper prepared for the Office of Fair Trading, 1998, at 17-21, available at: http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft239.pdf; See also: J.Engle-Warnick & B.J.Ruffle, *Buyer concentration as a source of countervailing power: Evidence from experimental posted-offer markets,* September 2005, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=310339 and Z.CHEN, *Buyer Power: Economic Theory and Antitrust Policy,* 22 Research in Law and Economics 17 (2007)

consideration in the assessment of a supplier's dominance.[39] As it will be developed in chapter 2, Section 1 below, the countervailing role that buyers may play in some markets is also considered by the Commission when enforcing the Merger Regulation. Countervailing power exerted by buyers may indeed prevent a merger between suppliers from constituting a significant impediment of effective competition.[40] On that matter, the *Enso/Stora* case constitutes a landmark decision.[41] In that case, the Commission cleared a merger between suppliers of liquid packaging board even though those merging parties had a combined market share of more than 60%, a position far ahead of the other players in the relevant market. In fact the operation was cleared solely on basis of the domination of a company, namely Tetra Pak, in the buying market. Tetra Pak's countervailing power was deemed sufficient to counteract the increase in market power of the merged entity in the upstream seller market.

However, where the effects of the exercise of countervailing power by some buyers are *a priori* positive, we will see that, depending on the symmetry/asymmetry of the upstream and downstream markets, the impact of such bargaining power may also raise some competitive concerns.

c) Atomistic sellers facing concentrated buyers

In case concentrated buyers face atomistic sellers, the balance of power is likely to tilt in favour of the former who will hence be able to exercise buyer market power over the latter. Where buyer power is often called monopsony power, a distinction can nevertheless be drawn between pure monopsony power, which involves a reduction in the quantity purchased, and the exercise of buyer power which leads to lower prices without affecting the volume of purchases.

i. Pure monopsony power

In the standard textbook model of monopsony power, as described by Professors Blair and Harrison, buyers and sellers interact via a market interface.[42] Facing competitive sellers and assuming that the

[39] See : Guidance on the Commission's enforcement priorities in applying Article 102 of the EC Treaty, *op.cit.*, at 18. Countervailing power held by buyers may deter or defeat an attempt by a large seller to profitably increase prices. As a result, the seller in question is not able to act to an appreciable extent independently of its customers and does not therefore fall within the definition of dominance.

[40] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, O.J. C 31 of 05/02/2004, at 64. Power of some buyers may neutralize the ability of the merging firm to raise prices in future. Depending on the situation, the existence of buyer power can constitute a decisive factor leading the Commission to give clearance for a merger among sellers.

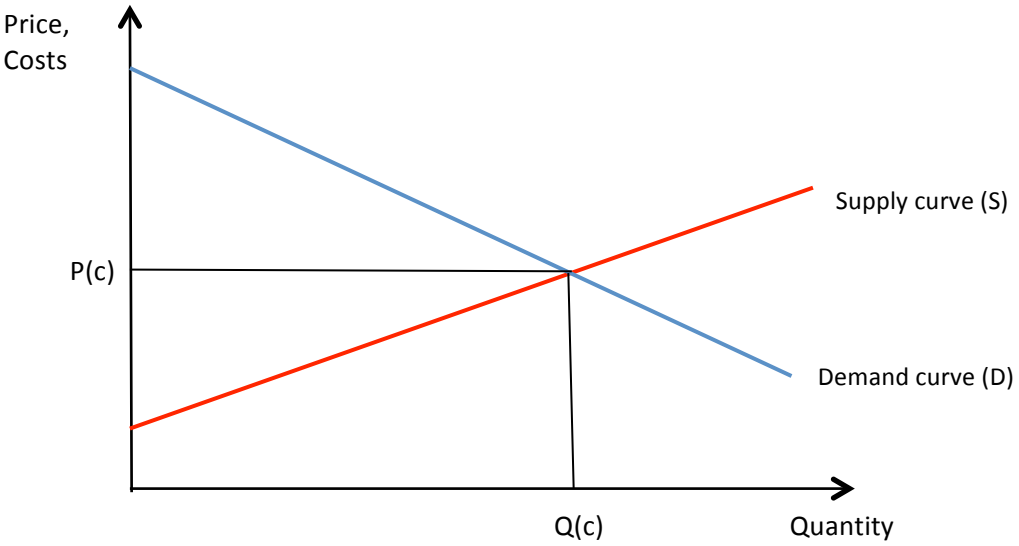
[41] *Enso/Stora,* Case No IV/M.1225, Commission Decision of 25 November 1998.

[42] R.D.Blair & J.L.Harrison, *op.cit.*. The text book view is mostly relevant for competitive commodity markets where a large number of producers sell their products on the spot market. However, nowadays, even for the purchase of those commodities, buyers tend to resort to contracts and interact with sellers through bilateral negotiations in order, in particular, to insure product quality and uniformity as well as to introduce a form of

supply side is represented by an upward-sloping supply curve, a monopsonist is able to obtain lower prices by reducing its demands.[43] This occurs when a single buyer is acting in the input market but also when a buyer has a sufficiently large share of the market so that its purchasing policy is likely to influence prices in the whole market or when some buyers recognize their common interest in restricting collective purchases (oligopsony).[44] A reduced demand for inputs may also be the result of an explicit agreement between competing buyers who collude to depress prices (collusive monopsony).

In a competitive industry, the competitive equilibrium is where the demand curve and the supply curve intersect as represented in figure 3.

Figure 3



As the purchase of an additional unit of input leads to a higher price for all the other units purchased, the marginal cost of that additional unit includes not only the cost of the unit in question but also the

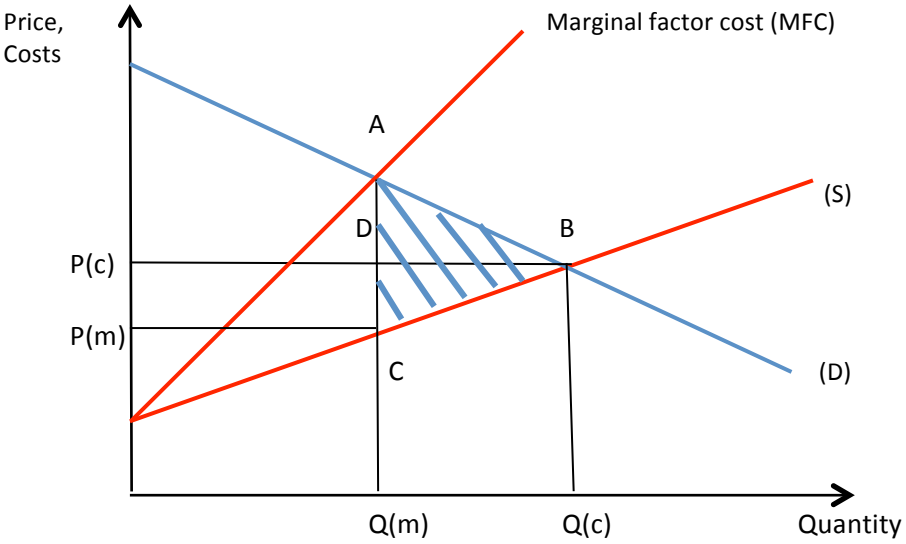
traceability and preservation of identity. See: B.Vorley, *Food, Inc. Corporate concentration from farm to consumer,* UK Food Group, London (2003), at 8-9.

[43] A supply curve is upward-sloping when the market price for a good increases as a higher quantity of that good is supplied, due to an increase in marginal costs for the input suppliers. According to J.M.Jacobson and G.J.Dorman, the supply curve is rarely upward sloping as, even in case of resource scarcity, if economies of scale are present, the supply curve will tend to flatten out. They consider that only two types of markets are likely to be characterized by an upward supply curve, namely labor markets and agricultural markets. With regard to the latter, producers use first their most productive land. If demand increases, they will have to use less productive land so that the additional output units will cost more and hence be more expensive. See: J.M.Jacobson & G.J.Dorman, *Monopsony revisited : a comment on Blair & Harrison,* 37 The Antitrust Bulletin 151, at 156-157 (1992)

[44] P.W.DOBSON, M.WATERSON & A.CHU, *op.cit.*, at 13.

cost increase on the other units. The curve representing the cost of each additional unit of input to a monopsonist, called the "marginal factor cost" (MFC), is consequently higher than the marginal cost of production. In order to maximize profits, the monopsonist will hence buy up to the point where its demand equals its marginal factor cost.[45] As shown in figure 4, by moving down along the supply curve, the buyer reduces both quantity and price of its purchases to a point below the competitive level.

Figure 4



Such reduction of purchases benefits all competing buyers in the input market but entails economic inefficiency and possible harm to consumers. The effects of pure monopsony power are indeed symmetrical to those of monopoly. In both situations, there is a wealth transfer – from the input seller to the input buyer in case of monopsony[46] and from end consumers to output sellers in case of monopoly -, as well as a deadweight social welfare loss represented by the triangle (ABC). In effect, because of the private profit maximization objective of the buyer, too few inputs are purchased in

[45] R.D.Blair & J.L.Harrison, *op.cit.*, at 43. The demand curve represents the marginal revenue product curve, that is, the additional revenue generated by employing one more unit of the input.

[46] Producer surplus declines by the area P(c)BMP(c) while buyer surplus increases by the difference between the rectangle P(c)DBP(m) and triangle ABD. See: L.Alexander, *Monopsony and the Consumer Harm Standard,* 95 The Georgetown Law Journal 1611, at 1616-1617 (2007)

comparison with the social optimal level so that the quantity exchanged leads to allocative inefficiency.[47]

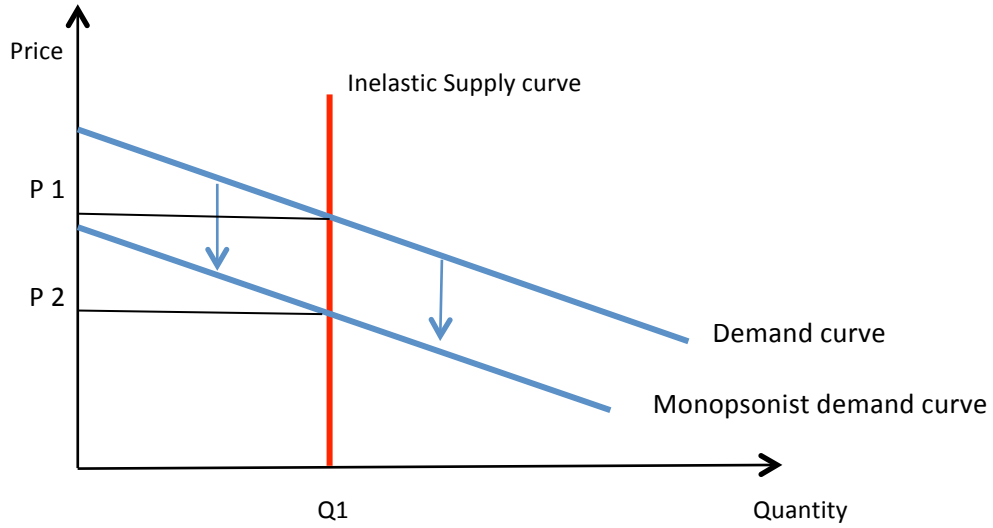
As regards the effects in the output market, the impact on consumer prices mainly depends on the position of the monopsonist in that market. If it also has market power as a seller, the reduced quantity of inputs purchased in the upstream market will lead to the production of fewer outputs and thus to higher prices for consumers, given a downward sloping demand curve in the downstream market. The presence of seller power will consequently entail an additional welfare loss. On the other hand, if the monopsonist faces a competitive output market where competitors have the capacity to increase production, consumer prices may be unaffected as other firms may make up for the shortfall in output.[48] For example, a processor may be the only buyer in a local input market, such as the livestock market, due to the high costs of transporting such a product. Once the meat is cut up and packaged however, the relevant geographic market may be national or even international in scope. A similar example may be found in the labour market. Where a company constitutes the largest employer in a particular local area, it may use its market power by restricting the amount of labor it demands in order to drive down salaries. Even though such conduct will lead to a decrease in output production, the price to end consumers may remain unchanged as the final product market is likely to be much broader and competitive.[49] However, as Professor Noll notes, even though other firms are able to increase their production, consumers are nevertheless not insulated from potential negative effects resulting from the exercise of monopsony power. In fact, the expansion of output production by the monopsonist's competitors may be carried out by using less productive inputs and thus requires more resources than would have been used in absence of monopsony. As a result, this is likely to make consumers worse off in the downstream market.[50]

Monopsony or collusive monopsony may also appear in case of supply inelasticity, that is when the supply curve is drawn as a vertical line so that any change in price will not affect the quantity supplied. Examples of inelastic supply curve may be found in the agricultural sector where perishable commodities cannot be restricted to respond to changes in price. In such a case, a monopsonist can artificially reduce its demand for the product in question in order to depress prices. As shown in

[47] R.D.Blair & J.L.Harrison, *op.cit.,* at 44-45. Allocative efficiency occurs when resources available are allocated in a way that meets the wants and needs of society so that no one can be made better off without others becoming worse off. Allocative efficiency is achieved at the point where supply and demand are equal, that is in this case, where "the value of the labor services as measured by the value of the marginal product (or the demand price) is just equal to the cost to society of providing that quantity as measured by the supply price."
[48] P.W.DOBSON, M.WATERSON & A.CHU, *op.cit.*, at 12-13.
[49] For an example of buyer power exercised in the labor market, see : R.D.Blair & J.L.Harrison, *The measurement of monopsony power,* 37 The Antitrust Bulletin 133 (1992). See also: A.Manning, *Monopsony in motion – Imperfect competition in labor markets* (2003).
[50] R.G.Noll, *« Buyer power » and economic policy,* 72 Antitrust Law Journal 589, at 599-600 (2005)

figure 5, this will not result in a movement down along the supply curve but in a downward movement of the whole demand curve.[51]

Figure 5



Consequently, suppliers will receive less, P2.Q1 instead of P1.Q1, for the same quantity while the difference will be absorbed by the monopsonist. Again, no reduction in quantity occurs in the short-run. However, depressed prices reduce producer profits and may hence lead them to reduce their production in the future and so consumer welfare.[52]

The issue of monopsony power is pointed out in the Guidelines on the assessment of horizontal mergers. The Commission considers indeed that mergers creating or strengthening buyer power may constitute a competitive concern, in particular, if the new entity would be able to obtain lower prices by reducing its purchases in the upstream buyer market.[53] However, it turns out that, in practice, the exercise of pure monopsony power is not envisaged by the EU institutions when enforcing the Merger Regulation and the other competition rules. The focus is rather on the effects of buyer power exercised without necessarily reducing the level of purchase of inputs. Those effects may for example consist in input foreclosure when a buyer uses its market power in the procurement market to restrict rivals' access to an input supplier.[54] Buyer power may indeed be exerted through different

[51] R.D.Blair & J.L.Harrison, *op.cit.,* at 79-82.
[52] *Ibid.,* at 82.
[53] Guidelines on the assessment of horizontal mergers, *op.cit.*, at 61.
[54] See, for examples: *Rewe/Meinl,* Case No IV/M.1211, *op.cit.*, at 71-74 and *Kesko/Tuko,* Case No IV/M.784, *op.cit.,* at 157-158. In those cases, the Commission pointed out that the mergers would significantly increase the parties' market power in the procurement market. Consequently, competitors would have difficulty

practices and affect not only prices in the upstream and downstream markets but also product quality, diversity or consumer choice.

ii. Buyer power

Pure monopsony power constitutes a narrow definition of buyer power as large buyers may obtain lower prices without withholding demand or may extract other concessions. This is possible when firms interact through bilateral negotiations for the supply of goods. In such a case, a buyer is deemed to have market power where he is able to significantly influence the transaction conditions to its advantage. Even though there is no general consensus on the definition of buyer power in such a situation, the term is related to the ability of a buyer to negotiate prices below the competitive level and/or other advantageous conditions, non-cost related, in comparison to those offered to his competitors.[55] In a report on buying power, the OCDE similarly defines buyers power as

> "the situation which exists when a firm or a group of firms, either because it has a dominant position as a purchaser of a product or a service or because it has strategic or leverage advantages as a result of its size or other characteristics, is able to obtain from a supplier more favourable terms than those available to other buyers."[56]

Under the Canadian draft enforcement guidelines on abuse of dominance of 2012, buyer power is deemed to exist when

> "a single firm or group of firms has the ability of profitably depress prices paid to sellers to a level that is below the competitive price for a significant period of time."[57]

With regard to the definition of market power on the selling side, the Canadian guidelines make it clear that the term "price" refers to all aspects of firms' actions that affect the interest of buyers, such as a reduction in product quality, choice, service, innovation or other dimensions of competition that buyers value. By analogy, one can assume that the clarification concerning the different aspects covered by the term "price" is also applicable to buyer power cases.

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securing suppliers at prices comparable to those of the merging entities and effectively competing with them in the downstream seller markets. Those two decisions will be further developed in chapter x.

[55] P.DOBSON & R.INDERST, *Differential Buyer Power and the Waterbed Effect : Do Strong Buyers Benefit or Harm Consumers ?,* 28 European Competition Law Review 393, at 394 (2007).

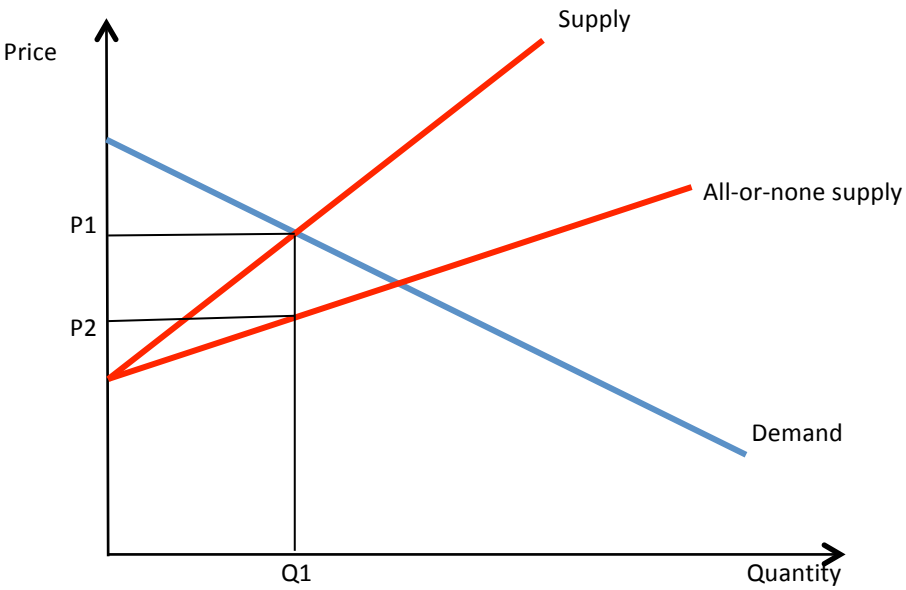
[56] OECD, *Buying power: the exercise of market power by dominant buyers*, Report, Paris, 1981, at 10.

[57] Draft enforcement guidelines on the abuse of dominance provisions (Section 78 and 79 of the Competition Act), Competition Bureau Canada, March 2012, at 2, available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Abuse-Dominance-2012-03-22-e.pdf/$file/Abuse-Dominance-2012-03-22-e.pdf

In order to obtain such concessions, the buyer uses all-or-nothing contracts according to which he agrees to buy a certain number of units but only at a specified price which can be significantly lower than the price for the last unit of that aggregate quantity given by the normal supply curve.[58] The concessions obtained result hence not from the act of reducing purchases but from the threat of moving to another supplier. Such take-it-or-leave-it contracts can occur only when buyers have sufficient market power in the input market or constitute inevitable business partners to access consumers so that suppliers cannot but accept the offer. This would be for example the case when suppliers lack sufficient alternatives to sell their products.

As explained by Professors Blair & Harrison, when buyer power is exercised to obtain the lowest possible prices without reducing the quantity purchased, the question facing suppliers is what the maximum quantity they would sell at a particular price given that the alternative is not to sell anything, or, put in another way, what the minimum price they would accept to provide each quantity. Through a credible threat of buying nothing, buyers can in fact push suppliers off their supply curve and onto their all-or-none supply curve represented in figure 6, which lies below the traditional supply curve.[59]

Figure 6



[58] *Monopsony and Buyer Power,* OECD – Policy Roundtables, 2008, DAF/COMP(2008)38, at 32, available at: http://www.oecd.org/dataoecd/38/63/44445750.pdf
[59] R.D.Blair & J.L.Harrison, *op.cit.,* at 83.

In a competitive market, the equilibrium quantity and price would have been Q1 and P1. However, through the exercise of market power, a buyer or a group of buyers is able to get the same quantity but at a lower price (P2), thereby absorbing a large part of producer surplus. This type of conduct does not lead to output reduction in the downstream market and entails actually only distributional consequences which, at first sight, do not constitute competition law concerns. In the long-run, yet, such behaviour might cause competition harm if suppliers were forced to reduce investments or to leave the market due to excessively low prices. This might in turn lead to a decreased product quality/variety in the downstream retail market to the detriment of consumers.

In addition, it is important to note that, through the use of those all-or-nothing offers, buyers have the ability not only to obtain low prices or extra discounts but also, for examples, to transfer unjustified risks or costs to their suppliers, to place additional contractual obligations on them such as most favoured customer clauses, exclusivity requirements or other restrictions with regard to competitors, etc. The different ways buyer power may manifest itself will be further illustrated below in the analysis of the retail sector. We can already mention that it is probably through some of those other practices, not directly related to a reduction in purchasing prices, that buyer power is likely to raise competitive concerns.

As mentioned above, in the few cases where buyer power was assessed by the Commission, concerns were not about the ability of buyers to decreases prices through the purchase of smaller quantities but rather on their ability to achieve the same result by, for example, threatening their suppliers to stop doing business with them. By so doing, buyers, who detain market power in the upstream buyer market, are able to obtain lower prices or other concessions without reducing their purchases. This is particularly common in the grocery retail sector where supermarket chains exercise significant buyer power over their suppliers. In different decisions, the Commission underlined indeed that large retailers can extract better terms and conditions from food producers due to different factors which increase their outside options and turn them into unavoidable trading partners for their suppliers.[60] Even though such exercise of buyer power does not lead directly to a

[60] See for example: *Kesko/Tuko,* Case No IV/M.784,; *Rewe/Meinl,* Case No IV/M.1221, and *Carrefour/Promodes,* Case No COMP/M.1684, *op.cit*. In those decisions, the Commission considered in particular that the increasing use of private labels, that is brands produced by retailers, reinforces the latter's buyer power. It was also highlighted that, due to the large number of alternatives available to supermarket chains, the latter can easily (threat to) switch to other suppliers. However, the high degree of concentration in the retail sector significantly reduces producers' outside options and turns large retailers into gatekeepers. All those factors contribute to strengthening supermarket chains' buyer power and enable them to force suppliers to lower prices and make other concessions. On the exercise of buyer power in the retail sector, see, in particular, below Chapter 2, Section II.

reduction in quantity and to higher prices in the downstream seller markets, it may nevertheless entail some harmful effects on the different markets involved.

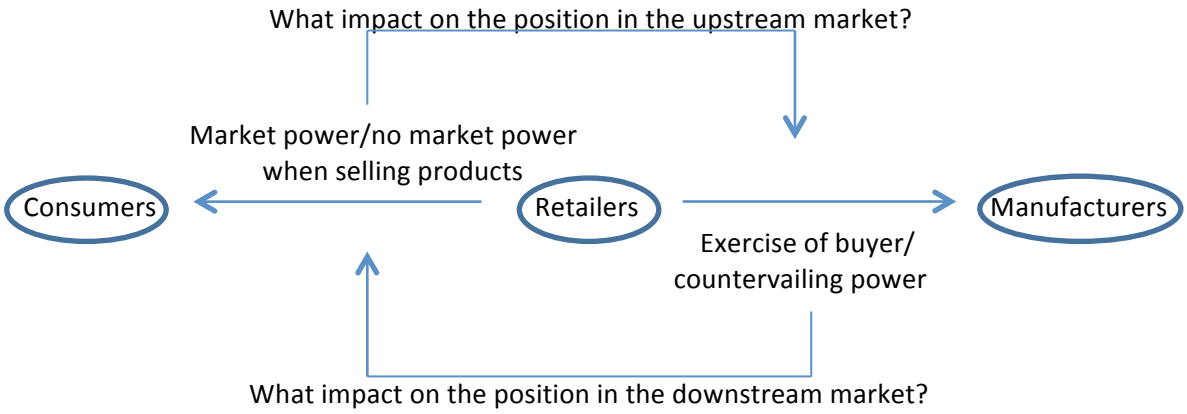
2. Potential effects of buyer power in the up- and downstream markets

The exercise of market power by buyers, be it in the sense of countervailing power or monopsony/buyer power, may lead to various potential effects on the different markets involved. Those effects are likely to be different depending, on the one hand, on the position of the buyer in the downstream retail market and, on the other hand, on the symmetry/asymmetry of the upstream markets.

a) Different relevant markets involved

Firms acting in the supply chain play different roles and may have a different position from one market to another. They act as buyers in the upstream input market but also as sellers in the downstream output/retail markets. The analysis of that downstream market is particularly relevant, not because of the buyers' market power – as we assumed that consumers lack market power –, but because the exercise of market power by buyers in the upstream market is likely to affect the latter's position in the downstream market when acting as sellers and *vice versa.* After examining the existence and the effects of buyer power in the upstream market, one should therefore turn to the situation in the downstream market.

Figure 7



We will see that when the same firms compete with each other as buyers in the upstream market and as sellers in the downstream market, the exercise of buyer power and the resulting benefits extracted from upstream suppliers constitute competitive advantages in the downstream market likely to reinforce the firm's position as sellers in that market. Conversely, a strong position in the

downstream market increases a firm's ability to exercise buyer power in the upstream market. Where the creation or exercise of buyer power results in enhancing seller power in the output market, it is considered that lower prices are less likely to be brought to consumers and that the latter may even end up worse off. On the one hand, the emergence of both forms of market power reduces the incitement of buyers to pass on lower prices to consumers. On the other hand, without fierce competition in the output market, the acquisition of seller power due to the exercise of buyer power will give the firm the ability to increase consumer prices.[61] In merger cases for example, competition authorities are thus less likely to authorize an operation which leads to the creation of both countervailing power and market power in the downstream market.[62] In the few merger decisions where buyer power was considered to be a competitive concern, the Commission indeed concluded that such power, when combined with market power in the downstream seller market, was very likely to adversely affect competition through a strengthening of the merging firms' market power both in the upstream and downstream markets.[63] This correlation between buyer and seller market power and the resulting mutual reinforcement of those powers will be illustrated in the section on the retail sector.

However, buyers competing in the upstream market for the purchase of goods do not necessarily act in the same relevant market when selling their products. A same input may indeed be used to produce different types of outputs not competing with each other in the downstream seller market. In addition, the relevant geographic upstream and downstream markets are not necessarily similar so that a firm may face a larger number of competitors in the downstream seller market than in the upstream buyer market. As it has been developed, in particular, in some merger cases, the relevant upstream input market is defined on basis of specific criteria focusing on suppliers' ability to find alternative buyers or to produce alternative goods.[64] The definition of the downstream market, however, primarily relies on consumers' ability to switch to readily substitutable products or to

[61] P.W.DOBSON, M.WATERSON & A.CHU, *op.cit.*, at 19-20. This is also true when buyer power is used as countervailing power. See: P.W.Dobson and M.Waterson, *Countervailing power and consumer price,* 107 Economic Journal 418 (1997); T.Ungern-Sternberg, *Countervailing power revisited,* 14 International Journal of Industrial Organization 507 (1996) and Z.Chen, *Dominant retailers and countervailing power hypothesis,* 34 RAND Journal of economics 612 (2003)

[62] See: J.B.Kirkwood, *Powerful buyers and merger enforcement, op.cit.,* at 42-47.

[63] See: *Kesko/Tuko,* Case No IV/M.784; *Rewe/Meinl,* Case No IV/M.1221 and *Carrefour/Promodes,* Case No COMP/M.1684, *op.cit.* The Commission pointed out that if a powerful buyer himself occupied a strong position in the downstream seller market, the incitement to pass on savings to consumers would be greatly reduced. In addition, it considered that a spiral is likely to be put into motion where the reinforcement of buyer power in the upstream market will strengthen the firm's market power in the downstream seller market and *vice versa.*

[64] On the definition of the relevant upstream buyer market, See Part II, Chapter 1, Section II, Point B, 2, a) and Part III, Chapter 2, Section II, Point B, 3, a).

suppliers located in another geographic area. This last definition of the relevant market is thoroughly spelt out in the Commission notice relating to that subject matter.[65]

Such difference between the upstream and downstream products and/or geographic markets is not uncommon. As we pointed out above, a monopsonist, such as a meat packer, which, by definition, detains significant buyer power over his suppliers may in fact lack market power as a seller in the downstream market. The final product, processed meat after packaging in that case, is indeed easily transportable in comparison with livestock so that the downstream market is likely to be much broader than the local upstream market for the purchase of animals. Many agricultural products are affected by high costs of transporting and must consequently be supplied in a limited geographic area as well as in a limited time frame due to their perishable nature.[66] Take for example producers of milk who are compelled to find buyers established near their farms in order to sell off their production without bearing excessive additional costs. Accordingly, a dairy processor may be the only buyer of milk in a local geographic area and held a monopsonistic position but nevertheless face competitors in the downstream market as dairy products can be sold in a nation-wide or international-wide market.

On the other hand, a buyer may lack market power in the upstream market but have a strong position as a seller in the downstream market. Take for example the automotive industry which has a high demand for steel products but face concentrated upstream sellers. Even though car manufacturers are generally deemed to detain a high degree of market power over their suppliers, they are less likely to exercise sufficient countervailing power when acting in an input market, such as the steel procurement market, where competing buyers are not only other car manufacturers but a multitude of firms which need the same input to produce different types of goods. Steel is indeed also in high demand in the construction, household appliances and packaging sectors for example. Consequently, as a buyer of that particular input, a car manufacturer will be subject to steel producers' seller power. However, when putting on its "seller hat", the manufacturer in question, given the high market concentration in the automotive industry, is likely to exercise market power in the downstream car market.

It is therefore particularly important to define separately the upstream and the downstream markets as they are not necessarily aligned with each other. The size of those markets is indeed likely to be

[65] Commission notice on the definition of the relevant market, *op.cit.*

[66] Farmers are indeed in most cases very impatient to strike a deal with buyers due to the perishable nature of their products. They are also more risk averse than buyers when the latter account for a large fraction of their total profit so that they are more willing to concede a larger share of profit to their customers in order to avoid that the negotiations break down. In addition, farmers' outside options are often less attractive and consequently less credible, further reducing their bargaining power.

different from both a geographical and product point of view and so the position of the firm in each of them. The narrower the relevant market, the likelier an undertaking will be deemed to have market power. An accurate definition of the relevant upstream and downstream markets is hence essential to assess the degree of market power of the firm in question as well as to identify its competitors and other competitive constraints that are capable of preventing it from using such power in an improper way.

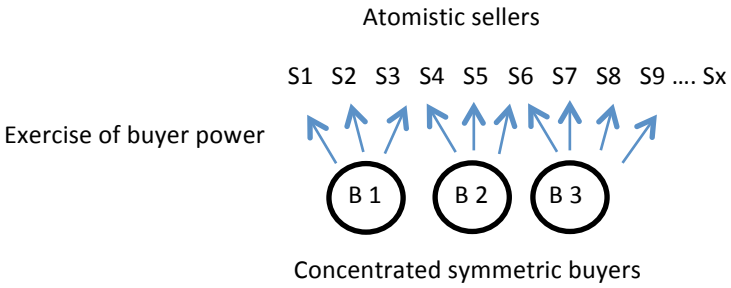
b) Exercise and potential effects of buyer power

The exercise of buyer power and the effects it is likely to entail in the up- and downstream markets vary according to the degree of market power in those markets but also to the presence or absence of smaller firms acting along powerful buyers and sellers.[67] In the four following situations, we examine briefly the potential impact of the exercise of buyer power depending on the structure of the downstream and upstream markets. In the first case, one or a few big buyers share the input market and do not face any powerful seller. The second situation involves symmetric buyers and sellers where all players enjoy some market power. In the two last situations, asymmetry among firms is envisaged in order to examine the effects of buyer power on smaller upstream sellers and on smaller rival buyers.

[67] On different potential harmful effects of buyer power, see: See: J.B.Kirkwood, *Powerful buyers and merger enforcement, op.cit.* Professor Kirkwood highlights ten ways in which the enhancement of buyer power following a merger may lead to negative effects in the downstream market where the merged entity sells its products and in the upstream market where it buys inputs. According to him, the acquisition of buyer power through a merger may harm competition in the downstream market in five ways and in five others in the upstream market. "In particular: (1) the merged firm may coerce or induce its suppliers to raise the costs if its remaining rivals, enabling the merged firm to increase prices in downstream markets; (2) the merged firm may extract price cuts or other concessions from its suppliers and they may react by increasing prices to other buyers, allowing the merged firm to raise its own prices; (3) the merged firm may obtain discriminatory concessions that are so large and long-lasting that they enable the merged firm to drive out or greatly diminish the market share of smaller buyers, increasing downstream concentration and making tacit or explicit collusion more likely; (4) even if downstream prices fall as the merged firm takes share from its smaller rivals, their destruction may deprive consumers of choices they preferred and depress overall consumer welfare; and (5) the concessions obtained by the merged firm may allow it to become less efficient, less dynamic, and less responsive to changing consumer preferences." (See at 47-59) "A merger of buyers that enhances countervailing power could also reduce competition upstream: (1) the merged firms' exercise of countervailing power could diminish the returns that suppliers earn from research and development, curbing their incentive to innovate; (2) alternately, by depressing suppliers' profits, the exertion of countervailing power may cause suppliers to restrict the variety of products they offer; (3) if the merged firm concentrates all its purchases in a single supplier, it could give that supplier monopsony power over atomistic suppliers further upstream; (4) a merger that appears to create countervailing power may actually result in monopsony power if the structure of the supplying tier changes and suppliers lose their market power; and (5) the merged firm's exercise of countervailing power may cause suppliers to collude in response, worsening consumer welfare." (See at 59-66) Most of those potential harmful effects on competition will be further developed in the next sections.

i. Concentrated symmetric buyers facing atomistic suppliers

Figure 8



In case of monopsony or symmetric oligopsony - that is, a situation where a small number of firms have (roughly) equal size -, all buyers have presumably market power over their suppliers and can exercise such power without constraints coming from the selling side if the latter is unconcentrated. Facing few powerful customers, sellers are indeed in most cases devoid of any bargaining power and hence unable to mitigate the exercise of buyer power. Such market structure can for example be observed in the milk sector where milk produced by a large number of farmers is generally sold to a limited number of dairy processors in the different Member States. The processing stage is indeed much more concentrated than the production stage in the milk supply chain.[68]

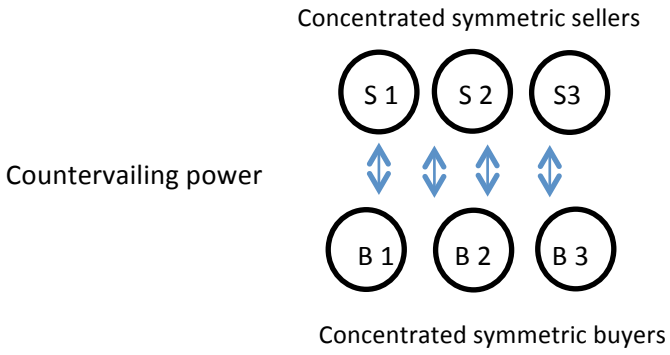
[68] The milk production sector may differ from one Member State to another in terms of market structures. In different Member States, a progressive restructuring process has undergone the milk sector due, in particular, to many farmers stopping their production activities. However, it remains that the dairy processing industry is overall characterized by higher ratios of concentration at national level and by the presence of larger operators than in the production sector. The milk supply chain is hence characterized by a numeric imbalance between milk producers and their buyers. For example, in France, 70% of farmers deal only with one buyer which purchases milk from at least 500 producers. See: European Commission, Competition DG, *Synopsis of Member states' National Competition Authorities Contributions on the Milk Supply Chain,* E2/AB/JCE/D(2009), Brussels, 23/11/2009. Dairy processors may be independent processing companies or farm-owned cooperatives. Milk producers can indeed reinforce their market position and bargaining power in the milk supply chain by entering into cooperation arrangements, such as by grouping in cooperatives. However, the European Milk Board has pointed out that, due in particular to the cooperatives' size and to the dependence of farmers on those organizations, the interest of milk producer members are in fact not represented effectively so that they can hardly obtain the expected benefits of such cooperation. The No.1 dairy cooperative in Europe processes more than 10 billion kg of milk from 14 800 farmers a year and operates in 25 countries. According to the European Milk Board, "the No.1 cooperative is no exception in Europe. The dairies are becoming bigger and bigger, their catchment areas for raw milk are constantly expanding. The individual member of the cooperative scarcely sees a trace of the old values of involvement in decision-making, solidarity and participation. S/he has practically no opportunity any more to influence how 'his/her cooperative' is run". See: European Milk Board, *Co-operatives – Between myth and reality – What dairy co-operatives can do to strengthen the milk producers' position in the market and what they cannot do*, May 2012, available at: http://www.europeanmilkboard.org/fileadmin/Dokumente/Positions_EMB/12-02_Positions/Cooperatives.pdf

As explained above, when buyer power is exercised in the form of pure monopsony power, involving reduced purchases in order to decrease the selling price, this leads to a deadweight social welfare loss which is likely to harm final consumers through higher prices. However, when buyers are able to extract lower prices or other advantageous purchasing terms without affecting their volume of purchases, the exercise of buyer power is often viewed as harmless or even beneficial since its impact is purely distributional. Especially if the downstream market is characterized by fierce competition, buyers will indeed probably pass on the lower prices obtained from suppliers to consumers. From a consumer welfare standard focusing in particular on retail prices, the exercise of buyer power without a reduction in quantity does not raise competitive concerns and is often viewed as procompetitive.

Some nevertheless maintain that buyer power is not always harmless to consumers and may in some cases negatively impact consumer welfare. For example, when the exercise of market power does not result in obtaining lower prices from suppliers but in transferring to them unjustified costs/risks or in imposing on them exclusivity obligations with no efficiency justification, consumers are very unlikely to reap any benefit from the presence of powerful buyers in the upstream market. In addition, turning from static welfare considerations to a dynamic perspective of buyer power, it is possible to envisage that excessive transfer of wealth from suppliers to buyers reduces the long-run incentives of upstream sellers to innovate, to invest in quality product or to participate in the production markets as their long-term viability may be threatened.[69] The arguments supporting the idea that competition authorities should take into greater consideration the potential long-term negative effects resulting from the exercise of buyer power and the impact such power has on suppliers will be further developed in the next chapters. The various opinions about the effects of buyer power are in fact closely related to the issue of the objectives of competition law.

ii. Concentrated symmetric buyers facing concentrated symmetric suppliers

Figure 9



[69] P.C.Cartsensen, *Buyer power and the horizontal merger guidelines: minor progress on an important issue,* 14 University of Pennsylvania Journal of Business Law 775, at 799-800 (2012)

When a limited number of symmetric buyers are able to exercise bargaining power over the few powerful and also symmetric upstream sellers and then act in a competitive downstream market to sell their products, buyer power is viewed as pure countervailing power and is very likely to benefit consumers. Such power is in fact a particular form of buyer power which is so-called countervailing or bargaining power as it is used against similarly powerful sellers. It is generally considered to be a positive strength since it may discipline the action of large firms in the upstream market.

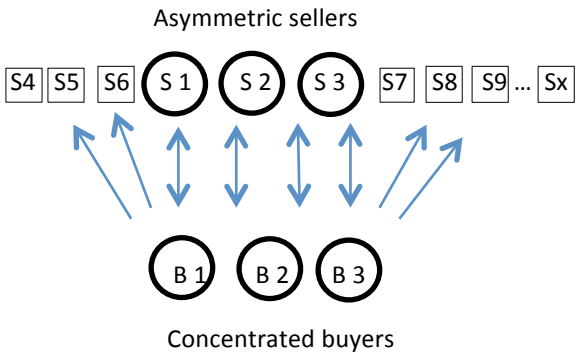
A good example of such market structures can be found in the *Enso/Stora* case where the Commission authorized a merger between two suppliers of liquid packaging board (LPB) given the strong countervailing power of one of the customers, Tetra Pak.[70] The Commission indeed considered that, after the transaction, the structure of the supply side would mirror the structure of the demand side of the market for LPB with one large supplier (StoraEnso) and two smaller suppliers facing one large buyer (Tetra Pak) and two smaller buyers.[71] Even though, in that case, firms were not symmetric, as Tetra Pak and StoraEnso were larger than their competitors in their respective market, the Commission nevertheless highlighted the existence of symmetry between the upstream and downstream markets. It was considered that the two other smaller firms acting in each market were very unlikely to be exploited or discriminated by the incumbents as it was not in the latter's interest to do so.[72] The exercise of countervailing power would hence benefit the whole market and prevent competition distortion as though each firm had in fact the same degree of market power.

However, such procompetitive power, if it reaches a particularly high degree, is likely to fall into the "darker side" of buyer power, that is, market power exercised against sellers devoid of bargaining power who are hence subject to the rules of their powerful customers. Increasing buyer power may indeed end up by taking away market power from sellers. In that case, the questions and controversies about the long-run impact of the exercise of buyer power would re-emerge. The main difficulty is to determine at what point the presence of buyer power does lead to imbalances of power between buyers and sellers and, more importantly from a competition law point of view, at what point does the exercise of such power may lead to anticompetitive effects.

[70] *Enso-Stora,* Case No IV/M.1225, Commission Decision of 25 November 1998.
[71] *Ibid.*, at 74-92.
[72] See: *Korsnäs/AssiDomän Cartonboard,* Case No IV/M.4057, Commission Decision of 12 May 2006. This case concerned the same market as in the *Enso/Stora* case. The Commission authorized further consolidation in the LPB market through a merger between the second and third suppliers. The strong position of Tetra Pak was again highlighted and the Commission concluded that such buyer was able to exercise sufficient countervailing power. It was pointed out that any discriminatory policy against Tetra Pak's competitors would be counter-productive for the merging parties. Such conduct would indeed be likely to foreclose smaller buyers and thereby reinforce even more Tetra Pak's market power in the upstream buyer market.

iii. Asymmetry among sellers

Figure 10



In an asymmetric upstream seller market, large but also smaller players compete with each other for the supply of goods or services. Even though the size of a firm is not the only factor likely to give rise to market power, large sellers are often in a better bargaining position when dealing with powerful buyers.[73] In such a case, powerful buyers detain a different degree of buyer power depending on the upstream business partner they are dealing with. In reference to the definitions given above, we can say that concentrated buyers facing asymmetric sellers are able to exercise buyer power over smaller suppliers and countervailing power over larger ones. The presence of powerful sellers in the input market over which a large buyer can only exercise countervailing power does not preclude the buyer in question from exercising a high degree of buyer power over the other market participants who are not shielded from the extraction of unjustified and possibly anticompetitive terms of supply.[74] In a bargaining interface where firms interact through bilateral negotiations, that situation is hence likely to lead to discrimination among sellers. In fact, smaller actors in the upstream seller market, devoid of bargaining power, will be forced to accept lower prices or less advantageous contractual terms in comparison with their larger rivals. Accordingly, their competitive position will be weakened, sometimes to such an extent that they will be driven out of the market.

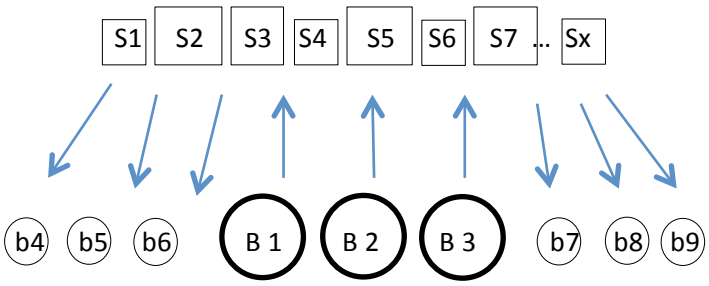
[73] Small firms may detain market power when they produce differentiated products for which consumer demand is high. As retailers reflect consumer demand in their purchases in the upstream market, they will be willing to pay more for the special features of the differentiated product in question. The relative size of the supplier to the buyer is therefore not always determinant to assess market power of each of them. This is also due to the fact that market power mainly depends on outside option for each party. See: U.Heimeshoff & G.J.Klein, *Bargaining Power and Local Heroes,* Düsseldorf Institute for Competition Economics, Discussion Paper, No.87 (2013), available at: http://hdl.handle.net/10419/70822

[74] The presence of some powerful sellers in the upstream market may indeed not be sufficient to prevent large buyers from adversely affecting competition by exploiting their market power over smaller producers. The same reasoning is held by the Commission in merger cases where buyer power may constitute a sufficient competitive constraint likely to counteract the increase in market power of the new entity in the upstream seller market unless that countervailing power is unlikely to shield smaller buyers from exploitative or exclusionary conduct following the merger. By analogy, it may be concluded that the ability of some manufacturers to exercise market power over large buyers does not exclude the possibility that the latter exert significant market power over smaller sellers and thereby potentially restrict or distort competition.

The issue of the role of competition law with regard to the exercise of buyer power over smaller sellers arises again in a situation of asymmetric upstream seller market. The competition rules are not designed to protect weaker or inefficient firms but they may nevertheless intervene when buyer power is used with the object or effect of lessening competition, by foreclosing competitors for example, or when the exercise of such power in fact prevents the achievement of the competition objectives. For example, large buyers could exploit their market power over smaller producers and use coercive measures to prevent them from dealing with competing buyers in order to foreclose the input market to the latter.[75] In addition, where some buyers' conduct is likely to lead to a reduction in product quality or diversity due to excessive pressure exerted on most suppliers, it may be considered that the exercise of buyer power hinders the goals of competition. That issue will be further developed in Part III.[76]

iv. Asymmetry among buyers

Figure 11



The presence of smaller actors on the buying side may also lead to discrimination but from suppliers in that case. Where large buyers are able to exercise countervailing or buyer power over sellers and to extract favourable terms of supply, such is not the case for all market participants. Smaller buyers are thus often subject to higher purchasing prices due to their limited volume of purchases - which prevents them from benefiting of rebates resulting from economies of scale for example -, but also due to their lack of market power when acting as buyers. That weakened position in the upstream buyer market is consequently likely to affect the ability of smaller firms to compete effectively in the downstream seller market if the favoured buyers also act as rival sellers in that market. The higher costs borne by those smaller firms will indeed make more difficult for them to offer better conditions to their own customers while remaining profitable. In addition, upstream sellers may be tempted to recover the loss profit engendered by the exercise of large buyers' market power and the resulting

[75] It is worth noting that, given the increasing bargaining strength of buyers in some sectors, such as in the grocery retail sector, such conduct is likely to be successfully used even with regard to larger suppliers.
[76] See: Part III, Chapter 1, Section II.

lower prices offered to them by raising prices on their other customers who lack bargaining power. That phenomenon, called the "waterbed effect", is defended by some while questioned by others. The different arguments on that issue will be examined in the section on the retail sector.

We cannot but notice that the Commission is not insensitive to the situation of smaller buyers. As we mentioned above, in the assessment of dominance, buyers' market power constitutes a competitive constraint which is likely to counteract a seller's market power and thereby to exclude the latter from the scope of the Article 102 TFEU. However, as provided in the Guidance paper on Article 102 TFEU, the Commission considers that such constraint is not sufficient if only a limited segment of customers is able to exercise countervailing buyer power.[77] The same approach prevails in the enforcement of the Merger Regulation. Indeed, in some cases, the exercise of countervailing buyer power may lead the Commission to clear a concentration despite an increase in the merging suppliers' market power following the transaction. However, the presence of smaller buyers must also be taken into consideration. As such, large buyers' market power cannot be found to sufficiently off-set potential adverse effects of a merger if only those buyers are shielded from deteriorated conditions after the operation.[78] For example, in a case involving a merger between two large processors of dairy products, the Commission considered that the exercise of countervailing buyer power by some large supermarket chains would not be sufficient to constrain the merged entity's conduct. It was indeed pointed out that other retailers would still be subject to the merging parties' market power and that larger buyers would use their strong bargaining position to protect their own interests only.[79] This makes it clear that attention should also be paid to smaller customers in order to safeguard their right to also operate in a competitive market.

We can conclude that buyers are protected by the competition rules against sellers' misuse of market power even though some of them are able to defend themselves because of their strong buyer power. However, smaller buyers can also be prevented from competing in an undistorted market due to an improper use of buyer power by some of their competitors. It is indeed not excluded that powerful buyers use their position, deliberately or not, to exclude smaller competitors and restrict competition in the upstream and downstream markets, calling for action from competition authorities. It cannot be denied that the stronger position acquired by some firms in the upstream market through efficiencies and the resulting better conditions obtained by them from

[77] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty, *op.cit.,* at 18.
[78] Guidelines on the assessment of horizontal mergers, *op.cit.*, at 65.
[79] *Friesland Foods/Campina,* Case No COMP/M.5046, Commission Decision of 17 December 2008, at 276. The Commission considered that this is all the more true because the retail market for milk is relatively competitive. Large retail chains would indeed gain from an increase in their rivals' costs since that would lead to a lessening of competition to their advantage.

suppliers are clearly procompetitive as it is probably the expression of the firm's higher performance. Nevertheless, that position should not be used so as to weaken competition either in the upstream buyer or downstream seller market.

C. ABILITY AND INCENTIVES TO EXERCISE BUYER POWER

Different factors may contribute to the emergence of buyer power. Most of them are related to the number of alternatives available to buyers and to the limited capacity of suppliers to switch to other customers. Where the market conditions are such as tilting the balance of power in favour of buyers, the latter may in addition be greatly incited to exploit their market power over suppliers. Given these elements, it is possible to draw some distinctions between buyer and seller power.

1. Ability to exercise buyer power

Numerous factors are likely to influence the degree of buyer power. High barriers to expansion or entry into the buy-side of the market for example insulate to some extent buyers from competitive constraints that new entrants might represent by offering better conditions to suppliers.[80] Other competitive advantages such as the reputation of a buyer may also give rise to a strengthened bargaining power over suppliers. However, a key factor to determine the existence of buyer power is the possibility for buyers to easily find alternatives to get their products while suppliers do not have the capacity to switch to other buyers without undue delay, risk or cost. In this section, the main and common factors giving buyers the ability to exercise market power over their suppliers are presented. However, those cannot be viewed as an exhaustive list. Depending on the characteristics of each market, various elements may also influence buyers' market power. Additional elements reinforcing buyer power in specific sectors, such as the use of competitive bidding or the development of private labels, will be examined further below.[81]

a) Concentration and market structure

The more concentrated the buyers, the fewer outside options available for suppliers. In sectors characterised by a high degree of consolidation on the buy-side, large buyers are therefore likely to enjoy greater bargaining power relative to their business partners, especially when they are facing

[80] Z.CHEN, *Buyer Power: Economic Theory and Antitrust Policy, op.cit.*, at 31.

[81] The use of private label will be developed in the section devoted to the retail sector. Different factors increasing buyer power will also be examined in section x of this chapter. In different sectors, the Commission has indeed identified the presence of significant buyer power and pointed out various elements likely to give customers a strong bargaining power with regard to their suppliers.

atomistic sellers.[82] Such as in cases involving the exercise of seller power, the determination of the buyer's market share in the input market as well as the relative market share of competitors may therefore be a first step in the assessment of buyer power. However, a very large share of the market in the hand of a particular buyer should be neither a necessary, nor a sufficient condition to conclude to the existence of buyer power.[83]

b) Alternatives available to buyers

A buyer will have substantial buyer power if it can find alternative sources of supply without incurring excessive risks or costs. Low level of concentration in the upstream market is for example likely to enable buyers to switch easily to other sellers should their suppliers refuse to concede lower prices or other benefits. The more attractive the buyer's outside options, the more credible the threat of resorting to those alternatives. As long as a buyer can credibly threat to switch to another supplier, it will be able to affect the outcome of the negotiation to its advantage.[84] The size of a buyer may also be a factor giving rise to buyer power. Even though a large buyer does not necessarily have buyer power over its suppliers, its size makes nevertheless more credible any threat to switch elsewhere by raising the value of its outside options.[85] Indeed, it may be cheaper for large buyers to switch to alternative sources of supply if there is a fixed cost required to do so. On a per unit basis, the costs of identifying and negotiating contracts with another seller will in fact be lower for big traders.[86] In addition, the larger the buyer, the higher the number of outside options available to it. Besides switching to existing suppliers, large buyers have the capacity to sponsor new entry in the upstream market by, for example, underwriting some or all of the new entrant's costs and/or by committing to placing larger orders with that new supplier.[87] Finally, large buyers may pose a credible threat of backward integration by producing the input themselves and becoming their own suppliers.[88]

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[82] See: U.Schumacher, *Buyer structure and seller performance in US manufacturing industries,* 73 the Review of Economics and Statistics 277 (1991). Schumacher established a negative relationship between buyer concentration and suppliers' profit margin, showing the stronger bargaining power of concentrated buyers.

[83] Z.CHEN, *Buyer Power: Economic Theory and Antitrust Policy, op.cit.,* at 31.

[84] A.Muthoo, *A non-technical introduction to bargaining theory,* 1 World Economics 145 (2000)

[85] R.Inderst & N.Mazzarotto, *Buyer power – Sources, consequences, and policy responses* (2006), available at: http://else.econ.ucl.ac.uk/conferences/supermarket/ind.pdf ,at 9.

[86] *Monopsony and Buyer Power,* OECD – Policy Roundtables, 2008, DAF/COMP(2008)38, at 40, available at: http://www.oecd.org/dataoecd/38/63/44445750.pdf

[87] C.Doyle & R.Inderst, *Some economics on the treatment of buyer power in antitrust,* 28 European Competition Law Review 210, at 213 (2007). See also: R.Inderst & G.Shaffer, *Retail mergers, buyer power, and product variety*, 117 Economic Journal 45 (2007)

[88] M.L.Katz, *The welfare effects of third-degree price discrimination n intermediate goods markets,* 77 American Economic Review 124 (1987). Katz's model shows buyers' ability to extract price concession through their increased threat of vertical integration.

c) Dependency of suppliers

Buyers' market power is all the more significant when suppliers lack alternative outside options so that they are at the mercy of their customers in the negotiations. The capacity to exercise buyer power is in fact closely related to the elasticity of supply (Es) and demand (Ed).[89] Those concepts measure respectively the responsiveness of the quantity supplied (Es) or demanded (Ed) of a good or service to a change in its price.[90] More specifically, the price elasticity is the percentage change in quantity supplied or demanded due to a percentage change in price. Supply or demand is elastic if a specific price change results in a larger change in quantity demanded or supplied. Conversely, supply or demand is inelastic if price changes cause relatively smaller change in quantity demanded or supplied.[91] With regard to the issue of buyer power, the more inelastic the demand by other firms in the upstream buyer market, the easier it will be for a large buyer to exercise market power in that market. Especially in case of pure monopsony, the strategy of a buyer to cut prices by curtailing its purchases would indeed fail if its rivals respond to such a decrease in prices by enhancing their purchases. In that case, elastic demand makes it hence difficult to keep prices low through the exercise of monopsony power.[92] On the supply side, the lower the elasticity of supply in the upstream seller market, the stronger the bargaining position of buyers. Where suppliers are unable to redirect their efforts to other markets or other products should prices fall, they can hardly be expected to bargain effectively with their large customers.[93] The supply elasticity in fact mainly depends on suppliers' capacity to find equivalent customers to sell their products. Different elements however may get in the way of suppliers willing to switch to new buyers, contributing hence to the emergence of buyer power.

Firstly, the finding of alternative customers may involve high switching costs, especially in sectors requiring important sunk investment. For example, in the labor market, skilled and highly trained employees, such as professional athletes, have invested substantial time and resources to master their profession. However, outside their area of expertise, such investment would lose much of its

[89] R.D.Blair and J.L.Harrison have defined a Buyer Power Index (BPI) in order to measure the degree of buyer power. The calculation of BPI is based on three elements, namely the buyer's market share, the overall elasticity of supply and the elasticity of demand of the fringe buyers. See: R.D.Blair and J.L.Harrison, *oop.cit.,* at 55-58.

[90] R.D.Blair and J.L.Harrison, *op.cit.,* at 58-59. The formula of price elasticity is: percentage change in quantity supplied or demanded/percentage change in price. High elasticity indicates that the supply is sensitive to a price change while low elasticity indicates that quantity supplied does not respond much to a price change.

[91] For example, if a 2 percent decline in the price apples results in a 4 percent increase in quantity demanded, the elasticity of demand is high as it equals 2 (> 1). In such a case the demand is elastic. On the other hand, if a 2 percent decline in the price of apples leads to only a 1 percent decrease in quantity supplied, the elasticity of supply is low as it equal 0.5 (< 1). In that case, the supply is inelastic.

[92] R.D.Blair and J.L.Harrison, *op.cit.*, at 59.

[93] *Ibid.,* at 58.

value thereby deterring workers from switching to a new employer.[94] Another illustration may be found in the livestock industry where the process of raising and feeding animals implies substantial and specialized investments by producers. Switching to an alternative line of production in order to enlarge their customer basis would therefore entail important losses for farmer and require them to make new investment. Seeking buyers who use the input in other geographical areas may also turn out to be a difficult task due to the high transport costs of some goods which strongly reduce the scope of the relevant market but also due to the perishable nature of assets.[95] The degree of uncertainty as well as the costs involved by a switch to a new customer may, as a result, constitute a substantial deterrent to looking for alternatives.[96]

Secondly, even if alternative buyers are present on the market, they may not constitute a good substitute to have access to a large number of consumers. This would be the case if a buyer acts in fact as a "gatekeeper" due to its significant market share in the retail downstream market. Without dealing with that particular buyer, suppliers would not be able to market efficiently their products since they would be deprived of the largest channel to serve end-users.[97] Market power in the downstream market is therefore likely to create or reinforce the firm's bargaining strength in the upstream market. In fact, buyer power and seller power often go hand in hand and reinforce each other as it will be illustrated in the section devoted to the retail sector. Where large buyers may intuitively be considered as difficult to replace, a smaller company can nevertheless also acquire significant buyer power if they act as a monopolist in a local market. In such a case, suppliers have indeed no alternative channel to serve consumers. As a result, their position in that market is even weaker than the one they hold when negotiating with a larger retailer in highly competitive markets, as, in that latter case, they may, at least in theory, replace sales made through that customer. According to Inderst and Mazzarotto, even though it is probable that a large retailer may be more difficult to replace, it is crucial to realize that "it is not size in itself that determines buyer power but rather the extent to which a retailer acts as a gatekeeper to final consumers."[98]

Finally, the ability of a supplier to switch to alternative buyers is influenced by the proportion a certain customer represents in its overall sales, the so-called risk or threat rate. The larger a buyer's

[94] W.S.Grimes, *Buyer power and retail gatekeeper power: Protecting competition and the atomistic seller,* 72 Antitrust Law Journal 563, at 567-568 (2005)
[95] The perishable nature of most agricultural products makes farmers eager to strike quickly a deal with buyers and thereby reduces their bargaining power.
[96] P.C.CARSTENSEN, *Buyer Power, Competition Policy, and Antitrust : The Competitive effects of discrimination among suppliers,* 53 The Antitrust Bulletin 271, at 279 (2008)
[97] C.Doyle & R.Inderst, *op.cit.*, at 213.
[98] R.Inderst & N.Mazzarotto, *Buyer power – Sources, consequences, and policy responses, op.cit.*, at 10. The role of gatekeepers is formalized in N.Mazzarotto, *Retail mergers and buyer power,* CCR Working Paper 04-3 (2003), available at: https://lred.uea.ac.uk/documents/107435/107587/ccp4-3.pdf

share in the supplier's total turnover, the more dependent the latter will be on the former. Indeed, where the proportion of turnover is high, substituting the customer in question would entail serious risks and possible heavy financial consequences for the supplier.[99] The percentage of business that a buyer or supplier would lose in case of breaking-off may therefore be of particular importance in determining the bargaining position of each party.

It must be made clear that the share a buyer accounts for in a supplier's turnover may be different from the market share held by that buyer in the upstream buyer market. The market share is the part represented by a buyer in the relevant procurement market which in fact corresponds to a percentage of the sales in one particular product category, considering all brands or sources of supply. That market share is not necessarily equivalent to the part the buyer in question represents in the total sales of the suppliers active in that relevant market. Suppliers may indeed carry out their activities in different markets so that products sold on a particular market do not necessarily represent all their sales. For example, in the grocery sector, suppliers sell the large majority, around 80%, of their products through the grocery retail sector where a limited number of large retailers, say three, are active. In a symmetric market, each of those retailers will have approximately a market share of 30% in the upstream buyer market. The suppliers in question also have smaller customers in other markets such as specialized outlets or drugstores which buy the remaining 20% of their production. Although the share accounted for by the incumbent retailers in suppliers' turnover varies depending on each supplier, it may be considered that each of those customers will represent around 25% in the suppliers' turnover. It is therefore important to make a distinction between a buyer's market share and the share accounted for by that buyer in a supplier's turnover as the calculation method as well as the resulting share is likely to be different.

2. Seller power and buyer power: distinctive features

A striking distinction between seller and buyer power concerns the elements taken into consideration when assessing the existence and degree of market power on each side of the market. In seller power cases, it is mostly referred to the horizontal structure and concentration of the relevant market. The first elements to be considered are indeed the market share of the firm involved, the position of its competitors and the other potential horizontal competitive constraints that could be exerted on that firm, such as the entry of new rivals. In some cases, the firm's vertical relation with its customers is also considered so as to examine whether the latter could exercise countervailing power and thereby constrain the firm's competitive behavior. However, such an

[99] C.Doyle & R.Inderst, *op.cit.,* at 213. The large share a customer accounts for in a supplier's turnover makes the latter risk averse given the loss it would suffer if the negotiations break down. Besides impatience and the lack of equivalent alternatives, risk aversion further weakens suppliers' bargaining power

assessment is not systematically carried out and generally plays a relatively minor role in the overall analysis of a seller's market power.[100] In addition, vertical relationships are in fact not examined to measure the seller's market power as such but to assess whether that power could be mitigated by customers' countervailing power. It may be concluded to the existence of significant market power in the hands of a selling firm without looking at the part such a firm represents in the business activity of its customers. Horizontal market conditions, and, in some cases, the firm's high market shares may be sufficient to determine the degree of market power of the firm in question.[101] The question of buyer power is only possibly considered where, on basis of those conditions, it appears that the firm holds significant market power or a dominant position. Vertical issues could then influence the market power assessment if, for example, it appears that the firm is economically dependent on some powerful customers. It results that vertical relations play a role only in the assessment of buyer power even in seller power cases.

In buyer power cases, the nature of the bilateral relationships between a buyer and its suppliers constitute the core of the market power assessment. The focus is indeed not put on the buyer's market share in the upstream purchasing market but on the share it accounts for and the importance it represents in the business portfolio of its suppliers and *vice versa*. Indeed, the more valuable is a specific customer in the eyes of its suppliers, the greater its buyer power with regard to the latter. Such power is further reinforced if each of those suppliers does not account for a large part in the buyer's business activity, is not indispensable for that buyer or can easily be replaced.

The "value" of a customer in the eyes of a particular supplier is high if that customer accounts for a substantial part of the supplier's sales and that no equivalent alternative is available. In such circumstances, the supplier is economically dependent on its customer who, a result, is able to exert significant buyer power. A limited market share in the upstream purchasing market can therefore not lead to the conclusion that a firm lacks buyer power in that market. If suppliers depend on that

[100] See for example, case T-228/97, *Irish Sugar v Commission* [1999] ECR II-2969, at 97-104 in which the General Court examined whether the alleged lack of independence of the seller *vis-à-vis* its customers could deprive the former of the freedom of conduct characteristic of a dominant position. See also for examples: T-57/01, *Solvay SA v Commission* [2009] ECR II-4621 and T-66/01, *Imperial Chemical Industries Ltd v Commission* [2010] ECR II-2631. Countervailing buyer power can also be considered in merger cases in order to assess whether the merging parties could impede effective competition post-merger by exerting market. The assessment of customers' countervailing power is only included in some merger decisions and, in most cases, the Commission did not enlarge on that issue. However, the existence and extent of buyer countervailing power was of particular importance in the *Enso/Stora* case and led the Commission to the conclusion that the merged entity would not be able to exert market power due to the presence of strong buyers. See: *Enso/Stora,* Case IV/M.1225, *op.cit*. On that case, see below Chapter 2, Section I, Point E, 4, b).

[101] In *Tetra Pak,* the General Court maintained that the firm's very high market shares (90%) guaranteed it the freedom of conduct characteristic of a dominant position and were in themselves evidence of the existence of a dominant position. See: T-83/91, *Tetra Pak v Commission* [1994] ECR II-755, at 109.

buyer for, say, 20% of their sales, they can indeed already be considered economically dependent on it. On the other hand, unless suppliers produce an essential input that cannot be replaced by another product, the buyer is unlikely to feel economically threatened by the loss of one of those suppliers and will then be incited to use its buyer power. This is particularly true where buyers do not produce new items by assembling components but merely resale as such various products, independent from one another, in the downstream seller market, such as in the grocery retail sector. The loss of one particular supplier is less likely to affect a large retail chain than the other way round because, on the one hand, the latter can generally find alternative sources of supply or can more easily integrate into the upstream market and, on the other hand, the share that supplier represents in the retailer's business activity may be insignificant with regard to the number of products bought and sold by that retailer.

Economic dependency of suppliers gives therefore buyers the ability to exercise significant market power in the upstream buyer market and the incentives to effectively exert pressure on suppliers may also be stronger than in seller power cases.

3. Incentives to exercise buyer power

Where the possession of market power is not reprehensible in itself, its exercise may nonetheless, in some circumstances, lead to adverse effects on the market and hence be subject to some conditions. Under the EU competition rules, a firm is deemed to be able to affect competition through its conduct only when its degree of market power is high enough to give it the ability to behave independently on the markets. In such a case, the firm in question will be qualified as dominant and be subject to Article 102 TFEU.[102] The prohibition on abuse of dominance imposes in fact a special responsibility on large market participants not to allow their conduct to impair competition on the market.[103] We will not enter here into the discussion of the degree of buyer power needed to possibly affect competition or the type of buyer practices likely to distort competition as that issue

[102] See: Case 27/76, *United Brands Company, op.cit.*, at 65 and Case 85/76, *Hoffman-La Roche, op.cit.*, at 38-39. The concept of dominance is defined by the Court of Justice as follows: "[the dominant position] relates to a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers. Such a position does not preclude some competition, which it does where there is a monopoly or quasi-monopoly, but enables the undertaking, which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment."

[103] See: Case 322/81, *Michelin I, op.cit.*, at 56. See also: Case 85/76, *Hoffman-La Roche, op.cit.*, at 91 where the Court of Justice delineated the concept of abuse of a dominant position, as a behaviour "which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

will be closely examined further below. However, we may nevertheless already note that, as maintained by Professor Peter C. Carstensen, buyers may have, in some circumstances, great incentives to exploit their market power over suppliers. In addition, self-correction of market distortions is less likely to occur than on the selling side.[104] Unless the demand for input exceeds supply, all buyers share a common interest in paying low prices. Indeed, where sellers may immediately increase their sales and profits through a price cut, buyers will not necessarily reap benefits by offering higher input prices to suppliers. In fact, buyers' costs of production will rise while an inherent lag will delay a potential increase in sales in the output market.[105] Buyers may therefore have greater incentives not to compete against each other by keeping prices low or by allocating the buying markets so that each buyer has its own set of suppliers over which they can exercise buyer power.[106]

Buyers are, as a result, insulated from competitive pressures exercised by rivals in the buyer upstream market to a greater extent than sellers are. In addition, it is more difficult for sellers to constrain a buyer's ability to impose different prices by engaging in arbitrage. On the selling side, a favored buyer may easily resell a product to a disfavored buyer and makes thus ineffective the seller's discriminatory pricing policy. On the buying side, however, a supplier can hardly substitute sales to a more favored supplier for delivery to a buyer who exercises its buyer power through price discrimination. The latter may indeed require that each supplier produces and provides the input itself.[107]

However, where greater incentives to exercise market power may emerge on the buying side with regard to homogeneous products, buyers may nonetheless have an interest in raising prices and taking care of the situation of firms producing differentiated inputs in order, among other things, to get higher quality product or to guarantee sustainable relationships with their suppliers. In that perspective, the Japanese automobile industry provides good examples of mutual beneficial buyer-supplier relationships. Car manufacturers such as Toyota or Honda have indeed developed long-term relations with their suppliers and implemented programmes which help the latter to improve

[104] P.C.Carstensen, *Buyer Power and merger Analysis – The Need for Different Metrics,* Statement prepared for the Workshop on Merger Enforcement, Washington DC, February 17, 2004, at 4-6.
[105] P.C.Cartsensen, *Buyer power and the horizontal merger guidelines, op.cit.,* at 790. In fact, by bidding up input prices, the buyer in question will attract more suppliers and achieve hence a larger volume of production. This in turn will lead to an increase in the volume of outputs sold in the downstream market. However, it is possible that the additional sales made in that market will not be sufficient to offset the higher costs resulting from the higher prices offered in the upstream buyer market. See also: P.C.Carstensen, *Buyer cartels versus buying groups: Legal distinctions, competitive realities, and antitrust policy,* 1 William & Mary Business Law Review 1, at 34-35 (2010)
[106] P.C.Carstensen, *Buyer Power and merger Analysis – The Need for Different Metrics, op.cit.,* at 6.
[107] P.C.Cartsensen, *Buyer power and the horizontal merger guidelines, op.cit.,* at 784.

production system so as to achieve lower costs and higher quality input. Instead of relying on immediate benefits of low prices imposed unilaterally on suppliers, those car manufacturers bet thus on the benefits of investing in better relationships with input producers with the view to ensure the quality of the final products. The results of such a policy turn out to be very conclusive as the car producers in question, in comparison with their U.S. rivals for example, have the fastest product development processes and manage to reduce their costs and to achieve a higher quality level year after year.[108] That example shows that buyers are not necessarily incited to exercise their market power to the detriment of suppliers but may instead believe that the latter's welfare is crucial to their own success. In addition, the ability to exercise market power in the upstream buyer market is closely linked to the number of alternatives available in that market. Excessive pressure exerted on suppliers, likely to drive them out of the market, might therefore jeopardize buyers' market power in the longer-term. In fact, the incentives to exploit buyer power depend in particular on the type of industry involved, on the degree of product differentiation and on the firm's business strategy to maximize profits.

In addition, buyers may be aware that their market power in the upstream buyer market mainly depends on the number of alternatives available in that market. Conduct which leads to the exclusion of suppliers is hence very likely to weaken buyers' bargaining power. With fewer outside options available to them, the threat of customers to switch to other sources of supply is indeed much less credible. Where that link between the availability of outside options and the degree of market power is taken into consideration, the incentives to exercise buyer power may therefore be reduced and lead buyers to care about their suppliers' viability.

Yet, especially in times of crisis such as those the European Union and the rest of the world have been going through since 2009, one cannot but notice that many firms do not turn their nose up at the opportunity to ensure better profitability through the exercise of buyer power. This is undoubtedly even more likely in sectors characterized by little product differentiation or in the retail sector for example where supermarket chains are not involved in manufacturing their own outputs but sell as such products they buy in the upstream market so that they are not directly responsible for product defects or lack of quality. In addition, as each supermarket chain sells generally the same brands in a large range of product categories, any product improvement or degradation will similarly

[108] See : J.K.Liker & T.Y.Choi, *Building deep supplier relationship,* Harvard Business Review, available at: http://hbr.org/2004/12/building-deep-supplier-relationships/ar/1

affects all retailers. The latter are consequently less incited to care for the situation of branded products manufacturers and focus instead mostly on price competition.[109]

Furthermore, buyers which are able to exercise market power over their suppliers are incited to effectively use that power as they may expect their large competitors to act similarly. A firm will indeed not deprive itself of better conditions obtained through the exercise of buyer power if it knows that some rivals are also able to extract good terms from suppliers. Low purchasing prices and other advantages obtained in the upstream buyer market are of crucial importance to compete effectively in the downstream seller market. If firms focus on their short-term interests, they are therefore very likely to exercise their buyer power in order to secure a competitive position when acting as sellers.

When buyers are so able and incited to exercise pressures on their suppliers, such power may be translated into lower prices paid to sellers, but also excessive transfer of risks/costs or other non-pricing obligations such as a restriction to deal with competing buyers. Whether those practices may put effective competition at risk is probably the main issue facing the European Commission and the national Competition Authorities today.

D. CONCLUSIVE REMARKS

Market power is a notion that has been examined and defined mainly in seller power cases. Clear guidelines have been published by the Commission in order to define the relevant seller market and to assess the existing competitive constraints in that market. Market power on the buy-side has yet drawn less attention in the early years of the EU competition policy. Buyer power is nevertheless an issue that may arise in various markets and that is worth being properly defined.

The assessment of market power constitutes an important step in the enforcement of EU competition law as the rules of the Treaty on that matter, and in particular Article 102 TFEU, only apply to market participants which possess significant market power. Accordingly, in the upstream buyer market, a firm would be subject to that provision if it detains a sufficient degree of market power so as to be able to prevent effective competition from being maintained in the relevant market. In such a case, the buyer would in fact have the ability to depress prices paid to suppliers to

[109] Circumstances are likely to change in case of own-brand products as retailers are responsible for those products and can win customers by differentiating their offerings introducing products that consumers demand. However, as most private label lines are produced by SME, retailers' buyer power over those smaller companies is likely to be great enough to extract low prices while exercising additional pressure to ensure that quality and other requirements are maintained. In most cases, given the large number of potential suppliers at disposal, retailers can easily find alternative sources of supply if one of their suppliers is forced to leave the market due to unbearable costs and charges.

a level that is below the competitive price or to obtain more favourable terms than those available to other buyers.

It was noted in this chapter that, where the same firm acts simultaneously as a buyer in the upstream input market and as a seller in the downstream output/retail market, its market power in the respective markets may be relatively different. The relevant downstream market may indeed be given a larger definition than the relevant upstream market and *vice versa.* This means that the competitive constraints exerted on the firm in question is also likely to differ from one market to the other. Consequently, in order to accurately assess the degree of buyer power, competition authorities have to define the relevant upstream market and then to evaluate the competitive pressures that a firm allegedly involved in anticompetitive behavior faces when acting as a buyer in that market.

On the buy-side, the degree of market power depends not only on the level of concentration among buyers but also and mainly on the number of alternatives available to buyers and sellers. A buyer is likely to exert market power over its suppliers where it can credibly threaten to switch to alternative sources of supply, to sponsor new entry or to integrate backwards. Outside options available to suppliers also constitute an essential element in the assessment of a firm's buyer power. Bargaining power of existing customers is indeed all the more significant when suppliers cannot find easily other and equivalent buyers to sell their products. As a result of such a lack of alternatives, producers may be heavily dependent on their customers, especially when the latter represent a very high proportion of their turnover. This gives *de facto* buyers the ability to exploit their market power in the relevant upstream buyer market.

With regard to the effects of buyer power, these depend on the structure of the upstream buyer and downstream seller markets as well as on the way such power is exerted. Where the selling and the buying sides of the market are both relatively concentrated, buyers may in fact exercise countervailing power over large suppliers. In such a case, buyer power is generally considered procompetitive as it prevents selling firms in the upstream seller market from exploiting their market power to the detriment of consumers. Where concentrated buyers face atomistic sellers, the former are more likely to exert market power unilaterally. It is generally accepted that the exercise of monopsony power - that is buyers reducing their purchases in order to make prices decrease - is harmful to competition. Such reduction in quantity is indeed likely to lead to a reduced production of output and consequently to an increase in consumer prices in the downstream seller market. However, where buyers are able to obtain lower prices or other concessions without limiting the quantity purchased but by using take-it-or-leave-it contracts, the effects on competition are more

controversial. Even though consumers generally benefit from the exercise of buyer power, especially in terms of lower prices, some argue that, from a dynamic perspective, buyer practices might affect competition on the markets in the longer term. This would for example be the case if buyer power is used by some firms to reinforce their market position in the downstream seller markets or leads in fact to a reduction in product quality or diversity.

In different upstream markets, buyers have strong incentives to exercise market power over suppliers. Issues related to buyer power and its consequences are therefore likely to arise frequently in various sectors. In order to make sure such power is not used anti-competitively, those issues are worth being addressed by competition authorities. The competitiveness of buyer practices is in fact to be assessed with regard to the goals of EU competition law. That question is essential so as to determine whether more intense enforcement of the competition rules is needed against powerful buyers.

SECTION II – IMPLICATION OF BUYER POWER IN EU COMPETITION LAW

The exploitation of buyer power has rarely given rise to antitrust action in the European Union. While the exercise of buyer power has been recognized in different sectors[110], nothing is really happening in the enforcement of the competition rules against powerful buyers as it will be developed below in Part II. One might, though, wonder whether the exercise of buyer power does not conflit with the competition goals or affect the long-term interests of consumers.

The first issue to be examined is related to the objectives of EU competition law. A short description of those objectives is provided in Point A of this Section. In Point B, we will sum up the potential effects of the exercise of buyer power and see whether, and to what extent, powerful buyers might impede the achievement of the competition goals. Point C provides some reflection on how to deal with buyer power in EU law.

A. THE OBJECTIVES OF EU COMPETITION LAW

The issue of the goals pursued in EU competition law is of crucial importance to assess the lawfulness of a firm's conduct. A practice is indeed unlikely to be found in violation of the competition rules unless it results in (potentially) impeding the achievement of the competition goals. Different objectives may in fact guide enforcement actions taken by competition authorities, ranging, in

[110] In various merger cases, the Commission highlighted in different sectors the presence of powerful buyers who were able to exercise significant market power over their suppliers. See blow, Chapter 2, Section I.

particular, from increasing economic efficiency to integrating national markets as well as protecting economic freedom or enhancing consumer welfare. These various objectives are further elaborated in Part III. It is however convenient to provide already an insight into the goals of EU competition law in this chapter so as to initiate some thought on the potential anticompetitive nature of certain buyer practices. On basis of documents issued and declarations made by the Commission, along with the case law of the European Courts, it may be affirmed that the competition rules aim primarily at enhancing consumer welfare. However, it appears that, when enforcing those rules, competition authorities focus rather on the protection of the competitive process and structure as a means of indirectly ensuring consumer interests.

1. Main objective of EU competition law: protection of consumers

Consumer welfare is at the heart of competition policy and constitutes the standard the Commission applies when assessing mergers and infringements of the Treaty competition rules, namely Article 101 and 102 TFEU. This was, in particular, highlighted by the former Commissioner Neelie Kroes who maintained that:

> "Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources. "[111]

The aim of the Commission's enforcement activity is hence to prevent firms from adversely affecting consumer welfare through their conduct and to ensure their act for the benefit of consumers.[112]

Practices that provide benefits to consumers are consequently unlikely to be condemned by the Commission. Restrictive conduct that may otherwise violate the competition rules may indeed be

[111] N.Kroes, *Delivering better markets and better choices,* Speech/05/512, European Consumer and Competition Day, London, 15 September 2005, available at: http://europa.eu/rapid/press-release_SPEECH-05-512_en.htm

[112] See: Commission Guidelines on the application of Article 81(3) of the Treaty (Text with EEA relevance), O.J. C 101 of 27/04/2004, at 13, noting that the objective of Article 101 TFEU "is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers". See also: Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 102 of the EC Treaty to abusive exclusionary conduct bye dominant undertakings (Text with EEA relevance), O.J. C 45/7 of 24/02/2009, at 19, which says that "The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anticompetitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice".

exempted if it contributes to the well-being of consumers.[113] In the overall assessment of the foreseeable impact of a practice on the market, the restrictive but also the positive effects of the practice in question are taken into account and balanced against each other in order to determine the net effect on consumers. In fact, restrictive practices can be deemed on balance pro-competitive only if the resulting benefits are passed on to consumers and at least compensate them for any negative impact caused by the restriction. Even though some restrictions appear beneficial to consumers in the short-term, they may nevertheless be considered to jeopardize the long-term interests of the latter due to their significant distortive effects on competition. In such a case, the practice will not be upheld if the potential negative impact on consumers caused in the future by such restriction is likely to outweigh the short-run benefits consisting for example of lower retail prices. Among those restrictive practices which bring about benefits to consumers only in the short-term, we can mention buyer cartels, predatory pricing or fidelity rebates, to name but a few.[114]

Even though consumer welfare constitutes the ultimate goal of EU competition law, the direct effect a practice may have on consumers is not necessarily the metric used to assess business conduct. Consumer harm is in fact neither a sufficient nor a necessary condition to find a violation of the competition rules. Accordingly, conduct that has an adverse impact on consumers may not be found anticompetitive where no harm to competition is established. Practices such as misleading information or confusing marketing are indeed more likely to be dealt with under consumer protection policy.[115] On the other hand, a firm's behavior may violate the Treaty provisions on

[113] See Article 101(3) which makes the prohibition in Article 81(1) inapplicable to agreements or categories of agreements that contribute to the improvement of the production or distribution of goods, or promote technical or economic progress, that pass a *fair share of the benefits to the consumers*, and do not impose restrictions that are not indispensable for achieving these benefits or afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question. See also: Guidelines on the application of Article 81(3) of the Treaty, *op.cit.* and Guidance on the Commission's enforcement priorities in applying Article 102 of the EC Treaty, *op.cit.*, at 28-31.

[114] Buyer agreements fixing lower prices, quantities or allocating sources of supply are prohibited even though they may lead to lower consumer prices as such arrangements eliminate the participants' autonomy in strategic decision-making. On that matter, see: Part II, Chapter 1, Section I, Point B, 1, a). With regard to predatory pricing, provided that the price fixed by a dominant firm is low enough to be considered predatory, it will be concluded that the firm abused its dominant position, regardless of whether the firm in question has a realistic chance of recouping its losses. Concerning fidelity rebates, those practices are seen as impeding competitors' access to the market leading to a potential reduction in consumer choice in the long-term. Lower prices enjoyed by some loyal consumers are therefore not sufficient to compensate the harm caused by the restriction on competition.

[115] P.Akman, *Exploitative abuse in Article 82 EC: Back to basics?,* CCP Working Paper 01/09 (2009), at 32, available at: http://www.uea.ac.uk/polopoly_fs/1.105848!ccp09-1.pdf Even though exploitative abuses are included in the ambit of Article 102 TFEU, unfair practices are hardly condemned under that provision unless additional harm, in the form of restriction on parallel trade or discrimination on the ground of nationality for example, is established. See: I.Haracoglou, *Competition law, consumer policy and the retail sector: the systems' relation and the effects of a strengthened consumer protection on competition law,* 3 The Competition Law Review 175 (2007). Concerning excessive prices, the case law shows that the Commission and the European Courts have mostly addressed such practices in markets where entry could not be expected, such as in case of

competition despite the absence of direct consumer harm. In different cases, the Court of Justice has indeed pointed out that, for a finding that a practice is anticompetitive, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price.[116] In fact, EU competition enforcers refuse to base their assessment on the direct harm a firm's conduct causes to consumers because they consider that the latters' interests in the medium to long term is best protected through protection of the competitive process and structure.

2. Protection of the competitive process as a means of enhancing consumer welfare

The primary concern in competition cases is to protect the structure of competition while proof of direct harm to consumers is generally not considered necessary. The Commission asserted that:

> "[The Treaty] does not require it to be demonstrated that the conduct in question had any actual or direct effect on consumers. Competition law concentrated upon protecting the market structure from artificial distortions because by doing so the interests of the consumer in the medium to long term are best protected".[117]

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legal monopoly. See for examples: *General Motors Continental,* Case IV/28.851, Commission Decision of 19 December 1974, annulled on appeal by the Court of Justice (Case 26/75, *General Motors Continental NV v Commission* [1975] ECR 1367); Case 30/87, *Corinne Bodson v SA Pompes funèbres des regions libérées* [1988] ECR 2479; Joined cases 110/88, 241/88 & 242/88, *François Lucazeau and others v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others* [1989] ECR 2811; *Deutsche Post AG – Interception of cross-border mail,* COMP/C-1/36.915, Commission Decision of 25 July 2001. The only exception is the *United Brands* case where the Court did not find excessive prices. (Case 26/76, *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207) On the EU experience on excessive pricing, see: OECD, Working party No.2 on competition and regulation, Excessive prices, document submitted by the European Union, DAF/COMP/WP2/WD(2011)54, 17 October 2011, available at: http://ec.europa.eu/competition/international/multilateral/2011_oct_excessive_prices.pdf With regard to unfair practices consisting of discriminatory prices, infringements of the competition rules were only found where such practices were used to limit parallel trade (See for example: Case 226/84, *British Leyland Public Limited Company v Commission* [1986] ECR 3263) or, for example, where they were accompanied and rendered effective through other practices restricting parallel trade. (See for example: *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207) Unfair trading conditions were also found in violation of Article 102 TFEU where they involved an element of discrimination on the ground of nationality or residence (See for example: *1998 Football World Cup,* Case IV/36.888, Commission Decision of 20 July 1999) On price discrimination, see: D.Geradin & N.Petit, *Price discrimination under EC competition law: The need for a case-by-case approach,* GCLC Working Paper 07/05 (2005), available at: http://www.coleurope.eu/sites/default/files/research-paper/gclc_wp_07-05.pdf Those cases show that the objective of market integration, central in the European Union, is also taken into consideration in the enforcement of the competition rules. On the objectives of EU competition law, see: Part III, Chapter I, Section I.

[116] See for examples: Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission* [1973] ECR 215, at 26; Case 85/76, *Hoffman-La Roche v Commission* [1979] ECR 461, at 125; Joined cases C-501/06P, C-513/06P, C-515/06P and C-519/06P, *Glaxosmithkline Services Unlimited and Others v. Commission* [2009] ECR I-9291, at 63; C-8/08, *T-Mobile Netherlands BV and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, at 38-39.

[117] T-219/99, *British Airways v Commission* [2003] ECR II-5917, at 264. See also: Opinion Advocate General Kokott, delivered on 23 February 2006, C-95/04P, *British Airways plc v Commission* [2007] ECR I-2331, at 68.

The proof of harm to the competition process is therefore sufficient to establish a violation of the competition rules. The Commission and the European Courts in fact consider that any restriction on competition is likely to endanger consumer welfare in a longer-term perspective.

The concept of consumer welfare includes a large variety of elements ranging from low prices to product quality, diversity, safety as well as choice and innovation. It is assumed that the protection of those different factors cannot be properly guaranteed by a mere assessment of the direct and immediate effect of a firm's conduct on consumers. The potential impact of business practices on consumer interests such as quality, innovation or choice, is difficult or even impossible to assess immediately. It is indeed only in the longer-term that the positive/negative effects of some practices will appear on the market. This is why the standard governing the assessment of anticompetitive behavior is not the direct impact on consumers as such but rather the likely effect on the competitive process brought about by such behavior. The protection of a competitive business environment is essential for enhancing consumer welfare. Rivalry between competitors and openness of markets incite indeed companies to compete and innovate so as to provide better goods/services for consumers. Accordingly, the EU authorities focus on the effects on the competitive process to decide whether firms' conduct violates or not Article 101 or 102 TFEU.

Given the objective to protect the competitive process as a means of enhancing consumer welfare, one may wonder whether the exercise of buyer power is likely, in some circumstances, to impede the achievement of that objective.

B. CONTROVERSY ABOUT THE EFFECT OF BUYER POWER ON COMPETITION

Unlike the exercise of seller power which generally leads to direct negative outcomes for consumers through, for example, higher prices, the exercise of buyer power entails less straightforward consequences. As we have already noted, the presence of large buyers may entail both positive and negative effects on the markets.

1. Positive effects of buyer power

The presence of large buyers has raised few competitive concerns so far as the action of those players in the input upstream market has been deemed beneficial for end-users. Powerful buyers are indeed able to achieve efficiencies in their purchasing activities such as economies of scale or scope and are in a position to bargain effectively over price and quality. In addition, the exercise of buyer power is likely to deter or to counteract anticompetitive conduct in the upstream seller market (countervailing buyer power) by preventing any increase in price above the competitive level or by tempting suppliers into deviating from a collusive scheme. A large buyer can indeed make seller

cartels less stable as the offer of important orders to some of the participants creates great incentives to deviate from the collusive strategy.[118] As a result, assuming that lower prices negotiated upstream are passed on to consumers in the output market, competition authorities and courts have not attached a great importance to the issue of buyer power. That limited interest is attested by the nearly non-existent case law of the European Courts on abuse of buyer power as well as the different instruments adopted by the EU institutions which focus almost entirely on output market considerations.[119]

2. Negative effects of buyer power

When lower prices obtained by large customers do not constitute efficiency-related discounts but are only the result of the exploitation of buyer power through coercive means or market-prices manipulation, uncertainty arises about the effects of such exploitation on the competitive process. Where in the short-run large buyers' action in the input market may improve consumer welfare, in the long-term, it is likely, at best, to leave end-users unaffected. Different adverse effects may indeed arise from the exercise of buyer power.

First, if buyer power is combined with seller power in the downstream market or used to enhance such power, consumers will not necessarily benefit from the presence of large buyers as the latter will not be incited to pass on cost-savings to their own customers.

Second, consumers are not always allowed to share the benefits resulting from the pressure exerted by buyers in the upstream market. Indeed, the exercise of buyer power does not only translate into lower prices paid to suppliers but may also consist in, for example, transferring excessive risks or costs to the latter or coercing them to boycott rival buyers. These other concessions that powerful buyers may extract are yet less likely to directly benefit consumers.

Thirdly, large buyers' market power may also harm market participants in the up- and downstream markets. On the firing line are small suppliers who are forced to absorb the revenue loss and sometimes to live with a very low, if any, return on capital. The wealth transfer from sellers to buyers resulting from the exercise of market power may consequently lower the incentives of the former to invest in product quality and innovation to the detriment of consumers.

[118] R.INDERST & G.SHAFFER, *Buyer power in merger control,* ABA Antitrust Section Handbook: Issues in competition law and policy, W.D.Collins, ed., 2007, Chapter XX, at 18.

[119] See for example : Commission Notice on the definition of the relevant market, *op.cit.*; Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, O.J. L 24, 29.01.2004; Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings O.J. C 265 of 18/10/2008 ; Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings O.J. C 31 of 05/02/2004; Commission notice - Guidelines on Vertical Restraints, O.J. C 130 of 19/05/2010

Fourthly, excessive pressures exerted on sellers may generate additional costs that society will have to bear such as taxpayer-funded subsidies granted to farmers in order, among other things, to provide them with a reasonable standard of living.[120]

Finally, competing buyers are also affected by the presence of powerful buyers. Market power in the input market constitutes indeed a competitive advantage which is likely to reinforce the position of the latter in the output market. Obtaining lower prices or better contractual conditions cannot be seen as anticompetitive, even though this puts rivals at a competitive disadvantage in the downstream market. However, some practices used to exclude competitors such as exclusive dealings or price squeezes may in fact adversely affect competition and contribute to the emergence of seller power in the output market.

Given those potential benefits and harmful effects, one may wonder whether the exercise of such power might hinder the achievement of the objectives of EU competition law.

3. Buyer power and the objectives of EU competition law

If competition authorities equated competition injury with direct consumer harm, the exercise of buyer power would hardly fall within the scope of EU competition law. Under such an approach, any action taken against a buyer's conduct would indeed require the proof that the buyer in question has market power in the downstream market or used its buyer power to enhance its position in that market. [121]

However, as briefly developed above, the Commission and the European Courts do not focus on the direct impact on consumers, appearing generally through higher or lower prices in the output market, but on the effects of business practices on the competitive process. Price alone is indeed not a sufficient metric to protect the long-run interests of consumers.[122] As maintained by the former Competition Commissioner Neelie Kroes, the pro-consumer approach includes not only lowering prices but also protecting choice and quality.

> "For the Commission's part, competition policy is about more than lowering prices for consumers. Our effect on choice and quality is just as important. We must also consider

[120] W.S.Grimes, *op.cit.*, at 574.
[121] See for example: J.T.Rosch, *Monopsony and the meaning of "consumer welfare": A closer look at* Weyerhaeuser, 2007 Columbia Business Law Review 353 (2007)
[122] J.C.Berson, *Looking beyond efficiency : Applying the consumer-choice standard to agriculture,* 83 Temple Law Review 491, at 494 (2011)

> the benefits of more dynamic efficiencies associated with innovation and increased productivity."[123]

Under such a dynamic perspective of consumer welfare, the exercise of buyer power might raise concerns under competition law. Indeed, the transfer of gains from upstream sellers to buyers may have an adverse effect on the incentives of the former to invest in innovation or to continue performing their productive activity. This in turn would negatively impact consumers in the downstream market who might face in the longer-term reduced choices and lower quality product. In order to prevent or at least limit the emergence of such harmful impact, one may wonder whether competition law should not protect competition in the downstream but also in the upstream markets and as such protect all market participants who are made victims of anticompetitive conduct.

Among others, Gregory Werden defends that approach and considers that the lack of end-user harm does not preclude competition authorities from concluding to a violation of the competition rules. The main issue must instead be the protection of the competition process as a whole as it constitutes the best mean to enhance consumer welfare in the end. Whoever are the victims of an anticompetitive practice, such conduct is therefore to be condemned in order to prevent any market distortion.[124] Accordingly, in sell-side cases, competition authorities would focus on consumers while in buy-side cases suppliers' interests would mainly be taken into consideration. Consequently, where the competition rules may be enforced to prevent unfair transfer of surplus from consumers to producers, any undue transfer of wealth from sellers to buyers should give rise to similar concerns.[125] The protection of the competitive process would thus imply that all market participants are entitled to the benefits of competition when they buy or when they sell a product.[126] Instead of subjecting competition injury to the proof of consumer harm, competition authorities should infer consumer harm from injury to competition.

That approach would in fact be in line with some recent statements made by the EU institutions. For example, the Court of Justice maintained in different cases that the Treaty provisions are designed

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[123] Speech given by Competition Commissioner, Neelie Kroes, on *Competition and Consumer Welfare,* 21/10/2009, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/486&format=HTML&aged=0&language=EN. See also: R.H.Lande, *Proving the obvious: The Antitrust laws were passed to protect consumers (not just to increase efficiency),* 50 Hastings Law Journal 959 (1999)

[124] G.J.Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light,* 74 Antitrust Law Journal 707, at 735 (2007)

[125] See: W.S.Grimes, *op.cit.,* at 569 and J.B.Kirkwook & R.H.Lande, *The fundamental goal of antitrust: Protecting consumers, not increasing efficiency,* 84 Notre Dame law Review 191 (2008)

[126] A.A.Foer, *mr.Magoo visits Wal-Mart: Finding the right lens for antitrust,* 39 Connecticut Law Review 1307, at 1332 (2007)

"to protect not only the immediate interests of individual competitors and consumers but also to protect the structure of the market and thus competition as such."[127]

As for the European Parliament, in a resolution of 2010, it called for "an expansion of European Competition Law beyond its current narrow focus on consumer welfare and concerns for low food prices".[128] This is in fact in line with the objective pursued by the Commission when enforcing the competition rules. The aim to safeguard a competitive environment in the EU in order to enhance consumer welfare requires protecting competition in all directions. Such an approach is indeed most likely to bring consumers all the benefits that fierce competition on the markets is supposed to offer, that is low prices, choice, quality, variety and innovation.

C. THE OPEN QUESTION ON HOW TO DEAL WITH THE EXERCISE OF BUYER POWER

The exploitation of buyer power has rarely given rise to antitrust action in the European Union. One could hence assume that buyer power is not an issue in EU law. However, it is clearly recognised that some buyers detain significant market power in the upstream buyer markets and that the exercise of such power may harm other market participants. The question is hence whether action against excessive buyer power should take place within the ambit of competition law.

1. Buyer power: an issue but not addressed in EU law

The EU competition rules are generally enforced against seller practices. Very few competition cases deal with the issue of buyer power and its consequences on the markets.[129] The lack of decisions and interests about that issue in the early years of EU competition law is mostly explained by the fact that customers were assimilated to atomistic consumers devoid of market power. The attention of competition authorities was hence rather focused on the potential misuse of market power form the selling side only.

The question is why today, while the exercise of buyer power has been recognized in different sectors, buyer practices seem to remain a side-issue in competition law cases. The answer probably lies in the controversies about the effects of buyer power on competition. As buyer power does not seem at first sight contrary to the primary objective of the Commission, which is to maximize welfare of consumers, no consensus has emerged on the necessity and on the way to intervene against some

[127] See for example: C-8/08, *T-Mobile Netherlands BV and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, at 38.
[128] European Parliament resolution of 7 September 2010 on fair revenues for farmers : A better functioning food supply chain in Europe, 2009/2237(INI), at 30.
[129] See Part II, Chapter 1, Section I, Point B where the few cases involving the enforcement of Article 101 and 102 TFEU against powerful buyers are examined. In fact, the issue of buyer power has mostly been addressed in merger cases. See below, Chapter 2, Section 1 and Part II, Chapter 1, Section II.

buyers' practices. Indeed, except in case of monopsony power combined with seller power in the downstream market, straightforward harmful effects on consumers have hardly been noted. On the contrary, buyer power is generally considered to bring about positive effects in the short-term, in particular through lower prices. Consequently, competition authorities are rather reluctant to take the risk of deterring conduct that creates such benefits for consumers.

However, as mentioned above, the exercise of buyer power might, in some circumstances, affect the long-term interest of consumers. Even though there is still room for disagreement about the need to intervene against powerful buyers, a rising number of national authorities are taking measures to restore a certain degree of fairness in business relationships.[130] At EU level, authorities seem also to consider that, in some circumstances, imbalances of power between the different players may lead to consequences going further than a mere inequitable distribution of profits. Various investigations have been carried out to assess, among other things, the impact of buyer power on the markets as well as to determine whether and which action at EU level is needed.[131]

2. Buyer power: an issue to be addressed within or outside EU competition law ?

It is undeniable that buyer power in the hands of a small number of firms causes harm to some other market participants. However, it remains to identify whether the effects of the exercise of buyer power run counter to the objectives of EU competition law. If so, the issue of the ability of competition authorities to address anticompetitive buyer practices under the current competition rules is to be raised.

a) Unfair versus anticompetitive practices

The Commission draws a distinction between, on the one hand, anticompetitive business practices which distort competition and, on the other hand, unfair practices resulting from contractual imbalances but which do not fall under the scope of EU competition rules because they do not entail any anticompetitive effect on the markets.[132]

On the buy-side, unequal bargaining power is present whenever the buyer can "drive a hard bargain"; that is, can impose upon its contracting party terms and conditions that are deemed

[130] Various types of measures have In fact been implemented by national authorities ranging from new contractual laws to a code of conduct. Action taken at national level in different countries is examined in Part II, Chapter 2.
[131] See Part III, Chapter 2, Section I, Point A.
[132] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A better functioning food supply chain in Europe,* SEC(2009) 591 final, Brussels, 28/10/2009, at 5.

unfavourable by that other party.[133] Different factors enable a buyer to do so without risking that its supplier declines the proposed contract. For examples, the economic dependency of a supplier on its customer, the significant sunk costs already incurred by the seller to comply with the buyer's requirements or the high concentration in the buyer market are so many elements that strengthen a buyer's bargaining position.[134] The resulting unbalanced relationships between buyers and suppliers often lead to unfair contractual terms that may be undesirable from a social or political point view. However, provided that those terms do not restrict competition, the issue of unequal bargaining power and its consequences should be addressed outside the scope of competition policy. The competition rules are indeed not designed to protect weaker players in the supply chain but to ensure effective and undistorted competition on the markets to the ultimate benefits of consumers.

By contrast, buyer power is more likely to constitute a problem from the perspective of EU competition law. Such power is deemed to exist "if a market is concentrated to such an extent that a particular buyer has not only power over a particular supplier but over suppliers in general".[135] In fact, the Commission considers that buyer power may have either beneficial or adverse effects on consumers. On the one hand, when powerful buyers exercise countervailing power and pass on the better prices and terms obtained from suppliers to consumers downstream, buyer power is seen as a positive strength for consumers. On the other hand, if a buyer has significant market power in the upstream buyer market combined with significant market power in the downstream seller market, savings are less likely to be passed on to consumers. In such a case, competition concerns may arise. Excessive buyer power may also raise competition concerns if a buyer used its position in the upstream market to foreclose (potential) rivals to the detriment of consumers.[136] In addition, the Commission points out that, in specific circumstances, the exercise of buyer power may induce suppliers to invest less in product quality and innovation due to the low profitability of such investment. This is hence likely to adversely affect consumers as the concept of consumer welfare encompasses not only low prices but also diversity, quality and innovation.[137]

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[133] Commission Staff working document, *Competition in the food supply chain,* SEC(2009) 1449, Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Economic Committee, and the Committee of the Regions, *A better functioning food supply chain in Europe,* COM(2009)591, at 17.

[134] *Ibidem.*

[135] European Competition network, ECN activities in the food sector – Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector, May 2012, at 41, available at: http://ec.europa.eu/competition/ecn/food_report_en.pdf

[136] European Competition network, ECN activities in the food sector – Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector, May 2012, at 41, available at: http://ec.europa.eu/competition/ecn/food_report_en.pdf

[137] Commission Staff working document, *Competition in the food supply chain, op.cit*., at 18.

b) Buyer power and competition law

Competition authorities mostly refer to the concept of unequal bargaining power when dealing with the issue of unfair trading practices whereas the potential negative impact of some buyer practices on competition seems to be disregarded or at least underestimated. However, in some sectors, such as in the food retail industry, a small number of large buyers are able to exert significant market power, not only over one particular contracting party, but over suppliers in general, including over some big food processing companies. Particular attention should therefore be paid by EU institutions on such exercise of buyer power and its effects on competition in the Union.

Throughout this thesis, different arguments will be set forth in order to determine whether the exercise of market power over producers impedes the achievement of the competition goals or, at least, is likely to bring about in the longer-term such harmful effects. Where a buyer' practices have a negative impact on suppliers in general but also on other market participants, it can be assumed that the buyer in question does not only benefit from unequal bargaining power with its suppliers but enjoy in fact significant buyer power whose exercise may adversely affect competition.

3. Buyer power: a need for specific criteria?

As soon as a company has sufficient market power to restrict or distort competition through its conduct, either by affecting prices or by reducing product quality, innovation or consumer choice, it should be subject to supervision of competition authorities and to the competition rules. Presuming that some practices used by powerful buyers are likely to cause competition harm, those firms' conduct should hence be scrutinized by competition enforcers. However, the EU competition rules turn out to be hardly enforceable against buyer practices as it will be examined below.[138] It appears indeed that the criteria to be used when enforcing Articles 101 and 102 TFEU are ill-adapted to tackle effectively the issue of buyer power, especially with regard to the market share thresholds applicable to assess dominance.

On that matter, one may consider that, if the buy-side of the market is protected equally to the sell-side, there is no reason to treat buyer power differently from seller power.[139] The same standards and criteria developed in the Commission guidelines and by the European Courts should hence be applied to buyers' conduct. This is in fact the approach the Commission and most national competition authorities have followed so far. However, if a firm or a group of firms restricts or distorts competition through its conduct but nevertheless shrink from the application of the

[138] See, Part II, Chapter 1, Section I.

[139] See : M.Schwartz, *Should Antitrust Assess Buyer Market Power Differently than Seller Market Power?,* Comments presented at DOF-FTC Workshop on Merger Enforcement, Washington DC, February 17, 2004.

competition rules because it does not meet the criteria of market power defined by the Commission, one may legitimately wonder whether the specificities attached to the exercise of buyer power should not call for a different treatment. Those specificities concern, in particular, the degree of buyer power likely to give a particular buyer the ability to behave independently on the markets. The concept of dominance as applied to seller power cases and the factors taken into consideration to assess such dominance, especially with regard to the market share threshold, may indeed not be accurate to determine from what point a buyer has sufficient market power to influence competition.

The need to define criteria specific to the exercise of market power on the buying side is particularly defended by Peter Carstensen who maintains that, if the concept of buyer power is often considered as the mirror image of seller power, the mirror must be seen as the one in a carnival fun house which distorts the viewer's image because buyer power presents different characteristics with regard to its sources, uses and impact.[140] He affirms in particular that the exploitation of buyer power may occur from a substantially lower market share than is usual in seller power cases.[141] The existing metrics used to assess the dominant position of sellers may therefore not be suitable to effectively take action against buyers whose conduct might adversely affect competition such as in the grocery retail sector where, despite a relatively low market share in the input market in comparison with the usual threshold applied in dominance cases, some retailers are nevertheless able to impede effective competition. The use of such different metrics on the buying side will probably lead to the finding of buyer power where it was maybe not expected. Take for example a situation where both buyers and upstream sellers are concentrated and symmetric. If the firms in question have relatively similar market shares in their respective market, say around 30%, one could presume that this is a case of countervailing power where both buyers and sellers are able to exercise market power over their business partners. However, the assessment of buyer power under specific criteria might lead the competition authorities to conclude that, in view of the particular circumstances of the case, buyers detain significant market power over their suppliers so that the latter are in fact faced with a lack of bargaining strength. As a result, the case would fall into the category of buyer power and, if it is concluded that such market power is sufficient to enable the buyer in question to behave independently, the prohibition on abusive conduct should apply. The main issue is therefore to determine which factors, peculiar to market power on the buying side, is likely to give a firm the

[140] P.C.Carstensen, *Buyer power, competition policy and antitrust, op.cit.,* at 273.

[141] See for examples : P.C.Carstensen, *Buyer Power and merger Analysis – The Need for Different Metrics,* Statement prepared for the Workshop on Merger Enforcement, Washington DC, February 17, 2004.
And P.C.Carstensen, *Buyer cartels versus buying groups: Legal distinctions, competitive realities, and antitrust policy,* 1 William & Mary Business Law Review 1 (2010).

ability to act without regard to the other market participants and thereby to affect competition through its conduct.

Extension of the scope of application of Article 102 TFEU would in fact enable competition authorities to act against all firms capable of influencing to an appreciable extent the conditions under which competition will develop. Such an approach would hence subject all firms meeting the definition of dominance given initially bye the Court of Justice to the rules of competition and thereby prevent any distortion on the markets.[142] A redefinition of the criteria used in dominance cases could hence be necessary on basis of the specificities of market power on the buy-side and on its impact on the markets, specifically regarding the market share threshold levels whereby business practices must be examined. This would prevent that conduct affecting competition goes unchecked because the buyers in question do not reach the threshold of 40% market share in the upstream buyer market.

Few Member States have addressed buyer power concerns through the enactment of specific criteria under the competition rules. In fact, most of them are trying to deal with that issue outside the scope of competition law by implementing new rules in contract law or soft law rules for examples. The diversity of actions undertaken at the national level again shows the lack of consensus about, on the hand, the effects of buyer power on the markets and on competition and, on the other hand, the way to address that issue. Action at the EU level could therefore pave the way for a common answer in the different Member states and thereby prevent that legislation discrepancies lead to potential competition distortion in the Union

D. CONCLUSIVE REMARKS

The objective of EU competition law is to promote consumer welfare through the protection of the competition process. Competition authorities are generally not concerned about powerful buyers as the latter are likely to obtain lower prices as well as better contractual terms from their suppliers and to pass on those savings to consumers. However, in light of all the aspects included in the concept of

[142] See: Case 85/76, *Hoffman LaRoche, op.cit.*, at 39. On that benchmark case, the Court of Justice defined the dominant position as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers. Such a position does not preclude some competition, which it does where there is a monopoly or a quasi-monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment."

consumer welfare, such as choice, quality or innovation, some argue that the exercise of buyer power may, in some circumstances, impede the achievement of EU competition goals.

Some buyer practices are indeed likely to bring about (long-term) negative effects on the smooth functioning of the supply chain and should, as a result, fall within the scope of EU competition law. In such a case, the enforcement of the competition rules against anticompetitive buyer practices must not be neglected. As regards unfair trading practices which do not distort or restrict competition on the markets, European and national authorities can resort to other policies to protect firms harmed by such conduct.

If it is concluded that, indeed, buyer practices may harm competition, it may then appear that the criteria used to enforce the competition rules are not appropriately designed to tackle the issue of buyer power. It is indeed argued that buyers with a relatively low market share are able to distort competition through their conduct. Specific factors could therefore be needed to define dominance in the upstream buyer market in order to give competition authorities the power to act against all practices likely to harm the competitive process. If new criteria are to be defined in buyer power cases, they should be at EU level so as to ensure undistorted competition in the Union.

The game of competition includes fierce trading and negotiation rules which are essential in a free market environment and entail benefits for consumers. Not all actors are therefore able to continue playing and that must be considered as part of the game. The objective of scrutinizing carefully buyer power practices is hence not to protect weaker and inefficient actors from competition but rather make sure that each market participant has the opportunity to operate in a competitive environment. The distinction between effects resulting from superior efficiency and effects resulting from abusive conduct is sometimes slim. Guidelines drawn up at EU level would therefore help competition authorities as well as all market participants in the Union to assess and ensure compliance with the competition rules.

CHAPTER 2- INDUSTRIES AND SECTORS CHARACTERIZED BY STRONG BUYER POWER

As pointed out in the First Chapter, buyers are, in some circumstances, able to exercise market power over their suppliers in the upstream buyer market. Among the factors that give a firm buyer power, we highlighted, in particular, the lack of alternatives available for suppliers and the large share represented by that firm in suppliers' total sales.

This Chapter provides some examples of sectors with a strong buying side so as to illustrate how buyer power arises and how it may be exerted. The analysis of these sectors will in fact show whether the theoretical elements with regard to the sources of buyer power developed in Chapter 1 can be observed in practice. That analysis will also put forward additional factors or circumstances that are likely to create or enhance buyer power.

Different markets in the hand of public authorities present elements in favor of buyers due to the limited number of customers but also to the particular procurement procedure used by those customers. In the private sector, we will refer, among others, to the car industry where buyers resort to different strategies to reinforce their position in the upstream buyer market and put further pressure on suppliers.

In the grocery supply chain, some processing companies are considered to be strong buyers facing weak producers. However, buyer power held by those companies appears lower or even insignificant compared to buyer power of large supermarket chains. Given grocery retailers' high degree of market power and the increasing attention that is being drawn on some practices used by those buyers, a particular emphasis will be put on the retail grocery sector in Section II of this Chapter. The characteristics of that sector will be examined as well as the different factors that give rise to a strong buying side and incite retail chains to effectively exploit their buyer power in the upstream procurement market. Various practices can be viewed as the expression of grocery retailers' significant buyer power. We will provide examples of such practices and underline the possible effects they may have on the markets. While some consider that those practices are harmless, others are concerned about their potential negative impact on competition and consumers.

SECTION I – BUYER POWER IN VARIOUS INDUSTRIES

Buyer power is exercised in various industries and by different types of firms. In this chapter, we will refer to sectors characterized by a strong buying side and point out factors that enable and incite buyers to exercise market power over suppliers in different buyer markets.

The selection of those sectors is based on merger decisions where the Commission assessed the degree of countervailing buyer power exercised by the merging parties' customers. The issue of buyer power had indeed mainly been examined in merger cases. The Commission, in its assessment of the compatibility of a concentration with the Common Market, takes into consideration the competitive pressures exercised on the new entity, not only by competitors but also by their customers. Where the latter possess sufficient countervailing buyer power, it may be considered that the merged entity, even if it holds a high market share in the relevant market, will not be able, post-merger, to significantly impede effective competition.[143] The degree of such competitive constraint coming from customers depends on the characteristics of the markets on the selling and on the buying side. In some cases, buyers' bargaining strength may constitute a decisive factor in the appraisal of a merger between upstream firms since it is likely, by itself, to mitigate or even neutralize the ability of the new entity to raise prices.

As we have already noted in the first chapter, when exercised as countervailing power, market power in the upstream buyer market is unlikely to raise competition concerns. Quite the opposite, it is considered to be procompetitive as powerful buyers are able to prevent concentrated sellers from exploiting their market power. Therefore, in this chapter, the potential adverse impact buyer power may entail on the markets is not addressed. When examining the existence of countervailing power exerted by customers in merger cases, the Commission indeed focuses on the positive effects such power may have on the markets by subduing the merged entity's market power.

The examination of the demand-side structure is therefore fully part of the Commission analysis in the enforcement of the Merger Regulation.[144] The assessment so carried out in merger cases provides valuable information about factors likely to give rise to buyer power. In addition, when reading the numerous decisions in which customers were recognized to enjoy a certain degree of buyer power, we cannot but notice that some sectors seem to be particularly characterized by a strong buying side. As such, public bodies, automotive manufacturers, retailers and well-known companies manufacturing consumer goods are recurring players, mostly mentioned as exerting competitive pressures on their suppliers. Highlighted in fewer decisions but nevertheless important,

[143] See: Guidelines on the assessment of horizontal mergers, *op.cit.*, at 64-67.
[144] Council Regulation (EC) No 139/2004 on the control of concentrations, *op.cit.*

we can also mention buyer power of electronics manufacturers, oil and gas companies, paper producers and publishers, as well as some isolated powerful private companies. Other customer-bases may be likely to exercise such countervailing buying power as well but, since they have not been subject to the Commission assessment in merger decisions or have only been mentioned in one or two isolated cases, we will not dwell on those categories of buyers.[145]

The characteristics of the sectors examined below and the analysis of the structure of each product market on the buying and on the selling side will help to determine the sources of buyer power common or specific to those different industries.

A. PUBLIC SECTOR: GOVERNMENT AND PUBLIC BODIES

As mentioned in the introduction, the merged entity's market power is assessed by taking into account the bargaining strength on the buying side. We cannot but notice that, when that demand-side is mainly composed of government Ministries or other public bodies, the Commission generally considers that those customers are able to exercise a certain degree of buyer power. The extent of such countervailing power varies depending on different factors such as the number of buyers, their knowledge of the cost structure in the upstream markets or their ability to easily switch to alternative suppliers. A common feature characterizing the different public entities mentioned below is the bidding nature of their procurement process, which is generally imposed on them by law. In the first part of this section, the specificity of those tendering procedures is addressed in order to understand their impact on the balance of power between buyers and suppliers. The second part takes a closer look at the different markets in which the Commission has already recognized, in one or several decisions, the presence of powerful buying public entities.

[145] Different categories of customers were recognized, at least in one merger decision, to exercise buyer power towards their suppliers. See for examples: *Vesuvius/Wülfrath,* Case No IV/M.472, Commission Decision of 5 September 1994. Steelmakers belonging to the major European steel groups were deemed to enjoy a large amount of buyer power in the market of refractory products; *GEC Alsthom/Cegelec*, Case No IV/M.1164, Commission Decision of 15 May 1998 and *BP Amoco/Castrol,* Case NO IV/M.1891, Commission Decision of 18 May 2000. The markets involved in those decisions were respectively the market of marine propulsion systems and the market of marine lubricants. The Commission held that recent consolidation in the shipping market and the emergence of buying consortia concentrating demand have increased ship-owners leverage to gain concessions from their suppliers and flexibility in honouring their supply contracts; *Emerson Electric/Ericsson Energy Systems,* Case No IV/M.1854, Commission Decision of 15 March 2000 and *Intracom/Siemens/STI,* Case No IV/M.2851, Commission Decision of 10 February 2003. Buyer power of telecom operators was recognized in the procurement market of telecom equipment such as transmission systems or access network equipment; *Apollo/Akzo Nobel IAR,* Case No COMP/M.4071, Commission Decision of 29 May 2006. Ink manufacturers were considered as exerting considerable buyer power on the resin manufacturers. This decision was confirmed by the General Court. See: T-282/06, *Sun Chemical Group BV, Siegwerk Druckfarben AG and Flint Group Germany GmbH v Commission* [2007] ECR II-2149; *Berkshire Hathaway/Converium/Gaum/JV,* Case No COMP/M.3035, Commission Decision 28 February 2003. In this decision, insurers were considered as able to exercise sufficient pressures on management services providers.

1. Special features of bidding markets

In different decisions, the Commission has maintained that, in bidding markets, high market share is not indicative of a supplier's long-term market power since that position can substantially vary depending on the outcome of a single tender.[146] As a consequence, even though a merged entity holds a very high market share at a given time, that single element will not be sufficient to constitute a possible impediment to effective competition due to the likely volatility of that position. This is particularly true in markets where contracts are very important in value and duration like in defence markets for example.[147] In such cases, suppliers have strong incentives to bid aggressively for each contract considering what is at stake. Furthermore, the purchase of products through competitive biddings enhances customers' buyer power since they can compare all competitors' respective offers and negotiate intensively with all those bidders before choosing their supplier.[148] Therefore, the bidding nature of the markets leads to fierce competition on the selling side and gives customers the means to exercise pressures in order to obtain quality bids at lower prices. In that context, the very high combined market shares of the merging parties, provided that some competition remains in the upstream markets, does not necessarily reflect a leading position which is likely to affect the competition process.

2. Buyer's markets in public sectors

Public-sector markets are generally buyer's markets characterized by a stronger buying side. When State bodies constitute the only or the largest purchasers of a particular product, they are indeed, in most cases, able to exercise buyer power over their suppliers. The purchase of products through public tenders and the fact that those buyers account for a very large part of the total demand contribute to the emergence of a non-negligible bargaining strength.[149] The degree of that buyer power depends in particular on the product involved and on the market structure of both the up- and downstream markets. The Commission has noted, through the enforcement of its merger policy, the existence of public entities' buyer power especially in the following different markets.

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[146] See for examples : *Philips/Marconi Medical Systems,* Case No IV/M.2537, Commission Decision of 17 October 2001, at 30 and *SHV/ERIKS,* Case No COMP/M.5563, Commission Decision of 31 July 2009, at 33. This particular case concerned tender launched by public hospitals. The fact that market share cannot be considered as an absolutely faithful indicator of market power has also been highlighted in other decisions where buyers were private entities, such as in the car industry. See below, Point B.

[147] *Thomson-CSF/Racal Electronics,* Case No IV/M.1413, Commission Decision of 15 March 1999, at 31.

[148] *EADS DS/Atlas/JV,* Case No COMP/M.5936, Commission Decision of 28 October 2010, at 92.

[149] Take for example, the purchase of deicing salt by public road authorities. Such product is normally purchased in very large quantities on an annual basis and mostly by public authorities. See: *K+S/Solvay/JV,* Case No COMP/2176, Commission Decision of 10 January 2002.

a) Defence and related security markets

The characteristics of the military markets are such as giving buyers of defence products strong market power over suppliers. In some cases, the Commission authorized a merger between suppliers of defence equipment although the parties held a combined market share of up to 80%.[150] The main argument leading the Commission to clear the operation was the presence of a considerable countervailing buying power. Different elements indeed enable customers to exert pressure in upstream buyer markets and thereby to counteract even a significant increase in market power on the selling side.

Firstly, suppliers of military devices are faced by a single customer in each Member State, namely the Ministry of defence. Such monopsony power severely restricts their scope of action since they are highly dependent on the decisions of those Ministries.[151] Secondly, military supplies are procured through bidding markets, involving a qualification process based on the specifications defined by the Ministry of the State concerned.[152] As mentioned above, the launch of public tenders enables customers to exercise additional pressures on the bidding suppliers and ensure fierce competition between them. Thirdly, buyer power may effectively be exercised since alternative sources of supply are available. Each Ministry of defence is indeed able to switch to other national producers or to call for new tenders at the European or even at the international level.[153] Finally, a specificity of defence markets is the key role played by the Ministry of defence in the granting of export licenses for military products.[154] Based on that competence, the Government has thus additional means to negotiate lower prices and to prevent the merged entity from acting independently.

Those various elements enable the Ministries of defence to exercise significant buyer power. It is therefore unlikely, as exemplified in the Commission decisions on that matter, that a merger between suppliers of military devices would entail anticompetitive effects.

[150] *Saab/Celsius,* Case No IV/M.1979, Commission Decision of 4 February 2000, at 36.
[151] *Thomson/Pilkington,* Case No IV/M.0086, Commission Decision of 23 October 1991, at 29 and *Saab/EMW,* Case No COMP/M.4288, Commission Decision of 31 August 2006, at 57. See also: *Safran/SNPE Matériaux énergétiques/Regulus,* Case No COMP/M.6104, Commission Decision of 30 March 2011.
[152] *EADS,* Case No IV/M.1745, Commission Decision of 11 May 2000, at 169.
[153] *SNPE/Saab/Patria/JV (Eurenco),* Case No COMP/M.3205, Commission Decision of 2 October 2003, at 38. See also: *HDW/Ferrostaal/Hellenic Shipyard,* Case No COMP/M.2772, Commission Decision of 25 April 2002, at 15.
[154] *Saab/Celsius*, *op.cit.*, at 36.

b) Aerospace markets

For different devices, such as institutional civil satellites, the European Space Agency acts as a monopsonist buyer in the European Union.[155] In other product markets, suppliers remain subject to a limited number of sophisticated customers.[156] As in the defence industry, the aerospace markets are therefore presumed to be buyer's markets where considerable countervailing buyer power is likely to be exercised.

In various decisions, the Commission pointed out the ability of aerospace customers, especially the European Space Agency, to closely scrutinize and monitor the suppliers' costs structure. Such knowledge on the pricing and supply conditions in the upstream markets enables those customers to detect uncompetitive prices possibly imposed by suppliers and to put significant pressure on the latter in order to avoid any unjustified price increase or other unacceptable contractual conditions.[157]

However, the exercise of buyer power is intrinsically linked to the availability of alternative sources of supply. Even a monopsonist would be deprived of its bargaining strength if it cannot credibly threat to switch to another supplier. That is why the Commission considers that, if following the merger, the European Space Agency would be confronted to a single source of supply, it would no longer have sufficient countervailing power to prevent the merger from giving rise to serious competition concerns in the product market in question.[158] Without outside options, the Commission is therefore unlikely to recognize the existence of market power on the buying side.

c) Medical devices and pharmaceutical markets

Public hospitals and university clinics are also sophisticated buyers with considerable buyer power. Among the factors giving rise to that power, some of them have already been mentioned, such as the bidding nature of the markets, the existence of credible alternative suppliers and the absence of switching costs.[159]

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[155] *Alcatel/Finmeccanica/Alcatel Alenia Space & Telespazio,* Case No COMP/M.3680, Commission Decision of 28 April 2005, at 74.
[156] *EADS, op.cit*., at 117.
[157] *MMS/DASA/Astrium,* Case No IV/M.1636, Commission Decision of 21 March 2000, at 64. The buyers' experience and control over the procurement markets is likely to prevent not only non-coordinated effects from occurring but also any attempt of collusion between the merged entity and its competitors as well as vertical foreclosure. See: *Alcatel/Finmeccanica/Alcatel, op.cit.*, at 115.
[158] *Alcatel/Finmeccanica/Alcatel, op.cit.*, at 87. Contrary to the market of institutional satellites, the market of radar altimeters was more concentrated on the selling side. The investigation showed that, post-merger, only one supplier would remain on the market. The Commission therefore did not accept the operation without undertakings since it would have removed all competitive constraints, coming from rivals and customers.
[159] *GE/Amersham,* Case No COMP/M.3304, Commission Decision of 21 January 2004, at 38.

In addition, other elements specific to that sector constitute important drivers of competition as well. Firstly, the ability of a supplier to offer highly innovative solutions constitutes an essential criterion for the hospitals' choice. Customers are therefore induced to switch to other producers should these offer machines with a better technological performance.[160] The possibility for competitors to leapfrog on the basis of technological innovation makes the market position of the current suppliers unstable. Competing suppliers' ability to manufacture new or improved products constitutes indeed a strong incentive for hospitals to switch to the most innovative firms. The second element related to the medical sector is the disciplinary effect that tight reimbursement regimes and hospital budgets have on product prices.[161] The Commission has indeed noticed that, in many cases, facing increasing budget-restraints, hospitals require their suppliers to offer improved medical equipment for the same price. The ability to obtain lower prices or similar prices for higher quality products is an indication of the effective exercise of buyer power. Finally, the existence of hospital purchasing groups enhances buyer power and enables the members of those groups, through centralized buying procedures, to negotiate lower prices.[162]

However, in some circumstances, hospitals and university clinics are not in a position to exercise market power over their suppliers. Indeed, if technical specifications requested by those customers may enhance innovation and competition in upstream markets, they may also considerably reduce the number of available suppliers. As mentioned above, hospitals primarily value the quality of the products. When they make a choice, winning bids are generally allocated not to the lowest-price bidder, but to the supplier that best meets the hospitals' technical specifications. The problem arises when those requirements become more and more complex and demanding for manufacturers so that only a few of them are able to meet all the specifications. As a result, the limited choice faced by buyers significantly impairs their ability to exercise countervailing power since the purchase cannot, in most cases, be delayed for a substantial period of time.[163] The Commission therefore pays attention to the number of alternatives left after a merger in the upstream market and will not accept the transaction if it substantially reduces that number.[164]

[160] *Philips/Marconi Medical Systems,* Case No IV/M.2537, Commission Decision of 17 October 2001, at 43.
[161] *Ibid..,* at 41.
[162] *Apax/Mölnlycke*, Case No COMP/M.3816, Commission Decision of 15 June 2005, at 47. See also: *Tyco/CR Bard,* Case No IV/M.2505, Commission Decision of 4 October 2001.
[163] *GE/Instrumentarium,* Case No COMP/M.3083, Commission Decision of 2 September 2003, at 208.
[164] *Glaxo Wellcome/Smithkline Beecham,* Case No IV/M.1846, Commission Decision of 8 May 2000, at 122-123. Although the Commission recognized that hospitals enjoy a certain degree of buyer power, it considered that the transaction would reduce the number of competitors from three to two, bringing together the two leading producers of anti-emetics, and would therefore remove the possibility to negotiate discounts post-merger.

Although it was maintained above that market shares do not constitute a strong indication of the merged entity's market power in bidding markets, in some cases, that assumption is no longer accurate. Indeed, when the number of tenders for a particular medical device is fairly high and the value of each contract is relatively low, the fact that purchases go through a tendering procedure does not fundamentally affect the value of market shares.[165]

d) Electricity markets

Despite the gradual liberalization of the electricity markets in the European Union, in most Member States the demand for electricity products consists mainly of the national operators such as ENEL in Italy and EDF in France.[166] Because those customers account for a very large part of domestic demand, suppliers are heavily reliant on national electricity utilities. The loss of such an important trading partner would indeed entail serious financial consequences.[167] The particular features of the bidding procedures used by those national operators also tilt the balance of power in favour of buyers as, in most cases, such as for the procurement of power cables, tenders take place infrequently and the value of each individual contract usually is significant.[168]

Due to their substantial purchasing power, national electricity operators have not only the possibility to switch to other existing suppliers but also to actively develop new supply sources through strategic allocation of orders.[169] The sponsor of new entry, or the threat to do so, reinforces the bargaining position of those powerful buyers. They are therefore able to use that power to obtain favourable conditions, such as the renegotiation of framework contracts when they feel that market prices have decreased during the contract term.[170]

Where former state monopoly entities in the electricity sector are, in many countries, still able to exercise substantial market power in the retail markets, those public bodies are very likely to also have the upper hand in the negotiations when acting on the buying side as suppliers can hardly find equivalent customers.

[165] *GE/Instrumentarium, op.cit.*, at 122. In this case, the procurement of perioperative patient monitors through a tendering procedure was not deemed to affect the value of market shares as a strong indication of the merged entity's market power.
[166] *Pirelli/BICC,* Case No COMP/M.1882, Commission Decision of 19 July 2000, at 70.
[167] *Pirelli/Siemens,* Case No IV/M.1271, Commission Decision of 30 September 1998, at 116.
[168] *Pirelli/BICC, op.cit.,* at 79.
[169] *Ibid*., at 76.
[170] *Ibid.*, at 75.

e) Railway markets

Customers for rail technology products are not only the national railway company but also a large number of local transport companies. The importance of bargaining power of those buyers is different and leads therefore the Commission to distinguish the markets for mainline railways from those for local railways.[171] In the procurement markets for mainline transportation products, the national operator, as a monopsonist, is in position to exercise buyer power over its suppliers and to obtain competitive offers.[172] The situation is nevertheless very different for local transport companies when they buy rail technology products for local railways. Much smaller in turnover and in terms of the size of their orders, those companies are to a great extent dependent on their suppliers and in most cases unable to exercise sufficient countervailing power.[173]

Although their degree of market power varies from one market to another, public entities are likely to hold, in many sectors, significant buyer power, contributing thereby to maintaining fierce competition in the upstream seller market. As far as the ability to exercise countervailing buyer power is concerned, private companies are yet not left behind, especially in the automotive industry, in the retail sector and in the food processing sector.

B. CAR MANUFACTURING INDUSTRY

Buyer power of car manufacturers has been highlighted by the Commission in many merger decisions. Those buyers are able to exercise significant bargaining power towards most of the suppliers of automotive components. To name but a few, car companies have been recognized as using their buyer power when purchasing coatings[174], anti-freeze products[175], wiper blades[176], switches[177], braking systems[178], bearings[179], batteries[180], airbags and steering wheels[181] as well as rear mirror systems[182].

[171] *AAB/Daimler-Benz,* Case No IV/M.580, Commission Decision of 18 October 1995, at 109.
[172] *Ibid.,* at 99-100.
[173] *Bombardier/ADtranz,* Case No COMP/M.2139, Commission Decision of 3 April 2001, at 81. The difference in buyer power existing between customers of the merged entity may therefore lead the Commission to conclude differently with regard to the effects of the concentration on the relevant markets. Even though some customers are able to counteract the increase in market power in the upstream markets through the exercise of buyer power, that does not exclude anticompetitive outcome from arising in other markets where the demand side is more fragmented and can therefore not act as a sufficient competitive constraint.
[174] *Dupont/Hoechst/Herberts,* Case No IV/M.1363, Commission Decision of 5 February 1999.
[175] *Elf/Texaco/Antifreze JV,* Case No IV/M.1135, Commission Decision of 18 August 1998.
[176] *Valeo/ITT Industries,* Case No IV/M.1245, Commission Decision of 30 July 1998.
[177] *Valeo/Labinal,* Case No IV/M.2036, Commission Decision of 4 August 2008.
[178] *Knorr/Bremse/Allied Signal,* Case No IV/M.337, Commission Decision of 15 October 1993.
[179] *INA/FAG,* Case No IV/M.2608, Commission Decision of 18 October 2001.
[180] *Johnson Controls/Robert Bosch/Delphi SLI,* Case No COMP/M.3789, Commission Decision of 29 June 2005.

In its assessment of an operation of concentration, the Commission considers, for a number of reasons developed below, that the high market share of the merged entity in the automotive industry is not a sufficient basis to raise anticompetitive concerns.[183] That market power on the selling side is indeed to be evaluated by taking into account the characteristics of the automotive parts markets which are characterized as buyer's markets due to the strong buyer power of automobile and truck manufacturers. The automotive industry has indeed experienced significant consolidation in the recent years so that the decreasing number and increasing size of car manufacturers enable the latter to exert strong pressure on suppliers.[184]

In the first part of this section, the different factors leading to the creation of buyer power in the automotive industry are developed. While the use of bidding procedures has already been mentioned as increasing the customers' bargaining strength, other elements, specific to the sector in question, reinforce even more that power. The second part refers to a few cases where the Commission refused to recognize the existence of sufficient countervailing buyer power in some particular product markets.

1. Buyer's nature of markets for automotive components

The structure of the markets in the automotive industry, sophisticated purchasing procedures used by car manufacturers, as well as the availability of alternative sources of supply constitute sufficient elements to give buyers the means to put their suppliers under pressures. Favourable contractual conditions or low prices prove that such buyer power is effectively exercised.

a) Structure and organization of the markets

Automotive components are usually sold to car manufacturers, called Original Equipment Manufacturers, for installation into new cars ("OEM" channel) or as replacement products to those same manufacturers and their authorized dealers, known as Original Equipment suppliers ("OES). Replacement sales also take place to the so-called independent after-market ("IAM") which consists of retailers, fast-fitters and supermarkets.[185] It is commonly recognized in the automotive industry to distinguish OEM/OES sales from IAM sales due to the difference in the customer base and in the

[181] *TRW Automotive/Dalphi Metal Espac,* Case COMP/M.3972, Commission Decision of 12 October 2005.
[182] *Magna/Donnelly,* Case No COMP/M.2901, Commission Decision of 16 September 2002.
[183] *Magna/New Venture Gear,* Case No COMP/M.3486, Commission Decision of 24 September 2004, at 40.
[184] *U-Shin/Valeo Cam,* Case No COMP/M.6714, Commission Decision of 6 February 2013, at 46. Such consolidation is the result of different mergers and acquisitions such as for example Fiat's acquisition of Chrysler and Volkswagen's acquisition of a number of lower volume manufacturers such as Porsche. The Commission also noted that there are a number of links between remaining manufacturers, for example, Renault has a shareholding in Nissan whilst Nissan has a shareholding in Renault.
[185] *Johnson Controls/Robert Bosch/Delphi SLI, op.cit.,* at 8.

purchasing mechanisms. Indeed, with regard to OEM/OES, the demand side is very concentrated and consists of the major car manufacturers which generally purchase large quantities of a particular product.[186] According to the Commission, it is anticipated that this client base will become even more concentrated in the future due to the consolidation which is taking place at the level of car and truck manufacturers and the increasing trend toward global sourcing.[187] Such shrinking in the number of OEMs, as well as the adoption of common global vehicle platforms over multiple vehicle lines, confer a certain buyer power to those customers which may also be used for the procurement of replacement parts. They can in fact require similar terms and conditions for the supply of components, be it for OES use or OEM use.[188]

With regard to the independent after-sale market, the bargaining strength of customers is likely to be different. Since there are more fragmented and purchase lower volumes of a particular product, independent resellers will probably face higher prices. However, for some specific products, the demand side in the after-sale market may be as concentrated as that in the OEM sales sector. For example, in the wiper blades market, the main customers are large retail chains, service stations networks and specialized retail chains which all account for a substantial part of suppliers' turnover.[189] Since those buyers may enjoy buyer power similar to that of car manufacturers, they will also be able to prevent an excessive increase in market power in upstream markets following a merger. In addition, even though the client base is less concentrated, strong competition may still come from parts sold through the OES network. Spare parts suppliers' ability to raise prices in the independent after-market may indeed be limited by the price at which those products are sold to the car manufacturers' own dealers. As mentioned above, those lower prices, in turn, reflect the purchasing power of OEMs.[190] If the distinction made between OEM/OES and IAM is relevant in some circumstances because of the difference in buying power of the respective customers, it is nevertheless necessary to assess whether, in fact, the purchasing conditions obtained by those actors are different or not. Anticompetitive effects may indeed be prevented on all the markets in question if the after-market is sufficiently concentrated or if independent resellers operating on that market indirectly benefit from OEMs' buyer power.

[186] *INA/FAG, op.cit.*, at 13.
[187] *Dupont/Hoechst/Herberts, op.cit.*, at 31.
[188] *Knorr/Bremse/Allied Signal, op.cit.*, at 25.
[189] *Valeo/ITT Industries,* Case No IV/M.1245, Commission Decision of 30 July 1998, at 39.
[190] *Knorr/Bremse/Allied Signal, op.cit.,* at 52.

b) Bidding and multi-sourcing strategies

Like in the public sector, buyers in the automotive industry use bidding procedures for the selection of suppliers. On basis of the technical specifications mentioned in the tender, suppliers submit offers to car manufacturers.[191] In addition to those product requirements, the Commission noted in different decisions that OEMs also determine a target price that has to be taken into consideration by the bidders.[192] Based on those elements and on the different quotations submitted, car manufacturers use to bargain for lower prices and leverage potential suppliers against each other in negotiations before choosing amongst them.[193] The possibility to switch to alternative sources of supply, as it will be developed below, enables OEMs to exercise pressures on the bidders if they do not match the pricing objective. In view of the high value of the contracts awarded and of their duration, generally running for the whole vehicle life, competition for every supply opportunity is fierce. Winning a tender is even more essential that R&D plays an important role in that sector. Huge investment has indeed to be made on products improvement and innovation in order to remain competitive on the markets.[194]

Furthermore, in order to maintain competitive constraints on their selected suppliers, car manufacturers adopt a multi-sourcing strategy. As such, they award contracts to different suppliers so that they are not dependent upon any single equipment manufacturer but can switch easily and quickly to alternative sources of supply. Such a strategy in fact allows them to retaliate against price increases in a specific product well before the end of the life-time of a specific vehicle.[195] As a result, technical and price competition is likely to remain fierce between the different suppliers.

[191] *Dupont/Hoechst/Herberts, op.cit.,* at 31. See also: *GKN/Gegrag Corporation/Getrag All Wheel Drive,* Case No COMP/M.6320, Commission Decision of 28 September 2011, at 41. The market investigation carried out in that case revealed that car manufacturers have extensive experience of employing competitive multi-stage tenders to ensure they obtain the most competitive terms from their suppliers.

[192] *Dupont/Hoechst/Herberts, op.cit.,* at 31 and *Magna/New Venture Gear,* Case No COMP/M.3486, Commission Decision of 24 September 2004, at 38.

[193] See for examples: *Dupont/Hoechst/Herberts, op.cit.*, at 31; *Freudenberg & Co/Trelleborg/JV,* Case No COMP/M.6339, Commission decision of 14 May 2012, at 38; *Robert Bosch/SPX' Service Solutions Business,* Case No COMP/M.6538, Commission Decision of 26 June 2012, at 64; *U-Shin/Valeo Cam,* Case No COMP/M.6714, Commission Decision of 6 February 2013, at 37; *Hig Capital/Petrochem Carless Holdings,* Case No COMP/M.6782, Commission Decision of 26 March 2013, at 72.

[194] *Dupont/Hoechst/Herberts, op.cit.*, at 31.

[195] See:*Freudenberg & Co/Trelleborg/JV,* Case No COMP/M.6339, Commission Decision of 14 May 2012, at 38. See also: *Dupont/Hoechst/Herberts, op.cit.*, at 32; *Johnson Controls/Robert Bosch/Delphi SLI,* Case No COMP/M.3789, Commission Decision of 29 June 2005, at 16; *Renco group/Body Systems,* Case No COMP/M.5785, Commission Decision of 2 December 2010 and *Sumitomo Electric Industries/Anvis Group,* Case No COMP/M.6876, Commission Decision of 24 May 2013, at 21.

c) Alternative sources of supply

The existence of buyer power is closely linked to the number of alternative sources of supply. In the car industry, different types of alternatives are available to OEMs. While car manufacturers can easily switch to existing suppliers on the relevant market, they can also threat to turn to other global players or induce new entry.[196] Such potential to switch is in particular facilitated when excess production capacity exists in the industry and when suppliers face low barriers to entry. However, the Commission has already recognized that, even though entry of new actors into the markets concerned is not probable because of the high costs of investment, customers are not prevented from exercising to a certain extent sufficient countervailing power. In most cases, the sophisticated purchasing procedures mentioned above as well as limited brand loyalty in that sector enable in fact car manufacturers to still hold the whip in the negotiations.[197]As a result, despite the lack of competitive constraints coming from potential competitors and the limited number of existing rivals, the Commission may consider that sufficient pressures are likely to be exercised from the buying side, counteracting the increase of market power of a merged entity in the upstream markets.

Existing or new suppliers do not constitute the only outside options. Indeed, car manufacturers themselves are sometimes able to produce car components in their own facilities. Such in-house or captive manufacture is an additional supply alternative that further increases OEMs' buyer power. The threat to meet internally component requirements or to enter into supply arrangements with other car manufacturers which are able to increase their in-house production, is a powerful bargaining tool to gain cost or other concessions from suppliers.[198]

d) Contracts in favour of buyers

The high concentration on the buying side in the car industry, the bidding nature of the procurement procedures and the large number of alternative sources of supply constitute the main factors leading to the creation of buyer power. Some contractual conditions imposed by car manufacturers on their suppliers as well as significant price decreases over the past year show that such power is effectively exercised. For example, it is usually provided that car manufacturers retain intellectual property rights on any products developed for them.[199] The existence of car manufacturers' buyer power is

[196] *Magna/New Venture Gear,* Case No COMP/M.3486, Commission Decision of 24 September 2004, at 50.
[197] See for examples: *Valeo/ITT Industries, op.cit.*; *Dupont/Hoechst/Herberts, op.cit.* and *INA/FAG,* Case No IV/M.2608, Commission Decision of 18 October 2001.
[198] Switching to in-house production or entering into cross-supply agreements was considered as a credible threat in products markets such as braking systems, transfer cases and power transmission units as well as driven axles. See: *Knorr/Bremse/Allied Signal, op.cit.,* 1993, at 40; *Magna/New Venture Gear, op.cit.*, at 47 and *Arvin Meritor/Volvo (Assets),* Case No IV/M.3351, Commission Decision of 1 October 2004, at 12.
[199] *Valeo/ITT Industries, op.cit.,*, at 29.

also expressed by the inclusion into supply agreements of a unilateral right to terminate as well as to reduce prices annually to the benefit of OEMs.[200] In fact, due to an excellent knowledge of the cost structure of components, OEMs are able to bring prices down. The Commission has nevertheless noted in a decision that, notwithstanding the significant price increase of battery raw materials, car manufacturers have managed to secure price reductions.[201] This confirms the high degree of buyer power exerted by OEMs.

It follows from all those factors that, even though a merger in the upstream markets would lead to increasing significantly the combined market shares of the merging parties, the effective exercise of buyer power by car manufacturers will mitigate, in most cases, the effects of the merger on competition. Where generally analysed in addition to other competitive pressures coming from rivals, buyers' market power may also be considered as a self-sufficient constraint and lead the Commission to authorize a merger on basis of that single element.[202]

2. Exceptions

The existence of OEMs' buyer power has been recognized in many product markets. However, the mere fact that the merged entity's customers are automotive companies does not mean that buyer power is present. In a limited number of cases, the Commission considered that, due to a lack of outside options, car manufacturers were not in a position to exert sufficient countervailing power.[203] It was indeed maintained that a highly concentrated customer-group is able to exercise buyer power only if credible alternatives exist which buyers can easily switch to.[204] In one of those cases, it was held that the long time scale necessary to introduce new suppliers, the limited number of alternative suppliers and the limited available capacity made it unlikely that car companies would exercise any

[200] *SGL Carbon/Brembo/BCBS/JV,* Case No COMP/M.5484, Commission Decision of 27 May 2009, at 42. See also: *U-Shin/Valeo Cam, op.cit.*, at 41. In that case, the market investigation provided indications that supply agreements between car component manufacturers and OEMs are at least subject to annual price negotiations, allowing OEMs to gauge competing suppliers' quotation prices. Also there can be 'annual price reductions', comprising annual, pre-defined percentage price reductions imposed by OEMs. The Commission concluded that, in any case, the inclusion of such pricing provisions to the benefit of OEMs confirms the existence of a degree of countervailing buyer power for OEMs. (at 44)

[201] *Johnson Controls/Robert Bosch/Delphi SLI, op.cit.*, at 16. See also: *JCI/Bosch/VB Autobatterien JV,* Case No COMP/M.2939, Commission Decision of 18 October 2002.

[202] See for example: *Johnson Controls/Robert Bosch/Delphi SLI, op.cit*. In this decision, the Commission only took into consideration the existence of a strong buying side to clear the merger. In spite of the merging parties holding a combined market share of 50-60%, various elements related to buyers were considered as sufficient to prevent the new entity from acting independently, such as the high volume of purchases, the multi-sourcing strategy, the use of bidding procedures and the presence of viable alternatives.

[203] See for examples: *Continental/Phoenix,* Case No COMP/M.3436, Commission Decision of 26 October 2004 and *Usinor/Arbed/Aceralia,* Case No COMP/ECSC.1351, Commission Decision of 21 November 2001.

[204] *Ibid.,* at 168.

form of buyer power in the short term.[205] The market in question, namely the supply of a certain steel product, was characterized by a level of concentration higher than the level in the automotive industry and the very strict and technical specifications required by OEMs were regarded as restricting even more the choice of suppliers.[206] In another case, the investigation showed that, for the procurement of air springs, many car producers had only one supplier. Those buyers were therefore to a great extent dependent on air springs manufacturers and would not be in a position to prevent the merged entity, with a combined market share around 85-95%, from acting independently of its customers.[207]

In most cases, suppliers are highly dependent on car companies since the latter account for a large proportion of their turnover and that the loss of one of those customers would have strong incidence on their market share. However, the examples mentioned above show that each situation must be assessed by taking into account all the circumstances of the case in order to determine accurately the degree of buyer power and hence the potential effects of the merger on competition.

C. RETAIL MARKETS

The second sector where the Commission concluded to the existence of private companies' countervailing buyer power in merger cases is the retail sector. Retailers, and especially large supermarket chains, enjoy indeed significant buyer power they can use toward suppliers of food and non-food products. The high level of concentration in the retail markets and the growing share of private labels on the shelves are the main sources of buyer power in that sector.[208] The presence of such countervailing buying power makes therefore the Commission more inclined to authorize a merger between suppliers of consumer goods except when the merging parties produce must-carry brands. In that latter case, the balance of power is likely to shift to the suppliers' advantage.

1. Sources of buyer power in the retail sector

The level of concentration among retailers plays an important role in the assessment of their market power on the selling and on the buying side. The presence and the success of private labels in the retail sector has also a strong influence on the degree of buyer power.

[205] *Ibid.*, at 162.
[206] *Ibid.*, at 163 and 164.
[207] *Continental/Phoenix,* Case No COMP/M.3436, Commission Decision of 26 October 2004, at 23.
[208] In addition, retailers have generally various alternatives in the upstream buyer market. They can switch to other suppliers but they can also get into vertical integration or sponsor new entry as a reaction to a price increase. See: *FrieslandCampina/Zijerveld & Veldhuyzen and Den Hollander,* Case No COMP/M.6772, Commission Decision of 12 April 2013, at 170.

a) Concentration and internationalization

Large supermarket chains have over time significantly increased their purchasing power through internationalization and concentration. In most Member States, only a few retailers control over up to 90% of the market. The high market shares held by big supermarkets in the selling and in the buying markets make suppliers dependent on those actors in two ways.

On the one hand, since a limited number of retail chains control a very large part of the retail market, they perform an important "gatekeeper" function for suppliers. Indeed, the access to consumers mainly depends on the access to those retailers' shelf-space.[209] For example, in a case concerning a merger between suppliers of oral care products, the Commission considered that the loss of such customers would entail serious consequences for a supplier since branded products excluded from a major retailer would risk disappearing from the consumers' awareness.[210] The threat of delisting and/or reduction in the self-space constitute therefore a very strong bargaining tool in the hands of retailers, especially when a product is characterized by low brand loyalty and subject to the increasing share of private labels as it is further developed below.

On the other hand, since large retail chains account generally for a large fraction of a supplier's total turnover, the loss of one of those customers is likely to put at risk the financial viability of the latter whilst the costs would be relatively minor for the retailer. Indeed, the sales with a particular branded product represent only a small fraction of a supermarket's turnover and, in most cases, consumers will be more likely to switch to another brand rather than to turn to another retail chain to find the delisted product.[211] The threat of losing those vital trading partners will hence force suppliers to agree on prices and conditions they would never have agreed on but for the exploitation of market power by large retailers.

b) Success of private labels

Private labels, also called own-brands, are products sold under a retailer's brand. Depending on the product involved and on the Member State in question, the share of private labels in a product's total sales may be significant. The success of that particular segment of consumer goods increases retailers' bargaining power with regard to brands producers but also with regard to the different suppliers of those own-brand products.

[209] *Phillip Morris/Nabisco,* Case No COMP/M.2072, Commission Decision of 16 October 2000, at 25.
[210] *Procter & Gamble/Gillette,* Case No IV/M.3732, Commission Decision of 15 July 2005, at 125.
[211] *Procter & Gamble/Gillette, op.cit.*, at 125

i. Competitive pressures on brands producers

Where retailers can threaten their suppliers to find alternative sources of supply or to sponsor new entry, such threat of delisting becomes even more credible when they can integrate private labels on their shelves.[212] The market investigations held in different merger cases attest that own-brand products predominate in more and more product markets.[213] The particular role of competitive constraint played by the private label segment has been particularly developed in a decision on concentration between producers of consumer tissue products.[214] The Commission noted in that case that increasing shelf-space is devoted by retailers to their own private label products at the expense of manufacturer branded products.[215] The success of own-brands in product markets such as toilet paper or household towels results from low brand loyalty among consumers. Due to the low level of differentiation between private labels and branded products in that sector, with regard to both quality and packaging, brands bring little added-value to consumers who therefore base their choice on the lower prices of retailers' brands.[216] In other decisions, the Commission also recognized that brand loyalty is relatively weak for products such as air fresheners[217] or nut snacks.[218] The continuing trend towards the weakening of brands and the increasing share of private labels in the markets of toilet paper and household products constitute a serious competitive constraint for brands producers. Since consumers are likely to turn easily to private labels, retail chains are in a position to discipline manufacturers of branded products in case of disagreement on the terms of the supply contracts.[219] They can indeed delist or threat to delist, reallocate shelf-space to other brands, put the manufacturer's brands on a less favourable position on the shelf or reduce the number of stores stocking the brands in question in order to make their trading conditions accepted by their suppliers.[220] The resulting strong competitive pressure put on branded product manufacturers by their large customers may be sufficient to prevent suppliers merging in the upstream market from exerting market power at the wholesale level.

[212] See for example: *Nestlé/Gerber,* Case No IV/M.4688, Commission decision of 27 July 2007. The Commission held in that case that retailers have buyer power vis-à-vis baby food manufacturers even though the parties' brands were considered as must-have brands. The data submitted by the parties indeed showed that the baby food products in question were subject to delisting and that large supermarkets could sponsor new entry either via introduction of private labels or by attracting new suppliers.
[213] For example, private label share of total retail sales amounts to 41% in Belgium, 45% in the United Kingdom and 51% in Spain. See on that matter, the figure in Part III, Chapter 1, Section II, Point A, 2.
[214] See : *SCA/P&G,* Case No COMP/M.4533, Commission Decision of 5 September 2007.
[215] *Ibid.*, at 80. Private labels clearly predominated in toilet paper and household paper with an overall share of approximately 80%.
[216] *Ibid*., at 114.
[217] *Procter & Gamble/Sara Lee Air Care,* Care No COMP/M.5828, Commission Decision of 17 June 2010.
[218] *Granaria/Ültje/Intersnack/May Holding,* Case No COMP/JV.32, Commission Decision of 28 February 2000, at 42. Retailer own labels account for approximately two-thirds of total sales in that market.
[219] *SCA/P&G, op.cit.*, at 81.
[220] *Ibid.*, at 118.

However, the constraint exercised by private labels on brands suppliers differs depending on the relevant product market involved. As mentioned above, the level of brand loyalty and the difference in quality between rival products influence the overall share of own-brands in a particular product market. According to the Commission, the low share of private labels in a market provides an indication that the relative buyer power of retailers is quite low since that means that the power of brands is still strong in that market. On basis of those elements, it was considered that the small share of private labels for frozen pizzas and the well-known brands owned by the merging parties prevented retailers from exercising sufficient bargaining power.[221] In contrast, in the same decision, the Commission held that, in the markets of frozen potato products, no barriers impede the expansion of private labels so that, in those markets, supermarkets are able to constrain the power of brand owners.[222] In the case related to the markets of consumer tissue products, the Commission noted a distinction between the toilet paper/household towels markets, characterized by a strong presence of private labels, and handkerchief/facials markets where a significant part of total sales is still made through branded products.[223] In that latter case, due to the important role that brands continue to play, the competitive constraint exerted by retailers' own brands on the shelves is less effective and so is the exercise of buyer power. The bargaining strength of each player in the negotiations varies therefore depending on the product in question. As such, while the Commission recognized that retailers enjoy buyer power when purchasing oral care products, it considered that, in the particular market of battery and rechargeable toothbrushes, such buying power was not sufficient to remove potential competition problems brought about by a merger in the upstream market.[224] It was maintained that private labels or other rival products were less likely to constitute credible competitive pressures, not only because the merging parties held a large number of important patents for those products, but also because a good reputation was needed to enter or expand successfully in that market.[225]

If the share of private labels may vary depending on the type of product in question, it may also be different from one Member State to another with regard to the same product market. While private label products represent a significant share of the chocolate tablet market in France for example, the situation is different in Poland and Romania where own-brands do not impose a significant competitive constrain on branded products given their significantly lower price, quality, different

[221] *Orkla/Chips,* Case No IV/M.3658, Commission Decision of 3 March 2005, at 25.
[222] *Ibid.*, at 30.
[223] *SCA/P&G, op.cit.*, at 154.
[224] *Procter & Gamble/Gillette, op.cit.*, at 24.
[225] *Ibid.*, at 26.

product denomination and shelf positioning.[226] The Commission also pointed out that the retail market in those countries is not as concentrated as in other Member States, because traditional small retail outlets still account for more than 50% of all retail sales.[227]

It is also worth mentioning that, if the large presence of private labels in some product markets or in some Member States enables retailers to exert strong pressures on their suppliers, it also gives them additional competitive advantages. Indeed, since supermarkets know the prices of goods offered by brands owners, they are in a position to fix the prices for their private labels in reaction to those of branded products. Due to this asymmetry of information, retailers have the capacity to counteract efficiently against the leading brands with its own-brand products.[228] The possibility to switch to private labels and to delist branded products, as well as the knowledge on prices of goods offered by brand producers give retailers strong bargaining tools and thereby substantial buyer power.

ii. Competitive pressures on private labels producers

Buyer power may also be exercised towards suppliers of retailers' brands. The procurement procedures used for private labels are very similar to those used in the public sector and in the car industry. As such, retailers typically ask for bids from a number of producers based on specifications with regard to the quality of the products and other contractual terms.[229] The supermarkets' bargaining strength resulting from those bidding procedures is further reinforced by their multi-source procurement strategy. Indeed, using EU-wide tenders, retailers are able to compare price offers from suppliers in several countries and to select multiple sources of supply so that they are not dependent upon a single supplier.[230] Spreading their private label purchases over different producers also enable retailers to benchmark those suppliers against each other.[231] In addition, it turns out that supermarkets' buyer power over suppliers is even more substantial when the industry in question is volume driven and has to cope with an oversupply problem, such as in the raw milk sector. As cooperatives are obliged to purchase all the milk produced by their farmer members and that such product cannot be stored, strong pressure is put on those market participants who have to find quickly sufficient sale channels to sell off their products. Consequently, suppliers' high degree of

[226] *Kraft Foods/Cadbury,* Case No COMP/M.5644, Commission Decision of 6 January 2010, at 96 and 117.
[227] *Ibid.*, at 118.
[228] *Procter & Gamble/Gillette, op.cit.*, at 124.
[229] *SCA Hygiene Products/Cartoinvest,* Case No IV/M.2522, Commission Decision of 21 March 2002, at 25.
[230] *Granaria/Ültje/Intersnack/May Holding, op.cit.*, at 48.
[231] *SCA Hygiene Prodcuts/Cartoinvest, op.cit*., at 31.

impatience further increases retailers' buyer power and enables them to negotiate even lower prices.[232]

Concerning the other contractual terms, purchase contracts for private label products are generally in the form of annual framework arrangements, allowing the retailer to call off quantities as required, without giving the supplier any commitment on the volume of purchases.[233] The short-term nature of those arrangements, and the availability of other sources of supply, give supermarkets the possibility to switch easily at minimal cost to another trading partner should their suppliers be no longer capable of meeting the lowest price presented.[234] As a result, as in other bidding markets, the market share of a merged entity involved in the manufacturing of private labels does not necessarily reflect a long term market position since winning or losing one of the contracts on the market can result in a significant increase or decrease in market share.[235]

2. Factors excluding the exercise of a sufficient countervailing buyer power

On basis of what has been developed above, it can be concluded that the exercise of buyer power by large retail chains is mostly linked to two factors: on the one hand, the presence of a large number of alternative suppliers that are capable of offering an equivalent range of products and, on the other hand, the retailer's effective power to delist brands if the terms on which those products are offered no longer meet its requirements.[236] Conversely, the presence of strong brands, the low share of private labels on a particular market and the limited number of alternative sources of supply are likely to greatly mitigate retailers' bargaining power as those factors increase the dependence of the latter on their suppliers.

a) Must-carry brands

Some well-known brands are so popular that retailers need to stock them in order to keep attracting consumers in their outlets. With regard to must-stock brands, retailers only reflect the demand of consumers who manifest a high fidelity for those brands. The best example of such a must-carry brand is Coca-Cola for which there is a strong demand among consumers. If that brand were delisted, a certain volume of consumers would switch to another retail outlet in order to find their preferred beverage.[237] A similar conclusion was reached in a case concerning a merger between producers of

[232] See: *Friesland Coberco/Nutricia,* Case No COMP/M.2399, Commission Decision of 8 August 2001, at 25-26.
[233] *Granaria/Ültje/Intersnack/May Holding, op.cit.*, at 48.
[234] *Sovion/S Fleisch,* Case No IV/M.3968, Commission Decision of 21 December 2005, at 76.
[235] *SCA/P&G, op.cit.*, at 75.
[236] *Guinness/Grand Metropolitan,* Case No IV/M.938, Commission Decision of 15 October 1997, at 68.
[237] *The Coca-Cola Company/Carlsberg A/S,* Case No IV/M.833, Commission Decision of 11 September 1997, at 79.

well-known whisky brands.[238] The Commission considered that the merging parties' brands were viewed as must-have brands and that, if retailers no longer stock those products, they risked losing a large part of their customers, not only for the whisky but for all the rest of their purchase from the store as well. In such a case, delisting is generally not a realistic option for retailers who are therefore deprived of a strong bargaining tool.[239] The percentage of such switch in each case is indeed unpredictable and thus constitutes a risk for the retailer. For example, in the assessment of a merger between suppliers of bottled mineral waters, the Commission held that, even though those products represent only an estimated 1% of the sales of a retailer, it is not excluded that a delisting of the brands in question can result in a loss of one out of 10 end-consumers. Removing one single major brand from the shelves can therefore have a much higher impact on the retailer's sales than the 1% figure would suggest. The delisting of one single brand may indeed lead to the loss of all the purchases made by consumers of that brand in the retail outlet concerned. [240] However, in later decisions, the Commission pointed out that, in case of delisting, consumers are more likely to switch to another brand than look for the desired product in another supermarket.[241]

It may be assumed that the stronger the brand, the less realistic the threat of delisting. Recent events yet show that large retail chains sometimes shake that preconceived principle and end up removing popular brands from their shelves following a dispute with a brand manufacturer.[242]

b) Lack of alternatives

The main source of buyer power is the ability to substitute away from any supplier. In merger cases, the Commission put the emphasis on the fact that such possibility must remain effective following the operation of concentration.[243] A merger may indeed significantly reduce buyers' bargaining power if it thereby removes an important alternative source of supply. Where the brands produced

[238] *Guinness/Grand Metropolitan, op.cit.*, at 75. See also in the tobacco products market: *BAT/Skandinavisk Tobakskompagni,* Case No COMP/M.5086, Commission Decision of 27 June 2008.

[239] Must-carry brands are also likely to mitigate buyer power of other types of retailers such as large sport goods retailers. In a merger decision in the market of alpine skis, the Commission considered that the strength of the brands provided by the parties mitigated to a significant extent buyer power of even large customers like Decathlon, Intersport and Sport 2000. See: *Amer/Salomon,* Case No IV/M.3765, Commission Decision of 12 October 2005, at 66.

[240] *Nestlé/Perrier,* Case No IV/M.190, Commission Decision of 22 July 1992, at 87.

[241] See: *Rewe/Meinl,* Case No IV/M.1221, Commission Decision of 3 February 1999. This decision will be analysed in Part II, Chapter 1, Section II, Point B, 2, c).

[242] See Part III, Chapter 1, Section II, Point B, 3.

[243] *Kraft Foods/Cadbury, op.cit.*, at 142. See also: *SCA/Georgia-Pacific Europe,* Case No COMP/M.6455, Commission Decision of 5 July 2012, at 213. In that case, the Commission considered that a three to two merger in the market for the supply for branded household towels would trigger limited competition and fewer alternatives to the detriment of final customers. The leverage given by the existence of a third alternative supplier would indeed disappear following the merger so that retailers would loss part of their negotiation power. In such a case, post-merger countervailing buyer power will not be sufficiently strong to offset the potential adverse effects resulting from the transaction. (at 211-214)

by the merging parties are the closest competitors in the downstream market, supermarkets risk losing most of their negotiation tools post-merger. They will no longer be able to play one brand against the other in listing and pricing negotiations. The same applies for the procurement of private labels since the operation will reduce the number of alternative sources of supply for those products as well.[244] If, following the merger, no supplier of the products in question has the capacity to serve the requirement of large retail chains other than the merging parties, buyer power is unlikely to be exercised, even by large supermarkets, and the operation is therefore less likely to be authorized.[245]

c) Presence of smaller and powerless retailers

Even though some buyers are considered as enjoying a certain degree of buyer power, the Commission also pays attention to the presence of smaller retailers who are not shielded from the imposition of adverse terms of supply.[246] Indeed, if large supermarkets are in a position to exercise pressures on their suppliers and obtain good supply conditions, there is no reason why other retailers should benefit from the same discounts or other advantages. Furthermore, especially when the retail market is relatively competitive, such as the retail market for fresh milk, large retail chains would be induced to take steps that protect only their own interests and would gain from an increase in their rivals' costs since that would lead to a lessening of competition to their advantage.[247] In fact, the Commission also takes into consideration a particular consequence that the presence of a few powerful buyers could have on smaller competitors post-merger, namely the waterbed effect.[248]

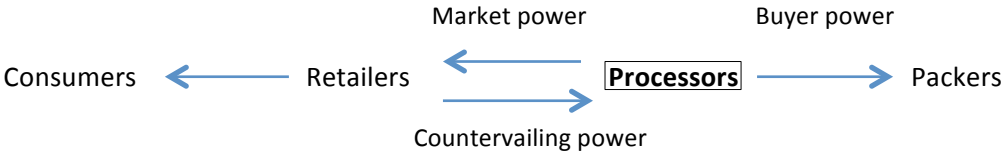
The existence and the degree of retailers' buyer power are therefore examined on basis of all those elements. Supermarkets' strongest weapon is probably the threat to delist which is becoming even

[244] *Friesland Foods/Campina,* Case No COMP/M.5046, Commission Decision of 17 December 2008, at 243.
[245] *Ibid.*, at 280.
[246] See: *Procter & Gamble/Wella,* Case No IV/M.3149, Commission Decision of 30 July 2003, at 57 and *Friesland Foods/Campina, op.cit.*, at 274 .
[247] *Friesland Foods/Campina, op.cit.*, at 276. See also: *Arla Foods/Milk Link,* Case No COMP/M.6611, Commission Decision of 27 September 2012. In that decision, the Commission also pointed out that "countervailing buyer power cannot be found to sufficiently offset potential adverse effect of a merger if it only ensures that a particular customer segment, with particular
bargaining strength, is shielded from significantly higher prices or deteriorated conditions after the merger. (…)In the Commission's view, a significant supply alternative will be removed and choice will be limited as the parties would have more than two thirds of the current sales in the long-life milk market and no other supplier would have a facility of a similar scale in the UK". (at 116-117)
117. Furthermore, it is easy to price discriminate between different customers as long-life milk products are delivered according to customers' specifications and thus are customized products. Hence, even if the largest customers would be able to exercise some countervailing buyer power this would not protect smaller customers and the parties would still be able to raise prices above the pre-merger level.
[248] The waterbed effect is a particular phenomenon which could arise when suppliers face some large customers and involves suppliers charging higher prices to smaller buyers in order to recoup the squeezed margins resulting from their transactions with powerful supermarkets. On that matter, see Section II, Point A, 4, of this Chapter.

more credible with the growing success of private label products. However, that trump may be made valueless when suppliers producing must-carry brands merge and no equivalent alternative to those products is left on the relevant market.

D. CONSUMER GOODS AND FOOD/BEVERAGE PROCESSING SECTOR

As developed in Section 3, some consumer goods manufacturers – be it food and beverage processing companies or other non-food manufacturers - produce must-carry brands which enable them to exercise significant market power in the downstream markets and, as a result, to mitigate or even override large retailers' buyer power. That strong bargaining power is though not limited to the selling side but may also be exercised by those companies in the procurement markets. It is particularly in the packaging and containers markets that the Commission had the opportunity to examine buyer power in that sector.



Different elements characterizing the existence of buyer power mentioned in the previous sections remain valid in this sector. The commission for example noted that prices for containers are set through competitive tendering on basis of the customer's specifications.[249] Competition among suppliers is thus generally intense, especially when multinational companies carry out centralized purchasing operations of a particular product at European or global level.[250] After comparing the different offers, customers use to select several sources of supply. Such multi-sourcing strategy enables them to play one supplier against the other and to guaranty supply security.[251]

When a contract has been drawn up[252], contractual terms are generally set in favour of buyers. Supply contracts are indeed often of a short duration, which enable the latter to switch to other

[249] *CVC/Danone/Gerresheimer,* Case No IV/M.1539, Commission Decision of 5 July 1999, at 33.
[250] *Alcon/Flexpack,* Case No IV/M.3049, Commission Decision of 24 February 2003, at 24.
[251] See for examples: *Viag/Continental Can,* Case No IV/M.0081, Commission Decision of 6 June 1991, at 21; *Henkel/Sovereign,* Case No IV/M.3612, Commission Decision of 22 December 2004, at 58 and *Ardagh/Impress,* Case No COMP/M.6025, Commission Decision of 29 November 2010. In those decisions, the Commission noted that food and beverage processing companies commonly use a policy of multi-sourcing for the procurement of various packaging materials such as glass containers or adhesives for flexible packaging.
[252] In some cases, customers do not commit themselves to purchase particular volumes and do not even have any contract. That gives them the freedom to switch to other suppliers very easily. See: *Mauser Holding International/Reyde/JV,* Case No COMP/M.5394, Commission Decision of 21 January 2009, at 39.

suppliers without difficulty and at short notice, and usually provide that contractual quantities and prices are renegotiated periodically.[253]

With regard to the issue of the number of alternatives available to customers, the Commission noted that well-known food and drink companies, such as Nestlé, Unilever, Coca-Cola, Mars or Kraft, may easily switch to other sources of supply, expand or buy rival suppliers as well as sponsor new entry or cross entry. [254] That large array of outside options gives customers the possibility to retaliate against any anticompetitive behaviour by withdrawing their purchases from their current suppliers and allocating it to competitors.[255] This is particularly likely to happen when buyers are able to monitor supply costs and other pricing parameters and thus to control any misconduct by upstream firms. Such customer retaliation would not only jeopardize the results of a non-coordinated anticompetitive conduct but could also be used to counteract a tacit collusion or an attempted input/customers foreclosure. [256]

Although large consumer goods companies' buyer power has been mostly analysed in cases related to mergers between packaging producers, it is nevertheless likely to be exercised towards any type of supplier.[257] Such strong countervailing buying power, combined with a significant market power on the selling side - which is hardly counteracted by retailers' buyer power - make those companies particularly powerful players on the markets.

[253] *CVC/Danone/Gerresheimer, op.cit.*, at 36.
[254] *Sun capital/DSM Special Products,* Case No COMP/M.5785, Commission Decision of 2 December 2010, at 202. This case does not concern the packaging industry but chemical products sold to soft drinks manufacturers who use them for low sodium variants of their products.
[255] *Ibid.*, at 151.
[256] *Ibid.*, at 151 and 195. The Commission considered that the two largest customers, namely Coca-Cola and Pepsi, had all the required power to control any misconduct by the merged entity and to retaliate against any attempted foreclosure. It was also maintained that the foreseeable reaction of current customers would jeopardize the results expected from a common policy between suppliers. See also: *Manitowoc/Enodis,* Case No COMP/M.5280, Commission Decision of 19 September 2008, at 156. In this case, the Commission considered that the three major customers of beverage dispensers, namely Coca-Cola, Pepsi and McDonalds, could exercise their buyer power if their bottlers were being disadvantaged by customer foreclosure behaviour leading to higher prices.
[257] See for examples: *Fox Paine/Advanta,* Case No IV/M.3506, Commission Decision of 20 August 2004. This decision concerned a merger between seeds producers. Strong countervailing buyer power is likely to be exercised by food processors in those markets. Indeed, the processing industry features a number of large players with significant buyer power, upon whom the seed producers are reliant for the majority of their sales. (at 36) See also: *Rhodia Chemie/Albright & Wilson,* Case No IV/M.1517, Commission Decision of 13 July 1999 and *Solvay/Montedison-Ausimont,* Case No IV/M.2960, Commission Decision of 9 April 2002. In those two decisions, large soapers such as Unilever, Procter& Gamble and Henkel, were recognized to exercise a significant countervailing power when buying detergent builders from chemical companies.

E. OTHER BUYER'S MARKETS AND COMPANIES ENJOYING SIGNIFICANT BUYER POWER

Market power of buyers has also been highlighted in other sectors. Even though the issue of buyer power has been addressed in fewer decisions, this does not necessarily mean that the degree of such power is lower in those markets. The number of cases in which buyers' countervailing power is examined in a particular sector only depends on the number of mergers occurring in the procurement markets of those buyers. Among the powerful customers recognised by the Commission, we can mention electronics manufacturers, oil and gas companies and, to a certain extent, paper producers and publishers. In some decisions, rather than referring to the whole buying side, the Commission specifically emphasized a particular company's buyer power.

1. Electronics sector

Large OEMs (Original Equipment Manufacturers) such as Apple, Dell, Nokia, Sony, HP and Philips constitute very sophisticated customers and tend to be highly concentrated.[258] Those electronics manufacturers generally procure electronic devices through tenders and adopt a multi-sourcing strategy.[259] They have generally sufficient possibilities to switch between suppliers or can sponsor a new entry if an additional supplier was needed.[260] As in the car industry, OEMs in this sector have also the ability to switch to in-house production should their suppliers do no longer meet their pricing requirements or other specifications.[261] Given those elements, it can be asserted that large electronic devices manufacturers are likely to use their market power and exert pressure in upstream buyer markets. Despite the possibly high combined market share of the merging parties, the Commission is therefore more likely to authorize the transaction.[262]

2. Oil/Gas sectors

Oil and gas exploration and production companies, such as Shell, BP, Mobil and Statoil, have also significant buyer power and are thereby able to contain an increase in market power in upstream markets that may result from a proposed merger. Such countervailing power may be used against

[258] *Foxconn/Sony LCB TV Manufacturing Company in Slovakia,* Case No COMP/M.5870, Commission Decision of 25 June 2010, at 36 and *Foxconn/Dell (Products) Poland,* Case No COMP/M.5765, Commission Decision of 28 September 2010.
[259] *Flextronics/Italdata,* Case No IV/M.2116, Commission Decision of 25 September 2000, at 16; *Toshiba/Samsung/JV,* Case No IV/M.3349, Commission Decision of 2 March 2004, at 15 and *Toshiba/Fujitsu HDD Business,* Case No COMP/M.5483, Commission Decision of 11 May 2009, at 32.
[260] *Seagate/Maxtor,* Case No IV/M.1400, Commission Decision of 27 April 2006, at 30 and 32.
[261] *Foxconn/Sony LCB TV Manufacturing Company in Slovakia, op.cit.*, at 36.
[262] See for example: *Seagate/Maxtor,* Case No IV/M.1400, Commission Decision of 27 April 2006. In this decision, the Commission mainly justified the merger authorization on basis of customers' buyer power. Even though the combined market share of the parties amounted to more than 60% in a specific market of data storage devices, that percentage was considered as volatile and any anticompetitive effect unlikely due to the strong countervailing strength on the buying side.

services providers or products manufacturers.[263] Bidding and multi-sourcing strategies used by vertically integrated oil and gas companies contribute to maintaining competitive pressures on suppliers.[264] In addition, their detailed knowledge on cost structures and prices of upstream producers generally prevents the latter from increasing prices above the competitive level.[265] The Commission takes therefore particularly into consideration those customers' buyer power in its mergers assessment.[266]

3. Paper and publication industries

Paper manufacturers and publishers are generally considered as enjoying a certain degree of buyer power. However, their bargaining strength is, in some cases, not sufficient to offset attempts by a merging firm to increase prices.

The paper industry in Europe is relatively concentrated and possesses a particular bargaining power which can successfully be used in the procurement market of paper chemicals such as fixatives or dyes for example.[267] Yet, the Commission did not come to the same conclusion with regard to pulp mill equipment. When those paper producers run integrated pulp and paper mills, their position in the procurement market of pulp mill equipment is indeed different since the customer base, consisting of pulp mills as well as integrated pulp and paper mills, is more fragmented. Even though a certain group of customers, such as paper producers, dispose of buyer power, this is not sufficient to off-set adverse effects of a merger, since it only ensures that these particular buyers are shielded from price increases.[268]

The assessment of publishers' buyer power may also lead to different conclusions. For example, in a merger case in 2001, the Commission held that firms involved in the publication industry were not in a position to exercise buyer power towards newsprints and other magazine paper producers due to the high degree of concentration and vertical integration in that sector as mentioned above.[269] Customers are not only large publishers but also atomized regional newspapers and specialized magazines who are unlikely to neutralize possible parallel oligopolistic behaviour in the paper

[263] See for examples: *Halliburton/Dresse,* Case No IV/M.1140, Commission Decision of 7 July 1998 and *Mannesmann/Vallourec,* Case No IV/M.906, Commission Decision of 3 June 1997. In the first case, the market affected by the merger was the provision of drilling services to oil and gas companies. In the second case, the merger concerned producers of gas cylinders.
[264] *Schlumberger/Smith International,* Case No COMP/M.5839, Commission Decision of 26 July 2010, at 43.
[265] *Mannesmann/Vallourec,* Case No IV/M.906, Commission Decision of 3 June 1997.
[266] See also : *Shell/Halliburton/Well Dynamics JV,* Case No IV/M.1976, Commission Decision of 15 March 2001 and *PKN/Mazeikiu,* Case No IV/M.4348, Commission Decision of 7 November 2006.
[267] See : *BASF/CIBA,* Case No COMP/M.5355, Commission Decision of 12 March 2009, at 88 and 162.
[268] *Metso/Aker Kvaerner,* Case No COMP/M.4187, Commission Decision of 12 December 2006, at 98-99.
[269] *UPM-Kymmene/Haindl,* Case No COMP/M.2498, Commission Decision of 21 November 2001.

industry. In addition, switching to a new supplier takes time and involves costs for publishers who are therefore willing to accept higher prices in order to continue with their current paper suppliers.[270] The transaction in question, namely a merger between two newsprints producers, was therefore not allowed without undertakings in order to prevent any anticompetitive outcome. This decision shows that the more concentrated is the upstream market, the less buyer power is likely to be exercised. Indeed, in 1998, the Commission authorized a merger between producers of newsprints and magazine paper based on the fact that the largest customers, due to their high volumes of purchases, would be able to discipline paper suppliers and to prevent the creation of an oligopolistically dominant position.[271] This assessment contrasts thus with the analysis made a few years later in the first decision mentioned above but is nevertheless quite understandable. The exercise of buyer power mainly depends on the level of concentration in upstream markets. In 2001, the Commission considered that, in view of the previous mergers which took place in the paper industry, further consolidation in that sector through a new operation of concentration would remove any possibility of exercising a competitive constraint from the buying side.

Publishers can nevertheless still exercise a certain degree of buying power in other products markets, such as the market of printing inks.[272] A limited number of large customers account for a substantial part of demand in that market while smaller customers bundle their purchases in buying cooperation to increase their leverage. The loss of a single customer may therefore lead to a significant decrease in inks manufacturers' market shares.[273] The use of European-wide or global tenders and the limited brand awareness and loyalty for a particular manufacturer's inks constitute elements reinforcing customers' bargaining power in that market.[274]

Those different decisions show that buyer power may vary over time and depends on the relevant product market involved. The number and the position of the players on the buying and on the selling side are indeed different on each market and not immutable.

[270] *Ibid.*, at 102. Switching costs result from the fact that publisher has to optimize the paper quality from a particular machine to the pressrooms where that quality is to be run. Changing into a new paper supplier would therefore be time consuming and increase risks given the different technical adaptation that has to be made.
[271] *Enso/Stora,* Case No IV/M.1225, Commission Decision of 25 November 1998, at 63-68.
[272] See : *CVC/Ani Printing Inks,* Case No IV/M.3564, Commission Decision of 28 October 2004 and *Aster 2/Flint Ink,* Case No IV/M.3886, Commission Decision of 25 August 2005.
[273] *Aster 2/Flint Ink, op.cit.*, at 26.
[274] *CVC/Ani Printing Inks, op.cit.*, at 18.

4. Particular companies enjoying significant buyer power

Whereas the Commission generally mentions some companies' names as examples of powerful customers, in some decisions, the firm(s) mentioned are considered as the only buyer(s) likely to exercise countervailing buying power, even though the customer base is larger. Depending on the number of smaller buyers acting besides those large companies, the Commission may decide that the latter are able, by themselves, to mitigate the effects of a merger between suppliers.

a) Boeing/Airbus

The strong bargaining power of Boeing and Airbus, two aircraft manufacturers, was highlighted in different cases. However, on basis of the product market and the corresponding client base, the Commission considered such power as sufficient only in a few decisions. For examples, concerning landing gear systems, those two constructors were recognized to exercise significant buyer power in the procurement market due to their large share of purchases.[275] While in that product market, Boeing and Airbus' buyer power was held to be sufficient to mitigate the increase in suppliers' market power following the merger, the conclusion on that issue was different in other spare parts markets where airlines were also included in the customer base.[276] Those buyers are indeed much more fragmented and need to maintain a good commercial relationship with spare parts manufacturers in order to have access to those products but also to the needed licences and repair processes which imply a high degree of know-how.[277] Given those elements, airlines are not likely or willing to exert significant buyer power. The Commission held therefore that such larger customer base, even though it included powerful aircraft manufacturers, was not able to exercise sufficient countervailing power.

b) Tetra Pak

In two decisions, the Commission put the emphasis on the strong market power of another firm, namely the multinational packaging company Tetra Pak.[278] On basis of this single competitive

[275] See : *Snecma/TI,* Case No IV/M.368, Commission Decision of 17 January 1994 and *Snecma/Messier Dowty,* Case No IV/M.1159, Commission Decision of 18 June 1998. Boeing and Airbus accounted for approximately 80% of all purchases of landing gear for civil application. See also: *Precision Castparts/Titanium Metals,* Case No COMP/M.6765, Commission Decision of 19 December 2012. In that case, the Commission considered that large airframe manufacturers, such as Airbus and Boeing, were able to deploy effective and timely counter-strategies to prevent input foreclosure strategy by the merged entity.

[276] See : *AlliedSignal/Honeywell,* Case No COMP/M.1601, Commission Decision of 1 December 1999 and *General Electric/Honeywell,* Case No COMP/M.2220, Commission Decision of 3 July 2001. This decision was confirmed by the General Court. See: T-210/01, *General Electric v Commission* [2005] ECR II-5575.

[277] *General Electric/Honeywell, op.cit.*, at 228.

[278] *Enso/Stora,* Case No IV/M.1225, Commission Decision of 25 November 1998 and *Korsnäs/AssiDomän Cartonboard,* Case No IV/M.4057, Commission Decision of 12 May 2006.

constraint, mergers in the liquid packaging board (LPB) market were authorized, despite the very high market share held by the new entity following the transactions in question. LPB is one of the components used by Tetra Pak in its food packaging production. The considerable bargaining strength of that company played a major role in the assessment of concentrations occurring in the upstream market.

In 1998, the Commission authorised a merger between suppliers of LPB (Enso and Stora) even though those merging parties had a combined market share of more than 60%, a position far ahead of the other players in that market. The position of the merged entity was all the more significant because barriers to entry were high and potential competition was limited.[279] The operation was nevertheless cleared given the domination of Tetra Pak in the buying market and its ability to prevent suppliers from increasing prices. The Commission considered that, after the merger, the structure of the supply side would mirror the structure of the demand side of the market for LBP with one large supplier (StoraEnso) and two smaller suppliers facing one large buyer (Tetra Pak) and two smaller buyers.[280] The merging parties were in fact dependent on Tetra Pak which purchased more than 50% of their total output. In addition, the production of LPB was recognized to be a high fixed-cost industry where high rates of capacity utilization are necessary in order to achieve satisfactory levels of profitability. The loss of such a customer would thus entail serious financial consequences since finding other customers to fill the capacity would not be an easy task.[281] In view of those elements and the possibility for Tetra Pak to develop alternative sources of supply, it was concluded that the latter had sufficient countervailing buyer power to neutralize the potential increase in market power of the merged entity.[282]

In 2006, further consolidation was authorized in the market of LPB through a merger between the second and third suppliers. The transaction resulted therefore in the creation of a near duopoly with, on the one hand, StoraEnso and, on the other hand, the new merged entity.[283] However, again, the strong position of Tetra Pak on the demand side was highlighted and considered as sufficient to counter any attempt by the merged entity and StoraEnso to increase prices. As already mentioned in the previous decision, suppliers are dependent upon that powerful customer for a large share of their respective sales and profitability in relation to their LBP activities. By contrast, Tetra Pak has the ability to sponsor a new entry or to support an increase in capacity of an existing player as well as to

[279] *Enso/Stora, op.cit.*, at 74-83.
[280] *Ibid.*, at 84-85.
[281] *Ibid.*, at 90.
[282] *Ibid.*, at 91-92.
[283] *Korsnäs/AssiDomän Cartonboard,* Case No IV/M.4057, Commission Decision of 12 May 2006, at 27-30. On that case, see: J.Karlsson, *Clearance of near duopoly,* 9 European Competition Law Review 514 (2006)

play-off the merged entity and StoraEnso against each other.[284] It is worth mentioning that, in this decision, the Commission excluded the risk that the merged entity would discriminate against Tetra Pak's competitors. Where in some cases it was held that the presence of some powerful customers was not sufficient to ensure the protection of smaller players against a potential increase in prices post-merger, the Commission maintained that, in this case, such discriminatory policy would be counter-productive in medium to long-term for LPB suppliers. Imposing higher prices only to Tetra Pak's competitors would indeed put those customers at risk of being foreclosed from the market and would in turn leave the LPB suppliers with Tetra Pak as a monopsonistic buyer.[285] Such situation would worsen the merged entity's bargaining position since the removal of the few existing alternatives would make it totally dependent on Tetra Pak.

Even though Tetra Pak was not the only customer of the merging parties, the Commission thus concluded that the firm's buyer power was such that it could, by itself, constitute a sufficient competitive constraint exerted on suppliers. Whatever the degree of market power held by the new entity and the weaker position of other buyers, a single customer may therefore, in some circumstances, be able to maintain effective competition in the upstream seller market.

c) Apple

While Apple was already mentioned as a powerful customer in the markets of electronic components, the Commission also noted its strong buying power in a relatively new market, namely the procurement market for recorded music in digital formats.[286] Apple's online service iTunes is indeed the leading digital music retailer and provides thus that company with a certain degree of countervailing buyer power. That particular position of Apple was an important element taken into consideration by the Commission when assessing the effects of the creation of a recorded music joint venture, "Sony BMG", jointly controlled by two major record companies.[287]

[284] *Ibid.*, at 46.
[285] *Ibid.,* at 52.
[286] *Sony/BMG,* Case No COMP/M.3333, Commission Decision of 3 October 2007.
[287] In that case, the Commission took a first clearance decision in 2004. However, the independent record companies and more specifically their industry association *Impala* brought an action before the Court of First Instance against that decision, considering that the Commission had not assessed properly whether the merger would create or strengthen a collective dominant position in the market for recorded music. In its judgment, the Court found that the Commission had made manifest errors on its assessment and that there was insufficient evidence for the Commission to clear the operation. (See: T-464/04*, Independent Music Publishers and Labels Association (Impala, international association) v Commission* [2006] ECR II-2289) Consequently, it annulled the decision. Sony and BGM had therefore to re-notify their JV so that the Commission could re-assess the transaction. In its second assessment, the Commission took into consideration developments since 2004 and, in particular, developments with regard to online music markets.

That concentration took place in a context where the growth of the Internet and its related technologies has been fundamentally changing the music industry. In view of the success of digital music delivered online, record companies have digitized and licensed the vast majority of their catalogue to online music platforms that make music available to consumers through various means. One particularity of the digital market is that, compared to the physical market, there is much less price differentiation regarding genres, the release date, the popularity of an artist or the chart success of a specific release.[288] In its market investigation, the Commission noted that, whilst the four major record companies have repeatedly called for Apple to change its policy of charging a flat rate of EUR 0.99/song, in order to increase the prices for releases with high demand and vice versa, Apple have resisted so far, saying that such pricing policy was crucial in helping the digital music business take off. Apple is therefore not generating significant profits from its iTunes online music retail business but its profit largely comes from the sale of iPods, PCs and related products.[289] The successful maintenance of the "one size fits all" pricing model to end users through non-differentiated wholesale prices was considered as the indication that iTunes was effectively using its buyer power against the record companies.[290] It appeared in fact that the strong demand position of iTunes and its correlated strong negotiation power had a significant impact on those companies' pricing structure decisions regarding the online download market.[291] Given those elements, the Commission considered that the transaction was not likely to impede competition in the market for recorded music in digital format, even though the recorded music industry was already concentrated prior to the notification of the Sony/BMG merger. Countervailing buyer power of customers, and in particular iTunes, was one of the main factors leading the Commission to exclude any risk of tacit collusion between the major record companies.[292] The presence of such strong buyer was indeed viewed as negatively affecting the ability to reach a coordinated effect. Representing a significant portion of market demand, iTunes could easily offer firms incentives to deviate from a tacit agreement and thus destabilize any potential coordination.[293]

[288] *Sony/BMG, op.cit.,* at 50.
[289] *Ibid.*, at 71. That pricing policy is also likely to affect rivals in the digital music retail market. The Commission noted that digital music retailers do not enjoy large profit margins at the current EUR 0.99 per track download price. These retailers can therefore only remain long term viable players when they receive the input of the record companies at terms below those charged to iTunes or when they sell digital music at a retail price above that of iTunes.(at 76)
[290] *Ibid.*, at 146.
[291] *Ibid.*, at 147.
[292] The issue of non-coordinated effects was shortly addressed since Sony BMG's market shares remained below a level that could generally be considered as constituting a single dominant position in any of the national markets.
[293] *Sony/BMG, op.cit.*, at 146.

We mentioned above that the degree of buyer power may be fluctuating over time due to the changing characteristics of the market. This is particularly relevant in a sector like the current digital music market. Indeed, in 2012, the Commission drew a different conclusion with regard to the existence of countervailing buyer power when assessing a merger reducing the four major music publishers to three in the markets for the licensing of online rights.[294] It was noted that the customer base on those markets is highly dynamic and that, since 2007, besides Apple's iTunes, different online music platforms have been launched successfully, such as the streaming service Spotify and Deezer. According to the Commission, the demand side is therefore less concentrated and includes smaller buyers that are unlikely to countenance rate increases or worsening of licensing terms and conditions by the merged entity.[295] In addition, different characteristics of the relationship between publishing companies and their customers can be interpreted as an exercise of the former's market power and thereby rule out the existence of sufficient countervailing power. For examples, customers highlighted that they were forced to make non-refundable advance payments and other lump sum payments to music publishers and therefore to bear the business risk normally incurred by the publishing companies.[296] All those elements are in fact counter-indicative of online customers exerting sufficient countervailing buyer power. The Commission hence concluded in that case that online platforms would be unable to prevent the anticompetitive effects that would likely arise from the proposed concentration.

In view of the rapid developments occurring in the digital music markets, it is inevitable that the players, their bargaining strength and the characteristics of that sector sector will still evolve further in the future.

F. CONCLUSIVE REMARKS

The emphasis put on the selected sectors reflects the high number of merger cases occurring in those industries which lead the Commission to frequently assess the bargaining strength of the respective client-base. This does definitely not exclude the exercise of significant buyer power in other sectors or by other customers not analysed in this paper. However, it may be suggested that the high number of mergers among suppliers of a same customer category is a reaction to the strong bargaining power of the latter. Even though different reasons may justify a concentration, the presence of powerful buyers, such as in the car industry, may be a strong incentive for suppliers to merge.

[294] *Sony/Mubadala Development/EMI Music Publishing*, Case No OMP/M.6459, Commission Decision of 19 April 2012.
[295] *Ibid.*, at 251.
[296] *Ibid.*, at 252.

In the different decisions, some factors were repetitively mentioned as sources of buyer power. If the bidding nature of the procurement procedures used by some customers has been recognized as enhancing the exercise of buyer power, the decisive element in the Commission assessment is the availability of alternative sources of supply. Even a monopsonist, as the Ministry of Defence when buying military equipment, would be indeed deprived of its bargaining strength if it could not threat to switch to another supplier. This confirms hence the theoretical examination of buyer power carried out in Chapter 1 with regard to the factors giving buyers significant market power in the upstream procurement market.

Recognition of buyer power in a particular merger decision cannot be taken for granted in the future, even if the new transaction takes place in similar circumstances. The perpetual change occurring in a product market implies that market power of the different actors is not frozen data but likely to evolve, especially in new technological markets. This notion is thus not immutable and may vary depending on different factors.

Firstly, the position of the players on the buying and on the selling side and, in particular, the level of concentration in the different markets, play a major role in the assessment of buyer power. It is therefore important to determine rightly the customer-base, its degree of concentration as well as the number of alternatives available in the procurement market. For example, since car manufacturers are generally more concentrated than independent resellers, the former can exercise a stronger bargaining strength on their suppliers. A similar difference in buyer power has been noted between the national railway operator and the local transport companies.

Secondly, the balance of power between buyers and suppliers may vary from one product to another due to the different characteristics of each product or geographic market. The level of brand loyalty for a particular consumer good and the correlated presence of private labels in that market is for example determinant in the assessment of retailers' buyer power. Between the same customers and suppliers, the balance of power may therefore tilts in favour of one or the other depending on the characteristics of the product in question and consumer preferences with regard to that product.

Thirdly, buyer power of customers is not homogeneous within the European Union. The definition of the relevant geographic market may therefore influence the analysis of the degree of countervailing power in a particular product market. The level of concentration on the buying side, consumer habits or a different organization of the market in question constitute some of the elements likely to influence the negotiation strength of each player.

The high degree of countervailing buyer power recognized in merger decisions shows that powerful buyers are likely to influence competition on the markets. They are indeed in a position to mitigate or even to neutralize a significant increase in market power occurring in the upstream market through a merger. That ability of customers to prevent a merged entity - holding sometimes much more than 50% of market share - from increasing prices post-merger or from tacitly colluding with other suppliers, attests of the degree of their power. So far, such strength has been mainly considered as a positive competitive constraint in merger decisions. It remains to be seen whether the exercise of buyer power is always promoting effective competition on the markets.

SECTION II – FOCUS ON BUYER POWER IN THE RETAIL AND PROCESSING INDUSTRY

A good illustration of the exercise of buyer market power occurs in the consumer goods retail sector where supermarket chains are becoming highly concentrated. Facing, in many product categories, a larger number of dispersed sellers, those actors enjoy generally a much stronger bargaining power in the negotiations with their suppliers. As a result, large retail chains are able to extract lower prices or other favourable terms from their suppliers. While it is commonly admitted that the exercise of buyer power in the retail sector may lead to unfair trading practices, uncertainties arise as to whether this may also impair undistorted competition on the markets. As the presence of big supermarkets generally leads to lower prices for consumers, competition authorities tend to categorize the exercise of buyer power as harmless or even procompetitive conduct. However, the erosion of competition in the upstream markets and the use of some practices detrimental to suppliers and smaller retailers might, in the long-term, affect consumers as well.

A. SUPERMARKETS' BUYER POWER

Due in particular to their size and their role of gatekeeper, big-box stores enjoy a significant degree of market power in the input markets. Their strong bargaining position enables them to extract lower prices and other concessions from their suppliers but also to put their rivals at a competitive disadvantage both in the upstream and in the downstream markets.

1. Development of large chain stores in the EU

The consumer goods retail sector has been constantly changing for the last decades in the European Union. A process of concentration of distributors has led to a situation where a small number of large supermarket chains dominate the market, often to the detriment of local and specialized retailers. In

some Member States, the top 2 or 3 retail stores may account for more than 75% of the market.[297] Owning large stores as well as smaller convenience stores[298], these big retail chains influence the lives of all consumers and the business activities of other market participants in the supply chain.

In addition to the increasing concentration of that sector, different factors have contributed to the emergence of supermarkets' buyer power. **Firstly**, the large market share held by a few retailers in the downstream market gives rise to a gatekeeper effect. In order to have access to a sufficient number of consumers, it is all but vital for producers to guarantee shelf space in those market leaders' outlets. Control over access to end-users turns thus big-box stores into unavoidable business partners for any supplier willing to efficiently market their products through a large scale distribution channel. **Secondly**, the high barriers to entry existing in the retail sector make the threat of new entrants unlikely. Besides the significant investment needed to open a supermarket, regulatory and administrative barriers are present in many Member States, impeding the entry of potential competitors. To name but a few, those restrictions may include planning laws or ex-ante authorization required for the opening or extension of retail stores.[299] **Thirdly**, the creation of buying alliances among retailers, such as central buying agencies in France, or other centralized purchasing systems reduces the number of alternatives available to suppliers to sell their products and thereby increases buyers' market power. Through the purchases of a large share of a supplier's outputs, buying groups make the latter highly dependent on them. **Fourthly**, the increasing internationalization of economic activities gives retailers the opportunity to source globally, enlarging their outside options and thereby increasing their market power vis-à-vis local producers.[300] **Finally**,

[297] There are significant differences in concentration ratios among the different Member States. For example, the UK top retailers have a combined market share of 65% in the downstream seller market, the Dutch top 3 of 83% and the Finish top 2 of 75%, while in other Member States the retail sector is more atomized, as in Romania where the top 10 retailers account only for 19% of the downstream seller market. See: Commission Staff working document, *Competition in the food supply chain,* SEC(2009) 1449, at 8.

[298] Many independent convenience stores have been bought out by large retail chains or are in fact controlled by the latter through franchising. Franchise stores can (or are forced to) buy all or an important part of their merchandise through a centralized purchasing system that the franchisor administers or participates in so that those smaller shops also benefit indirectly from large supermarkets chains' buyer power.

[299] See: OECD, *Land use restrictions as barriers to entry,* Policy Roundtables, DAF/COMP(2008)25, 28 November 2008, available at: http://www.oecd.org/daf/competition/abuseofdominanceandmonopolisation/41763060.pdf ; *The retail planning system as applied to the grocery sector: 2001-2007,* Grocery monitor: Report No 3, The (Irish) Competition Authority, July 2008, available at: http://www.tca.ie/images/uploaded/documents/grocery_monitor_report_3.pdf ; Avis n° 10-A-26 du 7 décembre 2010 relatif aux contrats d'affiliation de magasins indépendants et les modalités d'acquisition de foncier commercial dans le secteur de la distribution alimentaire, Autorité (française) de la Concurrence.

[300] While imports concern mainly non-food items, it appears that retailers are also turning, yet to a lesser extent, to global markets for the purchase of food products. However, only large retailers have sufficient resources to source directly from foreign manufacturers due to the high costs required to establish and enforce contracts abroad as well as to make sure those producers comply with product and process standards in the importing country. See: H.K.Nordas, M.Geloso Grosso & E.Pinali, *Market Structure in the Distribution Sector and*

the growing presence and success of own-label products on the shelves reinforces to a great extent supermarkets' buyer power. This last issue will be further developed below.

It is undeniable that consolidation in the retail sector has entailed economic advantages for retailers and greater convenience for consumers with the development of one-stop shops offering loads of different products.[301] Thanks to their size, supermarkets have been able to make heavy investment leading to economies of scale and to the creation of sophisticated and efficient distribution networks.[302] Nevertheless, the report of these changes is not all roses and includes competitive concerns as well. Indeed, as a result of that concentration, the number of traditional and specialist retailers, constituting competitive forces, has been sharply declining, leading to the creation of both an oligopolistic market on the selling retail side and an oligopsonistic market on the buying side. With regard to the latter, the exercise of buyer power by large retailers *vis-à-vis* their suppliers is a controversial issue which has raised debates concerning the effects of such power on the markets. While some consider that pressuring on suppliers leads to considerable benefits for end consumers, others view supermarkets' practices as a cause of competitive distortions which is likely to affect not only the price but also the quality and variety of products available on the shelves.

The EU Institutions and Member States are not remaining insensitive to the issue of buyer power. In 2008, in a written declaration, the European Parliament expressed concerns about abuse of power by large supermarkets and called upon the Commission to investigate the impact that retail concentration is having on the different market participants and to propose appropriate measures to protect consumers but also producers from any abuse in that sector.[303] At the national level, a significant number of sector inquiries have been carried out, especially in the food industry.[304] Those

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Merchandise trade, OECD Trade Policy Working Papers No.68 (2008), at 18. Actually, imports of food products are more likely when the retailer is established in the foreign country. As such, suppliers in the host country may be given the opportunity to export their products to the retailer's home country. (at 31) The reasons why food products are generally sourced locally may be that food is perishable and that those products are more likely to be replenished every day. In addition, consumer tastes generally vary from one place to another for food than non-food products. (at 25)

[301] One-stop shops refer to stores offering the shopper a very large number of product categories ranging from food and general household or garden items , to health/beauty products, clothes, books, toys or electrical appliances.

[302] P.W.Dobson, *Retailer Buyer Power in European Markets : Lessons from grocery supply,* Business School Research Series Paper, 2002, at 4.

[303] Written declaration of the European Parliament on investigating and remedying the abuse of power by large supermarkets operating in the EU, DCL-0088/2007, February 2008. On the different declarations of the EU Parliament on that matter and other actions taken at EU level to investigate the degree of competition in the food supply chain, see Part III, Chapter 2, Section I, Point A.

[304] Details on the various sector inquiries carried out by national authorities may be found in a report of the European Competition Network. See: *ECN activities in the food sector – Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector*, ECN subgroup food, may 2012, at 92-136, available at: http://ec.europa.eu/competition/ecn/food_report_en.pdf As the

monitoring investigations have looked at various issues. Some of them have examined the functioning of the food supply chain as a whole while others have focused on specific agricultural products. Most actions however have been concentrated on the multi-product retail sector. Among the recurrent issues dealt with by national competition authorities (NCAs) in their market monitoring investigations, priority has been given to the degree of consolidation and the use of alleged abusive practices linked to imbalances of bargaining power between market participants. The conclusions drawn on that matter in the resulting reports were, however, not unanimous. Some NCAs consider that the exercise of buyer power implies no harm for consumers and may even bring positive effects if competition among retailers in the downstream markets leads buyers to pass on the lower purchasing costs to end-users.[305] In the absence of established consumer injury, the practices in question can consequently not be qualified as anticompetitive. From that approach, instead of the EU or national competition rules, other instruments should therefore be enforced to tackle this issue such as the enactment of laws against unfair trading practices or the implementation of a code of conduct. In contrast, other NCAs point out that some commercial practices used by large retailers may ultimately have a detrimental effect on the competitive process and on consumers by decreasing suppliers' incentives to invest or innovate and thereby affecting consumer choice.[306]

Commission, many NCAs have the powers to conduct sector inquiries when circumstances suggest that competition may be restricted or distorted. In addition, NCAs may also conduct market monitoring investigations to enable them to provide opinions on legislative projects which may have an impact on competition conditions on markets. In total, since 2004, 25 NCAs have carried out 103 market monitoring actions. A large number of NCAs have paid greater attention to the food retail sector where 36 market monitoring actions are reported in Austria, Bulgaria (3), Belgium, Czech Republic, Denmark, Finland, France (5), Germany, Ireland (4), Italy, Lithuania (3), Norway, Poland (2), Portugal (3), Romania, Slovakia, Slovenia, Spain (3), Sweden and UK.

[305] For examples, the report of the Portuguese NCA on buyer power and pass through revealed that lower prices paid to suppliers tended to be partially passed on to final consumer in terms of lower retail prices and did not raise competition concerns on that matter. The Romanian NCA came to similar conclusions concerning the effects of buyer power and considered that unfair trading practices should be tackled under commercial law rather than competition law. It is worth yet noting that the degree of concentration in the Romanian grocery sector is relatively low so that retailers are more likely to pass on the benefits obtained from suppliers to consumers. Concerning the increasing use of own-label products by retailers, NCAs consider that it is a factor to take into account when examining buyer power. However, the Austrian NCA for example concluded that private effects had no adverse effect on consumers in terms of price competition.

[306] For examples, the UK NCA found that buyer power can have positive effects in terms of lower retail prices for consumers but nevertheless considered that when retailers transferred excessive risks or unexpected costs to suppliers, the latter were less incited to invest in new capacity, products and production processes. Consequently, those practices could ultimately have a detrimental impact on consumers. The Spanish report on the relations between manufacturers and retailers in the food sector also highlighted that buyer power may have a negative effect on competition among manufacturers and among retailers in the medium and long-term and may stifle innovation in the food industry. As regards commercial payments from suppliers to retailers, the Norwegian NCA pointed out that certain types of fees and payments may have, in some cases and in conjunction with other arrangements, foreclosure effects. On that matter, the Finnish NCA found that slotting fees may lead suppliers to increase prices and reduce innovation. Concerning private labels, the Spanish NCA recognized that, in the short term, those products can entail positive effects for consumers. However, it also

Despite the different investigations carried out in the European Union, the debate on the positive versus negative effects of buyer power is thus still open. We cannot but admit that the different practices used in the retail sector may benefit consumers, at least in the short term, if we consider, as the Commission does, that fierce competition still exist between the few large retail chains in most geographical markets. However, with regard to the long-term impact of those practices, there is less certainty.

2. Common practices in the retail sector

As a result of their superior bargaining power, large retailers are able to impose buying conditions to their advantage on most of their suppliers. However, such buyer power may be weakened when negotiations occur with large multinational suppliers which produce "must-carry" brands such as Kellog's or Coca-Cola.[307] The presence of those brands is indeed one of the *sine qua non* conditions for attracting consumers in the retailer's premises.[308] It may hence be assumed that the resulting interdependence between buyers and sellers leads to a more balanced business relationship. In such a situation of bilateral market power, the presence of large buyers is more likely to entail positive effects on the markets, provided that the downstream market is competitive. It may indeed prevent powerful producers from imposing prices above the competitive level or other selling conditions which turn out to be harmful to final consumers. Retailers are nonetheless not deprived of any weapon in their negotiations with must-carry brands manufacturers who may be only partially insulated from retailer coercion.[309] As the latter generally also produce lesser-known brands, the buyer may use its stronger bargaining power with regard to those products in order to gain leverage in negotiations related to the purchasing of must-carry brands. The prevalence of either buyer power or seller power will depend on various circumstances and, in particular, on the relative number of alternatives available to each party. The practices described below may probably be more successfully used against small and medium sized enterprises (SMEs) which are active in a significant number in the processing sector.[310] It is specifically with regard to suppliers with little market power

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pointed out that, in the long-term, own-brand products may reduce inter-brand competition due to elimination of secondary brands of manufacturers.

[307] Commission Staff working document, *Competition in the food supply chain,* SEC(2009) 1449, at 7.

[308] This argument does not apply to hard-discount retailers such as Aldi or Lidl which generally offer a limited assortment of products and focus mainly or only on own-label products.

[309] P.C.CARSTENSEN, *Buyer Power, Competition Policy, and Antitrust : The Competitive effects of discrimination among suppliers,* 53 The Antitrust Bulletin 271, at 292 (2008)

[310] SMEs represent approximately 99% of all enterprises active in the food supply chain. Creating almost 48% of the total value-added in the sector, they play a crucial role in promoting growth and diversity of food and drink products. See: Report on the Competitiveness of the European Agro-Food Industry, High level Group on the Competitiveness of the Agro-Food Industry, 17 March 2009, at 38, available at: http://ec.europa.eu/enterprise/sectors/food/files/high_level_group_2008/documents_hlg/final_report_hlg_17_03_09_en.pdf

that the exercise of buyer power is likely to lead to a systematic and significant imbalance in the parties' bargaining power.

a) Low prices and non-cost related discounts

Reduced prices obtained by large retailers which are justified by the size of purchases and the exploitation of economies of scale and scope do not raise policy concerns. Even though that leads to differences in prices with regard to smaller purchasers, this is part of normal business practice and generally benefits both parties as well as consumers.[311] The huge volumes bought and sold by big-box stores may indeed create economies of scale for the supplier, leading to a decrease in per-unit production cost. The problem arises when efficiency gains have been exhausted but the retailer still requires that the price be further reduced.[312] Due to their market power, some supermarkets are in fact able to extract non-cost related discounts from their suppliers and to impose prices below the competitive level. It is also not unusual that retailers unilaterally impose extra discounts or after-sale rebates at the end of the year on basis of the total sales made from the supplier's products during that year. In most cases, this is done in a non-transparent way without any negotiation through a reduction of the total sum owned to the supplier.[313] The demand for very low prices, deep discounts and other retro-active payments erodes profit margins of suppliers and precludes them from anticipating the amount of financial means that will be available for investment.[314] On a short-term consumer welfare basis, those advantageous financial conditions obtained by large retailers can be viewed positively, provided that they are passed on to consumers. However, as it is developed below, they could also entail harmful consequences.

b) Listing charges, slotting allowances and other commercial payments

While suppliers may receive only low prices for their products, they often see their profit margin further whittled away due to additional costs imposed by larger supermarkets such as listing fees and slotting allowances. The former constitutes a payment required by the retailer before agreeing to stock the supplier's products in its stores. The latter represents the payment made by the supplier for favourable shelf location, more shelf space or advertising in retail outlets.[315] Since positioning on

[311] P.W.Dobson, M.Waterson & A.Chu, *The Welfare Consequences of the Exercise of Buyer Power,* Research paper prepared for the Office of Fair Trading, 1998, at 27.
[312] A.A.Foer, *Mr.Magoo visits Wal-Mart: Finding the right lens for antitrust,* 39 Connecticut Law Review 1307, at 1324-1325 (2007)
[313] See for example: UK Competition Commission, *Groceries Market Investigation* (2008), available at: http://www.competition-commission.org.uk/rep_pub/reports/2008/538grocery.htm, at 165-173.
[314] M.Vander Stichele & B.Young, *The abuse of supermarket buyer power in the EU food retail sector – Preliminary survey of evidence,* Agribusiness Accountability Initiative, Amsterdam, March 2009, at 17.
[315] G.Mills, *Buyer Power of Supermarkets*, 10 Agenda 145, at 152-154 (2003)

shelves can have a great influence on the success/failure of a product, manufacturers are urged to pay those fees in order to make their merchandise the most visible and attractive for consumers. The payment of listing fees and slotting allowances is widely used in the retail grocery industry but the issue as to whether that practice tends to impair or not retail competition is subject to disagreements among economists and policy makers.[316]

The main reasons invoked in favour of those charges are that, on the one hand, it helps retailers to allocate shelf space - which is a scarce resource in the supermarkets – in an appropriate way and, on the other hand, it increases the chances to make a new product accepted by the retailer.[317] With regard to the latter, since new product failure rates tend to be very high, the payment of slotting allowances would enable retailers to cover, not only the new product introduction costs but also the risk of that new product failure. Indeed, such failure constitutes a major concern for retailers as well who have to bear additional costs for listing the new product in their stores and will suffer from the loss of unsold failed products. The different fees required from suppliers would therefore provide a kind of indemnification for retailers in case the products fail to sell well. [318]

However, the opponents to those practices consider that requesting such payments may affect the competitiveness of some suppliers. Indeed, according to them, supermarkets could not necessarily select the best products, those preferred by consumers or the most efficient suppliers but, instead, choose sellers which are the best able to bear those costs, leaving the others out of the shelves. As a result, efficient suppliers could be induced to limit the number of retailers through which they make their products available, limiting thus intra-brand competition. [319] Slotting allowances may in addition

[316] O.Foros & H.J.Kind, *Do Slotting Allowances Harm Retail Competition?,* 110 Scandinavian Journal of Economics 367 (2008).

[317] On the efficiency arguments of slotting allowances, see: K.Kelly, *The antitrust analysis of grocery slotting allowances: the procompetitive case,* 10 Journal of Public Policy and Marketing 187 (1991) & M.W.Sullivan, *Slotting allowances and the market for new products,* 40 Journal of Law and Economics 461 (1997). See also: W.Chu*, Demand signaling and screening in channels of distribution*, 11 Marketing Science 327 (1992). According to Chu, slotting allowances enable manufacturers to convey information about the likelihood of their products' success or failure as, by paying those fees, they in fact signal their quality.

[318] K. Sudhir & V.R.Rao, *Are Slotting Allowances Efficiency-Enhancing or Anti-Competitive?,* 43 Journal of Marketing Research 137, at 140 (2006). See also: H.Mullan, *Banning payments for slotting and shelf-space: Ireland set to follow the United kingdom's example,* 31 European Competition Law Review 151 (2010).

[319] See: G.T.Gundlach, Antitrust analysis of exclusionary arrangements involving slotting allowances and fees: issues and insights, American Antitrust Institute wording paper N° 05-03 (2005), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103520 See also: Guidelines on vertical restraints (text with EEA relevance), J.O. C 130/1 of 19/05/2010, at 204. The Commission points out in those guidelines that such payments may induce the supplier to channel its products through only one or a limited number of distributors and that this may lead to the same downstream foreclosure effect as an exclusive supply type of obligation. See also: L.Marx & G.Shaffer, *Upfront payments and exclusion in downstream markets,* 38 The RAND Journal of Economics 822 (2007). Marx and Shaffer show that the use of upfront payments can also lead to the exclusion of rival retailers. "The idea is that having given the dominant retailer an upfront payment to buy its input, the manufacturer will not then want to trade with the rival retailer because of fears that if it did, the

result in anticompetitive foreclosure of other suppliers as the widespread use of those payments is likely to raise barriers to entry for small entrants.[320] Deprived of adequate distribution due to such downstream foreclosure effect, some manufacturers could, as a result, be prevented from entering or forced to leave the market even though their products may be socially desirable. Finally, slotting allowances and other fees required by retailers may result in weakening price competition in the downstream retail market. At the heart of the negotiations between retailers and suppliers lies indeed the issue of slotting allowances and other commercial promotions so that buyers are more likely to accept higher prices knowing that their buyer power will enable them to offset the cost of this through the extraction of various payments. Higher prices paid to manufacturers may, in addition, be profitable for retailers as they signal competitors the intent to be less aggressive in pricing in the retail market, softening as a result downstream price-competition.[321]

Where commercial payments may offer advantages to the supplier through extra sales generated, for example, by end-of-aisle displays or other promotional actions, those payments are more likely to harm them when no service is offered in return. This may occur when a retailer request additional discounts or other concessions for the opening of a new store, for the anniversary of an existing store or following a merger ("wedding gift"), to name but a few. [322] Acceptance of such unjustified payments by suppliers reveals therefore the presence of significant buyer power in the hands of retail chains and may cause harm to suppliers but also to competing buyers and consumers.

c) Other (non-)contractual conditions imposed on suppliers

In addition to obtaining financial concessions such as low prices and discounts, retailers are able to exploit their buyer power through other practices which have been pointed out by some national competition authorities in their reports on the retail sector. [323] We can mention, for examples,

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dominant retailer would cut back on some or all of its planned purchases. Consumers lose in this case because retail prices are potentially higher, and with fewer retailers buying form the manufacturer, choice in the market place is reduced". (at 838) In addition, where payments are initiated by suppliers, they can be used to raise rivals' cost by bidding up the price of shelf space. See: G.Shaffer, *Slotting allowances and optimal product variety*, 5 Advances in economic analysis & Policy, article 3 (2005)

[320] Commission notice - Guidelines on vertical restraints, SEC(2010)411, O.J. C 130 of 19/05/2010, at 205.

[321] See: G.Shaffer, *Slotting allowances and resale price maintenance…, op.cit.* See also: Commission notice - Guidelines on vertical restraints, SEC(2010)411, O.J. C 130 of 19/05/2010 , at 206: "In addition to possible foreclosure effects, upfront access payments may soften competition and facilitate collusion between distributors. Upfront access payments are likely to increase the price charged by the supplier for the contract products since the supplier must cover the expense of those payments. Higher supply prices may reduce the incentive of the retailers to compete on price on the downstream market, while the profits of distributors are increased as a result of the access payments."

[322] - P.W.Dobson, R.Clarke, S.Davies & M.Waterson, *Buyer power and its impact on competition in the food retail distribution sector of the European Union,* 1 Journal of Industry, Competition & Trade 247, at 269 (2001)

[323] See for example: UK Commission, *Groceries Market Investigation* (2008), available at: http://www.competition-commission.org.uk/rep_pub/reports/2008/538grocery.htm. Among the other

transfer of excessive and unjustified risks and costs to the suppliers, such as for goods lost or stolen in the retailer's premises, retrospective changes to contractual terms, delayed payment, unforeseen change in quantities or product-quality specifications in a very short-term, request to buy back unsold items or failure to pay for them, introduction of a most favoured customer clause[324], absence of written contract or obligation to provide exclusive information regarding new products.[325] While directly benefiting retailers, those practices are less likely to entail a change in the latter's pricing policy and may incite suppliers to raise prices to compensate those unexpected costs and risks. As a result, consumers are unlikely to reap any benefit of the exercise of buyer power and may even end up paying higher prices as the ability of retailers to increase their profits by extracting unjustified payments and by transferring excessive risks and costs to their suppliers tends to reduce price competition in the retail market.[326]

d) De-listing threat

As a "gatekeeper", a powerful supermarket has a strong weapon to make its contractual conditions accepted by suppliers which is the threat to de-list a product. Since large retail chains buy an important proportion of the supplier's total output, the loss of that distribution channel can lead to serious financial consequences for the latter. Even though a retailer is likely to reduce its profits when it stops selling a product, the effect of such de-listing will probably be more significant for the manufacturer.[327] The risk for suppliers is therefore high as it is recognized that consumers switch more easily to another brand than seek the de-listed product at a rival store. As a result, due in particular to the sunk costs incurred in the beginning of the business relationship to meet the retailer's demand for large-scale production and due to the difficulty in replacing a customer which

practices found by the Competition Commission, we can note: delaying payments to suppliers, changing quantities or product-quality specifications in a short-term, requiring suppliers to make, and support the costs of, changes to packaging and labeling.

[324] A most favoured customer clause is a contractual obligation that guarantees the retailer to obtain the lowest price charged to any other buyer.

[325] Commission Staff working document on Retail services in the Internal Market, accompanying document to the Retail market monitoring report, *Towards more efficient and fairer retail services in the Internal Market for 2020*, SEC(2010) 807, at 40-41.

[326] Such as the extraction of slotting allowances or other payments by retailers, the transfer of excessive costs and risks may lead the latter to support the payment of higher prices as they will find alternatives to reduce their costs. The resulting reduction in price competition is even more likely to happen in countries where sales below costs are prohibited such as in Belgium, France, Luxembourg, Denmark and Greece as the different concessions extracted by retailers from their suppliers are generally not included in the calculation of the below-cost sales threshold. Even though higher prices paid to suppliers are more than compensated by other concessions, retailers are not allowed to sell below wholesale prices so that competitors are assured that price competition is not going to decrease prices below that threshold.

[327] G.Mills, *op.cit.,* at 46. When delisting one product, retailers are unlikely to lose a large share of their customers, especially if the product in question is not a must-carry brand. However, removing and replacing products nevertheless cause some inconveniences due in particular to the changes of data, coding and other organizational matters.

may account for 20-30% of the national market, it becomes unthinkable for suppliers to run the risk of losing that customer.[328] This is particularly relevant when suppliers are local SME or farmers who do not have the ability to equivalent alternatives. However, one cannot but notice that, nowadays, even large multinational companies are not shielded from delisting threat as illustrated for example in Belgium where, in 2008, one of the largest supermarket chains, namely Delhaize, delisted some 250 products including well-known brands such as Knorr, Dove or Lipton produced by Unilever due to a disagreement on the terms of supply.[329] Where delisting such very popular brands was unthinkable some time ago because of retailers' fear of losing customers, this case proves that the balance of power between producers and supermarkets may in some cases shift in favor of the a latter. Where delisting products is not as such prohibited under the competition rules since firms remain free to break off a business relationship, a refusal to deal with existing trading partners might nevertheless, in some circumstances, constitute an abuse just as a refusal to supply on the selling side.[330]

e) Restriction regarding rival retailers

Through the exercise of buyer power, retailers do not only aim at capturing welfare from producers but may also seek to exclude competitors either on the buying side or on the selling side of the market. In some circumstances, retailers may indeed have sufficient leverage to induce their suppliers to refuse to deal with a competing supermarket. To achieve such foreclosure of competitors, retail chains may either "bribe" suppliers or threaten to stop doing business with them in case they do not comply with the exclusivity dealing.[331] Exclusive supply agreements, imposing on a supplier to sell a particular final product only to a single retail chain, or even less drastic agreements prohibiting sellers from offering better conditions to competitors, have the potential to

[328] A.A.Foer, *op.cit.,* at 1324-1325.

[329] The spat between Delhaize and Unilever arises after the latter asked for better promotion and higher prices in order to reflect the higher raw material costs. Following Delhaize's decision, most consumers replaced Unilever products with those of competitors or Delhaize's private label lines. Some reports revealed that 30% of consumers shopped elsewhere to find the delisted products. However, Delhaize denied that the row had dented its sales. The dispute was settled one month later.

[330] See: Case 27/76, *United Brands Company and United Brands Continental v Commission* [1978] ECR 207 and *BBI/Boosey & Hawkes – Interim measures,* Case No IV/32.279, Commission Decision of 29 July 1987. In those cases, it was held that the refusal to supply was anticompetitive because by doing so the dominant firm was trying to impair rivals' competitiveness by denying them access to distribution. In *United Brands,* the dominant supplier refused to deal with its distributor the latter was engaged in promotional activities for a competitor of the supplier while in *BBI/Boosey,* the dominant firm refused further suppliers to a customer who had started selling a competing brand. On abusive refusal to deal on the selling side, see: R.Subiotto & R.O'Donoghue, *Defining the scope of the duty of dominant firms to deal with existing customers under Article 82 EC,* 12 European Compeittion Law Review 683 (2003).

[331] R.Inderst & N.Mazzarotto, *Buyer power in distribution,* in W.D. Collins, ed., ABA Antitrust Section Handbook - Issues in Competition Law and Policy (2008), at 1968-1969.

harm competition.[332] Indeed, such a restriction imposed on suppliers, either explicitly or under an implicit threat of de-listing, will prevent other retail chains from obtaining the products in question and therefore deprive consumers of lower prices resulting from intra-brand competition.[333] A retailer is not prohibited from obtaining favourable price and terms for itself since it may lead to benefits and efficiency. However, the requirement to sell at higher prices or not to offer the same advantageous condition to its rivals does, without any doubt, restrict free competition and prevent economic entities from acting on a level playing field.[334]

If those agreements may be justified in some sectors, it seems that, concerning the grocery market and its mass consumer goods, no benefits are likely to off-set the adverse effects on competition. It is indeed not in the interest of suppliers to forego additional sales and the exclusivity given to particular retailer will not provide consumers with better offers or services. Among the different situations where vertical restraints may help realise efficiencies and provide benefits to consumers, the Guidelines of the Commission on that matter point out, among other things, arrangements concluded to avoid a free riding or hold-up problem[335]. However, one cannot but notice that such a problem is unlikely to arise in that sector as food and non-food products sold in supermarkets are not information intensive goods requiring consumer education through dealer demonstration or advice. The only additional services that retailers may provide for consumers are in fact invulnerable to free riding and may consist in a more pleasant shopping environment, a prestigious store location, convenient opening hours or a fuller inventory for examples. It is clear that consumers cannot benefit

[332] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Food prices in Europe*, COM(2008) 821, at 9.
[333] T.A. Piraino, *A proposed Antitrust approach to the conduct of retailers, dealers, and other resellers,* 73 Washington Law Review 799, at 844 (1998).
[334] *Ibid.,* at 856.
[335] See: Guidelines on vertical restraints, *op.cit.,* at 107 and 192-202. Among the different reasons which may justify the application of certain vertical restraints, the Guidelines point out the free-rider problem. "One distributor may free-ride on the promotion efforts of another distributor. This type of problem is most common at the wholesale and retail level. Exclusive distribution or similar restrictions may be helpful in avoiding such free-riding. (…)For there to be a problem, there needs to be a real free-rider issue. Free-riding between buyers can only occur on pre-sales services and other promotional activities, but not on after-sales services for which the distributor can charge its customers individually. The product will usually need to be relatively new or technically complex or the reputation of the product must be a major determinant of its demand, as the customer may otherwise very well know what he or she wants, based on past purchases. And the product must be of a reasonably high value as it is otherwise not attractive for a customer to go to one shop for information and to another to buy. Lastly, it must not be practical for the supplier to impose on all buyers, by contract, effective promotion or service requirements. Free-riding between suppliers is also restricted to specific situations, namely to cases where the promotion takes place at the buyer's premises and is generic, not brand specific." (at 107(1))The so-called hold-up problem involves situations where client-specific investments are to be made such as in special equipment or training. It is required that the investment be relationship-specific, not recouped in the short term and asymmetric. (See at 107(4))

from those services while patronizing another store so that any type of exclusive arrangement in the grocery retail sector is hardly justifiable.[336]

Where vertical restrictions may hardly result in the exclusion of large retailers which are able to remain competitive on the different markets by using similarly their market power, it is a very different story for smaller competitors. The latter are indeed highly vulnerable to exclusive conduct of large supermarket chains and efficiency does not always suffice to protect them against exclusion. Exclusive and other restrictive vertical arrangements may thereby enable a large retailer to acquire monopsony power or strengthen its buyer power in the upstream market but also to reinforce its position in the downstream market. This would be the case where competing buyers are active on the same relevant retail market.

f) Category management

Besides vertical agreements containing restrictions on competition and limiting the ability of suppliers to define their own trading strategy, retailers may resort to other types of vertical arrangements with their business partners such as category management agreements. Based on the cooperation and synergy of expertise of each party, those agreements raise some competitive concerns.

Category management is a business technique which aims at studying consumer demand within a particular category in order to help retailers make decisions about product selection, placement, promotion and pricing so that they can best meet consumer preferences.[337] To this end, the management of a retail establishment is broken down into categories of like products, such as hair care or breakfast foods, and the retailer's strategy is defined on a category-by-category basis rather than on a brand-by-brand basis.[338] Because effective management require marketing expertise and continual analysis of data, retailers have recently started appointing a manufacturer, generally a leading supplier in the particular category, as "category captain" which is then in charge of making decision or giving advice to the retailer about its own products but also those of competitors.[339] In

[336] M.Lao, *Free riding: an overstated and unconvincing explanation for resale price maintenance,* in How the Chicago School overshot the mark – The effect of conservative economic analysis on U.S. Antitrust, R.Pitofsky (ed.) (2008), at 202.
[337] FTC, Report on the Federal Trade Commission Workshop on slotting allowances and other marketing practices in the grocery industry, February 2001, at 46, available at: http://www.ftc.gov/os/2001/02/slottingallowancesreportfinal.pdf
[338] L.S.Carameli, Jr, *The anti-competitive effects and antitrust implications of category management and category captains of consumer products,* 79 Chicago-Kent Law Review 1313, at 1314 (2004)
[339] B.J.Lorden, *Category management: The antitrust implications in the United States and Europe,* 23 Loyola Consumer Law Review 541, at 542 (2010-2011). The category captain carries analysis about the category and provides retailer with a detailed plan including a "plan-o-grams", that is a visual depiction of where each

most cases, supermarket chains rely on a single supplier to manage a category but they may also appoint another manufacturer of the same category (co-captain) for second opinions or call upon third-party advisor with no vested interest in the category.[340] Where the category captain is supposed to only give recommendations and advice, it is sometimes given much more responsibility and in many cases, the retailer simply accept the suggested decisions about which brands and products should be on the shelves with no or only few changes.[341]

Category management is likely to provide various benefits for retailers but also for consumers. It is indeed an effective retail marketing practice that enables supermarket chains to use their limited shelf-space efficiently and to enhance consumers' shopping experience by placing products in the most convenient location and by offering the best product assortment at the prices consumers are willing to pay.[342] By resorting to category captaincy, retailers can in addition benefit from their suppliers' expertise and knowledge in marketing the different categories.[343] However, despite those benefits, anti-competitive issues may also arise from category management arrangements and some of them may be related to the exercise of buyer power by large supermarket chains. Pointed out by competition authorities and the European Commission[344], those potential harmful effects concern exclusion of rival suppliers and collusion among suppliers or retailers.

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product in a given category should be shelved, and recommendations on product additions or deletions, promotions and possibly retail prices.

[340] R.L.Steiner, *Category Management – A pervasive, new vertical/horizontal format,* 15 Antitrust 77, at 78 (2001)

[341] B.J.Lorden, *op.cit.,* at 544.

[342] L.S.Carameli, Jr, *op.cit.*, at 1314.

[343] Manufacturers have more information about the market and its trends and can use various data to determine which factors specifically drive category sales (e.g., prices, promotions and product placement). In addition, suppliers have more resources including the necessary highly trained personnel to analyze data and implement category management suggestions. See: D.M.Desrochers, G.T.Gundlach & A.A.Foer, *Analysis of antitrust challenges to category captain arrangements,* 22 Journal of Public Policy & Marketing 201, at 202 (2003). The Commission also recognizes the benefits brought about by category management agreements in its Guidelines on Vertical restraints and affirms that "category management agreements may allow distributors to have access to the supplier's marketing expertise for a certain group of products and to achieve economies of scale as they ensure that the optimal quantity of products is presented timely and directly on the shelves. As category management is based on customers' habits, category management agreements may lead to higher customer satisfaction as they help to better meet demand expectations. In general, the higher the inter- brand competition and the lower consumers' switching costs, the greater the economic benefits achieved through category management." See: Guidelines on vertical restraints, *op.cit.*, at 213.

[344] See for examples: FTC, Report on the Federal Trade Commission Workshop on slotting allowances, *op.cit.* and Avis n°10-A-25 du 7 décembre 2010 relatif aux contrats de « management catégoriel » entre les opérateurs de la grande distribution à dominante alimentaire et certains de leurs fournisseurs (France). The European Commission refers to category management agreements in its Guidelines on vertical restraints. See: Guidelines on vertical restraints, *op.cit.*, at 209-213. The Commission defines category management agreements as "agreements by which, within a distribution agreement, the distributor entrusts the supplier (the "category captain") with the marketing of a category of products including in general not only the supplier's products, but also the products of its competitors." (at 209)

First of all, concerns have been raised concerning the category captain's ability to take advantage of its role to exclude rivals or hinder their entry or expansion on the market.[345] Some argue indeed that, given the substantial investment of time and money required by a category captaincy and the extra fee paid by some suppliers to take on the role of category captain[346], it is difficult to conceive that the chosen manufacturer does not derive some benefits from such arrangements, other than the well-being of the category as a whole, such as the opportunity to leverage its position to the detriment of competitors.[347] Due to its influence over marketing decisions, the category captain might indeed gain anticompetitive advantages over its rival and improve the return on its investment by simply excluding competing products or by making recommendations about product placement and promotions to the detriment of its competitors.[348] Competitive exclusion may also result from the misuse of information acquired by the category captain. Such business technique requires indeed the sharing of sensitive information between manufacturers and retailers about further promotional plans or innovations for examples. Supermarket chains generally provide the category captain with this information to help it manage efficiently the relevant category. Knowing its competitors' pricing, merchandising and promotional strategies in advance, the category captain may therefore be tempted to misuse such information to disadvantage its competitors by counteracting for example the latter's promotional efforts.[349]

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[345] FTC, Report on the Federal Trade Commission Workshop on slotting allowances o*p.cit.*, at 52. This is not an hypothetical case as, in the United States, a captain manufacturer's conduct was found o exclusionary to competition and harmful to consumers. See: *Conwood Co. v. United States Tobacco. Co*., 290 F.3d 768 (6th Cir. 2002). The case concerned the category of smokeless tobacco. Conwood, a tobacco manufacturer, sued one of its competitors, USTC, claiming that the later used its role of category captain to exclude competition. It was indeed recognized that USTC provided retailers with misleading and false information in order to maintain its poorer-selling items and disadvantage competitors' products.

[346] Even though the French Competition Authority maintained in its report on category management arrangements that category management services are not subject to payment either from the retailer or the manufacturer, it nevertheless also recognized that the procedure for appointing a category captain was very informal and opaque. In practice, it appears that many suppliers have been willing to pay for the privilege and that it is not uncommon that retailers use an auction process to assign captaincies. See: J.Tenser, *Vendors paying a high price to be category catpains,* Brand marketing: A supplement to supermarket new, May 1996, available at: http://supermarketnews.com/archive/vendors-paying-high-price-be-category-captains

[347] L.S.Carameli, Jr, *op.cit.*, at 1327. If the only benefit was the increased sales within the category, including sales of competitors, the manufacturer would be better off not spending resources and free-riding on the efforts of others. See also: Commission notice - Guidelines on vertical restraints, SEC(2010)411, O.J. C 130 of 19/05/2010, at 210.

[348] Retailers are not necessarily affected by such practices if consumers shift to another product of the same category to satisfy their needs. Provided that the overall profit in each product category is maximized, regardless of brand, retailers will indeed be satisfied with the category captaincy. However, opportunistic behavior may affect consumers as they will have to turn to other products and face a reduced choice on the shelves.

[349] FTC, Report on the Federal Trade Commission Workshop on slotting allowances, *op.cit.,* at 51. See also: D.M.Desrochers, G.T.Gundlach & A.A.Foer, *Analysis of antitrust challenges to category captain arrangements,* 22 Journal of Public Policy & Marketing 206 (2003)

The potential exclusionary effects that category captaincy entails affect mostly smaller suppliers which cannot afford to compete for captaincies and are therefore at the mercy of the leading manufacturer's decisions. Already subject to retailers' buyer power to a greater extent than their larger rivals which are sometimes able to exercise countervailing power, those firms may see their sales through the grocery channel even more hindered by a category captain's decisions. As reported by Steiner, "smaller producers also fear that the always-difficult task of obtaining entry to the retail shelves of the large chains is exacerbated when the keys to that kingdom are in the hands of their more powerful competitors."[350] The possible misuse of power by category captains and the obvious competitive advantages they acquire through the sharing of information with retailers contribute to weakening or excluding smaller suppliers and thereby may adversely affect product diversity and consumer choice.

Concerning the second competitive concern, namely possible collusive outcomes resulting from category captaincy, the Guidelines of the Commission and reports of national competition authorities highlight the risk that, when the same supplier serves as category captain for competing retailers, category management arrangements may facilitate collusion between the latter as the supplier provides common point of reference for pricing, promotion and product placement decisions.[351] Such conspiracy, known as the "hub-and-spoke" theory, may in fact be driven and orchestrated by large retailers or retailer cartels which can use their significant market power to coerce anticompetitive conduct from manufacturers.[352] Buyer power may indeed be exercised to persuade a category captain to administer minimum resale price fixing at competing retailers. As such, a retailer may coerce a captain manufacturer to recommend supra-competitive prices to the other retailers that the captain in question also serves or to sell to those competing retailers only on the condition that the latter do not resell the products below an agreed price.[353] Category captaincy and the close

[350] R.L.Steiner, *op.cit.*, at 79.

[351] Guidelines on vertical restraints, *op.cit.*, at 211. See also: FTC, Report on the Federal Trade Commission Workshop on slotting allowance, *op.cit.*, at 52 and Avis n°10-A-25 du 7 décembre 2010 (France), *op.cit.,* at 29-32. For example, "the category captain could make identical recommendations to all of the retailers and if each retailer were aware of this practice, there would be less incentive for any one of them to deviate from the recommendation". (FTC Report, at 52)

[352] See for examples in the United States: *Klor's v. Broadway-Hale Stores,* 359 U.S. 207 (1959) and *Toys "R" Us, Inc. v. FTC,* 221 F.3d 928 (7th Cir. 2000). Those cases will be examined in Chapter X devoted to the legislation and case law in United States.

[353] L.S.Carameli, Jr, *op.cit.*, at 1336. A retailer willing to raise prices is likely to lose a substantial number of customers if it acts alone. Therefore, the retailer is incited to make its rivals set a similar high price for the targeted product. A good illustration of such indirect exchange of information leading to a trilateral anticompetitive agreement is the *Replica Kit* case in the United Kingdom. In that case, the Court of Appeal upheld the decision of the Competition Appeal Tribunal concluding to the existence of an anticompetitive agreement between competing retailers even if exchange of information between those retailers was not direct but took place through a common supplier. See: Cases 1021/1/1/03 and 1022/1/1/03, *JJB Sports Plc v*

relationship between retailers and suppliers involved by that practice is therefore likely to facilitate indirect anticompetitive exchange of information between competitors leading to harmful tacit collusion.

Category management could also lead to collusion between suppliers, especially when multiple manufacturers act as co-captains for a retailer. In such circumstances, increased opportunities to exchange sensitive information are indeed likely to facilitate a common understanding between competing suppliers on future pricing or promotional plans for instance.[354] As, in many cases, retailers use to implement captains' recommendations without any change, it is easy for captain manufacturers make their anticompetitive agreements effective in the shadow of their captaincy.

Finally, some argue that category management arrangements may dampen vertical competition and lead to higher prices at the wholesale and the retail levels to the detriment of consumers. According to Steiner, just as do firms competing at the same level of the supply chain over sales, margins or market shares, suppliers and retailers compete over prices in order to obtain a larger share of a product's retailer price and should as such be considered competitors.[355] If those firms cease to compete and cooperate in order to raise margins at both stages, such truce on vertical competition would ultimately result in higher prices for consumers. Where collaboration between suppliers and retailers may create efficiencies and bring about better responses to consumers 'need and wish, the business technique of category captaincy lies in fact at the border line between pro- and anti-competitive practices so that competition authorities should be attentive to the potential abuses it may lead to.

Along with unjustified payments, transfer of risks/costs and other restrictions imposed on suppliers, category management arrangements may therefore, in some circumstances, affect the competitiveness of efficient suppliers and limit competition on the markets. Some harmful effects resulting from such arrangements may in fact be the direct consequence of retailers' buyer power exerted to restrict competition in the downstream retail market. All those practices mentioned above can easily be implemented by big supermarket chains due, in particular, to their size, their market share in the downstream market or the large part they account for in suppliers' total sales but also due to their private label lines which increase even further their market power in the upstream market.

OFT; Allsport limited v OFT [2004] CAT 17 and Case 2005/1071, 1074 and 1623 *Argos Limited and Littlewoods Limited v OFT and JJB Sports Plc v OFT* [2006] EWCA Civ 1318.

[354] Guidelines on vertical restraints, *op.cit.*, at 212.

[355] R.L.Steiner, *op.cit.*, at 79. See also: D.M.Desrochers, G.T.Gundlach & A.A.Foer, *op.cit.*, at 207.

3. Particular role of private label

Large supermarket chains are able to extract beneficial conditions from their suppliers due, in particular, to their size and their market power in the downstream markets. However, another factor, less obvious, has significantly improved the power of the retailers, namely the marketing of their own-brands. Also known as private labels, those products are sold under the brand of the retailer or under another brand-name controlled by the retailer.[356] Private label branding has evolved from a single house brand to a more complicated structure included "value/low-price", "standard" and "premium/high-price" own-brands and often supplemented with niche products such as "organic" or "allergen-free" private label lines.[357] The percentage of sales of own-brand products varies depending on the retailer,[358] the country[359] and the product category.[360] Even though own-brands can provide cost-efficient alternatives to branded products for consumers,[361] they also reinforce retailers' bargaining power in relation to their suppliers. Indeed, the existence and the success of private labels increase the credibility of the retailers' threats of de-listing when suppliers do not comply with their demands.

In addition, when those products are supplied by brand manufacturers, supermarkets are both customers and direct competitors of their suppliers. Wearing those two hats, retailers are able to exploit their position to their advantage. They may indeed, for examples, influence the sales of own-brand goods by putting them at customers' eye level, by reducing the shelf space available for competitive brands or by pushing up prices of those branded products.[362] Branded manufacturers are sometimes discontented with or even shocked by the high price set for some of their products in supermarkets but are forced to accept the pricing policy of their customers. It is worth also noting that, as customers of branded product suppliers, retailers are in possession of sensitive commercial

[356] *The economic benefits of retailer own-brands,* prepared for the European Retail Round Table, Oxera, September 2010, at 3.
[357] *Ibid.*, at 16.
[358] Some supermarkets stock almost exclusively private labels, such as Aldi, while others offer a mix of private labels and branded products (Carrefour, Delhaize, Albert Heijn or Tesco)
[359] The average percentage of sales represented by own-brands in the European Union amounts to 25-30% but this percentage can go up to more than 40% in some countries, as in Switzerland or in the UK.
[360] Huge differences in the success of private labels can be observed between product categories. The highest market shares concern products like milk, meat, fish, ready meals or vegetables. For beauty products, care products or baby food consumers show a clear-cut preference for branded goods. See: H.K.Nordas, M.Geloso Grosso & E.Pinali, *Market Structure in the Distribution Sector and Merchandise trade,* OECD Trade Policy Working Papers No.68, at 19-21 (2008)
[361] Price differences between brands and own-brands amount up to more than 48% in some European countries.
[362] M. Vander Stichele & B.Young, *op.cit.*, at 28. On other tactics used by retailers to promote own-brand sales to the detriment of industrial brands, see: *The impact of private labels on the competitiveness of the European food supply chain,* LEI Study commissioned by the European Commission, DG for Enterprise and Industry, The Hague, January 2011, at 43-44.

information such as promotions or marketing plans of the branded products.[363] Such information, normally unknown by competitors, gives supermarkets an additional advantage for the marketing of its own products. It happens for example that a retailer asks for more details about a new product a supplier is willing to sell and, while finally refusing stock that product, uses the same details to create a similar product sold under their own label.

The Commission has recognised in different merger decisions those various competitive advantages that private labels give to supermarket chains. For examples, it noted that, as those products are not sold by competitors, the retailer may fix the prices without taking into account the reaction of other retail chains as it is generally the case with branded products. Furthermore, even though private labels are generally sold at lower retail price than branded products, the margins on the former are generally higher.[364] [365] The incentive to launch private labels is therefore high.

Where the success of private label products reinforces retailers' buyer power with regard to branded-products manufacturers, producers of those own-brand products are not spared from large retailers' pressures either. It appears that the creation of private label lines has allowed the development of small and medium sized enterprises (SMEs) by increasing their market outlets and by giving them additional opportunities to have access to various consumer bases that they could not have reached but through the production of own-brand products. However, the situation of those suppliers is unsecure as they are also subject to retailers' significant buyer power. The purchase of private label products is often made through bidding procedures based on specifications with regard to the quality of the products and other contractual terms. Using, in addition, a multi-source procurement strategy, retailers are hence able to compare price offers from suppliers in several countries and to select multiple sources of supply so that they are not dependent upon one single supplier. The short-term nature of those arrangements, and the availability of other sources of supply, give indeed supermarkets the possibility to switch easily at minimal cost to another business partner should their suppliers be no longer capable of meeting their requirements.[366] Such unstable

[363] R.Scheelings, & R.S.Wright, '*Sui Generis'?: An Antitrust Analysis of Buyer Power in the United States and European Union,* 39 Akron Law Review 207, at 242 (2006).
[364] See: *Kesko/Tuko,* Case No IV/M.784, Commission Decision of 20 November 1996, at 130. Those merger cases will be further developed in Part II, Chapter 1, Section II, Point B.
[365] Private labels may indeed be supplied at significantly lower cost than branded products as suppliers do not have to pay slotting allowances or other fees to market their products and may save on brand marketing costs. As a result, retailers are able to price private labels below brands while still earning a high margin. See: *The impact of private labels on the competitiveness of the European food supply chain,* LEI Study commissioned by the European Commission, DG for Enterprise and Industry, The Hague, January 2011.
[366] See for examples: *Granaria/Ültje/Intersnack/May Holding,* Case No COMP/JV.32, Commission Decision of 28 February 2000, at 48; *SCA Hygiene Prodcuts/Cartoinvest,* Case No IV/M.2522, Commission Decision of 21 March 2002, at 31; *Sovion/S Fleisch,* Case No IV/M.3968, Commission Decision of 21 December 2005, at 76. Those merger cases will be further developed below.

situation is risky for manufacturers as the specific investments made to meet their customer's specifications are very likely to be lost in case of sudden termination of business relationships with that retailer.

The result of such power, which enables large distributors to dictate the rules to their advantage, may lead to a reduced choice on the shelves between, on the one hand, the private label and, on the other hand, only one primary and possibly another secondary brands. The proliferation of own-labels in consumer goods may also have some effects on innovation. Concerning that matter, the opinions are not unanimous and are even contradictory. On the one hand, the introduction of private labels may increase the competitive pressure on branded manufacturers and incite them to lower their prices as well as to increase quality and innovation to differentiate their products. On the other hand, the proliferation of own-brand products may lead to the opposite result. Facing distributors which systematically copy their innovative products, branded products suppliers have to bear the consequences of private label "free-riding" with reduced returns to innovation and may be therefore discouraged from making further investments.[367] It is though through such investment in product innovation, quality and advertising that producers ensure the creation of a strong brand image and thereby protect their precious shelf-space.

This controversy about the effects of the increasing presence of own-brand products on the shelves is part of the greater debate on the impact of the exercise of buyer power on the markets.

4. Potential effects within the supply chain

The practices described above may entail positive and/or negative effects on the markets.

However, no actual consensus exists on that matter. Indeed, politicians, economists and academics present different views concerning the possible benefits and drawbacks of supermarkets' buyer power. While the short-term beneficial effects of buyer power on consumers are generally not disputed, dissension emerges with regard to the potential long-run harmful effects of some practices, not only on smaller retailers and other market participants in the upstream markets but also on end-users. The difficulty is probably to separate the natural and necessary consequences of strong and beneficial competition on the markets – which may be the exclusion of smaller firms - from those which in fact constitute restrictions on competition in the retail or procurement market. Only the latter may justify action against the practices which originally cause those anticompetitive effects.

[367] See: A.Ezrachi, *Unchallenged market power? The tale of supermarkets, private labels and competition law,* 33 World competition 257 (2010)

a) (Potential) Effects on suppliers[368]

Suppliers are directly subject to buyer power of large retailers. Forced to cut prices, to pay allowances to remain on the shelves and to bear other (non-)financial burden, they may be forced to continue operations which are less or no longer profitable. In the long-term, the exercise of such power may therefore threaten the viability of some of those processors.[369] In addition, as pointed out for example by the UK Competition Commission in its report on the grocery markets, some practices may adversely affect the competitiveness of some suppliers and distort competition in the procurement market. The exercise of buyer power may in fact discourage suppliers to invest on new product development and innovation, leading to a decrease in product variety and quality for consumers.[370] With regard to that last concern and as it has already be mentioned concerning the success of private labels, the exercise of buyer power may also enhance suppliers' incentives to innovate and invest in order to differentiate their product or make them more attractive and , as a result, to strengthen their own bargaining power *vis-à-vis* their distributors. With a superior product at hand, the supplier is indeed likely to expand its outside options - as it will be easier to find alternative retailers interested in buying its new or improved product -, but also to increase the loss inflicted to its customer in case of failure in negotiation.[371] The theoretical prediction on the effects of buyer power on investment and innovation are in fact mixed and quite unclear. The High Level Group on the Competitiveness of the Agro-Food Industry (HLG)[372] nevertheless notes that pressure on industry actors is considerable, especially on the SMEs which have a persistent lack of resources. As a result, they have very limited capability to deal with the uncertainties and risks inferred in

[368] Most of those effects described below with regard to suppliers and smaller retailers have been highlighted by national competition authorities in various reports on the distribution sector. See for example: Avis n° 04-A-18 du 18 octobre 2004 relatif à une demande d'avis présentée par l'Union Fédérale des Consommateurs (UFC-Que Choisir) relative aux conditions de la concurrence dans le secteur de la grande distribution non spécialisée; Report of the Nordic Competition Authorities –"Nordic Food Markets - a taste for competition", November 2005; UK Competition Commission, *Groceries Market Investigation* (2008).

[369] P.W.Dobson, & R.Inderst, *The Waterbed Effect: Where buying and selling power come together,* 2008 Wisconsin Law Review 331, at 345.

[370] UK Competition Commission, *Supermarkets: A Report on the Supply of Groceries from Multiple Stores in the United Kingdom* (2000)

[371] Doyle, C. & Inderst, R., *Some Economics on the treatment of Buyer Power in Antitrust,* 28 European Competition Law Review 210, at 217 (2007). See also: R.Inderst & C.Wey, *Countervailing power and dynamic efficiency*, 9 Journal of the European Economic Association 702 (2011). ""The presence of fewer but larger buyers can keep a supplier on its toes and, thereby, increase incentives to invest in greater efficiency."

[372] The HLG was set up in 2008 and is mandated to identity the factors that can influence the competitive position of the European Agri-Food Industry and to formulate recommendations for actions addressed to policy makers in order to enhance the sustainable development and competitive position of the sector.

research and innovation project.[373] On that matter, the HLG points out that the level of R&D investments is low and that further opportunities are to be exploited.[374]

Some argue that it would not be in the interest of retailers to squeeze their suppliers so hard as to force them to give up business since this might in turn weaken their own bargaining position with regard to the few remaining sellers.[375] It would neither be in their interest to affect suppliers' incentives to innovate as retailers' position in the downstream market is closely linked to the quality and variety of the products they offer to consumers.[376] Where those arguments are rational, it seems nevertheless that they do not always prevail, especially for undifferentiated products. Indeed, where retailers have an interest in maintaining viable sources of supply, it is doubtful whether they would be willing to forego exercising their market power and benefiting from non-cost related concessions in view of the potential long-term negative impact that may cause to suppliers. Although the resulting outcome is often not intended, pressures exercised by a large retailer do drive some suppliers out of the market because firms generally look at their short-term profit rather than the dire consequences their conduct is likely to cause. In addition, as each retailer may assume that other large competing buyers will, in all likelihood, exert their market power over suppliers, it becomes obvious that no one will run the risk of losing a competitive advantage by giving better conditions to branded manufacturers for the same products. [377] In fact, the recent financial crisis confirms that market participants often act in accordance with their short-term interests only and seem to minimize or to overshadow the long-term effects of their action.[378]

b) (Potential) Effects on smaller retailers

Concerning the other retailers, it is clear that smaller distributors are unable to negotiate discounts and other benefits like those obtained by their powerful competitors. They are *de facto* in a less

[373] Report on the Competitiveness of the European Agro-Food Industry, High level Group on the Competitiveness of the Agro-Food Industry, 17 March 2009, at 13.
[374] *Ibid.,* at 10.
[375] T.A. Piraino, *op.cit.*, at 834.
[376] H.Mullan, *op.cit.,* at 152.
[377] J.B.Kirkwood, *Powerful buyers and merger enforcement,* Seattle University School of Law Research Paper No. 13-04 (2012), at 55, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1809985

[378] See: A.R.Ganesh, *The Right to Food and Buyer Power,* 11 German Law Journal 1190, at 1212 (2010). Ganesh refers to banks' practices which led to the worldwide banking and financial crisis. "The events of the past two years have not inspired confidence in the propensity of, at the very least, the banking sector to self-regulate in accordance with its long-term interests, and nothing particularly distinguished in this regard them from other private profit-making actors. Indeed, on may suspect that a firm that gets into particular habits of dealing with its suppliers over a long period of time will find it difficult to change them. Again in the 2008 *Groceries Market Investigation* in the UK, the CC found that of the52 practices identified in a similar market investigation carried out in 2000 and accordingly listed in the *Supermarkets Code of Practice (SCOP)*, 20 of them still being practices eight years later at the time of the 2008 investigation."

advantageous situation to compete in the retail downstream market. Those competitive advantages acquired by large supermarkets may yet result from totally lawful practices and reflect higher efficiencies.[379] The harm inflicted to smaller rivals, such as lower margins or exclusion in some cases, is therefore not necessarily the result of unlawful conduct but may be the natural consequence of fierce competition on the markets. However, practices inciting suppliers to boycott a competing retailer for example or restricting their freedom to offer better conditions to rivals do not result from higher efficiency but from the unlawful exercise of market power which is only meant to restrict competition on the markets. Less advantageous contractual conditions obtained by small retailers or exclusion of those firms from the market become therefore a competitive concern only where they result or are likely to result from conduct restricting competition.

According to some analysts, differentials in contractual conditions between large and smaller retailers may be strengthened by a possible phenomenon called the "waterbed effect". Such an effect occurs where suppliers, in order to recoup the squeezed margins resulting from their transactions with powerful supermarkets, charge higher prices to smaller retailers. Consequently, large buyers are given a twofold advantage: they obtain better terms of supply while their rivals are facing higher purchasing costs. [380] It is nevertheless a debatable relationship since one may wonder why the supplier would be, as a result of the exercise of large supermarkets' power, in a stronger position to extract a higher price from the other distributors while it was apparently not feasible beforehand. Different reasons may yet be put forward to explain the emergence of a waterbed effect. Firstly, some argue that the presence of powerful buyers will force suppliers to exit or merge with other suppliers, leading to a more consolidated upstream market. As a result, smaller buyers will be more affected by the emergence of stronger sellers and be unable to prevent a deterioration of their purchasing conditions. Secondly, the bargaining position of less powerful retailers may also be weakened due the growth of large retail chains in the downstream market as their smaller volume of purchases makes them less attractive for suppliers. The costs advantage of big supermarkets may indeed enable those firms to take sales from smaller retailers who will, thereby, be in a weaker

[379] A.Piraino, *op.cit.,* at 833. Ganesh refers to banks' practices which led to the worldwide banking and financial crisis.

[380] P.Dobson & R.Inderst, *op.cit.*, at 336-337. See also: P.Dobson & R.Inderst, *Differential Buyer Power and the Waterbed Effect : Do Strong Buyers Benefit or Harm Consumers ?,* 28 European Competition Law Review 393 (2007). On the other hand, some argue that an "anti-waterbed effect" may arise in the sense that the presence of powerful distributors is likely to improve the purchasing conditions of all other retailers as well. One of the reasons invoked to justify such an allegation is that suppliers, by granting the same advantages to smaller buyers, ensure that those parties, which constitute alternative channels to access consumers, will remain active in the market. It is indeed not in the suppliers' interest to indirectly contribute to a further increase in concentration in the retail market. See: P.Dobson & R.Inderst, *The waterbed effect…, op.cit.*, at 353.

position to negotiate discounts, especially if these depend on the buyer's size.[381] Finally, the decision to charge higher prices to smaller buyers may be a last resort solution available for suppliers to maintain sufficient margin. Although they may not be willing to worsen their small customers' buying conditions to prevent further consolidation in the buyer market, producers are nevertheless likely to end up increasing prices where they have the opportunity to do so if it turns out that no other option is available to compensate the sharp drop in profits caused by large retailers' buyer power.

Regarding the effects of the differentials in supply terms, it may be expected that, in the short-run, all retail prices will decrease as large retailers will pass on their lower costs to consumers while smaller retailers, despite their higher purchasing costs, will be incited to lower prices as well in order to remain competitive in the downstream market. However, facing squeezed profit-margins, the latter may end up exiting the market in the longer-term. Furthermore, as size and the volume of purchase of big-box stores enable them, among other things, to exercise buyer power and to extract a better deal from suppliers, this may deter any small-scale entry. The fear to be at a competitive disadvantage compared to the large incumbents, who enjoy lower purchasing prices, and the fear that a waterbed effect might further worsen their position, constitutes indeed a barrier to entry for potential new entrants. Added to the exit of existing retailers, this may amplify market power of large retail chains both in the upstream and in the downstream markets.[382]

In its market investigation in the supply of groceries, the UK Competition Commission addressed the issue of discrepancies between the prices paid to suppliers by large retailers and the prices paid by convenience store operators. It was established that, in some cases, the four largest retail chains may pay 10% less than their competitors. However, even if those better conditions may be due to the exercise of buyer power, the analysis showed that there is also a close relationship between price and volume which reflect economies of scale. In addition, the UK Competition Commission considered that smaller retailers often act in the procurement market through buying groups and are hence able to exercise greater bargaining power over suppliers. As a result, the difference in prices was found not to have an anticompetitive effect on the markets.[383] With regard to the possible waterbed effect, the report reveals that the circumstances under which such an effect would occur were unlikely to arise in the UK grocery retailing.[384] Underlining that the waterbed effect might also be based on non-price factors, the UK Competition Commission noted that when demand from large customers increases or when those firms require improved services, smaller retailers are likely to

[381] R.Inderst & N.Mazzarotto, *op.cit.,* at 1966.
[382] P.Dobson & R.Inderst, *The waterbed effect…, op.cit.,* at 352.
[383] UK Competition Commission, *Groceries Market Investigation* (2008), at 5.26.
[384] *Ibid.,* at 5.28.

experience supply shortages or lower levels of services.[385] However, it was held that for a waterbed effect to arise, those differentials would need to persist and widen over time. Considering that readjustment may be expected in UK grocery retailing, the Competition Commission concluded that a non-price waterbed effect is unlikely to be present.[386]

c) Virtuous or vicious circle?

The long-run effects of large retailers' power can be envisaged either in a virtuous or a vicious circle.

In its positive version, buyer power will enable supermarkets to offer lower prices to their customers and will thus lead to a further growth in sales. As a result of that reinforced power in the retail market, they will be able to obtain additional discounts and better conditions from their suppliers to the benefit again of consumers in the downstream markets.

In its negative version, however, the exercise of excessive market power on the buying side will give rise to a spiral effect harming most actors in the supply chain. In fact, as already mentioned, the lower costs and other benefits enjoyed by large buyers will constitute competitive advantages in the retail market when they act as sellers.[387] They will be able, without even practicing predatory prices, to offer lower prices to consumers and to force therefore some smaller retailers to withdraw from the market. The strengthened position acquired by those distributors in the sales market combined with the resulting reinforced power in the procurement market will lead to reducing the intensity of competition in both the up- and downstream markets.[388] As a result, consumers will face a limited number of distributors, probably less incited to pass on the lower prices obtained from their suppliers, and will suffer from a decrease in the quality and variety of the products on the shelves.

While the virtuous circle described above is probably too idealistic a view of the long-run effects of buyer power on the markets, the negative spiral effect may be, on the other hand, too pessimistic. However, despite the uncertainties surrounding supermarkets' buyer power, one can assume that buyer power is likely to reinforce seller power in the downstream market and the other way around.

d) (Potential)Effects on consumers

The exercise of buyer power is generally viewed as beneficial for consumers, at least in the short-run. Indeed, the lower prices obtained by retailers from their suppliers will in most cases be passed on to

[385] *Ibid.,* at 5.39.
[386] *Ibid.,* at 5.40.
[387] Those competitive advantages will be even greater in case of a "waterbed effect".
[388] P.W.DOBSON, M.WATERSON & A.CHU, *op.cit.*, at 28.

consumers.[389] The European Commission has pointed out that the retail sector remains competitive with frequent "price wars" between supermarkets, forcing them thus to deliver the best prices for their customers.[390] Furthermore, in some circumstances, buyer power can be used as a countervailing power against powerful manufacturers producing "must-carry" brands. In such situations of bilateral market power, the pressures exercised by retailers will prevent those powerful suppliers from increasing prices and help to bring them down toward the competitive level.[391]

However, the long-run effects of buyer power on consumers are much less certain. In the worst case scenario and following the logic of the spiral effect described above, supermarkets' power may lead to long-run harm to consumers. First of all, as supermarkets tend to absorb a large fraction of suppliers' benefits, investments in new products or product improvements may be reduced at the processing and production levels, leading to a decrease in quality and diversity of products.[392] That argument is nevertheless to be mitigated in view of the opposite opinion developed above. Secondly, as already mentioned, large supermarkets may be tempted to favour their private labels to the detriment of secondary brands which would result in reduced choices for consumers.[393] Finally, since buyer power tends to go hand in hand with seller power, there may be a lessening of competition on the retail market due to the exit of smaller and local retailers. Consumers might therefore in the future face a considerably reduced choice of stores which would give the few big retail chains remaining on the markets a greater seller power. This will reinforce the gatekeeper role of those large retailers and further increase their ability to influence the success of product innovations by dictating the choice of products that come to market.

If those harmful effects were accurate, requiring the proof of direct consumer harm in buyer power cases would be misplaced to ensure an effective and long-term protection of competition. By the time the negative impact of buyer power manifests itself on the markets, it might indeed be too late to correct it through a sanction or remedy but for imposing important structural remedies.

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[389] Chen, Z., *Buyer Power: Economic Theory and Antitrust Policy,* 22 Research in Law and economics: A Journal of Policy 17, at 35 (2007).
[390] Commission Staff working document, *Competition in the food supply chain,* SEC(2009) 1449, at 8.
[391] F.FIANDEIRO, K.CHOUDHARY & P.ANDERSON, *The Assessment of Joint Purchasing: Can too much "Buying Power" ever be a problem?,* 2010, at 5, available at: http://www.compcom.co.za/assets/Uploads/events/Fourth-Competition-Law-Conferece/Session-3A/The-assessment-of-joint-purchasingConference-paperAugust-2010.pdf
[392] See: Z.Chen, *Monopoly and product diversity: The role of retailer countervailing power,* Carleton Economic Papers 04-19, Carleton University, Department of Economics, 2004, available at: http://www1.carleton.ca/economics/ccms/wp-content/ccms-files/cep04-19.pdf. The result of this economic analysis shows that retailer buyer power lowers consumer prices but reduces product diversity. The alleviation of the distortion in prices is however outweighed by the exacerbation of the distortion of product diversity so that consumers are worse off.
[393] P.W.Dobson, R.Clarke, S.Davies & M.Waterson, *op.cit.*, at 4.

The various and opposite views about the effects of buyer power continue however to fuelling the debate on the appropriateness to address more severely supermarkets' practices. We will see yet in Part III that different factors in the grocery retail sector increase the likelihood that some buyer practices impede the achievement of the competition law objectives.

B. FARMERS SUBJECTED TO BUYER POWER

Among the various market chains in which retailers may exercise their market power, a particular attention has been drawn on the food supply chain which connects three main sectors: the agricultural sector, the food processing industry and the distribution sectors (wholesale and retail). As agricultural commodities often undergo a series of intermediate alterations, farmers do not deal directly with retailers but instead sell their products to food processing firms or other intermediaries.[394] Specific supply chain exists for every food product. Without analysing in details the functioning of each particular agricultural sector, the following paragraphs will be limited to a brief description of producers' position in the food supply chain and on the effects the exercise of buyer power may bring about in that industry.

1. Successive exercise of buyer power along the supply chain

Big as well as very small players are present at the different levels of the food supply chain. The degree of bargaining power of each market participant varies by product category depending on the market structure and on the outside options available to each of them. However, due to the high concentration of the retail sector and the role of gatekeeper played by large retail chains, it appears that the latter act as a buyer-driver and strongly influence the rules and conditions for all players willing to participate in the supply chain. In fact, the imbalances in trading relations between big-box stores and their suppliers are likely to have some implications back up the chain, namely for farmers which constitute the least concentrated sector in many product categories. In response to a powerful buyer, food processors may indeed transfer the harm upstream by requesting low prices and other concessions from their own suppliers over whom they have a strongest bargaining power. As a result of such ratchet effect, downstream pressures exercised by retailers have hence an impact on farmer margins.[395] In most cases, huge disparities in power exist between agricultural producers and the rest of the supply chain so that the former are kept under strong pressure. Where some food processors

[394] L.Bukeviciute, A.Dierx & F.Ilzkovitz, *The functioning of the food supply chain and its effect on food prices in the European Union*, Occasional Papers 47 – DG for Economic and Financial Affairs, 2009, at 4.The food processing industry is very heterogeneous. It includes activities such as refining (sugar), milling (cereals), cleaning, cutting or drying (fruit and vegetables) and slaughtering (livestock).

[395] M.Schwartz, *Should Antitrust Assess Buyer Market Power Differently than Seller Market Power?*, DOJ/FTC Workshop on Merger Enforcement, Washington DC, February 2004, at 5.

may countervail or even supersede supermarkets' buyer power due to the must-have status of branded products, farmers are, for their part, often deprived of any bargaining tool in negotiations with buyers. Indeed, producing non-differentiated products for which brand awareness is not high and acting in a more fragmented sector, they are in a much weaker position.[396] Packers and processors are generally able to find easily alternatives to buy agricultural commodities while farmers are highly dependent on them to sell quickly their products which may be perishable in nature.

In response to that asymmetry of bargaining power, producers have adopted different strategies and in particular the creation of producer groups and cooperatives to strengthen their position in relation to the other market players.[397] Associations between producers may pursue different aims such as concentrating supply and marketing the products of the members, ensuring that the production is planned and adjusted to demand or promoting the rationalisation and improvement of production and processing.[398] EU Competition rules grant a favourable treatment to those types of farmers' organizations which are deemed to be procompetitive and are hence most likely to benefit from a block exemption or to be justified under Article 101(3) TFEU.[399] The Court of Justice maintained that organizing an undertaking in the specific legal form of a cooperative association does not in itself constitute anti-competitive conduct as it encourages modernization and rationalization in the agricultural sector and improves efficiency.[400] It is also recognized that such forms of cooperation

[396] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Food prices in Europe,* COM(2008) 821.

[397] The legislation applicable to agricultural products provides for three exceptions to the application of the EU competition rules to the agricultural sector. However, those derogations from the applicability of Article 101 TFEU to certain agreements between farmers must fulfill particular conditions which have been restrictively interpreted by the European Courts. As a result, the vast majority of those agreements do not meet the requirements for such exceptions to apply. The various forms of cooperation between farmers are hence analysed in the context of the general competition rules. See: Council Regulation (EC) 1234/2007 of 22 October 2007 establishing a common organization of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation), J.O. L 299/1 of 16/11/2007 and Council Regulation (EC) 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products (codified version), J.O. L 214/7 of 04/08/2006. On the exceptions to the application of the competition rules and the interpretation given by the European Courts, see: The interface between EU competition policy and the Common Agriculture Policy (CAP): Competition rules applicable to cooperation agreements between farmers in the dairy sector, Working Paper, European Commission DG Competition, Brussels, 16 February 2010, at, 5-13, available at: http://ec.europa.eu/competition/sectors/agriculture/working_paper_dairy.pdf

[398] See: Council Regulation 1234/2007 establishing a common organization of agricultural markets, *op.cit.,* Article 122.

[399] For more details on the assessment of cooperation agreements such as joint production agreement and commercialization agreements, see: The interface between EU competition policy and the Common Agriculture Policy (CAP): Competition rules applicable to cooperation agreements between farmers in the dairy sector, Working Paper, European Commission DG Competition, Brussels, 16 February 2010, at, 13-27, available at: http://ec.europa.eu/competition/sectors/agriculture/working_paper_dairy.pdf

[400] See for example: C-399/93, *H.G. Oude Luttikhuis and others v. Verenigde Coöperative Meklindustrie Coberco BA* [1995] ECR I-4520.

"constitute a significant counterweight to the contractual power of large producers and make way for more effective competition".[401]

Where the EU competition rules do not preclude farmers from strengthening their position in the supply chain, strong imbalances of power yet remain as concentration in the processing and retail sectors are evolving at a much faster pace. More intensive cooperation between producers would be needed to improve their bargaining position in relation to the other market players. However, no agreement will be exempted if it is likely to create or increase the participants' market power. Such safeguards are necessary to maintain effective competition on the markets but may somewhat limit the ability of farmers to gain sufficient negotiating leverage with their large customers. Potential negative effects resulting from the exercise of buyer power, such as price manipulation, are therefore not excluded.

2. Potential price manipulation

In order to ensure steady supplies of commodities, packers and processors mostly resort to contracting and vertical integration.[402] Through the use of marketing or production agreements, farmers commit to sell a specific quantity and quality of agricultural products to a particular buyer at a price negotiated before harvesting or slaughter of animals.[403] Where those contracts may yield some benefits for farmers, such as reduced transaction/marketing costs, assurance of a buyer for their products or better access to capital, they are often drafted only to the buyer's advantage, leaving producers liable for losses and shifting on them the risk of poor quality produce or insufficient production for example.[404]

In addition, evidence tends to prove that processors use such arrangements to manipulate cash-market prices for agricultural commodities. Various economic studies indeed establish a negative relationship between the use of forward contracts and cash market prices so that the latter tend to

[401] T-90/92 and T-71/92, joined cases, *Florimex BV and Vereniging van Groothandelaren in Bloemkwekerijprodukten v. Commission of the European Communities* [1997] ECR II-697.
[402] A processor or packer is vertically integrated when it has complete control on farm production. The use of contracts may in some cases enable buyers to have some degree of control on some assets or production decision without leading to vertical integration.
[403] Farmers retain more control over their production process in marketing contracts which only specify output, quantities and delivering timing. In contrast, in production agreements, farmers often only provide labor, equipment and housing while the contractor provide and retain ownership of the commodity during the production process. This is particularly common in the poultry industry. For more details on the different ways to organize the vertical coordination of products, see: J.MacDonald & others, *Contracts, markets and prices – Organizing the production and use of agricultural commodities*, United States Department of Agriculture, Agricultural economic report No 837, November 2004, available at: http://ageconsearch.umn.edu/bitstream/34013/1/ae040837.pdf.
[404] S.Murphy, *Concentrated Market Power and Agricultural Trade,* Ecofair Trade Dialogue, Discussion Paper No.1, August 2006, at 15-16.

be lower when the former increases.[405] In fact, as the share of commodities committed to processors through ownership or contracts increases, the volume traded on the open market declines. The thinning of spot markets gives hence buyers the possibility to manipulate market-prices by delaying purchases when the market price is high or *vice versa*.[406] They are even incited to do so since the prices they pay to farmers under contract are somehow tied to the cash market on basis of a specific formula.[407] As a result, the role of cash-markets which consists in establishing equilibrium between supply and demand is highly weakened as all processor contracts are not reported as public market activity. Although the action of processors and packers distort the price discovery process, cash-market prices are still considered as competitive prices and used as a benchmark in the entire sector, be it for transactions on the spot market or for supplies committed through contracts.

This shows that buyer power may be used in different ways to the detriment of producers. In addition to imposing unfair contractual terms to their suppliers, buyers may further weaken their situation through market manipulation.

3. **Effects in the agricultural sector**

As already mentioned above, the exercise of buyer power may oblige sellers to operate under reduced profitability, limiting consequently their incentives to invest in new product and innovation. Actually, the share of agriculture value-added in food supply chain has been consistently decreasing for the last decades while that share has been taken up by the food processing industry and the retail sector.[408] The drop in farm income, in addition, reduces the attractiveness of entry in agricultural activities and leaves existing farmers dependent on non-agricultural income sources such as subsidies.[409] The damage caused to producers may even be exacerbated by a phenomenon called the "commodity problem", that is, the tendency to increase the production of agricultural commodities in response to a reduction in price. As it is particularly difficult for farmers to shift to the production of alternative commodities due to huge investment that such a change would require, they have in

[405] See for example: M.Zhang & R.J.Sexton, *Captive supplies and the cash market price: A spatial markets approach,* 25 Journal of Agricultural and Resource Economics 88 (2000).
[406] C.R.Taylor, *The Many Faces of Power in the Food System,* Comments presented at the DoJ/FTC Workshop on Merger Enforcement, February 17, 2004.
[407] B.Vorley, *Food, Inc. Corporate concentration from farm to consumer,* UK Food Group, London (2003), at 24.
[408] See: Commission Staff working document, *The evolution of value-added repartition along the European food supply chain,* SEC(2009)1445.
[409] P.C.Carstensen, *Buyer power and merger analysis – the need for different metrics,* Statement prepared for the workshop on Merger Enforcement held by the Antitrust Division and the Feral Trade Commission, Washington, DC, February 17, 2004, at 11.

most cases no other choice than increasing even more their production in an attempt to earn income in the short-term, reinforcing thereby the drop in price due to oversupply.[410]

Where many producers are pushed out of business, the question arises of the future of the European food production. In a recent resolution, the European Parliament put special emphasis on the producers' position in the Union which has been deteriorating due to power imbalances in the food chain and called on the Commission "to urgently address the problem of unfair distribution of profit (…), especially with regard to adequate incomes for farmers".[411] The Commission has also repeated in various documents that a strong EU agricultural sector is vital for the highly competitive European food industry to remain an important supplier of high quality and safe agricultural and food products and to contribute to global food security.[412] The exercise of buyer power is certainly not the only cause of the precarious situation of small farmers. [413] Other factors may indeed affect the profitability of farming activities such as competition from third countries' products, extreme weather events, disease outbreaks, the sharp rise in energy prices and other farm input prices as well as excessive speculation in food commodities derivatives[414]. Where various measures may be envisaged to help the farm industry, enforcement of the competition rules may, in some circumstances, be part of those remedies. If buyers' practices distort competition to the detriment of farmers, action under competition law may indeed contribute to helping farmers by offering them the opportunity to act in a competitive market. While the protection of upstream firms is not part as such of the objectives of the competition policy, maintaining effective competition for all market participants may nevertheless be seen as necessary to ensure the long-term welfare of consumers.

[410] A.R.Ganesh, *The Right to Food and Buyer Power,* 11 German Law Journal 1190, at 1196 (2010)
[411] European Parliament resolution of 7 September 2010 on faire revenues for farmers: A better functioning food supply chain in Europe, 2009/2237(INI)
[412] See : Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the Committee of the regions – Tackling the challenges in commodity markets and on raw material, Brussels, 02/02/2011, COM(2011)25 final and Commission Staff working paper – Impact assessment, *Common Agricultural Policy towards 2020,* SEC(2011)1153 final.
[413] It is worth noting that the farming sector does not only face concentration in the downstream market but also in the upstream market where a few large firms dominate the supply of farm inputs such as fertilizers, seeds or animal feed. See: Report of the European Parliament on the farm input supply chain: structure and implications (2011/2114(INI)), Committee on agriculture and rural development, 28/11/2011.
[414] Financial firms and speculators trade in the commodity markets with the only aim to make maximum money from short-term changes in price with no physical ownership of the commodities involved. On the trend towards greater financialisation of commodity trading and the need to regulate excessive speculation, see: Institute for Agriculture Trade Policy, *Excessive speculation in agriculture commodities: Selected writings from 2008-2011,* 2011, available at: http://www.iadb.org/intal/intalcdi/PE/2011/08247.pdf

Some of the adverse effects highlighted above have been reported by the Commission in various documents but no strong response seems to be on the agenda to address those concerns under the scope of EU competition law.[415]

C. CONCLUSIVE REMARKS

The emergence of large retail chains and their resulting buyer power in the upstream market generate positive effects, especially for consumers. Indeed, increasing efficiencies, consolidation in that sector also enables retailers to act as countervailing power against powerful suppliers producing must-carry brands. However, when the better terms and conditions obtained by big supermarkets do no longer result from economic efficiencies but only from the exercise of buyer power, the issue arises as to whether the presence of large buyers is beneficial in all circumstances or whether it should be supervise by appropriate rules to prevent potential negative impacts on the markets.

No one would contest that suppliers are subjected to significant pressure from supermarket chains. Such pressure exerted by all large retailers shows in fact that the latter are incited to exert their buyer power in the upstream procurement market. This result in most cases in in unfair trading practices to the retailers' advantage. However, some practices are also likely to cause broader effects on the markets. Among the possible harmful effects, we can mention the reinforcement of retailers' market power both in the upstream buyer market and in the downstream seller market, likely to lead to higher consumer prices, but also a reduction in product quality and diversity. If these potential harmful effects prove to be true, the issue of addressing supermarket chains' buyer practices under the competition rules could be raised.

[415] On the different actions taken at EU level, see Part III, Chapter 2, Section I, Point A.

CONCLUSION PART I

Theory and models of market power concern sellers' market power but also buyers' market power. However, the elements to be taken into consideration to assess the degree of market power vary on each side of the market. Indeed, instead of focusing on the level of concentration and on the firm's market share, the assessment of buyer power rather focuses on the vertical relationships between a buyer and its suppliers and, in particular, on the concept of economic dependency. The more suppliers are economically dependent on their customers, the more the latter are able to exert buyer power over them. Accordingly, the degree of buyer power depends on the relative dependence of suppliers which can be determined mainly on the basis of two factors, that is, on the one hand, the number of alternatives available for those suppliers and, on the other hand, the share the buyer accounts for in the suppliers' turnover. A buyer is able to exert market power in the upstream buyer market especially when suppliers have few alternatives and are in relation with that buyer for a large part of their business. Such buyer power is further reinforced if each of those suppliers can be easily replaced and is not indispensable for the buyer's business activity. In these circumstances, the buyer has much more value in the eyes of suppliers than the other way round so that market power lies on the buying side.

Although buyer power can be understood in the sense of monopsony power and refers to buyers who are able to lower prices by decreasing their volume of purchases, in most cases, buyers exert their market power without affecting the quantity purchased in the upstream procurement market. In different markets, buyers are indeed able to extract concessions from their suppliers by simply threatening them to switch to other sources of supply.

Various sectors have been pointed out as having a strong buying side. Those sectors have in fact been highlighted by the European Commission in merger cases where buyers' market power was examined as a countervailing strength. It is considered that buyers exert countervailing power when the upstream selling side of the market is concentrated and includes strong market players. The analysis of buyers' countervailing power in the merger decisions yet confirmed that the assessment of buyer power relies on factors different from those used when assessing seller power.

One sector is drawing particular attention, namely the grocery retail sector where large supermarket chains enjoy significant buyer power and have a particularly strong incentive to exploit it. This is explained by the fact that suppliers are highly dependent on those customers. Large retail chains play indeed a role of gatekeeper. As no equivalent alternatives can be found in the other sales channels,

supermarkets constitute unavoidable trading partners to reach consumers. Most of suppliers' sales go hence through the supermarket distribution channel. In addition, given the high degree of concentration in the grocery retail sector, only a few large companies have in fact the power to give suppliers access to that distribution channel. Each of those incumbents represents therefore a very large, if not vital, proportion in suppliers' business activity.

Controversies exist regarding the potential effects of buyer power in the short and longer term. Concerns are being raised, especially with regard to supermarkets' buyer power. It is generally considered that pressure exerted on suppliers leads to lower purchasing prices and thereby to lower consumer prices at the retail level. However, such a conclusion might be too a hasty conclusion. Indeed, in view of the objectives of EU competition law shortly described, one may wonder whether the exercise of buyer power constitutes a positive strength in all circumstances. The concept of consumer welfare does not only include to lower prices but also product quality and choice. Under that perspective, it is not excluded that buyer power impedes the achievement of the competition law objectives.

We will try to provide an answer to all the questions that have been raised in this first Part. The objective will be to ascertain whether, how and to what extent buyer power is likely to affect competition in the European Union. Given the particular interest of European and national authorities in supermarkets' buyer power, the focus will be put on the grocery retail sector so as to determine whether some characteristics of that sector could differentiate it from other industries and require a specific attention from competition authorities. If those characteristics make the exercise of buyer power potentially harmful for competition and consumer welfare, a suggested answer to the question of the necessity of taking action and of which action to be taken in the grocery retail sector will be put forward.

But first, in the next Part, we will examine EU as well as some national legislation and case law related to the concept of buyer power. In theory, buyer power should be assessed on the basis of the specific criteria described above. We have noted that, in merger cases, when assessing the existence of countervailing buyer power, the Commission underlined the limited number of alternative customers and the large share accounted for by a particular customer in the merging party's turnover as factors giving that latter customer countervailing buyer power. It remains to be seen whether, in practice, EU and national competition authorities take the specificity of buyer power into consideration when such power is not examined as a possible positive countervailing strength exerted against powerful sellers but as a competitive concern which could require the application of the competition rules against some large buyers misusing that power.

PART II – BUYER POWER IN EU AND NATIONAL LAWS

Buyer power is a complex issue as its impact on competition is rather controversial. The exercise of market power in upstream buyer markets may indeed bring consumers benefits through, for example, lower consumer prices but may also, in some cases, affect the competitive process in both the up-and downstream markets and, thereby, consumer welfare. To deal with buyer power while protecting competition and consumer interests may therefore turn out to be a delicate task for EU institutions and/or national authorities.

We have seen in the first Part that the definition given to the concept of buyer power is focused on the vertical relationship between a buyer and its suppliers and depart, to some extent, from the definition of market power used in seller power cases. Buyer power indeed depends less on the firm's market share in the relevant upstream market than on the actual importance it represents for its suppliers and *vice versa*. Turning to legislative instruments and competition law cases, this second Part examines whether such specificity in the definition of buyer power is reflected and finds an adequate answer in the competition law policy.

The issue of buyer power and its consequences on the markets may in fact be addressed at the EU level but also by national authorities. The **first chapter** considers the EU competition rules and their enforcement in buyer power cases. As developed in Part I, buyer power may manifest itself in different forms and to varying degrees depending on different factors. This raises the question of whether and how the concept of buyer power is treated in the EU legislation and other instruments published by the Commission. We will examine, on the one hand, the rules applicable under Article 101 TFEU on restrictive agreements and under Article 102 TFEU on abusive conduct, and, on the other hand, the various instruments used in the framework of EU merger control.

The **second chapter** turns to some national laws in order to give an insight into how buyer power has been dealt with by national authorities. To this end, three countries have been selected on a discretionary basis, namely France, the United Kingdom and the United States. The first two countries provide examples of the variety of national measures that may be implemented by the Member states in the European Union to address buyer practices. Besides those two member states, we will also examine the way competition authorities and national courts tackle the issue of buyer power in the United States. It is indeed worthwhile examining the situation on the other side of the Atlantic since the EU institutions have often been inspired by the US antitrust legislation to design the EU competition rules.

CHAPTER 1 – BUYER POWER IN EU COMPETITION LAW

Under the EU competition rules, market power held by some buyers may be examined within the framework of Article 101 TFEU[416], Article 102 TFEU or under the Merger Regulation.[417] The Treaty provisions prohibit anticompetitive conduct, namely and respectively restrictive agreements and abuses of dominance. In practice, the Commission assesses whether a practice occurring on the market harms or is likely to harm competition (*ex post* control). Various infringements of the competition rules have been sanctioned by the Commission, such as agreements fixing selling prices or abusive conduct leading to the exclusion of competitors. Article 101 and 102 TFEU have in fact mainly be enforced against powerful sellers colluding with each other or abusing their dominant position. The objective of **Section 1** of this chapter is, in particular, to determine whether buyer practices may also fall within the scope of those provisions and, if it be so, how the Commission addresses buyer power cases.

As it will be examined in **Section 2** of this chapter, the issue of buyer power is mostly analysed by the Commission in the enforcement of the merger policy. The Merger Regulation aims to prevent the creation or strengthening of market power and thereby to maintain competitive market structures (*ex ante* control).[418] It has already been noted that, in its competition assessment, the Commission may consider buyer power as a competitive constraint exerted on the merging parties (countervailing buyer power) that is likely to prevent the latter from exploiting their seller power following the merger.[419] However, buyer power of the merged entity itself is also taken into consideration in the assessment. In a forward-looking analysis, the Commission in fact examines whether the merger will increase the parties' market power in the relevant upstream buyer market and decides whether the operation is or not likely to impede effective competition. In some cases, increased buyer power may indeed be a source of competitive concern and stands in the way of a merger approval. The different Merger Guidelines develop to a great extent how buyer power is to be assessed in (non-)horizontal merger cases. Different decisions, especially in the retail and agricultural sectors, will be analysed in order to illustrate the role that the presence of or increase in buyer power plays in merger review.

[416] Treaty on the functioning of the European Union, O.J. C 115 of 9 may 2008.
[417] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, O.J. L 24 of 29/01/2004.
[418] R.Wish, *Competition law,* 6th ed. (2009, at 806.
[419] See: Part 1, Chapter 2, Section 1.

SECTION I - TACKLING BUYER POWER UNDER ARTICLE 101 AND 102 TFEU

This chapter is devoted to the Treaty's competition provisions and their enforcement by the Commission and the European Courts in buyer power cases. The prohibition on anticompetitive agreements and abusive conduct is indeed likely to apply both to the sell and to the buy-side of the market even though the focus has been so far mainly on the former in the various legal instruments.

The first part describes the Treaty competition rules, namely Article 101 and 102 TFEU, and other documents related to those provisions and referring somehow to the issue of buyer power. The second part focuses on the enforcement of Article 101 TFEU and 102 TFEU against buyer practices at the EU level. We will see that, in the application of those various instruments, the existence or creation of buyer power is, depending on the situation, viewed as a source of competitive concerns or as a positive countervailing strength which can be used to mitigate the exercise of market power by upstream firms or to achieve efficiency gains.

A. BUYER POWER IN EU INSTRUMENTS[420]

Where Article 101 TFEU and 102 TFEU do not expressively refer to the concept of buyer power, the terms used in those provisions clearly show that buyers are subject to the competition rules in the same way as sellers even though the Commission may be more inclined to find procompetitive effects in some buyer practices.

1. Assessment of buyer power under Article 101 TFEU

Buyer power may be exercised by a single firm but may also be the result of a group of buyers colluding with each other to extract higher profits or to exclude competitors. A buyer cartel may indeed be formed to fix lower prices, to share input markets so that the buyers involved do no longer compete in certain territories, to alter bidding processes by designating the winning buyer in advance or by agreeing on the maximum high bid (bid-rigging), to extract exclusive rights or to put in place group boycott by convincing sellers to not deal with a competitor, to name but a few.

Horizontal agreements, between buyers, as well as vertical agreements, between buyers and their suppliers, may fall within the scope of Article 101 TFEU. A combination of vertical agreements may also lead to the creation of horizontal restraints. Known as hub and spoke conspiracy, such arrangements may also violate the rules prohibiting anticompetitive agreements.

[420] It must be made it clear that some of the principles developed below, especially these mentioned in the Guidelines of the Commission, merely confirm the case law of the European Courts. However, we first provide the details of the legislation and other instruments that could be applicable in buyer power cases before turning to the enforcement of the competition rules and the case law of the European Courts on that matter.

a) Horizontal agreements

The prohibition on anticompetitive agreements applies to both buyers and sellers. Section 1 of Article 101 TFEU indeed states that:

> "The following shall be prohibited as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
> (a) directly or indirectly fix **purchase** or selling prices or any other trading conditions;
> (b) limit or control production, markets, technical development, or investment;
> (c) share markets or **sources of supply**;
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

Under the terms of that provision, hard-core cartels between buyers should be sanctioned in the same way as sellers' cartels. The prohibition on agreements fixing purchase prices or allocating suppliers is indeed clearly aimed at buyers when acting in the upstream buyer market while the other examples provided for in the provision may equally concern sellers' or buyers' conduct. The EU legislator was therefore willing to subject collusion among purchasers to the same treatment as collusion among sellers, assuming that both types of agreements are likely to distort effective competition on the markets.

However, one type of agreements on the buying side is given a particular status, namely joint purchasing agreements which are mentioned in the Guidelines on horizontal cooperation agreements.[421] Those arrangements are generally viewed as pro-competitive or, at least, not problematic from a competition point of view. Their objective is to combine demand of different buyers in order to obtain lower prices, better quality products and better terms or conditions. The joint purchase of products generally increases the negotiating capacity of the participants and

[421] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, O.J. C 11/1 of 04/01/2011, at 197-225.

enables them to get a treatment similar to that of their larger competitors.[422] In addition, aggregating purchases through buying groups can lead to cost savings such as reduced transaction and storage costs, thereby facilitating economies of scale.[423] Buying arrangement are therefore more likely than horizontal agreements between sellers to yield benefits. Lower prices and better terms may indeed allow the members of the alliance to increase investment in innovation and lead them to pass on those benefits to end consumers. This would be the case if sufficient competitive constraints exist in the downstream market inciting each player to offer the best conditions to their customers.[424] As a result, while price-fixing agreements are usually considered as restricting competition by object, the Commission states in the Guidelines that

> "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)."[425]

Despite the positive effects entailed by the conclusion of a joint purchasing agreement, different competitive concerns may nevertheless arise. First of all, the buying group may in fact not truly concern joint purchasing but instead be used as a tool to facilitate the coordination of the parties' conduct in output markets. In such cases, the Guidelines on horizontal co-operation agreements provide that the joint purchasing arrangement will be deemed to restrict competition by object.[426]

In addition, the conclusion of the agreement may lead to the emergence of buyer power. With regard to that particular issue, some of the negative effects deriving from the exercise of market power on the buying side are mentioned by the Commission in its Guidelines.

> "Buying power may, under certain circumstances, cause restrictive effects on competition. Anti- competitive buying power is likely to arise if a joint purchasing arrangement accounts for a sufficiently large proportion of the total volume of a purchasing market so that access to the market may be foreclosed to competing

[422] M.A.LINDSAY, *Antitrust and Group Purchasing*, 23 Antitrust 66 (2009)
[423] Guidelines on the applicability of Article 101 of the Treaty, *op.cit.,* at 217.
[424] OFT, *The competitive effects of buyer groups,* Economic Discussion Paper, January 2007, at 12. See also: A.Ezrachi, *Buying alliances and input price fixing: In search of a European enforcement standard,* 8 Journal of Competition Law & Economics 47, at 51 (2012)
[425] Guidelines on the applicability of Article 101 of the Treaty, *op.cit.*, at 206.
[426] *Ibid.*, at 205 and 213. That would be the case if the parties jointly purchase a large percentage of their input costs and that they have a significant proportion of their variable costs in common in the selling markets. The exchange of commercially sensitive information required for the implementation of a joint purchasing agreement may also facilitate a collusive outcome in downstream markets.

> purchasers. A high degree of buying power may indirectly affect the output, quality and variety of products on the selling market."[427]

Although described as potential consequences of a joint purchasing agreement, those effects may be caused by the action of single powerful buyer's conduct as well. A first concern on that matter is that buyer power could be used to foreclose competing purchasers by limiting their access to efficient suppliers through exclusive supply deal for example. As a result, competitive constraints will be weaker in the downstream market reducing the buyer's incentive to pass on the lower prices to consumers.[428] A second concern refers to the ability of large buyer to force prices below a competitive level which might affect in the long-run the output, quality and variety of products on the selling market.[429]

Given those possible positive and negative effects, the Commission has placed the formation of buying groups within guidelines. A safe harbor threshold is established so that a joint purchasing agreement is presumed to be procompetitive, or at least no harmful to competition, if the parties have a combined market share not exceeding 15% on both the purchasing and the selling markets. In such a case, the Commission considers that market power is unlikely to arise or that, in any event, the conditions of Article 101(3) will most likely be fulfilled.[430] A detailed assessment of the effects on the market is required when the agreement does not fall within that safe harbor or when it facilitates the coordination of the parties' conduct on the selling side.[431] Indeed, in those situations, market power created through the agreement might lead to restrictive effects on competition and prevent lower prices from being passed on to consumers. A balance is therefore to be stricken between the positive and the negative effects of the buying alliance in order to determine its overall impact on competition.

b) Vertical agreements

Some buyers use their power to force or incite their suppliers to adopt a particular behavior in order to foreclose rivals. A buyer may, for example, impose exclusive supply agreements on his suppliers which preclude sales of inputs to his competitors. Less drastic arrangements such as prohibiting sellers from offering better or similar conditions to other buyers or imposing a "most favoured nation" treatment can also be detrimental to competitors. Such a use of buyer power is likely to lead to the conclusion of an explicit or tacit vertical agreement under EU law. Indeed, the concept of

[427] Guidelines on the applicability of Article 101 of the Treaty, *op.cit*., at 210.
[428] OFT, *The competitive effects…, op.cit.,* at 16.
[429] Guidelines on the applicability of Article 101 of the Treaty, *op.cit.,* at 210.
[430] *Ibid.,* at 208.
[431] *Ibid.,* at 209.

agreement encompasses unilateral instructions given by one party which have been tacitly accepted by the other one.[432] Specific requirements imposed by a buyer, and which his suppliers abide by, constitute therefore vertical agreements under Article 101 TFEU.

However, in most cases, those agreements will fall within the block exemption on vertical restraints.[433] Indeed, the different practices mentioned above do not constitute hardcore or excluded restriction in the view of the Regulation[434] - which rather focuses on restrictive conditions imposed by suppliers on their customers -, and the market share threshold of 30% which is applied from 2010 to both sellers and buyers, will probably rarely be exceeded, even by powerful buyers.[435] In the Guidelines on vertical restraints, the Commission recognizes that exclusive supply agreement may, in some cases, foreclose other buyers from access to supplies. It nevertheless considers that such a competition problem is unlikely to arise when the market share of the buyer on the upstream

[432] See for examples : Case 107/82, *AEG-Telefunken v Commission* [1983] ECR 3151 and C-277/87, *Sandoz prodoti farmaceutici SpA v Commission* [1990]ECR I-45. The *AEG* case occurs in the context of a selective distribution system where a manufacturer, with a view to maintaining a high level of prices, refused to approve distributors who satisfied the qualitative criteria of the system. Admission to the network was in fact based on adherence to the manufacturer's pricing policy. It was considered therefore considered that the distributors had accepted that policy so that the manufacturer's decision was part of an agreement with its distributors. In the *Sandoz* case, a pharmaceutical company expressly introduced an export ban into all the invoices sent to its customers. It was considered that the successive payments without protest by the customers who de facto complied with the clause restraining competition demonstrated a tacit acquiescence in the supplier's policy. The restriction did not constitute unilateral conduct but formed part of the general framework of the contractual relations between the pharmaceutical company and its customers. See also: Joint cases 25 & 26/84, *Ford Werke & Ford of Europe Inc. v Commission* [1985] ECR 2725; T-62/98, *Volkswagen AG v Commission* [2000] ECR II-2707; T-368/00, *General Motor Nederland BV, Opel Nederland BV v Commission* [2003] ECR II-4491. However, the European Courts made it clear that if no concurrence of will has been established, the decision to restrict competition must be regarded as a genuinely unilateral conduct which escapes the prohibition in Article 101 TFEU. See: T-41/96, *Bayer v Commission* [2000] ECR II-3383. That case was upheld on appeal by the Court of Justice, see: C-2 & 3/01P, *BAI and Commission v Bayer* [2004] ECR I-23. See on that matter: I.Lianos, *Collusion in vertical relations under Article 81 EC,* 45 Common Market Law Review 1027 (2008).

[433] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (Text with EEA relevance), O.J. L 102/1 of 23/04/2010.

[434] *Ibid.,* Articles 4 and 5.

[435] The Block Exemption Regulation provides that Article 101(1) TFEU shall not apply to vertical agreements provided that the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services and that the market share held by the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services. (Article 3) In the previous Block Exemption Regulation (Regulation 2790/1999), only the supplier's market share was relevant. The 30% threshold only applied to the buyer's market share when the vertical agreement contained exclusive supply obligations. The "black list" of "hardcore" restrictions and the list of excluded restrictions remain yet the same in the 2010 Regulation. (Articles 4 and 5) An agreement containing hardcore restrictions is excluded as a whole from the benefit of the Block Exemption Regulation. The presence of excluded restrictions, however, only leads to the exclusion of those vertical restraints while the Block Exemption Regulation continues to apply to the remaining part of the vertical agreement if that part is severable from the non-exempted vertical restraints.

purchase market and on the downstream supply market do not exceed 30% and when the agreement does not last longer than five years.[436]

With regard to upfront access payments, the Commission underlines in its Guidelines on vertical restraints that

> "[these payments] may sometimes result in anticompetitive foreclosure of other distributors if such payments induce the supplier to channel its products through only one or a limited number of distributors. A high fee may make that a supplier wants to channel a substantial volume of its sales through this distributor in order to cover the costs of the fee. In this case, upfront access payments may have the same downstream foreclosure effect as an exclusive supply type of obligation".[437]

In such a case, upfront payments may be assimilated to an exclusive supply type of obligation and will be treated accordingly.

The large number of payments imposed by retailers on suppliers may also lead to increased supply prices and reduced price competition at the retail level. The Guidelines on that matter read as follows:

> "upfront access payments may soften competition and facilitate collusion between distributors. Upfront access payments are likely to increase the price charged by the supplier for the contract products since the supplier must cover the expense of those payments. Higher supply prices may reduce the incentive of the retailers to compete on price on the downstream market, while the profits of distributors are increased as a result of the access payments".[438]

However, again, provided that the 30% thresholds mentioned above are not exceeded, agreements involving payments extracted by retailers will be block exempted. The Commission in fact considers that the use of upfront payments may generate positive effects. It may, for

[436] Commission notice - Guidelines on vertical restraints, SEC(2010)411, O.J. C 130 of 19/05/2010, at 194-195. The Guidelines state that exclusive supply agreements shorter than five years entered into by non-dominant companies usually require a balancing of pro- and anti-competitive effects, while agreements lasting longer than five years are for most types of investments not considered necessary to achieve the claimed efficiencies or the efficiencies are not sufficient to outweigh the foreclosure effect of such long-term exclusive supply agreements.

[437] Guidelines on vertical restraints, *op.cit.*, at 204. The Commission also point out that "exceptionally, upfront access payments may also result in anticompetitive foreclosure of other suppliers, if the widespread use of upfront access payments increases barriers to entry
for small entrants. The assessment of this possible negative effect is made by analogy to the assessment of single branding obligations" (at 205).

[438] *Ibid.,* at 206.

example, contribute to an efficient allocation of shelf-space for new products by giving retailers a signal of which products are most likely to be successful or prevent suppliers from free-riding on distributors' promotional efforts in order to introduce suboptimal products.[439]

It is worth noting that the same criterion is used to measure sellers' and buyers' market power, namely their market share respectively in the downstream seller market and in the upstream purchasing market. The specificities of buyer power described in Part I seem hence not to be taken into consideration in the assessment of vertical agreements.

c) "Trilateral" agreements

Although indirectly related to the exercise of buyer power, another issue is worth mentioning, namely that of "hub-and-spoke" conspiracy, also known as A to B to C coordination. Such type of collusion involves a purchaser or supplier B (the "hub") who enters into different vertical agreements or shares information with his suppliers or distributors A and C (the "spokes"). Where that situation leads to an indirect transfer of information between competitors, the trilateral relationship may amount to a horizontal arrangement prohibited by Article 101(1) TFEU.[440] Indeed, the sharing of information between firms operating at the same level of the production/distribution chain (A and C) via an intermediary (B) may constitute a concerted practice if those rivals become aware of each other's trade policy.[441]

The Commission highlights that issue in its Guidelines on horizontal co-operation agreements concerning the assessment of information exchange. It points out that information can be directly shared between competitors but also indirectly through a common agency, a third party or the companies' suppliers or retailers.[442] The Commission also notes in its Guidelines on vertical restraints

[439] *Ibid.,* at 207 and 208. "Distributors often have less information than suppliers on the potential for success of new products to be introduced on the market and, as a result, the amount of products to be stocked may be sub-optimal. Upfront access payments may be used to reduce this asymmetry in information between suppliers and distributors by explicitly allowing suppliers to compete for shelf space. (…) Furthermore, due to the asymmetry in information mentioned above, suppliers may have incentives to free-ride on distributors' promotional efforts in order to introduce suboptimal products. If a product is not successful, the distributors will pay part of the costs of the product failure. The use of upfront access fees may prevent such free riding by shifting the risk of product failure back to the suppliers, thereby contributing to an optimal rate of product introduction. »

[440] For more details on A-B-C information exchange and cases involving that type of conspiracy, see : P.WHELAN, *Trading negotiations between retailers and suppliers: a fertile ground for anti-competitive horizontal information exchange?,* 5 European Competition Journal 823 (2009) and O.ODUDU, *Indirect information exchange: the constituent elements of hub and spoke collusion,* 7 European Competition Journal 205 (2011). See also, below, Part III, Chapter 1, Section II, Point C and Part III, Chapter 2, Section II, Point b, 4, b).

[441] The fact that the restriction on competition includes a horizontal element turns that restriction into a more serious infringement of the competition law rules leading to a stricter legal analysis.

[442] Guidelines on the applicability of Article 101 of the Treaty, *op.cit.*, at 55. .

that, in case of category management agreements for example, collusion between distributors may be facilitated

> "when the same supplier serves as a category captain for all or most of the competing distributors on the market and provides these distributors with a common point of reference for their marketing decisions."[443]

However, discussions between operators at different levels of the supply chain about prices, investment or innovation plans are not as such unlawful as the share of commercially sensitive information between retailers and suppliers is a normal feature of commercial relations.[444] In fact, indirect information-disclosure will constitute an unlawful horizontal restraint if two conditions are fulfilled: (1) the hub and spoke arrangement leads to an exchange of information that may be conceptualized as a horizontal exchange between rivals and (2) results in restricting competition on the relevant market. If, in the first stage of the competitive assessment, it is concluded that the triangular arrangement involving a flow of information from retailer to supplier to competitor is equivalent to a direct competitor-to-competitor information exchange, the next step of the analysis will then focus on the possible anticompetitive object or effect of such arrangement.[445]

On that matter, the EU decisional practice and case law provide that any information exchange between competitors amounts to a form of coordination prohibited by Article 101(1) TFEU if it leads the parties to knowingly substituting practical cooperation between them for the risk of competition.[446] Effective competition on the markets indeed requires that each firm determines independently its market policies and the conditions offered to its trading partners. Any direct or indirect contact between competitors which has the object or effect of influencing conduct on the market of a competitor or of disclosing to such competitor the course of conduct which they

[443] Guidelines on vertical restraints, *op.cit.*, at 211. Category management agreements are defined as agreements by which, the distributor entrusts the supplier (the "category captain") with the marketing of a category of products including in general not only the supplier's products but also the products of its competitors. (at 209)
[444] O.Odudu, *op.cit.,* at 230.
[445] P.Whelan, *op.cit.*, at 833-834.
[446] See for examples: Joined cases 48, 49 and 51-57/69*, Imperial Chemical Industries Ltd. v Commission of the European Communities* [1979] ECR 619, at 64; Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *A. Ahlström Osakeyhtiö and Others v Commission (Wood Pulp)* [1993] ECR 1307, at 63; C-8/08, *T-Mobile Netherlands BV and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, at 26. See also: Guidelines on the applicability of Article 101 of the Treaty, *op.cit.*, at 56. On the issue of information exchanges between competitors, see: OECD, *Information exchanges between competitors under competition law,* Policy Roundtables, DAF/COMP(2010)39.

themselves have decided to adopt or contemplate adopting on the market must therefore be regarded as a concerted practice within the meaning of Article 101(1) TFEU. [447]

The Commission recognizes that information exchange may, in some circumstances, be procompetitive.[448] However, it considers that when information-disclosure enables firms to be aware of future market strategies of their competitors, it reduces the degree of uncertainty which must prevail on the markets and gives thereby competing firms the opportunity to reach easily a common understanding on the terms of coordination.[449] Indirect exchange of information between competing retailers on individual pricing intentions, investment or promotional plans for example reduces significantly strategic uncertainty in the market and facilitates coordination of firms' competitive behavior. Conveying information to competitors through a triangular route may therefore result in an anticompetitive horizontal arrangement within the meaning of Article 101 TFEU.

Although no decision exists on that matter at EU level, some authors, inspired by national jurisprudence on indirect exchange of information[450] and by the interpretation given by the EU institutions to the notion of horizontal agreement and concerted practice, have shed some light on

[447] See: Joined cases 40-48, 50, 54-56, 111, 113, 114/73*, Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities* [1975] ECR 1663, at 173; C-7/95 P, *John Deer Ltd v Commission* [1998] ECR I-3111, at 86. See also: Guidelines on the applicability of Article 101 of the Treaty, *op.cit.*, at 61.

[448] The share of information between market participants may indeed lead to increased competition (by reducing or eliminating information asymmetries for example) or generate efficiency gains. Information exchanges may for example help firms allocate production towards high-demand markets or lead to cost savings. When information-disclosure is public, it may also help consumers make a more informed choice. See: Guidelines on the applicability of Article 101 of the Treaty, *op.cit.*, at 88-93.

[449] *Ibid.*, at 58-62.

[450] It is often referred to two decisions adopted in the UK where the Office of Fair Trading (OFT), upheld by the Competition Appeal Tribunal and the Court of Appeal, considered that, in some circumstances, A-B-C coordination (or hub and spoke collusion) amounts to an unlawful horizontal agreement. See: Case CP/0871/01 *Price-Fixing of Replica Football Kit* [2003] 1 August and Case CP/0480-01 *Agreements between Hasbro UK Ltd, Argos Ltd and Littlewood Ltd Fixing the Price of Hasbro Toys and Games* [2003] 21 November. On appeal before the Competition Appeal Tribunal: Case 1021/1/1/03 and 1022/1/1/03 *JJB Sports Plc v Office of Fair Trading; Allsports Limited v Office of Fair Trading* [2004] CAT 17 and Case 1014/1/1/03 and 1015/1/1/03 *Argos Limited & Littlewoods Limited v Office of Fair Trading* [2004] CAT 24.On appeal before the Court of Appeal: Case Nos 2005/1071, 1074 and 1623 *Argos Limited and Littlewoods Limited v Office of Fair Trading and JJB Sports Plc v Office of Fair Trading* [2006] EWCA Civ 1318. In the *Hasbro, Argos and Littlewood* case, Hasbro, a leading manufacturer of children toys and games, entered into restrictive agreements with two influential retailers, Argos and Littlewood, to fix the retail prices of its products. In addition, in order to reassure those two retailers that the recommended retail prices will not be undercut by rivals, Hasbro conveyed information between competing retailers so as to share the future pricing policy of the leading retailers and ensure that other retailers will sell at the same price. In that case, the investigator of the price-fixing agreement was Hasbro, the supplier. Conversely, in the *Replica football kit* case, it is a retailer, JJB Sports, which initiated the trilateral agreement. JJB Sports complained to its supplier, Umbro, that a competing retailer, Sport Soccer, was discounting replica football shirts and incited it to take measures preventing such discounts. Following discussions with Umbro, Sport Soccer agreed reluctantly to raise its prices on the understanding that other retailers, in particular JJB Sports, would not discount. Despite the absence of direct contact between the competing retailers, the CAT and the Court of Appeal found that they were part of an anticompetitive horizontal agreement.

the possible horizontal nature of hub and spoke arrangements. Some leads are thereby given to firms to help them distinguish situations where information exchange between trading partners is allowed or even necessary to build a meaningful business relationship from those where the intervention of a common trading partner between competing firms may give rise to an anticompetitive horizontal agreement or concerted practice. As such, according to P.Whelan, where every party involved in the trilateral relationship is aware that the supplier is simply acting as a conduit for the exchange of information between competing retailers, there should be no doubt about the horizontal nature of the arrangement.[451] However, when awareness of the role that the supplier, as intermediary, is supposed to be playing is not present in either the retailer or its rival, questions arise as to whether horizontal information exchange occurs or not.[452] Looking at EU case law, it seems that the definition given to the concept of a concerted practice requires that the competing firms be aware of the role being played by the supplier.[453] According to the Court of Justice, a concerted practice is defined as

[451] P.Whelan, *op.cit.*, at 834.

[452] P.Whelan considers that awareness on behalf of the supplier is for the hub-and-spoke arrangement to have a horizontal character. Provided that the competing retailers are aware of using the supplier as a conduit to pass on information to each other, the supplier in question does not have to have knowledge of its actual role to consider the flow of information to be horizontal. P.Whelan, *op.cit.,* at 835.

[453] The UK Court of Appeal in *Argos and Littlewoods v Office of Fair Trading* and *JJB Sports v Office of Fair trading* followed that interpretation. Even though it upheld the judgment of the Competition Appeal Tribunal (CAT), the Court of Appeal nevertheless narrowed the formulation of the test to be used in case of indirect exchange of information. The CAT had approved the decision of the OFT and considered that indirect contact between competitors via an intermediary constitutes indeed a concerted practice regardless of whether the retailer has actual knowledge of the role being played by the supplier. According to the CAT, "if one retailer A privately discloses to supplier B its future pricing intentions in circumstances where it is reasonably foreseeable that B might make use of that information to influence market conditions, and B then passes that pricing information on to a competing retailer C, then (…) A, B and C are all to be regarded on those facts as parties to a concerted practice having as tis object or effect the prevention, restriction or distortion of competition." (See: Case 1021/1/1/03 and 1022/1/1/03 *JJB Sports Plc v Office of Fair Trading; Allsports Limited v Office of Fair Trading* [2004] CAT 17, at 659) P.Whelan points out that for the CAT constructive knowledge of the role of the supplier is in fact sufficient to conclude that a concerted practice has occurred. This broad approach to the prohibition of indirect contact between competing firms was yet not followed by the UK Court of Appeal which maintained that the CAT might have gone too far if it intended to extend the prohibition to "cases in which A did not, in fact, foresee that B would make use of the pricing information to influence market conditions or in which C did not, in fact, appreciate that the information was being passed to him with A's concurrence". (See: Case Nos 2005/1071, 1074 and 1623 *Argos Limited and Littlewoods Limited v Office of Fair Trading and JJB Sports Plc v Office of Fair Trading* [2006] EWCA Civ 1318, at 91) According to the Court of Appeal, actual knowledge of both the retailer and its competitor must be established to conclude to the existence of a concerted practice and the following more restrictive test is to be applied: "if (i) retailer A discloses to supplier B its future pricing intentions in circumstances where A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is or may be one), (ii) B does, in fact, pass that information to C in circumstances where C may be taken to know the circumstances in which the information was disclosed by A to B and (iii) C does, in fact, use the information in determining its own future pricing intentions, then A, B and C are all to be regarded as parties to a concerted practice having as its object the restriction or distortion of competition." (at 141) In the case at hand, the narrower formulation of the test did not lead to a different result as the Court of Appeal also found a competition law infringement on basis of that formulation.

> "co-ordination between undertakings which, without having reached the stage where an agreement, properly so called, has been concluded, *knowingly* substitutes practical co-operation between them for the risks of competition."[454]

Accordingly, for a trilateral arrangement to fall within the scope of that definition, the retailer must intent or actually know that the information it has passed to its suppliers will be convey to its rival[455] and the latter must be aware of the flow of information via the hub and take that information into account for the purposes of determining its conduct on the market.[456] However, no matter whether the information is exchanged with or without reciprocity. It is indeed considered that the share of information between competitors is conceptualized as a concerted practice "where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it."[457] If those conditions are fulfilled, indirect contact between retailers via their common supplier will be treated as a direct exchange of information between competitors and be therefore held unlawful if it as the object or effect to reduce or remove uncertainties inherent in the process of competition.

Once it is established that the exchange from retailer to supplier to competing retailer is tantamount to a direct competitor-to-competitor arrangement, the Guidelines on the applicability of Article 101

[454] See for example: Joined Case 48, 49 and 51-57/69*, Imperial Chemical Industries Ltd. v Commission of the European Communities* [1979] ECR 619, at 64. (emphasis added)

[455] According to O.Odudu, intention on the part of the retailer may be inferred from three situations: (i) when there is a bidirectional flow of information, that is when the retailer not only provides information to its supplier but also receives similarly sensitive information concerning a competitor from the same supplier; (ii) when information is disclosed after agreement has been reached as once the terms are settled, there is no longer any legitimate basis for sharing information; and (iii) when the retailer complains to its supplier about the market activities of another competing retailer in order to make that supplier take action in response of its complaint. See: O.Odudu, *op.cit.,* at 234-235.

[456] In case of direct exchange of information between competitors, it is presumed that the firm getting information from its competitor takes account of it when determining its conduct on the market. See for examples: C-49/92 P, *Commission v Anic Partecipazioni Spa* [1999] ECR I-4125, at 121 and C-199/92 P, *Hüls AG v Commission* [1999] ECR I-4287, at 162. "Subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market." However, according to O.Odudu, in case of indirect exchange of information, it would be perverse to presume that the competing retailer has relied on the information received from its supplier. In case of direct contact between competing firms, the presumption of reliance is triggered because one may assume that the information disclosed is reliable so that the competing retailer is very likely to rely on it. However, when the information is provided via an intermediary, it is not always possible to imply credibility so that the competing retailer, taking into account the circumstances in which the information was disclosed, could decide not to rely on it. The author suggests therefore that the presumption of reliance be applied only after credibility of the information provided being independently established. See: O.Odudu, *op.cit.*, at 226-227.

[457] T-25/95, *Cimenteries CBR v Commission* [2000] ECR II-491, at 1849.

TFEU can be used for assessing the pro- and/or anti-competitiveness of the resulting share of information between competitors. [458]

Hub & spoke conspiracies can be initiated by (a) supplier(s) or by (a) buyer(s). Only the latter situations are relevant in the framework of this thesis because, in those cases, buyers' market power may be of particular importance and even a necessary condition to orchestrate a trilateral arrangement with competing buyers and/or suppliers. Indirect exchange of information between competitors may in fact result from pressure exerted by one or several strong buyer(s) on their suppliers. Buyer power could indeed be used to force a supplier to play a role of intermediary by passing on information to competing buyers or to convince some suppliers to abide by a specific policy, such as a boycott policy targeting competing buyers, leading in fact those suppliers to enter into an anticompetitive horizontal arrangement, possibly against their will. Examples of such practices can be found in the case law of some Member states. These will be developed below in Part III, Chapter 2, Section II, Point C.

2. Assessment of buyer power under Article 102 TFEU

Where the exercise of buyer power may result in the creation of anticompetitive agreements or concerted practices prohibited by Article 101(1) TFEU, it may also be examined under the rules on unilateral conduct contained in Article 102 TFEU. The issue of market power on the buying side may in fact arise in two different situations under that provision. The first situation involves cases of alleged abuses of dominance committed by buying firms where the Commission has to assess the degree of market power held by those buyers in the procurement market and the abusive nature of their conduct. The second situation refers to cases where the existence of buyer power is considered as a countervailing power ruling out an upstream undertaking of the definition of dominance.

a) Prohibition of abuses of buyer power

Article 102 TFEU reads as follows:

[458] Exchanging information on intentions of future conduct regarding prices or quantities is particularly likely to lead to a collusive outcome and constitutes therefore a restriction on competition by object. See: Guidelines on the applicability of Article 101 of the Treaty, *op.cit.,* at 67. Informing each other about intentions of future conduct regarding prices and quantity may indeed allow competitors "to arrive at a common higher price level without incurring the risk of losing market share or triggering a price war during the period of adjustment to new prices. Moreover, it is less likely that this type of information exchange is done for pro-competitive reasons." Exchanges of information which do not constitute restrictions of competition by object are analysed on a case-by-case basis. The results of the assessment depend on a number of factors such as the type of information exchanged (the strategic nature of its subject matter, its age, frequency, aggregation,…) and the structural characteristics of the market involved (such as concentration, transparency, stability, complexity, symmetry, etc.). See: Guidelines, at 69-87.

> "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
> Such abuse may, in particular, consist in:
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
> (b) limiting production, markets or technical development to the prejudice of consumers;
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. »

Even though the Commission has hardly ever sanctioned an abuse of buyer power so far, the prohibition on abusive conduct applies to dominant undertakings either in the selling or in the buying market. Indeed, according to the wording of Article 102 TFEU and to the examples of abuses given in that provision, it seems that the European legislator has taken into account the potential anticompetitive outcomes that powerful buyers' conduct may lead to. As such, that Article provides that an abuse may, in particular, consist in directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions. The first example, namely the requirement of unfair purchase prices, is specifically designed to address undertakings' behaviour when acting in the procurement market, while the prohibition on unfair trading conditions is likely to apply to both sellers and buyers. Therefore, the same principles as those applied to sell-side conduct may be used to enforce the competition rules on dominance against firms acting in the upstream markets.

The first step in the enforcement of Article 102 TFEU is to assess the degree of market power held by the buyer in question in the procurement market in order to determine whether it is or not in a dominant position with regard to its suppliers. Based on the definition of dominance given by the Court of Justice in previous seller power cases[459], this would be the case if the firm enjoys a position of economic strength, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.

[459] See Case 27/76, *United Brands Company and United Brands Continental v Commission* [1978] ECR 207, at 65 and Case 85/76, *Hoffmann-La Roche & Co. v Commission* [1979] ECR 461, at 38.

In a case of buyer power, the issue of independence should not only be analysed with regard to competitors, customers and consumers but also, and more particularly, with regard to suppliers since those actors are in the firing line of a potential abuse of buyer power. If the market share of the firm under examination is a useful first indication of its power in the procurement market, the Commission will not come to a final conclusion on the issue of dominance only based on that information. All factors which may constitute a competitive constraint, coming from suppliers, rivals or customers, will be assessed by the Commission.[460]

It is worth nothing that, in the current Guidance on the Commission's enforcement priorities in the application of Article 102 TFEU, no distinction is made between seller and buyer power so that the same criteria are to be used to assess market power on each side of the market. The particularities of buyer power mentioned in Part I, which should lead competition authorities to measure the degree of buyer power on basis of the vertical relationships between buyers and their suppliers, are hence not addressed in the texts of the Commission.

If a firm holds a dominant position in the upstream buyer market, the Commission must next examine whether an abuse has been committed. Article 102 TFEU would be infringed if a dominant buyer had not complied with its special responsibility and had impaired competition on the common market through its conduct.[461] Imposing unfair purchase prices, such as excessively low prices, or unfair trading conditions on suppliers constitute mere examples of abusive buying conduct. Nothing precludes the Commission from sanctioning other practices, provided that they are used by a dominant buyer and that they are likely to distort effective competition.

b) Buyer power as a competitive constraint

As mentioned above, dominance has been defined by the Court of Justice as

> "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers."[462]

Different competitive constraints may be exerted on a firm by competitors, customers or consumers which prevent it from acting independently and therefore exclude it from the definition of

[460] Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Text with EEA relevance), O.J. C 45/7 of 24/02/2009, at 13-15.
[461] Case 322/81, *Nederlandsche Banden Industrie Michelin (Michelin I) v Commission* [1983] ECR 3461, at 57.
[462] See Case 27/76, *United Brands Company, op.cit.*, at 65 and Case 85/76, *Hoffmann-La Roche, op.cit.,* at 38.

dominance under Article 102 TFEU. In the assessment of a selling firm's market power, the Commission takes therefore into account the competitive structure of the market, and in particular the constraints imposed not only by actual and potential competitors but also by the firm's customers through their bargaining strength.[463] Called countervailing buyer power in such a situation, market power on the buying side may constitute an important factor in the analysis of a seller's position as, even with a large market share, a firm may in fact be unable to act to an appreciable extent independently if its customers have sufficient bargaining strength. Indeed, where a buyer is able to exercise significant countervailing power, it may deter or defeat any attempt by its suppliers to profitably increase prices or to affect competition in some other way.[464]

According to the guidance of the Commission on abusive exclusionary conduct, such countervailing buying power may result from the customers'size or their commercial significance for the dominant firm. A buyer would constitute an important trading partner for a supplier when, for example, it accounts for a significant share in the latter's total turnover or when its large market share in the retail market turns it into an avoidable customer to access final consumers. The loss of such a customer would entail serious financial consequences for the supplier who can therefore not afford to ignore the possible reactions on the buying side when defining its trading policy.

Another factor taken into consideration by the Commission to assess the degree of countervailing buyer power is the customers' ability to find quickly alternative sources of supply either by switching to competing suppliers, by promoting new entry or by vertically integrating. Those outside options are the main sources of pressures since they enable customers to (threat to) change suppliers should the upstream undertaking try to increase prices and make therefore such an attempt less likely.

However, where only a limited segment of customers is shielded from the market power of the dominant firm due to their ability to exercise some degree of buyer power, that countervailing power may not be considered as a sufficient competitive constraint. Attention must also be paid to smaller buyers which are in no way in a position to counteract their supplier's conduct and to prevent anticompetitive outcome.

The issue of dominance on the selling side is therefore linked to the degree of market power held by buyers facing the alleged dominant seller firm. When pressures exercised by concentrated buyers are sufficient to prevent a firm from acting independently, the criteria of dominance are not met and Article 102 TFEU is hence not applicable.

[463] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty, *op.cit.*, at 12.
[464] *Ibid.,* at 18.

Noteworthy are the criteria to be used to assess buyers' countervailing power. Instead of focusing on buyers' market share, the Commission indeed put the emphasis, among other things, on the share a customer accounts for in the dominant firm's total turnover and on the ability of that customer to easily switch to alternative sources of supply. One can note that those criteria correspond, to some extent, to the factors mentioned in Part I as giving buyers the ability to exert market power over their suppliers. When buyers' market power is assessed from the angle of "countervailing power", the Commission seems therefore better to take account of the specificities of that power.

It appears from those EU instruments that buyer power is generally considered to be a positive constraint from a competition law perspective as it may be used to prevent anticompetitive behaviour in upstream seller markets. EU competition authorities are in fact rarely concerned about buyer power issues. As a result, only a few cases involve the enforcement of the competition rules against powerful buyers.

B. ENFORCEMENT OF ARTICLE 101 TFEU AND 102 TFEU AGAINST BUYER PRACTICES

The enforcement of Article 101 TFEU and 102 TFEU has only given rise to a few buyer power cases at EU level. Except when hard-core buyer cartels are involved, most buyers' practices are in fact viewed as benign from a competition law perspective or even procompetitive.

1. Article 101 TFEU

Three types of horizontal buying agreements may be distinguished.[465] First, agreements containing hard-core restrictions, such as price-fixing or market sharing, which are condemned under the object standard. Second, agreements which follow, for example, from the creation of a buying alliance and, due to the efficiencies that stem from such activities, are subject to an effects-based approach. Third, joint purchasing arrangements which in fact serve as a tool to engage in a disguised cartel, that is to say, otherwise prohibited price fixing, output limitation or market allocation and which are consequently regarded as restrictions of competition by object.[466]

The fixing of purchase prices and other hard-core restrictions, such as the allocation of sources of supply, fall within the mischief of Article 101 TFEU and are in fact treated as having the object of restricting competition.[467] In different decisions, the Commission and the European Courts have

[465] This distinction is based on the analysis carried out by Ariel Ezrachi who examined the EU competition law approach with regard to input price fixing. He defined a benchmark used to determine which case will be dealt with under an object approach and which situation would rather call for an effects-based analysis. See: A.Ezrachi, *Buying alliances and input price fixing: In search of a European enforcement standard,* 8 Journal of Competition Law & Economics 47 (2012)

[466] See : Guidelines on the applicability of Article 101 of the Treaty, *op.cit.*, at 205.

[467] An agreement is considered as a restriction of competition by object when it has, by its very nature, the potential to injure the proper functioning of normal competition. It is sufficient to establish the anticompetitive

confirmed that buyer cartels are to be condemned as strictly as seller cartels. For examples, in two cases related to the purchase of raw tobacco, the Commission condemned an agreement between tobacco processors which consisted in fixing common purchase prices and other trading conditions as well as in allocating suppliers and quantities.[468] By so doing, the processors in question aimed at avoiding that negotiations with producers could push prices beyond the level they were willing to pay. The Commission restated that agreements which fix transaction prices or share quantities are by their very object restrictive of competition, even when those agreements occur in the upstream buyer market.

> "Purchase price is a fundamental aspect of the competitive conduct of any undertaking operating in a processing business and is also, by definition, capable of affecting the behaviour of the same companies in any other market in which they compete, including downstream markets."[469]

The Commission considered that the coordination by the processors of their purchasing conduct sheltered them from full exposure of market forces and eliminated the autonomy of strategic decision-making so that fundamental aspects of their competitive conduct were affected.

> "By fixing volume quotas and allocating suppliers, the processors were prevented from competing for market shares and might have gradually succeeded in preventing or limiting the increase of purchase prices given that each allocated supplier would not be able to play buyers one against each other as happens in the normal competitive market. In other words, allocation of suppliers is a strategy to prevent price increases as a supplier allocated to a specific processor would not be able to sell to other processors and would find itself price-constrained by its allocated processor."[470]

> "In this case, it is clear that the agreements and/or concerted practices of the processors (…) have by their very nature the object to restrict competition within the meaning of Article [101(1)] as they shelter processors and producers of raw tobacco in Italy from full

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object of an agreement to conclude to an infringement of Article 101 TFEU, without examining the actual or potential effects of that agreement on the market. See for example: C-209/07, *Competition Authority v. Beef Industry Development Society Ltd.* [2008] ECR I-08637. If a horizontal co-operation agreement does not restrict competition by object, it must be examined whether it has appreciable restrictive effects on competition. See: Guidelines on the applicability of Article 101 of the Treaty*, op.cit.*, at 26-31.

[468] *Spanish Raw Tobacco,* Case No COMP/C.38.238/B.2, Commission decision of 20 October 2004 and *Italian Raw Tobacco,* Case No COMP/C.38.281/B.2, Commission decision of 20 October 2005. For other examples, see: *Aluminium Imports from Eastern Europe,* Case IV/26.870, Commission decision of 19 December 1984 and *French beef,* Case COMP/C.38.279/F3, Commission decision of 2 April 2003.

[469] *Italian Raw Tobacco, op.cit.*, at 280.

[470] *Ibid.*, at 281.

> exposure to market forces. By eliminating the autonomy of strategic decision-making and competitive conduct, they prevent such undertakings from competing on the merits and enhancing their position on the market vis-à-vis the less efficient firms. The result could be reduced pressure to control costs, to improve quality and to innovate, thereby limiting productive and dynamic efficiencies."[471]

Buyer cartels are hence considered anticompetitive because such a restriction on competition is likely to negatively affect different aspects included in the concept of consumer welfare. However, the proof of direct consumer harm is not required to find an infringement of Article 101TFEU. Although, in some cases, buyer agreements lead to lower consumer prices in the short-term or, at least, do not directly harm end-users, they nevertheless violate the competition rules because they prevent the undertakings concerned from independently determining their strategic trade policy and are as such anticompetitive. This was, in particular, affirmed in *T-Mobile* where the Court of Justice maintained that a concerted practice may be regarded as having an anti-competitive object even though there is no direct connection between that practice and consumer prices.[472] The case at hand concerned an arrangement between mobile operators to reduce dealer remunerations for postpaid subscriptions. The concerted practice did not relate to consumer prices to be applied in the retail market but to the remuneration that those mobile operators intended to pay for the services supplied to them by dealers. The Court nevertheless treated that buyer cartel as severely as seller cartels even though the agreement in question did not directly impact consumers. It underlined indeed that nothing in Article 101 TFEU indicates that only concerted practices which have a direct effect on the prices paid by end users are prohibited and added that

> "Article [101 TFEU], like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such."[473]

Consequently, and as repeated in *GlaxoSmithKline Services Unlimited v. Commission,* for a finding that an agreement has an anticompetitive object, is it not necessary that final consumers be deprived of certain advantages.[474]

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[471] *Ibid.*, at 285.
[472] C-8/08, *T-Mobile Netherlands BV and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, at 36.
[473] *Ibid.,* at 38.
[474] Joined cases C-501/06 P, C-513/06 P, C-515/06 P & C-519/06 P, *GlaxoSmithKline Services Unlimited v. Commission* [2010] ECR I-9291, at 63.

Those cases show that, in the assessment of anticompetitive conduct, the focus is not only on the downstream market and on potential harm to final consumers but that distortion of competition in the upstream market may be sufficient to find a violation of the competition rules.[475] However, such disregard for the potential effects buyer cartels have on consumers is justified by the fact that the agreements in question included restrictions of competition by object so that they were considered, as such, as anticompetitive, no matters their impact on the markets or even on consumers. In addition, even if hardcore restrictions may, in theory, be justified under Article 101(3) TFEU, it is very unlikely that the possible efficiencies or consumer benefits flowing out such restrictions be sufficient to reverse the presumption of illegality.[476]

In contrast, the impact on consumers is more likely to play a role when a restriction is assessed under an effects-based approach - because, for example, it is part of a joint purchasing agreement -, especially at the justification stage.[477] An agreement restricting competition by effect in the upstream buyer market may, in some cases, be justified if the conditions laid out in Article 101(3) TFEU are met. One of these requires that a fair share of the efficiency gains yielded by the agreement be passed on to consumers. Accordingly, where the proof of direct consumer harm is not a necessary condition for finding a violation of Article 101(1) TFEU, the proof of consumer benefits resulting from an arrangement may contribute to justifying the challenged conduct. On that matter, the Guidelines on the application of Article 101(3) TFEU provide that:

> "The concept of 'fair share' implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under [Article 101(1) TFEU]."[478]

[475] A.Ezrachi, *op.cit.,* at 58.

[476] Article 101(3) TFEU can be invoked as a defense by proving that the agreement is sufficiently likely to give rise to procompetitive effects. The application of an individual exemption is subject to four cumulative conditions: (1) the agreement must contribute to improving the production or distribution of products or contribute to promoting technical or economic progress, that is to say, lead to efficiency gains; (2) the restrictions must be indispensable to the attainment of those objectives, that is to say, the efficiency gains; (3) consumers must receive a fair share of the resulting benefits, that is to say, the efficiency gains, including qualitative efficiency gains, attained by the indispensable restrictions must be sufficiently passed on to consumers so that they are at least compensated for the restrictive effects of the agreement; hence, efficiencies only accruing to the parties to the agreement will not suffice; (4) the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question. See: Guidelines on the application of Article 81(3) of the Treaty (Text with EEA relevance), O.J. C 101 of 27/04/2004.

[477] For examples of joint purchasing agreement exempted under Article 101(3), see: *National Sulphuric Acid Association,* Case IV/27.958, Commission decision of 9 July 1980 and *EBU/Eurovision System,* Case IV/32.150, Commission decision of 11 June 1993.

[478] Guidelines on the application of Article 81(3) of the Treaty*, op.cit.*, at 85.

However, when the restriction takes place in the upstream buyer market, the efficiency test requires competition authorities to balance the negative effects resulting from that restriction in the upstream market against the benefits passed on to consumers in the downstream market. The Guidelines on applicability of Article 101 TFEU to horizontal co-operation agreements provide indeed concerning common purchase agreements that:

> "[The efficiency gains] must be passed on to consumers to an extent that outweighs the restrictive effects of competition caused by the joint purchasing arrangement. Hence, cost savings or other efficiencies that only benefit the parties to the joint purchasing arrangement will not suffice."[479]

In case of sell-side restriction, the balancing test refers to elements confined in one market, namely to the positive and negative effects the restriction causes to consumers in the relevant seller market. However, in case of buy-side restriction, the test involves weighing the harmful impact of the restriction in the upstream buyer market against the consumer benefits in the downstream seller market. The reason why the Commission cares about the likely positive effects of a practice on consumers instead of looking at whether the affected market participants in the upstream market are in fact compensated for the negative impact caused to them by the restriction is to be found in the objective of EU competition which aims primarily at enhancing consumer welfare.

2. Article 102 TFEU

One can hardly find cases on buyers' unilateral conduct treated at EU level. Few complaints on abuse of buyer power have been brought to the Commission up to now and the latter rarely concluded to a violation of Article 102 TFEU. In the *FENIN* case, the claim was rejected without any further analysis on that particular issue. The Commission and the Court of Justice took nevertheless the opportunity to make a number of passing observations on the abuse of excessively low prices in the *CICCE* case. A last case, however, is particularly worth mentioning, namely the *British Airways* case in which the Commission, but also and especially the European Courts, made important statements with regard to, on the one hand, the factors to be taken into consideration in the assessment of a dominant position in the upstream market and, on the other hand, the type of conduct which may be qualified as abusive. Where those cases reveal that action against powerful buyers is not only theoretical in EU law, the enforcement of Article 102 TFEU against those players remains nevertheless limited and hesitant. The main obstacle standing in the way of such enforcement is probably the criteria defining the notion of dominance which are ill-suited to address buyer power cases.

[479] Guidelines on the applicability of Article 101 of the Treaty, *op.cit.*, at 219.

The Commission and the European Courts have hardly ever dealt with buyer power cases in the framework of Article 102 TFEU on abuses of dominance. Three cases nevertheless show that complaints against buyer practices are not illusory and that the EU Institutions are not that hostile to the idea of condemning buyers for their conduct in the procurement market.

a) FENIN case[480]

In 1997, a complaint was submitted to the Commission by an association of undertakings (FENIN) which market medical goods and equipment used in Spanish hospitals. It was alleged that the organisation managing the social health service was in a dominant position on the Spanish procurement market of those products and that it had abused that position by delaying payment of their debts. While that case would have been a good opportunity to set some principles and guidelines on the notion of buyer power, the Commission missed it by rejecting the claim on basis that the organization in question was not an undertaking in the eyes of the competition rules. It was considered that where an organization purchases goods in order to use them in the context of an activity of a purely social nature, it does not carry on an economic activity and does not therefore act as an undertaking. An entity which operates according to the principle of solidarity such as in the present case is, as a result, classified in that particular category not subject to the prohibition provided by Article 102 TFEU.[481]

[480] *Fenin/SNS+Spain*, Case No IV.F.1./36.834, Commission decision of 26 August 1999.

[481] The organisation managing the social health service is indeed funded from social security contributions and other State funding and it provides services free of charge to its members on the basis of universal cover. That interpretation of the notion of undertaking was upheld by the General Court (See: Case T-319/99, *Fenin v Commission,* [2003] ECR II-357) and the Court of Justice (See: Case C-205/03, *Fenin v Commission* [2006] ECR I-6295). It was confirmed that the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity. The applicant tried to submit a new argument in order to make the substance of the case examined by the General Court, invoking that in some circumstances, where hospitals provide private care for which patients are charged, the organisation in question necessarily acts as an undertaking. However, since that argument had not been brought to the Commission's attention in the initial complaint, the General Court considered that the applicant could not include it in its action against the contested decision and criticise the Commission for failing to take account of those facts. Although the FENIN case does not provide any information on the way to assess buyer power, it sheds light on the concept of "undertaking" in buyer power cases. According to the European judge, a firm is considered an undertaking acting in the upstream buyer power for the purpose of EU competition law if and only if it is considered as such when acting in the downstream seller market, that is, if it is engaged in an economic activity in that downstream market. The concept of undertaking in buyer power cases is not developed in this thesis because, in our opinion, it does not call for a specific approach but, as the General Court asserted, it can be defined on the basis of the firm's business activity in the downstream market.

The issue of abuse of buyer power was therefore evaded in that particular case related to an activity of social nature. The only attention paid to that question can be found in the opinion of the Advocate General who maintained that:

> "The existence of a monopsony does not pose a serious threat to competition since it does not necessarily have any effect on the downstream market. Furthermore, an undertaking in a monopsonistic position has no interest in bringing such pressure to bear on its suppliers that they become obliged to leave the upstream market".[482]

It is difficult to determine whether that opinion would have been followed or not. However, the statements made in the *CICCE* case and in the *British Airways* case developed hereafter show that the Court does not rule out the finding of an abuse even though the buyer's conduct in question does not lead to any adverse effect in the downstream market.

b) CICCE case[483]

The issue of unfairly low prices was addressed in the *CICCE* case where an association of cinematic companies (CICCE) claimed to the Commission that undertakings with exclusive broadcasting rights in France had paid excessively low prices for the purchase of movies. Following a Commission's letter suspending the procedure, CICCE brought the case to the Court of Justice in order to make that letter declared void. The Court dismissed the action but developed somewhat the question of abuse of buyer power by joining the Commission's approach on that matter. It was held that unfair purchase prices imposed by an undertaking in a dominant position may constitute an abuse within the meaning of Article 102 of the Treaty. Like in the case of excessively high prices, such an abuse depends on the relationship between the cost and the economic value of the product or of the service provided.[484] In this particular case of film broadcasting rights, the Commission, upheld by the Court, considered that various criteria may be taken into consideration to assess the value of films so that it is impossible to determine a yardstick that is valid for all films. The claimant was therefore required to prove the alleged abuse by reference to actual cases involving specific films rather than by reference to the average licence fee paid for all the films for which the television companies acquired broadcasting rights.[485]

[482] Opinion of AG Poiares Maduro delivered on 10 November 2005 , *Fenin v Commission*, case C-205/03, at 66.
[483] Case 298/83, *Comité des industries cinématographiques des Communautés européennes (CICCE) v Commission* [1985] ECR 1105.
[484] *Ibid.,* at 22.
[485] *Ibid.,* at 24.

Where that decision does not define to a great extent rules circumscribing unilateral buying conduct, at least it confirms that Article 102 TFEU is likely to be applied to one type of buyer power abuse, namely excessively low purchasing prices imposed on sellers. In addition, the Courts seems to consider that the negative effects that uncompetitive prices would entail in the upstream market would as such be sufficient to conclude to a violation of Article 102 TFEU, regardless of whether those lower prices are obtained through a reduction in input purchases or through other practices and without considering whether the buyer's conduct in question is or not likely to affect the downstream market as well. Abuses of buyer power could therefore be condemned even though no consumer harm has been established.

The *CICCE* case attests of the difficulty of determining what constitutes an excessively low price. The problem of identifying unlawful excessive prices has already been pointed out in different cases on abuses of market power on the selling side. According to the case law of the Court, a price is excessive when it bears no relationship to the economic value of the product supplied or the service provided.[486] However, calculating the difference between the costs actually incurred and the price charged by a firm is not an easy task. That is why the Commission generally places a greater emphasis in price differentials between Member States, price discrepancies between branded and unbranded products or prices charged by competitors.[487] It is therefore not surprising that the Commission rarely concludes to the existence of excessively high prices and adopts a similar cautious approach with regard to excessively low prices.

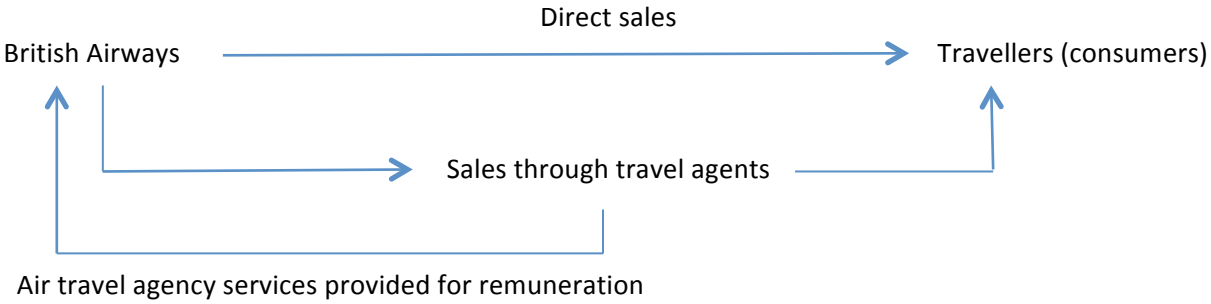
One can nevertheless point out that the situation is slightly different in case of excessively low prices. The justifications generally invoked to justify high prices - such as the necessity to make profit in order to reward beneficial investment in risky projects, to compensate firms for failed projects or to incite investments in research and development - are hardly sustainable in case of excessively low prices. Indeed, on the one hand, buyers do not normally make more profit since they are supposed to pass on lower prices to their customers. On the other hand, excessively low prices will in fact affect the suppliers' incentives to invest in improved and new products. As a result, that situation risks leading to a decrease in the products quality and variety available for consumers. Where obtaining lower prices is positive to enhance competition in the downstream markets, imposing excessively low prices is not.

[486] Case 27/76, *United Brands Company v Commission* [1978] ECR 207, at 250.
[487] R.O'DONOGHUE & J.PADILLA, *The law and economics of Article 82 EC,* 2006, at 609.

c) British Airways case[488]

The *British Airways* case is mainly known as the first case where the Commission concluded to the existence of a dominant position in spite of the firm in question having a market share slightly below 40% (39.7% more precisely). However, few have highlighted that the decision concentrated on British Airways (BA) as a buyer. Although the case presents some specific characteristics and thereby differs from the different situations involving the exercise of buyer power described in Part I, it is nevertheless relevant to examine the assessment carried out by the Commission and the European Courts with regard to the position and conduct of BA. Where that assessment was not drastically different from the analysis commonly used in seller power cases, various elements pertaining to the issue of buyer power are yet worth pointing out.

The case arose from a complaint lodged by Virgin, an airline company, against the travel agency commission schemes offered to travel agents by its competitor British Airways which was accused of abusing its dominant position as a purchaser of travel agency services. Where airlines companies are suppliers of air transport services, they also purchase air travel agency services from travel agents. These services consist in undertaking the administrative work of issuing a ticket, collecting money from travelers and remitting it to the airline company. In return, travel agents are paid through commission based on the sales of tickets. This is therefore a particular situation where buyers and sellers do not act in successive markets (upstream buyer market – downstream seller market) but in interlocked markets.



In that context, BA implemented a particular system of commission through which it intended to increase the sales of its tickets by offering additional financial incentives to travel agents. The

[488] *Virgin/British Airways,* Case No IV/D-2/34.780, Commission decision of 14 July 1999. The decision was upheld by both the CFI (General Court) and the CJE (Court of Justice). See: T-219/99, *British Airways v. Commission* [2003] ECR II-5917 and C-95/04 P, *British Airways v. Commission* [2007] ECR I-2331.
[489] *Virgin/British Airways, op.cit.*, para. 88.

contested performance reward schemes provided that if travel agents attained their BA tickets sales growth targets, they would get an increase in the rate of the commission paid to them by BA, not only on BA tickets sold after the target was reached but also on all BA tickets sold by the agents during the period of reference. Following the complaint against those commission schemes, the Commission decided to initiate a proceeding under Article 102 TFEU at the end of which it adopted a decision holding that BA abused its dominant position on the United Kingdom for air travel agency services.

Concerning the issue of the position of BA on the UK market for air travel agency services, different elements led the Commission to conclude that BA was the dominant purchaser on that market. First of all, the Commission pointed out the large market share of BA which accounted for 39.7% of sales through travel agents while its nearest rival (Virgin) had only a share of 5.5% of that market.[489] In addition, the economic strength of BA was considered as further reinforced due to the extent of the range of its transport services and to its network operations which allowed it to offer a wider choice of routes and more frequent flights.[490] Finally, the Commission noted that BA's strong position on the markets for air transport made it an obligatory business partner for travel agents. Indeed, the large number of BA air tickets purchased by travelers led in turn to a large number of transactions between BA and the travel agents for the sales of air travel agency services. Hence, travel agents needed to deal with BA as a very large proportion of their income was received from BA in consideration for their services.[491] Accordingly, based on those various elements, the Commission concluded to BA's dominance since it was in a position to behave independently in its purchases of travel agency services.

Turning to BA' s alleged abusive conduct, the Commission decided that the commission schemes in question, by rewarding loyalty from the travel agents and by discriminating between travel agents, constituted abuses of dominance prohibited under Article 102 TFEU.[492] The performance reward

[489] *Virgin/British Airways, op.cit.*, para. 88.
[490] *Ibid.*, para. 90-91.
[491] *Ibid.*, para. 92.
[492] On loyalty discounts and price discrimination, see : R.O'Donoghue & A.J.Padilla, *op.cit.*, at 374-406; D.Ridyard, *Exclusionary Pricing and Price Discrimination Abuses Under Article 82 - an Economic Analysis,* 23 European Competition Law Review 286 (2003); J.Kallaugher & B.Sher, *Rebates revisited: Anti-competitive effects and exclusionary abuse under Article 82,* 25 European Competition Law Review 263 (2004); D.Géradin & N.Petit, *price discrimination under EC Competition Law: The Need for a Case-By-Case approach,* Global Competition Law Centre Working Papers Series, GCLC Working Paper 07/05; S.M.Martinez Lage & R.Allendesalazar, *Community Policy on Discriminatory Pricing: A Practitioner' s Perspective,* in European Competition Law Annual 2003: What is an Abuse of Dominant Position?, C-D.Ehlermann and I.Atanasiu (eds) (2006); C.Ahlborn & D.Bailey, *Discounts, rebates and selective pricing by dominant firms: a Trans-Atlantic comparison,* 2 European Competition Journal 101 (2006); G.Faella, *The antitrust assessment of loyalty discounts and rebates,* 4 Journal of Competition Law & Economics 375 (2008); OECD, *Loyalty and fidelity discounts and rebates,* Report, DAFFE/COMP(2002)21, 4 February 2003.

schemes applied to travel agents were indeed clearly related to loyalty rather than efficiencies so that they entailed exclusionary effects on BA's competitors and potential new entrants.[493] The Commission considered therefore that they harmed competition in general and so consumers.[494] With regard to the discriminatory nature of the commission schemes, it was maintained that it placed certain travel agents at a competitive disadvantage relative to each other as it distorted the level of commission income earned by travel agents.[495] The Commission consequently concluded that, on the one hand, these schemes affected the ability of travel agents to compete with each other and, on the other hand, they distorted competition between BA and other airlines on the markets for air transport services.[496]

It is worth noting that BA's position in the buyer market for travel agency services resulted in fact only from its position on the air travel markets. The large market share of BA on those markets made travel agents economically dependent on that firm as they could not but offer BA's flight tickets in order to carry out successfully their business activity. The preponderant number of BA's flight tickets bought by travellers through travel agents led consequently to a significant number of transactions between BA and those agents for the purchase of air travel agency services related to the distribution of BA air tickets. The commissions were indeed paid on basis of the sales of tickets. Travel agents were hence dependent on BA because their revenue resulted mainly from the services provided to BA in relation to the sales of BA tickets. On basis of that correlation between the sales of air tickets and the services provided by travel agents to BA, the Commission took into consideration the market share of BA in the seller market for air tickets to assess the firm's position in the buyer market for air travel agency services. As a matter of fact, the share in the sales of air tickets through travel agents corresponded with the share in the purchases of air travel agency services. This is a particular situation which results from the interdependence of the different markets described above. In most buyer power cases, though, the relevant upstream buyer market needs to be defined separately so that the firm's position in that market is likely to differ from the one it holds in the

[493] *Virgin/British Airways, op.cit.*, para. 97-107. Rebates based upon an economically justified consideration will not infringe Article 102 TFEU. However, a system of rebates which as the effect of preventing customers from obtaining supplies from market competitors will be regarded as contrary to that provision if it is applied by an undertaking in a dominant position. See: Case 85/76, *Hoffmann-La Roche* [1979] ECR 541 and Case 322/81, *Michelin* [1983] ECR 3461.

[494] *Virgin/British Airways, op.cit.*, para. 106.

[495] In fact, on basis of the commission schemes at hand, two agents handling the same number of BA tickets and providing the same level of service to BA would receive a different commission rate, that is, a different price for their air travel agency services if their sales of BA tickets were different in the previous year. Conversely, two agents selling different volumes of BA tickets and providing a different level of service to BA could earn the same commission rate, that is, to be paid the same price by BA for air travel agency services if their sales of BA tickets have increased by the same percentage over the previous year. BA applied therefore dissimilar conditions to equivalent transactions and *vice versa*. See: *Virgin/British Airways*, *op.cit.,* para. 109.

[496] *Ibid.*, para. 111.

downstream seller market. This is why the *British Airways* case can be defined as a "fake" buyer power case. The competition assessment made by the Commission in that case remains yet of some importance such as the judgments of the European Courts.

The decision of the Commission was indeed upheld by both the Tribunal and the Court of Justice. The former confirmed that Article 102 TFEU applies to firms which are dominant with regard to their customers but also to those which are in the same position in relation to their suppliers.

> "With regard to the fact that the restrictions on competition which the Commission imputes to BA's performance reward schemes arise from the position which BA holds in its capacity not as supplier but as purchaser of air travel agency services, this is irrelevant having regard to the definition of the market in question. Article 82 EC applies both to undertakings whose possible dominant position is established, as in this case, in relation to their suppliers and to those which are capable of being in the same position in relation to their customers." [497]

It also considered that the Commission rightly concluded to the existence of a dominant position on basis of BA's economic strength in the relevant market but also of travel agents' economic dependence on BA. The Tribunal indeed pointed out that travel agents substantially depend on the income they receive from BA so that the latter was an obligatory business partner of those agents.[498]

With regard to BA's abusive practices, the Tribunal held that the Commission did not make any errors of assessment in deciding that BA contravened Article 102 TFEU by applying its performance reward schemes that were both discriminatory and had the object and effect of excluding rival airlines for the market of air travel agency services and, consequently, from the air travel markets.[499] Following the judgment of the Tribunal, BA brought an action before the Court of Justice invoking, among other things, in support of its appeal, that the Tribunal erred in law by failing to consider whether the practice condemned by the Commission had led to consumer harm. We noted above that the Commission carefully mentioned in its decision that the commission schemes at hand distorted competition between BA and its competitors, resulting in competition and consumer harm. The Court of Justice however made it clear in its judgment that consumer injury is in no way a condition to conclude to an abuse of dominance. It stated that:

> "Article [102 TFEU] is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their

[497] T-219/99, *British Airways v. Commission* [2003] ECR II-5917, para. 101.
[498] *Ibid.,* para 215-217.
[499] *Ibid.*, para. 299.

> impact on an effective competition structure (…). It follows that, in order to assess whether the conduct of an undertaking in a dominant position is abusive, it is not necessary to examine whether that conduct has caused prejudice to consumers. Rather, it is sufficient to examine whether it had a restrictive effect on competition."[500]
>
> "The commercial behaviour of the undertaking in a dominant position may not distort competition on an upstream or a downstream market, in other words between suppliers or customers of that undertaking."[501]

Accordingly, as soon as the commercial behavior of a firm in a dominant position tends to hinder the competitive position of some of the business partners of that firm in relation to the others, either in the downstream or in the upstream market, Article 102 TFEU is violated.[502]

In conclusion, even though the assessment made in the *British Airways* case with regard to the firm's position as a purchaser and its conduct in the upstream market was, to a great extent, similar to that generally carried out in cases of sellers' abusive practices, two elements can nevertheless be highlighted. First, when examining the position of BA in the upstream market, the Commission and the European Courts took a specific element into consideration, namely the travel agents' economic dependence on BA.[503] Although the firm's market share was still in the center of the dominant

[500] C-95/04 P, *British Airways v. Commission* [2007] ECR I-2331, para. 106-107. In its decision, the Court of Justice referred to an effective competition structure, as mentioned in former Article 3(1)(g) EC which provided that "the activities of the Community shall include (…) a system ensuring that competition in the internal market is not distorted." Even though that provision has been removed by the Lisbon Treaty, its terms have been included in a new legally-binding Protocol which provides that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted." See: Protocol No 27 on the internal market and competition, OJ C 115 of 09/05/2008.

[501] C-95/04 P, *British Airways, op.cit.*, para. 143.

[502] *Ibid.*, para. 144.

[503] It is not the first time that the economic dependence of trading partners is mentioned in the assessment of dominance. The Commission had already noted in some cases that the position of economic dependence of third parties was characteristic of the existence of a dominant position. See for example: *Magill TV Guide/ITP, BBC and RTE,* Case No IV/31.851, Commission decision of 21 December 1988 and *Michelin,* Case No COMP/E-2/36.041/PO, Commission decision of 20 June 2001. In that last case, the Commission considered that three elements showed the dominant position of Michelin. First, its large market share; second, its behavior on the relevant market which brought to light certain attitudes and practices which were typical of a company in a dominant position; and third, the position of economic dependence in which specialized dealers found themselves *vis-à-vis* Michelin, a necessary trading partner (See: at 173 and 200-208 of the decision). The economic dependence of trading partners was generally viewed as the consequence of the very large market share of the firm in question which exceeded 50% in those cases. Dominance was hence presumed and the factor of economic dependence only consolidated the Commission's conclusion on the existence of a dominant position. See also: *Soda ash-Solvay,* Case No COMP/33.133-C, Commission decision of 13 December 2000 (upheld by the General Court. See:T-57/01, *Solvay SA v. Commission* [2009] ECR II-4621) and *Soda ash-ICI,* Case No COMP/33.133-D, Commission decision of 13 December 2000 (upheld by the General Court. See: T-66/01, *Imperial Chemical Industries Ltd v. Commission* [2010] ECR II-2631). In the *British Airways* case, however, the market of the firm was definitely not sufficient to presume the existence of a dominant position, on the contrary. The fact that BA was an avoidable trading partner constituted therefore a factor on its own in the

position analysis, the factor related to the agents' dependency was nonetheless of particular importance in the overall assessment as BA's market share was far from sufficient to presume the existence of dominance.[504] Secondly, the Court of Justice clearly affirmed that the competition rules were aimed at protecting effective competition both in the downstream and in the upstream market. Therefore, any practice which distorts competition between suppliers and prevents them from acting in a competitive environment must be condemned, provided that it is carried out by a firm holding a dominant position in the relevant market.

C. CONCLUSIVE REMARKS

Although the use of market power is more commonly examined from the selling side, the Commission is not deprived of instruments to address the potential competitive concerns which may arise from the exercise of market power on the buying side. On the one hand, Article 101 TFEU may be enforced against buyer cartels and other agreements involving buyers provided that the restrictive effects on competition of those arrangements outweigh their positive effects. On the other hand, Article 102 TFEU, which prohibits abuses of dominance, is likely to apply to dominant buyers if they abuse their position in the procurement market.

However, in the different instruments used by the Commission to enforce the competition rules, buyer power is more often analysed as a countervailing strength. From that perspective, the presence of powerful buyers may have a positive impact on the competition process by removing, or at least attenuating, some of the negative effects which might come from a concentrated upstream market. Countervailing buying power may indeed be sufficient to prevent a seller from acting independently, excluding that seller from the definition of dominance and hence precluding the application of Article 102 TFEU. The extensive reference to buyer power as a countervailing strength in EU instruments reveals that, until now, such power has been mostly considered as a source of benefits for competition rather than a source of competitive concerns.

The very little case law and Commission action addressing the issue of buyer power as a source of competition distortion confirms that observation. However, it results clearly from the few buyer power cases dealt with at EU level that practices used in upstream buyer markets are likely to fall within the scope of the Treaty competition rules. Accordingly, Article 101 TFEU applies to both seller and buyer cartels even if the latter aim at decreasing prices. With regard to Article 102 TFEU, the case law confirms that the exploitation of buyer power over suppliers may constitute an abuse.

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assessment of dominance and attested that such position may be acquired from a lower market share, especially in the upstream market.

[504] P.Këllezi, *Abuse below the threshold of dominance?,* in Abuse of dominant position: new interpretation, new enforcement mechanisms? (2008), at 55.

Provided that they are in a dominant position in the relevant upstream market, firms are therefore required not to engage in conduct that might restrict competition.

To assess the degree of a buyer's market power, the Commission examines the traditional factors used in seller power cases, such as the firm's market share and the different competitive constraints present on the market. However, in the British Airways case, the concept of economic dependence was of particular relevance in the competition assessment. Although that case may be viewed as a "fake" buyer power case, based on a system of commission, it shows that the firm's market share is not always determinant in the assessment of dominance. In that case, the Commission put indeed rather the emphasis on the travel agents' economic dependence on British Airways to conclude that the latter was in a dominant position on the buyer market for travel agency services.

However, it remains that no specific approach has been defined to deal with buyer power cases under Article 101 and 102 TFEU. The concept of economic dependency is hence unlikely to take precedence over the market share threshold used to assess a firm's market power in the upstream buyer market. As such, if a buyer's share in that market is much below the threshold of 40%, the fact that most suppliers are dependent on that customer will probably not affect the conclusion of the Commission according to which the buyer in question is not in a dominant position.

The failure to take into account the particularities of buyer power might therefore let outside the scope of EU competition law practices which in fact affect effective competition. Suppliers' economic dependence on a particular customer gives indeed the latter significant buyer power which could be used to restrict competition. In those circumstances, one could argue that, despite the relatively low market share involved, competition authorities should be entitled to scrutinize the buyer's conduct in order to prevent any conduct restricting or distorting competition.

SECTION II - BUYER POWER AND THE EU MERGER POLICY

In the enforcement of the Merger Regulation, the role of the Commission is to examine both the positive and the negative impact of the transaction on competition. Where combining forces may increase efficiency and thereby bring benefits to the economy and to consumers, some mergers may also reduce competition in a market. In particular, when a concentration leads to the creation or strengthening of a dominant position in the downstream market, the new entity will probably be in a position to increase prices post-merger.

In the application of the merger policy, the existence or creation of buyer power may be viewed, depending on the situation, either as a source of competitive concerns or as a positive countervailing strength which can be used to mitigate the exercise of market power by upstream firms.[505]

We have already noted that countervailing buyer power exists in various industries and that such power may lead the Commission to clear a merger between suppliers in the upstream market, even though the operation will reinforce the latter's market power.[506] Customers may indeed be a source of competitive constraints. Their bargaining strength is therefore taken into account by the Commission when assessing the likely effects of an increase in market power of the merging parties.

However, the Commission does not only envisage the merged firm as a seller but also as a buyer who might exercise itself market power *vis-à-vis* its suppliers in the upstream markets. In such a case, buyer power may raise competitive concerns. The potential harmful impact of buyer power is, at first sight, not obvious since the immediate effect of the exercise of such power is generally a decrease in prices. The Commission nevertheless considers that, in some circumstances, pressures exerted by buyers on their suppliers may lead to anticompetitive outcome in the longer-term.

The first part of this Section describes the instruments used by the Commission when enforcing the Merger Regulation and in particular the different parts dealing with the issue of (countervailing) buyer power. In the second part, we will focus on merger cases where the Commission came to assess the merging parties' buyer power and its effects on competition. Among the very large number of merger cases dealt with by the Commission, only a few decisions concluded that increased buyer power might impede effective competition. Those decisions mainly took place in the agri-food sector. Three of them concerned mergers between supermarket chains while the others referred to increased buyer power of farmer cooperatives. The reasoning followed by the Commission as regards the effects of buyer power on competition will be exhaustively developed.

A. ASSESSMENT OF BUYER POWER UNDER THE MERGER REGULATION AND RELATED INSTRUMENTS

Similarly to the analysis made under Article 102 TFEU, the exercise of buyer power in merger cases may be viewed either as a competitive concern or as a countervailing factor. In the first case, the Commission may consider that a merger leading to an increase in buyer power in the procurement market is likely to significantly impede effective competition. In the second situation, market power exercised by some buyers may be considered as a sufficient countervailing power neutralizing the

[505] On buyer power in merger decisions, see : A.Ezrachi & M.Ioannidou, *Buyer power in European Union Merger Control,* 10 European Competition Journal 69 (2014).
[506] See: Part I, Chapter 2, Section I.

ability of the merging firm in the upstream market to raise prices in the future. The merger Guidelines give more details on those issues, in particular concerning the sources and the potential beneficial and harmful effects of buyer power.

1. Increase in buyer power through a merger

Mergers creating or strengthening buyer power in upstream markets may, in some circumstances, significantly impede effective competition in the common market and hence not be approved by the Commission, or at least not without undertakings.[507] The Commission is particularly concerned when, following the merger, the new entity would be in a position to obtain lower prices by reducing its purchase of inputs. This would be a case of pure monopsony which might, in turn, lead to a lower level of output in the final product market where consumers would consequently face higher prices. Such harmful effects on consumer welfare are likely to arise when upstream sellers are relatively fragmented in comparison with the market structure on the buying side. Another source of concerns mentioned in the Guidelines on horizontal mergers is related to the issue of output foreclosure. Competition in the downstream markets could indeed also be adversely affected if the merged firm uses its market power in the procurement market to foreclose its competitors.[508]

However, the Commission points out in its Guidelines that an increase in buyer power through a merger does not always entail a negative impact on competition, even if the operation creates or strengthens a dominant position in the procurement markets. Increased buyer power may even be beneficial for competition when the merged entity is able to lower input costs without restricting downstream competition or total output. In such a situation, it is likely that consumers will benefit from these cost reductions through lower prices.[509]

In its assessment of mergers, the Commission has therefore to analyse the competitive conditions in upstream markets and strike a balance between those potential negative and positive effects.[510] A merger would be deemed to significantly impede effective competition only when its likely harmful impact, in particular on consumers, outweighs its possible procompetitive effect.

2. Buyer power as a countervailing factor

Market power exercised on the buying side is also taken into consideration by the Commission in the assessment of the potential effects a merger between upstream suppliers may bring about on the

[507] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, O.J. L 24 of 29/01/2004, Article 2 (3).
[508] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, O.J. C 31 of 05/02/2004, at 61.
[509] *Ibid.,* at 62.
[510] *Ibid.,* at 63.

markets. The existence and the degree of countervailing buyer power are indeed likely to influence the outcome of the Commission's appraisal of mergers as powerful buyers are in fact able to mitigate the negative impact of a concentration. The Commission takes hence account of the exercise of buyer power when assessing the possible horizontal, vertical, non-coordinated, coordinated and conglomerate effects of mergers.

a) Horizontal mergers

When firms decide to merge, the assessment of their customers' market power in the buyer market is fully part of the Commission's analysis. Depending on the relative bargaining strength of the market participants on the selling and on the buying sides, the existence of buyer power may constitute a decisive factor in the appraisal of a merger because the exercise of such power is likely to counteract both the potential non-coordinated and coordinated harmful effects of the transaction.

i. Buyer power mitigating non-coordinated effects

As already mentioned with regard to Article 102 TFEU, competitive pressures on a supplier come not only from its competitors but can also come from its customers. Even though a merger has the effect of reducing or removing important competitive constraints exercised by other sellers, the operation will not automatically constitute a significant impediment to effective competition since customers may also be in a position to prevent the merged entity from acting to an appreciable extent independently. Under Article 102 TFEU, such countervailing buyer power could exclude an upstream firm from falling into the definition of dominance. In merger cases, that power may be considered as sufficient to counter the increase in market power that the concentration would otherwise be likely to create and therefore lead the Commission to clear the operation. According to the Guidelines on horizontal mergers, countervailing buyer power should be understood as:

> "The bargaining strength that the buyer has vis-à-vis the seller in commercial negotiations due to its size, its commercial significance to the seller and its ability to switch to alternative suppliers".[511]

The sources of buyer power described in those Guidelines are similar to those mentioned in the Guidance on abusive exclusionary conduct. The possibility of switching, within a reasonable timeframe, to alternative sources of supply is again an important factor in the assessment of the degree of buyer power. Those outside options may be existing suppliers which have the capacity to

[511] Guidelines on the assessment of horizontal merger, *op.cit.,* at 64.

increase their production, a vertical integration into the upstream market or the sponsor of upstream expansion or entry. The latter option may be possible by persuading a potential entrant to enter by committing to placing larger orders with that new firm. Even though a buyer is not able to find another source of supply for a particular product without excessive costs or delays, the Commission considers that countervailing buying power may still be exercised by refusing to buy other products produced by the supplier or, particularly in the case of durable goods, delaying purchases.[512] Those pressures exercised from the buying side are more likely to have a significant impact in the upstream market when exercised by large and sophisticated customers. The threat of losing important trading partners will dissuade the merging parties from increasing prices or deteriorating quality or the conditions of delivery.[513]

However, in some cases, it is not sufficient to note the existence of countervailing buyer power. A particular attention must also be paid to the incentives of customers to exercise their power. For example, a downstream firm may not be encouraged to invest in sponsoring new entry in the upstream market if the lower input costs obtained through that action could also be reaped by its rivals in the downstream market.[514] It may therefore be important to examine whether the use of buyer power would be profitable for the firms which hold that weapon. It is only where powerful buyers have an interest in exercising pressures in the upstream market that the increase in market power of the merged entity will effectively be counteracted.

As in the assessment of dominance, the presence of smaller buyers must also be taken into consideration. Point 67 of the Guidelines on horizontal mergers provides that:

> "Countervailing buyer power cannot be found to sufficiently off-set potential adverse effects of a merger if it only ensures that a particular segment of customers, with particular bargaining strength, is shielded from significantly higher prices or deteriorated conditions after the merger".

The protection of other actors who contribute to increasing consumer welfare is therefore considered as a non-negligible element in the objective of maintaining effective competition.

Finally, the Commission does not only examine the existence of buyer power prior the merger but adopt a prospective approach by analysing whether it will remain an effective constraint following the operation of concentration.[515] The exercise of countervailing buyer power mainly depends on the

[512] *Ibid.,* at 65.
[513] *Ibid.,* at 65.
[514] *Ibid.,* at 66.
[515] *Ibid.,* at 67.

number of alternatives available for customers. A merger between two suppliers may remove one of those outside options and therefore reduce significantly the credibility of the threat of switching to another source of supply. It is hence necessary that a sufficient number of suppliers remains on the market after the merger so that buyers may still exercise countervailing pressures.

ii. Buyer power mitigating coordinated effects

Even though a merger does not create or strengthen the dominant position of one single entity, it may still significantly impede effective competition if it occurs in a concentrated market through the creation or the strengthening of a collective dominant position. In some markets the structure may be such that firms are able to coordinate their behaviour and raise prices, even without entering into an anticompetitive agreement within the meaning of Article 101 TFEU.[516] A tacit collusion is more likely to happen in markets where it is relatively simple to reach a common understanding on the terms of coordination and where it is possible to make it sustainable. In the assessment of that last issue, namely the stability of coordination, the exercise of buyer power may play a role.

Indeed, before concluding that a merger will entail coordinated effects, the Commission has to establish that any deviation from the common understanding is unlikely by proving that three conditions, established by the Court of Justice and repeated in the Guidelines, are fulfilled.[517] The first and second conditions are related to the possibility for the coordinating firms to monitor the adherence to the terms of the understanding and to activate some form of deterrent mechanism in case of deviation while the third condition refers to the possible reactions of outsiders, such as competitors not participating in the coordination as well as customers. The presence of powerful buyers will therefore be taken into consideration by the Commission when assessing that last condition. To conclude that a merger will lead to coordinated effects, it must be established that no customer is able to jeopardise the results expected from the tacit collusion. That condition would not be met if customers are in a position to exercise countervailing buyer power impacting on the stability of coordination. A large buyer may successfully make a common understating unsustainable by inducing one of the coordinating firms to deviate through the offer of attractive conditions. Concentrating a large amount of its requirements with that supplier or offering long-term contracts

[516] Guidelines on horizontal mergers*, op.cit*., at 39.
[517] *Ibid.,* at 41.

constitute a few examples of the practices that may be used by strong buyers to save the market from any coordinated effect that could otherwise have resulted from the merger.[518]

b) Non-horizontal mergers

Without developing or illustrating the issue of buyer power, the Guidelines on non-horizontal mergers nevertheless refer to that concept as a factor which could in particular make unlikely input or customer foreclosure to arise.[519] Large buyers may indeed have the ability to find alternative sources of supply or to use their market power in the procurement market to prevent any restriction on access to inputs or any increase in prices. Likewise, the presence of powerful downstream firms will enable rivals of the merged entity in the upstream market to still have access to a sufficient customer base under similar prices and conditions as absent the merger.

With regard to conglomerate mergers, the Guidelines provides, in the same words as those used in the section on vertical mergers, that the effect on competition needs to be assessed in light of countervailing factors such as the presence of countervailing buyer power.[520] In those cases, market power on the buying side may make more difficult for the merged entity to leverage a strong market position from one market to another by means, for example, of tying or bundling.

B. BUYER POWER IN MERGER CASES

As developed in Part I, countervailing buyer power was taken into consideration by the Commission in a large number of decisions.[521] The analysis of those decisions provided relevant information with regard to the sources of buyer power, the factors which influence its existence or exercise as well as the various sectors in which such power is likely to be exercised. The Commission highlighted that some buyers have significant buyer power and are therefore able to prevent any misuse of market power in the upstream seller markets. Strong countervailing buyer power may be a decisive factor in the competition assessment. Powerful buyers' market power may indeed be sufficient to prevent anticompetitive effects following the merger and hence lead the Commission to authorize the creation of a very large merged entity, despite the presence of high barriers to entry in the relevant market and the lack of other competitive constraints.[522] In those cases, buyer power is not addressed as a competitive concern but rather as a positive strength protecting competition on the markets.

[518] *Ibid.,* at 47.
[519] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, O.J. C 265 of 18/10/2008, at 51 and 76.
[520] *Ibid.,* at 114.
[521] See: Part I, Chapter 2, Section I.
[522] See for example: *Enso/Stora,* Case No IV/M.1225, Commission Decision of 25 November 1998 and *Korsnäs/AssiDomän Cartonboard,* Case No IV/M.4057, Commission Decision of 12 May 2006. In those two decisions, the Commission highlighted the strong market power of Tetra Pak, a company involved in the food

This part B yet focuses on the other side of the coin and examines the dark side of buyer power. Where customers' buyer power is a factor in favour of clearing a merger between upstream firms, the increase of buyer power of the merged entity itself is however likely to jeopardize the operation. The creation or strengthening of firms' buyer power through a concentration may indeed entail some negative effects on the markets and as such raise competitive concerns.

1. Increase of buyer power: an issue to be assessed

Since the beginning of its merger policy, the Commission has recognized that an operation of concentration must also include an analysis of the potential effects on the procurement markets, that is to say not only on consumers and competitors of the merged entity, but also on its suppliers.

The Commission often assesses the increase of buyer power in relation to the market position of the merged entity in the downstream market. As it is further developed below, it is more easily concluded that the creation or strengthening of buyer power will lead to a negative impact on the markets when the merging parties hold a dominant position or significant market power on the selling side. In such a situation, the operation is indeed less likely to benefit consumers and may put competitors at a greater disadvantage, preventing them from exercising any credible competitive pressure on the new entity.

Even though the assessment of a potential increase in buyer power is fully part of the Commission's analysis, that issue has been developed only in a few cases. Where generally considered as unlikely to raise anticompetitive effects, the emergence of a strong buyer through a concentration operation has nevertheless led the Commission to block some transactions or to subject them to undertakings, especially in the agri-food industry. Competitive concerns were expressed in particular when large supermarkets or farmer cooperatives were planning to merge. The reasons underlying those concerns were though, to some extent, not similar in view of the different characteristics of those players and of the markets they were playing in.

2. Retail chains' buyer power under close scrutiny

Since its early decisions, the Commission has taken the view that, in assessing a concentration in the retail business sector, it is necessary to consider the market power that can be exercised towards

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packaging production. On basis of that competitive constraint, the Commission cleared mergers in the liquid packaging board market, despite the very high market share (>60%) held by the merging parties. On those cases, see above, Part I, Chapter 2, Section I, Point E, 4, b). See also: *Saab/Celsius,* Case No IV/M.1797, Commission Decision of 4 February 2000. In that case, the Commission authorized a merger between suppliers of defence equipment although the parties held a combined market share of 80%. The main argument leading the Commission to clear the operation was the presence of a single customer in each Member State, namely the Ministry of Defence, which is able to exercise significant countervailing buyer power.

both consumers and suppliers.[523] In three particular decisions on mergers between supermarkets, namely in *Kesko/Tuko*[524], in *Rewe/Meinl*[525] and in *Carrefour/Promodes*[526], the Commission, after pointing out the strong position of the merging parties on the retail markets, looked into the issue of increased buying power and its possible consequences within the food supply chain. It clearly expressed the potential harms that the exercise of buyer power may cause to different players and to the competition process. Since the food retail sector is already highly concentrated in most Member States, any further consolidation envisaged by supermarket chains is likely to be closely scrutinized by the Commission.

a) Definition of the relevant procurement market

Unlike the definition of the downstream market to be taken into consideration in the analysis of competition issues, the questions of how to define procurement product and geographic markets is not addressed in the Commission Notice on the definition of the relevant market.[527] However, some indications have been given by the Commission in the three decisions at hand.

i. Product market

While the consistent practice of the Commission has been to define the relevant selling markets primarily from the viewpoint of consumers, the approach endorsed when defining the relevant procurement markets is different. With regard to the relevant product market, the critical factors are the suppliers' flexibility in producing another product and the alternative sales channels open to them.

From the point of view of suppliers, the flexibility in changing the type of products manufactured is very limited since they generally produce a single product or category of products and are unable to switch easily to the production of other goods.[528] According to the Commission, each product or product group constitutes thus an individual product market. However, since the pattern of demand for each of them is broadly similar and concentrated, it is generally sufficient to examine the impact of the increased buying power across the whole range of daily consumer goods.[529]

Concerning the distribution channels, even though various outlets are open to producers of food products - such as the specialized trade, cash-and-carry shops and other wholesales, delicatessens,

[523] *Ahold/Jeronimo Martins/Inovacao,* Case No IV/M.320, Commission Decision of 19 April 1993, at 18.
[524] *Kesko/Tuko,* Case No IV/M.784, Commission Decision of 20 November 1996
[525] *Rewe/Meinl,* Case No IV/M.1221, Commission Decision of 3 February 1999
[526] *Carrefour/Promodes*, Case No COMP/M.1684, Commission Decision of 25 January 2000.
[527] Commission Notice on the definition of the relevant market for the purpose of Community competition law, O.J. C 372/3 (1997)
[528] *Rewe/Meinl, op.cit.*, at 76 and *Carrefour/Promodes*, *op.cit.*, at 15.
[529] *Kesko/Tuko, op.cit.*, at 34.

drugstores and the export trade -, the food-retailing trade is yet by far the most important sales channel for most products. On basis of a supplier's ability to find alternative buyers without incurring significant additional costs or risks, the Commission considers that the other sales channels are excluded from the relevant procurement market. In view of the considerable investment and adaptation that would require the substitution of a lost retail customer from the producer's point of view, the Commission concludes that the procurement market is subdivided according to sales channels, so that procurement for the food-retailing trade constitutes a separate market.[530]

ii. Geographic market

In the different decisions on mergers in the food retail sector, the Commission defines the relevant geographic market as national. Different elements are taken into consideration to reach that conclusion. Firstly, demand for national products is generally higher due to consumer preferences. Even in international branded goods, the procurement is effected almost exclusively through national establishments because the content of the products in question often vary from country to country according to different local tastes.[531] Secondly, supermarket chains buy predominantly from national suppliers, especially for products such as meat, dairy products, soft drinks, bread and pastries as well as fruit and vegetables. Such market definition mainly results from the fact that buying abroad remains difficult even for non-perishable goods owing to red tape, formal declaration and packaging. In addition, retailers expect from their suppliers some services such as shelf maintenance and market research which can only be effectively provided through a presence on the national territory.[532] Lastly, as regards manufacturers of international branded goods, access to final consumers can only be reached via the national distribution channels.[533]

It is therefore based on the characteristics of each national market that the Commission assesses an increase in buyer power in the retail sector. The level of concentration in that sector, the market shares of the merging parties, both in the selling and in the procurement markets, as well as other factors, such as the success of private labels, may greatly differ from one Member State to another. In the three decisions analysed below, the Commission dealt with the issue of supermarkets' buyer power in three different geographic markets, namely in Finland, in Austria, and in France.

b) Kesko/Tuko *decision*

[530] *Rewe/Meinl, op.cit.*, at 80 and *Carrefour/Promodes*, *op.cit.*, at 20. Concerning the investment and adaptation required to replace a lost customer, the Commission considers that different container sizes, get-up and packaging – for which special machines or other production requisites may be needed -, different sales strategies, the need for variety of knowledge and contacts for different distribution channels and different logistics make it difficult to switch between distribution channels.
[531] *Rewe/Meinl, op.cit.*, at 83 and *Carrefour/Promodes*, *op.cit.,* at 29.
[532] *Rewe/Meinl, op.cit.*, at 85 and *Carrefour/Promodes*, *op.cit.*, at 30.
[533] *Rewe/Meinl, op.cit.*, at 86.

In the *Kesko/Tuko* decision[534], the Commission blocked a proposed merger between two Finnish supermarkets. The retail of daily consumer goods in Finland at the time was already the most concentrated in the European Union. The Commission therefore considered that further consolidation in that market, through the acquisition of Tuko by Tesko, might impair effective competition. That conclusion was based, not only on the parties' strong position on the distribution market, but also on their significant buyer power on the upstream markets.

i. "Gatekeeper" position on the retail markets

With a combined market share of 55%, three times larger than the market share of their largest competitor, the merging parties were presumed to hold a dominant position in the relevant retail markets.[535] Different elements revealed by the market investigation strengthened this presumption, such as the parties' control of a significant part of all business premises suited for retail outlets, their customer loyalty schemes and private label products, their distribution systems and their position as buyers of daily consumer goods.[536] As regards this last element, the Commission acknowledged that the high market shares held by the merging parties would create a unique purchasing power in the hands of the new entity.

> "The position of Kesko following the acquisition of Tuko (…)will create a unique purchasing power in the hands of Kesko. (…)The strength created by this gate-keeper effect would be further increased by the combination of the successful Kesko and Tuko private label products, which could be used as a further negotiating tool vis-à-vis suppliers to achieve additional concessions on, inter alia, reduced prices or increased marketing support."[537]

Following the merger, suppliers would hence have no choice but to enter into an agreement with Kesko in order to have an effective and sufficient access to consumers. The dominant position enjoyed by the merged entity in the retail markets would thus give rise to a gatekeeper effect, turning that entity into an avoidable trading partner for any supplier willing to guarantee shelf-space in retail outlets representing at least 55% of the Finnish market.[538] That strength thereby created in

[534] On that case, see, in particular: J.J.Curtin, D.L.Goldberg & D.S.Savrin, *The EC's rejection of the Kesko/Tuko merger: leading the way to the application of a "gatekeeper" analysis of retailer market power under US antitrust laws,* 40 Boston College Law Review 537 (1999)
[535] *Kesko/Tuko, op.cit.*, at 94.
[536] *Ibid.*, at 106.
[537] *Ibid.*, at 133.
[538] *Ibid.*, at 133.

the procurement markets would lead to a significant imbalance in the negotiations between retailers and their suppliers.

ii. A resulting strong position on the procurement markets

Since distribution channels other than those dominated by the merging parties did not constitute viable alternatives for the majority of producers, the latter, including several major multinationals, were considered to be dependent on the parties. Even though some large producers of "must-carry" brands might have some countervailing power vis-à-vis Kesko, the Commission noted that most of the suppliers relied on that retailer for approximately 50 to 75% of their total sales in Finland. Due to the lack of sufficient additional capacity of other retailers, producers would therefore be unable to switch from Kesko post-merger and would be deprived of any bargaining power. In contrast, the new entity would not be dependent on an individual supplier to the same extent. The presence of alternative producers with adequate capacity gave Kesko the possibility to switch easily from one supplier to another.[539]

Such a situation would not only entail a negative impact in the upstream markets but also in the retail markets. The Commission considered that, due to its strong position, Kesko would be able to obtain lower prices from its suppliers and would thus enjoy an additional competitive advantage in the downstream markets.

> "Post-merger, Kesko will thus be able to obtain lower prices from producers to an extent that none of its competitors will be able to match. This will act as a further dis-incentive for Kesko's competitors to actively compete, in particular, on prices against Kesko. It will also make new entry on the market more difficult and as such act as a significant barrier to entry on the market."[540]

The strong position of the merged entity in the upstream buyer market would hence further reinforce its position in the downstream seller market and raise additional barriers to entry in that market. The possibility for any new retailer to access daily consumer goods at prices which allow it to effectively compete in the retail markets is indeed a key element.

The market position of Kesko in the retail and procurement markets led the Commission to conclude that the merged entity would have the ability to behave independently from its suppliers and actual/potential competitors. It was also pointed out that the success of the parties' private label

[539] *Ibid.*, at 150-151.
[540] *Ibid.*, at 134.

products would enhance even more the new firm's buying power and would therefore exacerbate the harmful effects on competition.

iii. The role of private labels

According to the Commission, private label development is a key element in retailers' buyer power.[541] Own-brand products, namely products sold under a retailer's brand, offer different and non-negligible advantages. **Firstly**, since those products are not sold by competitors, the retailer may fix the prices without taking into account the reaction of other retail chains as it is generally the case with branded products.[542] **Secondly**, although private labels are generally sold at lower retail price than branded products, the margins on the former are generally higher.[543] **Thirdly**, the success of some private label products may be used as a negotiating tool *vis-à-vis* suppliers to obtain reduced prices or increased marketing support.[544] The threat of delisting is indeed more credible when suppliers may easily and are incited to replace branded products with their own-brands. **Lastly**, acting as competitors as well as key customers of their suppliers, retailers have access to commercially sensitive details regarding the branded goods and promotional strategies. Furthermore, with the increased use of store payment card and loyalty cards, retailers are able to make targeted appeals to individual consumers based on known patterns of past purchases and socio-demographic profiles. Such access to sensitive information gives retail chains strong competitive advantages for the marketing of their private labels and enhances their negotiating power *vis-à-vis* branded products manufacturers.[545] Their market power, in the up- and downstream markets, is therefore reinforced and so is the likelihood of competition distortion in those markets.

Given all those elements, the Commission was of the opinion that the combination of the successful Kesko and Tuko private label products would increase to a significant extent the degree of buyer power of the merged entity. In addition, it was maintained that:

> "The increased buying power of Kesko would further reinforce the dominant position of Kesko on the retail market. In particular, Kesko would be able to use its buying power to employ different strategies, the long-term effects of which would be to further weaken the position of its competitors."[546]

[541] *Ibid.*, at 152.
[542] *Ibid.*, at 130.
[543] *Ibid.*, at 128.
[544] *Ibid.*, at 133.
[545] *Ibid.*, at 152.
[546] *Ibid.*, at 153.

In fact, in assessing the effects of the proposed merger, the Commission did not really dissociate the impact on the selling side from the impact on the buying side. It rather considered that the different effects were interlinked and that market power in the retail markets was reinforced by the parties' buyer power in the procurement markets and *vice versa*. The links between buyer and seller power, as well as the consequences of those combined strengths, were further developed in the *Rewe/Meinl* decision.

c) Rewe/Meinl *decision*

The circumstances surrounding the Commission decision in *Rewe/Meinl* were relatively similar to those in the previous case. The transaction involved two supermarket chains active in Austria where the level of concentration in the food-retailing trade was the highest after Finland.[547] The Commission referred extensively to the interaction between the two different facets of market power, namely seller power and buyer power, and described the vicious circle which could emerge from an excessive concentration in the retail sector.

i. Concentration in the Austrian retail markets

The Commission noted that, following the proposed merger, the parties would have a market share of up to 40%. Even though that percentage was lower than in the previous case, it was nevertheless considered that the merged entity would have a significant market share advantage over all other competitors and that it would be by far the leading supplier in the key regions of eastern Austria.[548] This was particularly true in Vienna where the parties had a 65-70% market share. The advantages of the dominant position held in that region would provide the firm with additional resources which could be used to further squeeze its competitors and leverage its position in other areas.[549]

In addition, the merged entity's position in the Austrian retail markets was strengthened by its centralized organization. Indeed, unlike their main competitors, the parties were centrally managed chain store companies. They were therefore able to take important business decisions, such as the listing or delisting of a product, in a very limited time and to implement those decisions in all shops immediately. In contrast, competitors' outlets were mainly run by independent affiliated retailers. Such an organization form was considered as less effective to react quickly to competitive challenges.[550]

[547] The five largest firms together controlled over 80% of the market with the top two alone accounting for nearly 60%.
[548] *Rewe/Meinl, op.cit.*, at 28-31.
[549] *Ibid.*, at 34.
[550] *Ibid.*, at 50.

The merged entity enjoyed thus structural competitive advantages which enabled it to decide centrally about important factors in competition but also to introduce more easily private label products and to pursue an efficient own-brand policy.[551] With regard to that last issue, the range of private labels that the parties had at their disposal in several product categories constituted a significant competitive advantage given the profits that retailers are able to make on that segment. The Commission restated that, unlike for well-known branded articles, consumers are unable to make a direct price comparison between own-brand products. Retailers can therefore achieve a higher margin on those products while pricing branded goods keenly in order to appear to be offering good value-for-money.[552] As it is further developed below, own-brand products not only play a particular role in the downstream markets but also constitute an additional strength in the hands of retailers that may be used against their suppliers.

ii. Increase in buyer power: the spiral effect and potential long-term consequences

Regarding the increase in buyer power that would arise from the merger, the Commission first maintained that:

> "The exercise of buyer power which leads to the securing of more favourable purchase deal is not to be considered *per se* detrimental to the economy as a whole."[553]

According to it, the effects on competition mainly depends on the market structure both on the upstream buying side and on the downstream selling side. Where retailers face concentrated suppliers and act in a competitive retail market, they can use their buyer power as a countervailing strength to prevent monopoly or oligopoly profits from being earned on the supply side. Given the competitive pressures exercised by rivals, they will hence be compelled to pass on the lower prices to their own customers.[554]

However, the situation would be radically different if the powerful buyer himself occupied a strong position in the seller downstream market since the incitement to pass on savings to consumers would be greatly reduced in such circumstances.

[551] *Ibid.*, at 51.
[552] *Ibid.,* at 51.
[553] *Ibid.*, at 71.
[554] *Ibidem*.

> "if the powerful buyer himself occupies in his selling market a strong position which is no longer kept sufficiently in check by the competition, any savings can no longer be expected to be passed on to customers."[555]

The Commission established the close interdependence existing between the distribution and the procurement markets by describing the spiral that is likely to take place when a retailer occupies a leading position in those two markets. It was maintained that the retailer's market share in the distribution market determines in fact its volume of purchases in the procurement market so that the higher the market share in the downstream markets, the larger the procurement volume in the upstream markets. In turn, the more a retailer buys in, the better its purchasing conditions will be and the better conditions a retailer obtain, the more chance it will have of strengthening his position in the distribution markets through low-price or other strategies. This improved position in the downstream markets leads again to a further strengthening of his buyer power, and so on.[556] The Commission's reasoning is thus circular and shows how buyer and seller powers go hand in hand and reinforce each other.

According to the Commission, the "vicious circle" described above – which can be seen as a "virtuous circle" from the powerful retailer's viewpoint – would result in ever-higher concentration both in retail markets and in procurement markets and risk leading to consumer harm in the long-run.

> "The spiral described above leads to ever-higher concentration both in distribution markets and in procurement markets. In the short term, final consumers may benefit from the process, as there may be a period of intense (predatory) competition in the distribution market during which the powerful buyer/trader is forced to pass on his savings to consumers. But this will last only until such time as a structure (as in this case, an individual dominant position) is arrived at in the distribution market which leads to a clear reduction in competitive intensity. At this stage, any consideration for the final consumer goes by the board, as he is left with few alternatives."[557]

In fact, final consumers might benefit in the short-term from lower prices that the retailer would be forced to pass on to them due to the still-intense competition in the distribution market. However, this would probably not last long. Given that the double market strengths held by the retailer in question would enable him to squeeze existing competitors and to drive them out of the market, competitive intensity is likely to be substantially reduced in the medium or long-term. Consequently,

[555] *Ibidem*.
[556] *Ibid.*, at 72.
[557] *Ibid.*, at 73.

the retailer would be able to act without any consideration for the final consumer, left with too few alternatives to exercise credible pressure, and would therefore retain all the benefits resulting from its favourable buying conditions wrested from his suppliers.

Furthermore, the Commission pointed out that powerful retailers have a considerable influence over the choice of products available to consumers. Due to the high level of concentration and the resulting lack of alternative outlets for suppliers, the marketing and the success of a product would mainly depend on the dominant buyer's will to buy that product.[558] Such an influence would end up affecting consumer welfare as well since that concept includes not only low prices but also product quality and variety. In the present case, the Commission concluded that the transaction would lead to a less varied range of goods on the shelves since the two large retailers involved in the operation would offer exactly the same products post-merger and that, as a result, consumer choice would be substantially limited.[559]

iii. Dependency of suppliers: the "threat point"

The existence of buyer power mainly relies on the limited number of alternatives available to suppliers and on their dependence on a few powerful buyers. A key factor determining such power is therefore the possibility for retailers to easily find alternative suppliers to buy their products while producers do not have the capacity to switch to other buyers without undue delay, risk or cost. The market investigation in the Rewe/Meinl case indicated that, in the Austrian procurement markets, the demand side was, and is still, far more concentrated than the supply side where most producers were small and medium-sized firms.[560] Big international firms were indeed the exception in many categories of products, such as dairy products, meat and sausages, poultry and eggs or bread and pastries, and constituted the main suppliers only in a limited number of sectors.[561] In contrast, as mentioned above, the food-retailing trade was considered to be highly concentrated and to represent the most important sales channel. It follows that the loss of a large customer, such as a leading supermarket chain, was not easy or even impossible to replace. According to some producers

[558] *Ibid.*, at 74.
[559] *Ibid.*, at 35.
[560] *Ibid.*, at 89.
[561] *Ibid.*, at 90-92.

surveyed, only small retailers, accounting on average for less than 5% of their turnover, could be replaced without difficulty.[562]

In order to assess the level of dependency of suppliers on the merging parties, 300 food producers were asked what part of their turnover was accounted for by Rewe and Meinl. The average shares being between 25 and 40%, the Commission was of the opinion that the transaction would increase appreciably the dependence of those producers on the merged entity and lead to the creation or strengthening of a dominant position in the procurement markets.[563] That conclusion was based on a "threat point" proposed by the Commission and above which it was considered that a dependency situation existed. To this end, producers were asked above what proportion of turnover with a given customer could not be switched to other distribution channels without heavy financial losses. It resulted that, on average, 22% is the maximum share of revenues that a supplier, behaving in an economically realistic manner, can afford to lose.[564] Where the sales to a particular retailer represent a percentage of the supplier's turnover exceeding that threshold, the loss of that amount of business would seriously risk driving the dependent supplier to bankruptcy since the replacement of such an important customer could only be done at very high cost, if at all.[565] This limit point is an average and may thus vary from one supplier to another.

The reasoning of the Commission is mainly based on the share that a retailer accounts for in its supplier's turnover. Above the threshold of 22%, the supplier in question is deemed to be dependent on his customer who is, as a result, in a position to exercise significant buyer power and sets the spiral described above in motion.

iv. Alternative options for retailers

The Commission assessment of buyer power was confirmed by the fact that the merging parties had outside options at their disposal which rendered the dependence of the supplier side much heavier

[562] *Ibid.,* at 97.
[563] *Ibid.*, 99.
[564] It is worth noting that, in 1985, the French Competition Authority came to a similar result in an opinion about large buying agencies. See: Commission de la concurrence, 14 mars 1985, Avis des super centrales, BOSP, 19 avril 1985. The French Commission considered that if, following a merger, the new entity has a market share of 20% in the upstream buyer markets, any producer will be economically dependent, even though he has made sure to diversify his market outlets. Such economic dependency justifies the possibility to control any operation of concentration proposed by the retail sector and to attach some conditions to it or even to stand in the way of the transaction if it appears that the outcome resulting from the economic analysis is globally negative.
[565] *Rewe/Meinl, op.cit.*, at 101.

than the other way round.[566] Especially for Austrian products, the parties had sufficient alternatives to replace the loss of any supplier.[567]

As regards branded goods, the issue of a retailer's dependence on their suppliers was examined on basis of the consequences that the non-availability of certain "must-carry" products would entail for that retailer. The answer to that question was considered as depending on the consumers' reaction.

> "The answer to the question as to the extent to which a trader is dependent on branded goods producers depends on what consequences the non-availability of certain brands has for the trader. What matters here is how the trader's customers react to the absence of a product. In the case of foodstuffs purchases, the duration of a shopping trip is an essential consideration to customers. One-stop shopping, meaning buying everything needed from one shop, is preferred. If a branded product which the customer wants is not stocked by such an outlet, the risks have to be weighed up that the customer might: (1) stop shopping or put off making the purchase till later, (2) go to another shop to look for the desired article, but otherwise remain faithful to "his" trader, (3) take his business elsewhere in the longer term, or (4) buy another brand."[568]

In this case, the Commission noted that consumers, who purchase foodstuffs frequently, are concerned with making their shopping trips as short as possible and would thus rather buy another brand than try to find the product in another supermarket. The Commission added that this is all the more true if the customer finds in his shopping environment almost nothing but outlets of one and the same trader.[569] The large share of the distribution market in the hands of the merging parties, especially in key regions of eastern Austria, significantly limited the reaction possibilities for consumers who were considered as locked to their supermarket chain. It was therefore held that, even for international branded products, the consequences of a delisting would be much heavier for the supplier than for the merged entity.

In addition, the Commission noted that the growth and increasing importance of private labels reduced even more the already limited dependence of the merging parties on their suppliers.

> "The growth and increasing importance of own brands are having the effect of shifting the balance of power between traders and producers in favour of traders."[570]

[566] *Ibid.*, at 103.
[567] *Ibid.*, at 104.
[568] *Ibid.*, at 105.
[569] *Ibid.*, at 106.
[570] *Ibid.*, at 112.

Since those products are sold under the retailer's brand, the actual producer is unknown to consumers and hence exchangeable almost at will.[571] With regard to branded products, the presence of private labels makes delisting threats even more credible since they enter into direct competition with the former. This is particularly true concerning brands which do not number among the "must-have" products.[572] The large portfolio of successful private labels held by the parties would therefore constitute an additional competitive advantage and reinforce their power in the procurement and in the distribution markets.

Given the numerous competitive advantages of the merging parties and the strong dependence of the suppliers, the Commission came to the natural conclusion in this case that the merger operation would create or strengthen a dominant position in the procurement markets for a large number of products.[573]

d) Carrefour/Promodes *decision*

In the *Carrefour/Promodes* decision, the Commission referred again to the "vicious circle" that supermarkets' high degree of market power may lead to in the retail sector. However, unlike in the two previous cases, the spiral mentioned by the Commission in this case did not find its source in the parties' strong position in the distribution market but rather in their high degree of buyer power in the procurement market. In addition, the Commission addressed the issue of the creation of a potential collective dominant position in the procurement market.

i. No dominant position in the distribution markets

The market investigation showed that the acquisition of Promodes by Carrefour would increase the latter's market share from 12-17% to 25-30% in the French distribution markets.[574] In spite of the new entity becoming the market leader in France and the high barriers to entry existing in that country[575], the Commission concluded that the transaction would not lead to the creation of a dominant position. The French retail market was indeed viewed as sufficiently competitive with still-active rival supermarkets likely to constrain the merged entity.[576] However, it was held that the parties' position in the downstream markets and the effects on competition could not be assessed

[571] *Ibid.*, at 112.
[572] *Ibid.*, at 113.
[573] *Ibid.*, at 117. In the first part of its decision, the Commission also concluded that it was expected that the proposed operation would place the parties in a dominant position in the food-retailing market in Austria. (at 70)
[574] *Carrefour/Promodes*, Case No COMP/M.1684, Commission Decision of 25 January 2000, at 40.
[575] Administrative barriers were provided by the French legislation which subjected the opening of food retail outlets to an authorization. Limitations, or even prohibitions imposed on traders by the authorities constituted a significant barrier to entry in the distribution market.
[576] *Carrefour/Promodes*, *op.cit.*, at 41-43.

regardless of the potential developments in the upstream markets post-merger.[577] Holding a strong position as a buyer may indeed considerably strengthen a retailer's seller power due to the close interdependence between the distribution and the procurement markets.

ii. Strong buyer power and other competitive advantages

According to the Commission, measuring precisely retailers' market shares in the procurement markets is particularly difficult. Based on information provided by suppliers as regards the share that represented the merging parties in their total sales in France, it was estimated that Carrefour/Promodes would have a market share of approximately 25%. The Commission noted that the transaction was taking place in the framework of a global consolidation in that sector given that most competing retailers had already created central purchasing agencies, two of them holding around 15-20% market shares.[578] Even though it was held in a previous decision that a market share of 25-26% in the procurement market was not in itself an indicator of a dominant position likely to impede effective competition[579], different elements in the present case were considered as prone to widen the gap between the new entity and its rivals.

Firstly, the Commission pointed out that the merged firm would obviously exceed in different products groups the "threat point" established in the *Rewe/Meinl* decision. A large number of suppliers would therefore be economically dependent on the parties.[580] Secondly, the new entity would be the only retail chain holding a significant position across all the different retail store formats (hypermarkets, supermarkets, maxi discount shops, small food stores) and would be the market leader in the hypermarkets segment which is the most profitable one. The considerable size of those stores enables a retailer to offer his suppliers the possibility to display a large line of products and, as a result, to obtain probably better buying conditions.[581] Thirdly, the Commission was of the opinion that the high number of fidelity cards attached to the parties' shop sign would constitute another competitive advantage.[582] That system would indeed provide the new group Carrefour with detailed and sensitive information about consumer behaviour and give it the possibility to pursue efficient customer loyalty strategies.[583] Furthermore, such information being particularly valuable for brands producers, who do not have comparable instruments to know consumer preferences, the parties' large share in the fidelity cards stock would further strengthen

[577] *Ibid.*, at 43.
[578] *Ibid.*, at 47-48.
[579] See: *Promodes/Casino,* Case No IV/M.991, Commission Decision of 30 October 1997, at 43.
[580] *Carrefour/Promodes*, *op.cit.*, at 52-53.
[581] *Ibid.*, at 56-63.
[582] The new entity could rely on more than 5 million fidelity cards. This represented more than 50% of the total cards stock in France.
[583] *Carrefour/Promodes*, *op.cit.,* at 64.

their buying strength *vis-à-vis* those suppliers.[584] Fourthly, as in *Rewe/Meinl,* the centralized organization of Carrefour was viewed as a structural advantage reinforcing the parties' bargaining power in negotiations with producers.[585] Finally, the Commission highlighted the strong financial strength of the merged entity which would enlarge its room to manoeuvre both in the distribution and in the procurement markets. For example, the new entity would be able to further develop their own-brands and thus to increase the pressure on branded products suppliers.

In Conclusion, the Commission decided that the parties' market position in the procurement market, combined with the competitive strengths described above, could lead to a situation where the new entity would be able to obtain much better buying conditions. Such a situation would therefore enable Carrefour to widen the gap with its competitors in the upstream markets and, in turn, to reinforce its position in the downstream markets.[586] Even though the Commission recognized that the emergence of that spiral depended on a number of other factors, it nevertheless concluded that the creation of a single dominant position in the procurement markets could not be excluded in this case. To this end, the merging parties suggested structural undertakings to the Commission which were considered as sufficient to remove the competition concerns.[587]

iii. Potential creation of a collective dominant position

The Commission also examined the likelihood that the merger would lead to the creation of a collective dominant position in the procurement market because of the high degree of concentration on the demand side that would result from the transaction. Carrefour, with two other central purchasing agencies, would represent around 60-70% of the total demand.[588] The characteristics of the market were though not likely to give rise to a collective dominance. Indeed, the conditions generally examined by the Commission when assessing that issue seemed not to be fulfilled in this case due to a lack of transparency on the markets, a lack of homogeneity between the products in question, a high variation in the structure and functioning of central purchasing agencies and the absence of structural links between the different retailers.[589] However, the Commission drove its

[584] *Ibid.*, at 65. Retailers can indeed sell information about consumer trends and behavior to their suppliers. In fact, they use to negotiate lower prices and better conditions in exchange of such information. They can also use such information to put additional pressures on producers or to promote their own-brands.
[585] *Ibid.*, at 66-69.
[586] *Ibid.*, at 87.
[587] *Ibid.*, at 89.
[588] *Ibid.*, at 98.
[589] *Ibid.*, at 99.

reasoning a bit further and maintained that the present transaction might, in the future, give rise to other rapprochements in the retail sector and that, on certain conditions, such further consolidation might lead to a situation of collective dominance. This conclusion resulted from the particular negotiation conditions in place between retailers and suppliers which provided that the latter could ask for adaptations of the buying terms only if they could justify the legitimacy of their request on basis of their cost evolution. According to the Commission, such a requirement would, inevitably, enable each retailer to acquire a particular knowledge on the costs borne by its suppliers. It was hence considered that, if the number of distributors still continued to decrease, each of them having the same information on the same suppliers, buying conditions would come to be standardized. The Commission committed therefore itself to draw a particular attention on those elements in the assessment of future rapprochements submitted to it.[590]

e) Similar approach likely to be held in other sectors

The reasoning followed by the Commission about the increase in retailers' buyer power may be transposed in other sectors. Shortly after the *Rewe/Meinl* decision, similar arguments were indeed held in the assessment of a merger between two television services providers in the Nordic countries. Since TV-distributors are active both on the downstream market for the provision of TV services to viewers and on the upstream market for the acquisition of rights to content, the likely effects of increased buyer power were also taken into consideration in the evaluation of the transaction.[591]

The large market shares of the parties on the downstream market, amounting to 60-70%, were again a central element in the conclusion on the existence of buyer power. Such customer-base size was considered as a competitive advantage giving the parties the ability to achieve significantly better conditions from broadcasters or exclusive distribution rights.[592] Indeed, what matters for such broadcasters is to address a sufficient number of viewers in order to attract advertising and/or subscription revenue. However, post-merger, the access to those households would not be possible without dealing with the merged entity which would thus become an obligatory partner. As a result, it was held that the parties would have an even stronger position as a buyer of content.[593] Following a circular movement, similar to that described in the retail sector, the increase in buying power in the procurement market would in turn strengthen the dominant position of the parties on the market for retail TV distribution. The preferential distribution rights obtained by the merged entity would

[590] *Ibid.*, at 104.
[591] See : *Telia/Telenor,* Case No IV/M.1439, Commission Decision of 13 October 1999.
[592] *Ibid.*, at 316.
[593] *Ibid.*, at 318.

indeed enable it to offer more preferential distribution agreements to its own customers and hence further reduce the ability to compete of the other TV-operators.[594]

As regards the issue of dependence of each trader, the Commission noted that the new entity would be much less dependent on any content-supplier than the other way round. Furthermore, the parties could take advantage of that situation and credibly threaten to take broadcasters off their distribution if they had not satisfied with their purchasing conditions.[595] All those competitive advantages enjoyed by the merged entity on both markets would lead to the creation of a dominant position in the procurement market.

The Commission also mentioned the adverse effects on competition that would occur in the long-term. Although the exercise of buyer would allow the parties to offer attractive conditions to their customers, the inability of rivals to compete on an equal footing would lead to a further lessening of competition in a longer-term and hence would give the merged entity the possibility to act independently of consumers. Moreover, the presence of a dominant purchaser would not only have a negative impact on the content-suppliers' profitability but also on their incentives to invest in improving quality and/or innovation of new content. Combined to the fact that the number and the type of TV programmes available to viewers would remain almost exclusively at the merged entity's discretion, consumer choice and quality content in the markets for TV distribution would be reduced as a result of the proposed concentration.[596]

The reasoning with regard to the reinforcement of market power in the procurement and the distribution markets, as well as the long-run effects on competition, were analogous to those developed in the *Kesko/Tuko, Rewe/Meinl* and *Carrefour/Promodes* decisions. This shows that the competitive concerns arising from the exercise of buyer power are not confined to the retail sector but are likely to emerge whenever the buying side of a market is concentrated and suppliers deprived of any outside option. However, the Commission, through its merger policy, only blocks concentrations that have the effect of strengthening the parties' buyer power to a significant extent and is likely to affect the competition process. Where a trader already enjoys a strong position in the procurement market but will not see its position be further reinforced post-merger, or where the parties both have a certain degree of buyer power but will not have the ability to combine their

[594] *Ibid.,* at 321.
[595] *Ibid.*, at 356.
[596] *Ibid.*, at 368.

strengths to foreclose competitors, the Commission will generally not be opposed to the transaction.[597]

f) Remarks on the assessment of grocery retailers' buyer power

The prospective approach adopted by the Commission in these decisions took into consideration the long-run effects of the exercise of buyer power. Instead of focusing on the low prices that consumers may benefit from in the short-term, it also addressed the long-term impact that an excessive concentration may have on prices and product variety. The parties' buyer power was generally deemed to derive from their strong position in the distribution market. However, in *Carrefour/Promodes,* the spiral took rather its source in the merged entity's market power on the procurement markets. The exercise of buyer power may indeed constitute a competitive advantage sufficient to trigger a circular reinforcement of market power in the up- and downstream markets, which might affect suppliers, competitors but also consumers.

The decisions analysed above show that the Commission may adopt an innovative reasoning in analysing the issue of increased buyer power and its potential consequences post-merger. Such reasoning takes in fact into consideration the specificities described in Part I regarding the ability and incentive to exert buyer power. The "threat point" established in the *Rewe/Meinl* decision seems to initiate a new approach in the assessment of market power, specific to the buying side. The notion of economic dependence developed in that decision, and the effects that it may lead to, may indeed be viewed as confirming that specific criteria should be used to assess the potential harmful impact of the exercise of buyer power. The threshold of 22% indicates that impediment to effective competition is likely to arise when the new entity holds a relatively low market share in the procurement market. In such a case, buyer power, combined with a strong - but not necessarily dominant - position in the downstream markets, may indeed enable the buying firm in question to behave independently of its suppliers, of its competitors and, finally, of its customers.

3. Farmer cooperatives: a specific approach

[597] See : *B Sky B/Kirch Pay TV,* Case No IV/M.0037, Commission Decision of 21 March 2000 and *KKR/Permira/Prosiebensat.1,* Case No IV/M.4547, Commission Decision of 22 February 2007. In the first case, the Commission noted that one of the merging parties already dominated the market for acquisition of broadcasting rights, in particular for films and sport, but considered that the concentration would not significantly strengthen that position. The second case concerned a merger between two TV operators active in two different Member States. The Commission examined whether, through a joint acquisition of TV broadcasting rights, the pooling of the parties would give rise to adverse effects *vis-à-vis* rights owners and/or to foreclosure issues *vis-à-vis* competing TV operators as regards access to TV rights. It was concluded however that acquisition of TV rights on a wider geographic basis was hardly possible and that the transaction would therefore not bring about any significant change on the parties' position on a national basis. See also: *Liberty Global/Virgin Media,* Case No COMP/M.6880, Commission Decision of 15 April 2013.

In the agro-food industry, some mergers among farmer cooperatives have also prompted competitive concerns concerning the increased buyer power of the parties involved following the transaction. In two decisions, the Commission reached indeed the conclusion that the merger operation, involving cooperative slaughterhouses in the first case and dairy cooperatives in the second one, by significantly increasing the parties' share in the procurement market, would affect effective competition.[598] Whereas the close interdependence between the up- and downstream markets was also mentioned in those cases, the reasoning of the Commission seemed to follow a slightly different logic due to the characteristics of a cooperative organization. In fact, the mergers in question were considered to impair mainly competitors' access to farm products and to affect to a lesser extent suppliers' interests.

a) The particular structure of a cooperative organization

Cooperatives are companies characterized by their dual relationship with their member-farmers. On the one hand, farmers are the owners of the cooperative and, on the other hand, they supply the cooperative with raw material, namely raw milk and animals intended for slaughtering in the two cases at hand.[599] Generally, each member is obliged to deliver 100% of his production to the cooperative on an exclusive basis while the latter is obliged to buy all raw materials its members produce.[600] The price paid to farmers includes a guaranteed payment, which is independent of the business results of the company, and a payment calculated ex-post to reflect the financial performance achieved by the cooperative in the selling markets. Such method of remuneration creates thus a strong link between the down- and upstream markets, which is particularly relevant for the assessment of a merger between cooperatives.[601]

Entrance and withdrawal requirements are imposed on farmers who want to join or leave the cooperative. While becoming a member is relatively easy[602], membership may only be cancelled on a given date and/or with a notice period.[603] Such a withdrawal policy creates hence barriers for farmers willing to switch from one cooperative to another. This issue, as well as the other peculiarities of the cooperative structure, must therefore be taken into account by the Commission when assessing the

[598] See : *Danish Crown/Vestyjyske Slagerier,* Case No IV/M.1313, Commission Decision of 9 March 1999 and *Friesland Foods/Campina,* Case No COMP/M.5046, Commission Decision of 17 December 2008.
[599] *Friesland Foods/Campina, op.cit.*, at 29.
[600] *Danish Crown/Vestyjyske Slagerier, op.cit.*, at 115 and *Friesland Foods/Campina, op.cit.*, at 32.
[601] *Friesland Foods/Campina, op.cit.*, at 36-40.
[602] In some cases, farmers can become member of the cooperative on simple request. In others, they have to pay an entrance fee which is intended to compensate existing members for the past investment made in the cooperative.
[603] *Danish Crown/Vestyjyske Slagerier, op.cit*., at 116 and *Friesland Foods/Campina, op.cit.*, at 44. In the first case, a farmer had to give 12 to 24 months' notice before he could leave. In the second case, a membership could only be cancelled as of 1 January of each year with a notice period of three months.

impact of a merger between cooperatives. Those elements can be expected to have an impact on access to agricultural products for competitors.

b) Danish Crown/Vestjyske Slagterier *decision*

The concentration in this case involved the two largest cooperative slaughterhouses in Denmark. The Commission examined separately the impact of the merger on the market of live pigs and on the market of live cattle.

i. Dominance in the procurement market of live pigs and potential consequences

The market investigation showed that, post-merger, the new entity would buy 76% of the production of Danish pigs while the other two cooperatives active in that market would have respectively 13 and 5% of the market.[604] The existing competitors would thus be unable to constrain the merged firm. The Commission also considered that potential competition was almost non-existent due to the exclusive supply obligation imposed on farmers who were members of the cooperatives and represented 94% of the Danish production of pigs. Other Danish as well as foreign slaughterhouses could indeed only obtain supplies of Danish live pigs if farmers accepted to terminate their membership. In view of the costs that such a withdrawal would cause to producers, in particular the loss of their annual profit-share in the cooperative, they were unlikely to switch to another slaughterhouse, even though prices were consistently higher in other countries, such as in Germany where the slaughterhouses at the time operated below full capacity utilization.[605] The Commission therefore concluded that the new entity would have a dominant position in the procurement market of live pigs in Denmark and that such a situation was likely to entail harmful consequences both for farmers and for private slaughterhouses.

With regard to producers, it was held that the merger would not affect their profits but rather their possibility to switch to another customer. The merged firm would indeed not be able to extract monopsonistic profits from their suppliers since, as a cooperative, it would share out back such profits to the farmer-members in the form of performance payment.[606] However, the transaction would significantly reduce the choice of the farmers. They would in fact be deprived of the possibility of terminating their membership with one of the parties and joining the other should the former were to become less profitable. The two remaining cooperatives running at full capacity and private

[604] *Danish Crown/Vestyjyske Slagerier, op.cit.*, at 121.
[605] *Ibid.*, at 125-126.
[606] *Ibid.*, at 128.

slaughterhouses not constituting real alternatives, it was concluded that the parties' members would be locked into the new entity.[607]

Concerning the effects on private slaughterhouses that had access to only 6% of the pig production that was accounted for by non-members of a cooperative, the Commission considered that the merger would make their position even worse. The new entity would indeed try to attract new farmers, especially those supplying to private slaughterhouses since the others were tied to a cooperative. Based on its economic power on the market for purchase of live pigs, it could offer those producers higher prices and thus capture a part of the private slaughterhouses' suppliers. As capacity utilization is particularly important in terms of profitability, the loss of one supplier would entail heavy financial consequences for private slaughterhouses and risk driving them out of business.[608]

The impact of the merger would therefore be more drastic for the new entity's competitors than for producers. The latter, being in control of the cooperative, would indeed be able to prevent any exploitation of a dominant position vis-à-vis themselves and would mainly benefit from the increase of buyer power of the new entity even though their choice would thereby be limited. The Commission nevertheless considered that sufficient competition should remain on the markets and that competitors' access to live pigs should be protected.

ii. No dominance in the procurement market of live cattle

The parties' position in the market for the purchase of live cattle was slightly weaker than in the procurement market of live pigs. The market investigation revealed that 58% of Danish live cattle for slaughter were bought by the merging parties with guaranteed supplies by cooperative members accounting for 48%.[609] The new entity's competitors were mainly private slaughterhouses. Their supply was less secure than that of cooperatives but it was nevertheless held that they had sufficient access to producers, given that half of the Danish cattle production was accounted for by non-members of a cooperative. With regard to farmers, it was concluded that both non-members and members of a cooperative had viable alternatives to sell their production. On that relevant market, the Commission therefore concluded that no dominant position or other impediment to competition was likely to emerge as a result of the transaction.[610]

[607] *Ibid.*, at 131.
[608] *Ibid.*, at 132.
[609] *Ibid.*, at 136.
[610] *Ibid.*, at 137-140.

The focus of the Commission was thus mainly on farmers' choice and competitors' access to live animals. In the following decision, that latter issue was at the heart of the Commission's competition concerns and constituted the source of a new spiral.

c) Friesland Foods/Campina *decision*

This Commission decision on the effects in the Netherlands of the merger between two dairy cooperatives highlighted the link between market power in the down- and upstream markets. The spiral effect, however, seems to turn in a different way than in the retail sector, harming mostly competitors.

i. Dominant position in the up- and downstream markets

The Commission considered that the merger would lead to the creation of a dominant buyer in the procurement market given the very high market shares of the merging parties, amounting to 78-80%.[611] Furthermore, the new entity was held to be able to exercise significant market power in the Dutch downstream markets for cheese and dairy products in which it would hold a market share of around 60-70% following the merger.[612] The Commission noted that transaction would in fact bring together the closest competitors in those markets. It was also pointed out that the new firm so created would be the only company offering the full range of fresh dairy products in sufficient volumes and quality, turning it into an unavoidable trading partner for supermarkets.[613] The Commission concluded that the lessening of competition in the fresh dairy products and cheese markets would enable the new entity to charge higher selling prices and secure higher margins.[614]

ii. No lower prices for farmers

In its assessment of the effects of the merger, the Commission first examined the impact of the transaction in the upstream market for the procurement of raw milk in order to analyze whether the increase of buyer power was likely to significantly impede effective competition. In contrast to the situation in the retail sector, it was held on that matter that the parties would have no reason to use their market power to reduce milk procurement prices post-merger. Such a policy would indeed be unsustainable since it would result in lower income for the cooperative's members and would as such be contrary to the primary aim of the parties which was to achieve long-term optimal pay-out prices for their member-farmers.[615] The Commission thus concluded that:

[611] *Friesland Foods/Campina, op.cit.*, at 83.
[612] *Ibid.*, at 107.
[613] *Ibid.,* at 108.
[614] *Ibid.*, at 109.
[615] *Ibid.*, at 101.

> "The merged entity would therefore hold a dominant position in the procurement of conventional raw milk. However, in the context of the present case, the strong market position of the merged entity would not, in itself, allow it to exert buyer power vis-à-vis member-as a result in particular of the cooperative structure of the merged entity."[616]

iii. Risk of input foreclosure

The Commission also examined whether the merged entity would have the ability to use its strong position in the procurement market in order to foreclose downstream rivals by impeding their access to raw milk.[617] In assessing that issue, the Commission noted the close link between the position in the down- and upstream markets. According to it, the profits raised in the downstream markets due to the increased market power of the parties would result in higher prices paid to farmers since part of those prices depends on the cooperative's performance in the selling markets.[618] Those favourable conditions offered by the merging parties, linked to their downstream market power, would make their members less likely to switch to other buyers and would even attract new farmers. As a result, the merged firm's position on the procurement market for raw milk would be further reinforced.[619] The Commission continued its reasoning by stating that:

> "In a situation where the merged entity would have the possibility of increasing its already very large farmers' base, these competitors would find it more difficult to gain access to independent sources of Dutch raw milk. It would therefore further reduce their ability to compete effectively in their respective Dutch downstream dairy markets by raising barriers to entry or expansion and strengthen the market power of the merged parties in these markets."[620]

The reinforced position of the new entity in the downstream markets would in turn enable it to further increase their profits and raise pay-out prices for its members and so on. That circular reasoning led the Commission to conclude that the notified concentration, by limiting access to sources of raw milk, was likely to significantly impede effective competition in the Dutch procurement market.

d) Remarks on the assessment of farmer cooperatives' buyer power

Unlike in the cases analysed above in the retail sector, the merging parties in the *Friesland Foods/Campina* case were already sufficiently powerful in the downstream markets to raise prices

[616] *Ibid.,* at 103.
[617] *Ibid.*, at 104.
[618] *Ibid.*, at 112.
[619] *Ibid.,* at 118.
[620] *Ibid.*, at 121.

and thus to behave independently of their competitors. Even though the latter could follow that pricing policy, their very limited share in the dairy products and cheese markets would not allow them to make sufficiently high profits to compete with the merged entity in the upstream markets by offering farmers equal favourable buying conditions. The resulting loss of suppliers in favour of the merged entity would prevent those competitors from having access to the minimum volume of raw milk needed to carry on a profitable activity on the downstream markets and would therefore force them to stop their business.

In the retail sector, a similar harmful impact on competitors and consumers was envisaged by the Commission. The latter was indeed concerned about the fact that the mergers between large supermarket chains would lead to driving competing retailers out of the markets and that consumers would, as a result, be charged higher prices in the longer term due to reduced competitive constraints exerted on incumbent retailers. However, two differences may be pointed out between mergers in the retail sector and agricultural cooperative mergers. Firstly, where potentially harming competitors and consumers, the mergers among supermarket chains were regarded as also and primarily affecting the merged entity's suppliers. In contrast, the Commission highlighted that the particular structure of the cooperative insulated farmers from any exploitation of buyer power. Secondly, the spiral process described by the Commission in its decisions related to the retail sector and leading to the lessening of competition was a bit longer than the reasoning held in its decisions on mergers between cooperatives. In the first case, the Commission maintained that, to exclude rivals and thereby acquire sufficient market power in the up- and downstream markets, the retailers would first have to decrease prices in the downstream markets. By so doing, they would acquire higher market shares in the downstream markets and thereby reinforce their position in the procurement markets. It is only when all competitors would be sufficiently squeezed and compelled to leave the markets, because in particular of their higher purchasing costs, that the merged entity would have the possibility to raise prices in the distribution markets. The elimination of competition would therefore occur from the downstream markets - namely through lower (but not predatory) prices in the retail markets, made possible due to the exercise of buyer power in the procurement market. In case of merger between cooperatives, however, the Commission maintained that exclusion of competitors would in fact occur from the upstream markets through input foreclosure. The high market shares of the merging parties in the procurement markets were indeed regarded as likely to hinder competitors' access to raw material. The Commission hence concluded that the transactions in question would reduce significantly competition not only in the upstream markets but

also in the downstream markets as, without sufficient access to inputs, rivals would be unable to compete effectively in those downstream markets.[621]

It is worth noting that the competition concerns raised by the Commission in its decisions on mergers between cooperatives resulted less from the specificities of such organizations than from the very high market shares they held both in the up- and downstream markets.[622] In both cases, objection to the transaction was expressed because the share of the parties exceeded 70% in the procurement market and 40% in the selling market. However, in the first case, a market share of near 60% in the procurement market for live cattle combined with a limited market share in the downstream market for fresh beef was not considered as impeding effective competition. Actually, the characteristics of the cooperative structure do not raise additional but specific competition concerns which seem to arise only when the merging parties have a significant market share in the buying and selling markets.

The specificity of those concerns mainly derive from the exclusivity and withdrawal requirements imposed by the cooperative on its members since, if the parties have a considerable market share in the upstream market, such conditions lead to input foreclosure. In comparison with the decisions on mergers between supermarkets, the Commission seems, however, to be more lenient towards the reinforcement of cooperatives' market power. Two arguments may be put forward to justify that assertion. Firstly, the creation or strengthening of a cooperative is generally viewed positively as it gives additional power to farmers who are the weaker actors within the food supply chain.[623] This

[621] Exclusion from the upstream markets would also occur in the retail sector. Incumbent retailers could indeed impede smaller retailers' access to some products in the upstream buyer markets through, for example, exclusive dealings or other arrangements.

[622] For example, the Commission did not oppose a merger between dairy cooperatives which together held a market share of 15-25% in the market for the procurement of raw milk and a market share of around 25-35% in the market for the supply of long-lie and fresh flavoured milk in the United Kingdom. See: *Arla Foods/Express Dairies,* Case No IV/M.3130, Commission Decision of 10 June 2003. In this case, the Commission also rejected the possibility of a collective dominant position on the buyer side. Buyers of raw milk were indeed considered as fragmented and very heterogeneous in their need due to their different usage of the raw milk. The Commission thus concluded that any coordination between buyers was unlikely or, at least, unsustainable. See also: *Arla Foods/Milk Link,* Case No COMP/M.6611, Commission Decision of 27 September 2012. In that case, the Commission considered that the parties' combined market share in the upstream buyer market of raw milk (20-30%) was unlikely to raise any concerns as any attempt to change the procurement conditions in that market would result in farmers switching their supply to other processors, co-operatives and traders. However, given the high market share of the merged entity at the retail level for the supply of long-life milk (70-80%), it was concluded that neither competitors nor customers would be able to prevent price increases. It was indeed found that retailers' countervailing buyer power was not sufficient to offset potential adverse effect of the merger as the operation in question would remove a credible alternative in the upstream buyer power and thereby reduce significantly buyer power.

[623] We have indeed noted that the European Union promotes the creation of producer groups and cooperatives. See: Council Regulation (EC) 1234/2007 of 22 October 2007establising a common organization of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation), J.O. L 299/1 of 16/11/2007.

enables them, in particular, to reinforce their bargaining power *vis-à-vis* strong buyers such as large supermarket chains or industrial food processors. Secondly, while suppliers are the first affected by an increase of retailers' buyer power, farmer-members instead benefit from the cooperative's stronger market power due to the resulting higher prices paid to them. The "threat point" established by the Commission in *Rewe/Meinl* is therefore not relevant when cooperatives are the main subject in the assessment of buyer power. That is why, in mergers between supermarkets, a combined market share of 25% in the procurement market, such as in *Carrefour/Promodes,* was already considered as likely to trigger the spiral effect and the resulting longer-term harmful effects for competitors and consumers. In contrast, a higher share in the procurement market seems to be needed to entail input foreclosure.

4. Increased buyer power: rarely a competition concern

In the majority of the decisions in which an increase in buyer power was assessed by the Commission, it was concluded that the transaction was not likely to impede effective competition on the relevant markets. In most cases, the market share of the parties remained very low on the buying and on the selling side or the transaction only added a small market share increment. However, in several decisions on mergers between non-cooperative slaughterhouses, the share of the parties was definitely not insignificant but the Commission was nevertheless of the opinion that competition was not endangered by the operation due, in particular, to the sufficient number of alternatives.

a) Mergers between non-cooperative slaughterhouses: large buyers deemed inoffensive

Different mergers among slaughterhouses were not blocked by the Commission even though the combined market shares of the merging parties sometimes amounted to over 40% both on the procurement market for live animals and on the downstream market for the supply of fresh meat to retailers and food processors.[624] This seems thus, at first sight, to be in contradiction with the reasoning held in the merger decisions in the retail sector. However, when reading the arguments invoked by the Commission to reach that conclusion, this only confirms that the exercise of buyer power is closely linked to the number of alternatives available to suppliers. The threshold of 22% established in *Rewe/Meinl* is indeed relevant only when a supplier lacks sufficient outside options to replace a customer representing that share of his turnover. Where alternative buyers are present on the market and have the capacity to increase their volume of purchases, no matter the share of a particular customer in a supplier's turnover since the latter will have the ability to switch to another

[624] See : *Sovion/HMG,* Case No IV/M.3605, Commission Decision of 21 December 2004 ; *Sovion/Südfleisch,* Case No IV/M.3968, Commission Decision of 21 December 2005 and *Vion/Weyl,* Case No COMP/M.5935, Commission Decision, of 28 August 2010.

trading partner should a customer stop purchasing its products or require unacceptable contractual conditions.

It seems nevertheless that the Commission showed more clemency to those mergers between slaughterhouses than it did to concentrations among large supermarkets. It was maintained that,

> "in any event, a merger that leads to increased buyer power is liable to significantly impede effective competition only under specific circumstances in particular where it is likely to lead to a reduction in output of the final products or the foreclosure of competitors of the merged entity".[625]

The main arguments advanced by the Commission to conclude that increased buyer power in those cases did not raise competition concerns were the large number of alternative purchasers, the transparent pricing system and the presence of strong competition on the downstream selling markets. As regards the first argument, the market investigation revealed that rival slaughterhouses could raise their slaughtering capacity if needed and that producers, not bound to slaughterhouses by supply obligations or long-term contracts, could thus easily turn to those competitors.[626] Concerning the second argument, the Commission noted that slaughter prices were published on a weekly basis and that even a small downward price correction imposed by a slaughterhouse led suppliers to switch to other purchasers.[627] Finally, it was considered that the mergers in question were not likely to give the parties a significant market power on the selling side. The new entity's share in the market for the sale of fresh meat to retailers and food processors remained indeed limited[628] or the market share increment was *de minimis.*[629] Interestingly, the Commission also pointed out supermarkets and industrial processors' considerable buyer power which would prevent the merged firm, even when holding a higher market share, from exerting excessive market power in the downstream markets. The significant pricing pressure exercised by those buyers on slaughterhouses was viewed as sufficient to exclude any increase in price following the merger.[630]

[625] *Sovion/Südfleisch, op.cit.*, at 40.
[626] See: *Sovion/HMG, op.cit.*, at 50 and *Sovion/Südfleisch, op.cit.*, at 53.
[627] See: *Sovion/Südfleisch, op.cit.*, at 51 and *Vion/Weyl, op.cit.,* at 27.
[628] See : *Sovion/HMG, op.cit*. In this case, even on basis of a narrow geographic market, the combined market shares of the parties for the supply of fresh pork and fresh beef to supermarkets and industrial processors did not exceed 15-25%.
[629] See: *Vion/Weyl, op.cit*. Even though the merged firm's market share was higher in this case, amounting to 20-30%, the Commission considered that the transaction only added a small increment.
[630] See : *Sovion/Südfleisch, op.cit.*, at 73 and 78.

b) No competitive concerns raised in the other cases

The Commission generally rejects any alleged impediment to effective competition when the parties have a market share not exceeding 20% in the procurement market. In such a situation, it is indeed held that the merged entity would not acquire sufficient buyer power so as to be qualified as dominant in the upstream market and would not be in a position to enter into anticompetitive behaviour.[631] Where the parties have a market share above that percentage, the Commission takes into consideration different factors to exclude the possibility of competition harm.

Firstly, the presence of powerful sellers in the upstream markets may play a role in preventing the new entity from exerting excessive buyer power.[632] The mutual dependency between suppliers and the merged buying firm is indeed viewed as an element excluding potential harmful effects.

Secondly, in its assessment, the Commission also examines the structure of the downstream markets and considers that, when fierce competition is present on those markets, the exercise of buyer power would not adversely affect competition as it would yield benefits for final consumers in terms of lower prices.[633]

Thirdly, if buyer power is not a direct consequence of the merger itself, the Commission is unlikely to pay a great deal of attention to that issue. Indeed, through its merger policy, the Commission can object to a concentration but only where the transaction in question strengthens the parties' market power to a significant extent so as to possibly affect the competition process. However, if it is established that, before the merger, (one of) the merging parties already detained buyer power in

[631] See for examples : *Vodafone Airtouch/Mannesmann,* Case No IV/M.1795, Commission Decision of 12 April 2000; *Norddeutsche Affinerie/Cumerio,* Case No COMP/M.4781, Commission Decision of 23 January 2008; *Henkel/Adhesives & Electronic Business,* Case No COMP/M.4941, Commission Decision of 15 February 2008 and *Akzonobel/Rhom and Hass Powder Coating Business,* Case No COMP/M.5745, Commission Decision of 22 April 2010. See also these different decisions concerning buying power of leisure travel operators on the procurement market for hotel accommodation: *Kuoni/First Choice,* Case No IV/M.1502, Commission Decision of 6 May 1999; *Preussag/Thomson,* Case No IV/M.2002, Commission Decision of 26 July 2000; *C&N/Thomas Cook,* Case No IV/M.2228, Commission Decision of 26 July 2001 and *Karstadtquelle/Mytravel,* Case No IV/M.4601, Commission Decision of 4 May 2007. In those cases, even though the parties' market shares amounted up to 20-30% on very specific procurement markets, the Commission's investigation indicated that the merger would not create significant dependency of hotel owners on the bedstock purchases of the new entity since most of those hotels diversified their supply of rooms to more than one tour operator.

[632] See for example: *Kingfisher/Asda,* Case No IV/M.1541, Commission Decision of 15 June 1999. In this case, the Commission recognized that the transaction would enhance the parties' buying power in the procurement market of recorded videos but also noted that the new entity would still face suppliers with significant bargaining power like Sony, Warner or EMI. See also: *Carnival Corporation/P&O Princess,* Case No COMP/M.2706, Commission Decision of 24 July 2002 and *Rexel/Hagemeyer,* Case No COMP/M.4963, Commission Decision of 22 February 2008. In this last case, the parties held a market share of 20-30% in the UK procurement market of electrical products. The Commission noted that large suppliers represented a significant part of the parties' total purchases and would therefore be able to mitigate the effects of increased buyer power post-merger.

[633] See: *Kvaerner/Trafalgar,* Case No IV/M.731, Commission Decision of 15 April 1996.

the procurement market and that the operation does not reinforce significantly the position of the merged entity in that market, the issue of buyer power will not constitute a competition concern.[634]

Concerning the different actors who might be affected by the exercise of buyer power, it appears that, in most decisions, the Commission examined mainly the effects of the merger on the new entity's competitors. It emerges yet from the cases developed above that the assessment of those effects has rarely results in the Commission blocking a concentration. It was indeed maintained in several cases that, even though increased buyer power might enable the parties to negotiate more favourable conditions for supplies, the transaction would not allow them to control access to inputs or lead to any foreclosure effects for rivals.[635] As it was noted in the mergers among cooperative slaughterhouses, a very large market share in the upstream buyer market is in fact needed to make such a foreclosure effect possible.

However, in the food retail sector, the Commission also examined the potential exclusion of competitors from a different point of view. It asserted that the better conditions obtained by a powerful supermarket would allow it to undercut its rivals prices on the downstream markets and thus to force those competitors to exit the market over time. One cannot but notice that such reasoning was not followed in other sectors. For example, about a merger between large paper distributors - which took place within an on-going consolidation process in that sector -, the Commission maintained that any competitive disadvantage of smaller players resulting from the increased buyer power post-merger could at least be offset. The main argument invoked to sustain that assertion was the possibility of those weaker buyers to set up buying consortia.[636] By excluding a potential spiral effect in the form of a circular reinforcement of market power in the up- and downstream markets, the Commission did not envisage any potential harmful effect for consumers in the longer-term.

It is worth noting that, even though the merged entity's increased buyer power is not likely to impede effective competition, it can nevertheless be considered as a sufficient countervailing pressure in the assessment of a future merger between upstream suppliers. The Commission had for

[634] See for example: T-405/08, *Spar Österreichische Warenhandels AG v Commission* [2013] Not yet published. The Tribunal confirmed a decision of the Commission authorizing a merger between two supermarket chains in Austria, namely Rewe and Adeg. See: *Rewe/Adeg,* Case No COMP/M.5047, Commission Decision of 23 June 2008. The Commission and the Tribunal considered in that case that Rewe already had buyer power in the procurement market and that Adeg was a weak player in that market. Consequently, the acquisition of Adeg by Rewe would not increase appreciably the latter's leveraging power on the procurement side.

[635] See for examples : *Carnival Corporation/P&O Princess,* Case No COMP/M.2706, Commission Decision of 24 July 2002, at 274 and *Akzonobel/Rhom and Hass Powder Coating Business,* Case No COMP/M.5745, Commission Decision of 22 April 2010, at 36.

[636] See : *Paperlinx/Buhrmann paper merchanting division,* Case No IV/M.3227, Commission Decision of 10 October 2003, at 23.

example considered, in February 2008, that a merger between electrical products wholesalers would not affect any upstream procurement market in the Netherlands given the limited position of the new entity on those markets.[637] Less than two months later, in April 2008, a concentration between electrical products manufacturers was examined by the Commission.[638] In the analysis of the different competitive constraints exercised on the merging parties, customers' significant countervailing buyer power was held to be likely to prevent the merged firm from exerting excessive market power following the transaction. Among those customers, the Commission mentioned the wholesale company which was the fruit of the merger cleared in February. This shows that, depending on its intensity, buyer power may be either a positive strength protecting the effectiveness of competition or a harmful force leading to competition distortions.

C. CONCLUSIVE REMARKS

Even though buyers' increased market power acquired through a merger has been rarely considered as impeding effective competition on the markets, it may raise competition concerns in some circumstances. The few cases in which the Commission developed the potential harmful impact of buyer power attest of those concerns. In the retail sector, different decisions focused on merging supermarkets' buying power. It resulted from the analysis of the *Kesko/Tuko, Rewe/Meinl* and *Carrefour/Promodes* decisions that the exercise of market power in the procurement market may distort competition only when the parties also hold a particularly strong position in the distribution market. It is, however, not required that the merged entity is in a dominant position in the downstream seller markets to oppose the transaction. The mere fact that suppliers are economically dependent on the merging parties – that is when they rely on the latter for more than 22% of their turnover – may be deemed sufficient to put a spiral effect in motion. Even if competition is still fierce in the distribution market, the lower prices obtained by the new entity, due to its increased buyer power, may enable it to eliminate gradually competitors and thereby to reinforce its position in the up- and downstream markets. Such a strengthening of market power will be facilitated by different competitive advantages and in particular by the success of the parties' private label. This might result, in the long-term, in harming consumer welfare as well due to higher prices and lower product diversity on the shelves.

In mergers between farmer cooperatives, the reasoning of the Commission regarding buyer power was slightly different but led to the same result, namely that increased market power in the procurement market was likely to lessen competition both in the up- and downstream markets. Although farmer cooperatives are generally viewed as a positive instrument to combine those

[637] *Rexe/Hagemeyer, op.cit.*, at 77.
[638] *EATON/Moeller,* Case No COMP/M.5050, Commission Decision of 1 April 2008.

weaker players' forces, the Commission keep nevertheless an eye on those organisations in order to prevent any input foreclosure.

The cases analysed in this Section constitute rather exceptions in the EU merger enforcement policy. The Commission generally considers that the merged entity is unlikely to affect competition through its buyer power due to its relatively low market share or to the large number of alternatives available to suppliers. A merger is usually blocked when the transaction would create or strengthen a dominant position. In the selling markets, it is rarely concluded to the existence of such a position when the parties' combined market shares do not exceed 40%. This contrasts with the much lower "threat point" of 22% established in *Rewe/Meinl* and regarded as particularly relevant when suppliers lack sufficient outside options to sell their products. We cannot but notice that, in the following decisions – except in *Carrefour/Promodes* – the Commission seems to have dropped that threshold and to stick to the approach used to assess market power in the selling markets. This may indicate that the Commission is relaxing the criteria applied to handle buyer power cases. It may indeed consider that positive effects are paramount in most situations and that competitors are able to counteract any potential negative impact. But this may also indicate that the "threat point" and the spiral described in the retail sector are only relevant and accurate in very specific situations. The elements characterising those situations would be, in particular, a fragmented supply side, a lack of alternative buyers, competitive advantages as well as strong market power in the hands of the merged entity, both in the procurement and the downstream markets. In those circumstances, whatever the sector concerned by the merger, the parties' conduct is likely to sensibly affect the competition process and harm consumer welfare even though their market share in the procurement market remains relatively low.

Where, in EU law, the specificity of buyer power is not recognised as such in the texts and, in practice, has been taken into consideration only in a few cases, one may wonder whether and how this issue is addressed in national laws.

CHAPTER 2 – BUYER POWER IN NATIONAL LAWS

Noteworthy are the various instruments implemented by national authorities to address the issue of buyer power. The analysis of national legislation dealing with that issue in different countries provides in fact relevant examples and food for thought with regards to the way buyer practices may be supervised at the EU level. The study carried out in this chapter is not exhaustive. There are indeed numerous and various measures that may be adopted to regulate the use of buyer power. To illustrate such diversity, we selected three countries on a discretionary basis - namely France (**Section 1**), the United Kingdom (**Section 2**) and the United States (**Section 3**) - where national authorities enacted new rules to tackle buyer power problems, especially in the retail sector.

According to Regulation No 1/2003 on the implementation of the rules on competition, Member States are not precluded from adopting stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.[639] Accordingly, some countries such as France have expanded the scope of the prohibition on abusive conduct to abuses of a state of economic dependence. The introduction of the concept of economic dependence seemed promising to facilitate action against powerful buyers as the notion of buyer power is mostly defined with reference to that concept. However, in practice, the provision prohibiting such conduct has hardly been successfully enforced. Acting at another level, outside the scope of competition law, French authorities have also implemented contract laws in order to ensure fairness in the commercial relationships between buyers and suppliers. It has yet appeared that those rules backfired and required therefore successive legislative modification. It remains that they constitute a particular way of dealing with buyer power issues, *a priori* more easily enforceable than the competition rules.

In the United Kingdom, authorities also took action outside the scope of the competition rules through the adoption of a soft law measure. Following different investigations into the grocery retail sector, national competition authorities recommended indeed the implementation of a code of conduct to be applied to the largest supermarket chains in the United Kingdom. The Code has been adopted to eradicate some practices which were considered to be likely to chill competition. Such a measure lacks however serious teeth so that one can cast doubt on its dissuasive effect.

Finally, we will turn to the legislation in the United States where competition authorities and courts have been dealing with competition law issues for decades. The enforcement of the general competition rules related to anticompetitive agreements and abuses shows that the prohibition on those practices applies to both sellers and buyers, even though some courts are still more reluctant

[639] Article 3, §2, *in fine* of Regulation No 1/2003 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty, *JO* L 1 of 04/01/2003, p.1.

to sanction the latter. To address the question of large retailers' buyer power, US authorities have also implemented specific rules which, in practice, failed to achieve the expected objective. Measures were also adopted to tackle the exercise of buyer power further up the supply chain. However, as in other countries, the focus on the effects of buyer practices in the downstream markets only in terms of price and quantity restrains the effective enforcement of the competition rules against large buyers.

SECTION I - FRANCE: LEGISLATION TARGETING SUPERMARKETS' BUYER POWER

Since the eighties and the growing concentration in the food retail sector, France has been trying to address large supermarkets' buyer power and to restore a balance in retailer-supplier relationships. Original legislative measures have been enacted to this end. Competition rules have first been modified to encompass a new concept, namely abuse of a state of economic dependence. However, the strict conditions assigned to that concept have made its enforcement difficult and rather ineffective to tackle the issue of buyer power. Given the difficulties in protecting smaller retailers and suppliers through those rules, the French legislator, in the nineties, added new provisions in the Commercial Code prohibiting "anticompetitive restrictive practices". Enacted specifically with the aim of establishing fairness in business relations, the rules on restrictive practices have nevertheless shown their limits. The prohibition to discriminate and the obligations imposed on retailers as regards resale prices have in fact entailed adverse effects on competition and led to various legislative modifications. French authorities mainly attempt to address the issue of buyer power outside the framework of competition through rules regulating negotiation between retailers and suppliers. However, other avenues may be suggested to ensure the maintenance of effective competition on the retail and procurement markets.

A. CONCENTRATION IN THE FRENCH RETAIL SECTOR

Since the sixties, as in most Member States, the French food retail market has been facing the development of big retail chains. Through various strategies of mergers and acquisitions, the degree of concentration in that sector has been continuously increasing and led to the creation of an oligopoly. That growing consolidation has given rise to two types of concerns. On the one hand, consumers may be deprived of a free choice between different retailers, especially in some local areas. On the other hand, big supermarket chains may use their bargaining power to exclude smaller retailers and impose unfair conditions on their suppliers.[640] We will focus on that last issue.

[640] See : Opinion of the French Competition Authority, Avis n° 00-A-02 du 4 février 2000 relatif à une demande d'avis sur un projet de réforme de l'ordonnance du 1er décembre 1986.

The unceasing opening of supermarkets and hypermarkets ("big-box stores") has particularly affected smaller and specialized grocery stores whose parts in the food retail market have been shrinking. In addition, the predominant position of a limited number of large supermarkets groups has modified the balance of powers between retailers and suppliers. Market power within the food supply chain has moved from the upstream to the downstream market to the detriment of suppliers, especially small and medium sized enterprises (SME).[641] Buyer power of those large customers has been even more reinforced by the creation of central buying agencies (*centrales d'achat*). As such, the different outlets do no longer buy their products from the producers or manufacturers but from the agency which negotiates the purchasing conditions for all its members.[642] Currently, five central buying agencies account together for more than 90% of the food retail market in France.[643] Such a limited number of players on the buying side has dramatically impacted suppliers' bargaining power. Various practices, nowadays common in the retail sector, attest of the shift of power in favour of those oligopsonistic retail chains.

In addition to demanding very low prices, large retailers impose different financial burden on their suppliers such as, for examples, listing fees, slotting allowances or contribution for opening new stores. Retrospective changes to contracts, excessive transfer of risks and late payments may constitute another expression of supermarkets' buyer power.[644] All those practices and pressures exerted by large retail chains are likely to harm producers and food processors but also smaller retailers. Weaker competitors in the retail market, who do not have a similar bargaining strength, may indeed face disadvantageous purchasing conditions affecting their position both in the procurement and selling markets.

In order to address buyer power concerns, French authorities have been enacting many legislative reforms in the last decades. Instead of using the competition rules, the legislator has mainly taken actions under the title of "competitive restrictive practices" in the Commercial Code. Despite linguistic appearances to the contrary, those prohibited practices do not fall under the framework of

[641] Small and medium sized enterprises are particularly active in the production of own-brand products. In France, 90% of private label products are supplied by SMEs. Where the development of large food retail stores may have enlarged or opened new selling channels for those enterprises, it has also affected their bargaining position in the negotiations. Retailers require very low prices for those products and impose strict conditions with regard to the quality, packaging, delivery, and so on.

[642] M.-L. Allain and C. Chambolle, « Les relations entre producteurs et distributeurs : bilan et limites de trente ans de régulation », *Revue française d'économie,* 2003, at 2, available at : http://hal.archives-ouvertes.fr/docs/00/24/30/00/PDF/2005-06-09-964.pdf.

[643] Those central buying agencies are : Carrefour, Lucie (Leclerc and Système U), Opéra (Casino, Cora, Franprix, Leader Price and Monoprix-Prisunic), Intermarché and Auchan.

[644] See : F.Bergès-Sennou and S.Caprice, « Les rapports 'producteurs-distributeurs' : Fondements et implications de la puissance d'achat », *Revue Economie Rurale,* 2003, available at : http://www2.toulouse.inra.fr/centre/esr/CV/berges/PROD.pdf

the competition policy but are specifically designed to deal with the imbalance in supplier-retailer relationships

B. TWO SET OF RULES TO ADDRESS SUPERMARKETS' BUYER POWER, TWO DIFFERENT OBJECTIVES

At first sight, the French legislation seems to be well equipped to apprehend some buyers' practices harming other traders within the food supply chain. On the one hand, the provision on abusive conduct is better devised to encompass supermarkets' abuses than its counterpart in EU law by including the concept of abuse of a state of economic dependence. On the other hand, various rules on restrictive practices complement the Commercial Code in order to regulate supplier-retailer relations and to prevent unfair practices. Different objectives are assigned to those provisions. The qualification of a conduct as anti-competitive and/or restrictive is closely linked to the objectives to be protected.

1. Anti-competitive practices

Articles L420-1 and L420-2 of the French Commercial Code prohibit anticompetitive agreements and abusive conducts.[645] With regard to the latter, its scope of application was extended in 1986 to encompass not only abuses of a dominant position but also abuses of a state of economic dependence (*abus de dépendance économique*).[646] That new concept, unknown in EU law[647], could have constituted a suitable instrument to act against some supermarkets' abusive practices. However, we will see in the next section that the enforcement of the provision in question has been particularly unsuccessful. The main reason relies on the objective assigned to the competition rules.

[645] Code de Commerce, livre IV, Titre II, Articles L420-1 and L420-2.

[646] Ordonnance n°86-1243 du 1er décembre 1986, Article 8.

[647] The concept of abuse of economic dependence is also included in the competition rules of other Member States such as in Germany (Act against restraints on competition, Article 20.2) and Portugal (Competition Act, Article 7). In Belgium, in 2006, a proposal for the modification of the Act on the protection of economic competition provided for an extension of the competition authority's competences through the introduction of a new provision prohibiting the abusive exploitation of a situation of economic dependence. However, the Competition Counsel at that time considered that such a provision would be a redundant duplicate of some provisions of the Act on commercial practices and consumer protection and information whose violations can be brought by private parties before a court. To introduce a cumulative competence between the competition authority, an administrative authority, and the courts, which hand down decisions on private disputes, was therefore deemed to be inappropriate. (See: Avis du Conseil de la concurrence sur l'avant-projet de loi modifiant la loi du 5 août 1991 sur la protection de la concurrence économique) The EU rules on competition do not prohibit abuses of a state of economic dependence. However, the Commission has referred to that concept in merger cases. We have indeed pointed out above that, in its assessment of the effects of a concentration, the Commission also examines the potential consequences of increased buyer power following the operation in question. In different cases, instead of looking at the market share of the merged entity in the procurement market, the Commission examined whether suppliers were economically dependent on the merging parties. When such state of dependency exists, the operation is more likely to have a negative impact on effective competition. See for examples: *Rewe/Meinl,* Case No IV/M.1221, Commission Decision of 3 February 1999 and *Carrefour/Promodes*, Case No COMP/M.1684, Commission Decision of 25 January 2000. On those cases, see above, Chapter 1, Section 2, Point B, 2.

The role of the authorities in that matter is to ensure that enterprises' behaviour on the markets contribute to consumer welfare through lower prices and high variety and quality products/services. They are only required to intervene when players' conduct negatively affects the degree of competition on a particular market. The provision on abusive conduct is therefore not meant to protect suppliers or smaller retailers against dominant or powerful supermarkets, unless the exercise of such power leads to competition restrictions.[648] According to the French Competition Authority, even though large retailers' practices affect the viability of some producers and food processors, the risk that such conduct restricts the intensity of competition is too low to justify measures protecting those weaker parties.[649]

Given the shift of powers between suppliers and retailers and the impossibility of acting under Article L420-2 of the Commercial Code, the French authorities have enacted new provisions aimed specifically at regulating the large retail sector.[650]

2. Competitive restrictive practices

The provisions included in the chapter on competitive restrictive practices[651] meet different objectives related to the fairness of the commercial relationships between suppliers and retailers. Governed by civil law and enforced by the national courts, those rules do not require any effect on consumers or on competition to be sanctioned. Many practices are in fact prohibited *per se*. For example, Article L442-6 mainly focuses on abusive transfers of wealth from a supplier to a retailer. Among the objectionable practices we can mention: subjecting a partner to unjustified obligations or trading conditions, obtaining an advantage which does not correspond to any commercial service effectively provided or manifestly disproportionate with regard to the service provided, sudden severance of established business relations, subjecting a partner to obligations which create a significant imbalance in the contract as well as requiring listing fees or retroactive rebates.

Should a retailer do not comply with those rules, he will be liable and obliged to compensate the harm caused thereby. An original system of action is provided in order to sanction offenders. The case may be brought to the court by any person justifying an interest but also by the Ministry of

[648] See : M.-D.Hagelsteen, « La négociabilité des tarifs et des conditions générales de vente », Rapport au ministre de l'économie, des finances et de l'emploi et au secrétaire d'Etat chargé de la consommation et du tourisme, Bercy, 12 February 2008, at 19.
[649] Opinion of the French Competition Authority, Avis n°00-A-02 du 4 février 2000*, op.cit.*, p.2.
[650] M.-L.Allain and C.Chambolle, *op.cit.,* 2003, at 22.
[651] Code de Commerce, livre IV, Titre IV, Chapters II and III. Most of those provisions have been introduced in the Commercial Code by the Loi Galland and Loi Dutreuil (Loi n°96-588, 1er juillet 1996, sur la loyauté et l'équilibre des relations commerciales, JORF 3 juillet, p.9983 and Loi n°2005-882, 2 août 2005, en faveur des petites et moyennes entreprises, JO 3 août, p.12639). Different modifications have since been made in order to remedy some adverse effects that the *Loi Galland* caused on the markets. See below, Point D.

economy. The latter may request a whole battery of sanctions such as the suspension of the unlawful practices, the nullity of the clauses in question, the recovery of undue payments and a civil fine up to € 2 million. Civil cases involving the Ministry of economy are rising. In 2010, 21 decisions were rendered following an action brought by the Ministry and the latter intervened in 6 other pending cases.[652] Giving the possibility to a third party to act against restrictive practices is particularly important since most suppliers refrain from complaining about supermarkets' abusive conduct. In most cases, the fear of losing a large customer constrains producers to accept unfair contractual conditions.

Where the provisions on restrictive practices may constitute a suitable instrument to restore the balance in supplier-retailer relations, the Competition Authority has nevertheless highlighted that fairness objectives may not be pursued to the detriment of competition on the markets. Rigidifying trading relations and limiting the free determination of prices may indeed damage the intensity of competition and in the end penalize consumers.[653] The current anticompetitive practices included in the Commercial Code are the result of many and still ongoing legislative changes. It seems indeed that some of the first rules introduced by the *Loi Galland* in 1996 had an adverse impact on competition and consumer prices. The different modifications which have been made so far, in particular on the applicable threshold for below-cost prices and on the prohibition of discrimination, will be developed in Point D.

C. ABUSE OF ECONOMIC DEPENDENCE

Article L420-2 of the French Commercial Code prohibits both abuses of a dominant position and abuses of a state of economic dependence. Such a broad approach of abusive conduct was meant to remedy the strict conditions required to characterize a position as dominant and to give authorities an instrument to protect suppliers against some large retail outlets' practices. However, the Competition Authority has limited the application of the second prohibition. It has strictly defined the concept of economic dependence and the notion of abuse so that, since 1986, the conditions required to apply the provision in question have rarely been met.

1. Abuse of dominance versus abuse of economic dependence

The first part of Article L420-2 prohibits abuses of dominance and is drawn up in similar terms to Article 102 TFEU. In most cases, that rule is of little use to address retailers' behaviour in the procurement market as even the largest supermarket hardly holds a sufficient market share to be

[652] « Bilan de l'action contentieuse civile et pénale de la DGCCRF en 2010 », Paris, 2 May 2010, available at : http://www.economie.gouv.fr/files/bilanpcr_civil_penal2010.pdf
[653] Opinion of the French Competition Authority, Avis n°00-A-02 du 4 février 2000, *op.cit.* p.4.

considered as dominant.[654] That is why, in 1986, the French Competition Authority has been entitled to control inter-business relations with the enactment of the second paragraph of Article L420-2 which reads as follows:

> "Also prohibited, whenever it is susceptible to affect the functioning or structure of competition, is the abusive exploitation, by a company or group of companies, of the condition of economic dependence in which a customer company or supplier finds itself vis-à-vis such company. These abuses may consist of the refusal of sale, tied sales or the discriminatory practices mentioned in article L442-6."[655]

The prohibition on abuses of dominance seeks to control the conduct of undertakings which hold a dominant position in a particular market. The prohibition on abuses of economic dependence, however, targets undertakings which have a dominant position *vis-à-vis* a particular trading partner. The concept of economic dependence therefore focuses on the business relations between two contractors and on the economic power one of them may be tempted to abuse.[656] In an opinion about the concentration in the retail sector, the French Competition Authority defined the condition of economic dependence as the situation where a retailer is in a position of power in the relation with a supplier so that the latter cannot escape from the business relationship in question. In such a case, the economic viability of the supplier which is in a situation of dependence is no longer secured should the relationship with the powerful retailer be put to an end.[657]

In order to sanction a supermarket under Article L420-2, the situation of dependence of its supplier must therefore be first established. The authorities have then to assess the abusive character of the criticized practice with regard to its effects on competition.

[654] OECD, *Monopsony and buyer power,* Policy roundtables, DAF/COMP(2008)38, at 164. Market shares constitute an important factor is the assessment of dominance even tough other factors must also be taken into account such as barriers to entry or expansion. According to the case law Court of Justice, a firm holding a market share of 50% may be held to have a dominant position. Between 40% and 50% market share, the dominant position needs to be supported by other factors. Below 40%, dominance is unlikely even though not excluded. See: R.Wish, *Competition Law,* 6th edition, at 175-183 (2009)

[655] P.Këllezi, "Abuse below the threshold of dominance ? Market power, market dominance, and abuse of economic dependence", in *Abuse of a dominant position: new interpretation, new enforcement mechanisms?,* 2008, at 63.

[656] L.Vogel and J.Vogel, "Abuse of dominance under French law: desirable evolutions", Global Competition Review, 2011, at 108.

[657] Opinion of the French Competition Authority, Avis n°97-A-04 du 21 janvier 1997 relatif à diverses questions portant sur la concentration de la distribution, p.32.

2. Factors leading to economic dependence

The French Competition Authority, in different decisions, has put forward four criteria to be used to assess the existence of a state of economic dependence.[658] Applied to the relationship between a supermarket and its suppliers, those criteria are: Firstly, the popularity of the retail chain and the importance of its market shares in the downstream market; secondly, the share of the retailer's purchases in the supplier turnover; thirdly, the reasons why the supplier's sales are mostly concentrated in that retailer, namely whether it is a deliberate choice based on a commercial strategy or whether the supplier could not but deal mainly with that customer; and lastly, the existence of equivalent alternatives (outside options) for the supplier.

In each case, the Competition Authority examines carefully all those criteria but rarely concludes to the existence of a condition of economic dependence. For example, in the sector of parcel post delivery, it was considered that, although more than 80% of an undertaking's turnover relies on the orders of only one customer, this does not mean that the former is economically dependent on the latter. The main reasons excluding the application of Article L420-2 in that case were the existence of alternative customers and the position of the buyer in the downstream market which was not significant, both in terms of popularity and in terms of market share. It was therefore concluded that the customer in question did not constitute an obligatory trading partner.[659] The same reasoning was held in a case involving the relationship between a cider apples producer and a cider manufacturer. The Competition Authority recognized that the cider sector was highly concentrated and that

[658] We only examine cases and criteria related to a condition of economic dependence on the upstream side of the vertical relationship, namely the economic dependence of a supplier on a particular retailer. However, most cases dealt with by the Competition Authority concerned the potential economic dependence of a buyer on his seller in various sectors. See for examples: Décision n°01-D-49 du 31 août 2001 relative à une saisine et à une demande de mesures conservatoires présentées par la société Concurrence concernant la société Sony; Décision n°02-D-77 du 27 décembre 2002 relative à une saisine de la Société anonyme Daniel Grenin à l'encontre des sociétés Imphy Ugine Précision, Sprint-Métal et Usinor Achats ; Décision n°04-D-44 du 15 septembre 2004 relative à une saisine présentée par le Ciné-Théâtre du Lamentin dans le secteur de la distribution et de l'exploitation de films ; Décision n°05-D-44 du 21 juillet 2005 relative à des pratiques mises en œuvre par le groupe La Provence dans le secteur de la publicité dans la presse quotidienne régionale à Marseille ; Décision n°06-D-10 du 12 mai 2006 relative à des pratiques mises en œuvre par la société Bouygues Télécom contre le grossiste Stock-Com ; Décision n°10-D-08 du 3 mars 2010 relative à des pratiques mises en œuvre par Carrefour dans le secteur du commerce d'alimentation générale de proximité ; Décision n°11-D-04 du 23 février 2011 relative à des pratiques mises en œuvre par Carrefour dans le secteur de la distribution alimentaire.

[659] Décision n°04-D-36 du 23 juillet 2004 relative à des pratiques mises en œuvre dans le secteur du transport de petits colis, para.9. This decision reveals that the importance of the buyer's share on the seller's turnover is not decisive, especially when outside options are available. The same is true when the plaintiff is on the buying side. For example, it was maintained that a telecom wholesale dealer who made 100% of his turnover with the sales of a particular supplier's products was not dependent on that supplier. The importance of the share of the telecom operator in question in the plaintiff's turnover did not resulted from the impossibility to find alternative operators but from a deliberate choice. See: Décision n°06-D-10 du 12 mai 2006 relative à des pratiques mises en oeuvre par la société Bouygues Télécom contre le grossiste Stock-Com.

processors enjoyed a significant bargaining strength with regard to apples producers. However, the availability of various equivalent alternatives, such as the possibility to export apples, excluded that business-relation from the scope of Article L420-2.[660]

The concepts of dominance and of economic dependence are different but not exclusive of each other. As such, the same facts may be examined under both qualifications, each of them relying on distinct constitutive elements. In its analysis, the French Competition Authority may reach different conclusions as regards the position of a buyer in the procurement market. (1) It may exclude the application of the whole Article L420-2, considering that the buying firm has neither a dominant position in the upstream market, nor a significant economic power over a particular supplier. (2) Based on the criteria developed above, it may also consider that, even though the accused firm is not a dominant buyer, the supplier subject to the alleged abusive practices is economically dependent on that firm. (3) A third possible conclusion may be that an undertaking is dominant in the relevant market and one or several trading partners are in a state of economic dependence.[661] (4) And lastly, the qualification of dominance may be upheld while that of economic dependence rejected. For example, following a complaint by a services provider for the maintenance of electrical wiring devices, it was considered that the national electricity network operator was a near-monopsony customer for a particular type of services and was therefore in a dominant position in the buyer upstream market of those services. However, the Competition Authority highlighted that the concentration of the plaintiff's activities in that operator was the result of a deliberate commercial strategy and that alternatives were available in the electricity sector for the provision of different and less specific services. As a result, that services provider could not be considered as economically dependent under Article L420-2.[662]

Those decisions prove that strict conditions are required to characterize a buyer as dominant or a supplier as economically dependent. Getting through that step is not the only difficulty in the application of Article L420-2 since, to find a violation of that provision, an abuse must be established.

[660] Décision n°07-D-18 du 16 mai 2007 relative à des pratiques mises en œuvre sur le secteur du cidre et des pommes à cidre.

[661] See for example : Décision n°04-D-44 du 15 septembre 2004 relative à une saisine présentée par le Ciné-Théâtre du Lamentin dans le secteur de la distribution et de l'exploitation de films. In that decision, it was considered that a film distributor had a quasi-monopoly in the relevant market and that cinemas were economically dependent on it since they did not have any alternative.

[662] Décision n°09-D-21 du 23 juin 2009 relative à des pratiques mises en œuvre par la société RTE sur le marché de travaux de lignes aérienne haute tension. See also : Décision n°05-D-44 du 21 juillet 2005 relative à des pratiques mises en œuvre par le groupe La Provence dans le secteur de la publicité dans la presse quotidienne régionale à Marseille.

3. Abuses and effect on competition

The rules under Article L420-2 of the Commercial Code only apply when a particular conduct is likely to restrict competition on a market. That requirement is strictly interpreted. Even if a practice may lead to the exclusion of a player in the upstream market, the Competition Authority is unlikely to consider that such an effect is sufficient to justify an intervention in the business relationship between trading partners. We will analyse different decisions to illustrate the approach followed in the assessment of a potential abuse and the circumstances in which such an abuse is deemed to exist.

The first case does not concern the retail sector but the cinematographic industry.[663] A cinema owner, holding a monopolistic position in some parts of the French territory, used that power to reinforce its position in different territories where he was in competition with other cinemas. In fact, he subjected the purchase of film rights in the areas where he had a monopoly to the granting of exclusive rights in other parts of the country. The Competition Authority established that the monopolistic position of the cinema owner in some geographic markets was sufficient to give him a dominant position in the corresponding procurement markets.[664] The practice in question was hence analysed under the concept of dominance. It is nevertheless relevant to examine the reasoning of the court in that case since, with regard to the issue of abuse, an effect on competition is required in cases of both a dominant position and a state of economic dependence. Even though the wording of Article L420-2 (1) is not exactly similar to that of (2)[665], we may assume that the Authority will equally condemn a dominant buying firm and a firm on which a supplier is economically dependent if the practices used by those buyers lead to the same restrictive effect on competition. It is indeed not the nature of the conduct in question which matters to determine its abusive character but well its impact on competition in a particular market. In the case at hand, it was concluded that the practice of the cinema owner towards films distributors had an anticompetitive effect since that conduct gave the former an undue competitive advantage in areas where he was competing with rivals. The use of his market power in a particular market to exclude competitors in another one was therefore considered as contrary to Article L420-2.[666]

[663] Décision n°07-D-44 du 11 décembre 2007 relative à des pratiques mises en œuvre par le GIE Ciné Alpes.
[664] *Ibid.,* at 112 and 113.
[665] Article L420-2 (1) refers to Article L420-1 on anticompetitive agreements which provides that a practice is prohibited when it has the object or effect to prevent, restrict or distort competition on a market. Article L420-2 (2) provides that an abuse of economic dependence is prohibited when it affects the functioning or the structure of competition. We may ask whether the choice of a different wording for the provision on economic dependence was expected to be given a different meaning.
[666] Décision n°07-D-44 du 11 décembre 2007, *op.cit.*, at 121-130.

In the second case, the Competition Authority dealt specifically with the issue of a supplier's economic dependence on a food retailer.[667] Following an operation of concentration leading to the constitution of the buying group agency *Opéra*, the supermarkets involved in that operation demanded that the procurement conditions be renegotiated. Suppliers were required to offer various additional advantages without any compensation such as, the harmonization of the trading conditions between the supermarkets based on the most favourable ones, retroactive compensations to make such harmonization effective even before the creation of the agency, payments of fees as an act of recognition of the new entity ("wedding gift") and compensations for virtual commercial cooperation services. Threat of de-listing were added to those requirements should suppliers refuse to comply with them. In some cases such a threat took effect since recalcitrant suppliers were partly delisted and subjected to boycotts. Even though some of those practices were unfair and unjustifiable, it was decided that they did not violate the competition rules.

Without excluding the existence of a situation of economic dependence as regards some of the complaining suppliers, the Competition Authority considered that the renegotiation of the agreements and the delisting of certain products did not constitute abusive conduct. The importance of the buyer's free choice was emphasized as the main tool to stimulate the suppliers' productivity, the improvement of product quality and the cut in prices. Negotiation of agreements and trading conditions, refusal to list or delisting of a product were recognized as lawful and not in themselves anticompetitive.[668] Even though the practices mentioned above have led to a transfer of wealth from suppliers to retailers due to the increased buyer power of the new agency, they were not declared contrary to Article L420-2. Indeed, in accordance with the wording of that provision, retailers' conduct is prohibited only when it restricts competition in the procurement market or in the retail market in question.[669] According to the Competition Authority, obtaining advantages without real compensation could not be considered as limiting, restricting or distorting competition in that case. Concerning the delisting threat used in the negotiation, it resulted from the facts that only a few suppliers were affected by that threat and for a limited number of products. In addition, it was maintained that suppliers' access to consumers was not hindered because of the retailers' conduct, excluding hence any restriction on competition.[670]

Examples of practices restricting competition in the retail sector may yet be found in two other decisions. However, in those cases, the Competition Authority did not sanction the use of buyer

[667] Décision n°03-D-11 du 21 février 2003 relative à des pratiques mises en œuvre par la centrale de référencement Opéra.
[668] *Ibid.,* at 67.
[669] *Ibid.,* at 68.
[670] *Ibid.,* at 82.

power as such but well an agreement or concerted practice giving rise to such a power and affecting suppliers or competitors. In the *Lessives* case[671], a central buying agency delisted a supplier's products and organized a boycott against those consumer items by preventing its members from buying them through any other channel. Where the creation of a central buying agency to negotiate listing agreements is not prohibited, the Competition Authority nevertheless asserted that such entity cannot implement practices affecting competition between suppliers or between retailers. With regard to the practice at hand, it was held that the boycott limited the supplier's access to consumers and violated therefore the competition rules. Abuse of buyer power resulting from a concerted practice was also sanctioned in a case involving a professional organization rallying manufacturers and installers of heating and plumbing devices.[672] In order to limit competition coming from hardware shops, the members of that organization jointly force their suppliers not to supply competitors by threatening them to boycott or delist their products if they did not comply. The object of the practice was clearly anticompetitive as access to the procurement market is essential to compete in the downstream market on an equal playing field.

Those decisions show that the finding of an effect on competition resulting from buyer power practices is rather exceptional. Practices were deemed to be anticompetitive when they restricted suppliers' access to consumers or prevented rivals from buying a particular product. Due to the strict application of the conditions related to the state of dependency and to the restrictive effect on competition, Article L420-2 has rarely been applied to buyers and has never been used to sanction unilateral conduct engaged in by a large retail chain. The notion of economic dependence seems in fact unable to meet the political will which was to protect suppliers against supermarkets' abusive practices.[673] In the nineties, another instrument was therefore implemented to restore the balance in supplier-retailer relationships.

D. COMPETITIVE RESTRICTIVE PRACTICES AND THE DRAWBACKS OF THE *LOI GALLAND*

Alongside the competition rules, the French Commercial Code includes provisions on restrictive practices. Most of those provisions have been introduced in 1996 by the *Loi Galland*[674] in order to overcome the difficulties in enforcing Article L420-2 against large retailers. That legislation was enacted in order to level the playing field in the trading relations between small businesses and the

[671] Décision n°94-D-60 du 13 décembre 94 relative à des pratiques relevées dans le secteur des lessives. See also in the medical sector : Décision n°99-D-01 du 5 janvier 1999 relative à des pratiques mises en œuvre par la société Distri club médical.
[672] Décision n°06-D-03 du 9 mars 2006 relative à des pratiques mises en œuvre dans le secteur des appareils de chauffage, sanitaires, plomberie, climatisation.
[673] M.-L.Allain and C.Chambolle, *op.cit.*, at 10.
[674] Loi n°96-588, 1er juillet 1996, sur la loyauté et l'équilibre des relations commerciales, JORF 3 juillet, p.9983

rapidly growing large retail chains.[675] Where the objective pursued is laudable, some of the rules in question led nevertheless to an adverse impact on competition. We will focus in particular on the rule banning below-cost prices as clarified by the *Loi Galland* and on the effects that such prohibition, combined with a non-discrimination provision, entailed on the markets. Other restrictive practices introduced or modified by subsequent instruments are, for examples, imposing or attempt to impose obligations creating a significant imbalance in the rights and obligations of the parties[676], obtaining conditions that are manifestly abusive by threatening to terminate commercial relations, imposing to automatically benefit from the most favourable terms granted to competitors, imposing retroactive rebates or breaking off commercial relationships without written notice.

1. Prohibition on resale below cost and on discriminatory general terms of sales

Resale below cost in the retail sector is prohibited in France since 1963.[677] However, the unclear definition of the threshold led the French legislator to clarify the rule in the *Loi Galland*. The below-cost prices threshold defined in 1996 corresponds to the "net wholesale price" which is the invoice price. That price includes only rebates vested at the time of purchase. However, other discounts, not mentioned on the invoice, may be granted at the end of the year. The "double net wholesale price" includes conditional rebates which cannot be evaluated at the time of invoicing such as quantity rebates.[678] The"triple net price" is the price effectively paid by the buyer since it takes into account all the rebates mentioned above as well as additional discounts resulting from commercial services offered by the retailer to the supplier. Those services aim at stimulating the resale of the supplier's products and consist, for examples, in placing the products in question at the end-aisle displays or in launching promotional activities. The difference between the net and the triple net prices is called "hidden margin" (*marges arrière*).[679] Under the *Loi Galland*, the hidden margin was hence only benefitting retailers and could not be passed on to final consumers. Any price below the net wholesale price was indeed prohibited. That threshold, combined with the fact that the general

[675] P.Biscourp, X.Boutin & T.Vergé, « The effects of retail regulations on prices : Evidence from the *loi Galland* », INSEE-DESE Discussion Paper G2008/02, at 1, available at: http://www.diw.de/sixcms/detail.php/86155

[676] That provision has been modified by the *Loi de modernisation de l'économie* (Loi n°2008-776, 4 août 2008). Before that modification, the provision in question prohibited abusive exploitation of buyer power or of a state of economic dependence. However, the courts used to refer to the strict criteria established under Article L420-2 as regards anticompetitive abuses of economic dependence. In order to simplify and make the provision more effective, the French legislator enacted the concept of "significant imbalance" which is likely to apply to more practices.

[677] Loi de finances n°63-628 du 2 juillet 1963. Sales below cost are considered as unfair for different reasons. Firstly, large retailers may use such practice to eliminate smaller and specialized competitors. Secondly, sales below price may harm producers. Where a retailer sets very low prices, rivals may suspect their supplier of giving additional advantages to the first retailer and require price reductions. Lastly, such practice may also harm the brand image of a product. See: M.-L.Allain and C.Chambolle, *op.cit.*, at 11.

[678] P.Biscourp, X.Boutin & T.Vergé, *op.cit.*, at 3.

[679] *Ibid.*, at 4.

terms of sales had to be non-discriminatory between the different retailers[680], entailed adverse effects on the markets.

2. Negative impact of the *Loi Galland* on the markets

The enactment of the *Loi Galland* gave rise to many criticisms due to different adverse effects it caused on the markets.[681] Where that instrument was supposed to protect smaller retailers and suppliers, it seems that it failed to achieve that objective and, in addition, was detrimental to consumers.

First of all, as the general terms of sale were transparent and non-discriminatory, collusion on prices between competing suppliers was easier to maintain. Indeed, lower retail prices of a particular brand could only be the result of a deviation by one of the manufacturers involved in the agreement since retailers were forbidden by law to sell below the (agreed) invoice price. Such transparency facilitated the monitoring of the coordinated policy and enabled suppliers to take quickly retaliatory measures against the deviating player.[682]

Secondly, it was maintained that the *Loi Galland* led in fact to minimum resale prices maintenance.[683] Indeed, as retailers were not allowed to resale below cost, the invoice price resulting from the general terms of sales - common to all retailers due to the non-discriminatory principle - constituted *de facto* a minimum price.[684] In addition, the *Loi Galland* enabled suppliers to impose relatively high prices. Indeed, because of the prohibition on discrimination, retailers were not incited to negotiate lower prices as they knew that any reduction would also benefit competitors. They were also guaranteed that the same conditions were imposed on rivals who could therefore not sell products under the same invoice price threshold.[685] Besides, it was pointed out that suppliers could "buy" the

[680] It was nevertheless still possible to obtain different terms of sale on basis of objective criteria such as the characteristics of the distribution channel. The prohibition on discrimination was imposed on suppliers in order to prevent a powerful retailer from obtaining exclusive rebates with the aim of excluding competitors. With regard to arguments in favour or against such prohibition, see: M.-L.Allain, C.Chambolle & T.Vergé, "La loi Galland sur les relations commerciales – Jusqu'où la reformer?", Opuscules du CEPREMAP, 2008, at 51-52.

[681] See : Rapport du groupe d'experts constitué sur les rapports entre industrie et commerce, 2004, available at : http://www.minefi.gouv.fr/directions_services/Tresor_public/fonds_documentaire/minefi/pratique/consommation/rap_canivet.pdf

[682] Avis n°04-A-18 du 18 octobre 2004 relatif à une demande d'avis présentée par l'Union Fédérale des Consommateurs (UFC-Que Choisir) relative aux conditions de la concurrence dans le secteur de la grande distribution non spécialisée, at 45.

[683] Different cases of resale price maintenance were sanctioned. See: Décision n°03-D-45 du 25 septembre 2003 relative aux pratiques mises en œuvre dans le secteur des calculatrices à usage scolaire ; Décision n°05-D-45 du 19 décembre 2005 relative à des pratiques mises en œuvre dans le secteur des vidéocassettes préenregistrées ; Décision n°07-D-50 du 20 décembre 2007 relative à des pratiques mises en œuvre dans le secteur de la distribution des jouets.

[684] M.-L.Allain, C.Chambolle & T.Vergé, *op.cit.*, at 21.

[685] Avis n°04-A-18 du 18 octobre 2004*, op.cit.*, at 38.

retailers' agreement on increased prices through the guaranty of a higher hidden margin.[686] The heart of the negotiation therefore shifted from "upfront margins", namely rebates vested at the time of the invoice, to "hidden margins".[687] Large retailers were allowed to exert buyer power only to their own benefit as they could not integrate additional discounts into the resale below cost threshold.

As a result, intra-brand competition was affected and retail prices were on the rise.[688] The intrusion of regulatory instruments into the business-relationship between retailers and suppliers caused adverse effects to the retail markets in France. In addition, the achievement of the *Loi Galland* objective was not fully ensured since buyer power could still be exercised through the negotiation of hidden margins to the detriment of weaker suppliers and retailers. Noting those drawbacks, the French legislator enacted different reforms in the 2000s.

3. Subsequent modifications of the *Loi Galland*

In 2005, through the *Loi Dutreuil*[689], the threshold for below cost pricing was slightly modified. However, it is only in 2008 that the *Loi Châtel*[690] reduced that threshold to the triple net wholesale price. All financial advantages granted by suppliers to retailers can henceforth be passed on to consumers through lower prices. As regards the prohibition to discriminate, it was lifted the same year by the *Loi de modernisation de l'économie.*[691] Retailers and suppliers can therefore freely negotiate prices and do no longer have to justify any advantage given to one or the other retail chain. The objective is to enhance competition both in the procurement and in the retail markets and to facilitate the passing-on of rebates to consumers.[692]

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[686] *Ibid.*, at 39.
[687] P.Biscourp, X.Boutin & T.Vergé, *op.cit.*, at 2.
[688] Where, between 1996 and 2001, food retail prices were decreasing in most Member States, French consumers were facing a rise in prices in their supermarkets. Food prices were indeed increasing faster than the general consumer price index in France. See: P.Biscourp, X.Boutin & T.Vergé, *op.cit*. That paper provides an empirical evaluation of the effects of the *Loi Galland* and established that the correlation between retail prices and the level of concentration has vanished following the enactment of that legislation confirming that retail chains did no longer compete fiercely. A similar effect was noticed in Ireland where a comparable instrument to the *Loi Galland* (prohibition on resale below cost with the same threshold and prohibition on tariff differentiation) was in force since 1987 (*Grocery Order Act*). That piece of legislation was held responsible for the inflationary spiral and repealed in 2006. See: A.Collins & S.Burt, "Below cost legislation: lessons from the Republic of Ireland", *International Review of Retail Distribution and Consumer Research,* at 33-49 (2011).
[689] Loi n°2005-882, 2 août 2005, en faveur des petites et moyennes entreprises, JO 3 août, p.12639.
[690] Loi n°2008-3, 3 janvier 2008, pour le développement de la concurrence au service des consommateurs, JO 4 janvier, p.258.
[691] Loi n°2008-776, 4 août 2008, de modernisation de l'économie, JO 5 août, p.12471.
[692] OECD, *Monopsony and buyer power,* Policy roundtables, DAF/COMP(2008)38, at 164.

E. OTHER OPTIONS TO ADDRESS THE EXERCISE OF BUYER POWER?

As illustrated by the *Loi Galland,* too strict supervision of supplier-retailer relationships may lead to competition restriction, increase in prices and harm to final consumers. Where the legislator may be entitled, in some circumstances, to take measures in order to protect weaker players on the markets, this cannot be made to the detriment of competition. On that matter, the French competition authority asserted that excessive interventionism in the business relations is likely to weaken the competition process.[693] Different other solutions have therefore been suggested to address the adverse effects that the exercise of buyer power may cause to suppliers, smaller retailers but also to the market structure as a whole.

Firstly, the balance of negotiating power between retailers and suppliers may be improved by reinforcing the latter's position in the upstream market. This is particularly encouraged in the procurement markets for agricultural products where derogations from the competition rules are provided for at EU level. Facing a much concentrated buying side, farmers are allowed, under specific conditions, to group together in producer organizations to offer their products. Such concentration of supply can be achieved by the creation of cooperatives or associations of farmers.[694] In particular, on that matter, the French legislator has enacted new rules imposing on milk producers and processors to contractualise their relationships and allowing the former to negotiate collectively the contract terms and conditions.[695] The French Competition Authority encourages producers to gather

[693] Avis n°00-A-02 du 04 février 2000, *op.cit*., p.10.

[694] Under the status of a cooperative, producers transfer the ownership of their products to the organization. Profits deriving from the cooperative's activity are then shared between farmer members. Under the status of an association, the organization markets the products on behalf of the farmers on basis of a mandate. The selling price is individualized for each producer. Those types of agreements between farmers are concluded in the framework of the common organization of agricultural products in EU law. That legal framework established at EU level provides for common rules concerning, in particular, public intervention in agricultural markets, quota and aid schemes, marketing and production standards, and trade with third countries. See: Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation), OJ L 299, 16 July 2009, p.I-149.

[695] See : Loi n° 2010-874 du 27 juillet 2010 de modernisation de l'agriculture et de la pêche. This act provides that contract agreements can be made compulsory within a sector. In application of that act, a decree declares it compulsory for the dairy industry to propose contracts in writing and provides for compulsory provisions to be included in each contract. (See : Décrets n° 2010-1753 30 décembre 2010 pris pour l'application de l'article L.631-24 du code rural et de la pêche maritime dans le secteur laitier. See also : Décret 2012-512 du 19 avril 2012 relatif à l'organisation économique dans le secteur du lait de vache) Those provisions are in compliance with EU law. See : Regulation (UE) n°261/2012 of the European Parliament and of the Council of 14 March 2012 amending Council Regulation (EC) N°1234/2007 as regards contractual relations in the milk and milk products sector, JO L 94, p.38. The Regulation recognizes the role of producer organizations and authorizes those organizations, under some conditions, to negotiate collectively contracts terms with processors, including the price of raw milk. However, it is worth noting that the French legislation which provides that delivery of raw milk must be covered by a written contract has been adopted before the entry into force of the EU Regulation.

in order to strengthen their bargaining weight when negotiating with large buyers.[696] However, it also recognized that such derogations from the competition rules are justified by the economic specificities of the agricultural markets and could therefore not be extended to other sectors.[697]

Secondly, the oligopolistic and oligopsonistic position of large retail chains, which creates the imbalance of power, may be fought by lessening entry barriers in the French retail sector. Since 1963, competition in that sector has been hindered by different pieces of legislation introducing structural regulatory barriers to entry.[698] As such, the *Loi Royer*[699] introduced a mandatory retail permit for stores over 1000 m^2. In 1996, those planning restrictions were reinforced by the *Loi Raffarin*[700] which reduced the threshold to 300 m^2. The objective of such regulation was to protect smaller retailers by preventing an excessive development of big box stores. However, the limitation of new retailers' entry has insulated existing big supermarkets from competitive pressures coming from the potential setting up of new players. In addition, the strict conditions imposed on the opening or extension of retail outlets led powerful retailers to develop their business through the buyout of other stores. The strong position of leading players was therefore protected and even reinforced both in the retail and in the procurement markets.[701] In 2008, to reintroduce competitive pressures in the retail sector but also to comply with EU legislation on the internal market[702], the *Loi de modernisation de l'économie*[703] raised the threshold to its former level so that retail outlets up to 1000 m^2 may be established without restrictions. The objective is therefore to restore competition dynamics in the

[696] See : Avis n° 08-A-07 du 7 mai 2008 relatif à l'organisation économique de la filière fruits et légumes and Avis n° 09-A-48 du 2 octobre 2009 relatif au fonctionnement du secteur laitier. In order to improve the situation of farmers and to protect them against the price volatility of agricultural products, the French competition authority also encourages the contractualisation of the relationships between producers and their customers. However, it raised some criticisms with regard to two projects of decrees relating to that matter. Those criticisms mainly concerned the term of the contract as well as the characteristics of the mandatory volume and price clauses. See: Avis n°10-A-28 du 13 décembre 2010 relatif à deux projets de décret imposant la contractualisation dans des secteurs agricoles. As mentioned above, the contractualisation in the agricultural sector was enacted in the *Loi de modernisation de l'agriculture et de la pêche* (loi n°2010-874 du 27 juillet 2010) with the laudable objective of balancing the relations of power between producers and their customers, especially retailers.

[697] Avis n° 08-A-07 du 7 mai 2008, *op.cit.*, at 79.

[698] To these regulatory barriers may be added other types of barriers which make entry of new rivals more difficult such as huge investment requirements, high customer loyalty, large retailers' buyer power, etc.

[699] Loi n° 73-1193 du 27 décembre 1973 d'orientation du commerce et de l'artisanat.

[700] Loi n° 96-603 du 5 juillet 1996 relative au développement et à la promotion du commerce et de l'artisanat. For more details on the Loi Royer and the Loi Raffarin, see : M.-L.Allain and C.Chambolle, *op.cit.,* at 20-21.

[701] OECD, *Monopsony and buyer power,* Policy roundtables, DAF/COMP(2008)38, at 164.

[702] According to the Commission, the authorisation process to acquire the permit was not based on precise and objective criteria. The legislation in force was considered as contrary to the freedom of establishment. See: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1794&format=HTML&aged=0&language=FR&guiLanguage=fr

[703] Loi n°2008-776, 4 août 2008, de modernisation de l'économie, JO 5 août, p.12471. See on that new instrument : A.Grabay-Grobesco, « La loi de modernisation de l'économie et la nouvelle réforme du droit de l'urbanisme commercial », *RDI*, 2008, p.470-487.

retail sector characterized by significant concentration at the national but also and particularly at the local level.[704] Due to the close link between market power in the selling market and buyer power in the procurement market, a lower degree of concentration in the retail sector is likely to also have a positive impact in retailer-supplier relationships.

The third avenue to address the issue of buyer power is to supervise retailers' conduct under the competition rules on basis of a new approach as regards the effects on competition. Currently, unequal share of profits in supplier-retailer relations is deemed not to come within the competence of competition authorities since this does not restrict competition, at least in the short-term. The competitive process leads indeed some market participants to suffer loss or to exit a market. Due to the development of new techniques, products or to a change in consumer tastes, some producers may indeed show a lesser degree of innovation or adaptation and, consequently, face financial difficulties or even be forced to leave the market. That process is yet part of a well-functioning competitive market.

However, the French competition authority has nevertheless pointed out in an opinion on the fruit and vegetable sector that the weakening of upstream suppliers through the exercise of excessive buyer power is likely, in the medium-term, to reduce diversity and choice on the markets and thereby to affect consumer welfare.[705] Some large retailers' practices may indeed affect suppliers'

[704] On the local retail concentration, see : Avis n°12-A-01 du 11 janvier 2012 relatif à la situation concurrentielle dans le secteur de la distribution alimentaire à Paris. In this opinion, the French competition authority addressed the issue of food retail concentration in Paris. It noted that the retail chain *Casino* represents 60% of the food retail stores in Paris and, in 22% of the city territory, the only food outlets that inhabitants can found at less than 300m from home belong to the *Casino* group. According to the Authority, lowering entry barriers is probably not enough to modify the market structure in the food retail sector. It recommends the reinforcement of e*x ante* supervision through the concentration policy as well as e*x post* supervision of market structures. On that last issue, a direct and immediate action on the structures could be deemed necessary to enable new players to entry the market and to reduce the weight of existing large retailers. The French competition authority is allowed to impose remedies of a structural nature, such as the selling of some stores, but only in the framework of anticompetitive abusive conduct. As such, Article L752-26 of the Commercial Code stipulates that "in the event of the abuse of a dominant position or of a state of economic dependence by a company or group of companies operating one or more retail outlets, the French competition authority may have recourse to the injunctions and financial penalties provided for in article L. 464-2. If such injunctions as are issued and such financial penalties as are set do not result in an end being put to said abuse of a dominant position or said state of economic dependence, the French competition authority may, by means of a reasoned decision made after cognizance has been taken of any observations made by the company or group of companies concerned, enjoin the latter to modify, supplement or terminate, within a given time limit, all agreements and all deeds by means of which the economic power enabling the aforementioned abuse to occur was obtained. The French competition authority may likewise enjoin the company or group of companies concerned to divest themselves of retail outlets if such divestment is deemed to be the only means of ensuring a sufficient degree of actual competition in the catchment area concerned". In order to impose such structural remedies, it is therefore necessary to get through the difficulties of establishing abuse of a dominant position or of a state of economic dependence and the abuse must be found to have continued despite a decision of the French Authority condemning it.

[705] See : Avis n° 08-A-07 du 7 mai 2008*, op.cit.*, at 12.

capacity to invest and innovate or may, in some cases, threaten their viability. The exercise of buyer power may therefore lead to a higher degree of concentration in the upstream markets and a reduction in product variety and quality.[706] In order to prevent such adverse effects on competition, it is suggested to adopt a broader view of buyer power potential consequences on the markets. Anticipating the long-term impact of a buyer's conduct on the competition structure should be part of the assessment. The application of the competition rules on retailers when acting in the procurement market would therefore imply a reconsideration of the strict conditions of Article L420-2 with regard to the criteria relating to both the state of economic dependence and the effects on competition. However, we cannot but notice that rethinking the enforcement of the provisions on abusive conducts to address the issue of buyer power is not in the French legislative agenda.

F. CONCLUSIVE REMARKS

It is undeniable that the political will in France is to fight against supermarkets' excessive buyer power and to protect consumers against the negative effects of excessive concentration in the retail sector. However, the various legislative measures attesting such willingness seem to have missed their aim. The innovative concept of abuse of a state of economic dependence has indeed never been applied in a case involving powerful retail chains. Except when an anticompetitive agreement is established, large supermarkets are in fact insulated from the application of the competition rules when acting on the buying side. The narrow definition of the condition of economic dependence as well as the focus on the direct and immediate effects of the challenged practices on competition prevents the French Competition Authority from effectively enforcing the rules in question.

As regards the rules on restrictive practices, different adverse effects have been noted following their enactment. Intervention in the trading relations may indeed lead to restrictions of competition and higher consumer prices, as exemplified by the *Loi Galland*. In addition, the sharp increase in hidden margins which resulted from the new definition of the resale below cost threshold shows that powerful players on the markets have been able to circumvent the rules so that they could continue exercising their buyer power but through a different channel. Most practices prohibited under the Commercial Code, such as imposing retroactive rebates or other unjustified fees on suppliers, are still commonly used by large retail chains even though they are not formally included in contracts. However, fear of delisting dissuades suppliers from complaining and the Ministry of Economy probably lacks sufficient means of investigation to act against every infringement.

The basic principle should therefore remain the freedom of the parties to negotiate. Action against supermarkets must be carried out only when their conduct is likely to affect the competition process.

[706] F.Bergès-Sennou and S.Caprice, *op.cit.*, at 10.

This must include a strict *a priori* control over the creation of central buying agencies and a close *a posteriori* supervision of retailers' practices in the upstream market. Restricting competitors' access to the procurement market, through exclusivity obligations imposed on suppliers for example, must as such be prohibited as well as any conduct which may affect, in the longer-term, effective competition or product variety/diversity offered to consumers. Such broader view would remedy some of the limits encountered in France as regards effective supervision of supermarkets' buyer power. Competition policy is likely to be applied to every player acting within the food supply chain and may, in some cases, contribute to restoring more balanced relationships between suppliers and retailers when the latter's practices also affect effective competition on the markets. In view of the level of the fines provided for under the competition rules, the threat of their enforcement may be in addition much more dissuasive than the possible sanctions under the rules on restrictive practices.

Choosing suitable instruments to tackle buyer power problems is hence not an insignificant issue. France is still swinging between the competition rules and the rules on restrictive practices to address supermarket chains' growing power. That choice may yet be crucial to ensure a well-functioning competitive market. Direct intervention into the business relations of market participants through contractual rules may turn out to be ineffective to solve unbalanced-relationship problems and lead, in addition, to the creation of competition distortions. Such an approach is therefore very likely to call for continuous legislative changes, a problem to which France is not unfamiliar.

SECTION 2 - BUYER POWER IN THE UNITED KINGDOM

The UK Competition Authorities are dealing with the issue of buyer power from different angles. On the one hand, they do not exclude using the general competition rules to sanction abusive conduct of a dominant buyer. On the other hand, they have contributed to the introduction of specific measures to address buyer power in a particular sector, namely the grocery retailing industry. Each set of rules aims at protecting effective competition on the markets but relies on different conditions to be enforced. The specific measures applying to large supermarkets have been introduced following a market investigation into the retail sector which revealed anticompetitive exercise of buyer power. To eliminate those harmful practices in the upstream markets and discipline supermarkets' behaviour, a code of conduct has been draft. However, it appears some years later that the code was rather ineffective and suppliers still subjected to abusive practices. The UK Competition Authorities did not yet give up the code but decided rather to modify it in order to deal more effectively with some specific concerns.

We will first examine the different cases dealt with under the general competition rules. The second part will focus on the grocery retailing sector and on the conclusions drawn from the different investigations carried out in that sector. This includes a description of the practices used by large supermarkets towards their suppliers, of their harmful impact on the markets as well as of the remedial actions implemented to address the adverse effects of buyer power. The last part will assess the effectiveness of a code of practice in tackling those buyer power concerns compared with the general competition rules.

A. COMPETITION RULES APPLIED TO BUYER POWER CASES

The laws on anticompetitive behavior under the UK Competition Act are similar to Article 101 and 102 TFEU in EU law. As such, are prohibited anticompetitive agreements between businesses[707] and abuse of a dominant position[708]. The UK Competition Authority has dealt with a few cases on alleged abuses of buyer power but has never reached the conclusion that the practices invoked were anticompetitive. Two decisions illustrate how the competitive rules are applied to buyers' conduct.

[707] Competition Act 1998 (CA98), Chapter I.
[708] Competition Act, Chapter II.

1. *BetterCare Case*

In the *Bettercare* case[709], an organisation providing health and social services (the North & West Belfast Health and Social Services Trust) was accused of abusing its dominant position as the sole purchaser of residential and nursing home care services from the BetterCare Group, by offering excessively low contract prices and unfair terms. It was held that the public body in question was carrying out an economic activity and was as such an undertaking subject to the competition rules.[710] On the issue of the alleged abusive practices, the British Competition Authority, the Office of Fair Trading (OFT), ruled that charging excessively low purchases prices is only likely to constitute an abuse of a dominant position in exceptional circumstances. It added that

> "in the absence of barriers to exit by suppliers from the relevant market, a purchaser which paid excessively low prices would be unable to obtain supply beyond the short term even if it was a monopsonist. (...) Excessively low purchase prices will normally be self-correcting and would not, absent price discrimination, usually justify action".[711]

Considering that no exceptional circumstances arose in that case, the OFT found that the organisation had not abused a dominant position.

2. *British Airways* Case

The *British Airways* case[712] resulted from a complaint by the Association of British Travel Agents (ABTA) concerning British Airways (BA)' alleged abuse of buyer power. The association claimed that

[709] Decision of the Office of Fair Trading No CA/98/09/2003, *BetterCare Group Ltd/North and West Belfast Health & Social Services Trust* (remitted case), 18 December 2003, Case no CE/1836-02.

[710] In a first decision, the Office of Fair Trading (OFT) considered that, in the circumstances at hand, the Trust was not an undertaking for the purpose of the Competition Act. See: *North & West Belfast Health and Social Services Trust,* 30 April 2002, [2002] UKCLR 428. That decision was, however, reversed on appeal by the Competition Appeal Tribunal (CAT) which held that the public body in question was indeed an undertaking. See: Competition Commission Appeal Tribunal, *BetterCare Group limited v DGFT,* Case No 1006/2/1/01, 1st August 2002. The case was hence remitted to the OFT to address the issue of the alleged abusive conduct. The decision of the CAT in fact contrasted with the FENIN case dealt with at the EU level. In that case, the Commission and the European Courts concluded that, where an organization purchases goods in order to use them in the context of an activity of a purely social nature, it does not carry on an economic activity and does consequently not act as an undertaking. See: *Fenin/SNS+Spain*, Case No IV.F.1./36.834, The decision of the EU Commission was upheld on appeal. See: Case T-319/99, *Fenin v Commission,* [2003] ECR II-357 and Case C-205/03, *Fenin v Commission* [2006] ECR I-6295. (On the FENIN case, see: Chapter 1, Section I, Point B.2.a)i) In the light of the legal development at EU level on the test to determine the existence of an economic activity, the Office of Fair Trading drafted a note on the circumstances in which a public body engaging in purchasing may or may not be considered to be an undertaking. On basis of that document, it emerges that the OFT will henceforth stick to the interpretation given by the EU institutions. See: OFT, The Competition Act 1998 and public bodies, Policy note 1/2004, August 2004.

[711] OFT Decision, *BetterCare, op.cit.,* at 56.

[712] Decision of the Director General of FairTrading No CA98/19/2002, *The Association of British Agents and British Airways plc,* 11 December 2002, Case CE/1471/02.

BA, which was a dominant purchaser of air travel agency services[713], abused its position by making excessively low booking payments that did not cover travel agents' costs. In its assessment, the UK Competition Authority did not exclude that excessive low prices might constitute abuse of a dominant position.[714] However, in this case, the allegation of abuse was rejected. Even though BA held a dominant position as a buyer of travel agency services, the Director of Fair Trading considered that:

> "BA is [not] obliged obliged, simply by virtue of any market power that it may have as a buyer of travel agency services, to make booking payments to travel agents that cover the full cost they incur in issuing tickets since travel agents can supplement their income by charging service fees."[715]

It is worth noting that a case involving similar parties was dealt by the Irish Competition Authority. In *Reduction In Travel Agent Commissions By Aer Lingus plc*[716], a complaint that Aer Lingus was abusing its dominant position by reducing travel agent commissions was rejected. Considering that the decrease in price did not affect either consumers or the competitive process, the Competition Authority added that:

> "For the exercise of any monopsony power that Aer Lingus might have to be harmful, this requires that it must be correlated with market power on the seller side. Specifically, a firm with market power on both sides can reduce the price it pays for inputs – the services of travel agents – in order to reduce overall supply of airline tickets sold so that prices to the consumer can be raised."[717]

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[713] To conclude to the dominant position of BA in the procurement market for travel agency services, ABTA referred to the Commission's conclusion on that matter in the *Virgin/British Airways* decision. See: Case IV/D-2/34.780, *Virgin/British Airways,* OJ [2000] L 30/1, upheld on appeal to the CFI: Case T-219/99, *British Airways plc v Commission of the European Communities*, [2003] ECR II-5917. The UK Competition Authority nevertheless asserted that the competitive conditions in a market change over time and that the market and the players' position must therefore always "be defined in any particular case by reference to the facts prevailing at the time and not simply be reference to precedents". In this case, given the findings on the allegedly abusive behavior of BA, the Competition Authority did not find necessary to consider further whether BA has or not a dominant position in the relevant market.

[714] The Competition Authority referred to the case *CICCE v Commission* in which the Court of Justice asserted that imposing excessively low prices is in principle capable of constituting an infringement of Article 102 TFEU. See: Case 298/83, *CICCE v Commission,* [1985] ECR 1105.

[715] Decision No CA98/19/2002, *op.cit.,* at 37. The UK Competition Authority considered that whether consumers are charged an inclusive price by airlines, from which travel agents receive a payment, or a price for the fare plus a service fee to cover the booking costs, the end price to customers and the income received by travel agents is the same

[716] Irish Competition Authority Decision, *Reduction In Travel Agent Commissions By Aer Lingus plc.,* Case COM/15/02, 10 June 2003.

[717] *Ibid.,* at 2.13.

Again in this last decision, a double abuses requirement seems to be applied. A particular buyer's conduct might only be viewed as abusive if combined with another abusive behavior on the selling side. Instead of referring to double abuses of buyer power, the Irish Competition Authority imposes a combination between an abuse on the buying side and an abuse on the selling side. Should buyer power abuses only be sanctioned in conjunction with seller-side abusive conduct, one can only wonder what the purpose of the notion of buyer power is.[718] Such an interpretation of abuses on the buying side would in fact be more lenient than the terms of the Treaty and, as a result, contrary to EU law so far as the conduct affects trade between Member States.[719] Indeed, national authorities are not precluded from applying stricter national laws which prohibit unilateral conduct but are required to apply the prohibitions laid down in the Treaty. In this regard, Article 102(2)(a) TFEU states that an abuse may consist in, for example, "directly or indirectly imposing unfair purchase **or** selling prices or unfair trading conditions".[720] Excessively low prices or other anticompetitive buying conduct may therefore constitute an abuse in itself, even if not combined with abusive behavior in the downstream market.

In view of those decisions, one may conclude that the UK Competition Authority is not reluctant to address the issue of buyers' market power but that the number of cases involving that issue remains very limited. In addition to the general rules on abusive conduct, action has been taken in the UK to deal with supermarkets' buyer power. The growing concerns arising from the use of some practices in the concentrated grocery retailing sector indeed compel the UK Authorities to decide on new measures in order to ensure effective supervision of retailers' conduct.

B. SPECIFIC APPROACH TO ADDRESS SUPERMARKETS' BUYER POWER

The high degree of concentration in the UK grocery retailing, where four large supermarkets have three quarters of the market, led the authorities to investigate into that sector.[721] The Competition Commission (CC) delivered two reports, in 2000 and 2008, on retailers' practices used, both in the downstream markets, as regards consumers and smaller rivals, and in the upstream markets, as regards suppliers. Where the CC found, in many respects, that the different markets were competitive and offered a good deal for consumers, it nevertheless objected to certain anticompetitive practices deriving from the exercise of buyer power.

[718] R.O'DONOGHUE & J.PADILLA, *The law and economics of Article 82 EC,* 2006*,* at 645.
[719] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty(Text with EEA relevance), O.J. L 1/1 of 04/01/2003, Article 3(2).
[720] Emphasis added.
[721] Concerning the degree of concentration in the UK groceries market and the practices used by large supermarket chains, see: P.W.Dobson & R.Chakraborty, *Buyer power in the UK groceries market,* 53 The Antitrust Bulletin 333 (2008)

1. First investigation and conclusions on supermarkets' buyer power[722]

The first major inquiry concerning the UK grocery market was completed in 2000 and led to new measures in order to regulate the relationships between the four largest supermarkets and their suppliers.[723]

a) Why an investigation in the food retail sector?

The principal responsibility of enforcing competition law in the UK lies with the Office of Fair Trading (OFT) and the Competition Commission (CC). In order to help ensure healthy competition between companies, the former may refer an in-depth investigation into markets to the latter if it is concerned about potential competition problems.[724] The CC is then required to decide whether any feature or combination of features in the market in question prevents, restricts or distorts competition and, if need be, to introduce remedies. The 2000 investigation in the grocery retailing[725] found its origin in a public perception that the prices of many consumer goods tended to be higher in the UK than in other Member States and in the United States as well as in criticisms as regards an apparent disparity between farm-gate and retail prices.[726] The OFT launched an initial investigation in 1998 and identified additional concerns about different issues, including the relationship between supermarkets and their suppliers. This, in turn, led the Director General of Fair Trading to refer to the CC in April 1999 for investigation.

b) Findings of the Competition Commission

In October 2000, the CC gave its final report. As regards price trends, based on international comparisons, it was concluded that UK grocery retailers were not acting in an anti-competitive manner and that cost reductions at the farm gate were being reflected in retail prices charged to consumers. Where there had not, higher prices were generally justified by cost increases elsewhere in the food supply chain.[727] However, the CC found that two groups of practices carried out by supermarkets operated against the public interest.[728]

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[722] Competition Commission, *Supermarkets – A report on the supply of groceries from multiple stores in the United Kingdom,* October 2000.

[723] On the first market investigation, see for examples : G.Mills, *Buyer power of supermarkets,* 10 Agenda 145 (2003); P.W.Dobson, *Exploiting Buyer Power: Lessons from the British Grocery Trade,* 72 Antitrust Law Journal 529 (2005)

[724] Enterprise Act 2002, Section 131. For more details on UK competition authorities, see : http://www.competition-commission.org.uk and http://www.oft.gov.uk

[725] In the terms of reference from the OFT, « groceries » included food and drink, cleaning products, toiletries and household goods.

[726] Report 2000, at 2.5.

[727] Report 2000, at 2.84 to 2.117 and at 2.140 to 2.161.

[728] The CC also considered that considerable barriers to entry existed, not just because of the existing strength of the incumbents in a market but also because of the limitations on acquisitions of sites from planning legislation. See: Report 2000, 2.162 to 2.212.

i. Practices carried out in the downstream market

The first group of practices concerned pricing behavior of large retailers in the downstream market. Persistent below-cost selling was considered as distorting competition and damaging smaller retailers.[729] The CC also asserted that price flexing, namely varying prices in different geographic locations, operated against the public interest.[730] Yet, no remedial action was recommended for this group of practices. Indeed, given the adverse effects of legislation on resale below cost noted in some countries, including in France and in Ireland, and the difficulties presented by other suggested measures, the CC decided to make no recommendation for remedial action in respect of persistent below-cost selling.[731] In light of the general finding that the market was competitive and consistent with its duty to ensure that any intervention in a market must be proportionate, the CC recommended no remedy either for identified problems deriving from price flexing.[732]

ii. Practices carried out in the upstream market

The second group of practices was related to the conduct of large retail chains towards their suppliers. The CC received many allegations about large retailers' malpractices from suppliers. However, almost all complainants, including large suppliers, were reluctant to give detailed information or to name the supermarkets involved in the practices in question. The main reason of this reluctance was the fear of being delisted by one of those large customers or being subject to worse terms of supply.[733] A questionnaire was also sent to the main retailers in order to collect further information on practices they were engaged in.[734] On the outcome of the investigation, the CC drew different conclusions concerning the relationship between large supermarkets and their suppliers.

To determine the existence of buyer power in the food retail industry, various elements were taken into consideration. Retailers' power was assessed on basis of their volume of purchases, their buying conditions and the degree of dependency of their suppliers. On basis of those factors, the CC considered that any supermarket with more than an 8 percent share of grocery purchases for resale from its stores enjoyed buyer power in the UK. At the time of the investigation, five retailers held such a market share, namely Asda, Safeway, Sainsbury, Somerfield and Tesco. All the practices

[729] Report 2000, 2.377 to 2.393.
[730] *Ibid.*, at 2.394 to 3.409.
[731] *Ibid.*, at 2.558 to 2.565.
[732] *Ibid.*, at 2.566 to 2.577.
[733] *Ibid.*, at 2.437.
[734] The questionnaire included a list of 52 alleged practices and retailers were asked to tell the CC which of them they had engaged in during the last five years.

invoked were examined only with regard to those five players since, without buyer power, retailers' conduct is unlikely to prevent, restrict or distort competition.[735]

The CC reached the conclusion that some practices prevent, restrict or distort competition when carried out by retailers that have buyer power. That conclusion was based on a thorough assessment weighing up the specific benefits of each practice against their adverse effects. On balance, 27 practices were considered to be against the public interest. Among them, we can mention for examples, requiring various non-cost-related payments or discounts, sometimes retrospectively, requiring a supplier to buy back unsold items, requiring compensation when the retailer's profit on a product turns out to be less than it had expected, delaying payments beyond the terms in the contracts, unreasonably transferring risks to the supplier and other various unilateral changes to prices and to related contractual terms.[736]

Concerning the effects of those practices, the CC asserted that suppliers were the most affected by such exercise of buyer power. Facing decreasing prices and additional costs, suppliers were viewed as less likely to invest in new product development and innovation. In the longer term, large retailers' practices could even force smaller suppliers to leave the market. As a result of this process, the CC underlined the risk that consumer product quality and choice could be reduced.[737] Besides, it was pointed out in the report that some of the practices mentioned above also distorted competition between retailers. Since the largest supermarket chains use their buyer power to extract more favourable terms, they enjoy, as a result, a significant advantage over smaller rivals in the downstream market. In some cases, this could therefore contribute to ousting small retailers from the market place. As a knock-on effect on consumers, the CC put forward the risk of higher prices and reduced choice of retail store.[738]

In order to remedy the adverse effects resulting from the identified practices used in the upstream market, a Code of practice governing the relationship between powerful retailers and their suppliers was recommended.[739]

c) Solution suggested: Code of practice

The CC considered that the most effective way of addressing buyer power adverse effects would be a code of practice imposed on large retailers. It was recommended that any supermarket holding a

[735] Report 2000, at 2.439 to 2.459.
[736] *Ibid.*, at 2.460 to 2.536.
[737] *Ibid.*, at 2.543.
[738] *Ibid.*, at 2.544.
[739] A code of buying practice in response to supplier complaints about supermarkets conduct has also been established in Australia. For a comparative analysis, See: G.Mills, "Buyer power of Supermarkets", *Agenda,* 145-162 (2003).

market share of 8 percent in the upstream market should be required to give undertakings to comply with the Code. Designed to meet the concerns pointed out in the report, the Code should also include provisions for independent dispute resolution.[740] After consulting the supermarkets and representatives of suppliers, the OFT drafted the *Code of Practice on Supermarkets' Dealings with Suppliers.* The four companies meeting the 8 percent threshold signed undertakings in December 2001.[741]

During the drafting of the code, it was agreed not to intervene excessively within the supplier-retailer business-relationships. It was indeed considered that

> "[It is] legitimate for supermarkets to compete vigorously for supplies on terms that provide good value in respect of price, quality and other characteristics that their customers desire. That is an important aspect of competition between retailers, and competition between them in turn brings benefit to, and is ultimately driven by the demands of, the general public as consumers."[742]

The OFT did not want the code to be overly prescriptive in order not to deter collaborative arrangements which yield mutual benefit. As such, it was decided that the wording of the code could not inhibit significantly retailers' freedom of negotiation.[743] A degree of flexibility in the application of the code was therefore left by the use of the term "reasonableness". Supermarkets were permitted to seek payments or other contributions as well as make changes to agreements in order to respond to competition provided their requests were "reasonable". Basically, the following provisions were included in the text: Terms of business to be available in writing, no retrospective reduction in price without Reasonable Notice, no promotions without Reasonable Notice, no change to supply chain procedures without Reasonable Notice or compensation, no unjustified payment for consumer complaints, no tying third party goods and services for payment, obligatory training for buyers, compliance and dispute resolution.

As regards the dispute resolution mechanism, when a supermarket and a supplier could not themselves resolve a dispute arising under the terms of the code within 90 days, it was provided that

[740] Report 2000, at 2.578 to 2.618.
[741] The code came into force on 17 March 2002 and applied only to contracts between supermarkets and suppliers that were signed on or after 1 November 2001. The four companies subject to the code were Asda, Safeway, Sainsbury and Tesco. By the time the report was published, the market share of Somerfield had fallen below eight per cent. The authorities hoped that the principles in the code would also be adopted voluntarily by other traders within the food supply chain.
[742] OFT, *Supermarkets: The code of practice and other competition issues*, March 2005, at 3.33.
[743] OFT, *The supermarkets code of practice – Report on the review of the operation of the code of practice in the undertakings given by Tesco, Asda, Sainsbury and Safeway to the Secretary of State for Trade and Industry on 18 December 2001*, February 2004, at 3.5.

the former would, at its own expense, offer the services of a mediator to assist. If a mediation had failed, the supermarket was required to give notice to the Director of the OFT.[744]

The code was expected to put relations between supermarkets and their suppliers on a clearer and more predictable basis and as such to effectively address anticompetitive concerns raised by the CC about some retailers' practices. However, responding to retailers' buyer power through a code of conduct has proved not to be working as intended and led the UK authorities to look again into that issue a few years later.

2. Second investigation and conclusions on supermarkets' buyer power

Following the implementation of the code, the OFT was committed to reporting the level of compliance with it and whether it was working as expected. Some concerns about the code's effectiveness led to a second investigation into the grocery market and a new code of conduct.

a) Supervision of the enforcement of the Code

In 2003, the OFT carried out a review of the code and consulted suppliers in order to know how individual supermarkets were operating under the code.[745] That consultation exercise revealed a widespread belief that the new measures were not working effectively. Suppliers alleged breaches of provisions of the code and considered that the fundamental imbalance of negotiating strength between them and supermarkets still remained. Where the code had not changed the dealings with large retailers for the majority of suppliers, some reported that matters had even worsened since the publication of the 2000 CC report.[746] However, none of the respondents provided detailed information and were very sensitive about confidentiality. Such climate of apprehension among both small and large suppliers made hence it hard for the OFT to identify key problems and formulate solutions. The principal reason of that lack of cooperation was the fear of the supermarkets worsening the terms of business or cutting off business to those which had complained.[747] This also explained the absence of cases being taken to mediation.[748] The wide use of the term "reasonableness" in the code added greatly to the fear of complaining because suppliers considered

[744] Code of Practice on Supermarkets' Dealings with Suppliers, part 8.
[745] OFT, The supermarkets code of practice – Report on the review of the operation of the code of practice in the undertakings given by Tesco, Asda, Sainsbury and Safeway to the Secretary of State for Trade and Industry on 18 December 2001, February 2004.
[746] OFT, The supermarkets code of practice, *op.cit.,* 5.8. See also: A.Hollingsworth, *Increasing Retail Concentration,* 106 British Food Journal 629 (2004)
[747] OFT, The supermarkets code of practice, *op.cit.,*at 7.9. The OFT had no doubt that such fear is genuine but did not receive any substantive evidence of those practices.
[748] OFT, The supermarkets code of practice, *op.cit.,* at 5.24 to 5.27.

that there was a high risk that the retailer's definition of that concept would prevail to their detriment.[749]

Suppliers' fear of complaining forced the OFT to find alternative sources of information. It was hence decided to commission an audit of the supermarkets' dealings with their suppliers.[750] The auditors' report indicated some breaches of the code but, since they were relatively minor in nature and that no complaints were made about them, it was held that no formal action was needed.[751] The OFT concluded that the main reason for the perceived ineffectiveness of the code was the retailers' fear of complaining. According to it,

> "No code can be effective in dealing with allegations of breaches unless evidence of those breaches comes forward".[752]

As far as suppliers were not prepared to assert their rights under the code, it was considered that varying the rules or drafting them more rigorously would not improve the situation.[753] Suppliers and trade associations were rather encouraged to report alleged no compliance with the code and to use the dispute resolution procedure in the code.[754] The OFT repeated that its overall goal was to make markets work well for consumers. In assessing the necessity to act on any ineffectiveness of the code, the benefits of competitive relationships between supermarkets and their suppliers are hence also to be examined. In this respect, the OFT found that the market at retail level was broadly competitive and that further intervention in retailer-supplier relations was not recommended at this point.[755]

However, following the OFT decision to let the code unchanged, pressure was exercised by the Association of Convenience Stores. In May 2006, the OFT finally withdrew its decision and referred the supply of groceries by retailers in the UK to the CC for investigation.

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[749] *Ibid.,* at 5.21 to 5.23. It was expected that the definition of reasonableness would be refined by the use of the mediation process but this not happened.
[750] OFT, Supermarkets : The code of practice and other competition issues, March 2005. Each of the four supermarkets that had given undertakings was audited. In each case, a sample of the supply agreements entered into over a time period was examined, covering both smaller and larger suppliers.
[751] *Ibid.*, at 3.15 to 3.17.
[752] *Ibid.*, March 2005, at 3.30.
[753] OFT, The supermarkets code of practice – Report on the review of the operation of the code of practice in the undertakings given by Tesco, Asda, Sainsbury and Safeway to the Secretary of State for Trade and Industry on 18 December 2001, February 2004, 2.10.
[754] OFT, Supermarkets : The code of practice and other competition issues, March 2005, at 3.18.
[755] *Ibid.*, at 3.25.

b) Results of the second investigation

In April 2008, the CC published its final report in its inquiry into UK groceries retailing.[756] Five different issues were addressed in that report: potential distortion in competition between grocery retailers, concentration in local markets for grocery retailing, barriers to entry and expansion for grocery retailing, coordination between grocery retailers and exercise of buyer power by certain grocery retailers. In many respects, the CC concluded that supermarkets in the UK were delivering good outcomes for consumers such as choice, value, innovation and convenience. However, The CC found a feature or a combination of features which prevent, restrict or distort competition as regards, on the one hand, the strong position of several grocery retailers in a number of local markets and, on the other hand, some supermarkets' practices used towards suppliers.[757] We will focus on that last issue.

It was held that the exercise of buyer power may have a positive impact on consumers, especially when it counteracts supplier market power.

> "In general, the exercise of buyer power by grocery retailers is likely to have positive implications for consumers. Where competition between grocery retailers is effective, retailers will pass on to consumers a substantial portion of the lower prices that they obtain from suppliers through the exercise of buyer power. Grocery retailers' buyer power may also act as a countervailing force to any market power possessed by suppliers. In addition, the exercise of buyer power can spur innovation in the supply chain."[758]

However, the CC recognized that some practices used by powerful supermarkets, if left unchecked, might also harm consumers.

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[756] Competition Commission, The supply of groceries in the UK – Market investigation, 30 April 2008. On that second investigation, see: P.Davis & A.Reilly, *The UK Competition Commission's Groceries Market Investigation: Market Power, Market Outcomes and Remedies,* Presented at the 27th International Association of Agricultural Economists Conference, Beijing, August 2009.

[757] Concerning the impact of large grocery retailer store entry on convenience stores and specialist grocery stores, the CC found that the concerns examined about competition distortions were not substantiated. A decline in the number of smaller grocery stores was deemed not to be conclusive evidence of competition distortion. Better purchasing conditions obtained by large supermarkets may be explained by scale benefits and by their greater buyer power. The CC did not find that the differences in supplier prices would be likely, in themselves, to entail anticompetitive effects. As regards the potential waterbed effect, that is suppliers charging higher prices to smaller retailers in order to compensate lower prices offered to powerful supermarkets, it was held that the circumstances under which such an effect would occur were unlikely to arise in the UK grocery retailing. Even though competing with large retailers is difficult, the CC found that smaller retailers were not in terminal decline and that vigorous competition entailed significant benefits. For more details on that issue, See: Report 2008, at 5.12 to 7.36.

[758] Report 2008, at 9.4.

> "The exercise of buyer power by grocery retailers may, however, raise concerns in certain limited circumstances if it allows retailers to impose excessive risks and unexpected costs on suppliers, which reduces suppliers' incentive or ability to invest and innovate. This could lead to reduced capacity, reduced product quality and fewer new product offerings, and ultimately, to a detriment to consumers."[759]

The emphasis was in fact put on practices implying the transfer of excessive risks or unexpected costs to suppliers that may affect their willingness to invest in new products, capacity or production processes. In particular, retrospective changes to previously agreed terms of supply in favour of retailers, such as requirement for price adjustment or promotions, are source of uncertainty and add costs/risks to suppliers.[760] As a result, they become unable to foresee those additional burdens and to accurately calculate the degree of risk and the likely returns of making an investment. The CC asserted that the reluctance of suppliers to launch new projects risks leading, in the longer-term, to reduced choice and product quality for consumers.[761] In addition to retrospective adjustments of supply arrangements, the transfer of excessive risks, even agreed up-front between a retailer and a supplier, was also pointed out as leading to detrimental effects, especially where such a transfer creates a "moral hazard". This would be the case if the retailer is the best placed to control the degree of risk incurred but is no longer incited to minimize that risk because it has been transferred to the supplier.[762]

Even though the CC recognized that the trends in product innovation at the time of the investigation did not indicate a cause of concern, it nevertheless underlined that the levels of investment would not be maintained in the future were practices transferring excessive risks and unexpected costs to continue. Furthermore, the CC pointed out that the levels of investment and innovation might have been even higher in the absence of those practices. [763] In order to better serve consumers and to prevent any detrimental effect to their interests in the future, it was therefore recommended to take remedial action and improve the existing system.

c) Solutions suggested: New code and Ombudsman

In order to address the anticompetitive effects related to some retailers' practices, the CC established a *Groceries Supply Code of Practice*, based on the former Supermarkets Code of Practice but with some amendments. Those new rules came into force in February 2010. They aim, on the

[759] *Ibid.*, at 9.5.
[760] *Ibid.*, at 9.45.
[761] *Ibid.*, at 9.46.
[762] *Ibid.*, at 9.47.
[763] *Ibid.*, at 9.67.

one hand, at preventing the transfer of excessive risks or unexpected costs to suppliers and, on the other hand, at encouraging suppliers to complain about breaches of the code.

In order to bind a larger number of UK retailers likely to use the identified anticompetitive practices, the scope of the code has been extended to all firms which are active in the supply of groceries at a retail level in the UK and which are controlled by corporate groups with an annual UK retail groceries turnover of 1£ billion or more.[764] As regards the content of the code, the provisions are the result of a balance stricken by the CC between being prescriptive and allowing retailers a degree of commercial flexibility. As such, retailers are only prohibited outright from making retrospective adjustments to terms of supply and from holding suppliers liable for losses due to shrinkage[765]. A provision that ensures that suppliers are less subject to customer complaint charges is also included in the code.[766] For the rest, as a general safeguard against the transfer of excessive risk and unexpected cost, an overarching "fair dealing" provision is introduced so that commercial flexibility is not unreasonably constrained by additional outright prohibition.[767]

With the aim of improving suppliers' confidence in relying on the code, retailers must appoint an in-house code compliance officer who will assist resolution of queries raised by suppliers and report to the audit committee (or non-executive director). In addition, to make it easier to establish whether retailers have complied with the code or not, different documents must be provided in writing such as the retailer's standard terms and conditions, the terms of supply between retailers and suppliers as well as any notice in relation to de-listing.[768]

As regards monitoring and enforcement of the code, the CC decided to establish an Ombudsman and to change the nature of the dispute resolution from mediation to arbitration. Among the different tasks assigned to the Ombusdman, we can mention: monitoring and enforcing the code; gathering information and proactively investigating retailers' records in areas subject to complaint; arbitrating disputes between retailers and suppliers; publishing guidance on specific provision of the code; and reporting to the OFT on a regular basis regarding the nature of the complaints and disputes it has

[764] *Ibid.*, at 11.280 to 11.282. Those grocery retailers would be: Tesco, Sainsbury's, Asda, Morrisons, Sommerfield, M&S, CGL, Aldi, Iceland and Lidl.
[765] Losses due to shrinkage are losses that arise when stock is recorded on a company's books but is not on hand, due to theft, the goods being lost or accounting error. In most cases, suppliers are not in a position to control such a risk while retailers are able to take appropriate measures such as improving security at depots or stores.
[766] Report 2008, 11.316 to 11.317.
[767] *Ibid.*, at 11.314 to 11.315.
[768] *Ibid.*, at 11.331. Different safeguards are provided for against "wild" de-listing. A retailer must: provide suppliers with a letter setting out the reasons for the retailer taking this action; give suppliers notice of their right to escalate a decision for de-listing or having their business with the grocery retailer significantly reduced, to a more senior person in the commercial team; and give suppliers an opportunity for an interview with the in-house code compliance officer prior to the decision taking effect.

investigated.[769] In addition, the CC recommended giving the Ombudsman the power to levy significant financial penalties on the retailers for non-compliance.[770] In order to remedy the significant imbalance of power between the parties that undermined the effectiveness of negotiation under the mediation procedure, the new code provides for arbitration of disputes and reduces the time period for instigating the dispute resolution process from 90 days to 21 days.[771] The Ombudsman will be in charge of undertaking dispute resolution but will also have the power to investigate complaints received on a confidential basis.[772]

Given that, in August 2009, retailers had not voluntarily agreed to an Ombudsman, the CC formally recommended that the Government should establish one. The 25th June 2013, the Groceries Code Adjudicator Act came into force, establishing an independent adjudicator to oversee the relationships between supermarkets and their suppliers.[773] Its mission is to enforce the Groceries Supply Code of Practice. To do so, it has powers, in particular, to investigate confidential complaints from any source about how supermarkets treat their suppliers; to make recommendations to retailers is a complaint is upheld; to require retailer to publish details of a breach of the code; in the most serious cases, impose a fine on the retailer; to arbitrate disputes between retailers and suppliers.[774] With regard to the fines that can possibly be imposed in case of breaches of the Code, the Government has not yet decided on how high these financial penalties should be. The Adjudicator recommended on that matter a fine of maximum 1% of UK turnover. This is much lower than the maximum penalties for breaches of the competition rules which can amount up to 10% of worldwide turnover.[775] It remains hence to be seen whether such a maximum level of fine will be such as to dissuade supermarkets from breaching the Code.

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[769] Report 2008, at 11.337 to 11.347.

[770] The CC considered that the payment of compensation by retailers does not provide a sufficient incentive to comply with the code.

[771] Report 2008, at 11.354 to 11.360.

[772] *Ibid.*, at 11.361 to 11.368. Anonymity cannot be ensured in case of a dispute notified to the Ombudsman since due process requires that the defending retailer has the opportunity to answer and address any particular allegations. Investigation carried out following a complaint is intended to be broad ranging and to be based on general patterns of behavior by the retailers. It cannot result in imposing a sanction on a particular retailer. On the results of the first and second investigation in the UK grocery sector, See also: A.Seely, *Supermarket: Competition inquiries into the groceries market* – Commons Library Standard Note, Published 2 August 2012, Amended 17 July 2013, available at: http://www.parliament.uk/briefing-papers/SN03653

[773] Groceries Code Adjudicator Act 2013, available at: http://www.legislation.gov.uk/ukpga/2013/19/pdfs/ukpga_20130019_en.pdf

[774] See: The Groceries Code Adjudicator website: https://www.gov.uk/government/organisations/groceries-code-adjudicator/about

[775] The proposed maximum level of fine suggested by the Adjudicator will be established by Order by the Secretary of State, taking into account the Adjudicator's recommendation. Retailers would have a full right of appeal against any fines imposed. See: Press release, *Groceries Code Adjudicator Bill receives Royal Assent,* Published 25 April 2013, available at: https://www.gov.uk/government/news/groceries-code-adjudicator-bill-

C. GENERAL V SPECIFIC APPROACH TO DEAL WITH BUYER POWER

The UK competition authorities decided to tackle concerns about supermarkets' buyer power through the introduction of specific measures, namely the adoption of a code of practice and the establishment of an Ombudsman. Those rules applying in the grocery retail sector supplement the general provisions on competition. Although they may remedy the strict conditions required to enforce the competition rules, they nevertheless have some limits and might be unable to prevent anticompetitive practices within the grocery supply chain.

1. Scope *ratione personae*

The Groceries Supply Code of Practice only applies to the UK largest retailers. This means that possible anticompetitive practices adopted by intermediaries in their dealings with their own suppliers are not subject to specific rules. However, it is not uncommon that pressure exerted by grocery retailers influences the behavior of food processors or other intermediaries further up the food supply chain. Those market participants are indeed incited to use similar practices against their own suppliers to reduce as much as possible the loss of profit incurred due to retailers' buyer power. Suppliers and especially primary producers may hence still be facing transfer of excessive risk and unexpected costs. The OFT and the CC are expecting that the new measures introduced with regard to supermarkets will have some spill-over effect throughout the whole food supply chain and alleviate buyer power problems encountered at any level of that chain. The CC nevertheless asserted that, if such an effect did not occur, appropriate measure should be introduced such as the extension of the code or the adoption of a complementary code to deal with all buyer-supplier relationships.[776]

2. Scope *ratione materiae*

The competition rules on abusive conduct can only be applied when a retailer's behaviour amounts to an abuse of a dominant position. Given that even the largest supermarket may not fulfill the conditions of dominance, especially as regards the market share usually thought necessary to characterize such a position, the practices used by powerful retailers in fact evade supervision of competition authorities.[777] The Groceries Supply Code of Conduct constitutes therefore an useful

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receives-royal-assent See also: Groceries Code Adjudicator, *Statutory guidance on how the Groceries Code Adjudicator will carry out investigation and enforcement functions,* December 2013, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/267646/Statutory_Guidance_Consultation_Summary_Response.pdf

[776] Report 2008, at 11.294 to 11.296. In its review of the code in 2005, the OFT paid attention to proposals for a new code known as Buyers' Charter which would have a broader scope. The OFT asserted that it stands ready to advise and have constructive discussion with all parties in the food supply chain on this matter. See: OFT, Supermarkets: The code of practice and other competition issues, March 2005, 3.31.

[777] Market shares constitute an important factor is the assessment of dominance even tough other factors must also be taken into account such as barriers to entry or expansion. According to the case law Court of Justice, a firm holding a market share of 50% may be held to have a dominant position. Between 40% and 50% market

instrument to tackle anticompetitive practices since, provided that a supermarket is controlled by corporate groups with an annual UK retail groceries turnover of 1£ billion or more, it will be subject to the provisions of the code. However, the code focuses on very specific practices which were deemed anticompetitive at the time of the CC investigation. In order to prevent excessive rigidity into retailer-supplier relations and maintain the possibility for both parties to react to evolving opportunities in the market, it was indeed agreed to introduce a very limited number of prohibitions targeting specifically the transfer of excessive risks or unexpected costs to suppliers. Yet, it remains to be seen whether retailers will be more inclined to comply with those new provisions and whether new practices, distorting or restricting competition, will not emerge in the near future. Supermarkets are in fact likely to use other trading arrangements, not covered by the code, to keep extracting benefits from the imbalance of power between them and their suppliers. In that event, competition authorities would therefore have again to bring the code up to date in order to encompass every conduct considered to be anticompetitive. Such an *a posteriori* reaction may be time consuming, in particular if another in-depth investigation is referred to the CC before modifying the code.

In contrast, the general competition rules - provided that the issue of dominance is resolved - apply to any conduct likely to prevent, restrict or distort competition. Each practice is examined individually on basis of its potential effects on the markets at the time it was carried out by the firm(s) involved. The broader and even unlimited range of practices which may fall within the ambit of the competition rules gives EU and national authorities the possibility to immediately open proceedings against any alleged violation of the competition rules and to impose sanctions or other remedies if the practice under examination turns out indeed to be anticompetitive.

In conclusion, where the introduction of a code of practice may be more effectively enforced against buyers than the traditional competition rules, it remains that it only targets specific actors and practices on basis of a market investigation carried out at a given time. It is therefore likely to be overtaken by the fast changes occurring in the markets all along the food supply chain.

D. CONCLUSIVE REMARKS

A cautious approach is followed when it comes to deal with buyer power. The UK Competition Authorities are prepared to apply the rules related to abuse of dominance to buyers but, given the benefits that the exercise of buyer power is considered to provide for consumers, they will do so only in exceptional circumstances. The same approach prevailed when it was decided to take specific measures in the grocery retailing sector. The CC and the OFT recognize that pressure exerted by large

share, the dominant position needs to be supported by other factors. Below 40%, dominance is unlikely even though not excluded. See: R.Wish, *Competition Law,* 6th edition, at 175-183 (2009).

supermarkets has secured lower retail prices and that, in general, consumers benefit from fierce competition in the grocery market. However, on basis of the outcome of the two investigations led by the CC, it was concluded that, if exercised inappropriately and if left unchecked, buyer power may damage the competitiveness of suppliers and ultimately harm consumers. Some practices, such has retrospectively imposing charges or transferring excessive risks and costs on suppliers, are likely to reduce their incentives to invest in new products and innovation. In the longer-term, this may lead to consumers facing lessened product choice and quality on the shelves. The UK competition Authorities have therefore had the difficult task of finding the right measure likely to eradicate anticompetitive practices while still ensuring a degree of commercial flexibility to allow both parties to react to changes in the markets. The “soft” measure introduced to achieve that aim has been a code of practice that the largest supermarkets have to comply with. In force since 2010, the new version of that code has little chance to reap the benefits expected without the participation of suppliers. It remains to be seen whether the establishment of the Ombudsman will help them overcome the fear of complaining.

The introduction of a code of practice to address buyer power concerns is a good initiative. But it is probably too a soft measure to effectively deter supermarkets from using anticompetitive practices since its enforcement remains primarily on weak and dependent suppliers.

SECTION 3 – BUYER POWER IN THE UNITED STATES

Buyer power concerns have been addressed by the U.S. authorities since the implementation of the antitrust policy. The traditional competition rules have been enforced against anticompetitive buyers' practices, such as buyer cartels, arising in various sectors. As shown by the case law on that matter, the issue of buyer power is not confined to the agri-food industry. The high degree of concentration within the food supply chain and the vital role of food in the society have yet led the U.S. legislator to focus primarily on that sector. In the early 1900's, specific provisions were enacted in order to curb large retail chains' bargaining power and to establish a level playing field in the retail sector. However, we will see that the invasive intrusion into the retailer-supplier relationships have caused harmful effects to competition and to consumers. Moving up the supply chain, packers and processors' buyer power have also drawn the attention of the U.S. authorities. In view of the weakness of producers facing concentrated processing industries, specific rules have been implemented in order to increase farmer's bargaining power and to regulate the behavior of market participants.

Where the U.S. set of antitrust rules may be viewed as adequate laws to tackle all potential harmful practices, be it on the sell-side or the buy-side of the market, the enforcement regime deprives them of their efficacy in many cases. The main issue is often the effects of buyers' conduct in the output market. The exercise of buyer power may, in some circumstances, also affect consumers but in most cases it is unlikely to harm directly end-users and may even benefit them in the short-term. The question is therefore whether the antitrust laws only protect consumers against improper use of seller power or whether they can also be enforced against powerful buyers, assuming that a competitive environment must be protected in all markets to ensure the long-term interests of consumers.

A. BUYER POWER CONCERNS IN THE AGRI-FOOD INDUSTRY

Massive consolidation has been taking place in the US agri-food industry for the last decades. The resulting increased buyer power in the hands of a few market participants has particularly affected producers which have become, in most cases, subject to those powerful buyers' diktat and manipulation. However, buyer power concerns are not confined to that industry as revealed by antitrust claims made in various sectors.

1. Consolidation at different levels of the food supply chain

Food retailer, food processor and meatpacker mergers have dramatically enhanced the exercise of buyer power within the food supply chain. In the retail sector, four companies account for more than half of the sales in the United States. Supermarket chains and especially Wal-Mart, the largest

retailer in the world, are therefore in a position to increase pressure on their suppliers in order to get lower prices or other concessions.[778] Significant buyer power characterizes also giant agribusinesses which buy crops and livestock from farmers. For example, the top four beef processors control more than 81% of the market whilst the top four firms for pork and broiler chicken processing account respectively for 64% and 54% of the market.[779] Due to the limited number of competitors in those markets, buyers do not bid up the price of agricultural commodities. In contrast, buyer power derived from that concentration enables them to pass the lower prices imposed by retailers on to producers. As a result, famers take the brunt of that successive exercise of buyer power along the food supply chain.[780]

In addition to exerting downward pressure on prices, food processors are increasingly using captive supply contracts to buy livestock instead of competing in the spot market. According to the definition given by the Grain Inspection, Packers and Stockyards Administration (GIPSA), the term "captive supply" refers to livestock that is owned or fed by a packer more than 14 days prior to slaughter, livestock that is procured by a packer through a contract or marketing agreement that has been in place for more than 14 days, or livestock that is otherwise committed to a packer more than 14 days prior to slaughter.[781] Control over the input market through livestock ownership or contracts may adversely affect producers. Those contracts, which are presented on a take-it-or-leave-it basis, are indeed drafted exclusively in favor of buyers and spot market prices, on which is based the formula for calculating the contract price, tend consequently to drop. The involvement of processors in the production process is particularly important, for example, in the poultry industry where farmers do not own the birds but are only responsible for providing labor, facilities and services for processors. Growers perform those services under strict conditions and are required to make substantial capital investment to comply with them, without receiving any guaranteed long-term contracts or not long enough to cover the life of their investment. [782] In view of those considerable sunk costs, of the perishable nature of their commodities, and short of alternative processors operating in the area,

[778] *Farm Bill 101,* Report of Food & Water Watch, January 2012, at 5, available at: http://www.foodandwaterwatch.org/reports/farm-bill-101/
[779] *Ibid.,* at 4.
[780] T.A.Wise & S.E.Trist, *Buyer Power in U.S. Hog Markets: A Critical Review of the Literature,* Global Development and environment Institute, Working Paper No.10-04, August 2010, at 19.
[781] *Captive supply of cattle and GIPSA's reporting on captive supply,* United States Department of Agriculture – Grain Inspection, Packers and Stockyards Inspection, January 11, 2002, at 2, available at: http://www.gipsa.usda.gov/Publications/psp/captive_supply/captivesupplyreport.pdf
[782] C.R.Taylor, *The Many Faces of Power in the Food System,* Comments presented at the DoJ/FTC Workshop on Merger Enforcement, February 17, 2004. "The system can best be described as feudal, with master (integrator) and servant (contract producer)."

farmers are thus reluctant to respond to lower prices or other exploitative contract terms imposed by their contractors.[783]

Market consolidation in the agri-food industry is hence particularly detrimental to producers. Those concerns have been mentioned in a series of workshops exploring competition in the agricultural sector and hosted by the Antitrust Division of the U.S. Department of Justice and the U.S. Department of Agriculture in 2010.[784] Interested parties, including ranchers, farmers, processors, retailers, workers, academics, law enforcers and regulators, gathered to discuss competition concerns in that sector. Those concerns were mainly related to market concentration, merger enforcement, monopsony, bid rigging, market transparency, captive ownership, contracting, low prices for commodities, lack of capital, and potential market manipulation.[785] Farmers had the opportunity to provide examples of potentially anticompetitive conduct and to make their voices heard on those issues. However, it remains to be seen whether the U.S. authorities will change or enforce more strictly the antitrust rules to address effectively the alleged competition distortions mentioned by the various market participants.

2. Market price manipulation to the detriment of producers

The reduced number of buyers creates an imbalance of power between processors and producers. As a result, the latter are often forced to take ever lower price offered to them or to accept disadvantageous contracts, not to mention the fact that such arrangements are likely to entail adverse effects on the market prices. Where contracts with processors may yield some benefits for farmers, such as reduced transaction/marketing costs, assurance of a buyer for their products or better access to capital[786], some have indeed established a negative relationship between captive supplies and cash market prices due to market manipulation.[787] As the share of commodities committed to processors through ownership or contracts increases, the volume traded on the open market declines, falling for example to less than 10% for hogs and 1% for cheese. The thinning of spot

[783] *Abusive poultry contracts require Government action,* Fact Sheet of Food & Water Watch, March 2011, available at: http://documents.foodandwaterwatch.org/doc/PoultryCompetition-web.pdf

[784] Five joint public workshops were held on different topics and in different locations: *Issues on concern to farmers*, Iowa, March 12, 2010; *Poultry industry*, Alabama, May 21, 2010; *Dairy industry*, Wisconsin, June 25, 2010; *Livestock industry*, Colorado, August 27, 2010; *Margins*, Washington, December 8, 2010. Transcripts are available at: http://www.justice.gov/atr/public/workshops/ag2010/index.html

[785] *Competition and agriculture: Voices from the workshops on agriculture and antitrust enforcement in our 21st century – Economy and thoughts on the way forward*, Report issued by the U.S. Department of Justice, May 2012, available at: http://www.justice.gov/atr/public/reports/283291.pdf

[786] *Captive supply of cattle and GIPSA's reporting on captive supply,* United States Department of Agriculture – Grain Inspection, Packers and Stockyards Inspection, January 11, 2002, at 47, available at: http://www.gipsa.usda.gov/Publications/psp/captive_supply/captivesupplyreport.pdf

[787] See for example: J.R.Schroeter & A.Azzam, *Captive supplies and cash market-prices for fed cattle: The role of delivery timing incentives,* 20 Agribusiness 347 (2004).

markets and the information imbalance give in fact buyers the ability to manipulate market-prices. They are even incited to do so since the prices they pay to farmers under contract are somehow tied to the cash market on basis of a specific formula.[788] Because future delivery arrangements are not reported as a public market activity, producers cannot evaluate processors' immediate need.

Consequently, packers can assert that their demand is likely to be satisfied by captive supplies, which they may or may not have, in order to influence the cash market price.[789] They may also decide to delay their entry in the cash market to further lower prices. Due to the perishability of some agricultural commodities, producers are in fact more inclined to receive lower prices as the time running out makes them fear to lose all the benefits of their production. In addition, with their supply arrangements, processors can push prices further down below the competitive level by acting on the selling side of the cash market. When market-prices are high, processors may indeed sell commodities committed to them through contracts in order to make price move down and take back the "buyer cap" when prices actually have gone down.[790] The result of such price manipulation is a decline in prices paid on the cash market but also for commodities committed through contracts. By using their buying power to force farmers to enter into supply contracts, buyers acquire hence the ability to further foster their market power in the procurement market through market manipulation.

Free and fair competition in the agricultural market is of crucial importance for producers but is also a matter of national security and public health.[791] Various concerns have been expressed by farmers at the workshops on competition in agriculture and, in particular, the issue of market price manipulation which *de facto* runs counter to free and fair competition. At the close of those workshops, the Antitrust Division recognized that antitrust rules are to be vigorously enforced in order to ensure a healthy and competitive agriculture sector.[792] The following section describes the basic rules of US antitrust law.

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[788] R.A .Mc Eowen, P.C. Carstensen & N.E. Harl, *The 2002 Senate Farm Bill: the ban on packer ownership of livestock,* 7 Journal of Agricultural Law 1, at 9-10 (2002). Price is often determined at or after slaughter in the livestock industry. While producers may generally choose the week in which they will deliver the livestock, meatpackers keep the right to pick the day of the week the animals will be slaughtered. They are therefore incited to make that decision on basis of the current market-price or to manipulate it if need be.

[789] D.A.DOMINA & C.R.TAYLOR, *The debilitating effects of concentration in markets affecting agriculture,* 15 Drake Agricultural Law Journal 61, 91 (2010), available at: http://farmfutures.com/mdfm/Faress1/author/2/OCM%20competition%20report.pdf

[790] C.R.Taylor, *The Many Faces of Power in the Food System,* Comments presented at the DoJ/FTC Workshop on Merger Enforcement, February 17, 2004.

[791] See: Public workshop exploring competition issues in agriculture, *A dialogue on competition issues facing farmers in today's agricultural marketplace,* Iowa, March 12, 2010.

[792] Report issued by the U.S. Department of Justice, *Competition and agriculture…, op.cit.*, at 2.

B. ANTITRUST LEGISLATION

The basic antitrust rules contained in the Sherman Act are, to a certain extent, similar to their European counterparts, namely Article 101 and 102 TFEU. The Clayton Act and the Federal Trade Commission (FTC) Act supplement those rules. These Acts target more specific practices likely to cause anticompetitive effects or other type of conduct which could hardly be caught under the Sherman Act. In addition, the U.S. legislator has enacted particular rules designed to address, directly or indirectly, some buyer power concerns and to strengthen the bargaining power of weaker parties. In the agricultural sector, the Packers and Stockyards Act and the Capper-Volstead Act pursue respectively these objectives in favor of producers.

1. General rules

Drafted in general terms, the U.S. antitrust rules may be enforced against either selling side or buying side conduct. Dating back to 1890, the Sherman Act prohibits trade restraints and monopolization. Two additional instruments were passed by the Congress in 1914.

a) Sherman Act

Section 1 of the Sherman Act reads as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal".

Concerted practices among competitors are deemed to deprive society from the benefits of competition. Regardless the issue of market power, the actors involved – be it sellers of buyers -, or in some cases the effects of the agreements on the markets, it is the participants' conduct or action itself which triggers the application of that provision. A distinction may nevertheless be drawn between naked restraints on competition falling in the *per se* category and agreements subject to the rule of reason due to their possible procompetitive traits.[793] Are challenged under the *per se* rule agreements which are so likely to harm competition without significant procompetitive benefit that they do not require inquiry into their particular effects on the markets.[794] Drafted on basis of judicial antitrust decisions, the Antitrust Guidelines for Collaborations Among Competitors provide examples of *per se* illegal agreements including among others agreements to fix prices or output, rig bids, or

[793] For a development of those two standards, see : *Brooke Group Ltd. V. Brown & Williamson Tobacco Corp.,* 509 U.S. 209 (1993), at 156-222.

[794] *Per se* illegal agreements are prohibited regardless of any possible justification. This particularity distinguishes *per se* agreements in the U.S. from hardcore restrictions in the EU. Indeed, in theory, nothing precludes participants to an anticompetitive agreement, whatever its object, to invoke Article 101 (3) TFEU in order to justify their conduct. However, in practice, the chances of convincing the Commission or the Tribunal of the procompetitive benefits of such hardcore restrictions are very thin.

share or divide markets by allocating customers, suppliers, territories, or lines of commerce.[795] All other practices are examined under the rules of reason implying a factual inquiry in order to determine the overall competitive effect of the agreement in question. If the latter is reasonably necessary to achieve procompetitive benefits that are likely to outweigh anticompetitive harms, the prohibition of Section 1 will not be applicable.[796]

Section 2 of the Sherman Act focuses on unilateral conduct by prohibiting monopolization and attempts to monopolize.

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."

That provision does not outlaw monopoly power or the use of monopoly power as such but rather the acquisition or maintenance of that position through anticompetitive means.[797] For examples, predatory pricing and price squeezes, refusals to deal with competitors, or customer restrictions are considered as exclusionary conduct prohibited under Section 2.[798] Proof of monopoly power is not needed in case of an attempt to monopolize. Instead, it must be proven that the defendant adopted predatory or anticompetitive conduct with the specific intent to monopolize and that there exists a dangerous probability of success.[799]

The Antitrust Division of the U.S. Department of Justice (DoJ) has exclusive jurisdiction in the enforcement of the Sherman Act which provides for criminal penalties against corporations and

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[795] Antitrust Guidelines for Collaborations Among Competitors issued by the Federal Trade Commission and the U.S. Department of Justice, April 2010, at 1.2.

[796] *Ibidem.*

[797] Monopoly power has been defined as the power to control prices or exclude competition in a relevant market. See: *U.S. v. E.I. du Pont de Nemours & Co.,* 351 U.S. 377, 391 (1956). It generally requires a substantial degree of market power. However, no meaningful criteria have been established to evaluate the existence of such power. See: P.E.Areeda & H.Hoverkamp, *Antitrust Law*, 3rd ed. (2008). Like the European Commission, US courts take the market share of the firm in question as a starting point. The US Supreme Court held in *United States v. Aluminum Co. of America,* 377 U.S. 271 (1964) that a percentage over 90 is enough to constitute a monopoly while it is doubtful whether 60 or 64% would be enough to support the existence of monopoly power. On basis of the case law on that matter, it may be assumed that a market share in excess of 70% will infer a prima facie case of monopoly power. However, there is little chance that courts reach such a conclusion when the market share is below 50%. See: T.J.Klotz, *Monopoly power: Use, proof and relationship to anticompetitive effects in Section 2 cases,* working paper, 1st December 2008, available at: http://www.ftc.gov/of/sectionwohearings/doc/section2monopoly power.pdf

[798] See : D.F.Broder, *A Guide to US Antitrust Law* (2005), at 99.

[799] See for examples : *Swift & Co. v United States,* 196 U.S. 375, 396 (1905) and *American Tobacco Co. v United States,* 328 U.S. 781, 785 (1946).

individuals involved in anticompetitive conduct.[800] In addition, consumers and business firms may also bring civil suits to Federal courts. Private antitrust litigation is particularly attractive in the U.S. since each person harmed by anticompetitive behavior may recover treble damages.[801]

b) Clayton Act as modified by the Robinson-Patman Act

The Sherman Act has been supplemented by the Clayton Act in 1914 which specifies particular prohibited conduct. The objective was to strengthen the antitrust laws and to capture specific anticompetitive practices through the enactment of more detailed provisions. As such, are prohibited price discrimination (Section 2), tying and exclusive dealing contracts (Section 3), corporate mergers where the effect may substantially lessen competition (Section 7) and common director among competing companies (Section 8).

The Clayton Act is a civil Statute carrying no criminal penalties.[802] Its enforcement is in the hands of both the Antitrust Division of the Department of Justice and the Federal Trade Commission. Such as under the Sherman Act, treble damage action may also be brought by private parties harmed by violations of the Statute.

As regards Section 2 of the Act dealing with price discrimination, the prohibition was amended by the Robinson-Patman Act in 1936. That modification was meant to protect smaller retailers which were facing the emergence and rapid growth of large chain stores, principally in the grocery sector. Those efficiently run retail chains were indeed in a position to obtain lower prices due, in particular, to their

[800] Section 1 of the Sherman Act provides “any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court”. Any person convicted of Sherman Act Section 2 violation “shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court”.

[801] Section 4 of the Clayton Act states: "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." This provision in fact constitutes a major inducement to sue so that 90% of antitrust cases are brought by private plaintiffs such as consumer or business firms.

[802] The Clayton Act is a civil Statute carrying no criminal penalties. Its enforcement is in the hands of both the Antitrust Division of the Department of Justice and the Federal Trade Commission. Such as under the Sherman Act, treble damage action may also be brought by private parties harmed by any violation of the Statute. The first Section of the Robinson-Patman Act expressly amends Section 2 of the Clayton Act. In contrast, Section 3 does not amend the Clayton Act. This provision prohibits three kinds of trade practices, namely (a) general price discriminations, (b) geographical price discriminations, and selling at unreasonably low prices for the purpose of destroying competition or eliminating competitors. Penal sanctions are provided for in case of violation. However, Section 3 of the Robinson-Patman Ac is not part of the list of laws designated as “antitrust laws”. As a result, even though there is a partial overlap between Section 3 of the Robinson-Patman Act and Section 2 of the Clayton Act, the enforcement of the former is left solely in the hands of the public authorities. The practices forbidden by Section 3 of the Robinson-Patman Act could only be subject to private antitrust actions if, and to the extent that, they also constitute a violation of Section 2 of the Clayton Act. See: *Nashville Milk Co. v. Carnation Company,* 355 U.S. 373 (1958).

bargaining power but also to their ability to purchase in bulk and directly from food processors.[803] This alleged unequal playing field threatened independent single unit establishments which lobbied the Congress to eliminate the competitive advantage "unfairly" held by large chain stores to the detriment of traditional retailers.[804] Because the Sherman Act and the Clayton Act were ineffective in halting the decline of individual merchants, Section 2 of the Clayton Act was amended by the enactment of the Robinson-Patman Act.

Section 2 (a) of the Clayton Act henceforth bars a seller of commodities from selling goods to equally-situated buyers at different prices. The provision states that:

> "It shall be unlawful (…) to discriminate in price between different purchasers of commodities (…) where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them".

Under the Clayton Act, discrimination is hence equated to a difference in price regardless of the costs required to serve the different buyers in question.[805] The wording of the prohibition attests that the objective of the Act was not only to prevent primary line injury but also secondary line injury. Primary line price discrimination occurs when a selling firm sets lower prices in certain markets in order to exclude or harm competitors in those markets. Secondary line price discrimination, in contrast, entails a competitive injury in the downstream market where the buyer receiving lower prices enjoys, as a result, a competitive advantage over its disfavored rivals which are charged higher prices.[806] The origin of the Robinson-Patman Act shows that protection of secondary line competition was the principal reason for the enactment of that legislation. The US courts have in fact interpreted the provision differently depending on the nature of the injury invoked. In the assessment of competition harm, primary and secondary line discriminations are indeed examined

[803] T.Calvani & G.Breidenbach, *An introduction to the Robinson-Patman Act and its enforcement by the Government,* 59 Antitrust Law Journal 765, at 766 (1991).
[804] D.J.Gifford & R.T.Kudrle, *The Law and Economics of Price Discrimination in Modern Economies: Time for Reconciliation?,* University of Minnesota – Legal Studies Research Paper Series No. 08-21, at 21.
[805] The legal definition referred to in the Robinson-Patman Act differs from the economic definition of price discrimination which takes into consideration the difference in the marginal costs of serving two buyers to determine the existence of such discrimination. Where differences in the costs of manufacture, sale, or delivery are not part of the legal definition of discrimination, those factors may nevertheless be used as a defense in price discrimination actions. Article 2(a) *in fine* of the Clayton Act reads indeed as follows: "nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."
[806] T.R.Beard, D.L.Kaserman & M.L.Stern, *Price discrimination and secondary-line competitive injury: The law versus the economics,* 53 The Antitrust Bulletin 75, at 76 (2008).

under different standards. We will see below that the enforcement of the Robinson-Patman Act against secondary line discrimination has been greatly facilitated, probably at the expense of competition itself.

The ban on price discrimination does not constitute an outright prohibition. Two defenses are indeed available to the defendant, namely the cost justification defense and the meeting competition defense. Under the former, differentials may be justified if they result from differences in the cost of manufacture, sale, or delivery. The second justification allows the selling at different prices in order to meet an equally low price of a competitor on a similar product. However, in view of the substantial burden imposed on defendants to invoke successfully one of those justifications, suppliers will rather avoid any price discrimination than risk relying on the defenses provided by the Act.[807]

In order to prevent disguised price reductions, the Robinson-Patman Act also prohibits false brokerage, discriminatory discounts or any allowance if not related to a service rendered in connection with the sale or purchase of goods and made available to all other customers on proportionally equal terms (Section 2 (c) and (d)). The granting of such advantages is unlawful, regardless of the impact it might yield on competition. The only way to rebut the prima facie case of discrimination is to show that the allowance or service was made in good face to meet competition (Section 2 (b)).

Finally, Section 2 (f) of the Act provides that it is unlawful for a buyer to knowingly induce or receive discriminatory price. That provision is derivative of Section 2 (a) in the sense that a buyer cannot be liable if a prima facie case of price discrimination is not established against a seller or if the seller can successfully rely on one of the justifications.[808] The FTC has the burden of showing that the buyer knew or should have known the illegality of the price.[809] If the primary aim of the Robinson-Patman Act was to curtail buying power of large retail chains, buyer liability is likely to arise only in one

[807] See : E.Gellhorn & W.E.Kovacic, *Antitrust Law and Economics* (1994), at 444-448 and D.J.Gifford, *Farewell to the Robinson-Patman Act? The Antitrust Modernization Commission's report and recommendation*, 53 The Antitrust Bulletin 481, at 500-502 (2008).

[808] See for examples: *Automatic Canteen Co. of America v. FTC,* 346 U. S. 61 (1953) and *Great Atlantic & Pacific Tea Co., Inc. v FTC*, 440 U.S. 69 (1979). An exception to that rule was accepted in case of "lying buyer". When a buyer gives false price information to its supplier concerning a rival's competing bid and induces consequently the former to meet the low price allegedly offered in that bid, the transaction may be held illegal as regards the buyer for inducing a discriminatory price in violation of Section 2 (f) but justified as regards the supplier on basis of the meeting competition defense. See: *Kroger Co. v. FTC,* 438 F. 2d 1372 (6th cir.) 404, U.S. 871 (1971). The doctrine however does not encompass misrepresentation by silence. See: *Great A & P Tea Co. v. FTC,* 440 U.S. 69 (1979). See on the distinction between those two cases: D.E.Ray, *Buyer liability under Section 2 (f) of the Robinson-Patman Act,* 15 University of Richmond Law Review 547 (1981).

[809] On details concerning the conditions to be met to prove such knowledge, see : B.Rosner, *Buyer Liability,* 53 Antitrust Law Journal 999 (1984-1985).

situation, namely inducement of price discrimination. Section 2 (f) does not apply to inducements of discriminatory services or allowances. However, it was held in some cases that such conduct constitutes an unfair method of competition and as such is governed under Section 5 of the FTC Act.[810] As a result, both the buyer and the seller could be prosecuted in case of inducement of discriminatory allowances or services, the former under Section 5 of the FTC Act and the latter under Section 2 (d) or (e) of the Clayton Act. Some courts have, on the other hand, given a very broad interpretation to Section 2 (a) of the Act and treated a promotional allowance as an indirect price discrimination the inducement of which entails the buyer liability under Section 2 (f).[811] Nevertheless, it remains that actions against sellers are generally given a preference because no proof is required as to the buyer's knowledge of the discrimination.[812]

Where the Robinson-Patman Act is an antitrust statute in name, some argue that the legislative history underlying the enactment of that legislation shows that it was designed neither to enhance consumer welfare nor to encourage allocative efficiency. Instead, the only purpose of the Act was to protect smaller retailers.[813] Even though, in the text, proof of competition injury is required to establish illegal price discrimination, it turns out that the meaning attributed to that concept by US courts is completely different from its commonly-understood meaning under the other antitrust rules. Indeed, as it will be developed below, courts have stuck to the protectionist objective of the Act and, as far as secondary line price discrimination is concerned, have given priority to the welfare of individual competitors over the protection of competition. However, according to Professor Hovenkamp, Congress's intent was not to preclude any rebate or other price concession awarded by a manufacturer to some customers but rather to tackle price discrimination induced by a large retailer and injuring both rival buyers and the seller forced to grand such concession.[814] It appears yet

[810] See for examples : *Giant Foods Inc., v. FTC,* 907 F. 2d 184 (D.C.Cir. 1962) and *Grand Union Co. v. FTC*, 3000 F. 2d 92 (2d Cir. 1962). Section 5 of the Federal Trade Commission Act prohibits unfair or deceptive practices affecting commerce. Enforcement actions against those practices are taken exclusively by the FTC since the Act does not provide for a private cause of action.

[811] See for example : *Intimate Bookshop Inc. v Barnes and Noble, Inc.,* 88 F. Supp. 2d 133 (S.D.N.Y. 2000).

[812] Although the term "knowingly" also appear in Article 2(a) of the Act which prohibits discriminations that "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them", the courts have ignored such knowledge requirement when applying the provision against sellers. See: H.Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished business,* 68 Antitrust Law Journal 125, 141-142 (2000)

[813] T.Calvani & G.Breidenbach, *op.cit.,* at 770.

[814] H.Hovenkamp, *The Robinson-Patman Act …, op.cit.,* at 138. According to the author, the Robinson-Patman Act pursues a similar objective as the Sherman Act, namely protection of competition. "The legislative history indicates that Congress's concern was not with injury to competitors for its own sake. Rather, Congress believed that an injury to individual competitors was an essential prerequisite to injury to competition conditions generally." He points out that manufacturers should remain free to reward dealer effectiveness through rebates or other price concessions and maintains that the concerns of the Congress that passed the Statute focused only on the practices of large retailers which use their buyer power to extract non-cost-related rebates and concessions from their suppliers.

that the case law has ignored the principal concern of the Act, namely the coercive use of buyer power.

c) Federal Trade Commission Act (FTC Act)

The FTC Act, enacted in 1914, prohibits *inter alia* "unfair methods of competition" (Section 5(a) of the Act). The U.S. courts have ruled that such ban includes Sherman Act and Clayton Act offenses[815] but that other practices, not addressed under those Statutes, may also be caught by the FTC Act. As such, the Federal Trade Commission, which is exclusively competent to enforce the Act, may use its power to bolster the other antitrust laws by, for example, stopping in their incipiency practices which, when full blown, would violate the Sherman Act or the Clayton Act.[816] However, no criminal sanctions await violators of the FTC Act. The Federal Trade Commission may only impose a cease and desist order to halt the illegal practice in question. In comparison with the other antitrust laws, the penalties are therefore lighter-handed. In addition, no private remedy is available for individuals, reducing even more the deterrent effect of the FTC Act.[817]

The letter of the Act may be read expansively and give the Federal Trade Commission the competence to examine most business practices.[818] In order to safeguard an open, free market economy, all conduct that threatens to undermine that general goal should be condemned under the FTC Act, even if no other antitrust law has been violated.[819] For examples, the Act could be used against new forms of anticompetitive practices that have never been dealt with under the other antitrust laws. It could also be applied to harmful conduct that fails to satisfy one of the legal requirements of Section 2 of the Sherman Act. [820] In the area of buyer power, the Act could therefore encompass practices carried out by powerful buyers which have the ability to affect competition but which have a market share below that required under Section 2 of the Sherman Act for a

[815] See for examples: *Fashion Originators' Guild v. FTC,* 312 U.S. 457 (1941) and *FTC v. Cement Institute,* 333 U.S. 383 (1948). The FTC is less likely to use the FTC Act to pursue practices violating the Clayton Act because it is authorized to enforce that Act directly. However, as regards violations of the Sherman Act, the FTC is not competent to take action against them. Due to the fact that any conduct illegal under the Sherman Act is also prohibited under the FTC Act, the Federal Trade Commission may nevertheless use its competence under the FTC Act to enforce indirectly the provisions of the Sherman Act.

[816] See for examples: *FTC v. Motion Picture Advertising Svc. Co., Inc.,* 344 U.S. 392 (1953) and *FTC v. Brown Shoe Co.,* 348 U.S. 316 (1966)

[817] See: P.C.Ward, *Restitution for consumers under the Federal Trade Commission Act: Good intentions or Congressional intentions?,* 41 The American University Law Review 1139 (1992)

[818] N.W.Averitt, *The Federal Trade Commission Act – An Introduction,* 19 J. Reprints Antitrust L. & Econ. 5 (1989)

[819] *Ibid.,* at 6.

[820] The first situation would be a "frontier" case, that is to say "one that meets all of the legal requirements for a Sherman Act claim, but involves new forms of anticompetitive conduct that fall outside traditional categories of antitrust analysis". The second example would be a "gap-filling" case. See: S.A.Creighton & T.G.Krattenmaker, *Some Thoughts About the Scope of Section 5,* FTC Workshop on Section 5 of the FTC Act, October 2008, at 2.

monopolistic seller.[821] However, the Statute remains an antitrust Act and as such is designed to protect competition, not competitors. Only conduct which is proved to entail probable anticompetitive effects may therefore be condemned under the FTC Act.[822] We will see below how broadly the Act may be interpreted as regards buyer power conduct and how it could be used to tackle buyer practices which so far have escaped from the ambit of the antitrust laws.

2. Specific rules in the agricultural sector

The exercise of buyer power within the food supply chain affects particularly producers who are in most cases at the mercy of their buyers, be it retailers, processors or packers. Various measures have been taken in order to strengthen farmers' bargaining power and to give them an effective protection against unscrupulous customers. We will focus in this section on a brief description of the Capper-Volstead Ac and on a more detailed presentation of the Packers and Stockyards Act.

a) Capper-Volstead Act[823]

Where Section 6 of the 1914 Clayton Act already provided an exception to the antitrust laws by allowing producers to act collectively through agricultural organizations, the Statute proved to constitute a too narrow and vague exemption.[824] In 1922, the Congress filled the gap through the enactment of the Capper-Volstead Act and expanded the authorization to capital-stock and for-profit cooperatives.[825] Producers are therefore allowed to create countervailing power to bargain more effectively with large buyers. However, the immunity granted to farmers is not unrestricted. Limitations are indeed provided for in order to prevent that countervailing power turn into supervailing power and lead to other adverse effects on the markets.[826]

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[821] See: A.A.Foer, *Section 5 as a bridge toward convergence,* Amercian antitrust Institue for the FTC Workshop on Section 5 of the FTC Act, October 17, 2008, at 8. Such expansion of Section 5 of the FTC Act is however controversial. For example, according to Judge Richard Posner, "the Sherman and Clayton Acts have been interpreted so broadly that they no longer contain gaps that a broad interpretation of Section 5 of the FTC Act might be needed to fill". He underlines the risk of false positives and the risk of deterring procompetitive conduct. See: R.A.Posner, *The Federal trade Commission: A Retrospective,* 72 Antitrust Law Journal 761, at 766 (2005).

[822] S.A.Creighton & T.G.Krattenmaker, *Some Thoughts About the Scope of Section 5,* FTC Workshop on Section 5 of the FTC Act, October 2008.

[823] Capper-Volstead Act, 7 U.S.C. §§ 291-292.

[824] Section 6 of the Clayton Act does not shelter for-profit and capital-stock cooperatives. It also provides that individual members of a cooperative may carry out the "legitimate objects" of the organization without giving any guidelines on what activities are covered by those terms.

[825] C.A.Varney, *The Capper-Volstead Act, Agricultural Cooperatives, and Antitrust Immunity,* The Antitrust Source, at 2, December 2010. Other exemptions were enacted following the Capper-Volstead Act such as the Cooperative Marketing Act of 1926, 7 U.S.C. § 455, the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §608b and the Agricultural Fair Practices Act of 1967, 7 U.S.C. §§ 2301-2306.

[826] D.L.Baumer, R.T.Masson, & R.A.Masson, *Curdling the Competition: an Economic and Legal Analysis of the Antitrust Exemption for Agriculture,* 31 Villanova Law Review 183, at 194 (1986). On the scope of the immunity and on the conditions to be fulfilled, see: D.A. Frederick, *Antitrust statute of farmer cooperatives: The story of*

b) Packers and Stockyards Act[827]

Enacted in 1921, the Packers and Stockyards Act (PSA) was intended to curb the meat processing industry's excessive power. Different reports issued by the Federal Trade Commission revealed that the "Big Five" packing houses, which dominated meat-packing markets, had engaged in anticompetitive practices.[828] Considering that the Sherman Act and the Federal Trade Commission Act were unable to tackle those practices and that the livestock industry needed specialized regulation, the Congress enacted the PSA in order to regulate more strictly trade practices in that sector.[829] Unlawful practices are enumerated as follows:

> "It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
> (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or
> (c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or
> (d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or
> (e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

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the Capper-Volstead Act, United States Department of Agriculture , Rural Business-cooperative service, Cooperative Information Report 59 (2002)

[827] Packers and Stockyards Act of 1921, 7 U.S.C. §§ 181-229b.

[828] FTC, *Report of the Federal Trade Commission on the Meat Packing Industry* 392 (1919). The five largest packers were Swift, Armour, Morris, Cudahy and Wilson. They were criticized for manipulating live-stock markets, for controlling the prices and defrauding producer and consumers.

[829] C.R.Kelley, *An Overview of the Packers and Stockyards Act,* An Agricultural Law Research Article, Arkansas Law Notes, at 35 (2003)

> (f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices; or
> (g) Conspire, combine, agree or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section. (7 U.S.C. 192)" [830]

In fact, the Statute prohibits, in particular, meatpackers from engaging in or using any unfair, unjustly discriminatory, or deceptive practice, from manipulating or controlling prices and from creating a monopoly in the acquisition of, buying, selling, or dealing in, any article. The enforcement of the Act comes within the competence of the U.S. Department of Agriculture which has delegated the authority to control the livestock industry and halt unfair and anticompetitive practices to the Grain Inspection, Packers and Stockyards Administration (GIPSA).[831]

More than 90 years after the enactment of the PSA, it turns out that the meat packing industry, following a series of mergers in the nineties, is now more concentrated than it was in 1921.[832] For example, in 2011, the four-firm concentration ratio for hog and cattle slaughterers rose respectively to 65% and 85%.[833] Therefore, the necessity to regulate the behavior of large processors and to limit the negative consequences that such a concentrated industry might cause to the markets is probably even more blatant today than it was in the early 1900's. However, criticisms have been raised as regards the deficient enforcement of the PSA. On the one hand, GIPSA is found to take no sufficient action to protect effectively competition in the livestock industry[834] and, on the other hand, U.S. courts conclude to a violation of the Act only under strict conditions.

Concerning the latter issue, a controversy has arisen on whether a violation of the PSA implies the proof of overall market harm resulting from the packers' conduct or whether harm to an individual market participant is sufficient.[835] Under the terms of the Act, Section 202(c) prohibits apportionment of territory only "where such practice has the tendency or effect of restraining

[830] Capper-Volstead Act, 7 U.S.C. § 202.
[831] C.R.Kelley, *op.cit.*, at 36.
[832] *Ibid.,* at 37.
[833] See: 2011 P&SP Annual Report – Packers and Stockyards Program, United States Department of Agriculture, Grain Inspection, Packers and Stockyards Administration, March 2012, available at: http://www.gipsa.usda.gov/Publications/psp/ar/2011_psp_annual_report.pdf
[834] See: GAO Report to Congressional Committees, *Packers and Stockyards Programs – Actions needed to improve investigations of competitive practices,* Unites States General Accounting Office, September 2000, available at: http://www.gao.gov/new.items/rc00242.pdf
[835] R.L.Dettmann, *You're not the boss of me: an analysis of GIPSA's authority to regulate private contracting in the beef industry,* 16 Drake Journal of Agricultural Law 321, at 325 (2011)

commerce or of creating monopoly". However, no similar condition was included by the Congress in the other provisions. Section 202(a), for example, simply states that unfair, unjustly discriminatory and deceptive practices are unlawful while the provisions related to market-price manipulation provide that a packer cannot engage "in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, (…) or of restraining commerce."[836] Plaintiffs and GIPSA itself argue therefore that proof of competitive injury is not necessary to satisfy the statutory language.[837] They contend that the reach of the PSA was intended to be broader than the other antitrust laws since the very purpose of the Act was to tackle practices that could not be condemned under the Sherman or the FTC Act. The position that the PSA extends farther than those traditional antitrust rules "is consistent with the language and structure of the PSA, as well as its legislative history and purposes."[838] However, the majority of the U.S. courts does not agree with that interpretation and refuse to restrict market participants' conduct unless some adverse effect on competition is established.

C. ENFORCEMENT OF ANTITRUST LAWS AGAINST BUYER PRACTICES

The DOJ and the FTC share responsibility for enforcing the US antitrust laws.[839] Individual and business firms may also participate in the enforcement of the Sherman Act and the Clayton Act. Through private litigation they may indeed reinforce the deterrent effect of the Statutes by seeking to recover three times the amount of actual damages sustained as a result of anticompetitive conduct.[840] Actions under the Sherman Act and the Clayton Act, be it civil or criminal suits, are brought to a federal district court which will examine the legality of a firm's behavior and decide appropriate remedies in case of violation of antitrust laws.[841] The case law of the US courts plays

[836] Emphasis added.
[837] R.L.Dettmann, *op.cit.,* at 327-328.
[838] GIPSA, Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008, Conduct in Violation of the Act, Proposed Rules, 75 Fed. Reg. at 35340,-35341, June 22, 2010, available at: http://archive.gipsa.usda.gov/rulemaking/fr10/06-22-10.pdf.
[839] The DOJ is an executive branch of government while the FTC is an independent administrative agency. The latter was created to reduce the influence of presidential policies on the federal antitrust enforcement system. Criminal prosecutions under the Sherman Act can only be undertaken by the DOJ. The Clayton Act is enforced by both agencies which may bring civil suits to courts' attention. As regards the FTC Act, its enforcement falls under the FTC's purview which can, however, only seek cease and desist order.
[840] Private litigation is an important antitrust enforcement tool in the United States. Private fillings largely outnumber government fillings by roughly a ratio of 10 to 1. See: E.D.Cavanagh, *The private antitrust remedy: Lessons from the American experience*, 41 Loyala University Chicago Law Journal 629 (2010)
[841] In addition to proceeding before courts, the FTC has the power to enforce antitrust laws through an administrative proceeding which begins with issuing a complaint against an alleged violator and is followed by hearings before an Administrative Law Judge (ALJ). The resulting decision may then be appealed to the Commission. Courts play nevertheless still a role in that procedure since the final Commission determination may be appealed to a regional Circuit Court of Appeals. See: OECD, *Institutional and procedural aspects of the relationship between competition authorities and courts, an update on developments in procedural fairness and*

therefore a crucial role in the antitrust system and provides answers about how the statutory terms are interpreted and enforced.[842] However, as regards the potential harm that may be caused by the exercise of buyer power, US courts have sometimes diverging opinions. Buyers' conduct has been mostly addressed under Section 1 of the Sherman Act. Where restrictive agreements among purchasers are nearly unanimously condemned, unilateral conduct seems to have gone unpunished so far.

1. Section 1 of the Sherman Act applied to buyer agreements

Many courts have not been reluctant to enforce Section 1 of the Sherman Act against buyer cartels. Those practices are generally condemned as *per se* illegal because they constitute unjustified restraints of trade. However, some courts have analyzed buy-side conduct under the rule of reason, considering that it may benefit consumers and, as such, be procompetitive.

a) Illegal buyer cartels

A long time has already passed since the potential harm caused by buyer agreements was recognized in the US case law. Different decisions attest that courts and enforcers are willing to treat buying conduct just as strictly as conduct on the selling side of the market, even though no direct threat to consumers is established.[843] Most cases concern price-fixing arrangements in various sectors or group boycotts involving a restriction to deal with a particular market participant.

i. Price-fixing

Per se prohibition of price fixing agreements among buyers date back to the forties where the U.S. Supreme Court held that:

> "Under the Sherman Act, a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se."[844]

In *Mandeville,* three refiners were condemned for entering into an agreement to pay uniform prices for sugar beets. According to the Supreme Court, such conduct is prohibited even though the price is fixed by purchasers and the persons specially injured are sellers, not customers or consumers.[845] It

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transparency, Directorate for financial and enterprise affairs – Competition Committee, Working Party No.3 on Co-operation and enforcement, DAF/COMP/WP3/WD(2011)98, 11 October 2011.

[842] On the enforcement system in the U.S., see: E.Gellhorn & W.E.Kovacic, *Antitrust Law and Economics,* at 449-472 (1994) and D.F.Broder, *A Guide to US Antitrust Law*, at 166-192 (2005)

[843] N.Rosenfelt, *The verdict on monopsony,* 20 Loyola Consumer Law Review 402, at 412 (2007-2008).

[844] *United States v. Socony-Vacuum Oil Co., Inc.,* 310 U.S. 150, 223, (1940). Emphasis added.

[845] *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U.S. 219, 236 (1948). See also: *Swift & Co. v. United States,* 196 U.S. 375 (1905); *National Macaroni Manufacturers Association v. F.T.C.,* 345 F.2d 421 (1965) and *Bellevue Drug Co. v. Advance PCS*, 333 F.Supp.2d 318 (E.D.Pa.2004). In the first case, dealers of meat

was asserted that the act does not confine its protection to consumers, or to purchasers, but instead protect all who are made victims of restraints of trade.[846] Even though the Court also found a harmful effect flowing from the monopsony conspiracy in the downstream output market, it did not hold that such effect was a necessary condition to make a buying practice forbidden.[847] One can therefore read this case as attesting that a practice could offend the antitrust laws even if it only harms sellers.[848] Price-fixing agreements are prohibited because of their very nature whoever are the price fixers or the immediate victims.[849]

Various arguments have been invoked by conspiring buyers to justify their conduct. In *Socony-Vacuum Oil* for example, oil companies claimed that the agreement led to fairer and more reasonable prices on the markets. The Supreme Court yet rejected that argument and stated that the reasonableness of prices is not an issue in price-fixing cases. What matters is that, as a result of the agreement, one form of competition is eliminated. Such conduct must therefore be prohibited otherwise the Sherman Act, which protects a system of free competition, would be emasculated.[850] In *Knevelbaard Dairies,* a United States Courts of Appeals refused to associate antitrust injury with harm to consumers.[851] In that case, cheese makers conspired to depress the prices they paid to milk producers. They argued that the agreement was not anticompetitive since it entailed benefits for consumers. The reduced milk acquisition costs indeed enabled them to lower manufacturing costs and, as a result, to offer lower prices for cheese products to consumers. Although the argument seems appealing, the Court refused to make consumer injury a necessary condition to find a violation

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agreed not to bid against one another in order to regulate prices. The second case concerned a buying cartel of macaroni manufacturers which attempted to control the price of durum wheat by reducing the quantity purchased. The third case involved a class action brought on behalf of retail pharmacies against an alleged anticompetitive agreement between plan sponsors. The participants agreed not to bid up the price or bid against each other, thereby reducing the market price for prescription drugs and dispensing services provided by retail pharmacies. It was maintained that injury to sellers inflicted through a horizontal price-fixing conspiracy of buyers constitutes an antitrust injury which is actionable by the seller.

[846] *Mandeville Island Farms, op.cit.,* at 237.

[847] M.C.Naughton, *Buyer power under attack: recent trends in monopsony cases,* 18 Antitrust 81, at 83 (2003-2004)

[848] R.D.Blair & J.E.Lopatka, *Predatory buying and the antitrust laws,* 2008 Utah Law Review 415, at 444 (2008)

[849] Commissioner J. Thomas Rosch does not agree with such interpretation of the *Mandeville* case. According to him, that case arose long before consumer welfare became the standard of US antitrust policy. It can therefore not be interpreted as a proof that sellers and consumers are equally protected by the antitrust laws. He is in the opinion that the latter care about the welfare of consumers which is only likely to be impaired by the exercise of seller market power in the output market. Under that interpretation, the exercise of monopsony power is not anticompetitive unless it is used to create or maintain market power in the output market. See: J.T.Rosch, *Monopsony and the meaning of "consumer welfare": A closer look at* Weyerhaeuser*,* 2007 Columbia Business Law Review 353, at 359-361 (2007)

[850] *United States v. Socony-Vacuum Oil Co., Inc.,* 310 U.S. 150, 221-223 (1940)

[851] *Knevelbaard Dairies v. Kraft Foods, Inc.,* 232 F.3d 979 (9th Circ. 2000)

of the antitrust laws or to consider consumer benefits as justifying a restraint of trade.[852] It restated that the central purpose of the antitrust laws is to preserve competition and protect the economic freedom of participants in the relevant market. Conspiracy among buyers to pay suppliers less than the prices that would otherwise prevail was held to injure milk producers and competition. The Court strongly opposed the interpretation given by other courts to the notion of antitrust injury by affirming that:

> "Clearly mistaken is the occasional court that considers low buying prices pro-competitive or that thinks sellers receiving illegally low prices do not suffer antitrust injury. To hold otherwise would be contrary to long-established antitrust law."[853]

Price-fixing agreements between buyers are not only prohibited on the commodities markets but are also likely to be condemned as *per se* unlawful arrangements in markets for services or in the labor market. As regards the latter, US courts held that arrangements between employers to set salaries violate Section 1 of the Sherman Act since such agreements reduce their incentive to bid up payments in order to attract or to retain employees.[854] As a result, the latter receive a salary lower than what they would have received but for their employers' conspiracy.

Even nonprofit associations are not beyond the reach of the antitrust laws. In *Law v. NCAA*[855], the court held that, by limiting the salaries of some assistant coaches, the National Collegiate Athletic Association (NCAA)[856] entered into an anticompetitive agreement.[857] The argument that the rule would reduce the schools' costs and preserved employment opportunities was rejected as not valid. The court indeed maintained that:

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[852] See also: *Nate Pease, et al. v. Jasper Wyman & Son, Inc., et al.,* Civil Action No. 00-015, Knox County, State of Maine (2004). This case involves a conspiracy among processors to fix prices paid for wild blueberries. There was no proof that the defendants had the power to increase prices in the downstream markets but it was held that blueberry growers were injured since prices had been depressed significantly.

[853] *Knevelbaard Dairies, op.cit.*, at 47.

[854] See for example: *Todd v. Exxon Corporation,* 275 F.3d 191 (2nd Cir. 2001). Even though the case involved an exchange of price information, which is not itself a *per se* violation of the Sherman Act, the courts considered that sharing current price information has the greatest potential for generating anticompetitive effects and has consistently been held to violate the Sherman Act.

[855] *Law v. NCAA,* 134 F.3d 1010 (10th Cir. 1998)

[856] Members of the NCAA are colleges and universities. The association is in charge of organizing the athletic programs of its members.

[857] Although price-fixing agreement is usually illegal per se, the court decided to apply the rule of reason in this case. It followed a decision of the Supreme Court in which it was considered that the NCAA regulated an industry in which horizontal restraints on competition are essential if the product is to be available to all. See: *NCAA v. Board of Regents,* 468 U.S. 85 (1984). The Supreme Court had first developed the theory in *Broadcast Music, Inc., v. Columbia Broadcasting System, Inc.,* 441 U.S. 1 (1979). In that case, the Court held that the ASCAP (The American Society of Composers, Authors and Publishers) blanket music license could not exist absent an agreement among artist to sell their rights at uniform prices. It was hence decided to apply a rule of reason analysis to examine the restraint. (at 24)

> "Lower prices cannot justify a cartel's control of prices charged by suppliers, because the cartel ultimately robs the suppliers of the normal fruits of their enterprises. Further, setting maximum prices reduces the incentive among suppliers to improve their products. Likewise, in our case, coaches have less incentive to improve their performance if their salaries are capped."[858]

It was clearly asserted that free competition is protected not only because it produces lower prices but also because it incites traders to offer better goods and services. Therefore, even though the exercise of market power by a group of buyers results in lower costs to the buyers and may be, as result, beneficial to consumers, it is not sufficient to constitute a defense under the antitrust laws. The court added that:

> "If holding down costs by the exercise of market power over suppliers, rather than just by increased efficiency, is a procompetitive effect justifying joint conduct, then Section 1 can never apply to input market or buyer cartels. That is not and cannot be the law."[859]

Two lessons might be drawn from this decision. **Firstly**, the court refused to take into consideration the possible benefits that a buyer agreement may yield on the selling side and that buyers invoke to justify their practices. Cost savings or end-user positive effects are hence irrelevant to determine the legality of concerted conduct by buyers.[860] The underlying reasoning is that buyer cartels do not create efficiencies so that the lower prices obtained and passed on in the downstream seller market only result from the exercise of combined market power. If such anticompetitive behavior in the upstream buyer market could be justified by (short-term) benefits in the downstream seller market, buyer cartels could hardly be condemned. One may nevertheless assume that those benefits are fleeting and that the resulting reinforcement of market power in the up- and downstream markets is likely to adversely affect consumers in the longer-term. Anticompetitive conduct in the upstream buyer market can therefore not be justified by any positive effect in the downstream seller market unless the benefits invoked have been created through higher efficiency. The **second** lesson to be underlined refers to the objectives of competition law pointed out by the Court. Where lower costs/prices are particularly important in a bargain, other elements come also into the picture such as quality, service, safety, and durability. Even though buyer agreements may lead to lower prices, restriction on free competition and on the free opportunity to select among alternative offers is

[858] *Law v. NCAA,* 134 F.3d 1010 (10th Cir. 1998), at 1022
[859] *Ibid.,* at 1023
[860] G.J.Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light,* 74 Antitrust Law Journal 707, at 720 (2008)

nevertheless likely to go against the achievement of the competition goals by negatively affecting other but equally important aspects included in the concept of consumer welfare.

ii. Non-price concessions imposed on sellers

In addition to restraints of trade commonly considered as *per se* unlawful under the antitrust laws such as price fixing, market sharing or output/input restriction, the courts have also condemned other types of agreements involving induced refusal to deal orchestrated by buyers. The *per se* rule was for example applied in *Klor's* where an appliance store conspired with household appliance manufacturers and their distributors either not to sell to Klor's, a competitor, or to sell to it only at discriminatory prices and highly unfavorable terms.[861] The Supreme Court maintained that group boycotts fall in the forbidden category, even though they operate to lower prices or temporarily stimulate competition, because

> "Such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment".[862]

The Court distinguished this case from those involving a single trader refusing to deal with another or a manufacturer and a dealer agreeing to an exclusive distributorship. The complaint at hand concerned a conspiracy between manufacturers, distributors and a retailer which seriously handicapped a rival's ability to compete and deprived suppliers of their freedom to sell to Klor's. The Court added that no matters whether the victim is just one small merchant whose exclusion is not likely to make a difference in the economy.[863] It is worth noting that in this case, the buyer's orchestration was deemed to have a monopolistic tendency, that is to say, to be likely to create a monopoly in the downstream markets.

A similar case, dealt with by a Court of Appeals, concerned a large retailer of toys, Toys 'R' Us, which orchestrated an agreement among toy manufacturers not to sell to low-price rival stores.[864] The arrangement took the form of a network of vertical agreements between Toys 'R' Us and the individual manufacturers in which the former acted as a middleman, conveying assurance to each supplier that their competitors would abide by the same restriction. It was indeed not in the manufacturers' interests to deprive themselves of a profitable sales outlet but, because of the insurance that their competitors would do the same and under the pressure of the retailer's buyer power, they agreed to join in the boycott. Instead of acting against the buyer's conduct at the root of

[861] *Klor's v. Broadway-Hale Stores,* 359 U.S. 207 (1959)
[862] *Ibid.*, 213.
[863] *Ibid.*, 214.
[864] *Toys "R" Us, Inc. v. Federal Trade Commission,* 221 F.3d 928, (7th Cir.2000)

the anticompetitive agreement, the court decided to condemn the horizontal conspiracy as violating Section 5 of the FTC Act. This case nevertheless attests that a buyer may be in a position to affect competition despite its relatively low market share. Although Toys 'R' Us accounted for only 20% of the national wholesale market, it had nevertheless sufficient buyer power to achieve its intended anticompetitive goal, namely eliminating the competitive threat posed by new discounters.[865]

Restriction on sellers' freedom imposed by buyers was also held unlawful by the Supreme Court in *Crescent*[866] and *Griffith*[867]. In those cases, movie exhibitors were found to have combined their buyer power to eliminate their competitors. To achieve that aim, they agreed to buy films from distributors in cities where they had no competition, on condition that distributors give them monopoly exhibition rights in towns where the theaters faced competition. In the first case, the common end of film exhibitors was to acquire monopoly power in all market areas and was therefore condemned under Section 1 and 2 of the Sherman Act.[868] However, in the second case, the Court held that it is not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the Sherman Act has been violated. It is sufficient that a restraint of trade or monopoly in fact results from the buyers' conduct.[869]

b) Agreements likely to be held reasonable

In some cases, courts have not condemned agreements on the buying side as strictly as they would have been on the selling side. In contradiction with what was held in the decisions analysed above, those courts have put the emphasis on the potential benefits that buyer conduct may entail in the output markets. For example, in *Balmoral,* the court refused to hold as *per se* illegal an agreement between competing film exhibitors not to engage in competitive bidding for films offered by distributors.[870] The practice was deemed to be likely to serve rather than undermine consumer welfare since it would result in lower prices to moviegoers at the box office. In contrast, the lower prices paid to distributors were considered of little importance in this case due, in particular, to the

[865] M.E.Stucke, *Buyer power: Should the seller beware?,* Paper presented at the Conference on Buyer Power in Competition Law, Centre for Competition Law and Policy, Oxford, 15 May 2012, at 23.
[866] *United States v. Crescent Amusement Co.,* 323 U.S. 173 (1944)
[867] *United States v. Griffith,* 334 U.S. 100 (1948). See also: *FTC v. Motion Picture Advertising Svc. Co., Inc.,* 344 U.S. 392 (1953)
[868] The practices were condemned under Section 1 and Section 2 of the Sherman Act because exhibitors have combined with each other and with the distributors to obtain the monopoly rights. However, the same practice enforced by a single buyer would be enough to violate Section 2 of the Sherman act since the result would be the same. The consequences of such use of pooled or single buying power is that films are licensed on a noncompetitive basis
[869] *United States v. Griffith, op.cit.,* at 105. In that case, exhibitors made no threat to withhold the business of their closed or monopoly towns unless the distributors gave them the exclusive film rights in the towns where they had competitors. However, the Court found that the effect was likely to be the same.
[870] *Balmoral Cinema, Inc., v. Allied Artists Pictures Corp.,* 855 F.2d 3313 (6th Cir. 1989)

great market power wielded by them over film products. The Court suggested that the agreement would not create monopsony but would represent a shift from a monopoly situation to a bilateral monopoly situation.[871]

A similar argument was held in *North Jackson Pharmacy.*[872] An alleged anticompetitive drug buying cartel between insurance companies to drive down the prices paid to pharmacies escaped from the *per se* standard because such agreement might benefit consumers, at least in the short term, through lower drug prices. Again in that case, the court seemed to consider that prescription drug sellers held market power and that the arrangement constituted a mean to lower prices closer to the competitive level.[873]

However, such argument seems hardly justifiable. Even though buyer may be in a weaker position when dealing with large sellers, the mere fact to hold market power is not unlawful under the Sherman Act. Authorizing restrictive buyer cartels to counterbalance the exercise of market power on the other side of the market restricts free competition and does not, in any way, restore effective competition. Furthermore, the reasoning of the court is likely to entail uncertainties on the markets. When do sellers hold sufficient market power to allow their customers to conspire? This case concerned an arrangement between buyers not to bid against each other but may price-fixing agreements also fall into the reasoning of the court? Where buyer power may constitute, in some circumstances, a positive countervailing strength when buyers face a concentrated upstream seller market, the countervailing power argument is more arguable in cases of buyer cartels. Indeed, the exercise of market power is not unlawful unless it results in competition distortions while agreements among market participants limit de facto competition on the market and can only be justified on efficiency grounds.

US courts have also been more lenient towards boycotts orchestrated by a buyer when no horizontal agreement has been established. Where a single retailer induced one of his suppliers to stop selling to a rival distributor, courts consider that the "group boycott" doctrine upheld in *Klor's* is not applicable.[874] As confirmed by the Supreme Court, the *per se* rule is limited to cases involving horizontal agreements among direct competitors, either between buyers or between sellers, that

[871] L.Alexander, *Monopsony and the Consumer Harm Standard,* 95 The Georgetown Law Journal 1611, at 1625 (2007)
[872] *North Jackson Pharmacy, Inc. v. Caremark RX, Inc.,* 385 F.Supp.2d 740 (N.D. III. 2005). See also: *Addamax Corporation v. Open Software Foundation, Inc.,* 888. F.Supp. 274 (D.Mass. 1995). In that case, the court considered that lower prices benefit consumers. Antitrust injury is only likely to occur when the colluding buyers also possess market power in the output market. In such a case, they would be able to harm consumer by raising prices and thereby cause competition injury.
[873] L.Alexander, *op.cit.,* at 1625.
[874] *Oreck Corporation v. Whirlpool Corporation,* 563 F. 69 (1979).

may have been orchestrated by a powerful buyer.[875] The main reason of such differential treatment is the willingness to preserve the ability of a manufacturer to award and cancel an exclusive distributorship.

However, the real evil in all those cases is not the existence of a conspiracy among manufacturers or among buyers but the exercise of buyer power to exclude competitors. When it is established that the decision to cease to do business with a customer does not result from the supplier's free choice but from coercive pressure exerted on that supplier by a competing buyer, the restrictive effect on competition is the same, whatever the number of conspirators at each level of the supply chain.[876] A similar treatment should therefore be applied when a buyer is at the root of the anticompetitive practice. According to the US case law, though, a boycott involving horizontal agreements is *per se* unlawful, while a single buyer's inducement will be examined under the rule of reason. In the latter case, it will be required to demonstrate that the exclusion of the targeted retailer entails a significant restriction on competition in the relevant market. If, in addition, the court dealing with the case bases its assessment only on the direct impact of the conduct on the downstream seller market, boycotts induced by large buyers are unlikely to be considered as violating the competition rules. Consequently, although the two examples of boycott lead to similar effects, namely market foreclosure, the result of the competition assessment may be radically different.[877]

Even though the assessment approach may vary from one court to another, buyer agreements are nevertheless a target in US antitrust enforcement. Buyer power cases involving Section 2 of the Sherman Act, however, seem to raise fewer competition concerns.

2. Section 2 of the Sherman Act

Section 2 of the Sherman Act applies to unilateral conduct aiming at monopolizing a particular market. We cannot but notice that the provision has hardly been successfully used to tackle alleged anticompetitive practices used by a single buyer. The focus on the lower prices that the exercise of buyer power may bring to consumers and the application of standards ill-adapted to buy side conduct are probably the main reasons of that under enforcement.

a) Lower prices and refusal to deal

As imposing low prices in the input market is likely to benefit consumers, US courts are not willing to condemn such conduct even though prices are pushed down below the competitive level. To

[875] See: *Business Electronics Corp. v. Sharp Electronics Corp.,* 458 U.S. 717 (1988) and *Nynex Corp. v. Discon, Inc.,* 525 U.S. 128 (1998)
[876] T.A.Piraino, *A proposed antitrust approach to buyers' competitive conduct,* 56 Hastings Law Journal 1121, at 1134 (2005)
[877] T.A.Piraino, *op.cit.*, at 1135.

consider that low consumer prices are, in any case, procompetitive constituted the reasoning followed by the Court in *Kartell.*[878] The case involved a health insurance company, Blue Shield, which decided to cap the prices that doctors could charge to its subscribers. That ban against balance billing prevented hence physicians to set higher prices for more expensive services. In order to implement its policy, Blue Shield simply refused to deal with doctors who did not agree with the program. In view of the large number of privately insured residents covered by Blue Shield, doctors felt coerced to adhere to the maximum fee schedule and alleged that the insurance company violated the Sherman Act.[879]

While the district court concluded that the payment system imposed heavy economic pressure on physicians and set unjustifiably low prices[880], the Court of Appeals, however, did not find any unlawful restraint. It considered that, as a buyer of the doctors' services, Blue Shield was entitled to determine the price of the product that will be sold. The company was even free to exploit its monopsony power and to set uncompetitive prices, namely prices below the level that a freely competitive market would otherwise set. It is only in special circumstances, such as in case of predatory pricing, that the antitrust laws may interfere in the price bargain between buyer and seller. Furthermore, the Court emphasized that when enacting the Sherman Act, the Congress intended to protect consumers against prices that were too high, not too low. Since the prices at issue in that case were low prices, the Court concluded that the payment program was likely to bring benefits to consumers in the form of lower insurance premiums.[881] Finally, it was maintained that, as the price system in the health care sector is one supervised by state regulators, strict antitrust scrutiny was less likely to be necessary.[882]

Turning to the issue on whether Blue Shield's refusal to deal with recalcitrant doctors was or not unlawful, the Court held that, as long as there is no horizontal conspiracy, a firm is free to deal, or refuse to deal, with whomever it likes.

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[878] *Kartell v. Blue Shield of Massachusetts, Inc.,* 749 F.2d 922 (5th Cir. 1984). See also: *Westchester Radiological Associates P.C. v. Empire Blue Cross and Blue Shield,* 884 F.2d 707 (2nd Cir. 1989)

[879] Blue Shield covered nearly 74% of all privately insured Massachusetts residents. Physicians who did not agree with the program were therefore likely to be cut off from a substantial number of possible patients. Indeed, the latter were dissuaded from choosing a non-participant doctor as they would consequently lose their Blue Shield benefits and would have to pay personally, not only for the additional charge, but for the entire bill.

[880] According to the district court, the system interfered with the doctors' freedom to set higher prices for more expensive services. Such restriction was likely to discourage them from developing better but more expensive services.

[881] S.C.Salop, *Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The* True *Consumer Welfare Standard,* Georgetown University Law Center, November 4, 2005, at 7-8.

[882] That argument has been maintained in other regulated sectors, such as in the electric power industry. See for example: *Kamine/Besicorp Allegany v. Rochester Gas & Elec.,* 908 F.Supp. 1194 (W.D.N.Y. 1995)

> "It runs squarely into basic antitrust law that a firm generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. There is nothing special here to take this case outside the general rule. There is neither evidence of a horizontal conspiracy nor any charge that Blue Shield agreed with one of its competitors not to deal with nonparticipating doctors. (…)Blue Shield's independent determination of the terms on which it will deal, of the customers to whom it will sell, and of the suppliers from whom it will purchase is a manifestation of the competitive process, not an effort to suppress or to destroy that process."

We can note that, even though Blue Shield, due to its very large market share in the health insurance market, might be viewed as an avoidable trading partner or "gatekeeper" in the eyes of physicians, that issue was not raised by the Court. As long as the practice is likely to bring lower prices to consumers, it will be held procompetitive. No matter the degree of coercion imposed on suppliers which are deprived of the benefits of a competitive buying market.

However, courts may be stricter when threats of refusal to deal are used as a means, not to set low prices, but to drive rivals out of the market. In *Reazin*[883], the largest private health care financing organization in Kansas (Blue Cross) threatened hospitals to terminate their contracting agreement if they were doing business with competing insurance companies. The reason of that new policy was the perceived competitive threat posed by growing rivals in the market. Although all hospitals and 90% of all physicians were affiliated to Blue Cross as providers of medical services to its subscribers, the company was seeking a mean to maintain its monopoly power. The court judged in that case that Blue Cross's conduct violated the Sherman Act because it prevented providers from contracting with rival buyers and thereby injected a market distortion.

b) Predatory bidding

Predatory practices have been addressed by US courts in different decisions. Where most of them concerned sellers engaged in predatory pricing, similar practices involving buyers have also been subject to courts' scrutiny. Predatory bidding on the buying side may be seen as the mirror image of predatory pricing on the selling side of the market. The latter involves the practice of selling a product or service at a very low price in order to drive competitors out of the market. In contrast, the former occurs when a buyer bids up the market price of an input to a level unsustainable for rival buyers which are consequently ousted from the market. To that period of aggressive price competition succeeds a period where the seller is able to exercise monopoly power and to increase prices to consumers. Similarly, in the case of predatory bidding, the buyer acquires (or maintains or

[883] *Reazin v. Blue Cross and Blue Shield of Kansas, Inc.,* 899 F.2d 951 (10th Cir. 1990)

increases its) monopsony power as a result of its predatory conduct and is therefore in a position to lower the input prices below the competitive level.[884] The question of whether those two similar practices are to be treated under the same standard has been answered by the Supreme Court in the *Weyerhaeuser* case.[885]

In that case, Weyerhaeuser, a saw mill, was accused by a competitor (Ross-Simmons) of buying more raw materials that it needed. The objective of such strategy was to push up prices of sawlogs in the upstream buyer market so as to force rivals out of that market and acquire monopsony power.[886] The intention of the firm was clearly to recoup the costs manifold once competition would be sufficiently restricted.[887] Before the District Court, Weyerhaeuser argued that the *Brooke Group* test under which predatory pricing is assessed should also apply to claims of predatory bidding.[888] On the selling side, that test requires the plaintiff to show that the prices he complained about are below an appropriate measure of the predator's costs and that the latter has a dangerous probability of recouping its investment in below-cost prices.[889] The District Court and the Court of Appeals, however, disagreed and considered that predatory pricing and predatory bidding constituted practices materially different.[890] According to those courts, to prove a predatory bidding claim, it is sufficient to show that a buyer purchased more inputs than it needed, or paid a higher price than necessary in order to prevent competitors from obtaining the input they needed at a fair price. Under that interpretation,

[884] J.B.Kirkwood, *Buyer power and exclusionary conduct : Should* Brooke Group *set the standards for buyer-induced price discrimination and predatory bidding ?,* 72 Antitrust Law Journal 625, at 652-653 (2005). Predatory bidding, which aims at acquiring monopsony power in the input market, must be distinguished from raising rivals' costs. In the latter case, a buyer raises its rivals' costs by overbuying inputs in order to gain market power in the downstream market. The objective of such practices is not so much to exclude competitors as to make them sell at a higher price in the downstream seller market due to their higher purchasing costs. This enables then the overbuying firm to also charge higher prices in the output market and to increase its margins, reducing as a result consumer welfare. On the distinction between predatory overbuying and raising rivals' costs overbuying and the treatment that should apply to those practices, see: S.C.Salop, *Anticompetitive overbuying by buyer power,* Georgetown University Law Center, Research paper No. 614513 (2004).

[885] *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.,* 549 U.S. 312 (2007)

[886] Pushing up input costs was part of Weyerhaeuser's consolidation strategy. Other bidding practices were implemented to increase input costs for competitors. It also used strategic acquisitions and entered into various exclusive arrangements to lock up the sawlog market. See: M.E.Haglund, *Weyerhaeuser's aftermath: increased vulnerability of resource-based input markets to monopsony,* 53 The Antitrust Bulletin 411, at 422-428 (2008)

[887] M.E.Haglund, *op.cit.*, at 432-433.

[888] *Brooke Group Ltd. V. Brown & Williamson Tobacco Corp.,* 509 U.S. 209 (1993).

[889] *Ibid.,* at 221-222.

[890] *Confederated Tribes of Siletz Indians of Ore. V. Weyerhaeuser Co.,* 411 F.3d 1030 (9th Cir. 2005)

predatory bidding should hence be addressed following a loose profit-sacrifice test rather than a cost test.[891]

The Supreme Court reversed that decision and ruled that, since predatory pricing and predatory bidding claims are analytically similar, the same legal standards should apply, namely the two-prong *Brooke Group* test. On the buying side, the test requires, first, that the alleged predatory bidding led to below-cost pricing of the predator's outputs in the downstream seller market. That is, the cost of the relevant outputs must be above the revenues generated in the sale of those outputs due to the high prices paid for inputs in the upstream buyer market. Second, a dangerous probability of recouping the losses through the exercise of monopsony power must be established.

Despite the similarities noted by the Supreme Court between predatory pricing and predatory bidding, it nevertheless maintained that the consequences of those practices on consumers may be different. In predatory pricing cases, consumers are directly affected during the recoupment period due to the higher prices imposed by the new monopolist. Without successful recoupment, however, consumers fully benefit from the intense price competition period initiated by the predator.[892] This is not always accurate in case of predatory bidding. Indeed, the Court asserted that failed predatory bidding schemes can also, but will not necessarily, benefit consumers. The reason is that the predator's high bidding does not necessarily result in the manufacture of more outputs and thereby lower prices for consumers.[893] In addition, the Court noted that successful predatory bidding may occur without any effect on consumer prices. The predator may in fact only use its monopsony power to recoup its losses, by forcing down input prices, without decreasing prices in the output market. It was therefore recognized that buyer's conduct may be held anticompetitive even though it leads to no consumer harm.[894]

The restrictive liability standard of the *Brooke Group* test was established in order to prevent false positives. With only vague requirements, aggressive price competition could indeed easily be mistaken with predatory pricing schemes. In order to avoid the risk of deterring such procompetitive

[891] Under a profit-sacrifice test, a plaintiff can prevail by demonstrating that the buyer made a profit sacrifice. Instead, under a cost test the plaintiff is required to establish that the product was sold at a loss as a result of the predatory practice. See: S.C.Salop, *op.cit.*, at 39-47.
[892] That is why the Court held in Brooke Group that, short of successful recoupment, predatory pricing is not prohibited even though the practice causes allocative inefficiency. Injury to competition was clearly equated to consumer harm in that case. See: R.D.Blair & J.E.Lopatka, *op.cit.*, at 420.
[893] The predator may indeed decide not to use the excess inputs or to destroy them. An increase in outputs may also be offset by a decrease in outputs by market competitors. See: S.C.Salop, *op.cit.*, at 14.
[894] Comments during oral argument made reference to the fact that the Sherman Act protects suppliers against anticompetitive conduct such as it protects consumers. However, the Court did not explicitly mentioned in its decision that efficiency in input market is part of the competition goals. See: Transcript of Oral Argument, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.,* 549 U.S. 312 (2007) (No. 05-381)

price cutting which benefits consumers, the Court therefore decided to impose strict conditions to prevail on a predatory pricing claim. The same argument was held in *Weyerhaeuser.* It was maintained that:

> "Given the multitude of procompetitive ends served by higher bidding for inputs, the risk of chilling procompetitive behavior with too lax a liability standard is as serious here as it was in *Brooke Group.* Consequently, only higher bidding that lead to below-cost pricing in the relevant output market will suffice as a basis for liability for predatory bidding."[895]

A lot of ink has been spilled over this decision. Some have argued that the Supreme Court was wrong when applying the *Brooke Group* test to predatory bidding with little adaptation.[896] Professor John B. Kirkwood considers that the claim should have been analyzed under a full rule of reason in order to determine whether the practice was likely or not to reduce consumer welfare.[897] According to him, the application of the test to predatory bidding conduct does not constitute a good proxy to evaluate consumer injury.[898] Defending a consumer welfare standard, he maintains that buyer liability should be in any case precluded when monopsony power is exercised to the benefit of consumers through lower prices, even though suppliers are hurt by the practice in question.[899] In contrast with Professor Steven Salop's developments on that issue, John B. Kirkwood considers that consumer injury may not necessarily be significant to find anticompetitive buying conduct.[900] He seems to admit that suppliers deserve protection under antitrust laws, unless buyers' conduct is likely to increase consumer welfare. He maintains that:

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[895] *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.,* 549 U.S. 312 (2007), pp.6-7.

[896] See for examples: M.E.Haglund, *op.cit.* and J.B.Kirkwood, *op.cit.*

[897] "The plaintiff should establish four elements: First, that the defendant raised the price that its rivals had to pay for a critical input; second, that this price increase impeded the rivals' ability to compete and made it likely that the defendant would exercise monopsony power in the future; third, that the exercise of this power was not likely to be undermined by new entrants; and finally, that this power was likely to cause adverse effects on consumers that would outweigh any benefits attributable to the defendant's behavior." See: J.B.Kirkwood, *op.cit.,* at 661. Mr. Michael E. Haglund, who appears on behalf of Ross-Simmon in the *Weyerhaeuser* case, is also of the opinion that the rule of reason balancing test would be more appropriate, especially when the input market is inelastic, such as the sawlog market. In that situation, however much buyers pay, the same amount of inputs are supplied and hence processed. Higher prices offered to suppliers are therefore not likely to lead to higher outputs and lower prices for consumers. See: M.E.Haglund, *op.cit.,* at 422.

[898] He considers that, unlike in predatory pricing cases, there is no direct correspondence between a buyer profits and consumer losses. Indeed, higher prices for inputs do not automatically lead to extra dollars gained by consumers. Similarly, during the recoupment period, lower prices may be set in the buying market without causing any consumer injury.

[899] J.B.Kirkwood, *op.cit.*, at 662.

[900] Steven Salop considers that both the *Brooke Group* test and the rule of reason should apply to predatory bidding. As regards the latter, he rejects to apply only a "minimal" consumer harm standard. Because consumers may benefit during the predatory period, a non-insignificant harm must be established to condemn a buyer's conduct.

> "When an upstream monopsonist has no significant power in the downstream product market, its acquisition of monopsony power through predatory bidding may have no significant effects on downstream consumers. That however should not absolve the defendant."[901]

Commissioner J. Thomas Rosch is, however, not of that opinion. He also rejects the application of the *Brooke Group* test but, in addition, considers that where the defendant lacks market power in the output market, such as in *Weyerhaeuser,* predatory bidding claims should automatically be rejected since, in such circumstances, the exercise of monopsony is unlikely to harm consumers.[902] According to him, unlike predatory conduct on the selling side, predatory bidding is not detrimental to consumers and may in fact benefit them, be it during the predation period or the harvest period. Competition in the output market indeed dissuades the firm from increasing output prices during the first period and, once monopsony is acquired, induces it to pass on the lower prices obtained in the input market to consumers.[903] Considering that antitrust law is confined to the protection of consumers confronted by the exercise of seller market power, he holds that exclusionary conduct in the input market is only likely to raise anticompetitive concerns when it is used to create or maintain market power in the output market.[904]

Other criticisms have been put forward concerning the first prong of the *Brooke Group* standard, namely the price-cost test which requires that the predatory bidding scheme leads to below-cost pricing in the output market. In fact, the Supreme Court drew on the price-cost test from that applied to predatory pricing without any adaptation. However, the comparison between the cost and the output price is much less evident in a situation of predatory bidding. Indeed, as Professors Roger D.Blair and John E. Lopatka rightly highlighted,

> "In a predatory pricing case, the relevant comparison is between the allegedly exclusionary price charged for a good and the cost of that good. By contrast, in a predatory bidding case, the comparison is between the price charged for some good other than the one whose price is allegedly exclusionary and its costs."[905]

There is therefore a lack of symmetry which would require a different metric to assess predatory bidding. It results yet from the *Weyerhaeuser'*s rule that buyers have more leeway than sellers have

[901] J.B.Kirkwood, *op.cit.* at 664.
[902] See: J.T.Rosch, *Monopsony and the meaning of "consumer welfare": A closer look at* Weyerhaeuser*,* 2007 Columbia Business Law Review 353 (2007)
[903] *Ibid.,* at 366.
[904] J.T.Rosch, *op.cit.,* at 368-369.
[905] R.D.Blair & J.E.Lopatka, *op.cit.*, at 416.

in the downstream market to increase their market power in the upstream buyer market through their pricing policy. They can indeed acquire monopsony power without necessarily selling at a loss in the downstream seller market.[906] For example, the buyer could decide not to use all the inputs in order to limit the amount of outputs and keep prices high in the downstream market. Such conduct would enable the predator to harm rival buyers in the upstream buyer market by bidding up input prices but would nevertheless not prevent it from selling the end product for a profit. The first prong of the test would, as a result, not be fulfilled and the practice not condemned by the courts.[907] One can also mention the case of a partially vertically integrated buyer which only buys a small amount of its needed inputs on the markets. In that situation, bidding up the prices would not push up the predator's costs to the same extent as its competitors' costs. Applying another standard in predatory bidding cases might therefore be more suitable not to leave intended exclusionary conduct in the input market unpunished.[908]

Where the *Brooke Group* test probably constitutes a too extensive safe harbor rule to tackle buyers' predatory conduct, it remains that the *Weyerhaeuser* case contains important statements as regards the treatment of buyer power. On the one hand, the Court recognized that practices on the buying side may lead to anticompetitive outcomes and must therefore be treated as strictly as selling practices. On the other hand, by stating that successful predatory bidding does not necessarily harm consumers, the Court considered that anticompetitive injury does not equate to consumer injury. The Sherman Act may hence be enforced to protect competitive pricing for input suppliers despite no consumer injury being established. For example, lacking sufficient market power in the output market, a buyer is unlikely to affect directly consumers. Yet, this is not an argument to avoid the application of the antitrust laws. In case of predatory bidding, and more generally in case of any alleged anticompetitive buyer's conduct, the resulting distortions on competition should raise similar antitrust concerns as sellers' practices do. According to some scholars, such interpretation would be totally consistent with the legislative history and the terms of the Sherman Act which aim at preventing any restraint of trade whoever are the perpetrators, be it buyers or sellers.[909] They argue that the Congress intended to condemn trusts not only for raising prices to consumers but also for

[906] M.E.Haglund, *op.cit.*, at 451-452.
[907] R.D.Blair & J.E.Lopatka, *op.cit.,* at 449.
[908] This seems to be corroborated by the Weyerhaeuser's conduct and the resulting positive effects on the relevant markets after the judgment of the District Court confirmed by the Court of Appeals. The firm indeed abandoned its bidding practices and, as a result, the competitive situation in the input market improved significantly. The antitrust litigation helped restore competition in those markets. However, after the Supreme Court's decision, it is likely that Weyerhaeuser will yield to its prior practices. See: M.E.Haglund, *op.cit.,* at 434-435.
[909] See for examples: W.S.Grimes, *Buyer power and retail gatekeeper power: Protecting competition and the atomistic seller,* 72 Antitrust Law Journal 563 (2005) and G.J.Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light,* 74 Antitrust Law Journal 707 (2007)

reducing prices paid to farmers.[910] During the debates on the Sherman Act, Senators and Congressmen underlined the harmful effects that powerful buyers were causing to farmers. They pointed out that the former were robbing producers of their hard-earned money by forcing them to sell at an enormous sacrifice, at starvation prices.[911] Consequently, it may be assumed that the Sherman Act is not only concerned with restriction in the downstream seller market but rather extends its protection to all market participants who are made victims of anticompetitive conduct. Even though consumer welfare remains the ultimate aim of competition law, the achievement of that objective could be impeded by a broader range of practices, not limited to the increase of consumer prices or the reduction of output quantity. However, US courts have never effectively applied such an approach in antitrust cases. Focusing on prices and quantities in the downstream market, they generally consider that end-users are better off only through lower prices. Any buyer practice restricting competition in the upstream market but resulting in (short-term) lower prices in the retail market is therefore very likely to be characterized as procompetitive.

Besides Section 1 and Section 2 of the Sherman Act, the enforcement of two other pieces of legislation mentioned above is worth looking at, namely the Robinson-Patman Act and the Packers and Stockyards Act.

3. Robinson-Patman Act (Section 2 of the Clayton Act)

Section 2 of the Clayton Act requires that suppliers sell to everyone at the same price and prevents buyers from inducing lower prices to the detriment of rivals. Enacted to establish a competitive level playing field for the purchase of commodities, the Robinson-Patman Act have entailed adverse consequences on the markets and failed to reach the intended targets, namely large retail chains holding significant buyer power. One of the reasons of that failure is the particular meaning given by the U.S. courts to the notion of competition injury in cases involving secondary line discrimination. Departing from the tradition meaning given to that notion, competition enforcers have, in some cases, favored protection of smaller buyers over protection of competition and, consequently, deprived consumers of the benefits resulting from supply chain efficiencies gained by large retailers.

[910] G.J.Werden, *Monopsony and the Sherman Act…, op.cit.,* at 713-714.

[911] See: Statement of Rep. John T. Heard and Statement of Sen. William M. Stewart, 21 Cong. Rec. 2461 (1890). See also statement of Sen. John Sherman, 21 Cong. Rec. 2461 (1890): "These trusts combinations are great wrongs to the people. They have invaded many of the most important branches of business. They operate as a double-edged sword. They increase beyond reason the cost of necessaries of life and business, and they decrease the cost of raw material, the farm products of the country. They regulate at will, depress the price of what they buy and increase the price of what they sell."

a) Primary line discrimination

Primary line discrimination arises when a seller decides to lower its prices in a particular area in order to attract more business and exclude competitors from that market. Such discriminatory pricing policy is likely to cause injury to competition between the discriminating seller and its rivals. For three decades following the enactment of the Robinson-Patman Act, injury to competition in those cases was equated to harm to competitors.[912] Because selling at lower prices was likely to injure competitors by taking business away from them, the U.S. courts considered that the mere proof of a difference in prices was sufficient to raise a presumption of violation of the Act. To antitrust observers, that interpretation limited to a great extent competitive activities which include, by definition, attempts to take business away from rivals by offering lower prices or higher quality products.[913] Condemning price competition was hence totally inconsistent with the type of behavior the Sherman Act seeks to foster, especially when price reductions resulting from scale economies were found in violation of the Robinson-Patman Act.[914]

It is only since 1993 that a new interpretation has been put forward by the Supreme Court in its *Brooke-Group* decision.[915] That change in the construction of the Act reflected a new general understanding of the objectives of the antitrust laws which emerged in the 1970s. The focus was no longer upon fairness or rivalry for its own sake but rather upon efficiency.[916] Thereby, the Court ruled that primary-line injury requires proof of predatory pricing.[917] This hence implies that the plaintiff must prove that (1) the seller's prices were below an appropriate measure of its costs and that (2) the seller has a reasonable prospect of recouping its investment in below-cost prices.[918] Under that new interpretation, the diversion of business from rival sellers is no longer equivalent to injury to competition. Instead, it must be established that price discrimination is profitable in the sense that the subsequent monopoly profits extracted by the seller are likely to exceed the costs of driving rivals out of business.

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[912] See for examples : *Samuel H. Moss, Inc., v. FTC,* 148 F.2d 378 (2d Cir.), cert. denied, 326 U.S. 736 (1945); *FTC v. Anheuser-Busch, Inc.,* 363 U.S. 536 (1960), *Utah Pie Co. v. Continental Baking Co.,* 386 U.S. 685 (1967); *Baking Corp. v. Old Homestead Bread Co.,* 476 F.2d 97 (10th Cir.) (1973).

[913] D.J.Gifford & R.T.Kudrle, *op.cit.*, at 23. See also: D.Gifford, *Farewell to the Robinson-Patman Act? The Antitrust Modernization Commission's report and recommendation,* 53 The Antitrust Bulletin 481, at 510 (2008).

[914] See : *Utah Pie Co. v. Continental Baking Co.,* 386 U.S. 685 (1967).

[915] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209 (1993).

[916] That new antitrust economic theory is called the « Chicago School » and was a reaction to the shortcomings of another antitrust doctrine, namely the "Harvard School" which was deemed to overprotect individual competitors against market power of large firms. See on that matter: T.A.Piraino, *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century,* 82 Indiana law Journal 345 (2007).

[917] In cases of predatory pricing, the seller imposes uniform price cuts. On the other hand, predatory price discrimination consists in selective price cuts resulting in different prices for the same product in separate areas.

[918] *Brooke Group Ltd., op.cit.*, at 222-224 (1993).

This new approach to the interpretation of the Robinson-Patman Act seems better constructed to avoid anticompetitive outcomes and ensure a consistent enforcement of the antitrust rules. It remains yet that the meaning given to competition injury in second-line discrimination cases is still in contradiction with the need to ensure an effective competitive environment.

b) Secondary line discrimination

Secondary line injury considers the effect of a discriminatory price given by a seller to a favored customer on the latter's competitors. Early in the history of the Act and since then, courts have inferred harm to competition within the meaning of the Act from price differentials among competing customers.[919] Such presumption is however rebuttable. The defendant may for example break the causal connection between the discriminatory price and the loss of sales or profits by proving that the disfavored competitors have in fact increased their profits[920] or that the differential price constituted a "new customer discount".[921]

The unwillingness of U.S. courts to shift to the commonly-used 'injury to competition' standard - as the Supreme Court did as regards primary line discrimination -, is probably due to the underlying purpose of the Robinson-Patman Act which was to protect buyer-level competition. However, the presumption of unlawfulness deriving from a price differential seems to go far beyond the objective of protecting small buyers against large chain stores' buying power. Courts indeed consider that the Act is of general applicability and hence prohibits any discrimination, regardless of whether the discount has been granted to or extracted by a powerful buyer.[922] Already incompatible with the consumer-welfare and efficiency objectives of the antitrust legislation, the enforcement of the Act seems, as a result, also to miss the goals of fairness intended by the Congress by immunizing any market participant, big or small, from the vagaries of price competition.

c) Unsatisfactory result

Although the Robinson-Patman Act was meant to address an important competitive concern, namely the exercise of significant buyer power and its effects within the supply chain, it does not constitute an adequate tool to effectively achieve that objective. Different elements reveal that the Act fails to curb retail chains' market power and, in addition, entails anticompetitive effects by harming consumers.

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[919] See: *FTC v. Morton Salt Co.,* 334 U.S. 37 (1948) and *Texaco Inc. v. Hasbrouck,* 496 U.S. 543 (1990). In order to establish the prima face case, the plaintiff has merely to prove either lost sales or profits or a substantial price differential over time.

[920] *Boise Cascade Corp. v. FTC,* 837 F.2d 1127 (D.C.Cir. 1988)

[921] *Motive Parts Warehouse v. Facet Enters,* 774 F.2d 380 (10th Cir. 1985).

[922] *Falls City Industries, Inc. V. Vanco Beverage, Inc.,* 460 U.S. 428 (1983).

Firstly, the Act has been criticized for discouraging sellers from granting non-cost but also cost-justified concessions to large buyers. Indeed, the difficulty in invoking the justifications provided by the Act leads suppliers to imposing a uniform price to all their customers. As a result, such price-rigidifying effect deprives consumers of the benefits generated by a higher efficiency of large chain stores. By integrating the wholesaling and retail functions and by purchasing directly from manufacturers without resorting to brokerage services, those large customers are indeed able to save some expenses which may be passed on to consumers through lower prices.[923] If a preferential price that is not cost-justified may in some cases pose a threat to consumer welfare, cost-justified discounts are more likely to benefit consumers.[924] The inference of competition harm from a mere price differential results in fact in confiscating the benefits offered by the development of large retail chains to the detriment of consumers.

Secondly, the protection of small business firms for its own sake is at odds with the currently prevailing goals of competition law. Even though the precise determination of those objectives is still subject to controversy in the United States, the protection of weaker players on the markets is not a source of concern either under the efficiency theory or under the consumer welfare doctrine. By preventing pricing flexibility, courts impede the dynamics of the competitive process.[925] The focus upon the welfare of individual rivals is hence likely to reduce the intensity of competition. Instead of protecting competition as the other antitrust rules do, the Robinson-Patman Act rather insulates competitors from the rigor and beneficial fierceness of competition.[926] In addition, the different meaning given to the concept of competition injury under the Act is likely to give rise to inconsistencies in the enforcement of the antitrust rules. Indeed, proof of a price differential or other

[923] D.Gifford, *op.cit.,* at 495.
[924] J.B.Kirkwood, *op.cit.,* at 646-651. According to M.Kirkwood, the impact on consumers resulting from non-cost-justified discrimination may be either positive or negative. It would be positive if a buyer induces a discriminatory price from oligopolistic sellers and that the concession spreads to other buyers causing the oligopolistic structure to collapse. Even if the price discount is not granted to smaller buyers, the impact on consumers may still be positive if the concessions are passed on to them due to competition forces in the retail market forcing retailers to keep low prices. On the other hand, non-cost-justified discrimination may have negative effects in at least five situations. Frist, favored buyers may be able to take business from their competitors and thereby reduce the number of players on the market leaving consumers with a restricted array of options. Second, a favored buyer may use that competitive advantage to gain market power as a seller. The strong position acquired in the selling market would then allow him to raise prices to consumers. Third, a buyer may use its power not to lower its own purchasing prices but to induce sellers to discriminate by raising prices to competitors. By raising its rivals' costs, the buyer will be able to increase its prices in the downstream markets. Fourth, since favored buyers are conferred a competitive advantage through the price concession, they may become less efficient and less innovative in the sense that they "use concessions to cushion their own sluggishness". Fifth, unjustified discrimination may reduce the supplier's profit margin and thereby reduce its incentive to invest in the industry. As a result, the product diversity or quality offered to consumers may be affected.
[925] D.Gifford, *op.cit.,* at 491.
[926] *Ibid.*, at 499.

concession obtained by a buyer is sufficient to infer the existence of an unlawful discrimination under the Robinson-Patman Act. In contrast, if a sufficiently powerful buyer uses its bargaining strength, for example, to forbid a manufacturer to sell to rivals with the intent to drive the latter out of business, the plaintiff will have the difficult task to prove that such conduct is likely to harm competition. Where the second practice seems more reprehensible, in practice, it is less likely to be condemned.

Thirdly, despite the fact that the enactment of the Robinson-Patman Act was dominated by concerns about the power of large buyers who were able to exacted discriminatory concessions, the resulting statute is primarily directed at sellers.[927] Indeed, even though discrimination is often the result of a buyer exploiting its market power, the provisions of the Act focus on the price discriminator rather than on the firm benefiting from the price differential. This is nonsensical since, besides harming rival buyers, price discrimination may also cause injury to suppliers forced to submit to the pressure of powerful customers and to forego sometimes essential profits to the development or survival of their business. Direct victims of the use of buyer power in most cases, sellers remain nevertheless the main and easier target of the Act and can even not invoke the buyer's inducement as a defense for discriminatory prices. The derivative nature of the buyer liability would indeed imply condemning the seller as well.

Probably because of those adverse effects, the enforcement of the Act by the federal agencies has declined substantially for a couple of decades. Consequently, price discrimination has been mainly subject to private treble damage action in the recent years.[928] Leaving the enforcement of the Statute to private suits is however likely to intensify pressure against the wrong target, namely sellers. It is indeed much easier to establish the seller liability, inferred itself form the price differential, than to prove the buyer's knowledge of the illegal price. Furthermore, as regards the other types of discrimination related to services, allowances or other compensation, the buyer liability is likely to be examined under Section 5 of the FTC Act which cannot lead to private treble damage remedy. Without the intervention of the federal enforcement authorities, buyers are therefore allowed to use their buying power in order to extract various advantages, with complete impunity under the Robinson-Patman Act.[929]

Despite the criticisms, the Statute has not been repealed. The adverse effects mentioned above are therefore likely to be continuing and the use of buyer power to remain not properly addressed.

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[927] D.E.Ray, *Buyer liability under Section 2 (f) of the Robinson-Patman Act,* 15 University of Richmond Law Review 547, at 555 (1981).
[928] E.Gellhorn & W.E.Kovacic, *op.cit.,* at 434.
[929] Action might be brought under Section 2 of the Sherman Act but, in practice, the stricter conditions required to prove monopolization or attempt to monopolize make the enforcement of that provision difficult against the exercise of buyer power.

4. Packers and Stockyards Act (PSA)

Like the Robinson-Patman Act, the specialized rules enacted to address anticompetitive concerns in the agricultural sector have resulted in unsatisfactory enforcement. Most practices the Congress intended to tackle when enacting the PSA have indeed remained unpunished due, in particular, to the interpretation given by the majority of the U.S. Courts to the Act. While the United States Department of Agriculture is of the opinion that the PSA encompasses more than anticompetitive conduct, judicial authorities do not generally defer to that interpretation of the Statute but instead subject any violation to the proof of competition injury. All federal appellate courts that have addressed that issue have indeed held that the PSA is essentially an antitrust statute and as such requires the plaintiff to establish an adverse effect on competition to sustain a cause of action.[930] The two following cases illustrate the Circuit Courts' position and show how strict is the requirement of competition injury.

The first case concerns an alleged unlawful market-price manipulation carried out by Tyson, the largest meatpacking company in the United States.[931] Picket, the owner of a cattle-producing farm, contended that the processor in question had used marketing agreements to deflate the price of fed cattle on the cash market and that the use of such a strategy to obtain lower prices constituted unfair practice and price manipulation in violation of the PSA. The district court sustained the claim and found that Tyson's use of marketing agreements had an adverse effect on competition and that no legitimate business reason had been established to justify the use of such agreements. The verdict was however set aside by the Circuit Court which considered, in contrast, that Tyson had competitive justification for using marketing agreements. It was restated that unfairness or price manipulation claim requires a plaintiff to show harm to competition. Although the Court recognized that the agreements had resulted in lower prices for cattle both on the cash market and the market as a whole, it nevertheless maintained that the PSA had not been violated as at least three competitive justifications could be upheld.[932] First, marketing agreements provides the company with a reliable

[930] See : *Terry v. Tyson Farms Inc,* 604 F.3d 272 (6th Cir. 2010); *Wheeler v. Pilgrim Pride Corp,* 591 F.3d 355 (5th Cir. 2009); *Been v. O.K.Indus., Inc.,* 495 F.3d 1217 (10th Cir. 2007); *Pickett v. Tyson Fresh Meats Inc.,* 420 F.3d 1272 (11th Cir. 2005); *London v. Fieldale Farms Corp.,* 410 F.3d 974 (11th Cir. 2005); *JBP, Inc. v. Glickman,* 187 F.3d 974 (8th Cir. 1999); *Philson v. Goldsboro Milling Co., Nos.,* 164 F.3d 625 (4th Cir. 1998); *Farrow v. United States Dep't of Agric.,* 760 F.2d 211 (8th Cir. 1985); *DeJong Packing Co. v. United States Dep't of Agric.,* 618 F.2d 1329 (9th Cir. 1980); *Pac. Trading Co. v. Wilson & Co.,* 547 F.2d 367 (7th Cir. 1976). The position of the USDA has only been embraced by some district courts. See for examples: *Schumacher v. Tyson Fresh Meats, Inc.,* 434 F.Supp.2d 748 (D.S.D. 2006); *Kinkaid v. John Morell & Co.,* 321 F.Supp.2d 1090 (N.D.Iowa 2004) and *Gerace v. Utica Veal Co., Inc.,* 580 F.Supp. 1465 (N.D.N.Y. 1984).

[931] *Pickett v. Tyson Fresh Meats Inc.,* 420 F.3d 1272 (11th Cir. 2005)

[932] A fourth justification was presented namely the meeting competition defense. Tyson argued that it is necessary to use marketing agreements in order to have access to the cattle since otherwise it would lose all of that supply to its competitors who did use the agreements. The Court highlighted that the meeting competition defense constituted a defense under the Robinson-Patman Act but that such justification had not been

and stably supply of cattle which is needed to keep its processing plants operating at full capacity. Second, those arrangements reduce transaction costs, and finally, as the company was allowed to pay for each head of cattle based on the quality of the meat, incentive was created for the producers to grow better cattle. As a result, the Court concluded that:

> "While Picket presented evidence at trial that Tyson's marketing agreements have decreased the price of cattle on the cash market and on the market as whole, he did not present any evidence from which a reasonable jury could conclude that Tyson lacked pro-competitive justifications for using the agreements."

The second case involved a chicken grower who claimed that its customer, a monopsonist processor, was charging uncompetitive low prices.[933] The Court acknowledged that a monopsony can threaten competition but gave a narrow-scope interpretation to the notion of competition injury by equating the latter with harm in the output market. Accordingly, to establish that the practices of a monopsonist have injured or are likely to injure competition,

> "The plaintiff must show that the monopsonist's practices have caused or are likely to cause the anticompetitive effect associated with monopsonies, namely the arbitrary manipulation of market prices by unilaterally depressing seller prices on the input market with the effect of increasing prices on the output market."

Those two cases call for some remarks as, besides the controversy on whether the PSA does or not require the proof of competition injury, they appear to strongly limit the potential scope of the Act and to make the plaintiff bear a heavier burden of proof. In *Pickett v. Tyson,* the Circuit Court departed from the standard application of the rule of reason in two ways. On the one hand, it did not settle for the proof of market manipulation but required in addition the plaintiff to present evidence that the defendant lacked procompetitive justifications for using marketing agreements. Such reasoning in fact shifts the issue of justification from the defendant to the plaintiff. In the case at hand, the Court should instead have concluded that the mere fact to manipulate market prices constituted a violation of Section 202(e) of the PSA. Although prices in the cash market are determined by the forces of supply and demand, this does not mean that the price resulting from that interaction is necessarily competitive.[934] Particularly in the context of market-price

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included into the PSA. As other justifications were offered in that case, the Court refrained from deciding whether the meeting competition defense could or not be used to justify a market-price manipulation under the PSA.

[933] *Been v. O.K.Indus., Inc.,* 495 F.3d 1217 (10th Cir. 2007)

[934] C.R.Taylor, *Buyer power litigation in agriculture:* Pickett v. Tyson Fresh Meat, Inc., 53 The Antitrust Bulletin 455, at 469 (2008)

manipulation, such as in *Pickett v. Tyson*, the price determination by supply and demand is meaningless. Any practice carried out for the purpose of manipulating prices is likely to create market distortions and yield anticompetitive or unfair prices. As such, price manipulation must be considered to distort competition and to violate the PSA. It remains then with the defendant to present legitimate business reasons in order to justify its conduct. On the other hand, the Court failed to strike a balance between competition harm and procompetitive benefit derived from Tyson's conduct. In fact, the Court limited itself to finding the existence of procompetitive justifications without weighing those positive effects against injury to the market.[935]

According to C. Robert Taylor, the rule of reason three parts test applied to a restriction in the input market would be the following:

(1) A business practice fails a rule of reason test if it is not essential to the conduct of business and if an alternative conduct that is less likely to affect welfare adversely is available. Passing this test is mandatory.

(2) A business practice fails a rule of reason test if its likely result is a lower price to the seller; that is, if it is exclusionary and denies seller acceptable and competitive higher-price options. Passing this test, too, is mandatory.

(3) A business practice also fails the rule of reason test if its lacks clear transaction cost benefits that make the enterprise more efficient than any one of its competitors or if it lacks the potential to enhance welfare in some other way. Passing this test is not mandatory because the restraint's effects might be neutral.[936]

Such test would imply that competitive injury also includes harm caused to the upstream buyer market, provided that such harm is not outweighed by procompetitive benefits. However, the second case analyzed in this section seems to contradict such an interpretation. According to some courts, buyer power raises competitive concerns only where it is likely to entail negative effects in the output market and thus to harm directly consumers. Such competition injury would occur in case of pure monopsony, namely when a reduction in input purchases leads to a lower level of output and thus to higher prices for consumers. Any violation of the PSA would hence be subject to the proof of a direct negative impact on end-users through higher prices.

That interpretation seems however too narrow to encompass all potential harmful effects that buyer power may cause on the markets. Without settling the issue on whether the PSA is or not broader in

[935] *Ibid.,* at 465-467.
[936] *Ibid.,* at 466.

scope than the traditional antitrust instruments, we do think that, even if competition harm is required, the Act could be enforced against a larger number of practices. Buyer's conduct is indeed likely to distort competition even though it does not directly affect the output market. As we noted in cases involving the Sherman Act or the FTC Act and despite the controversy on whether suppliers are protected by those traditional antitrust laws, some U.S. courts are willing to adhere to that broader conception of competition injury. As the PSA has been enacted specifically to protect competition in the input markets, it would be contrary to the legislative intent of the Act to focus only on the output markets to assess the potential anticompetitive effects of buyers' practices.

D. CONCLUSIVE REMARKS

The issue of buyer power is not a new concern in the United States. Antitrust rules have been enacted, adapted or complemented in order to prevent, or at least limit, the negative effects resulting from a consolidated buying side. The necessity to target the real evil, namely excessively powerful buyers, and to enforce the antitrust laws thoroughly is all the more urgent today that the degree of concentration has been increasing in various sectors, such as in the agri-food industry. The Robinson-Patman Act failed in every respect to properly address the issue of buyer power in the retail sector. Directed to sellers and protecting competing retailers, be it small or big, from fierce price competition, the Act has not curbed the exercise of market power in the procurement market but has entailed harmful effects on competition, especially to the detriment of consumers.

Section 1 and Section 2 of the Sherman Act, mainly enforced against sellers' practices, have yet been also used to condemn conduct affecting suppliers in the upstream market. The enforcement of the Act against buyer cartels shows that enforcers and courts treat, in most cases, those practices just as strictly as seller cartels. Even though consumer welfare is part of the goals of the antitrust policy, direct effects on end-users do not constitute the ultimate test used by US courts, at least as far as Section 1 of the Sherman Act is concerned. As such, consumer harm is not required to find a violation of the antitrust rules and the proof of consumer benefits through lower prices is not sufficient to reject an antitrust claim. It was recognized that effective competition does not only yield lower prices but also more choices, higher quality and innovative product. In order to guarantee those various benefits, courts seem willing to protect the competition process by considering the interest of all market participants.[937]

Where buyer cartels may be condemned as such because of their very restrictive nature, unilateral conduct is often treated more leniently as monopoly power is not prohibited by itself. A single buyer may however be powerful enough to restrict competition. The U.S. Supreme Court seems to have

[937] N.Rosenfelt, *The verdict on monopsony,* 20 Loyola Consumer Law Review 402 (2007-2008)

admitted the potential harmful effect of the exercise of buyer power, at least with regard to predatory conduct. By treating predatory bidding as strictly as predatory pricing, the Court refused to equate competition injury with consumer harm. Even though a buy-side conduct is not used to enhance market power in the output market, it may nevertheless lead to anticompetitive outcomes.[938] However, would the Court condemn unilateral conduct which distorts competition in the input markets but benefits consumers? If the antitrust laws really aimed at protecting undistorted competition for all market participants, a balancing test should be carried out between the positive and the negative effects, both in the input and output markets. Yet, it appears that, even in cases involving an Act which expressly aims at protecting suppliers, such as the PSA, a showing of a positive impact on consumers in terms of lower prices is likely to sweep aside all considerations for input sellers.

[938] Such an interpretation was confirmed in a note submitted by the United States to the OECD, stating that buyer cartels are unlawful if they create market power on the buying side of the market. Single conduct is also unlawful if it maintains, creates or threatens to create high degree of market power on the buying side of the market. See: *Monopsony and Buyer Power,* OECD – Policy Roundtables, note submitted by the United States, 13 October 2008, DAF/COMP/WD(2008)79.

CONCLUSION PART II

The notion of buyer power appears in various EU legal instruments and non-regulatory documents such as notices and guidelines of the Commission. The exercise of buyer power is treated either as a positive competitive constraint or, more rarely, as a source of competitive concern. In the texts, but also in practice, the Commission adopts a cautious approach on that matter and seems rather reluctant to take action against powerful buyers' practices in upstream markets. Even though the Treaty competition rules are designed to apply to both seller and buyer practices, the enforcement of Article 101 and 102 TFEU against powerful buyers remains weak if not inexistent with regard to the latter provision. The specificities of buyer power pointed out in Part I are in fact hardly taken into consideration by EU competition authorities when enforcing the competition law Treaty provisions.

The Commission has nevertheless addressed more deeply the issue of buyer power and its effects when enforcing the merger Regulation. The increase of the merging parties' buyer power was indeed considered in some cases to be likely to impair effective competition following the merger. The Commission had therefore the opportunity to examine thoroughly the different factors giving rise to market power in upstream buyer markets as well as the positive and negative effects that may result from the (mis)use of such power. The competition assessment made in those merger cases shows that buyer power probably needs to be addressed differently than seller power.

At national level, various initiatives have been undertaken to tackle the issue of buyer power, especially in the grocery sector. French authorities have for example enlarged the scope of the prohibition on abusive conduct to cover no only abuses of dominance but also abuses of economic dependency. On paper, this seemed promising because the concept of economic dependency, as defined by the French Competition Authority, covers the specificities of buyer power. Large buyers' practices were hence allegedly more likely to be scrutinized by competition authorities under that concept. However, the enforcement of the prohibition on abuse of economic dependency turned out to be ineffective and never concerned large retail chains.

The French legislator has also enacted contractual laws to regulate retailer-supplier relationships and to prevent unfair practices in business-to-business relationships. Although the objective was to restrain the exploitation of buyer power so as to restore fair relations between large retailers and their suppliers, the prohibition *per se* of some practices used by those large retailers did in fact not bring about the expected positive change in the grocery sector, on the contrary.

In the United Kingdom, the issue of buyer power has been addressed more gently through the adoption of a Code of conduct applicable to the largest grocery retailers. Two elements are yet likely

to make such an instrument ineffective: on the one hand, the fear of suppliers to denounce non-complying retailers and, on the other hand, the lack of deterrent sanctions applied in case of violation of the Code.

It is essential to adopt instruments suited to tackle effectively buyer power concerns without affecting competition. This involves targeting buyers for misuse of their power instead of sellers subject to that power and to assess the competition impact of those buyers' practices. The enforcement of the Robinson-Patman Act in the United States provides an example not to be followed on that matter.

The national rules examined in this Part show that buyer power may be addressed within or outside the scope of competition law. One may hence wonder under which policy buyer power should be dealt with. To answer that question, it is needed to take a closer look into the objectives of EU competition law.

PART III - BUYER POWER: AN ISSUE TO BE ADDRESSED IN EU LAW

EU and national competition rules have rarely been used to address buyer power concerns. The reason may be either that buyer practices are unlikely to affect competition on the markets or that the competition rules are ill-suited to prevent harmful exploitation of buyer power. To answer that question, it is needed to look into the objectives of EU competition law so as to determine whether the exercise of buyer power is likely to impede their achievement. If so, one could hence conclude that the second hypothesis prevails.

Chapter 1 is meant to describe the objectives pursued in EU competition law and to highlight, in view of those objectives, practices used by large retail chains in the grocery procurement market which might be considered anticompetitive. The potential harmful effects caused by those practices to competition raise the question of the responsibility of competition authorities to address effectively the issue of buyer power, in particular in the grocery retail sector.

In **Chapter 2**, it is argued that a common action should be taken at EU level under the scope of the competition policy so as to control buyers' market power. Large supermarket chains are not the only buyers having the ability to exert buyer power over their suppliers. However, concerns about buyer power have especially been raised in the grocery retail sector so that one may wonder whether EU action should not be limited to that sector. It must hence be examined whether the specificities of the grocery retail sector incite buyers to exploit their buyer power to a greater extent than in other industries and thereby increase the risk of anticompetitive effects on the markets.

Action at EU level may take various forms. One of them involves the harmonization of national competition rules on buyer power so as to subject large buyers to the national competition authorities' supervision. In such a case, it is necessary to justify EU authorities' intervention, to determine the type of EU instrument to be used as well as the degree of harmonization. The objective would be to make sure supermarket chains which are able to affect competition through their conduct due to their large degree of buyer power can be pursued and sanctioned if they abuse their power. This would hence require introducing new criteria, common to the Member States, with regard to the assessment of buyer power.

CHAPTER 1 – BUYER POWER: A POSSIBLE IMPEDIMENT TO THE OBJECTIVES OF EU COMPETITION LAW

Whether buyer power should be addressed under EU competition law in fact depends on the objectives pursed by the treaty rules on competition. We have already provided an insight into those objectives in Part I when raising the issue of the potential detrimental effects of buyer power on competition in the European Union. Section 1 of this chapter aims at exploring more deeply, though not exhaustively, the various goals the authorities may pursue when enforcing the competition rules and to define those which prevail in EU law. Although the impact of firms' conduct on consumer prices may provide some indication of the (un)lawfulness of such conduct, other aspects than price are to be taken into consideration in the competition assessment which may require competition authorities not to focus only on the direct and immediate effects on consumers.

In view of the so-defined EU competition goals, we will then examine, in Section 2, some of the practices used by large buyers in the grocery sector which might seriously restrict competition on the markets and impede the achievement of the competition law objectives.

SECTION I – THE OBJECTIVES OF EU COMPTITION LAW

The debate surrounding the objectives of competition law has already been spilled over by much ink. The purpose of this section is not to provide an extensive examination of each position concerning that debate but rather to determine what are the prevailing goals pursued under the EU competition policy and whether the exercise of buyer power is likely to jeopardize the achievement of those goals. The issue of the objectives of competition law is of significant importance for the development, drafting and enforcement of the competition rules. As rightly maintained by Professor Bork, one of the founders of the Chicago School,

> "Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law – what are its goals? Everything else follows from the answer we give".[939]

Even though the answer he gave to that question, in its real meaning, is not the one supported by the EU authorities, at least Professor Bork highlighted the importance of the objectives of competition law and fuelled the debate with new thoughts.

These last decades, among the various objectives underlying the competition rules in most countries, the European Commission has put the emphasis on the protection of consumer welfare. Without

[939] R.H.Bork, *The Antitrust Paradox – A policy at war with itself* (1978), at 50.

denying the relevance of other elements such as the integration of the single market or the role of economic efficiency, bringing consumers the benefits resulting from competitive markets is at the heart of the EU competition policy. It seems, however, that direct consumer harm/benefit does not constitute a benchmark in the assessment of business practices. The EU authorities, and in particular the European Courts, instead focus on the effects on the competitive process to decide whether firms' conduct violates or not Article 101 or Article 102 TFEU. The protection of that process as a means to enhance consumer welfare, envisaged in a broad and long-term perspective, derives from the terms of the Treaty and was given concrete expression in the EU case law. On basis of that objective, which in fact guarantees the achievement of many others, the issue of buyer power is likely to take on another dimension in EU competition law.

A. VARIOUS OBJECTIVES OF COMPETITION LAW

Following a report prepared by the International Competition Network (ICN), it emerges that competition laws, regulations and policies aim in most countries and primarily at ensuring an effective competitive process as an objective in itself or as a tool to achieve other desirable goals such as economic freedom, economic efficiency or consumer welfare.[940] In this section we will develop those last three objectives as they all play a role in the elaboration and enforcement of the EU competition policy. In addition, we cannot but mention the central objective of the European Union, that is, the single market goal which continues to influence the action of the competition authorities.

1. Market integration

The goal of political and economic integration constitutes the cornerstone of EU law. From its beginning, the EU competition policy, as a complement to the other EU policies and specifically to the free movement rules, has been designed and enforced to achieve the single market objective.[941]

[940] See : ICN – Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-created Monopolies, prepared by the Unilateral Conduct Working Group, Presented at the 6th Annual Conference of the ICN, Moscow, May 2007. The other objectives mentioned in that report but less cited by the authorities questioned include: ensuring a level playing field for small and medium size enterprises; promoting fairness and equality; promoting consumer choice; achieving market integration; facilitating privatization and market liberalization; and promoting competitiveness in international markets. On the objectives of EU competition law, see also: I.Lianos, *Some Reflections on the Question of the Goals of EU Competition Law,* Centre for Law, Economics and Society Working Paper Series 3/2013, January 2013, available at: http://www.ucl.ac.uk/cles/research-paper-series/research-papers/cles-3-2013

[941] Article 2 of the former EC Treaty enumerated the various tasks of the Community which were to be carried out by establishing in particular a common market. Among the different common policies which were to be implemented in order to realize the potential of that common market, Article 3 (1) (g) referred to a system ensuring that competition in the internal market is not distorted. Following the Lisbon Treaty, that last provision was repealed and moved to a Protocol annexed to the Treaties. Those provisions will be further examined below in section 2, 3.

Such as state measures, arrangements between private undertakings or abusive conduct by dominant firms can similarly create barriers to trade between Member States impeding the realization of the integration of the markets within the Union. The competition rules contribute hence to the establishment of a common market which is supposed to bring in turn economic efficiencies and benefits to consumers. Market integration in fact enlarges the size of the market available to firms and thus enables the latter to produce more efficiently through the realization of economies of scale. In addition, the presence of a larger number of (potential) competitors reinforces the competitive pressure on firms thereby contributing to allocative efficiency and stimulating innovation.[942] As a result of such cost reduction and greater competition in prices but also in research and development (R&D), significant benefits are brought to consumers who have access to wider choices, better quality and lower prices.[943] Generally, there is therefore no conflict between the objective of market integration and the other competition goals that will be examined below.

The relative importance of the single market objective in EU competition law is likely to diminish as the process of integration is moving forward. However, that objective remains an ongoing process which will consequently never be marginalized by the competition authorities.[944] As underlined by the Commissioner for Competition, Joaquin Almunia,

> "Establishing the Single market is among Europe's highest achievement, but in many respects, it is still work in progress. Competition enforcement must help to accelerate the completion of this crucial element of our integration process."[945]

Various recent cases also show that market integration is still very much present in the assessment of firms' conduct. The Court of Justice has in particular reaffirmed in *Syfait II*[946] and in *Glaxosmithkline*[947] that prohibiting or limiting parallel trade constitutes restriction of competition by object since such conduct aims at partitioning the national markets and hence neutralizes the

[942] D.Geradin, *Efficiency claims in EC competition law and sector-specific regulation,* in The evolution of European Competition law –Whose regulation, which competition?, Hanns Ullrich (ed.) (2006), at 318.
[943] W.-H.Roth, *Strategic competition plicy : a comment on EU competition policy,* in The evolution of European Competition law –Whose regulation, which competition?, Hanns Ullrich (ed.) (2006), at 42.
[944] E.Buttigieg, *Competition law : Safeguarding the consumer interest – A comparative analysis of US antitrust law and EC competition law* (2009), at 78.
[945] J.Almunia, *Competition as a pan-European effort,* Speech given by the Vice President of the European Commission responsible for Competition policy, Speech/12/672, European Competition Day, Nicosia, 2 October 2012, available at: http://europa.eu/rapid/press-release_SPEECH-12-672_en.htm
[946] Joined cases C-468/06 to C-478/06, *Sot Lee los kai Sia EE and Others v. Glaxosmithkline AEVE Farma keftikon Proïonton (Syfait II)* [2008] ECR I-7139.
[947] Joined cases C-501/06P, C-513/06P, C-515/06P and C-519/06P, *Glaxosmithkline Services Unlimited and Ohters v. Commission* [2009] ECR I-9291.

benefits of effective competition.[948] The Court stated that, by restoring the national divisions in trade between Member States, private firms frustrate the objective of the Treaty to achieve the integration of national markets through the establishment of a single market. The importance of the market integration objective was further highlighted by the Court which held that an agreement aimed at limiting parallel trade constitutes a restriction of competition by object, even though it is not established that final consumers are deprived of the advantages of effective competition.[949] The goal of market integration is thus still given particular protection in EU competition law even though, nowadays, greater attention is devoted to consumer welfare.

2. Economic freedom

The protection of economic freedom as an objective of competition law involves the protection of economic actors' opportunities to enter the market and compete within that market without being restricted by any other firm.[950] Protecting economic freedom is the keystone of the ordoliberalism theory which has been developed by German economists and legal scholars from the Freiburg School and influenced German and EU competition law.[951] The ordoliberal thought arose in response of the

[948] In *Syfait II*, Glaxosmithkline (GSK), a dominant pharmaceutical company, refused to meet fully the orders sent to it by pharmaceutical wholesalers in order to limit the export activity of the latter. Referring to other cases (see for examples: Case 26/75, *General Motors Continental v. Commission* [1975] ECR 1367, para.12 and Case 226/84, *British Leyland v. Commission* [1986] ECR 3263, para. 24), the Court of Justice restated that restriction of parallel trade constitutes abuse of a dominant position. Examining the objective considerations put forward by GSK to justify its conduct, the Court considered that neither the omnipresent regulation of prices in the pharmaceuticals sector nor the minimal benefit that parallel trade would bring to final consumers could exempted the refusal to supply from the application of Article 102 TFEU. However, it was recognized that a firm holding a dominant position can take steps that are reasonable to protect its own commercial interests if it is confronted with orders that are out of the ordinary in terms of quantity. The *Glaxosmithkline* case concerned an agreement between GSK and Spanish wholesalers operating a distinction between prices charged for domestic resale and higher prices charged in the case of exports of medicines to any other Member State.

[949] Joined cases C-501/06P, C-513/06P, C-515/06P and C-519/06P, *Glaxosmithkline Services Unlimited and Ohters v. Commission* [2009] ECR I-9291, at 62-64. The Court of Justice overturned the General Court's reasoning which maintained that such an agreement constitutes a restriction by object only in so far as it may be presumed that consumers are deprived of certain advantages of effective competition in terms of supply or price. According to that reasoning, parallel trade must be given a certain protection only if it gives final consumers certain advantages. In that case, the General Court considered that, as the prices of medicines are to large extent shielded from the free play of supply and demand owing to the applicable regulations, it cannot be taken for granted that parallel trade tends to reduce price and thus to increase the welfare of final consumers (See: T-168/01, *GlaxoSmithKline Services* v *Commission* [2006] ECR II-2969, at 121-122).

[950] L.Lovdahl Gormsen, *The conflict between economic freedom and consumer welfare in the modernization of Article 82 EC,* 3 European Competition Journal 329 (2007).

[951] When the Rome Treaty was being drawn up, Germany was about to enact its national competition law. The German debate on the competition rules was influenced by the ordoliberalist ideas defended by a group of economists and political thinkers from the Freiburg School. Such simultaneity of the national and European negotiations led to a significant influence of German thinking on the EU competition policy. See: D.J.Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, 42 American Journal of Comparative Law 25 (1994) and A.Weitbrecht, *From Freiburg to Chicago and beyond – The first 50 years of European competition law,* 2008 European Competition Law Review 81. On the Freiburg School, see: V.J.Vanberg, *The Freiburg School: Walter Eucken and Ordoliberalism*, Freiburg Discussionpapers on

Nazi Germany during the Second World War where private economic power was turned into political power to the detriment of democratic principles.[952] In order to prevent a repetition of history, ordoliberalists argue that an appropriate legal framework has to be established in order to control private economic power and protect individual economic freedom. The role of the State is therefore to take active measures to foster competition and to prevent accumulation of power in the hands of private companies so that they cannot destroy or restrict freedom of others.[953] They indeed consider that individual economic freedom is to be protected not only from the power of government but also from the economic power of private undertakings. In the dispersion of such power, they seek to safeguard the economic order and ultimately the benefits of democracy.[954] Under the ordoliberal thinking, the protection of individual economic freedom is hence the primary objective of competition policy which is designed to prohibit any form of conduct restraining autonomous economic behavior or rivalry between competitors.

3. Economic efficiency

Another objective assigned to competition law is to promote economic efficiency. That economic antitrust theory has been particularly influenced in the late 60's by the "Chicago School", a group of economic and legal scholars from the University of Chicago in the United States.[955] Chicagoans strongly criticized US authorities for acting against practices which were in fact procompetitive because justified on efficiency grounds. They objected to the Harvard School structuralist approach which often guided antitrust action at the time.[956] According to Harvard scholars, when the structure

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Constitutional Economics, 04/11, ISSN 1437-1510, available at: http://www.walter-eucken-institut.de/fileadmin/bilder/Publikationen/Diskussionspapiere/04_11bw.pdf

[952] L.Lovdahl Gormsen, *op.cit.,* at 332.

[953] G.Ghidini, *Comment : A short note on the generation of efficiencies in the context of the « constitutional » principles of European competition law,* in The evolution of European competition law – Whose regulation, which competition?, Hanns Ullrich (ed.) (2006), at 361.

[954] F.Maier-Rigaud, *On the normative foundations of competition law – efficiency, political freedom and the freedom to compete,* in The goals of competition law, Daniel Zimmer (ed.) (2012), at 142.

[955] The Chicago School scholars included Robert Bork, Richard Posner and Frank Easterbrook. See, in particular: R.H.Bork, *The antitrust paradox – A policy at war with itself* (1978) and R.A.Posner, *Antitrust law: an economic perspective* (1976). Much has been written on the influence of the Chicago School on competition policy. See, for examples: H.Hovenkamp, *Antitrust Policy After Chicago,* 84 Michigan Law Review 213 (1985); E.W.Kitch, *The fire of truth: Remembrance of law and economics at Chicago, 1932-1970,* 1963 Journal of Lac and Economics 163; M.S.Jacobs, *An Essay on the Normative Foundations of Antitrust Economics,* 74 North Carolina Law Review 219 (1995); W.H.Page, *The Chicago School and the evolution of Antitrust Characterization, Antitrust Injury, and Evidentiary Sufficiency,* 75 Virgina Law Review 1221 (1989).

[956] See for examples: *Unites States v. Aluminum Co. of America*, 148 F.2d 416 (2nd Cir. 1945). In that case, Judge Learned Hand clearly expressed an aversion to concentration by stating that: "(…) great industrial consolidations are inherently undesirable, regardless of their economic results (…)Throughout the history of these statutes, it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake, in spite of possible cost, an organization of industry in small units which can effectively compete with each other." (at 428-429) See also: *Northern Pacific Railway Co. v. Unites States*, 356 U.S. 1 (1958) and *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962)

of the market is concentrated, firms are more likely to adopt anticompetitive practices.[957] Following that approach, which is opposed to market concentration regardless of the positive effects it may have on the markets, the US courts condemned practices which in fact led to higher efficiencies and benefitted consumers. Influenced by criteria of fairness and aimed at protecting small businesses, such a policy ended up shielding inefficient competitors from competition.[958]

The Chicago School pointed out that economic efficiencies, even though they could reinforce a firm's market power, lead to benefits for consumers and should thus not be negatively appraised in the assessment of firms' business conduct. To the question of the goal of competition law, the Chicagoan Robert Bork answered that consumer welfare was the only objective pursued by the Congress when enacting the Sherman Act.[959] However, it appears that the terms used by Professor Bork are confusing since behind the expression "consumer welfare" hides in fact the economic concept of economic efficiency. That concept includes three basic components, namely allocative efficiency, productive efficiency and innovation efficiency. Allocative efficiency is achieved when products are allocated to those buyers who value them most, in terms of willingness to pay. Productive efficiency is attained when goods are produced using the optimal combination of inputs available under existing technology to produce maximum output for the minimum costs. Innovation efficiency involves the development, invention and diffusion of new products and production processes.[960] That last component promotes dynamic efficiency as it leads to longer term investment resulting in innovation and improving efficiency over time unlike static efficiency which is concerned with the most efficient combination of resources at a given point in time.[961]

In his definition of consumer welfare, Bork referred to allocative efficiency, considering that those concepts were align. He wrote that

[957] H.J.Hovenkamp, *The rationalization of antitrust,* 116 Harvard Law Review 117, at 920 (2003). See also: H.J.Hovenkamp, *The Neal Report and the Crisis in Antitrust,* U Iowa Legal Studies Research Paper No 09-09 (2009), available at: SSRN: http://ssrn.com/abstract=1348707. Among the Harvard economists we can mention: E.Chamberlain, *The theory of monopolistic competition* (1933); E.S.Mason, *Economic concentration and the oligopoly problem* (1964) and J.S.Bain, *Industrial Organization,* 2nd ed. (1959). Those economists influenced Harvard antitrust. See for examples: D.F.Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harvard Law Review 655, (1962); T.J.DiLorenzo, *The Origins of Antitrust: An Interest-Group Perspective*, 5 International Review of Law and Economics 73 (1985)

[958] A.Pera, *Changing views of competition, economic analysis and EC antitrust law*, 4 European Competition journal 127, at 141 (2008).

[959] R.H.Bork, *op.cit.*, at 50-71.

[960] J.F.Brodley, *The Economic goal of Antitrust: Efficiency, Consumer welfare, and Technological progress,* 62 New York University Law Review 1020, at 1025 (1987)

[961] R.J.Gilbert & S.Sunshine, *Incorporating dynamic efficiency concerns in merger analysis: The use of innovation markets,* 28 Journal of Reprints for Antitrust Law and Economics 447 (1998)

> "Consumer welfare is the greatest when society's economic resources are allocated so that consumers are able to satisfy their wants as fully as technological constraints permit."[962]

Rejecting distributive issues as a source of competition concern, the Chicagoan consumer welfare model focuses in fact on aggregate welfare (or total surplus) to determine the legality of an activity instead of valuing consumers surplus, that is the difference between the buyer's willingness to pay for a good and the price he actually pays for it.[963] As for total welfare standard, it refers to the welfare of buyers and sellers[964] in a particular market and does not take into consideration wealth transfers which might occur from one side of the market to the other.[965] Focusing only on allocative efficiency, Bork distinguishes two types of conduct: on the one hand, firms' activities which restrict output in order to gain monopoly power (detrimental) and, on the other hand, practices which increase a firm's profits by achieving new efficiency (beneficial).[966] He makes clear that only the former is to be prohibited by antitrust law because if a practice is not used to restrict output, it must necessarily be designed to increase the firm's efficiency. As regards exclusionary behavior, he considers that exclusion or foreclosure is part of competition as all business activity excludes. In order to separate normal and efficient conduct from improper exclusion, he suggests a theory of predation according to which, unless some indication of a firm's wrongful intent is established, exclusion of rivals is deemed to result from superior efficiency.[967] Consequently, very few practices would require authorities' intervention.[968] The Chicago School indeed believes that markets are efficient and self-correcting so that governments do not need to intervene in the economy at the risk of condemning efficient practices and creating over-deterrence. Excessive intervention would wipe out the benefits resulting from efficiency gains whereas wrongly tolerated practices will in any case disappear under the onslaught of competition. False negatives are thus less detrimental than false

[962] R.H.Bork, *op.cit.,* at 90. "The evil of monopoly, then, is not higher prices or smaller production (though these are its concomitants) but misallocated resources, or allocation inefficiency." Following a restriction in output, "the unneeded resources must either lie idle, an obvious social waste, or migrate to other industries where the value of their marginal product will be less than it would be in the monopolized widget industry." (at 101)

[963] B.Y.Orbach, *The antitrust consumer welfare paradox,* 7 Journal of Competition Law & Economics 133, at 139 (2011)

[964] Producer surplus represents the difference between the price a seller received for a good and the seller's cost of producing it.

[965] E.Buttigieg, *op.cit.,* at 12. According to Bork, the distribution of wealth or the accomplishment of noneconomic goals should be the subjects of other laws. Trade-off decisions between different values such as between manufacturers and consumers' interests should be made by the legislature rather than by the judiciary. See: R.H.Bork, *op.cit.,* 79-89.

[966] R.H.Bork, *op.cit.*, at 122. He also makes reference to neutral conduct, that is practices which increase a firm's profits by some device not related to either productive or allocative efficiency.

[967] R.H.Bork, *op.cit.*, at 137.

[968] The law should only strikes non-ancillary horizontal agreements between rivals to fix prices or divide markets, horizontal mergers creating very large market shares and deliberate predation engaged in to drive rivals from a market. Antitrust should however have no concern with vertical agreements or mergers.

positives. In the latter case the damage is irreparable while if bad practices are allowed, the market will self-correct and eradicate them.[969]

Such blindly trust in the markets as well as the concept of consumer welfare defended by the Chicagoans raise yet some criticisms.[970] **First of all**, allocative efficiency does not always enhance consumer well-being. For example, in case of discriminatory pricing, producers increase output and thereby allocative efficiency. However, imposing different prices depending on the willingness to pay of consumers leads to a transfer of wealth from buyers to sellers reducing consequently consumer surplus.[971] Another contradiction between consumer welfare and economic efficiency may be found in merger or collaboration cases which enable the participants to lower their production costs because of improved efficiency but also to raise prices due to their stronger market power. If the savings in costs are higher than the consumer welfare loss, the operation would increase total welfare and consequently be considered as efficient under the Chicago School approach, regardless of the harm caused to consumers.[972] Those examples show clearly that the economic efficiency standard does not necessarily translate into consumer benefit s so that considering efficiency tantamount to consumer welfare may be misleading.

Secondly, Professor Eleanor Fox points out that the Chicago School has given rise to a new paradox, namely the efficiency paradox. She argues that, in the name of efficiency, Chicagoans, like Bork, in fact protect inefficient conduct by dominant firms. By condemning as inefficient only conduct which

[969] F.H.Easterbrook, *The limits of antitrust,* 63 Texas Law Review 1, at 15 (1984). See also: D.S.Evans & A.J.Padilla, *Designing antitrust rules for assessing unilateral practices: a Neo-Chicago approach,* 72 University of Chicago Law Review 73 (2005). The authors assume that most cases involve practices that are not harmful and that the cost of false "conviction" is higher than the cost of false "acquittals". In order to minimize the error costs, they recommends therefore that, when assessing unilateral practices, competition authorities use a strict legal standard that is more likely to result in false acquittals than false convictions.

[970] Criticisms have in particular been raised by the Post-Chicago School. Post-Chicago economists produced a series of models based on theoretic-game concepts which demonstrate that some practices considered by Chicagoans as efficient could in fact be anticompetitive. Those models highlight indeed that it may be profitable for firms to engage in coordinated action and exclusionary conduct. They show that market failures are not always self-correcting and that firms can take advantage of imperfections and make money while producing inefficiency. See: R. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: the Efficiency Interpretation Challenged,* 34 Hastings Law Journal 65 (1982); L.Kaplow, *Extension of Monopoly Power Through Leverage*, 85 Columbia Law Review 515 (1985); T.G.Krattenmaker & S.C.Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale Law Journal 209 (1986); J. Baker*, Recent Developments in Economics that Challenge the Chicago School Views*, 58 Antitrust Law Journal 645 (1989); M.D.Whinston, *Tying, Foreclosure, and Exclusion,* 80 American Economic Review 837 (1990); L.A. Sullivan, *Post-Chicago Economics: Economists, Lawyers, Judges, and Enforcement in a Less Determinate Theoretical World*, 63 Antitrust Law Journal 669 (1995); B.Baker, *A preface to Post-Chicago antitrust,* in Post-Chicago developments in Antitrust Law, Antonio Cucinotta et al. (eds.) (2000), at 60.

[971] J.F.Brodley, *op.cit.,* at 1033.

[972] *Ibid.*, at 1034.

leads to a particular outcome, namely output reduction, they indeed fail to tackle anticompetitive conduct which creates other types of inefficiency.[973]

Thirdly, the Borkean theory is a static approach focusing on market prices and on the maximization of social wealth at a fixed point in time.[974] It is, however, commonly recognized that dynamic efficiency provides the greatest enhancement of social wealth over time.[975] Innovation leads not only to cost reduction but also to higher product quality and diversity. Those elements enlarge consumer choices and thereby contribute to consumer welfare to the same extent as low prices. As Robert Lande argues, consumer welfare does not only refer to consumer surplus but also include various non-price product variables which are to be taken into consideration by competition authorities.[976] In addition to ignoring the wealth transfer issue between producers and consumers, the Chicago School

[973] E.M.Fox, *The efficiency paradox,* in How the Chicago School overshot the mark – The effect of conservative economic analysis on U.S. antitrust, Robert Pitofsky (ed.) (2008), at 77-88. Practices which do not lead to output reduction but affect the openness of the markets or restrict to a great extent rivalry among firms are also likely to affect adversely market efficiency, especially dynamic efficiency.

[974] O.E.Williamson, *Economies as an Antitrust Defense : The Welfare Tradeoffs,* 58 American Economic Review 18, at 29-31 (1968)

[975] See : J.F.Brodley, *op.cit.*. According to Brodley, the promotion of innovation efficiency should be the first economic goal of antitrust policy. In fact, Schumpeter was the first to emphasize the central role of innovation in firms' productivity growth. See: J.Schumpeter, *Capitalism, socialism and democracy* (1942). According to him, the harm caused to the economy by restraints on innovation can be much greater than the social costs resulting from static resource misallocation. Different authors have agreed with that theory. See for examples: R.M.Solow, *Technical Change and the Aggregate Production Function,* 39 Revue of Economics and Statistics 312 (1957); P.Aghion & P.Howitt, *Capital, Innovation, and Growth Accounting,* 23 Oxford Revue of Economic Policy 79 (2007). Schumpeter also considered that large firms with market power are more likely to enhance innovation as they are better able to pursue successfully research and development projects. In addition, the fewer the rivals, the grower the incentive the dominant firm will have to engage in innovative activities as the returns on innovation are likely to be higher. On that matter, see also: P.Gayle, *Market concentration and innovation: new empirical evidence on the Schumpeterian hypothesis,* Center for Economic Analysis Working Papers, No 01-14, University of Colorado (2004), available at: http://www.colorado.edu/econ/papers/paper01/wp01-14.pdf The assumption that monopoly rather than competition promotes innovation was contested in particular by Kenneth Arrow who maintained that the monopolist has less incentive for innovation because a loss of self-substitution exists. Competitors have indeed nothing to lose from innovation while the monopolist takes into account that innovation will replace part of its existing technology. See: K.J.Arrow, *Economic welfare and allocation of resources for innovation,* in The rate and direction of economic activities: Economic and social factors, Richard Nelson ed. (1962), at 609. The dominant answer to the issue concerning the relationship between market structure and the rate of innovation seems to be that the innovation curve is an inverted "U" with innovation occurring at the fastest pace in moderately concentrated markets. See: P.Aghion, N.Bloom, R.Blundell, R.Griffith and P.Howitt. *Competition And Innovation: An Inverted-U Relationship*, 120 Quarterly Journal of Economics 701 (2005)

[976] According to Robert Lande, the ultimate goal of antitrust law is "consumer choice". That objective is attained when the consumer "has the power to define his or her own wants and the ability to satisfy these wants at competitive prices". See on that matter: N.W.Averitt & R.H.Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and consumer Protection Law,* 65 Antitrust Law Journal 713 (1997); N.W.Averitt & R.H.Lande, *Using the "Consumer Choice" Approach to Antitrust Law,* 74 Antitrust Law Journal 175 (2007); Kirkwood & Lande, *The fundamental goal of antitrust: Protecting consumers, not increasing efficiency,* 84 Notre Dame Law Review 191 (2008); R.H.Lande, *Wealth transfers as the original and primary concern of antitrust: The efficiency interpretation challenged,* 34 Hastings Law Journal 65 (1982); R.H.Lande, *Consumer Choice as the Ultimate Goal of Antitrust,* 62 University of Pittsburgh Law Review 506 (2001).

antitrust theory disregards the long-term benefits of the latter, moving even further away from a true consumer welfare objective.

Finally, competition policy cannot be limited to economics as conceived by Chicagoans who use law as an instrumental tool to achieve an economic model.[977] Conversely, economics should serve competition law by helping authorities to promote values which go beyond allocative efficiency.[978]

Where economics is playing a growing role in the enforcement of the competition rules and helps authorities to assess more accurately the effects of business practices on the markets, it remains that the ultimate objective of competition law is rarely efficiency as such but rather consumer welfare in its literal sense of consumer well-being.

4. Consumer welfare

Contrary to the standard put forward by the Chicago School, a true consumer welfare standard is sensitive to the distribution consequences that firms' conduct may entail. Under that approach, efficiencies generated by a single or collective practice will be positively appraised only in so far as they translate into consumer benefits. Accordingly, the right balance is to be struck between the positive and negative effects of business conduct on consumers. Only those practices which generate sufficient benefits for consumers so as to outweigh any harmful effect are likely to be allowed by competition enforcers. As a result, practices which enhance aggregate welfare but also cause an unfair transfer of wealth from consumers to producers are to be held illegal, unless consumer harm is fully compensated by other benefits.[979] Under that approach, antitrust authorities are concerned, not about allocative inefficiency, but rather about the transfer of surplus from consumers to cartels or monopolists[980] and about the negative impact firms' conduct may have on the other aspects of consumer welfare such as choice, quality and diversity.

[977] L.Boy, *Abuse of market power : controlling dominance or protecting competition ?,* in The evolution of European competition saw – Whose regulation, which competition?, Hanns Ullrich (ed.) (2006), at 223.
[978] E.Buttigieg, *op.cit.,* at 30.
[979] J.B.Kirkwook & R.H.Lande, *The fundamental goal of antitrust: Protecting consumers, not increasing efficiency,* 84 Notre Dame law Review 191, at 201 (2008). The authors assimilate such transfer of wealth to a robbery which is to be condemned not because stealing is inefficient but because it is a taking of property without consent and without compensation.
[980] J.B.Kirkwood & R.H.Lande, *The Chicago School's foundation is flawed: antitrust protect consumers, not efficiency,* in How the Chicago School overshot the mark – The effect of conservative economic analysis on U.S. antitrust, Robert Pitofsky (ed.) (2008), at 92. According to the authors, when enacting the Sherman Act, the U.S. Congress did not intent to promote allocative efficiency, as argued by Bork, but "to prevent conduct that deprives consumers of the benefits of competition and transfers their wealth to firms with market power". (at 93)

We will see in the next section that such balancing test constitutes the main approach followed by the Commission and the European Courts in their assessment under Article 101 and 102 TFEU as well as in merger cases.

B. ARTICULATION OF COMPETITION OBJECTIVES IN EU LAW: ECONOMIC EFFICIENCY, CONSUMER WELFARE AND PROTECTION OF THE COMPETITION PROCESS

In European law, competition policy is supposed to protect competition as a process, the outcome of which must be efficiency and welfare, consumer welfare being the primary objective. As maintained by the former competition commissioner Neelie Kroes:

> "Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources. An effects-based approach, grounded in solid economics, ensures that citizens enjoy the benefits of a competitive, dynamic market economy."[981]

Consumer welfare is hence at the heart of competition policy and the protection of the competition process is deemed to be the best instrument to achieve that objective. However, in order to ensure that competition gives consumers long-term benefits, it seems that the proof of direct and immediate consumer harm or benefit is not necessarily conclusive that a practice is anti- or procompetitive in the eyes of the European authorities which focus rather on the effectiveness of the competition process.

1. Focus on consumer welfare but…

It emerges clearly from the terms of the Treaty, from the texts implementing the competition rules as well as from the various guidelines and declarations of the Commission that the objective of EU competition law is to protect consumer well-being in its literal sense. However, economic efficiency arguments are not set aside for all that. To the opposite, those last years, stronger emphasis has been placed on economics in the enforcement of the competition rules. Shifting from a legalistic approach to an effects-based approach, EU authorities rely indeed greatly on economic analysis in the assessment of business conduct in order to measure the likely effects of such conduct on the

[981] N.Kroes, *Delivering better markets and better choices,* Speech/05/512, European Consumer and Competition Day, London, 15 September 2005, available at: http://europa.eu/rapid/press-release_SPEECH-05-512_en.htm. See also: P.Lowe, *Consumer welfare and efficiency – new guiding principles of competition policy?*, Speech given at the 13th International Conference on Competition and 14th European Competition Day, Munich, 27 March 2007, available at: http://ec.europa.eu/competition/speeches/text/sp2007_02_en.pdf

market.[982] It appears clearly from the various guidelines adopted for the application of the competition rules that economic criteria such as the market power of firms and other factors relating to the market structure constitute key elements of the assessment under the Treaty provisions and the Merger Regulation.[983] Except for hardcore restrictions, the economics-based approach requires therefore that the Commission examines carefully the actual or potential effects of a firm's conduct on competition by taking into account all the circumstances specific to the case at hand, instead of condemning as such some practices because of their supposed anticompetitive effects.

In the overall assessment of the foreseeable impact on the market, the negative effects but also the efficiency gains generated by the practice are taken into account and balanced against each other. It is indeed recognized that agreements, mergers or single-firm conduct that restrict competition may at the same time entail pro-competitive effects. Such behavior may lead to efficiencies by lowering cost of producing output, improving the quality of the product or helping firms to create new products.[984] However, the focus is not on aggregate welfare but on consumer well-being so that a restrictive practice will be deemed on balance pro-competitive only if the resulting benefits are passed on to consumers and at least compensate them for any negative impact caused by the restriction. Such consumer pass-on requirement is one of the four conditions to be met, according to Article 101(3) TFEU, to exempt an anticompetitive agreement from the application of Article 101(1) TFEU.[985] The overall benchmark in assessing efficiency claims, which also applies in Article 102 TFEU and in merger cases[986], is that consumers are not worse off as a result of the practice in question. In addition, the Guidelines on the application of Article 101(3) TFEU make clear that

[982] See: D.Hildebrand, *The role of economic analysis in the EC competition rules,* 3rd ed. (2009); D.Geradin, *EU competition law and economics* (2012).

[983] See, in particular: Guidelines on the application of Article 81(3) of the Treaty (Text with EEA relevance), O.J. C 101 of 27/04/2004; Commission notice - Guidelines on vertical restraints, SEC(2010)411, O.J. C 130 of 19/05/2010; Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, O.J. C 11/1 of 04/01/2011; Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 102 of the EC Treaty to abusive exclusionary conduct bye dominant undertakings (Text with EEA relevance), O.J. C 45/7 of 24/02/2009; Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, O.J. C 31 of 05/02/2004; Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, O.J. C 265 of 18/10/2008.

[984] See : Guidelines on the application of Article 81(3) of the Treaty, *op.cit.,* at 33.

[985] For more details, see : Guidelines on the application of Article 81(3) of the Treaty, *op.cit.,* at 83-105. The other three conditions are the following: (1) the agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress; (2) the restriction must be indispensable to the attainment of these objectives; and (3) the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question. That last condition will be further examined below.

[986] See : Guidance on the Commission's enforcement priorities in applying Article 102 of the EC Treaty, *op.cit.,* at 28-31; Guidelines on the assessment of horizontal mergers, *op.cit.,* at 76-89.

> "cost savings and other gains to the parties that arise from the mere exercise of market power do not give rise to objective benefits and cannot be taken into account."[987]

The firms' increased profit resulting not from efficiencies but from an unfair transfer of wealth is therefore in no way positively appraised by the Commission.

Economic efficiencies play thus an important role in the assessment of business conduct. If they outweigh the negative effects and are sufficient to guarantee that no net harm to consumers is likely to arise, they may indeed turn an anticompetitive practice into a procompetitive one. The economic analysis is in fact used as an instrument to assess the overall impact on competition and to ensure that consumer welfare is protected. Any efficiency claim is subject to that more global objective.

2. … consumer harm/benefit is not a benchmark

Even though consumer welfare is the ultimate goal of EU competition law, the direct effect that a practice may have on consumers is not necessarily the metric used to assess whether such a practice is pro- or anticompetitive. Accordingly, the absence of consumer harm or the proof of (short-term) consumer benefits does not necessarily preclude the finding of a violation of the competition rules. In some cases, short-term consumer harm can even be tolerated if the practice causing such harm is likely to give rise to sufficient benefits in the future.

a) No proof of consumer harm required

In different cases, the Court of Justice pointed out that a practice can be held contrary to the Treaty provisions, even though no consumer harm has been established. The *Glaxosmithkline* case, mentioned above when examining the market integration goal, is one of those. The Court overturned the reasoning of the General Court and maintained that any conduct limiting or prohibiting parallel trade constitutes restriction of competition, no matter the absence of consumer harm resulting from such restriction. Referring to the wording of the Treaty provisions and to the European case-law, the Court asserted:

> "First of all, there is nothing in [article 101(1)] to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object. Secondly, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, [Article 101 TFEU] aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-

[987] Guidelines on the application of Article 81(3) of the Treaty, *op.cit.,* at 49.

> competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price."[988]

If such statement is evident concerning agreements restricting competition by object - since those are prohibited whatever their effects on the market -, the same reasoning yet applies to all types of collusive arrangements as well as to abusive conduct. Already in *Continental Can* and in *Hoffman-La Roche,* the Court refused to base its assessment on the direct harm a practice is likely to cause to consumers. Maintaining that the Treaty provisions on competition must be interpreted and applied in the light of the former Article 3(1)(g) of the EC Treaty - which provided that the activities of the Community shall include the "institution of a system ensuring that competition in the common market is not distorted" -, the Court considered that those provisions cover not only practices which may directly prejudice consumers but also those which are indirectly detrimental to them by impairing the effective competitive structure as envisaged by Article 3(1)(g) of the EC Treaty.[989]

One may think that, as those last years the European institutions have put to a greater extent the focus on consumer welfare and on an effects-based analysis, the current approach followed by the Commission would require proof of direct harm to consumers before condemning a practice as anticompetitive. It appears, however, from recent cases that nothing has changed on that matter. The primary concern still remains on the protection of the competitive process while the direct actual or potential impact of the firm's conduct on consumers is generally not considered.[990] This is in particular illustrated in the *British Airways* case where the Court of First Instance reaffirmed that

> "[The Treaty] does not require it to be demonstrated that the conduct in question had any actual or direct effect on consumers. Competition law concentrates upon protecting the market structure from artificial distortions because by doing so the interests of the consumer in the medium to long term are best protected."[991]

The case was upheld on appeal by the Court of Justice ruling according to the opinion of the Advocate General Kokott who maintained that:

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[988] Joined cases C-501/06P, C-513/06P, C-515/06P and C-519/06P, *Glaxosmithkline Services Unlimited and Ohters v. Commission* [2009] ECR I-9291, at 63. See also: C-8/08, *T-Mobile Netherlands BV and Others v. Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, at 38-39.

[989] Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission* [1973] ECR 215, at 26 and Case 85/76, *Hoffman-La Roche v Commission* [1979] ECR 461, at 125. See also: T-228/97, *Irish Sugar* [1999] ECR II-2963, at 232.

[990] See : P.Marsden & P.Whelan, *"Consumer detriment" and its application in EC and UK competition law,* 27 European Competition Law Review 569 (2006).

[991] T-219/99, *British Airways v Commission* [2003] ECR II-5917, at 264.

> "The starting-point here must be the protective purpose of Article [102 TFEU]. The provision forms part of a system designed to protect competition within the internal market from distortions (Article 3(1)(g) EC). Accordingly, Article [102 TFEU], like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the structure of the market and thus competition as such (as an institution), which has already been weakened by the presence of the dominant undertaking on the market. In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared."[992]

The proof of harm to the competitive process is therefore sufficient for the finding of a violation of the competition rules as it is assumed that such harm is detrimental to consumers as well.

b) Consumer benefits do not preclude the finding of anticompetitive conduct

Different types of practices are likely to be prohibited under the Treaty provisions on competition although they appear beneficial to consumers in the short-term. This is in particular the case where the benefits offered to end-users are not due to the creation of efficiencies but result merely from the exercise of market power or aim at excluding competitors. It is recognized that the long-run interest of consumers may differ from the short-run benefits, such as lower prices, a firm gives to them in view of strengthening its position on the market.[993] Three examples can be pointed out to illustrate such long-term perspective followed by the Commission in its competition assessment.

First, buyer agreements to fix lower prices, quantities or to allocate sources of supply are prohibited as hardcore restrictions even though they may lead to lower consumer prices.[994] Such arrangements are indeed considered to eliminate the participants' autonomy in strategic decision-making and thereby to distort competition on the markets.

Secondly, fidelity rebates are generally condemned under Article 102 TFEU. The Commission considers that those types of discounts may turn out to be harmful to consumers in the long-run.[995]

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[992] Opinion Advocate General Kokott, delivered on 23 February 2006, C-95/04P, *British Airways plc v Commission* [2007] ECR I-2331, at 68.
[993] E.Buttigieg, *op.cit.,*at 160.
[994] See : Part II, Chapter 1, Section I, Point B, 1, a).
[995] See for examples: T-219/99, *British Airways v Commission* [2003] ECR II-5917; T-203/01, *Manufacture française des pneumatiques Michelin v Commission (Michelin II)* [2003] ECR II-4071. Volume-related discounts schemes are in principle lawful provided they reflect costs savings/economies of scale. On the various types of rebates and the case law of the European Courts on that matter, see : R.O'DONOGHUE & J.PADILLA, *The law and economics of Article 82 EC,* 2006, at 374-406. See also: OECD, *Loyalty and Fidelity Discounts and Rebate,* Report, DAFFE/COMP(2002)21, 2003; W.Tom, D.Balto & N.Averrit, *Anticompetitive aspects of market-share discounts and other incentives to exclusive dealing,* 67 Antitrust Law Journal 615 (2000); D.Spector, *Loyalty*

The lower prices obtained by the latter are indeed conditional on their loyalty to a particular firm. As a result, by inducing buyers to forego other sources of supply, the firm in question impedes access to the market for competitors and thereby strengthens its position and the level of concentration in the market, leading to a likely reduction in consumer choice in the longer-term.[996] Lower consumer prices can therefore not be taken as a benchmark to assess the overall impact of the practice on competition.

Thirdly, the approach followed by the Commission and the European Courts in case of predatory pricing also reveals that lower consumer prices do not constitute a conclusive argument. The legal test used in predation cases includes two rules: (1) Price below average variable cost (AVC) is presumed to be predatory; (2) price below average total cost (ATC) but above AVC is considered as abusive if it is part of a plan for eliminating a competitor.[997] However, unlike in U.S. antitrust law[998], no recoupment condition is required in EU law so that, provided that one of the conditions mentioned above is fulfilled, it is concluded to a pricing abuse even though the firm has no realistic chance of recouping it losses.[999] In addition, the Court of Justice asserted in *Tetra Pak II* that

> « it must be possible to penalize predatory pricing whenever there is a risk that competitors will be eliminated. (…) The aim pursued, which is to maintain undistorted

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rebates: an assessment of competition concerns and a proposed structured rule of reason, 1 Competition Policy International 89 (2005); C.Ahlborn & D.Bailey, *Discounts, rebates and selective pricing by dominant firms: A trans-Atlantic comparison,* 2 European Competition Journal 101 (2006).

[996] E.Buttigieg, *op.cit.,* at 218-219.

[997] See for examples : C-62/86, *AKZO Chemie BV v Commission* [1991] ECR I-3359, at 70 et seq.; T-83/91, *Tetra Pak International SA v Commission* [1994] ECR II-755, at 150, on appeal Case C-333/94 P, *Tetra Pak International SA c Commission* [1996] ECR I-5951; Joined cases T-24/93, T-25/93, T-26/93, and T-28/93, *Colmpagnie Maritime Belge Transports SA and Others v Commission* [1996] ECR II-1201, at 139-141, on appeal Joined cases C-395/96 P and C-396/96 P, *Compangie Maritime Belge Transports SA, Compagnie Maritime Belge SA and Dafra-Line A/S v Commission* [2000] ECR I-1365; Case COMP/38.233, *Wanadoo Interactive,* Commission Decision of 16 July 2003. See also: Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 102 of the EC Treaty to abusive exclusionary conduct bye dominant undertakings (Text with EEA relevance), O.J. C 45/7 of 24/02/2009, at 63-74.

[998] See : *Brooke Group Ltd v Brown & Williamson Tobacco Corp,* 509 US 209, 225 (1993). The greater reluctance of US courts to consider pricing conduct as predatory may be explained by the influence of the Chicago School which alleges that predatory pricing schemes are rarely tried as they are too speculative and rarely successful so that they do not constitute a rational strategy. See: H.Schweitzer, *The history, interpretation and underlying principles of Section 2 Sherman Act and Article 82 EC,* EUI Working Paper (2007), published in Claus-Dieter Ehlermann and Mel Marquis (eds.), European Competition Law Annual 2007: A reformed approach of Article 82 EC, pp.119-164, available at: http://www.eui.eu/RSCAS/Research/Competition/2007(pdf)/200709-COMPed-Schweitzer.pdf, at 31.

[999] On the concept of predation in EU competition law, see for examples : J.Glöckner, *Predatory pricing and recoupment under EU competition law: per se rules, underlying assumptions and the reality: results of an experimental study,* 31 European Competition Law Review 423 (2010); A.Mateus, *Predatory pricing: a proposed structured rule of reason,* 7 European Competition Journal 243 (2011).

> competition, rules out waiting until such a strategy leads to the actual elimination of competitors. »[1000]

It is hence sufficient to prove an intention to eliminate competitors – which is presumed if prices are below AVC[1001] – to prove the abusive character of a pricing policy, regardless whether that result is achieved or not.

All those examples show that business conduct leading to lower consumer prices does not necessarily fall outside the scope of the Treaty rules on competition. The conflict between the short-term and long-term interests of consumers is resolved in favor of the latter. This requires in some cases to rule out practices which are likely to eliminate competitors and affect the competitive structure of the market, despite the fact that they may be beneficial to consumers in the short-run. Low prices are indeed not the only parameter included in the notion of consumer welfare. Other sort of damage has also to be considered, such as a reduction in consumer choice or innovation, which may result from the eviction of competitors.[1002] Consequently, when the Commission and the European Courts condemned practices in cases where no consumer harm had been proved or where consumers were guaranteed to benefit from lower prices as a result of those practices, they did in fact consider that consumer welfare was endangered but in a less visible way, that is in a longer-term perspective or through a reduction in choice, quality, diversity or innovation.

c) Consumer harm is not necessarily equivalent to competition harm

Where direct benefits to consumers are not sufficient to characterize a practice as pro-competitive, conversely, it is not excluded that a practice leading to consumer harm will be exempted from the prohibitions contained in the EU competition rules. Again, the main concerns are the long-term interests of consumers. Competition authorities may sometimes refrain themselves from blocking or condemning some initiatives that cause immediate harmful effects to consumers when it turns out that the same practices are likely to entail long-term deferred positive effects, in particular due to

[1000] C-333/94 P, *Tetra Pak International SA c Commission* [1996] ECR I-5951, at 44.

[1001] In such as case, it is considered that there is no conceivable economic purpose other than the elimination of a competitor.

[1002] See: P.Nihoul, *Freedom of choice: the emergence of a powerful concept in European competition law* (2012), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2077694 In different cases, the limitation of the choices available to consumers was considered as outweighing the reduction in consumer prices. See for example: *Wanadoo Interactive,* Case COMP/38.233, Commission Decision of 16 July 2003. Decision upheld on appeal by the General Court and the Court of Justice: T-340/03, *France Télécom SA v Commission* [2007] ECR II-107 and C-202/07 P, *France Télécom SA v Commission* [2009] ECR I-2369. The issue of consumer choice was also highlighted in other cases. See for examples: *Microsoft,* Case COMP/C-3/37792, Commission Decision of 24 March 2004 (On appeal, see: T-201/04, *Microsoft Corp. v Commission* [2007] ECR II-3601); *Intel,* Case COMP/C-3/37.990, Commission Decision of 13 March 2009.

the substantial productive and innovative efficiencies they generate.[1003] In its Guidelines on the application of Article 101(3) TFEU, the Commission refers to those possible deferred beneficial effects and recognizes that, in some cases, a certain period of time may be required before the efficiencies materialize. The fact that an agreement has only negative effects in the short-run and that pass-on to consumers occurs with a certain time lag does, however, not in itself prevent the participants from benefiting of an individual exemption under Article 101(3) TFEU.[1004] Provided that the efficiencies generated by the firms are sufficient to compensate in the long-term consumers for the negative impact caused to them by the restriction of competition, the Commission may consider that the pass-on condition of Article 101(3) TFEU is fulfilled.

The reason why EU authorities give lesser consideration to the short-run harmful impact of firms' conduct is that practices likely to increase innovative efficiency, which is the main source of economic growth, sometimes involve an immediate adverse effect on consumers through, for example, higher prices. Yet, in view of the benefits that innovation may generate in the economy, it may be considered in certain circumstances that the limited harm caused today to consumers will be outweighed tomorrow by the positive effects resulting from innovative efficiencies.

3. Protection of the competitive process as a means to protect long-term consumer interests.

There is no doubt that the ultimate goal of EU competition law is to protect and enhance consumer welfare. However, that concept includes a large variety of elements whose protection cannot be properly guaranteed by a mere assessment of the direct and immediate effects of business conduct on final consumers. Those effects reflect indeed only a static perspective of consumer welfare and are therefore not a good metric to evaluate dynamic/innovative efficiency or the potential harm that is likely to affect consumers in the long-run. As shown in the previous section, the Commission and the European Courts focus rather on the protection of the competitive process which is considered as the best way to achieve the long-term interests of consumers.

a) Consumer welfare, a broad concept…

When referring to consumer welfare, the European authorities make it clear that such concept is not limited to low prices that competition is expected to provide for consumers. Instead, the emphasis is put, among other things, on product variety, diversity, quality, innovation and on consumer choice. Expressing the point of view of the Commission, Neelie Kroes affirmed that

[1003] E.Buttigieg, *op.cit.,* at 46.

[1004] Guidelines on the application of Article 81(3) of the Treaty, *op.cit.*,, at 87. "However, the greater the time lag, the greater must be the efficiencies to compensate also for the loss to consumers during the period preceding the pass-on."

> "Competition policy is about more than lowering prices for consumers. Our effect on choice and quality is just as important. We also consider the benefits of more dynamic efficiencies associated with innovation and increased productivity."[1005]

Consequently, even though the direct effect a particular practice has on consumer prices may constitute a handy standard to assess the legality of that practice, such an approach would not be effective in protecting all the aspects included in the concept of consumer welfare. However, one must admit that the potential impact firms' conduct is likely to have on those other consumer interests, such as quality, innovation or choice, is definitely not easy to assess immediately. It is indeed only in the longer-term that the positive/negative effects of some practices will appear on the markets. By the time consumer harm manifests itself, the structure of the market and the position of the remaining market participants may hence be much different and the enforcement of the competition rules less likely to ensure sufficient corrective effects. This is why the standard governing the assessment of anticompetitive conduct is generally not the immediate impact on consumers as such but rather the consequences the practice engenders on the competitive process. The Commission's work on competition law is in fact not to deliver directly the benefits mentioned above to consumers – that should be the job of companies – but to enable a functioning market.[1006] Philppe Lowe, the former Director General of Competition, clearly expressed this approach by stating that

> "The concept of consumer welfare should be interpreted dynamically in the sense of the effects of any structure or conduct on price, choice, quality and innovation in the short and long terms. Sometimes those effects are immediate and measurable. However, often the effects are difficult to quantify and the only way to protect consumer welfare in the longer term is by safeguarding the process or dynamic of competition on the markets."[1007]

b) …To be protected through an effective competitive process

The primary concern is the protection of the competitive process as a means to maximize consumer welfare in all its aspects. To focus on such process, instead of on a particular market outcome at a given point of time, constitutes the best approach to safeguard long-term consumer interests and is consistent with the wording of the Treaty. The effects of business conduct on consumers keep

[1005] N.Kroes, *Consumer welfare : more than a slogan,* Competition and Consumers in the 21st Century, Speech/09/486, Brussels, 21 October 2009, available at: http://europa.eu/rapid/press-release_SPEECH-09-486_en.htm?locale=en

[1006] *Ibidem.*

[1007] P.Lowe, *The design of competition policy institutions for the twenty-first century: The experience of the European Commission and the Directorate-General for Competition* in Competition policy in the EU – Fifty years on from the Treaty of Rome, Xavier Vives (ed.) (2009), at 32.

nevertheless a significant role in the competition assessment since most restrictions on the competitive process may be justified if sufficient consumer benefits are likely to derive from the restrictive practice.

i. The protection of the competitive process in the Treaty

The importance of the competitive process was enshrined in ex-Article 3(1)(g) of the EC Treaty. That provision provided that, in order to achieve the objectives mentioned in Article 2 EC, the activities of the then European Community shall include "a system ensuring that competition in the internal market is not distorted". In different cases, the Court referred to that provision to underline that the competition rules do not only cover practices which may directly prejudice consumers but also those which are indirectly detrimental to them by impairing an effective competitive structure.[1008] Even though the provision in question has been repealed by the Lisbon Treaty, it is nevertheless still relevant today and keeps the same value as it has been moved to a Protocol annexed to the Treaties.[1009] Furthermore, the interpretative status of the former Treaty provision is not affected either in view of recent judgments rendered by the Court of Justice. The substantive content of the Protocol is indeed read in conjunction with the objectives of the Union and the requirement of undistorted competition considered as part of the fundamental principles of the economic constitutional law of the EU.[1010]

The prevalence of the competition process is also embedded in Article 101(3) TFEU which contains the four conditions to be met for an exemption from the prohibition on anticompetitive agreements. According to that provision, such prohibition may be declared inapplicable if the arrangement "contributes to improving the production or distribution of goods or to promoting technical or

[1008] Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission* [1973] ECR 215, at 26 and Case 85/76, *Hoffman-La Roche v Commission* [1979] ECR 461, at 125. See also: T-228/97, *Irish Sugar* [1999] ECR II-2963, at 232.

[1009] Protocol (No 27) on the internal market and competition, *OJ* C 115, 9/05/2008. According to Article 51 TEU, protocols form an integral part of the Treaties. The former commissioner responsible for competition Neelie Kroes also insisted that the Lisbon Treaty does not affect the protection of competition in the Union by stating that "The Internal Market and Competition Protocol is a legally binding confirmation that a system of ensuring undistorted competition is an integral part of the Internal Market. The Protocol paraphrases the current Treaty provisions: competition is no an end in itself – but it is the best means anyone has found to create the conditions for growth and jobs. Integrating competition into the very concepts of the "Internal Market" clarifies that the one simply cannot exist without the other – which is a fact." See: N.Kroes, "Competition policy; Achievements in 2006; Work program in 2007; Priorities for 2008", European Parliament Economic and Monetary Affairs Committee, Speech/07/425, 26 June 2007, available at: http://europa.eu/rapid/press-release_SPEECH-07-425_en.htm

[1010] See : C-52/9, *Konkurrensverket v TeliaSonera Sverige AB* [2001] ECR I-527; C-496/09, *European Commission v Italian Republic* [2001] not yet reported. Those cases concerned illegal state aids. See also: B.Van Rompuy, *"Thanks Nicolas Sarkozy, but no thanks." CJEU rules on status of Protocol on Internal Market and Competition* (2011), available at: http://kluwercompetitionlawblog.com/2011/11/25/%E2%80%9Cthanks-nicolas-sarkozy-but-no-thanks-%E2%80%9D-cjeu-rules-on-status-of-protocol-on-internal-market-and-competition/ and J.Drexl, *La constitution économique européenne – L'actualité du modèle ordolibéral,* 2011/4, t.XXV, p.447.

economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question." The last condition reveals the important role accorded to the intensity of residual competition and the necessity to safeguard an effective competition structure.[1011] The Guidelines on the application of Article 101(3) TFEU further highlight the predominance of the competitive process over any other value. In Paragraph 105 of those Guidelines, it is stated that:

> "Ultimately the protection of rivalry and the competitive process is given priority over potentially pro-competitive efficiency gains which could result from restrictive agreements. The last condition of Article [101(3)] recognises the fact that rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation. In other words, the ultimate aim of [Article 101] is to protect the competitive process. When competition is eliminated the competitive process is brought to an end and short-term efficiency gains are outweighed by longer-term losses stemming inter alia from expenditures incurred by the incumbent to maintain its position (rent seeking), misallocation of resources, reduced innovation and higher prices."[1012]

Consequently, even if a practice provides efficiencies which are passed on to consumers, this will not be sufficient to justify elimination of competition as it is presumed that such negative impact on the competitive process will harm consumers in the future. The emphasis of the Commission's enforcement activity on safeguarding the competitive process also applies in abuse of dominance cases as explained in the Guidance paper on Article 102 TFEU.[1013]

ii. The competitive process and competition on the merits

Protection of the competitive process implies preservation of a competitive business environment in which companies are incited to compete and innovate. This in turn requires that competition authorities maintain a level playing field for consumers and businesses and make sure smaller, but efficient, players are not driven out of the market by large competitor strategies not based on "competition on the merits". Even though there is no general agreement on what these term means, the Commission and the European Courts have been using "competition on the merits" for years in

[1011] H.Schweitzer, *Efficiency, political freedom and the freedom to compete – comment on Maier-Rigaud,* in The goals of competition law, Daniel Zimmer (ed.) (2012)
[1012] Guidelines on the application of Article 81(3) of the Treaty, *op.cit.*, at 105.
[1013] Guidance on the Commission's enforcement priorities in applying Article 102 of the EC Treaty, *op.cit.*

single-firm conduct cases to determine whether a certain practice was abusive or not.[1014] That notion implies that firms in a dominant position cannot have recourse to methods different from those which conditions normal competition if these have the effect of hindering the maintenance of effective competition.[1015] Where it is admitted that powerful firms have the right to take reasonable steps to protect their interests and are not under an obligation to refrain from competing vigorously, their conduct must nevertheless be proportionate and cannot be allowed if it is used to strengthen a dominant position.[1016] A firm's success must in fact be based only on its superior performance in terms of price, quality or innovation. If a practice improves a firm's performance leading to the elimination of rivals not able to match such improvement, the conduct in question will generally be included in the notion of normal competition, despite its exclusionary effect. This occurs for example when a firm increases its market power by offering higher quality or more attractive products so that consumers prefer to turn to that firm to satisfy their needs.

However, if the practice only results in elimination of competitors without generating efficiencies, it is much less likely to fall within the scope of competition on the merits.[1017] In some cases, a firm is indeed able to influence consumers' buying conduct - and thereby its position and the degree of

[1014] OECD, *Competition on the merits,* Directorate for Financial and Enterprise Affairs – Competition Committee, 2006, DAF/COMP(2005)27, available at: http://www.oecd.org/competition/abuseofdominanceandmonopolisation/35911017.pdf Different tests have been suggested to evaluate the legality of dominant firm conduct: The profit sacrifice test (or "but for" test); the No economic sense test; the Equally efficient firm test; the Consumer welfare test; the Elhauge test. See at 25-37. For the assessment of specific cases of exclusionary abuses, especially pricing abuses, the Commission uses the "as-efficient competitor test". The Guidance paper on the application of Article 102 TFEU gives some substance to the concept of "competition on the merits" by defining criteria based on economic analysis for each kind of practices. See: Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 102 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Text with EEA relevance), O.J. C 45/7 of 24/02/2009.

[1015] See: Case 85/76, *Hoffmann-La Roche v. Commission* [1979] ECR 461, at 6; *ECS/AKZO,* Case IV/30.698, Commission Decision of 14 December 1985, at 81, upheld on appeal in Case C-62/86, *AKZO Chemie BV v Commission* [1991] ECR I-3359; T-203/01, *Manufacture française des pneumatiques Michelin v Commission* [2003] ECR II-4071, at 107-110. The Court defined abuse as "an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on basis of the transaction of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition." In practice, it is sometimes difficult to distinguish legitimate competition from abusive exclusionary conduct. A practice may be considered as "normal" if it is carried out by a non-dominant firm but be prohibited if it is the result of a dominant firms' action as the impact on competition is likely to be different. On the uncertainty surrounding the definition of abusive conduct, see: R.O'DONOGHUE & J.PADILLA, *The law and economics of Article 82 EC* (2006), at 176-178.

[1016] See: Case 27/76, *United Brands Company and United Brands Continental v Commission* [1978] ECR 207; C-62/86, *Akzo Chemie BV v Commission* [1991] ECR I-3359; T-203/01, *Manufacture française des pneumatiques Michelin v Commission (Michelin II)* [2003] ECR II-4071. The European institutions also use the phrase "special responsibility" to define abusive conduct in the sense that a firm in a dominant position "has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market." See: Case 322/81, *Nederlandsche Banden Industrie Michelin (Michelin I) v Commission* [1983] ECR 3461, at 10.

[1017] J.Faull & A.Nikpay, *The EC law of competition* (2007), at 148.

competition on the market - by excluding competitors or making them less attractive through practices which in no way enhance productive or innovative efficiency and do not contribute to improving products/services offered to consumers. Similarly, a firm may be in a position to raise artificial barriers to entry or expansion not related to any superior economic performance or efficiency. In such cases, exclusion of rivals will generally be considered anticompetitive. When a dominant firm excludes competitors through its behavior, one should therefore wonder whether the resulting enhancement or maintenance of dominance is due to the firm's efficiency improvement or to the impairment of competitors' efficiency.[1018]

This distinction between efficiency exclusion and exclusion resulting from the mere exploitation of market power is essential and attests that protection of the competitive process does not in any way mean protection of competitors against competition. Injury inflicted to weaker rivals does indeed not necessarily lead to competition harm. It is obvious that all business activity excludes in fact competitors from some share of the market but such exclusion may result from efficiencies which enhance competition on the markets and constitute the very essence of the competitive process.[1019] The objective is therefore not to keep markets de-concentrated at all costs - as is recognized that, in some cases, a large number of players do not necessarily lead to an optimal economic outcome and that strong power may help achieve efficiencies and raise incentives to compete – but to maintain markets with sufficient competitive pressure on large firms. By protecting rivalry between competitors and openness of markets, EU competition policy ensures a dynamic and innovative economy for the benefit of all market participants and especially consumers.

iii. The competitive process and consumer welfare

Protection of the competitive process is not an end in itself but an instrument to ensure consumer welfare. The objective of the Commission is thus to make market work better, not for an abstract notion of free competition but because better functioning markets provide consumers with better

[1018] This is more or less the reasoning developed by Professor Elhauge in his efficiency test which lies "in distinguishing whether the alleged exclusionary conduct succeeds in furthering monopoly power (1) only if the monopolist has improved its own efficiency or (2) by impairing rival efficiency whether or not it enhances monopolist efficiency. In the first category of cases, the greater efficiency of the monopolist may cause it to expand, which in turn makes rivals lose sales and become less efficient. But the root cause is the increased efficiency of the monopolist because this conduct cannot expand or maintain its monopoly share unless the monopolist has improved its efficiency. In the second category of cases, the decreased rival efficiency procured by the exclusionary conduct causes the monopolist to gain or maintain its monopoly share even if the conduct does not improve the efficiency of the monopolist at all." (…) "The key factor that distinguishes the sort of exclusionary conduct that merits condemnation is that it can successfully increase or maintain the monopolist's market power even if the monopolist has not increased its efficiency in any way." See: E.Elhauge, *Defining better monopolization standards,* 56 Stanford Law Review 523 (2003), at 315 and 323.

[1019] OECD, *Roundtable on competition on the merits* – Note by the European Commission, Directorate for Financial and Enterprise Affairs – Competition Committee, 2005, DAF/COMP/WD(2005)31, at 7.

goods/services.[1020] When focusing on the competitive process, competition authorities keep nevertheless in mind that ultimate objective.

In practice, in most cases, restriction affecting the competitive process also harms consumers so that it may rapidly be concluded to a violation of the competition rules. This occurs in particular when the restriction in question entails direct effects on quantity or consumer prices. However, when such direct effects are not visible immediately, the apparent absence of consumer harm cannot exclude a finding of anticompetitive conduct at the risk of committing a "straight line fallacy".[1021] One has instead to go beyond the short-term view, namely the view based on lower prices, and take into consideration the long-term aspects of consumer welfare such as choice, quality and diversity. Those parameters are yet very difficult to evaluate immediately. That explains why the approach of the competition authorities rather takes the form of a "curved line" with the emphasis put on the competitive process whose protection is assumed to guarantee long-term positive dynamic effects for consumers. Any negative impact on such process will be considered anticompetitive.

However, the issue of consumer interests may still reemerge when an objective justification is raised by the defendant(s) and examined by the Commission or the European Courts.[1022] Any anticompetitive practice may indeed be justified if it is objectively necessary[1023] or if it gives rise to more efficient methods of production or commercialization for the benefit of consumers.

In the assessment of efficiency claims, productive and innovative efficiencies are generally more prized than allocative efficiency which only contributes to a static perspective of consumer welfare. This is why, in case of predatory abuse, the resulting lower prices on the market are not considered sufficient to justify a restriction on competition. It may also be held that such decrease in prices is mostly due to the exploitation of market power and can therefore not be taken into consideration by

[1020] N.Kroes, *Competition Policy and Consumers,* General Assembly of Bureau Européen des Unions de Consommateurs (BEUC), Speech/06/691, Brussels, 16 November 2006, available at: http://europa.eu/rapid/press-release_SPEECH-06-691_en.htm?locale=en

[1021] See : B.Heitzer, *What kind of benefits ? Consumer welfare as a standard of competition policy,* presented at the European competition day, Paris, 18-19 November 2008, at 23. According to Heitzer, the former president of the Bundeskartellamt, "competition is a complex process. Its results cannot be known in advance, but we can assume that it will create beneficial outcomes. (…) To try to directly manipulate one of the potential results of the process, namely consumer welfare – is an endeavor fraught with numerous uncertainties. It may turn out that what looks like a straight line is in fact more complicated, and that trying to force the process into a direct, straight line may cause more harm than good to the system."

[1022] Guidance on the Commission's enforcement priorities in applying Article 102 of the EC Treaty, *op.cit.*, at 28-31.

[1023] Concerns about quality, security or safety might for example justify a refusal to deal. European competition authorities however scrutinize very carefully such kind of defenses in order to assess whether those legitimate objectives constitute the real purpose of the restriction on competition. See for examples: *FAG-Flughafen Frankfurt/Main AG,* Case IV.34.801, Commission Decision of 14 January 1998 and *Eurofix-Bauco v Hilti,* Case IV/30.787, Commission Decision of 22 December 1987, upheld on appeal T-30/89, *Hilti AG v Commission* [1991] ECR II-1439.

the Commission in its balancing test. Output and price effects on consumers must in fact not be overvalued or, to put it another way, effects on quality, innovation and consumer choice must not be underestimated. One should in addition remember that, where restriction on competition may be justified on efficiency grounds, there is still the safeguard condition providing that competition cannot be eliminated. Competition authorities have therefore to make sure that, despite the restriction, market access is not foreclosed and competitive constraints, coming in particular from actual or potential competition but also from customers due to their ability to switch to other business partners, remain sufficient on the market.

In conclusion, the competitive process approach constitutes an economic and effects-based analysis but focused on the process of competition instead of on the direct effects on consumers. The absence of consumer harm is hence not relevant in the assessment. However, the focus may be redirected toward consumers if it is established that the latter benefit from the efficiencies created by the restriction. The final stage of the assessment is turned back again on the competitive process in order to make sure that the competitive game is not completely truncated or distorted and that other (new) players have still the opportunity to participate in that process.

C. BUYER POWER AND COMPETITION LAW OBJECTIVES

In view of the enforcement priorities in EU competition law and of the potential effects of buyer power described above in the previous sections, the question now arises as to whether the exercise of market power over suppliers is likely to hinder the achievement of the competition law objectives.

With an eye on end consumers, whose welfare constitutes the ultimate goal of competition policy, the European authorities seem to be more lenient with regard to restrictive practices in upstream buyer markets since the detrimental effects caused to suppliers or competitors in those markets do not necessarily go hand in hand with consumer harm, at least in the short-run.[1024]

However, we have extensively examined and shown that the texts (Treaty, guidelines,…) and the EU case law look beyond the direct effects on consumers and take mostly into consideration the effectiveness of the competitive process to assess the legality of business conduct. That approach should therefore also prevail in case of buyer power alleged abuses. Whether the practice takes place in the buyer or in the seller market, the focus should remain on the protection of the competitive process so that all market participants have the opportunity to play in a competitive environment. Such a broad understanding of the process to be protected runs in no way counter to

[1024] *Buyer power in Competition law – Status and perspectives,* BundesKartellamt, Meeting of the Working Group on Competition Law on 18 September 2008, available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/2008_ProfTagung_E.pdf , at 18.

the consumer welfare objective, quite the contrary. Different situations will be examined to illustrate how the exercise of buyer power could be integrated in the assessment of the competition authorities in view of contributing to the realization of the competition policy objectives.

1. Protection of competition in all directions

Various compelling reasons can be put forward to justify protection not only of supply competition but also of demand competition**. First of all**, the wording of the Treaty attests that all practices used by a dominant firm, either in the downstream seller market or in the upstream buyer market, may fall within the scope of article 101 and 102 TFEU. With regard to the first provision, any agreement, including conspiracy between buyers, is prohibited when it has the object of effect to restrict competition. Among the arrangements deemed incompatible with the internal market, Article 101 TFEU refers to agreements which directly or indirectly fix purchase prices or share sources of supply. As for the other examples of restriction included in that provision, one can note that they might apply similarly to buyers or sellers. Concerted practices creating discrimination among trading parties or imposing unjustified supplementary obligations to the other parties are indeed prohibited whoever they are aimed at. If only customers were protected against those anticompetitive conditions, the drafters of the Treaty would have explicitly mentioned that category of participants instead of using the general term "other parties". Similar examples are provided in Article 102 TFEU so that abusive conduct may be condemned, even though it has been taking place in the upstream buyer market. One may hence assume that the EU competition rules aim at protecting all market participants from exploitation of market power.

Secondly, anticompetitive exclusion of rivals may be the result of practices used in the downstream seller market as well as in the upstream buyer market. Take for example exclusive supply obligations imposed on suppliers by a powerful buyer in order, not to pursue a legitimate aim, such as avoiding a free riding problem, but to eliminate competitors offering lower prices in the retail market. Such exclusionary conduct is not part of competition on the merits as the elimination of rivals does not result of the firm's better performance on the market. The restrictive effect in the upstream market will therefore contribute to strengthening the firm's position in the retail market without generating any benefit for consumers. Other types of practices may also cause the exclusion of competitors such as those that raise rivals' costs or involve predatory bidding. As a result of such exclusion, the firm's market power will be reinforced in the upstream buyer market but also in the downstream seller market if the excluded buyers were also competitors in that market. In order to maintain competitive constraints on powerful firms and to preserve the openness of the markets, it may hence be more effective to act upstream of the supply chain against abusive conduct of powerful buyers rather than waiting for the emergence or reinforcement of a dominant position in the downstream seller market.

Again, the objective is not to protect weaker or inefficient players but to make sure competitors are not excluded from the market by improper means.

Thirdly, the necessity to protect the competitive process and to maintain fair and undistorted competition referred to by the EU authorities cannot be restricted to one side of the market. The protection of such a process implies indeed that all market participants are protected against abusive practices and coercion. Agreements among buyers or abuses by a large buyer which affect suppliers by imposing on them unjustified obligations or by restricting their freedom of action or choice should therefore be considered to restrict the competitive process and as such be condemned as anticompetitive. Even if abuses committed in the upstream market by a powerful buyer do not lead directly to reinforcing the market position of the latter in the seller market, we will see below that those abuses may nevertheless affect the dynamics of competition. Such potential negative impact on dynamic efficiency justifies thus also protection of competition in all directions.

Professor Zimmer, in particular, defends that approach by arguing that competition must be protected, not only among sellers but also among buyers. According to him, what competition law seeks to achieve is to protect the opposite side of the market.[1025] Consequently, any conduct which harms the other side of the market should be deemed anticompetitive. For example, transfer of wealth resulting from the exploitation of market power, either from consumers to sellers or from suppliers to buyers, should be prohibited. As regards exclusionary conduct, he underlines that competitors are not protected as such by competition law against exclusion but conduct leading to the elimination of rivals would be condemned if it had a detrimental effect on the opposite side of the market.[1026] Professor Zimmer's approach could be followed to ensure the protection of the competitive process in EU markets. However, one must not forget that the objective of competition law is to protect the competitive process not for its own sake but because it is the best tool to promote consumer welfare. Among the different sides of the different markets involved, the side of end consumers should hence take precedence. That is why competition authorities should in any case keep an eye on consumers and take into consideration any objective justification which includes benefits for consumers.

[1025] D.Zimmer, *The basic goal of competition law : to protect the opposite side of the market,* in The goals of competition law, Daniel Zimmer (ed.) (2012), at 496. See also: M.Schwartz, *Should Antitrust Assess Buyer Market Power Differently than Seller Market Power?,* Comments presented at DOF-FTC Workshop on Merger Enforcement, Washington DC, February 17, 2004. Professor Schwartz argues that the term consumers is a metaphor for trading partners. As a result, with regard to the enforcement of the competition rules in merger cases, he maintains that "a merger that increases market power and enables the merged firm to impose worse terms on its trading partners is equally objectionable if the trading partners in question are suppliers to or buyers from that firm."

[1026] D.Zimmer, *The basic goal of competition law…,op.cit.* at 497-499.

2. Buyer power and protection of consumer welfare

The protection of competition in all directions may raise the question of whether such an approach is truly to the benefit of consumers as the latter may not be affected by the exploitation of market power over suppliers or may even benefit from lower prices due to some buyer practices. However, the exercise of buyer power may be as harmful to consumers as seller power or lead to consumer benefits which in fact derive from practices reprehensible under the competition rules. In case buyer power yields some positive effects in the downstreamseller market, any restriction on competition in the upstream buyer market should be balanced against those beneficial effects in order to assess the legality of the practice in question. Attention should in particular be drawn on the other parameters contributing to consumer welfare such as choice, quality and diversity.

a) Buyer power increasing seller power

The exercise of buyer power does not necessarily leads to consumer benefits because, in most cases, it goes along with a reinforcement of market power in the downstream market to the detriment of consumers. In such cases, firms are not incited to pass on the better conditions obtained from their suppliers to their own customers and may gain a position which is likely to restrict competition in the downstream seller markets as well. This is described as the "spiral effect" which led the Commission to block mergers among retailers such as in *Rewe/Meinl* or *Carrefour/Promodes.*[1027] Where buyer power goes hand in hand with or contributes to the emergence of seller power, competition authorities should be more inclined to condemn restriction of competition in the upstream market since such restriction is unlikely to benefit consumers.

b) Buyer power and lower prices

Even if buyer practices may lead to benefits for consumers, such as lower prices, this should not be taken into consideration if those benefits result only from abusive exploitation of market power. The Guidelines on the application of Article 101(3) TFEU provide indeed that

> "Cost savings that arise from the mere exercise of market power by the parties cannot be taken into account. (…)The cost reductions in question do not produce any pro-competitive effects on the market. In particular, they do not lead to the creation of value through an integration of assets and activities. They merely allow the undertakings

[1027] *Rewe/Meinl,* Case No IV/M.1221, Commission Decision of 3 February 1999 and *Carrefour/Promodes*, Case No COMP/M.1684, Commission Decision of 25 January 2000. See also: *Kesko/Tuko,* Case No IV/M.784, Commission Decision of 20 November 1996. On those merger cases, see above Part II, Chapter 1, Section II, Point B, 2.

> concerned to increase their profits and are therefore irrelevant from the point of view of [Article 101(3)]."

Profits gained through the exercise of buyer power and thus not resulting from efficiency or greater performance achieved by the buyer in question should therefore not be positively appraised in the assessment of restrictive conduct. The fact that some of those profits may be passed on to consumers does not necessarily change what is at stake. Indeed, if abuses committed in the upstream buyer market enable buyers to offer lower prices to its customers, such pricing policy could also be used to exlude competitors in the downstream seller market. A comparison can here be made with anticompetitive practices such as tying or predatory pricing. Even though those practices lead to lower consumer prices, the (potential) exclusion of rivals is deemed sufficient to enforce the competition rules because such exclusion would be the result of action which cannot be described as competition on the merits. The same reasoning could therefore be held with regard to buyer power abuses which allow the dominant buyer to offer lower prices to its customers but are unlikely to benefit them in the longer-term as they strengthen the firm's market position without generating additional efficiencies.

However, it must be made clear that lower prices obtained from suppliers and passed on to consumers are in principle procompetitive and should hence be encouraged, especially when upstream sellers have market power. Fierce competition in buyer markets leads indeed suppliers to offer better prices and better quality products/services to their customers who in turn are incited to pass on those benefits to consumers if sufficient competitive pressure is present in the downstream seller market. The exercise of countervailing power when buyers face powerful sellers enables the former to lower prices closer to the competitive level for the benefit of consumers. Competition implies that all parties bargain, even aggressively, to take a bigger share of the pie. Concerns arise when a market participant acquires sufficient market power so as to be able to behave independently and influence the market conditions.

This is why it is important to examine first the degree of market power of each market participant in order to evaluate whether a buyer could distort or restrict competition through its conduct. In such a case, abuses committed in the upstream market, such as imposing sub-competitive prices to suppliers, are unlikely to promote effective competition and thus unlikely to contribute to consumer welfare. For example, Professors Lande and Kirkwood argue that buyers as well as sellers should obtain the benefits of competition and that, consequently, both supra- and sub-competitive prices should be condemned. They maintain that

> "the rival sellers should not have to face prices set artificially below the competitive level, just as consumers should not have to face prices set artificially above the competitive level. This conduct has no redeeming value and should be condemned. While consumers benefited in the short term from the below-cost prices, these low prices should not count as an 'antitrust benefit' because they were not the types of low prices the antitrust laws were designed to achieve. The main point of the antitrust laws is to prevent consumers from paying supra-competitive prices, not to provide them with artificially low prices."[1028]

Other potential abusive practices such as excessive transfer of cost or unjustified obligations imposed on suppliers may also enable a firm to lower prices in the downstream market. Those benefits, however, are likely to be precarious as they do not rely on any efficiency gain or they are acquired to the detriment of other aspects included in the concept of consumer welfare, namely innovation, product quality and consumer choice.

c) Buyer power and investment: impact on innovation and quality

Where the exercise of buyer power might harm consumers in the longer-term because of the likely consolidation of downstream seller markets, it might also affect consumer interests due to the impact some practices have on dynamic efficiency competition. Suppliers may indeed not be incited to invest in new or improved products as the difference in profit that they can earn through such investment compared to what they would earn if they do not invest is likely to be very slim.[1029] In the grocery industry for example, retailers are able to use similar coercive strategies against most of their suppliers, no matter the brand, the type or the quality of the products the latter put on the markets. As a result, receiving always less for what they produce and knowing that there is little chance they will obtain better conditions whatever product they offer, some producers may not find profitable or simply do not get sufficient resources to invest in better quality or new products. Quite the opposite, they are more likely to reduce expenses as much as possible by limiting investment and lowering costs of production.

Achievement of cost reduction is obviously beneficial for competition as it leads firms to produce more efficiently. However, when productive efficiency can no longer be improved through technical advances or innovative methods of production, cost reduction will be realized by using lower quality products or by reducing the pack size of their products without, in so doing, decreasing prices. The

[1028] J.B.Kirkwook & R.H.Lande, *The fundamental goal of antitrust…, op.cit.,* at 210.
[1029] R.Gilbert, *Looking for Mr.Schumpeter: Where are we in the competition-innovation debate?,* 6 Innovation Policy and the Economy 159 (2006)

exercise of buyer power may hence affect consumer welfare, imperceptibly in the short-run, through a lower product quality level and a lessening in product innovation.

d) Buyer power and consumer choice

Conduct of powerful buyers, such as retailers, who have the ability to dictate the rules in buyer markets, may have an impact on consumer choice as well. First of all, in the retail industry, consumer choice is being reduced due to the increasing presence of private label lines which limit to a great extent space available for branded products. Secondly, suppliers may decide to remove some of their products from the market or to limit the number of retailers they will deal with because they are unable to satisfy all buyers' demands for all their product lines. Few products will hence be available to consumers or at a higher cost as the latter will have to shop from one place to another to find the products they need. Finally, the presence and success of products on the markets may not necessarily be based on choices made by consumers but may in fact rely only on retailers' discretion. Due to their significant buyer power, large retail chains can indeed exercise discretionary power to decide which products will be displayed on their store shelves. To make such decisions, they take consumer preferences into consideration as their sales and profits depend on consumer purchases. However, if suppliers do not agree or cannot cope with the low prices, additional payments and other obligations imposed by retailers, the latter are likely to simply delist products of those suppliers regardless of consumer demand. In fact, retailers' decisions do not rely so much on consumer preferences as on suppliers' ability to yield to their demands.

The number and type of products available on the markets should be subject to consumers' judgment revealed through their own purchasing choices based on their needs and preferences. Excessive market power in the hand of buyers may in some cases remove from consumers such ability to decide which product best corresponds to their needs.

As consumer choice is as important as low price or quality, practices affecting that aspect of consumer welfare should be tackled by competition authorities. This requires in some cases a balancing test which takes into account all the effects the exercise of buyer power entails on the markets.

3. Effects-based analysis of buyer power cases

Various situations involving the exercise or the creation of buyer power may be envisaged. In each situation, the enforcement of the competition rules must be based on the effects buyers' action entails on the markets. Those effects may be restrictive but also pro-competitive, in which case a balancing test must be applied in order to determine the legality of the practice in question.

The first situation concerns a case of pure monopsony. As pointed out in the first chapter, such situation leads to both producer and consumer harm and causes in addition a reduction of aggregate welfare. By limiting the volume of purchases in order to obtain lower prices, the buyer is indeed likely to reduce outputs in the downstream seller market and consequently brings about higher prices in that market. Such conduct is therefore considered anticompetitive.

The second situation where the effects of buyer power must be addressed involves a restriction of competition in the upstream market which is likely to generate efficiencies. Take for example the creation of buying alliances between some retailers. Such arrangement restricts competition in the upstream market as the members do no longer compete against each other in their purchasing activities. However, common purchase agreements may give rise to efficiency gains such as reduced transaction, transportation and storage costs or enable the participants to exercise more effectively countervailing power against powerful sellers. The legality of those agreements will then depends on whether and to what extent those benefits are passed on to consumers. As provided in the Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements,

> "[the efficiency gains] must be passed on to consumers to an extent that outweighs the restrictive effects of competition caused by the joint purchasing arrangement. Hence, cost savings or other efficiencies that only benefit the parties to the joint purchasing arrangement will not suffice."[1030]

This balancing test shows that restriction on competition, whichever market is involved, is considered tantamount to consumer harm. The general efficiency test provided in Article 101(3) TFEU requires that, to be exempted from the application of the competition rules, restrictive practices create benefits for consumers which at least compensate them for any actual or likely negative impact caused by the restriction on competition.[1031] When the restrictive practice takes place in the upstream market, such as in case of purchasing agreements, the balance is stricken between the negative effects in that upstream market and the benefits passed-on to consumers in the downstream market. It can thus be concluded that the European Commission equates restriction of competition in buyer markets with prejudice to consumers. This is moreover consistent with the approach followed by the European institutions which put forward the protection of the competitive process as a means to promote consumer welfare so that any restriction affecting that process is deemed to conflict with consumer interests. If the efficiency gains are effectively passed on to consumers,

[1030] Guidelines on the applicability of Article 101 of the Treaty, *op.cit.,* at 219.
[1031] Guidelines on the application of Article 81(3) of the Treaty, *op.cit.,* at 85.

competition authorities have then to examine whether competition is not eliminated in respect of a substantial part of the products concerned in order to make sure rivalry remains on the relevant market.

The last situation refers to practices which increase buyers' profits but do not enhance efficiency whatsoever. That situation has already been addressed above and it has been concluded that, even if the firm passed on some of its profits to consumers, such lower prices should not be the type of benefit protected under competition law.

4. Protection of the competitive process but not more

The protection of the competitive process may sometimes lead to the protection of (potential) competitors if the latter are eliminated or are prevented from expanding or entering the market because of a dominant firm's anticompetitive conduct. Effective competition implies the presence of competitors or at least the possibility of new rivals entering the market. Competitive pressure coming from those (potential) competitors is indeed a key element to bring consumers the benefits of competition. Rivalry among competing firms leads the latter to create efficiencies and achieve greater performance in order to attract consumers through the offer of lower prices, better quality or new products. It is therefore necessary to maintain such rivalry as much as possible. However, a firm cannot be condemned because it has achieved what competition law is aimed at, that is increasing efficiencies for the benefits of consumers, even though this results in excluding competitors. The protection of rivals against exclusion does therefore not include the protection of weaker or smaller competitors which are unable to compete as efficiently as larger firms.

The same is relevant with regard to suppliers in buyer power cases. The enforcement of the competition rules might, in some cases, lead to protecting suppliers. However, practices affecting some producers by lowering their profits or by limiting their access to consumers are not necessarily anticompetitive. Take for example small producers who are unable to meet large orders placed by retailers. The latter's refusal to deal with those producers cannot be considered an abuse even though such decision will exclude the producers in question from a very large part of the market. Provided that buyers' conduct does not distort or restrict competition either in the upstream buyer market or in the downstream seller market, the resulting negative effects on suppliers are not the type of harm protected by the competition rules. Competition law must in fact be limited to the protection of the competitive process in view of promoting consumer welfare.

Some argue that other values, such as the right for producers to earn a minimum level of income in order to protect their right to food for example, should be included in the scope of competition

policy.[1032] Under such a view, the rules of competition law should be interpreted in conformity with the right to food which is recognized in various international instruments.[1033] The protection of a minimum level of producer welfare that is demanded by the right to food should even be itself a proper task of competition law.[1034] One of the proponents of this approach, M.Ganesh, maintains that

> "there is nothing special about consumers that gives them a moral right to the lowest prices possible, even at the cost of producers' ability to earn an income sufficient to enable them to function as equal members of society."[1035]

Such assertion is completely right from a fairness and humanity point of view. However, from a competition law perspective, harm caused to smaller market participants cannot by itself trigger an intervention of competition authorities. Indeed, where prices set artificially below the competitive level, such as in case of price manipulation, may be considered anticompetitive, all practices leading to lower prices or to the transfer of additional obligations on suppliers are not to be condemned under the competition rules unless they distort or restrict competition and so, even if they might impair the viability of some producers.

However, where human rights protection cannot be as such an objective of EU competition policy, unfair exploitation of market power over producers may nevertheless be condemned by competition authorities if such exploitation is also likely to restrict effective competition. The enforcement of the competition rules against buyers' anticompetitive conduct could hence *de facto* lead to protecting producers, such as small farmers.

In addition, if European politicians consider it necessary to grant greater protection to smaller producers regardless of the impact on competition, action should be taken through other specific policies. The same applies in downstream seller markets. When sellers' practices do not distort competition but are nevertheless likely to affect consumers, other provisions than the competition rules can be applied, namely provisions contained in consumer protection laws and regulations.

[1032] See: A.R.Ganesh, *The Right to Food and Buyer Power,* 11 German Law Journal 1190 (2010) and A.R.Ganesh & N.Harsdorf Enderndorf, *Monopsony in European food markets,* Revue Européenne de droit de la consommation 93 (1/2012).

[1033] For examples Article 25 of the Universal Declaration of Human Rights adopted by the United Nations General Assembly on 12 December 1948 provides that "(everyone) has the right to a standard of living adequate for the health and well-being of himself and his family, including food…" and Article 11 of the International Covenant on Economic, Social and Cultural Rights adopted by the United Nations General assembly on 16 December 1966 that recognized the right to adequate food and the right to be free from hunger.

[1034] A.R.Ganesh, *op.cit.*, at 1230.

[1035] *Ibid.,* at 1224.

D. CONCLUSIVE REMARKS

There is no doubt that the ultimate objective of EU competition law is the well-being of consumers. The concept of consumer welfare in its literal sense is yet not static but dynamic and includes various equally important aspects among those we can mention low prices, diversity, quality, innovation and choice. Any agreement between market participants or any conduct of dominant firms that might adversely affect one of those parameters must therefore be condemned under the EU competition rules. However, in a large number of cases, harmful effects on consumers are not immediate or directly measurable. The EU authorities consider therefore that the best way to safeguard the long-term interests of consumers is to protect the competitive process. As a result, any practice distorting that process must be prohibited, despite the absence of direct consumer harm.

SECTION II – FOCUS ON ANTICOMPETITIVE PRACTICES IN BUYER MARKETS

One cannot deny that significant buyer power stands in the hands of large supermarket chains as well as in those of large buyers in other sectors. Some doubts have yet been raised as regards the effects of such power on the competitiveness of the markets. Pro-competitive benefits resulting from the exercise of buyer power have indeed been underlined, in particular in respect to lower prices that may be passed on to consumers. This explains probably the lack of (effective) action taken at national and EU level to tackle the issue of buyer power in the retail and other sectors.

However, in view of the objectives of EU competition law developed in Section 1, we can affirm at this point that the exercise of market power in buyer markets is likely to adversely affect the competitive process and harm consumers. In order to illustrate how buyer power affects or is likely to affect the achievement of the competition objectives, we will refer to concrete situations occurring in buyer markets of the grocery sector. Most of the practices described below have already been mentioned in Parts I and II. This section highlights, in particular, their negative impact on the competition process as well as on consumers in order to establish that further action against buyer power is needed.

Among the different potential harmful practices that are used by large retail chains, we will point out, first, practices that are likely to exclude competitors, be it competing retailers or competing producers - as supermarket chains also play a role, to a certain extent, at the manufacturing level through their private label lines -, secondly, practices that in fact raise consumer prices in the retail market and, finally, practices that affect other aspects included in the concept of consumer welfare such as quality and choice.

A. PRACTICES EXCLUDING COMPETITORS

Various practices may, in some circumstances, lead to excluding smaller market participants. A distinction has to be drawn between pro- and anti-competitive exclusion. On the one hand, fierce competition based on price or quality for example, or competitive advantages enjoyed by large firms, such as economies of scale/scope, are likely to drive some market participants out of the market. However, such exclusion is part of the competitive process and is hence not a concern from a competition law perspective. On the other hand, some firms are able to exclude competitors by using practices which depart from competition on the merits. These firms generally hold significant market power they can use to weaken the market position of rivals and strengthen their own position on the market. That latter type of exclusion, when resulting from a dominant firm's conduct, calls for intervention of competition authorities.

As it was already pointed out in the Section on the retail sector, supermarket chains are customers of brand manufacturers but they are also competitors of those manufacturers. They indeed put on the market, through backward integration, their own products, called private labels or own-brand products, which compete with branded products on the shelves.[1036] Market power of large retail chains could therefore be used, on the one hand, to exclude competing retailers and, on the other hand, to exclude competing producers by favoring their own-brands.

1. Exclusion of competing retailers

The most blatant exclusionary practice takes the form of an exclusive supply agreement imposed by large retail chains on their suppliers. Such an agreement leads indeed to input foreclosure, restricting access of competing retailers to a particular input and thus preventing them from competing in the downstream seller market.

However, one can consider that, given the oligopolistic structure of the retail market in most Member states, exclusive supply agreements are unlikely to be effectively enforced except for a few products.[1037] Most brands are indeed available in all the largest grocery stores so that it is assumed that a single retail chain cannot restrict to such an extent producers' freedom. Large supermarket chains impose thus less drastic, but just as much anticompetitive, restrictions on their suppliers. For

[1036] Supermarkets do not produce private label products but own the private label brands and source their products sold under those own-brands from third-party suppliers.

[1037] Take for example regional products sold by a supermarket in a particular geographic area. The supermarket in question can use its buyer power to prohibit the local producer from selling its products to competing retailers located in the same area. Such a restriction excludes competition with regard to the products in question but also prevents producers from expanding and gaining more leverage in the negotiations with their large customer.

examples, they can prevent the latter from selling to an incoming retailer under the threat of delisting some products. In view of the large percentage that incumbent retailers account for in their turnover, product manufacturers generally give in to their large customers' pressure. Supply restrictions may also be aimed at existing discounters which are known as willing to start selling branded products in addition to their own-brands. As a result of such restrictive conduct in the upstream buyer market, smaller retailers cannot constrain the exercise of market power of large supermarkets, either in the upstream buyer market or in the downstream seller market, and potential competing retailers are strongly dissuaded from entering a market where a few players are able to dictate the rules to their detriment. Furthermore, suppliers are kept in a position of dependence with regard to large supermarkets as they are prevented from diversifying their customer base.

Restrictive supply agreements may also be used by large retailers in order to orchestrate a collective boycott of rival distributors. A situation involving such a hub and spoke conspiracy[1038] was for example dealt with by US antitrust authorities.[1039] In the *Toys "R" Us* case, a leading discounter of toys concluded a series of agreements with toy manufacturers in order to prevent them from offering some products to a new competing distributor. To make sure that restriction would be abided by, the retailer conveyed the information among its suppliers that each of them was committing not to supply the incoming distributor. As a result of this tacit agreement among suppliers, incited by one of their customer, the new distributor was excluded from the procurement market and therefore prevented from competing in the retail market with regard to all products concerned by the agreement.[1040]

There is hardly any doubt that practices restricting access of competitors to products from upstream markets constitute anticompetitive restrictions. Such vertical agreements, generally imposed tacitly on suppliers, cannot be justified by any economic reason. Indeed, in the grocery retail sector, supermarket chains do not bear the cost and risk of launching or promoting a particular product. All investments are in fact made by the product manufacturer at its own risk through various payments required by the retailers. No economic efficiency gains are therefore generated from restrictions on

[1038] On the notion and implication of hub & spoke conspiracies, see Part II, Chapter 1, Section I, A, 1, c) and below Point C of this Section and Chapter II, Section II, Point B, 4, b).
[1039] *Toys "R" Us, Inc. v. Federal Trade Commission,* 221 F.3d 928 (7th Cir.2000). See also: *Klor's v. Broadway-Hale Stores,* 359 U.S. 207 (1959). On these two US cases, See Part II, Chapter 2, Section III, Point C, 1, a), ii.
[1040] Even though the suppliers' conduct was strongly incited by the retailer, US competition authorities focused only on the result of the pressure exerted by the latter, namely the anticompetitive agreement between the producers to restrict sales to a particular buyer. The Federal Trade Commission found that a horizontal agreement, provoked by the distributor, had been concluded between the different manufacturers involved since each of them accepted the limitations on sales on the condition that their competitors comply with that restriction as well.

producers' freedom to supply competitors. As pointed out in Part II, Section I, Point A.1, exclusive or other restrictive supply agreements may be justified if they incite buyers to invest so as to improve the production or distribution of goods to the benefit of consumers. The objective is to promote higher quality of products and services and avoid the free-ride problem. However, unlike luxurious or technological products, mass consumer goods do not require substantial investment in staff training or other services. Economic and consumer benefits which may, in some cases, justify vertical restrictions, are therefore very unlikely to emerge from exclusive supply agreements or other supply restrictions in the grocery sector.

2. Exclusion of "competing" producers

The exercise of buyer power over suppliers is likely to drive many of them out of the market due to the increased costs and risks they have to bear to get access to and remain on large supermarkets shelves. On the one hand, commercial costs, such as promotional and marketing costs, store equipment costs, distribution and the management of individual stores, are transferred from the buyer to the supplier through a variety of payments imposed by retailers on product manufacturers. The use of payments not related to discounts on rate price or volume of sales has indeed significantly increased those last years. Those payments take the form of shelf-access fees, slotting fees, pay-to-stay fees, wedding gifts or other commercial payments made for services either overtly overcharged or purely fictitious as noting is provided in return by the retailers. The amount of those costs may reach up to 50% or even 70% of producers' revenues, affecting especially small and medium sized enterprises.[1041] On the other hand, supermarket chains use to pass on the cost of their business risk to their suppliers. This is achieved thanks to various unfair terms and conditions imposed on suppliers including, for example, return of unsold goods, extra discounts, after-sale rebates or retrospective change to agreed terms based on how well the product in question was sold to consumers.[1042] The benefits so obtained are not justified by economic reasons, such as economies of scale that could be created by a larger volume of purchases for example, but from pressure large retailers are able to exert on suppliers.

There is no consensus on whether the various payments extracted by big supermarket chains are anticompetitive or not. If one considers that effective competition should be protected in all

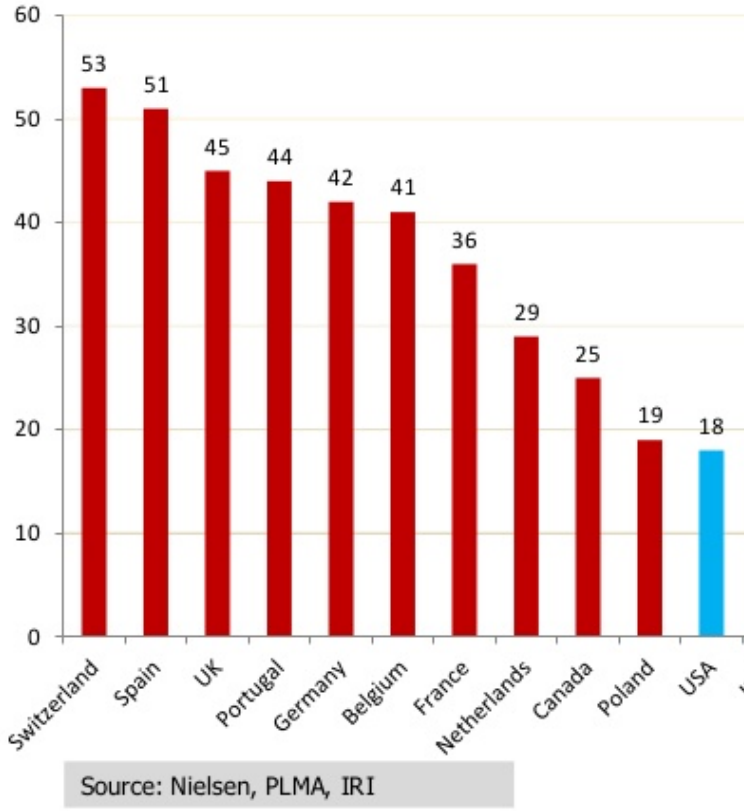
[1041] C.Nicholson & B.Young, *The relationship between supermarkets and suppliers: What are the implications for consumers?,* Report by Consumer International (2012), at 6, available at: http://www.consumersinternational.org/media/1035301/consumer%20detriment%20briefing%20paper%20sept2012.pdf,

[1042] See: Opinion of the European and Social Committee on "The current state of commercial relations between food suppliers and the large retail sector" (own initiative opinion), Rapporteur: Mr Sarmir, JO C 133, p.16, 9 May 2013, at 18, point 2.3.2.

directions, that is customers as well as suppliers should protected against abuse of market power, those unjustified payments would constitute exploitative abuses when imposed by a dominant buyer.

A larger consensus would probably arise over the abusive character of some payments if retailers were not seen as customers but as competitors of brands manufacturers. Through their private label brands, supermarket chains indeed compete with brands producers. Private labels represent a significant market share, amounting to more than 40% of the market in some product categories and in some Member states.[1043]

Private label share of total retail sales by country in 2013



[1043] Own-brands penetration varies considerably from one product category to another. Among the top product categories, we can mention aluminum foil, milk, frozen food, vegetables, delicatessen, garbage/refuse bags and kitchen paper/towel. On the other hand, shampoo, insect control, alcoholic beverages, baby formula, chewing gum and toothpaste are in the bottom categories where own-brands penetration is low. See: *The economic benefits of retailer own-brands,* Report prepared for the European Retail Round Table, Oxera, September 2010, available at: http://www.errt.org/uploads/Oxera%20report%20on%20the%20economic%20benefits%20of%20retailer%20own-brands.pdf, at 7 and *The impact of private labels on the competitiveness of the European food supply chain,* LEI Study commissioned by the European Commission, DG for Enterprise and Industry, The Hague, January 2011, available at: http://edz.bib.uni-mannheim.de/daten/edz-h/gdb/11/study_privlab04042011_en.pdf, Appendix 1B.

Retailers are therefore becoming the main competitors of their brands suppliers. Under that perspective, one cannot but note that supermarket chains are able to influence and restrict competition in the retail market by exploiting their buyer power over suppliers in the procurement market and unfairly favouring their own products in the retail market. They can indeed gain significant competitive advantages in the downstream seller market and exclude competitors in that market by affecting brands manufacturers through different practices they can use when buying and reselling branded products.

Firstly, the increase of commercial payments mentioned above has the effect of raising significantly brands producers' costs and thereby squeezing their margins. Unjustified fees levied by supermarket chains may, consequently, lead those producers to revise upwards the transfer prices of their products in order to finance the additional costs imposed on them by their customers. As a result, branded products may be considered to be put at a competitive disadvantage in the retail market in comparison with private labels. The commercialization and marketing of the latter products are indeed not subject to similar costs. Some brands manufacturers may even be forced to leave the market due to such an imbalance between branded products and private label products. Retailers' financial and other requirements may, to some extent, be regarded as a technique for raising rivals' costs and facilitating the growth of private label lines.[1044] The growing presence of own-brand products on the shelves gives in turn retailers greater leverage in the upstream buyer market to seek better commercial payments from brands manufacturers, leading to a spiral which reinforces supermarket chains' market power both in the retail and procurement markets.

Secondly, supermarket chains can deliberatively set the prices of private labels and branded articles so as to make the former more attractive for consumers. As such, brands producers are sometimes surprised to find out that the prices of their products have been artificially increased in order to make private label competing products appear considerably low-priced.[1045] Those pricing practices affect particularly branded goods with weaker market shares but also stronger brands which finally disappear from the shelves.

Thirdly, the fact that retailers have the last word in relation to the presence and the place on the shelves of branded products as well as to the promotion of those products in their stores also leads

[1044] See: Distribution of daily consumer goods: competition, oligopoly and tacit collusion, Report of the Basque Competition Court (2009), at 180, available at: https://www.euskadi.net/r51-14000/es/contenidos/informacion/imformes_mercados/es_infomerc/adjuntos/090519%20ESTUDIO%20DISTRIBUCION%20COMERCIAL%20ENGLISH%20VERSION.pdf

[1045] O.Rainer & C.-C.Buhr, *Who benefits from the prohibition of resale price maintenance in European competition law? – the case of food retailing,* 26 European Competition Law Review 705, at 707 (2005) Different suppliers questioned on that matter confirmed such pricing policy tactics.

to unjustified exclusion of competing producers. Supermarket chains hold indeed all the cards necessary to promote their own-brands and expand their penetration by delisting or putting other brands at a disadvantage. The threat of delisting is commonly used by retailers in upstream buyer markets in order to extract further concessions from brands suppliers and consequently reinforce the market position of private labels in the retail market.

Fourthly, the specific position in which retailers find themselves by virtue of the fact that they are both customers and competitors of brands manufacturers also gives them the ability to reinforce their competitive position in the retail market due to detailed knowledge of their competitors' commercial terms and plans they can obtain when acting as buyers in the upstream procurement market.[1046] Retailers require indeed unjustifiably access to sensitive information from their suppliers such as information on their price structures, on their strategic plans or research and development plans, on product innovations or new product launches and so on. Information so obtained in their capacity as customers is clearly used by retailers when acting as competitors in the downstream seller market in order to adjust private label offers accordingly and consequently strengthen again their market position.

The mutual consolidation of big supermarkets' market power in the retail and procurement markets is therefore not only associated with the exclusion of competing distributors but also with the appearance of private labels which gives those supermarkets much more leverage on brands suppliers.[1047] The latter can indeed be excluded at any time and their products be replaced by own-brand products. Restraints imposed on those manufacturers for the purpose of encouraging consumers to switch to private label products distort competition but are yet not addressed by competition authorities due, in particular, to the absence of dominance in either market.

However, the revision of the criteria used to assess dominance in upstream buyer markets could set up a new deal. Indeed, if under new criteria it could be concluded that some large retailers hold a dominant position in a particular relevant procurement market, any practices used by those retailers to strengthen their position as buyers in the market in question but also those used to leverage the position of private labels in the retail market would hence constitute an abuse prohibited by Article

[1046] A.Ezrachi, *Unchallenged market power? The tale of supermarkets, private labels and competition law,* 33 World competition 257, at 267 (2010). See also: A.Gorrie, *Competition between branded and private label goods. Do competition concerns arise when a customer is also a competitor?,* 27 European Competition Law Review 217, at 225 (2006)

[1047] Distribution of daily consumer goods: competition, oligopoly and tacit collusion, Report of the Basque Competition Court (2009), at 180, available at: https://www.euskadi.net/r51-14000/es/contenidos/informacion/imformes_mercados/es_infomerc/adjuntos/090519%20ESTUDIO%20DISTRIBUCION%20COMERCIAL%20ENGLISH%20VERSION.pdf

102 TFEU. The issue of dominance and abusive conduct in buyer markets is examined below in Chapter 2, Section II, Point B.

Even though competing retailers and suppliers are presented as direct victims of large retail chains' unfair and abusive conduct, consumers are not either left unharmed from the superpower of large grocery chains.

B. PRACTICES HARMING CONSUMERS

Buyer power is generally not addressed by competition authorities due to the assumption that pressure exerted on suppliers entails benefits for consumers, especially in terms of lower prices. However, that assumption turns out to be not necessarily true. Some buyer practices do indeed cause harmful effects in downstream seller markets and consequently affect the primary objective of EU competition law, namely consumer welfare.

1. Practices raising consumer prices

Exclusionary practices used by large supermarket chains are likely to lead to higher consumer prices in the mid or longer term due to a reinforcement of their position in the retail market. It appears, though, that such harmful effects already arise and might get worse in the short-term as well. According to suppliers, the exercise of buyer power does indeed not turn into lower prices at the retail level but, on the contrary, causes an increase in consumer prices in some circumstances.

As mentioned above, the countless commercial payments required by large distributors may force brands producers to raise the transfer prices of their products. Although buyers keep exerting pressure on their suppliers to prevent such an increase of the purchasing prices, the core of the negotiation between the two parties appears to be often redirected towards other issues that are unlikely to benefit consumers. In fact, supermarket chains tend to exploit their buyer power mostly to extract other types of concessions than lower prices from their suppliers. As such, through the sales of expensive (factious) services to producers (promotional activities in the stores, advertising leaflets, and so on) and through different payments and retroactive discounts imposed on the latter, retailers are in the end able to far overcompensate a possible increase in the transfer prices of branded products. In those circumstances, the exercise of market power in the procurement does not yield the benefits expected for consumers. Distributors are indeed unlikely to pass on off-invoice payments and discounts obtained from suppliers to consumers through lower prices, and definitely not in Member states where resale-below-cost offers are prohibited.

In addition, to protect their market position in the retail market, large distributors may use different techniques so as to make sure rivals are subject to and apply the same increase in prices in their stores. For example, most-favored-customer clauses aim at ensuring that suppliers do not offer better conditions to competitors. Under such a clause, a producer commits not to offer worse terms to a particular retailer than are offered to its other customers.[1048] As a result, producers are dissuaded from lowering the prices charged to one distributor as this would compel them to decrease prices charged to their larger customers. In case of complaint from those customers about competing retailers' lower prices, suppliers are hence more likely to level prices upwards than downwards.

Buyer power can also be used to orchestrate the implementation of a common trade policy at the retail level, such as retail price realignment, by using common suppliers to share information with competing retailers. This would constitute a particular type of hub and spoke conspiracies initiated by (a) buyer(s) leading to higher prices for consumers as it is developed below in Point C.

In terms of consumer prices, buyer power benefits consumers where it is used to lower supracompetitive prices imposed by powerful producers. However, when such power is exploited by retailers to extract unjustified concessions from suppliers and/or incite them to engage in unlawful conduct, consumers can in fact not expect any benefits in terms of lower prices in their supermarkets. In view of the current trends in the retail sector which lead supermarket chains to exercise pressure on other aspects of the negotiation, which may be more profitable for them than lower purchasing prices, skepticism gains ground with regard to the positive effects of buyer power.

2. Practices affecting quality

Facing downward pressure on prices and increasing costs, producers may be left with little choice but to undermine the quality of their products. Quality erosion may indeed constitute an attractive avenue to alleviate the financial burden resulting from supermarket chains' buyer power.[1049] Such quality depression may consist in using lower-quality ingredients, reducing the nutritional value of the products or modifying the recipe and may even lead producers to depart from the values or ingredients indicated on the products.

Producers of private labels are assumed to be more prone to engage in quality erosion because they do not own the brands of their products. High concentration among buyers in the procurement

[1048] J.P. van der Veer, *Antitrust scrutiny of most-favoured-customer clauses: an economic analysis,* 4 Journal of European Competition Law & Practice 501 (2013)
[1049] A.Ezrachi & K.De Jong, *Buyer power, private labels and the welfare consequences of quality erosion,* 33 European Competition Law Review 257, at 260 (2012)

market and the resulting competitive pressure on suppliers may lead some of them to take some risks with regard to the quality of their production. Producers of private labels are indeed played against each other in tenders issued by large retailers and pressured to bid very low prices so that the only way to retain profitability may be to reduce quality. Such quality erosion may in fact remain undetected as supermarket chains, which own the private label brand, do not necessarily possess the technology or incentive to screen each of their product lines.[1050]

Brands owners are less likely to undermine the quality of their products because such conduct might seriously damage the brands name and image. However, quality depression is not excluded in branded products either, in particular if consumers do not have the capacity to spot it when consuming the product in question and/or are misled by false information.

Stories illustrating possible quality erosion are sometimes reported and concern both private labels and branded products. For example, in 2011, in the United Kingdom, pangasius fish, sold under private labels as well as some producers' brands, was withdrawn from the shelves of three of the UK's largest retailers after it was found that the fish in question was adulterated by significant levels of additives used to retain water in the fish and thereby increase the latter's weight.[1051] More recently, in January 2013, beef lasagna and other beef product sold in most Member states were discovered to be made of horse meat. Such adulteration enabled processors to reduce their costs as horse meat may be much cheaper than beef. Even though in that case no evidence of health risk was proved, it comes that consumers were deceived by disguised inferior products bought at a price above their market value. As rightly pointed out by M.Ezrachi, in those cases, the possible benefit resulting from price decreases is cancelled out by quality erosion to the detriment of consumers.[1052]

Could those practices have been avoided if large retailers were not allowed to abuse their market power in the procurement market? This is an open question but that is worth being asked. One can indeed legitimately think that ever present pressure from retailers is likely to push producers to engage in practices that they would not have envisaged otherwise. To remain profitable, producers may hence be led to impair the quality of their products or relocate their production to countries with cheap labour and inputs, thereby making quality control much more difficult. Even though supermarket chains cannot be blamed for all dysfunctions occurring along the supply chain, sanctions for abusive practices in the upstream buyer market could alleviate the burden imposed on suppliers and make them less likely to take risks with regard to the quality of their products so as to reduce their costs.

[1050] *Ibid*., at 259-260.
[1051] "Three UK Retailers Nix Pangasius" in *Seafood International,* September 2011, p.19.
[1052] A.Ezrachi & K.De Jong, *op.cit.*, at 261.

3. Practices affecting choice

In a competitive market, retailers select products in the procurement market which are the most likely to meet the needs and preferences of consumers according to their type, price and quality.[1053] However, exploitation of producers by large retailers and some strategies used by the latter to increase their market power may in fact affect that selection to the detriment of consumers.

Hopes of profits and higher margins constitute the main considerations that influence distributors when making their selection in the upstream buyer market. Accordingly, they are very likely to choose their suppliers on the basis of criteria unrelated to consumer welfare such as the capacity and consent of those suppliers to pay the required number of fees and to comply with any additional demand that could be imposed on them.[1054] Retailers can in fact strongly influence and even prescribe the demand of consumers so as to serve their own best interests. The convenience of one-stop-shopping provided by large supermarket chains makes indeed consumers more likely to buy another brand or a private label product should their favorite brand be no longer available in their store rather than go to a competing retail store to find the desired product. The high loyalty of consumers to their supermarket gives distributors much more leeway and leverage in selecting their suppliers. Being the final decision-makers, distributors can as such dictate consumer choice. However, given the high discrepancy that may exist between retailers' and consumers' interests, especially due to the large number of payments the former can extract from some suppliers, the exercise of buyer power may not necessarily benefit consumers. Consumer choice, that is the ability of consumers to choose the products that best satisfy their needs and preferences, is hence likely to shrink away to nothing.

Consumers cannot but settle for products selected by their supermarket in the upstream buyer markets and may sometimes suffer the consequences of some decisions such as the delisting of some branded goods. Where the removal of products from a distributor's shelves is not the result of a reduced consumer demand but of dissensions between the distributor and the product manufacturer in question, consumers end up facing products assortments that do not reflect their choice.

For example, in 2008, one of the largest Belgian retailers, Delhaize, delisted some 300 Unilever products including very popular brands such as Dove, Knorr or Lipton after the two parties failed to

[1053] H.Köhler, *Buyer power and the control of abusive and discriminatory trade practices in West Germany,* 136 Journal of Institutional and Theoretical Economics 533, at 540 (1980)
[1054] M.Lehmann, *Legal control of buying power on the distribution level in Germany,* 9 International Review of Intellectual Property and Competition Law 340, at 349 (1978)

conclude negotiation.[1055] The decision was thus made regardless of consumer high demand for those products. Where delisting such well-known brands was unthinkable some time ago because of retailers' fear of losing customers, this case proves that the balance of power between producers and supermarkets has shifted in favor of the a latter. Such power may lead to lower prices for consumers but it can also affect their choice. With regard to the dispute between Unilever and Delhaize, the delisting decision in fact deprived consumers of their ability to make their own choice for a very large variety of products. Even if Unilever requirements had led to an increase in price for some products, consumers could have made the decision to continue buying those products or rather to switch to another brand or private label line. But Delhaize decided in place of consumers and the result, unavailability of 300 products in more than 800 retail stores, can hardly be considered to serve consumer interests.

In addition, the growing presence of private labels promoted by the distributors leads to the exclusion of some brands to the benefit of these distributors but not necessarily of consumers. Retailers have indeed an interest in increasing space available for their own-brands because, on the one hand, those products generate more benefits and, on the other hand, unlike with regard to branded products, there is no intra-brand competition since private labels are only represented in one retailer's outlets.[1056] However, practices used by distributors to increase the market share of private labels may harm consumer welfare through a reduction in product variety. The boom in private label lines lead to a scarcity of shelf-space for branded products which, consequently, makes placement on the shelves prohibitively expensive for brands producers. Delisting practices and unfordable payments required by distributors are therefore likely to adversely affect product diversity and consumer choice.

C. HUB &SPOKE CONSPIRACIES INITIATED BY RETAILERS

As explained in Part II, hub and spoke collusion may be seen as a combination of horizontal and vertical agreements involving competing suppliers and their common customer(s) or retail competitors and their common supplier(s).[1057] When such trilateral agreements are initiated by

[1055] The spat between Delhaize and Unilever arises after the latter asked for better promotion and higher prices in order to reflect the higher raw material costs. Following Delhaize's decision, most consumers replaced Unilever products with those of competitors or Delhaize's private label lines. Some reports revealed that 30% of consumers shopped elsewhere to find the delisted products. However, Delhaize denied that the row had dented its sales. The dispute was settled one month later. See: http://www.just-food.com/news/delhaize-pulls-unilever-brands-in-price-row_id105390.aspx

[1056] R.Olbrich & C.-C.Buhr, *The impact of private labels on welfare and competition,* Research paper No.1, Department of Business Administration and Economics, FernUniversität in Hagen (2004), at 19, available at: http://www.fernuni-hagen.de/marketing/download/no1-web.pdf

[1057] See Part II, Chapter 1, Section I, Point A, 1, c).

buyers, it may be assumed that the latter detain significant market power in the upstream buyer market so as to be able to convince or force suppliers to engage in a collusive practice which may not necessarily be in the latter's interest.

There is no European case law on the issue of hub and spoke conspiracy. However, on the basis, in particular, on national cases, different examples of unlawful A-B-C arrangements induced by a powerful buyer can be pointed out.

Firstly, as already mentioned above with regard to practices leading to the exclusion of competing retailers, a hub and spoke conspiracy may consist in a retailer coercing or convincing a supplier to abide by an exclusive or restrictive supply obligation by assuring that supplier that the same restriction will be enforced by the other suppliers as well.[1058] Knowing the terms of his rival's future supply policy, the supplier decides then to align his own decision by accepting the restrictive deal. That would result in a kind of tacit agreement among suppliers boycotting other retailers and possibly leading to input foreclosure.[1059]

Secondly, a powerful retailer (A) may complain to his supplier (B) about the market activities of a rival (C) which benefits from lower prices or simply offers lower prices to consumers. In response of A's complaint and possibly due to pressure the latter puts on it, the supplier then may act in a way which limits the competitive activity of retailer C in the downstream retail market by increasing his sale prices to the same level as that offered to A or by persuading retailer C to realign its retail prices to a higher level. In fact, the retailer's complaint is only meant to convince the supplier in question to take action against a competing retailer and thereby to make that rival raise its prices or stop discounting.[1060] Such a trilateral arrangement is likely to be regarded as minimum resale price

[1058] The hub-and-spoke conspiracy may concern restrictions on supply but also pricing conditions or other anticompetitive cooperation such as sharing of geographic markets. Without the assurance that its competing suppliers are also bound by the same restriction, the supplier would be even more reluctant to accept the buyer's exclusive conditions. If a supplier is the only one foregoing sales to other buyers, it would indeed be put at a significant competitive disadvantage in comparison with its rivals.

[1059] A good example of such an hybrid arrangement is the case *Toys "R" Us, Inc. v. Federal Trade Commission,* 221 F.3d 928, (7th Cir.2000) in the United States where a leading discounter of toys concluded a series of agreements with toy manufacturers in order to prevent them from offering some products to a new competing distributor. See above in this Section Point A, 1.

[1060] Complaints from retailers to suppliers may yet also be legitimate, especially when they are directed at getting better terms and conditions from suppliers. Provided that discussions about a competitor's pricing policy remain on a vertical basis and do not lead to include a horizontal element in the relationship, no horizontal concerted practice is likely to be found. See: UK Court of Appeal, *Argos Limited and Littlewoods Limited v Office of Fair Trading and JJB Sports Plc v Office of Fair Trading*, Case Nos 2005/1071, 1074 and 1623 [2006] EWCA Civ 1318, at 106. See also: P.Whelan, *Trading negotiations between retailers and suppliers: a fertile ground for anti-competitive horizontal information exchange?,* 5 European Competition Journal 823, at 838 (2009)

maintenance imposed *de facto* by the retailer.[1061] In addition, as the A-B-C arrangement leads to an alignment of selling prices in the downstream market, it might hence be concluded that competitors A and C have been involved in an anticompetitive concerted practice fixing prices, at least if both of them were aware that the supplier was acting as a "hub".

Illegal indirect share of information induced by a complaining retailer has already been sanctioned by UK competition authorities in the sector of sportswear and sport equipment. In the *Replica football kit* case, a retailer, JJB Sports, initiated a trilateral agreement by complaining to one of its supplier, Umbro, that a competing retailer, Sport Soccer, was discounting replica football shirts. In order to keep its higher prices without losing customers, JJB Sports incited the supplier in question to take measures so as to prevent discounts by competitors at the retail level. Following discussions with Umbro, Sport Soccer agreed reluctantly to raise its prices on the understanding that other retailers, in particular JJB Sports, would not discount. Despite the absence of direct contact between the competing retailers, UK competition authorities found that they were part of an anticompetitive horizontal agreement.[1062]

A **third** example where a hub-and-spoke conspiracy may amount to a horizontal anticompetitive arrangement induced by a powerful buyer, involves a retailer willing to increase the retail prices of some products, possibly after a rise in the wholesale prices of these products. However, in order to remain competitive at the retail level, the retailer will first get assurances from its supplier that competing retailers will also raise prices in the downstream retail market.[1063] If discussions between the supplier and its different customers lead in fact to an indirect horizontal exchange of information about prices between competitors who have knowledge of the role being played by the supplier in question, competition authorities could consider that the hub-and-spoke arrangement amounts to a horizontal agreement restricting competition by object.

[1061] Resale price maintenance is considered as a vertical hardcore restriction and is therefore not covered by the Block Exemption Regulation. See Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (Text with EEA relevance), O.J. L 102/1 of 23/04/2010. Article 4 provides that the exemption for vertical agreements will not apply to agreements "which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:
(a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties (…)"

[1062] See: OFT Decision, *Price-Fixing of Replica Football Kit,* Case CP/0871/01, 1 August 2003. On appeal before the Competition Appeal Tribunal, see: Competition Appeal Tribunal, *JJB Sports Plc v Office of Fair Trading; Allsports Limited v Office of Fair Trading,* Case 1022/1/1/03 [2004] CAT 17. On appeal before the Court of Appeal: Court of Appeal, *Argos Limited and Littlewoods Limited v Office of Fair Trading and JJP Sports Plc v Office of Fair Trading,* Case No 2005/1071, 1074 and 1623, [2006] EWCA Civ 1318.

[1063] P.Whelan, *Trading negotiations between retailers and suppliers…, op.cit.,* at 839.

Such an arrangement to increase retail prices was for example sanctioned by the French competition authority in 2007.[1064] The case occurred in the sector of toys and involved toys producers, supermarket chains and specialist toys distributors. In order to cease price competition and to establish a unique retail price for some products in competing stores, the distributors concerned largely participated in an arrangement with their suppliers and competitors. Price monitoring policies were also organized so as to track down "deviant" distributors and achieve a quick realignment of prices. For example, the supermarket chain Carrefour launched a commercial operation called "Carrefour repays ten times the difference", inciting thereby consumers to report any decrease in prices in competing retail stores. Using the information obtained thanks to the claims of repayment brought by consumers, Carrefour systematically intervened with the concerned suppliers in order to "fix the problem" – thas is, they demanded suppliers to obtain that their competitors increase prices.[1065]

Even though, in this case, the price alignment seems to have been initiated by toys producers,[1066] large supermarket chains have, without any doubt, sufficient market power to orchestrate such collusion, especially in product markets where their buyer power is greater than in the toys market. Toys manufacturers have indeed alternative customers and sell in fact most of their products to toys distributors. They are therefore unlikely to be dependent of supermarket chains, limiting the latter's bargaining power. The situation is however radically different with regard to food product or detergent manufacturers for example who can hardly reach final consumers without supermarket chains buying their products. Given the economic dependence of those producers on large grocery stores, the latter can therefore easily exploit their buyer power and incite their suppliers to participate in anticompetitive practices.

For example, in the UK, competition authorities fined four retailers for indirectly sharing confidential future retail pricing information in 2002 and 2003 via common dairy processor suppliers acting as intermediaries.[1067] In fact, milk processing companies sought to increase wholesale cheese prices charged to retailers. The latter wished to pass on the cost price increase to consumers but were concerned that they would be undercut by rivals at the retail level. To prevent any competitive

[1064] See: Décision 07-D-50 du 20 décembre 2007 relative à des pratiques mises en œuvre dans le secteur de la distribution des jouets.
[1065] See: Press releases of the French competition authority on decision 07-D-50, available at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=211&id_article=881
[1066] Manufacturers colluded to set toy resale prices while distributors participated in keeping an eye on pricing of competitors.
[1067] OFT Decision, *Dairy retail price initiatives,* Case No CA/98/03/2011, 26 July 2011. Each of the parties to the infringement has admitted its involvement except for Tesco which lodged an appeal before the Competition Appeal Tribunal. See: Competition Appeal Tribunal, *Tesco Stores Ltd Tesco Holdings Ltd Tesco Plc v Office of Fair Trading,* Cases 1188/1/1/11 [2012] CAT 31.

disadvantage, some of them passed on their future retail pricing intention to common suppliers, foreseeing that the latter would, in turn, pass that information to retailer competitors who would use it to define their own pricing strategy on the market. On basis of the EU case law on exchange of information and on the decision of the UK Court of Appeal in *Replica Football Kit,* it was held that the retailers and suppliers involved infringed the Competition Act 1998 by coordinating increases in the prices consumers paid for certain dairy products.

A firm may therefore be used as a conduit through which information is knowingly passed between competitors. Even though the proof of unlawful indirect exchanges of information may be difficult to establish, the examples developed above nevertheless show that the use of buyer power may lead to vertical as well as horizontal restrictions involving suppliers and competing retailers.

The risk of retailers inducing suppliers to participate in an unlawful exchange of information arises when these buyers have the ability and incentive to exploit market power in the upstream procurement market so as to exclude competitors or raise prices at the retail level. This is the case in the grocery retail sector where a few retailers compete against each other both in the downstream retail market and in the upstream buyer market. These competing supermarkets have therefore common suppliers over whom they can exert significant buyer power due to the latter economic dependency. As illustrated above, large retailers' buyer power give them the ability to orchestrate retail price realignments by asking their suppliers, possibly under the threat of delisting their products, to persuade competing distributors to raise prices.[1068] The high level of concentration in the grocery retail sector in most Member states makes it easier to implement and monitor such A-B-C arrangement as deviation can quickly be detected and punished.

In addition, grocery chains are incited to use their market power to force suppliers to police collusion, such as sale price maintenance, at the retail level. Provided that competitors align their pricing policy according to the information obtained from (a) common supplier(s), retailers can indeed benefit from an increase in prices of branded products as this would create a price gap with their own-brands and, as a result, makes the latter more attractive for consumers. It is also worth noting that the benefits of retailers are unlikely to fall even if the arrangement to coordinate retail prices is accompanied or results from an increase in prices at the wholesale level. On the contrary, any increase in prices charged to retailers will be (over)compensated by other concessions extracted by the latter from their suppliers, such as additional payments for promotional services. Conversely, in some cases, suppliers have no incentive to police indirect exchange of information, except for the

[1068] V.Bonfitto, *Buyer power in anti-trust investigations: a review,* 32 European Competition Law Review 414, at 424 (2011)

fear of being delisted by large retailers which force them to play the role consigned to them in the hub-and-spoke distribution strategy.

Indirect exchange of information between competitors induced by large buyers is likely to generate harmful effects on competition as it may remove uncertainty concerning the intended conduct of rivals and, as such, amount to an anticompetitive horizontal arrangement.[1069] We will see in the next Chapter how hub-and-spoke conspiracies could fall within the scope of the prohibition on restrictive agreements provided by Article 101 TFEU and possibly under the scope of Article 102 TFEU on abuses of dominance.

D. CONCLUSIVE REMARKS

The protection of the process of competition should prevail in seller power cases as well as in buyer power cases. Even though the exercise of buyer power may appear beneficial for consumers as it may lead to lower prices in the retail markets, exclusion of competitors or exploitation of market power over suppliers in upstream markets are nevertheless likely to cause longer-term harm to end-users. Powerful buyers are indeed able to reinforce their position, not only as a buyer but also as a seller in downstream seller markets, through practices which do not generate any benefit for consumers. In particular, where extracting other concessions than lower prices is more profitable for retailers, this may result in an increase in consumer prices at the retail level.

In addition, excessive pressure exerted on producers may, in some cases, undermine the latter's incentives to invest in higher quality or new product thereby affecting dynamic efficiency on the markets. The common interest of powerful buyers in exploiting suppliers and their ability to dictate the rules to their advantage in the upstream markets may also result in restricting consumer choice. The range of products available on the markets relies indeed on buyers' decisions which should, in principle, reflect consumers' preferences. However, it turns out that, when a firm acquires significant market power in the buyer market, such decisions may sometimes be taken independently from the other market participants and from consumers, impairing, as a result, the latter's ability to buy

[1069] MM. Sahuguet and Walckiers present a model describing the working of hub-and-spoke collusion and showing that the impact of such collusion on consumer's welfare depends on the bargaining power in the relationship. If the supplier has the bargaining power, the agreement, comparable to a vertical restraint, can be welfare improving in reducing double marginalization. However, in the presence of buyer power, such collusion leads to a loss of welfare since it helps retailers to improve their collusive scheme. See: N.Sahuguet & A.Walckiers, *Selling to a cartel of retailers: a model of hub-and-spoke collusion,* CEPR Discussion paper No DP9385 (2013), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2231876 See also: P.Dobson & M.Waterson, *The competition effects of industry-wide vertical price fixing in bilateral oligopoly,* 25 International Journal of Industrial Organization 935 (2007). The authors also maintain that where retailer power is strong, the welfare effects of resale price maintenance are likely to be adverse, since the practice can assist in coordinating price levels.

products best corresponding to their needs and preferences. As consumer welfare includes product quality, diversity, innovation and choice, an improper use of buyer power over suppliers may therefore hinder the achievement of the competition policy objective.

In EU competition law, the prohibition on abusive conduct is only applicable to firms in a dominant position as it is assumed that, without such a position, firms are unable to distort the competition process. The ability of some buyers, with significant buyer power but considered non-dominant under the criteria currently used by the Commission, to restrict competition through their conduct raises therefore the question of the need to define new criteria to address buyer practices. One can indeed consider that the competition rules should be applicable to any buyer which is in a position to adversely affect competition so as to prevent conduct inconsistent with competition on the merits.

CHAPTER 2 – ACTION AT EU LEVEL NEEDED

The analysis of the EU competition objectives and of buyer practices used in the grocery retail sector sheds some light on the potential anticompetitive impact of large retail chains' buyer power. The next issue to address is what type of action would be best to sanction and prevent the harmful exercise of buyer power. This requires determining at which level - national or supranational -, under which policy and in which sector action is to be taken as well as specifying the type of instrument to be used and defining the rules to be included in that instrument.

In **Section 1** of this Chapter, we will address the first three questions. Firstly, it will be argued that common action should be envisaged at EU level to remedy the negative effects arising from discrepancies in national laws. Secondly, different arguments call for addressing buyer power under the competition rules. Thirdly, given the specificities of the grocery retail sector and the increasing concerns related to large retail chains' buyer power, EU intervention should be limited to that sector.

How to address grocery retailers' buyer power in concrete terms under EU competition rules will be dealt with **in Section 2**. We suggest the adoption of a Directive which would empower national competition authorities to control large retail chains' conduct in the procurement market. To do so, new criteria are suggested to assess the degree of buyer power and buyers' ability to restrict competition. A particular attention will also be drawn on the issue of hub-and-spoke conspiracies when initiated by large buyers.

SECTION 1 – NEED FOR COMMON ACTION WITHIN THE SCOPE OF COMPETITION LAW

Voices are being raised against abuses of buyer power in different Member states but also at EU level. Various actions have been taken by national authorities in order to address some buyer practices used, in particular, in the retail grocery industry but so far none of them has succeeded in containing supermarkets' buyer power.

Within the European institutions, concerns have been emerging for some time about unfair trading practices, including and especially, about unfair use of buyer power in business-to-business relationships in the supply chain. However, the potential anticompetitive effects of buyer power have been only prudently mentioned. The **first part** of this section provides an overview of the different investigations carried out at EU level on the competitiveness of the supply chain and on the different initiatives that have followed to further investigate on the appropriateness of intervening in trade relationships through a European common set of principles.

The current debate on unfair trading practices within the European institutions attests of the latter's growing interest in buyer power and its consequences. Most of the practices pointed out as unfair concern indeed practices used by large retailers in the procurement market. Even though highlighting unfair buyer practices can be seen as a laudable step, it remains that the possible anticompetitiveness of some of those practices has not been formerly recognized so that, if action should be taken, it would probably be outside the scope of competition law. It has though been established in the first Chapter above that large buyers, such as supermarket chains, have the ability to restrict competition and harm consumers through their conduct. It is therefore argued in the **second part** of this Section that, given the actual or potential harmful effect of buyer power on competition within the common market, this issue should be dealt with uniformly and through effective measures within the European Union under the competition rules. Such an action against buyer practices would indeed present different advantages and be best suited to protect undistorted competition. In addition, the specificity of buyer power in the grocery retail industry should call for a particular focus on that sector where supermarket chains' conduct is more likely to affect competition. In order to avoid excessive intervention in business-to-business relationships, action should therefore be limited to defining new rules so as to give competition authorities the power to tackle anticompetitive buyer practices in the grocery industry.

A. CURRENT APPROACH OF EU INSTITUTIONS

The exercise of buyer power by large companies constitutes undoubtedly a concern in EU law, especially in the food sectors. That issue has indeed been examined by the EU institutions in different monitoring investigations related to the functioning and competitiveness of the food supply chain. Different reports resulting from those investigations highlight some potential negative effects that may arise due to imbalances of power in the supply chain. A particular attention is for example drawn on the possible negative impact of some practices on innovation and on the strong position acquired by large retailers due to the growing penetration of private labels which give them significant competitive advantages. However, the anticompetitive impact of buyer power seems to be an incidental issue in those reports leading the authorities to envisage action to address unfair trading practices in business-to-business relationships only outside the scope of competition law.

1. Emphasis on buyer power in monitoring investigations

Different documents, declarations and reports issued recently by the EU institutions show a new focus on the impact of buyer power, especially when exercised within the food supply chain. In fact, the exercise of buyer power by large companies constitutes one of the issues examined by the EU institutions in different monitoring investigations related to the functioning and competitiveness of

the food supply chain. The recent food prices developments have led the Commission to investigate, among other things, the impact buyer-supplier contractual relationships may have on the competitiveness of all sectors of the food supply chain in the European Union. While the sharp increase in agricultural commodity prices in the second half of 2007 resulted in higher consumer prices, the following drop in prices in 2008 has yet failed to fully translate in lower food prices at retail levels. That discrepancy between agricultural commodity prices and consumer prices has raised concerns among the EU institutions as regards the functioning of the European food supply chain and triggered the need to better monitor potential competition issues.

The Commission has identified significant imbalances in bargaining power between contracting parties in the food supply chain which lead very often to unfair trading practices.[1070] It is considered that the proliferation of such unfair practices is likely to undermine the food industry's investment and innovation. Contractual imbalances associated with unequal bargaining power indeed limit the ability and incentives of smaller but efficient actors to invest in improved product quality and innovation of production processes as they may be obliged to operate under reduced profitability.

This issue was, in particular, underlined in the Report drawn up in 2009 by the High Level Group on the Competitiveness of the Agro-Food Industry.[1071] It was pointed out in that report that the level of investment in R&D in the European food industry is too low, especially because SMEs, which represent approximately 99% of all the enterprises active in the supply chain, have very little capability to deal with the uncertainties and risks inferred in research and innovation projects and

[1070] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A better functioning food supply chain in Europe,* SEC(2009) 591 final, Brussels, 28/10/2009. The technical analysis on which this Communication is based is published in a series of six accompanying staff working documents. See: Staff working document, *The evolution of value-added repartition along the European food supply chain,* SEC(2009)1445, 28/10/2009; Staff working document, *Improving price transparency along the food supply chain for consumers and policy makers,* SEC (2009)1446, 28/10/2009; Staff working document, *Agricultural commodity derivative markets: the way ahead,* SEC(2009)1447, 28/10/2009, Staff working document, *Outcomes of the High-Level Group on the Competitiveness of the Agro-Food Industry – Proposals to increase efficiency and competitiveness of the European food supply chain,* SEC(2009)1448, 28/10/2009; Staff working document, *Competition in the food supply chain,* SEC(2009)1449, 28/10/2009; Staff working document, *Analysis of price transmission along the food supply chain in the European Union,* SEC(2009)1450, 28/10/2009. See also: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Food prices in Europe,* SEC(2008) 821 final, 09/12/2008;

[1071] The High Level Group was set up in 2008 in order to analyse the factors influencing the competitiveness of the European food industry. The Group was composed of representatives of selected Member States, of the European agro-food industry, of professional associations and of civil society. In its Report, the Group put forward 30 recommendations and a roadmap of key initiatives to boost the competitiveness of the sector. In 2010, the Commission put an end to the mandate of the High Level Group and established the High Level Forum for a Better Functioning Food Supply Chain to follow the implementation of its recommendations. See: http://ec.europa.eu/enterprise/sectors/food/competitiveness/high-level-group/index_en.htm

lack sufficient resources to invest in such projects.[1072] Producers' inability to invest in R&D and product innovation may be considered to be a direct consequence of tensions and imbalances of power in contractual relations between companies. Various unfair practices in fact curb suppliers' ability to make sufficient margins to make their businesses viable and to make new investments.[1073]

The attention of the High Level Group was also drawn on the increased use of private label products by retailers. Some Member States have indeed noted that, due to the growing presence of their own-brands,

> "[retailers] have become direct competitors to the agro-food processing industry, with detailed insights into production trends, innovation activity, cost-structures and marketing strategy. This situation provides them with a clear advantage over their suppliers and raises serious questions of competition, namely, the possible foreclosure of existing and potential competing suppliers."[1074]

Private labels give indeed retailers "artificial" competitive advantages over brands producers which can be used to the detriment of the latter.

2. Declaration and Resolutions of the EU Parliament

The European Parliament has also raised concerns about unbalanced buyer-supplier relationships and unfair practices occurring along the food supply chain. The first declaration warning against excessive buyer power dates from 2008.[1075] The European Parliament requested the Commission to propose appropriate measures to remedy the abuse of power by large supermarkets. It pointed out that abuses committed by big supermarkets affected farmers and other suppliers by forcing down prices paid to them to unsustainable levels and by imposing unfair conditions. It also underlined that such squeezes on suppliers may also have negative knock-on effects, in particular on consumers through a reduction in quality as well as a loss in diversity of products and retail outlets. Those concerns were repeated in a resolution adopted by the European Parliament in which it drew the attention on increasing concentration not only in the retail sector but along the whole of the food

[1072] High Level Group on the Competitiveness of the Agro-Food Industry, *Report on the Competitiveness of the European Agro-Food industry,* 17 March 2009, at 42, available at: http://ec.europa.eu/enterprise/sectors/food/files/high_level_group_2008/documents_hlg/final_report_hlg_17_03_09_en.pdf

[1073] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Retail market monitoring report "Towards more efficient and fairer retail services in the internal market for 2020",* COM(2010)355 final, 05/07/2010, at 7, available at: http://ec.europa.eu/internal_market/retail/docs/monitoring_report_en.pdf

[1074] Report of the High Level Group on the Competitiveness of the Agro-Food Industry, *op.cit.,* at 50.

[1075] Written declaration on investigating and remedying the abuse of power by large supermarkets operating in the European Union, 0088/2007, 24 January 2008.

supply chain.[1076] It was considered that some practices used by large companies, including manufacturers, wholesalers and retailers, constitute one of the factors influencing the gap between producer and consumer price.[1077] Even though the effects of market concentration can lead to lower price levels for food, the European Parliament nevertheless underlined that, in the medium and long term, this may damage free competition, drive small producers out of the market and limit consumer choice.[1078]

In 2010, in a resolution on fair revenues for farmers, the European Parliament called on national and European competition authorities to take action against abusive buyer practices of all actors which put farmers in a very unequal bargaining position.[1079] It urged the Commission to revise the criteria currently used to assess anticompetitive behavior as those were deemed to be unsuitable to get the true measure of anticompetitive practices.[1080] It also emphasized the necessity to expand European competition law beyond its current narrow focus on consumer welfare and concerns for low food price.[1081] With regard to unfair commercial practices, Members of the European Parliament considered that a certain degree of coordination and harmonization of national measures are needed at EU level.[1082] They encouraged Member states to draft codes of good commercial practices for the food chain, including complaint mechanisms and penalties for unfair practices, as well as to establish ombudsmen for the food retail sector and other arbitration mechanisms aimed at guaranteeing compliance with those codes and contractual agreements.[1083] Such a call for effective enforcement mechanisms was reiterated in a 2011 resolution where the European Parliament suggested the establishment of an EU Ombudsman.[1084]

[1076] European Parliament resolution of 26 March 2009 on food prices in Europe, (2008/2175(INI)).
[1077] Among the other factors, it underlined the share of non-agricultural costs such as energy and labour, legislative and regulatory frameworks, the perishable nature of the product, the degree of product processing as well as speculation with agricultural commodities.
[1078] European Parliament resolution of 26 March 2009, *op.cit.* at 19-20.
[1079] European Parliament resolution of 7 September 2010 on fair revenues for farmers : A better functioning food supply chain in Europe (2009/2337(INI)), para.15.
[1080] *Ibid.,* para.22.
[1081] *Ibid*., para.30.
[1082] *Ibid*., para.25.
[1083] *Ibid*., para.45.
[1084] European Parliament resolution of 5 July 2011 on a more efficient and fairer retail market (2010/2109(INI)). In this resolution, the European Parliament put the emphasis on the role of SMEs. It stressed that SMEs "constitute the backbone of the European economy and have a unique role to play in creating jobs, particularly in rural areas, as well as fostering innovation and growth in the retail sector in local communities across the EU". (at 17) In order to ensure fair competition in both vertical and horizontal B2B relations, thereby paving the way for a genuine level playing field for businesses, the European Parliament considered that new measures should be adopted. Those would enable companies, especially SMEs, to uphold their rights and to restore confidence. (at 19)

More recently, the European Parliament resolution of 19 January 2012 on imbalances in the food supply chain highlighted the effect of the exercise of buyer power on farmers and called again on national and European competition authorities to address abusive buyer practices on the part of dominant wholesalers and retailers which systematically put farmers in an extremely unequal bargaining position.[1085] In this resolution, the Parliament stressed that the problem of imbalances in the food supply chain clearly has a European dimension requiring a specific European solution. It called therefore upon the Commission to propose robust EU legislation to ensure fair relations amongst producers, suppliers and distributors of food products; to define unfair and abusive practices as well as to create an independent Food Trading Ombudsman to control them.[1086]

3. Towards fairer trading relationships

One can note that buyers' conduct in the retail grocery sector does not leave indifferent within the European institutions. Following the different market investigations and the call of the EU Parliament, various measures have been taken at EU level to investigate more deeply imbalances of power in the supply chain and to assess whether a common action is needed to address unfairness in business-to-business relationships which results from such imbalances. However, given the current status of that initiative, it is very unlikely that the European Union will prescribe Member states to act within the ambit of the competition rules.

a) Unfairness in business-to-business relationships

The use of unfair trading practices and its effects on the markets constitute a recurrent issue highlighted by the EU institutions on several occasions. Different measures have therefore been taken by the European Commission to further investigate the impact of such practices on the business-to-business (B2B) food but also non-food supply chain. It is indeed argued that unfair trading practices (UTPs) may occur not only in the food sector but in other sectors as well due to different factors. On the one hand, the retail sectors have evolved towards a "mixed" format where the vast majority of retailers supply range of food as well as non-food products under the same management and under the same terms and conditions. On the other hand, some large manufacturers produce food goods but also detergents, cosmetics, hygiene products, etc. so that the issue of UTPs is likely to arise in different types of sectors. The Commission has therefore recognized the need to go beyond the agro-food industry and to launch new initiatives to combat UTPs in business relations.

[1085] European Parliament resolution of 19 January 2012 on the imbalances in the food supply chain, 2011/2114(INI), para.8.
[1086] *Ibid*., para.4-17.

As mentioned above, UTPs are typically imposed in a situation of imbalance of power where a stronger party has the ability to impose contractual arrangements to its advantage, either through better prices or through improved terms and conditions. UTPs are in fact practices and terms that grossly deviate from good commercial conduct and which are contrary to good faith and fair dealing in business-to-business (B2B) relationships.[1087] The weaker party is often not in a position to switch to another business partner and fear to lose its contract in the event of a complaint on its part. Agricultural producers are for example particularly vulnerable to UTPs. They have limited choice of business partners for the take-up of their production and the intrinsic characteristics of many goods make them unable to store production for a long period of time in order to obtain better buying conditions.[1088] As a result, the asymmetry in bargaining power in B2B relationships is likely to affect companies', especially SMEs', capacity to invest and innovate and may ultimately restrict consumer choice. Such practices may occur at every link of the supply chain and can be employed when negotiating a contract, can be part of the contract itself or can be imposed in the post-contractual phase as revealed by the responses received to the Commission's consultation on unfair business to business commercial practices.[1089]

b) Expert Platform on B2B contractual practices

In 2010, the Commission created an Expert Platform within the High Level Forum for a Better functioning Food Supply Chain to consider the issue of UTPs and put forward recommendations.[1090]

[1087] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Setting up a European retail action plan,* COM(2013)36 final, Brussels, 31/01/2013, at 11.

[1088] Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe, COM(2013)37 final, Brussels, 31/01/2013, at 6.

[1089] See: Summary Report of the responses received to the Commission's consultation on unfair business-to-business commercial practices – Directorate-General for the Internal market and services, 12 February 2012, available at: http://ec.europa.eu/yourvoice/ebtp/consultations/2011/unfair_business/report_en.pdf Among unfair practices during pre-contractual negotiations, the Report refers for examples to: abuse of bargaining power (pressure on weaker companies during the negotiations) or no willingness/room whatsoever to negotiate; sale targets which were unrealistic and unilaterally set; unilateral (and repeated) changing contract terms; unilateral imposition of standards or requirements; discriminatory terms relative to competitors; unilateral reduction of margins; unfair pricing or very lengthy payment terms; imposition of unacceptable warranty/guarantee handling requirements; stipulation of disproportionate/excessive contractual penalties. Unfair practices in the contract may consist for examples in disadvantageous conditions that were non negotiable and non challengeable, clauses allowing the company positioned as a customer in the business relationship to unilaterally withdraw from the contract, imposition or change of standards and requirements to undergo compulsory training. As regards unfair practices after the conclusion of the contract, the report refers to non-compliance with contract terms, refusal to pay, unilateral and repeated amendments to the contract, unilateral imposition of higher standards, termination of the contract without reason, prior notice or compensation.

[1090] The High Level Forum has set up three working groups in order to focus on flagship issues requiring a specific expertise. Those Expert Platforms are dedicated to: (1) Business-to-Business contractual practices in

The mandate of the Expert Platform on B2B contractual practices in the food supply chain includes three objectives: (1) To agree on a list of practices which can be deemed unfair; (2) To identify relevant best practices in commercial relations; (3) To propose actions when necessary (regulatory or non-regulatory instruments).[1091]

A major step was taken in the implementation of the first two objectives in 2011 when the business organisations composing the core group of the Expert Platform worked together towards a common understanding of fairness in B2B relations. The resulting document enumerates a set of general principles such as taking consumer interests into account, freedom of contract and fair dealing as well as a set of specific principles of good practices including the importance of written agreements, predictability, compliance, information, confidentiality, responsibility for risk and the need for requests to be justifiable. In addition, concrete examples of good and bad practices in the supply chain were provided to illustrate those principles.[1092] The High-Level Forum welcomed the document and invited the core group to agree on an implementation and enforcement framework.[1093] In January 2013, a framework was established, consisting in a registration system whereby companies voluntarily commit to implement the principles and accept different options for the resolution of disputes.[1094] The success of such a voluntarily framework depends therefore upong the willing participation of companies.

Even though the initiative to implement voluntarily principles of good practices is laudable, such an announcement is, though, very unlikely to be effectively followed by the members of those organizations if no enforcement mechanism is put in place to ensure compliance. It appears indeed that most practices considered unfair by the members of the multi-stakeholder dialogue are in fact commonly used, in particular by large retail chains. We can mention for examples non-contractual retroactive unilateral changes, transfer of unjustified or disproportionate risk, imposing listing fees

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the food supply chain; (2) Competitiveness in the agro-food industry and; (3) The European Food Prices Monitoring Tool.

[1091] Report of the High Level Forum for a Better Functioning Food Supply Chain, 5 December 2012, at 8, available at: http://ec.europa.eu/enterprise/sectors/food/files/hlf-third-meeting-final-report-cover_en.pdf

[1092] See : *Vertical relationships in the Food Supply Chain: Principles of Good Practices* proposed by the following core members of the B2B Platform: AIM, CEJA, CELCAA, CLITRAVI, Copa Cogeca, ERRT, EuroCommerce, Euro Coop, FoodDringEurope, UEAPME, UGAL, 29 November 2011, available at: http://ec.europa.eu/enterprise/sectors/food/files/competitiveness/good_practices_en.pdf

[1093] The EU Parliament also welcomed the principles of good practice and the list of examples of fair and unfair practices in vertical trading relationships in the food supply chain, as well as the framework for the implementation and enforcement of these principles. See: Motion for a European Parliament Resolution on the European Retail Action Plan for the benefit of all actors, 2013/2093(INI), available at: http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0374&language=EN&mode=XML

[1094] See the framework on the *Supply Chain Initiative* website at: http://www.supplychaininitiative.eu/sites/default/files/b2b_voluntary_initiative_-framework.pdf

that are disproportionate to the risk incurred in stocking a new product, threatening business disruption or the termination of the business relationship to obtain an advantage without objective justification or demanding payments for services not rendered, to name but a few. Without a common framework applied to all market participants and including sufficient incentives to make them abide by the principles of good practice, it is hence doubtful that the initiative will achieve a real culture change in business-to-business relationships.

c) Action Plan and Green Paper on unfair trading practices

In January 2013, the Commission published a Communication setting up a European action plan in which it identifies five key priorities to achieve more competitive and sustainable retail services in the food but also non-food supply chain.[1095] The third key driver consists in developing fairer and more sustainable trading relationships along the retail supply chain. The Commission indeed considers that by tackling unfairness, upstream and downstream players would enjoy more sustainable relationships and be encouraged to increase both innovation and investment.[1096] As a part of this action plan, the Commission has also adopted a Green Paper on unfair trading practices in the business-to-business food and non-food supply chain which opens a consultation on this topic.[1097]

The Green Paper adopted in parallel of the European retail action plan is aimed at opening a public debate on the impact of UTPs on businesses affected, on national legislation that seeks to address this problem and on possible avenues of actions at EU level.

> "The three-month long consultation will help the Commission to assess the magnitude of unfair trading practices and gather evidence on their effect on the economy and on cross-border activity. It will examine the effectiveness of self-regulatory and legislative frameworks put in place to address those practices at national level and will look into

[1095] Communication from the Commission, *Setting up a European retail action plan, op.cit*. The five key priorities are: (1) Consumer empowerment – through, *inter alia*, more transparent, more reliable and more directly comparable information on the price and quality of products; (2) Improved access to more sustainable and competitive retail services – both "bricks and mortar" and e-commerce retail could benefit from improved market access, in particular through clearer and more transparent establishment rules; (3) Fairer and more sustainable trading relationships along the retail supply chain – stakeholders could benefit from a framework effectively tackling unfair trading practices; (4) More innovative solutions – stakeholders would benefit if research results were brought more rapidly to market; (5) Better working environment – both employees and employers will benefit from creating better working conditions and addressing mismatches between skills required and those available.

[1096] Communication from the Commission *Setting up a European retail action plan, op.cit.*, at 11.

[1097] Green Paper on unfair trading practices, *op.cit*. The results of the consultation are expected to be available by late spring 2013. Based on the results of the consultation, the Commission will consider appropriate next steps in 2013.

> the question of whether these divergent approaches may lead to a fragmentation of the Single Market."[1098]

As pointed out in the Green Paper on unfair trading practices, it may be necessary to ensure the existence in all Member States of a common set of enforcement principles.[1099] Due to the legal fragmentation between Member States concerning the treatment of UTPs, companies confronted with such practices are indeed unable to benefit from consistent protection across the European Union. In addition, both the Commission and the High-Level Forum underlined that such a common set of enforcement principles should include a proper remedy to the "fear factor", that is to weaker parties' fear of complaining about UTPs because of possible retaliatory measures.[1100] This could be done for example by granting powers to the competent authorities to accept anonymous complaints, to impose deterrent sanctions, to launch *ex officio* action and to report publicly on their findings.[1101]

d) A likely action outside the competition rules

While the EU institutions are considering adopting a common set of principles to tackle UTPs, it seems that such action is very likely to be implemented outside the scope of competition law. The Commission considers indeed that unequal bargaining power cannot be automatically assimilated to a buyer power problem involving competition issues.

i. Unequal bargaining power v. buyer power

The Commission draws a distinction between, on the one hand, anticompetitive business practices which distorts competition and, on the other hand, unfair practices resulting from contractual imbalances but which do not fall under the scope of the EU competition rules because they do not entail any anticompetitive effect on the markets.[1102] With regard to the issue of UTPs imposed by powerful buyers, it is considered that, in most cases, unequal bargaining power leading to such practices does not necessarily imply a competition infringement and must therefore be addressed through other policy tools.

[1098] Press release, Commission adopts a European Retail Action Plan and consults on unfair trading practices, Brussels, 31/01/2013, available at: http://europa.eu/rapid/press-release_IP-13-78_en.htm
[1099] Green Paper on unfair trading practices, *op.cit.,* at 17.
[1100] See: Report of the High Level Forum for a Better Functioning Food Supply Chain, *op.cit.*, at 13 and Green Paper on unfair trading practices, *op.cit.*, at 17.
[1101] Green Paper on unfair trading practices, *op.cit.*, at 17.
[1102] Communication from the Commission, *A better functioning food supply chain in Europe, op.cit.,* at 5.

On the buy-side, unequal bargaining power exists whenever the buyer can impose upon seller terms and conditions that are deemed unfavourable by that other party.[1103] Unequal bargaining power is unlikely to raise competitive concerns unless it amounts to buyer power. The exercise of buyer power may indeed cause harmful effects to competition in the market. Such power is deemed to exist

> "if a market is concentrated to such an extent that a particular buyer has not only power over a particular supplier but over suppliers in general".[1104]

The ability to exert buyer power, that is to extract unilateral concessions from suppliers in general, is therefore considered to be a potential source of anticompetitive conduct.

ii. Focus on unequal bargaining power at EU level

In the different documents mentioned above, it is mostly referred to the concept of unequal bargaining power. The issue of the potential negative impact of some buyer practices on competition seems in fact to be disregarded or at least underestimated. However, in some sectors, such as in the grocery retail industry, a small number of large buyers are able to exert significant market power, not only over one particular contracting party, but over suppliers in general, including over some big processing companies. In such a case, according to the distinction mentioned above, it is no longer a matter of unequal bargaining power but rather of buyer power which may be used anticompetitively.

Consequently, particular attention should be paid by EU institutions on unfair trading practices that result from the exercise of buyer power because, when used by powerful buyers, those practices are likely to affect competition by strengthening incumbents and hindering new entrants. Even though EU competition law is not *per se* concerned with fairness in individual business relations, it is hence not excluded that UTPs impede the achievement of the competition objectives and require the intervention of competition authorities.

B. NEED FOR ACTION UNDER EU COMPETITION LAW IN THE GROCERY RETAIL SECTOR

The growing interest of the EU institutions in tackling unfair trading practices suggest that a common framework is likely to be defined at EU level. The issue about the necessity to act against UTPs in order to protect weaker players in the supply chain will not be addressed here. That question falls indeed outside the scope of competition law which is not concerned with unfairness as such but with

[1103] European Competition network, ECN activities in the food sector – Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector, May 2012, at 41, available at: http://ec.europa.eu/competition/ecn/food_report_en.pdf

[1104] Report of the European Competition network, ECN activities in the food sector*, op.cit.,* at 41.

practices that (are likely to) restrict or distort competition. Unfair conduct harming smaller firms without affecting competition should therefore be dealt with under other policies than competition.

However, some of the reasons invoked to justify action at EU level against UTPs are also relevant to support the establishment of common measures against anticompetitive buyer practices. The likely cross-border effects of those practices and the impediment to the integration process that may result from the disparities among national laws on that matter call indeed for a uniform answer within the European Union. Such common action is all the more justified with regard to anticompetitive practices given the exclusive competence of the European Union in competition law.

Whenever buyers' conduct affects competition, suitable competition rules should be available in order to sanction companies involved in such conduct and restore effective competition in the relevant market. Anticompetitive practices should indeed not escape the application of the competition law regime. In addition, the latter presents different advantages that are likely to make the enforcement of the rules against powerful buyers more effective and to increase deterrence.

Buyer power presents yet some specificity compared to seller power that should be taken into consideration when enforcing the competition rules. Those specificities can especially be observed in the grocery retail sector where the structure of the different product markets gives supermarket chains significant buyer power and incites them to exploit it. Given the particular harmful effects of large grocery chains' buyer power established in Chapter 1, Section 2 above, we argue that EU authorities should focus their action on that sector.

1. Need for a common action

In the current debate about UTPs, some call for a common action at EU level to harmonize the treatment of those practices in the different Member States. The geographic expansion of large retail chains and processing companies lead indeed to the creation of EU-wide business-to-business relationships in the food and non-food supply chain. Buyer practices occurring in that supply chain may therefore have repercussions in different Member States and affect trade and competition within the European Union. The EU-wide dimension of trade relationships would justify a common action at EU level.

Furthermore, regulatory fragmentation across Member states, different levels of enforcement against buyer practices and the lack of co-operation between national authorities may also be invoked in favour of a harmonization in the European Union. National laws adopted to address the issue of buyer power have indeed distinctive features and vary from one Member State to another in terms of the level, nature, and legal form of protection provided against buyer practices. Some

frameworks are statutory while others are self-regulatory. There are also substantial differences related to the scope of the national instruments as, in some Member States, they apply only in the retail supply chain or in a given retail sector - such as in the United Kingdom where the code of conduct concerns the grocery supply chain -, while in others the rules apply across the board.[1105]

The lack of an EU regulatory framework on that issue and the resulting divergent national laws can lead to barriers fragmenting the internal market, distorting competition or increasing the risk of circumvention.[1106] Companies, especially when they are SMEs, may indeed be discouraged from taking up activities outside their Member State of origin as national legal frameworks are subject to frequent changes, making it difficult and costly to keep track on the legal rights available in the different Member States.[1107] Varied rules have indeed been implemented by national authorities to sanction some harmful practices used in procurement markets. In most Member states, those rules are in fact included in the national regulation against unfair trading practices as the possible anticompetitive effect of buyer power is hardly explicitly recognized.

In addition, the vast majority of market participants do not feel that they are sufficiently protected by the enforcement instruments available in their Member State of operation. The lack of rules governing buyer practices or their poor application is likely to hamper business activities in a wide range of sectors throughout the European economy.[1108] Furthermore, it is worth noting that, even where enforcement mechanisms are available, companies may be very reluctant to make use of them due especially to fear of retaliation or of contract being revoked. Such fear, which strongly dissuades firms from turning to national authorities in order to seek protection against the buyer practices they have experienced, makes in fact the legal instruments implemented at national level ineffective.[1109]

The diversity or the lack of sanctions provided for by the Member states to prevent unfair trading practices, including the harmful exercise of buyer power, may dissuade companies from expanding

[1105] Green Paper on unfair trading practices, *op.cit.,* at 11.
[1106] Report from the Commission, *Retail market monitoring report "towards more efficient and fairer retail services in the internal market for 2020*", *op.cit.,* at 7.
[1107] Green Paper on unfair trading practices, *op.cit.,* at 12.
[1108] Report from the Commission, *Retail market monitoring report "towards more efficient and fairer retail services in the internal market for 2020", op.cit*., at 10.
[1109] The main reasons for reluctance to make use of enforcement mechanisms are fear of retaliation, fear of contracting being revoked and costs too high. Among the other reasons, respondents to the Commission's consultation on unfair business-to-business commercial practices mention: length and complexity of proceedings, legal issues (different legal system) and language barriers in cross-border relations, fear that the courts would have a national bias and doubts as to whether such mechanisms would help (unpredictable outcome, no suitable remedies). See: Summary Report of the responses received to the Commission's consultation on unfair business-to-business commercial practices – Directorate-General for the Internal market and services, 12 February 2012, at 37-38.

their activities in countries where they could be subject to abusive conduct but is also likely to lead to "law shopping" by powerful buyers. French authorities have for example pointed out that some supermarket chains impose on their suppliers to negotiate at multinational level via buying agencies outside France, where the legislation is more lenient with regard to buyer practices.[1110] The possible negative outcome that results from the disparity in national laws and from the relative inefficiency of the existing national rules, such as competition distortion or barriers fragmenting the Common market, would hence justify a common action at EU level to address buyers' conduct.

Furthermore, the restrictive impact on competition and on the freedom of movement is even greater where unfair buyer practices amount to anticompetitive practices. The latter practices, by definition, restrict or distort competition by exploiting or excluding other market participants. In such a case, potential competitors are not only dissuaded from entering a particular market due to unfavorable legislative environment but may in fact be prevented from doing so due to powerful buyers' conduct. For example, restrictive supply agreements imposed by incumbent retailers on their suppliers limit access to input markets and thereby the entry in the retail market of competitors that may come from another Member state. It is therefore not only the differences between national regulations that are likely to hinder cross-border trade but some buyer practices themselves. The possible restrictive impact on competition of those practices and their cross-border effects call therefore for a common action at EU level under the competition rules to harmonize the treatment of anticompetitive buyer practices.

Although Member States constitute a kind of laboratory where various national legislative experiments on buyer power can be observed, assessed and by which EU institutions may be inspired before possibly taking an EU initiative, it appears that national authorities remain relatively timid when it comes to adopt measures against anticompetitive buyer practices or to enforce effectively those measures. An EU impetus can thus be considered necessary for addressing harmful use of buyer power within the Union.

2. Need for action under the competition rules

Once the possible anticompetitive character of buyer practices has been recognized and given their potential restrictive effect on trade between Member states, it is self-evident that those practices have to be supervised through the lens of the EU competition rules. Action within the ambit of

[1110] French authorities response to the Green Paper on unfair trading practices in the business to business food and non-food supply chain COM (2013)37, at 13, available at : http://ec.europa.eu/internal_market/consultations/2013/unfair-trading-practices/docs/contributions/public-authorities/france_fr.pdf

competition law would be limited to sanctioning competition restrictions resulting from the exploitation of buyer power.

a) Anticompetitive buyer practices require action under competition law

On the buy side, UTPs may amount to anticompetitive practices when they do not result from a mere unequal bargaining power between two parties but from the exploitation of buyer power which implies the ability of a buyer to exert its market power over suppliers in general. As a result, the (positive or negative) effects of buyer power are likely to concern not only weaker market participants or the buyer's direct trading partners but a whole market. Powerful buyers have in fact the ability to adversely affect competition through their conduct if they use their power to restrict the freedom of suppliers or to exclude competitors.

For example, in the grocery retail sector, it has been pointed out by the Commission and by a few National competition authorities (NCAs) that the imbalances of bargaining power between retailers and suppliers may result in the transfer of excessive costs or risks and to the imposition of trading practices which may lead, in the medium and long-term, to a decrease in investment and innovation as well as to a reduction in consumer choice.[1111] As the concept of consumer welfare includes not only lower prices but also quality, diversity, innovation and choice, we cannot but conclude that UTPs, especially when imposed by large buyers, are likely to adversely affect consumers and thereby impede the achievement of the primary objective of EU competition policy. Although EU authorities recognize that the competition assessment of business practices must be based on a long-term perspective and not be limited to the immediate effects of those practices, when dealing with UTPs they seem to reduce the scope of competition law only to practices which cause a direct increase in consumer prices. While has been underlined in several occasions that UTPs prevent investment and innovation in new and quality products, links are rarely made between those adverse effects and the objectives of EU competition law.

In addition, we have established that a large number of practices used by big supermarket chains (are likely to) exclude competitors and thereby substantially restrict competition. As developed above in Chapter 1, Section I, larger distributors can exclude competing retailers but also competing producers. Restrictive agreements but also, and especially, the use of various technics to promote private labels give indeed large retailers significant competitive advantages acquired only thanks to their huge market power.

[1111] Report of the European Competition network, ECN activities in the food sector, *op.cit.,* at 116-117.

The negative impact that some buyer practices may have on suppliers in general but also on other market participants, such as competitors, yet attests that large buyers' bargaining power is likely to amount to buyer power more often than suggested by the Commission. Without significant market power in the upstream buyer market, large buyers would indeed be unable to dictate the rules without generating any reaction from their suppliers. Given the negative effects that the exercise of buyer power may cause to the competitive process and ultimately on consumers, an important tool to address UTPs should hence be the application of the provisions and sanctions provided for in case of breach of competition law.

Given the potential restrictive impact on competition of buyer practices within the internal market, a common action at EU level is all the more justified and even prescribed by the Treaty. Article 3, paragraph 1, a), TFUE gives indeed the European Union exclusive competence to establish the competition rules necessary for the functioning of the internal market. As conduct occurring on the buy side adversely affects, in some circumstances, competition and that the current competition rules defined by the EU institutions are not suitable to address that issue, new means of action should be given to the Commission and/or national competition authorities to protect competition.

Unlike the rules envisaged at EU level to protect weaker firms against UTPS, regardless of their impact on competition, action under the competition rules is only aimed at restoring effective competition. Intervention of authorities would therefore be required only in cases where buyer practices affect the competition process or harm consumers. Such limited intervention in business-to-business relationships will prevent a too great intrusion by authorities in those relationships and the negative effects that may result from it so as to make sure that the public interest in intervening outweighs the risks of intervention.[1112]

Even though all UTPs do not amount to anticompetitive practices, some of them undoubtedly impede effective competition and are therefore to be dealt with within the scope of EU competition law.[1113] Giving competition authorities the power to sanction abuses of buyer power, by defining new

[1112] Excessive interventionism could damage market dynamics, deter new entry and raise consumer prices. See: UK Government response to the Green Paper on unfair trading practices in the business to business food and non-food supply chain, at 12, available at: http://ec.europa.eu/internal_market/consultations/2013/unfair-trading-practices/docs/contributions/public-authorities/united-kingdom_en.pdf

[1113] With regard to UTPs that do not distort or restrict competition on the markets, European and national authorities can resort to other policies to protect firms harmed by such conduct. On that matter, expected harmonization of national laws at EU level outlawing some of those practices and providing for uniform standards of enforcement could constitute complementing measures to ensure fairness along the supply chain. However, competent authorities should make sure such an intrusion in business-to-business relationships does not entail adverse effects on competition.

criteria on that matter[1114], would, in addition, imply other advantages related, in particular, to the effective enforcement and the efficacy of the rules prohibiting anticompetitive conduct.

b) Advantages of dealing with buyer power under the competition rules

Applying the competition rules to buyer practices would not be an easy task, even if new criteria of dominance were defined as suggested below. The proof of a restrictive impact on competition may indeed turn out to be hard to establish, such as in seller power cases. Dealing with buyer power under the scope of competition law would yet offer some advantages. Any anticompetitive conduct is likely to be caught by the rules on competition whereas the latter provide for strict requirements in order to prevent the drawbacks of excessive interventionism in trade relationships. In addition, the enforcement of the rules by independent authorities and the level of the sanctions imposed in case of infringement might be a good means to ensure the effective application of those rules and create strong incentives to abide by them.

i. Open list of anticompetitive conduct

The prohibition of anticompetitive agreements and abuses in competition law may be enforced against any conduct that restricts or distorts competition, provided that it is committed by a firm in a dominant position with regard to abusive conduct. Although Articles 101 and 102 TFEU give some examples of anticompetitive practices, the latter do not constitute a closed list.[1115] Firms' conduct must in fact be assessed on a case-by-case basis so as to determine its (potential) impact on competition. This means, on the one hand, that there is no *per se* prohibition as the effects of a particular practice on competition depend on the circumstances of the case, and, on the other hand, that any behavior restricting competition is likely to be sanctioned even if such conduct is not expressly prohibited and has never been dealt with by competition authorities.

[1114] On the new criteria to be defined in order to give competition authorities the ability to effectively take action against anticompetitive practices, see below Section II, Point B.

[1115] Article 101 TFEU provides that agreements restricting or distorting competition are prohibited, and in particular those which : (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. Article 102 TFEU prohibits abusive conduct which may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical developments to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Circumstantial assessment of firms' conduct aims at preventing excessive intervention in business relationships that could deter procompetitive behavior or lead to sanctioning practices that have no impact on competition. Such drawbacks may happen when practices are prohibited as such, regardless of their effects on competition such as in some national contractual laws. For example, in France, the *Loi Galland* introduced a prohibition on price discrimination in order to protect smaller retailers and suppliers. However, by outlawing some practices irrespective of their impact on the market, that legislation led in fact to competition restriction and harm to final consumers.[1116]

In addition, anticompetitive practices are evolving and vary from one market to another. Prohibiting one practice assumed to be anticompetitive at a given time is therefore likely to lead firms to circumvent the rules by using practices that are not forbidden but which in fact similarly harm competition. The use of a general standard, such as the one related to an appreciable impact on competition, gives therefore authorities a wider discretion when enforcing the law so as to appreciate at best the opportuneness of intervening.

ii. Independent authority to enforce the rules

Measures taken by national authorities to tackle buyer power have often remained ineffective due, in particular, to the fact that the initiative to enforce those measures is left to suppliers, victims of large buyers' practices. As the latter fear to lose their largest customers, they often choose not to complain about unlawful buyer conduct. This "fear factor" is a reality, in particular in the grocery retail sector where suppliers are strongly dependent on large supermarket chains. The likely retaliation from retailers therefore dissuades producers to report breaches of the law.

For example, in the United Kingdom, the first code of conduct implemented in 2002 in the grocery retail sector failed to provide the expected benefits.[1117] It appeared indeed during the second investigation carried out in the grocery sector some years later by the Competition Commission that nothing had changed in retailer-supplier relationships and that matters had even worsened. The reason was that nothing had been provided for to address the "fear factor" so that abuses prohibited under the code were kept quiet by suppliers. In 2013, a supermarket ombudsman was named in order to police the new code of practice instituted in 2010 and to prevent the largest supermarkets in the UK from abusing their market power over suppliers. The supermarket adjudicator has the power to investigate anonymous tip-offs from suppliers and to take enforcement action by, among

[1116] On the French legislation, See Part II, Chapter 2, Section I.
[1117] On the measures taken in the United Kingdom to address supermarkets' buyer power, see Part II, Chapter 2, Section II.

other things, imposing financial penalties on retailers.[1118] It remains yet to be seen whether the amount of the penalty will be high enough to deter unlawful conduct.

The establishment of an independent authority to take enforcement action against large buyers is crucial as it may incite suppliers to speak out against abusive practices. Naming a supermarket ombudsman may be decided to address more effectively some unfair trading practices in the food and non-food supply chain, as suggested within the context of the European Retail Action Plan. However, with regard to anticompetitive practices occurring in the very same supply chain, action has to be taken by other independent authorities, namely competition authorities which can enforce the competition rules on their own initiatives. In addition, sanctions that can be imposed by those authorities are more likely to deter firms from engaging in the most harmful unfair trading practices, that is anticompetitive practices.

iii. Deterrent sanctions

Financial penalties provided for in competition law are meant, on the one hand, to sanction the infringing undertaking(s) and prevent recidivism ("specific deterrence") and, on the other hand, to deter *ex ante* other firms from engaging in anticompetitive conduct ("general deterrence").[1119] To create those deterrent effects, the Commission and national competition authorities are entitled to impose fines amounting up to 10% of the total turnover of the firm(s) participating in the infringement.[1120] High levels of fines play in fact a key role in the enforcement of the competition rules and raise awareness of firms and citizens of the adverse effects of anticompetitive practices. The higher the fine, the stronger is the incentive to comply with the rules. In addition, firms subject to a severe sanction for infringing the competition rules may face a loss in popularity among consumers.[1121] Enforcing the competition rules and sanctions against restrictive buyer practices would therefore send a strong signal to large buyers that their conduct in the procurement market is not immune from competition law scrutiny and enforcement.

In some Member states, independent authorities (other than competition authorities) have the power to impose financial sanctions on buyers engaged in unlawful conduct. For example, in the

[1118] Groceries Code Adjudicator Act 2013, available at : http://www.legislation.gov.uk/ukpga/2013/19/pdfs/ukpga_20130019_en.pdf

[1119] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, p.2, 01/09/2006, at 4.

[1120] *Ibid.*, at 32 and Regulation Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty(Text with EEA relevance), O.J. L 1/1 of 04/01/2003, Article 25(2).

[1121] OECD, *Promoting Compliance with Competition Law,* Policy Roundtables, DAF/COMP(2011)20, 30 August 2012, at 201, available at: http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf

United Kingdom, the new Groceries Code Adjudicator Act provides that supermarkets dealing unfairly with their suppliers could, in the most extreme cases, be fined by the adjudicator. One can yet wonder whether the maximum fines that the latter will be allowed to impose on firms breaching the code will reach a level of sufficient deterrence. In France, the Ministry of economy can bring to courts cases involving competitive restrictive practices and requests sanctions such as a civil fine up to € 2 million. However, that amount is very unlikely to incite firms to abide by the law given the huge benefits they can gain from exploiting their market power.

As already mentioned above, unfair trading practices do not necessarily amount to anticompetitive practices. Where unfairness in the supply chain does not lead to an adverse impact on the competitiveness of the market, sanctions imposed under other rules than those provided for in competition law may be suitable to protect weaker players. However, all practices which have the object or effect of excluding competitors, raising consumer prices, reducing product quality or limiting consumer choice must be sanctioned severely and prevented as far as possible given the damage they cause to the society at large. Sanctions provided for under the competition rules are more likely to achieve that objective and deter large buyers from exploiting anti-competitively their market power.

3. Need for a specific answer to buyer power in the grocery retail sector

Anticompetitive buyer conduct should be addressed under common competition law rules within the European Union. We argue though that specific criteria should be defined in order to sanction buyers engaged in such harmful conduct. The current competition rules and the different guidelines of the European Commission are indeed primarily designed to prevent sellers from misusing their market power when acting in the downstream seller market. Buyer power presents though particular features which are not caught by competition law instruments in their present form.

Specificity of buyer power, compared to seller power, can especially be observed in the grocery retail industry where supermarket chains are able to exert significant market power over their suppliers and to affect competition through their behavior despite their relatively low market share. Given the potential anticompetitive outcome of some supermarket chains' practices, competition authorities should focus their action on the grocery retail sector.

1) Specificity of buyer power

Market power arises, among other things, from concentration among sellers or buyers. On the buy-side, concentrated buyers are indeed likely to acquire significant market power when facing an atomistic upstream seller market, especially when there is no scarcity in supply and that buyers can

easily switch from one producer to another. However, we have already referred in Part I to the specificities of buyer power whose degree mostly depends on the nature of the vertical relationships between buyers and suppliers. In addition, incentives to exert market power or to compete with rivals may be very different from one side of the market to another. [1122]

Unlike in seller markets where competition may be fierce between sellers who are willing to attract as many customers as possible by offering them better conditions (lower prices, higher quality, more choice of products,…)[1123], buyers are less incited to compete against each other by raising prices in order to appeal to suppliers. Provided that unlimited inputs are available in the procurement market, they are indeed unlikely to gain benefits from such conduct, especially with regard to undifferentiated products.

Where a buyer could attract more suppliers by bidding up input prices and thereby enlarge his volume of production, this would also raise his costs of productions. The buyer in question would hence be put at a competitive disadvantage in the downstream seller market so that his chance of making profits through his additional sales would be quite slim.[1124] The incentive to compete is therefore unlikely to be present in the procurement market, at least when firms cannot differentiate to some extent their production or when their activity merely consist in reselling goods in the retail market.[1125]

In addition, in terms of supply, buyers' needs are met with a limited number of suppliers. The objective is therefore not to become customers of all producers but to select some of them and play them against each other so as to obtain the most favorable conditions. Unlike in retail markets where firms' profits depends mainly on the width of their customer base – inciting them to decrease prices-, in buyer markets, a larger supplier-base does not necessarily means higher profits. Although, in retail markets, a large product choice certainly helps attract more consumers, retailers can only sell a limited range of products due to space scarcity in retail stores. Facing a large number of suppliers in each product category who offer similar goods, retailers are not concerned about appealing to all of

[1122] See Part I, Chapter 1, Section I, Point C.

[1123] The loss of one customer will necessarily benefit one of the competing sellers. As, by definition, competing firms sell similar or interchangeable products, customers can select one of them to satisfy their needs. Sellers are therefore incited to lower prices, improve quality of their products or increase services provided to customers in order to be the lucky one.

[1124] P.C.Carstensen, *Buyer power and the horizontal merger guidelines : minor progress on an important issue,* 14 University of Pennsylvania Journal of Business Law 775, at 790 (2012).

[1125] The situation may be different if buyers could get higher quality products by offering better conditions to their suppliers and thereby produce and sell differentiated products in the downstream seller market. In such case, higher prices paid in the procurement market would not necessarily be a competitive disadvantage as the firm could stand out from competitors through other aspects than its products price. New technology or higher quality may indeed be as appealing to consumers as lower prices.

them but instead of getting the most of a few of them so as to gain competitive advantages in the downstream seller market.

The ability and incentive to exert buyer power is all the more present when a few buyers act in fact as gatekeepers. In such circumstances, suppliers cannot but deal with all incumbent buyers in order to access consumers. As a result, unlike in seller markets where customers can satisfy their needs with regard to a particular product by selecting one firm and switch to another one if they can get a better deal, suppliers may literally be stuck to all large buyers if no alternative sales avenues are available. Aware of the fact that they are unavoidable trading partners for most suppliers, buyers can therefore freely exert their market power in the procurement market. Suppliers are very likely to resign themselves to agreeing with the terms and conditions imposed by their large customers. They know indeed that, on the one hand, losing one of these customers would threaten their economic viability and, on the other hand, switching to one of the other incumbents would not result in better deals since, as mentioned above, none of them are incited to improve suppliers' conditions, on the contrary.

When rival buyers also compete in the downstream seller market, it would also be in their best interest to exploit as much as possible their power in the procurement market at risk of suffering from serious competitive disadvantages in the downstream seller market. This makes even more sense where the firms in question are not involved in activities which consist in adding value to inputs but rather in selling products bought from producers to consumers. As competitors buy and sell the same or similar products, none of them are incited to pay higher prices in the procurement in order, for example, to encourage suppliers to invest in product quality or innovation since any product improvement would also benefit competitors. The latter will not, though, have borne the costs of such improvement so that they will gain significant competitive advantages in the downstream seller market to the detriment of the firm which induced product improvement. By so reasoning, each buyer is strongly incited to exert its market power over suppliers, expecting the same conduct from competitors.

Unlike in seller markets, firms do not have, in most cases, any interest in doing their best to satisfy their trading partners when acting as buyers in the procurement market. Large buyers use practices that serve their best interests in the downstream seller market and exert therefore significant buyer power over their suppliers in order to strengthen their position as sellers in that market. Nothing seems to dissuade a buyer from so acting, not even competing buyers due to the absence of incentives to act the other way round.

2) Specificity of retail grocery industry

Large supermarket chains hold considerable market power. The grocery procurement and retail markets are indeed structured as such as to give rise to significant buyer power in the hands of retailers. In addition, different factors contribute to the reinforcement of buyers' market power in the grocery retail industry and increase the incentives to exploit that power.

i. Buyer power in the retail grocery industry

Large retailers' buyer power has already been extensively described and illustrated above. All factors giving rise to buyer power are in fact present in the grocery retail sector.

Firstly, in many products categories, the buy-side of the market is much more concentrated than the sell-side so that concentrated buyers are facing atomistic suppliers. Retailers' market power in the procurement market is therefore more likely to amount to buyer power instead of countervailing power, excluding thereby the likely positive effects generally associated with the latter power.[1126]

Secondly, grocery retailers can easily switch from one supplier to another as the demand rarely exceeds the supply. On the contrary, many product manufacturers are waiting at the doors of large supermarket chains since getting space on the shelves of each incumbent retailer is the only key to have sufficient access to consumers. Few shelf-spaces are though available. The large choice of suppliers therefore gives retailers the ability to play the latter against one another. By threatening them to change their source of supply and remove some products from the shelves, retailers can in fact extract concessions that they would never have got otherwise.[1127]

Thirdly, suppliers are highly dependent on large supermarket chains due, on the one hand, to the high proportion the latter represent in their turnover (high risk rate) and, on the other hand, to the lack of equivalent alternatives available to reach consumers. In most Member States, each of the largest grocery retailers may account for more than 20% of a supplier's total sales. The loss of one of those customers is therefore likely to mark the decline of a producer's business activities. The grocery retail channel is indeed the main sales avenue for producers and is in the hand of a very few retail chains. The large volume of sales made through the stores of one of those supermarket chains can hardly be sold off via other customers such as smaller self-service or drugstore chains.

[1126] On the different forms of buyer power and, in particular, on the distinction between buyer power and countervailing buyer power, see Part I, Chapter 1, Section I, Point B.

[1127] Retailers can push suppliers off their supply curve onto their all-or-non supply curve. See, Part I, Chapter 1, Section I, Point B, 1, c), ii. As a result, they can obtain lower prices but also and especially other concessions such as supply restrictions aimed at competitors, invoicing of expensive services or other payments.

In addition, the possibility of finding new customers by turning to an alternative line of production probably constitutes an illusory solution. All grocery products have indeed to pass through the gateway guarded by large supermarket chains so that the production of another product is unlikely to lead to the opening of new horizons in terms of sales, not to mention the high costs that such a change may involve. The inability of suppliers to find alternative buyers results in fact in a very low elasticity of supply and thereby reinforces retailers' buyer power. The latter indeed know that, whatever the price and purchase conditions imposed on suppliers, the quantity supplied will not be affected.

Some processing companies, such as Unilever, Nestlé or Kraft Foods, are yet better equipped and positioned to counter the pressure exerted by large grocery chains due, in particular, to their large market share, their reputation and their brand strength. Although retailers' buyer power may have constituted at another time a countervailing means for mitigating those large suppliers' market power and preventing them from imposing supra-competitive prices, it appears, at this time, that large retail chains are getting the upper hand in their business relationships, even over their largest suppliers. Countervailing buyer power, and its recognized positive effect, has therefore given way to buyer power and its possible harmful effects on competition.

Among the various types of buyer power described in the first part, retailers are unlikely to exert monopsony power that is to reduce the volume of purchases in order to lower prices.[1128] Supermarket chains use instead all-or-nothing contracts in order to impose their terms and conditions on suppliers. Those are related to lower purchase prices but also to other concessions which may result in excluding competitors or significantly strengthening large retailers' position in the upstream buyer market but also in the downstream retail market.

ii. Specific features of the retail grocery industry

In Part I, we mentioned various sectors where the Commission considered that buyers held a strong position.[1129] It may yet be argued that different features distinguish the retail grocery industry from those other sectors and make powerful supermarket chains potentially more harmful for competition than other buyers. These different features specific to the retail grocery industry make indeed large grocery chains' market power particularly strong and therefore increase the probability that such power leads to competition harm.

[1128] On the model of monopsony power, see Part I, Chapter 1, Section I, Point B, 1, c), i.
[1129] See Part I, Chapter 2, Section I.

Firstly, the nature of buyer-supplier relationships in the grocery retail sector attests to the presence of significant buyer power and not only unequal bargaining power. In various sectors, the balance of power between a supplier and its customer may tilt in favour of the latter and result in unfair terms and conditions imposed on the former. Contractual imbalances are, though, not as such as to affect competition, especially when they are limited to one or a few trading relationships. According to the Commission, competition concerns may nevertheless arise when unequal bargaining power amounts in fact to buyer power that is when a buyer has not only power over a particular supplier but over suppliers in general.[1130] One cannot but note that supermarket chains' bargaining power in the procurement market has reached that level of power. Those buyers enjoy indeed market power over all their suppliers, large and small, so that unfair trading practices are systemic.[1131] The ability of large retail chains to dictate the rules in the procurement market is therefore more likely to lead to competition harm in that market but also in the downstream retail market.

Secondly, supermarket chains' market power in the upstream purchasing market is amplified due to their "gatekeeper" role and *vice versa*. As illustrated above, supermarket chains can use their buyer power in order to gain competitive advantages and reinforce their position in the downstream seller market. This in turn strengthens their role of gatekeepers. The larger a retailer's market share in the downstream retail market, the stronger is its position in the upstream buyer market as it becomes an unavoidable trading partner to reach consumers. The bottleneck represented by large grocery chains is in fact unique. Only a few companies are indeed active in the grocery retail sector and no equivalent alternatives are available for suppliers to sell their products. Such considerable "gatekeeper effect" seems to be present in no other sector.

The reason of that uniqueness probably lies, on the one hand, on the absence of other avenues to sell grocery products and, on the other hand, on the loyalty of consumers to their supermarket. Unlike in other sectors where the market structure may appear close to that in the grocery retail sector, the bottleneck characterizing the latter sector is hardly expansible. For example, a ready-to-eat salads producer is unlikely to get by without its largest grocery retail customers which may represent more than 80% of its sales. Smaller retailers are indeed unable to store and sell large volume of production and only a relatively limited number of consumers can be reached through those retailers. While forward integration may constitute an outside option in some sectors, creating

[1130] See: Communication from the Commission, *A better functioning food supply chain in Europe, op.cit.,* at 5 and Report of the European Competition network, ECN activities in the food sector, *op.cit.,* at 41.
[1131] Submission of Promarca (Spain) to the European Commission's Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe, at 2, available at : http://ec.europa.eu/internal_market/consultations/2013/unfair-trading-practices/docs/contributions/individuals-and-others/promarca-spanish-association-of-manufacturers-of-daily-consumer-goods_en.pdf

a new distribution channel is unthinkable for grocery products manufacturers because of the high costs such an option would imply and of consumers' preferences for one-stop shopping.

In other sectors where a few retailers face numerous suppliers, the gatekeeper effect does not seem to be as strong as in the retail grocery industry. For example, in the hardware retail market, the French authorities pointed out the high concentration at the retail level and the atomistic structure of the supply market. Incidentally, unfair trading practices imposed by some large retail chains have been sanctioned by French courts under the legislation on anticompetitive restrictive practices.[1132] However, no competition concerns have been raised so far in that sector. The reason may be that suppliers may find or develop more easily alternatives to sell their production. Hardware products can indeed be sold through hypermarket stores, smaller specialized retailers or via the internet for examples. Many sales avenues are indeed available on the internet and can be used by product manufacturers to circumvent the predominance of large hardware retail chains. Producers can develop their own online sales channel or use existing online sales platforms to put their products on the market. In contrast, the grocery retail market remains insulated from the development of online sales. Consumers keep indeed going to their supermarket store to get fresh foods and take advantage of the opportunity to buy all other products available that they need. Moreover, current online grocery shopping platforms that offer a sufficiently large number of product lines are in fact in the hands of the incumbent grocery retail companies.

Consumers' loyalty to their favorite supermarket and their preferences for one-stop shopping contribute to making large retail chains indispensable. Even though consumers may prefer a particular brand, they are more likely to be loyal to their supermarket store than to their favorite brand. The convenience of one-stop shopping leads indeed consumers to switch more easily to another brand or to private label products rather than go to another store to find their favorite brand. As a result, the removal of a product from the shelves of a supermarket turns for the supplier into the loss of a large majority of consumers who used to buy the product in question in that supermarket. The loss of a grocery retail customer causes serious financial consequences on suppliers who may end up more affected than in other sectors as, even with the best will and capacity in the world, they can hardly make up for the resulting shortfall.

Thirdly, nothing seems to dissuade supermarket chains from exploiting their market power over suppliers. With regard to branded products, all big retail chain companies sell to a large extent the same products for which they are not responsible, be it in respect of the composition or quality of

[1132] Réponse des autorités françaises au livre vert sur les pratiques commerciales déloyales dans la chaîne d'approvisionnement alimentaire et non-alimentaire interentreprises en Europe COM(2013)37, at 10.

those products. In fact, supermarkets do not use and transform inputs to produce new outputs but merely resell finished products in the retail market. Unlike buyers in other sectors, such as car or aircraft manufacturers, grocery chains are therefore not incited to pay more or offer better conditions to producers so as to improve some products. In the first Part, we have indeed mentioned that car manufacturers may have an interest in taking care of the situation of firms producing some car components in order to get higher quality product. As they are responsible for the final products that they can differentiate through a good manufacturing process but also through a higher quality of each component, car producers are in fact more likely establish close and mutually beneficial relationships with their suppliers. In contrast, grocery retailers have no direct interest in giving brands suppliers the ability to improve their products through higher purchase prices or better purchase conditions since they know that any improvement of those brands would also benefit competing retailers. They are rather incited to exploit their market power so as to get lower prices and other concessions which will constitute competitive advantages in the downstream seller market.

Fourthly, supermarkets can generally find easily alternatives in the upstream buyer market and are not required to keep buying one particular product to carry out their activity in the downstream retail market. Their product assortments can indeed change and the loss of one product is not likely to seriously affect their results. This distinguished grocery retailers from product manufacturers who need a complete assortment of inputs, each one being indispensable to produce a particular output. Although product manufacturers can use multi-sourcing strategies to avoid any rupture in supply, they are nevertheless more dependent on their suppliers than grocery retailers due to the consequences such a rupture would have on their business activity.

In addition, in other sectors, buyers may have a strong interest in keeping good relationships with their suppliers. For example, public bodies buying facilities to provide public services, such as public transport, are better off keeping stable commercial relations with their suppliers so as to benefit from their know-how in maintaining or repairing those facilities. In these circumstances, the incentive to exercise buyer power and to use the threat to switch to other suppliers is much lower than in the grocery retail sector.

Fifthly, the strong and increasing presence of private labels in the grocery sector further amplifies the incitement for retailers to (ab)use buyer power in the procurement market. Supermarket chains are indeed incited to exert their market power over brands suppliers as this may in fact result in improving the market position of their own-brand products. Different practices used by retailers with

regard, for example, to the acquisition or placement of branded products may weaken or even eliminate some brands to the benefit of private label lines.[1133]

The ability and particular incitement to exert market power in the grocery procurement market is likely to cause adverse effects on competition. As developed above in Chapter 1 with regard to the likely anticompetitive impact of some practices used in the grocery retail sector, supermarket chains tend to extend their field of action by using their buyer power not only to obtain lower prices but also and especially to extract other concessions from suppliers. Negotiation on restrictive supply arrangements, on listing, slotting or promotional fees or on charged services imposed on suppliers are much less likely to benefit consumers in the short and longer-term. On the contrary, such use of buyer power may lead, among other things, to the exclusion of competitors and higher consumer prices.

As the specificities of the retail grocery industry may lead to anticompetitive use of buyer power, suitable competition rules should be designed to effectively address harmful practices in that sector. Those rules should apply to large supermarket chains that have the ability to exert buyer power over suppliers in general and restrict or distort competition through their conduct. Suppliers may be food but also non-food items producers. For many household and personal care products manufacturers for example, the grocery retail sector constitutes indeed the main and indispensable avenue to reach consumers. The strength of supermarkets' buyer power and the potential harmful impact of such power on competition in those non-food markets are therefore similar to those observed in the food procurement and retail markets so that similar rules should be applied.

The specificity of buyer power and, in particular, of buyer power in the grocery retail industry calls for a specific assessment of supermarket chains' buyer practices under the competition rules. A common and specific approach to address buyer power in that sector would help authorities prevent and deter restrictions on competition while not intervening excessively in business relationships.

[1133] On the different practices used by large retail chains in order to promote their own-brands, see above, Chapter 1, Section II, Point A, 2.

SECTION 2 – NEW CRITERIA TO BE DEFINED IN EU COMPETITION LAW

While it is clear that buyers' practices may adversely affect competition in the grocery sector, it remains to be seen whether the EU competition rules can sanction and prevent anticompetitive conduct committed by large supermarket chains. On that matter, it turns out that Articles 101 and 102 TFEU are very unlikely to be effectively enforced against anticompetitive practices in the upstream procurement market, in particular, because the current criteria used in the application of these provisions are ill-suited to address the specificities of buyer power. In fact, competition authorities focus mainly on the firms' market shares to assess the latter's ability to distort competition and thereby to determine whether the competition rules apply to them. However, the ability of large retail chains to affect competition relies mostly on other factors than the level of their market shares in the procurement market. Except in a few merger cases, those factors have been largely underestimated by competition authorities, leaving, as a result, uncontrolled possible harmful buyer practices.

In order to protect effective competition, large retail chains that have sufficient market power so as to limit or distort competition should be subject to competition authorities' supervision. This would therefore call for defining new criteria of dominance applicable to buyer retailers in the grocery sector. The specific approach to be adopted in buyer power cases should in fact be part of the common action needed at EU level and could be implemented in the Member States' national legislation via an EU instrument which presents some degree of flexibility, such as a Directive.

The objective would be to harmonize national laws on buyer power by defining common criteria to be used in the assessment of buyer power. This would in fact give national competition authorities the power to enforce the prohibition on restrictive agreements and abusive conduct in a larger number of cases. The new criteria would indeed integrate the specificities of buyer power so as to ensure that buyer retailers which are in a position to limit competition and adversely affect consumers through their conduct do not escape from the competition rules.

A. CURRENT COMPETITION RULES UNSUITABLE TO ADDRESS BUYER CONDUCT

Theoretically, anticompetitive buyer practices could be caught under EU competition law. The prohibition on anticompetitive agreements and abusive conduct, provided respectively by Articles 101 and 102 TFEU, are indeed meant to apply to both the sell- and the buy-side of the market.[1134] In the enforcement of those provisions, the focus has though mainly been put on sellers' market power

[1134] See : Part II, Chapter 1, Section I.

and practices. As the result, the current criteria used to assess business practices are defined on the basis of the characteristics of seller markets and appear unsuitable to address buyers' conduct.

The EU Commission has yet drawn greater attention on the potential harmful effects of buyer power in a few merger cases. Although those cases remain relatively isolated in the enforcement of the Merger Regulation, the criteria used and the arguments developed therein are nevertheless worth being taken into account as they may help shape a new approach, specific to buyer power cases.

1. Article 101 TFEU

Horizontal agreements between competing producers or between competing retailers but also vertical agreements between retailers and their suppliers are prohibited if they have the object or effect to restrict competition. The different (potential) anticompetitive practices involving large supermarket chains described above are though unlikely to be sanctioned under Article 101 TFEU.

a) Horizontal agreements

Hardcore restrictions between competing buyers, such as agreements fixing purchase prices or sharing sources of supply, are clearly prohibited by Article 101 TFEU.[1135] In a few cases, the Commission has enforced this provision against buyer cartels, confirming the harmful effect of such arrangements on competition even though they do not lead to an increase in consumer prices.[1136]

With regard to buyer agreements that may have the effect of restricting competition, a balancing approach is used, weighing the benefits against the harm caused by the agreement in question both in the upstream buyer market and the downstream seller market. Such an effect-based approach is

[1135] Article 101 TFEU reads as follows : "The following shall be prohibited as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix **purchase** or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or **sources of supply**;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

[1136] See for examples : *Spanish Raw Tobacco,* Case No COMP/C.38.238/B.2, Commission decision of 20 October 2004 ; *Italian Raw Tobacco,* Case No COMP/C.38.281/B.2, Commission decision of 20 October 2005; *Aluminium Imports from Eastern Europe,* Case IV/26.870, Commission decision of 19 December 1984 ; *French beef,* Case COMP/C.38.279/F3, Commission decision of 2 April 2003; C-8/08, *T-Mobile Netherlands BV and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529.

for example applied to assess the lawfulness of buying agreements between parties with a combined market share exceeding 15%.[1137]

Although Article 101 TFEU is applicable to buyer alliances, this provision may turn to be useless to prevent anticompetitive practices in the grocery retail sector. Agreements between retailers to coordinate their conduct in the upstream procurement market are indeed unlikely to be concluded due, in particular, to the fact that each single big supermarket chain is able to dictate the rules to its suppliers without conspiring with competing buyers. As all large grocery chains constitute unavoidable trading partners to reach consumers, each of them can indeed exert their market power in the upstream buyer market without fearing to lose suppliers which are dependent on them. In addition, since those buyers have no interest in increasing purchase prices or in offering better purchase conditions to producers, none of them is likely to give up exploiting their buyer power. On the contrary, knowing that producers will not be offered better terms and conditions from competitors, retailers are incited to exploit their buyer power in the upstream procurement market so as to maximize their profits and do not feel it necessary to enter into an agreement with competitors to do so.

As for competition concerns related to the share of information between competitors which may result from the exercise of buyer power by some retailers, they have little chance to be addressed under Article 101 TFEU. For example, with regard to the current practices in relation to private labels, it was developed above that retailers can exploit their buyer power in order to get sensitive information from suppliers about branded products. Such a share of information may be regarded as occurring in fact between competitors since retailers compete with brands producers in the retail market through their own-brands. However, the double-agent function of grocery retailers blurs the picture. One may indeed consider that information exchange is part of the vertical relationship between the supermarkets and their suppliers so that it cannot be regarded as an infringement of the competition rules.[1138] Among the indispensable flow of information between retailers and producers, it is therefore uneasy to distinguish the part which is needed for a better marketing of the products from the part which is likely to be used in an anticompetitive manner, especially because those two parts may in fact be confused.

Retailers may also use their buyer power to orchestrate a trilateral arrangement leading to an indirect share of information between competitors, a so-called “hub-and-spoke” conspiracy. The convey of information between competing firms through a common agency is an issue that has been

[1137] On the rules applicable to buying agreements and the case law on that matter, see : Part II, Chapter 1, Section I, Point A, 1 and B, 1.

[1138] S.Erzene, *Buyer power in the Context of Private Label in the EU,* Global Antitrust Review 106 (2012), at 118.

recognized by the Commission.[1139] We have already mentioned that an A-B-C collusion is likely to constitute a horizontal agreement. However, no criteria have been defined at EU level to determine when indirect exchange of information must be regarded as an anticompetitive arrangement in the sense of Article 101 TFEU as no case involving that matter has been dealt with by the Commission so far.[1140] Given the difficulty in proving such type of collusion, retailers exploiting their market power over suppliers so as to use them to convey information to competitors are unlikely to be sanctioned under Article 101 TFEU. In addition, when some suppliers, under the pressure of a large retailer's power, are forced, for example, to abide by a policy of boycotting smaller retailers and consequently end up being engaged in an unlawful horizontal arrangement at the supply level, the application of Article 101 TFEU to those suppliers will not sanction or deter the conduct which is behind the anticompetitive boycott, namely the anticompetitive exercise of buyer power by a retailer.

b) Vertical agreements

Terms and conditions imposed by a retailer on its suppliers may constitute a vertical agreement when a concurrence of will is established. According to the EU case law on this matter, apparently unilateral conduct may indeed be part of an agreement between two parties where clear evidence is established that one of those parties has agreed or acquiesced, explicitly or tacitly, in any unilateral policy declared by the other party.[1141] For there to be an agreement within the meaning of Article 101 TFEU it is sufficient that the parties have expressed their joint intention to conduct themselves on the market in a specific way, no matter the form in which the intention is expressed.[1142]

[1139] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, O.J. C11/1 of 04/01/2011, at 55.

[1140] The issue of indirect exchange of information between competitors has been dealt with by some national authorities. See for example, in the UK: Case CP/0871/01 *Price-Fixing of Replica Football Kit* [2003] 1 August and Case CP/0480-01 *Agreements between Hasbro UK Ltd, Argos Ltd and Littlewood Ltd Fixing the Price of Hasbro Toys and Games* [2003] 21 November. On appeal before the Competition Appeal Tribunal: Case 1021/1/1/03 and 1022/1/1/03 *JJB Sports Plc v Office of Fair Trading; Allsports Limited v Office of Fair Trading* [2004] CAT 17. On appeal before the Court of Appeal: Case Nos 2005/1071, 1074 and 1623 *Argos Limited and Littlewoods Limited v Office of Fair Trading and JJB Sports Plc v Office of Fair Trading* [2006] EWCA Civ 1318.

[1141] See for examples : Case 107/82, *AEG-Telefunken v Commission* [1983] ECR 3151; Joint cases 25 & 26/84, *Ford Werke & Ford of Europe Inc. v Commission* [1985] ECR 2725; C-277/87, *Sandoz prodoti farmaceutici SpA v Commission* [1990]ECR I-45; T-62/98, *Volkswagen AG v Commission* [2000] ECR II-2707; T-368/00, *General Motor Nederland BV, Opel Nederland BV v Commission* [2003] ECR II-4491. See also: However, the European Courts made it clear that if no concurrence of will has been established, the decision to restrict competition must be regarded as a genuinely unilateral conduct which escapes the prohibition in Article 101 TFEU. See: T-41/96, *Bayer v Commission* [2000] ECR II-3383, upheld on appeal by the Court of Justice, C-2 & 3/01P, *BAI and Commission v Bayer* [2004] ECR I-23. See on that matter: A.Jones & B.Sufrin, *EU competition law: Text, cases and materials* (2011), at 147-158.

[1142] Guidelines on vertical restraints, *op.cit.*, at 25. In case there is no explicit agreement expressing the concurrence of wills, there are two ways in which the Commission can prove that the unilateral policy of one party receives the acquiescence of the other party. First, the acquiescence can be deduced from the powers conferred upon the parties in a general agreement drawn up in advance. If the clauses of the agreement drawn up in

In the context of buyer power in the grocery retail sector, if a supermarket chain requires some suppliers to adopt specific conduct and that the latter abide by such a requirement, the supermarket chain's decision is deemed to be part of an agreement falling within the scope of Article 101 TFEU. Take for example, a supply restriction imposed by a grocery retailer on a food manufacturer in order to prevent the latter from selling its products to a new competing retailer. If the supplier in question acquiesces in its customer's restrictive supply policy, such restriction will be regarded as the expression of the concurrence of wills between those two parties even though it did not operate to the supplier's advantage. Tacit acquiescence may in fact be deduced from coercion exerted by the retailer to impose its unilateral policy on the supplier. As such, a system of penalties, including for example the delisting of items produced by the supplier in question, set up by the retailer to penalize non-compliance with its unilateral policy, points to tacit acquiescence.[1143]

The fact that the supplier was unwilling to accept those terms is irrelevant for the finding of an anticompetitive agreement.[1144] Provided that the retailer's aims could not have been achieved without the supplier's participation, the two parties are considered to be involved in the same infringement of Article 101 TFEU. The Commission could though decline to fine a supplier that has acted under duress against its own economic interest.[1145] That supplier will nevertheless be declared a party to the unlawful agreement and could, as a result, become liable for damages to anyone who has suffered a loss caused by the infringement.[1146]

The payment of listing or slotting fees may also be regarded as part of a vertical agreement between a retailer and a producer. In the Guidelines on vertical restraints, the Commission points out that those payments may sometimes result in anticompetitive foreclosure of other distributors if they induce the supplier to channel its products through only one or a limited number of distributors.

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advance provide for or authorise a party to adopt subsequently a specific unilateral policy which will be binding on the other party, the acquiescence of that policy by the other party can be established on the basis thereof . Secondly, in the absence of such an explicit acquiescence, the Commission can show the existence of tacit acquiescence. For that it is necessary to show first that one party requires explicitly or implicitly the cooperation of the other party for the implementation of its unilateral policy and second that the other party complied with that requirement by implementing that unilateral policy in practice .

[1143] See, by analogy: Guidelines on vertical restraints, *op.cit.*, at 25.

[1144] A.Jones & B.Sufrin, *op.cit.,* at 148.

[1145] See for example : *VW,* Case IV/35.733, Commission Decision of 28 January 1998. In that case, The European Commission fined Volkswagen ECU 102 million for systematically forcing its authorised dealers in Italy to refuse to sell Volkswagen and Audi cars to foreign buyers, mainly from Germany and Austria. Authorised dealers were in fact threatened that their dealership contracts would be terminated if they sold to foreign customers, and some of them were actually terminated. The Commission therefore considered that those dealers were victims of the restrictive policy introduced by Volkswagen as were forced to consent to such a policy under pressure. It was therefore decided not to impose a fine on them (at 208).

[1146] A.Jones & B.Sufrin, *op.cit.*, at 149.

They may indeed have the same downstream foreclosure effect as an exclusive supply type of obligation.[1147]

Restrictive supply agreements in the grocery sector are, however, very likely to fall within the scope of the Block Exemption Regulation on vertical restraints.[1148] That Regulation provides indeed for a safe harbor, according to which Article 101(1) TFEU will not apply to vertical agreements where the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services.[1149] With regard to exclusive supply agreements, the Commission points out in its Guidelines on vertical restraints that the main competition risk is competitive foreclosure of other buyers. Although the market share of the buyer in the upstream procurement market is important to assess its ability to impose exclusive supply obligations, particular attention is also drawn on the position of the buyer in the downstream market. The Commission indeed considers that no appreciable negative effects can be expected if the buyer has no market power downstream. Accordingly, a competition problem is unlikely to arise when the market share of the buyer does not exceed 30% either in the upstream procurement market or in the downstream seller market.[1150]

Among the other factors that are relevant to assess the lawfulness of exclusive supply agreements, we can mention the market position of the competing buyers in the upstream market. Anticompetitive foreclosure is indeed more likely to arise when competing buyers are significantly smaller than the foreclosing buyer. Countervailing power of suppliers is also of particular importance as powerful suppliers will not easily allow themselves to be cut off from alternative buyers. Foreclosure is mainly a risk in the case of weak suppliers and strong buyers.[1151] Although the grocery retail sector is characterized by those features - as a few big retail chains are facing a large number of smaller suppliers who can be coerced at will -, the safe harbor set in the Block Exemption Regulation creates in fact a presumption of legality for most vertical agreements imposed by those big retail chains. The market shares of large grocery chains will indeed fall below the threshold of 30% in most Member States.

[1147] Guidelines on vertical restraints, *op.cit.*, at 204.
[1148] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (Text with EEA relevance), O.J. L 102/1 of 23/04/2010.
[1149] *Ibid.,* Article 3(1)
[1150] Guidelines on vertical restraints, *op.cit.*, at 194.
[1151] *Ibid.,* at 196 and 198.

With regard to the application of such an exemption to the consumer goods retail sector, some comments are though worth being made. Where vertical restraints are generally less harmful than horizontal restraints and are likely to lead to efficiencies, the reasons underlying the exemptions of most of those agreements hardly apply to supermarkets. Indeed, according to the Guidelines on vertical restraints, the positive effects of exclusive agreements are likely to outweigh any competition restriction when, for example, substantial investments have to be made by the distributor to launch a particular product. In such a case, a particular protection in the form of exclusivity may in fact promote the entry of new products or improve quality of services offered to consumers.[1152] Among the other positive effects of exclusive agreements, the Commission underlines that they may constitute a mean to solve a "free-rider" problem. Such problem arises for instance when one distributor free-ride on the promotion efforts of another distributor. However, it is made clear in the Guidelines that the product subject to the exclusivity will usually need to be relatively new or technically complex and must be of a reasonably high value.[1153]

In view of those elements, one may wonder to what extent the exemptions of vertical restraints, such as exclusive supply agreements, are justified when they are imposed by large supermarket chains. Indeed, we have seen that all investments necessary to launch or promote a product are made by the supplier in question so that there is no reason to grant retailers a certain protection to recoup inexistent costs. Concerning the free-rider problem, one cannot but note that supermarkets do not generally sell high-value and complex items but rather daily consumer goods for which consumers do not need specific information to make a decision. No extra-services requiring substantial investment in staff training or new infrastructure for examples are hence provided by those retail chains which would justify a restriction on competition.

In conclusion, two arguments may justify a stricter approach when a vertical restriction is induced by a buyer. On the one hand, a firm may have significant buyer power below the threshold of 30% market share established in the block exemption regulation. On basis of other factors, such as the economic dependency of suppliers or a gatekeeper effect, a buyer may in fact be in a position to influence the market conditions in order to increase its profits at the expense of its suppliers and competitors. On the other hand, as far as supermarket chains are concerned, economic efficiencies which are likely to arise from the conclusion of vertical agreements, and which justify the existence of the block exemption, are less likely to emerge from vertical practices used by large retail chains. If some restrictions imposed on the distribution of specific products, such as luxurious or technological products, may lead to improvement in production or distribution and benefit consumers, they are

[1152] *Ibid.,* at 61.
[1153] *Ibid.*, at 107.

more hardly justified with regard to mass consumer goods. The ability of retail chains to impose an anticompetitive policy on their suppliers so as to strengthen their market power both in the upstream procurement market and in the downstream seller market is therefore likely to remain unsupervised by competition authorities.

The grant of individual or block exemption cannot be such as to render inapplicable the prohibition set out in Article 102 TFEU.[1154] Derogation, through a declaration of inapplicability, from the prohibition on anticompetitive conduct applies indeed only to agreements, decisions, and concerted practices provided by Article 101(1) TFEU. Such derogation can therefore not preclude the application of Article 102 TFEU.[1155] Although both provisions pursue the same aim of monitoring effective competition on the market, they are nevertheless designed to regulate distinct situations and are as such independent and complementary.

Such a complementary approach between the Treaty rules on competition presents two advantages for tackling buyer power used by large grocery retailers to impose their restrictive policy on suppliers. Firstly, agreements exempted under the block exemption regulation may still be scrutinized under Article 102 TFEU and sanctioned if it is established that the retailer's policy in which a producer has explicitly or tacitly acquiesced, be it willingly or unwillingly, constitutes an abuse of a dominant position. Secondly, even though a restrictive agreement between a large retail chain and a grocery producer is not exempted and hence falls within the scope of Article 101(1) TFEU, the possibility to apply both the latter provision and Article 102 TFEU may be used, in some cases, to put the real wrongdoer in the spotlight.[1156] Indeed, if a retailer in a dominant position in the upstream procurement market has succeeded, by exploiting its buyer power, in imposing its restrictive policy on a supplier who has, as a result, been unwillingly involved in an anticompetitive agreement, the application of Article 102 TFEU could contribute to putting the emphasis on the initiator of the anticompetitive practice.

[1154] See: Joint cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports and Others v Commission* [2000] ECR I-1365, at 130; T-51/89, *Tetra Pak v Commission* [1990] ECR II-309, at 25. See also: Guidelines on the application of Article 81(3) of the Treaty (Text with EEA relevance), O.J. C 101 of 27/04/2004, at 106.

[1155] In *Tetra Pak,* the General Court argued that, "if the Commission were required in every case to take a decision withdrawing exemption before applying Article [102], this would be tantamount, in view of the non-retroactive nature of the withdrawal of exemption, to accepting that an exemption under Article [101(3)] operates in reality as a concurrent exemption from the prohibition of abuse of a dominant position. (…) That would not be consistent with the very nature of the infringement prohibited by Article [102]. Moreover, in view of the principles governing the hierarchical relationship of legal rules, grant of exemption under secondary legislation could not, in the absence of any enabling provision in the Treaty, derogate from a provision of the Treaty, in this case Article [102]." (at 25)

[1156] The possibility to apply that Articles 101 and 102 TFEU may both be applicable can indeed not be ruled out. See for example: Case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V* [1989] ECR 803, at 37.

However, applying Article 102 TFEU to powerful grocery retailers so as to punish and deter anticompetitive practices used in the procurement market, such as the imposition of restrictive policy on their suppliers, may turn out to be difficult under the current criteria applied to assess the existence of a dominant position. Those difficulties in enforcing the Treaty provision on dominance against powerful retailers involved in an anticompetitive agreement with some suppliers are in fact the same as those encountered when it comes to tackling truly unilateral conduct.

2. Article 102 TFEU

Many practices used by large retail chains in the grocery procurement market are not part of an agreement with suppliers but constitute the expression of unilateral conduct adopted by those chains. Big supermarkets can indeed use their buyer power to achieve their aims without participation of producers. In such a case, the retailer's policy does not fall under Article 101 TFEU, since no agreement can be established, but could nevertheless be caught up by Article 102 TFEU. The prohibition on abusive conduct applies indeed both in the downstream seller market and in the upstream buyer market, provided that such conduct is adopted by a firm in a dominant position in the relevant market.

In the context of possible abusive buyer practices used by large retail chains in the grocery sector, the first step in the enforcement of Article 102 TFEU consists therefore in assessing the degree of buyer power held by those firms in the relevant upstream procurement market. However, the criteria used to do so appear unsuitable to effectively address restrictive practices in that sector. Despite their significant power and their ability to behave independently of competitors and suppliers in the upstream buyer market, grocery chains are indeed very unlikely to be considered dominant.

In addition, although the grocery procurement market can be regarded as an oligopsoly where a few supermarket chains detain significant buyer power, the concept of collective dominance seems hardly to be applicable to that market.

a) Single dominance

Grocery chains are able to impose their own policy without necessarily getting the agreement of suppliers. Take for example practices used by supermarkets which consist in delisting branded products or in using confidential information obtained from some producers so as to promote or to launch new private label lines. Those practices escape the prohibition of Article 101 TFEU as they constitute genuinely unilateral practices. They could though fall within the scope of Article 102 TFEU as the latter forbids abuses of dominance committed by a firm when acting as a seller in the

downstream market but also when buying inputs in the upstream market. Abusive conduct may for example consist in imposing unfair purchase price or making the conclusion of contracts subject to acceptance by suppliers of supplementary obligations which have no connection with the subject of such contracts.

However, as developed in Part I, among the different elements taken into consideration by the Commission to measure the degree of market power, the market share held by the firm under examination is not conclusive but plays nevertheless a key role.[1157] Below 40%, the finding of a dominant position is very unlikely, excluding therefore the application of Article 102 TFEU.[1158] Even if competition enforcers were more willing to enforce Article 102 TFEU against alleged abuses of buyer power in the grocery sector, such task could therefore turn out to be hard since, in most Member States, even the largest supermarket chain does not account for such a market share.

The criteria defining the notion of dominance have in fact been determined in seller power cases but it seems that buyer power presents different characteristics which would require the application of a specific test. No consensus exists among scholars and officials about the key elements giving rise to substantial market power in the hands of a buyer, especially with regard to the use of a different market share threshold.[1159] It is yet argued that a buyer will get a position of economic strength *vis-à-*

[1157] See : Part I, Chapter 1, Section I, Point A, 1.

[1158] According to the case law of the Court of Justice, an undertaking with a market share of 50% or more will be presumed dominant while a market share below 40% is unlikely to give a firm such a position. Between those two thresholds, other additional factors will play a role in the determination of the existence/nonexistence of dominance. See: Case 85/76, *Hoffman-La Roche v Commission* [1979] ECR 461 and C-62/86, *Akzo Chemie BV v Commission* [1991] ECR I-3359 and 22/79, *United Brands v Commission* [1978] ECR 207. However, it is not excluded that the Commission find a dominant position where the firm has a market share below 40% if other factors reinforce the economic strength of that firm and give it the ability to behave independently on the markets. See, for example, the *British Airways* case examined above where BA was qualified as dominant with a market share of 39.7%. See also: *Wanadoo Interactive,* Case No COMP/38.233, Commission Decision of 16 July 2003. In that case, it was concluded that Wanadoo did hold a dominant position, albeit it only had a market share of 39% based on the fact that the rest of the market was very fragmented. Among the additional factors taken into consideration in the assessment of dominance, we can mention economies of scale and scope enjoyed by the firm, privileged access to essential inputs or natural resources, highly developed distribution and sales network or important technologies. See: Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 102 of the EC Treaty to abusive exclusionary conduct bye dominant undertakings (Text with EEA relevance), O.J. C 45/7 of 24/02/2009, at 17.

[1159] Some suggestions have already been made on that matter, in particular by the UK Competition Commission which considers in its reports on the supply groceries that a market share of 8% enables retailers to exercise buyer power while the OECD mentions a threshold of 15%. See: UK Competition Commission, *Supermarkets: A Report on the Supply Groceries from Multiple Stores in the United Kingdom* (2000) and *Buyer Power of Multiproduct Retailers,* OECD – Policy Roundtables, 1998, DAFFE/CLP(99)21.

vis its suppliers with a smaller market share than that generally associated with significant market power on the selling side.[1160]

Article 102 TFEU applies only to firms in a dominant position as it is assumed that only those firms are able to substantially affect competition through their conduct. However, it appears that in the grocery sector, large retail chains hardly have a market share of 40% in the procurement market but are nevertheless in a position to harm competition by exploiting their buyer power. A certain inadequacy of the current criteria of dominance therefore appears for effectively tackling anticompetitive conduct in buyer power cases.

We have already noted that other factors are more relevant to assess the degree of buyer power and to determine whether a firm is able to restrict or distort competition on a particular market. These factors may be, for examples, the role of gatekeeper of the buyer in question or the state of dependency of its suppliers. It is worth though noting on that matter that economic dependency may arise when buyers have a relatively low market share in the procurement market, especially when those buyers are in fact gatekeepers, such as retail chains in the grocery sector.

It is striking to see that the only cases where the Commission highlights the state of dependency of trading partners, in spite of the firm under assessment having a market share below 40%, concerned buyer power cases. In the *British Airways* case analyzed above[1161], the Commission and the European Courts considered that British Airways was a dominant buyer in the market for the purchase of travel agency services while that firm had a market share slightly below 40%. In fact, in that case, besides the market share held by British Airways, another factor was of particular importance in the dominance assessment, namely the travel agents' economic dependence on British Airways. Although the configuration of the markets of ailrines services differs to a great extent from those where grocery chains are acting[1162], the British Airways shows that other factors than the firm's market share might be given a prime position in the assessment of a firm's market power. A departure from the market share thresholds defined in seller power cases would be all the more relevant in the grocery sector where different elements, such as the growing presence of private

[1160] P.C.Carstensen, *Buyer Power, Competition Policy, and Antitrust: the Competitive Effects of discrimination among suppliers,* 53 Antitrust Bulletin 271, at 296 (2008)
[1161] See, Part II, Chapter 1, Section I, Point B, 2, a), iii.
[1161] See, Part II, Chapter 1, Section I, Point B, 2, a), iii.
[1162] In the analysis of the *British Airways* case, we pointed out that airline companies and travel agents do not act in successive markets (upstream buyer market and downstream seller market) but in interlocked markets. Airline companies supply air transport services but also purchase air travel agency services from travel agents. In return, travel agents are paid through commission based on the sales of tickets. As the result, the market share of BA in the procurement market for travel agency services corresponded to its market share in the seller market for air tickets.

labels or the strong loyalty of consumers to their supermarket, reinforce producers' dependence on large retail chains and give thereby the latter significant buyer power despite their relatively low market share in the upstream procurement market. These other factors which contribute to the emergence of market power, such as the trading partners' economic dependence, should therefore be paid even greater attention in the grocery sector. The economic dependence of suppliers was for example the main factor which led the Commission in three cases related to mergers between supermarket chains, *Kesko/Tuko, Rewe/Meinl and Carrefour/Promodes*, to conclude that the merging parties in question had a dominant position in the relevant upstream buyer market, even though the latter had a market share far below the thresholds generally used to assess a firm's dominant position.[1163]

In contrast, in seller power cases, the Commission concluded to a situation of dependency only as a consequence of the very high market share of the firm in question.[1164] It is nevertheless recognized that the economic dependence of trading partners is characteristic of a situation of dominance. The argument, according to which a buyer with a market share below 40% may be considered to be dominant in a certain market, can be put in the following syllogistic form: the state of dependence of trading partners is characteristic of a dominant position; buyers with a market share below 40% may be unavoidable partners for suppliers who are dependent on them; therefore, buyers with a market share below 40% may be in a dominant position.

Even though the economic dependence of suppliers is not the only element to be taken into consideration, it is nevertheless a factor of particular importance when assessing the ability of a firm to behave independently. It would therefore be advisable to redefine the conditions of dominance on the buying side in order to put greater emphasis on elements which characterized market power in the grocery procurement market. On basis of the definition given to that concept in previous seller power cases, this would consist in determining the situations where a buyer has a position of economic strength which gives it the power to behave independently of its competitors and suppliers

[1163] See: *Kesko/Tuko,* Case No IV/M.784, Commission Decision of 20 November 1996; *Rewe/Meinl,* Case No IV/M.1221, Commission Decision of 3 February 1999 and *Carrefour/Promodes*, Case No COMP/M.1684, Commission Decision of 25 January 2000. On those decisions, see Part II, Chapter 1, Section II, Point B, 2.
[1164] See: *Magill TV Guide/ITP, BBC and RTE,* Case No IV/31.851, Commission decision of 21 December 1988; *Soda ash-Solvay,* Case No COMP/33.133-C, Commission decision of 13 December 2000; *Soda ash-ICI,* Case No COMP/33.133-D, Commission decision of 13 December 2000 and *Michelin,* Case No COMP/E-2/36.041/PO, Commission decision of 20 June 2001. In one seller power case, the Commission considered that the dependence of customers on their supplier was sufficient to conclude to the existence of a dominant position, even though the latter had a market share of only 26%. See: *ABG/Oil companies,* Case No IV28.841, Commission decision of 19 April 1977. However, that case was justified by exceptional circumstances as it arose during the oil crisis in the seventies. See: P.Këllezi, *Abuse below the threshold of dominance?,* in Abuse of dominant position: new interpretation, new enforcement mechanisms? (2008), at 77.

on the procurement market and which enables it to have an appreciable influence on the conditions under which competition will develop on that market.[1165]

The application of Article 102 TFEU in the grocery procurement market to a single retail chain seems to be only theoretical due to the difficulties related to the current criteria used to assess dominance. It remains yet to examine whether that provision could be applied through the concept of collective dominance.

b) Collective dominance

Express agreements or concerted practices between competitors which have as their object of effect to restrict competition are prohibited under Article 101(1) TFEU.[1166] However, in oligopolistic markets, rivals may be able to coordinate their conduct without entering into agreements or other arrangements amounting to concerted practices. Such a situation is referred to as "collective dominance" or "tacit collusion" and may, in some circumstances, be caught under Article 102 TFEU.[1167]

Oligopolistic interaction does, however, not necessarily equate to collective dominance. It must therefore be examined whether, in the grocery sector, the oligopsolistic position of large retail chains could be regarded as a collective dominant position.

i. The concept and conditions of collective dominance

Article 102 TFEU applies to dominance held by a single firm but also to collective dominance that is dominance enjoyed by legally and economically separate firms. The Treaty prohibits indeed "any abuse *by one or more undertakings* of a dominant position within the common market".[1168] The decisional practice under Article 102 TFEU and under the Merger Regulation has shed some light on the concept of collective dominance.[1169]

[1165] On the definition of a dominant position, see, in particular : 22/79, *United Brands v Commission, op.cit.,* at 65 and 85/76, *Hoffman-La Roche v Commission, op.cit.,* at 39.

[1166] Concerted practices is defined as "a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition". See: Case 48/69, *ICI v Commission* [1972] ECR 619, at 64. In Case 40/73, *Suiker Unie v Commission* [1975] ECR 1663, the Commission elaborated upon this definition and held that Article [101 TFEU] prohibits "any direct or indirect contact between [competing firms], the object of effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market" (at 174).

[1167] R.O'Donoghue & A.J.Padilla, *The Law and Economics of Article 82 EC* (2006), at 137.

[1168] Emphasis added.

[1169] Mergers that create or strengthen situations of collective dominance can indeed be blocked under merger control laws. The approach followed to address collective dominance under Article 102 TFEU is the same as the

In *Compagnie Maritime Belge*, the Court of Justice defined collective dominance as a dominant position held by

> "Two or more economic entities legally independent of each other provided that from an economic point of view they present themselves or act together on a particular market as a collective entity".[1170]

Even if there are no structural or other links in law between the firms concerned, the latter could be held to be collectively dominant. The oligopolistic nature of the market may indeed be such that competing firms become aware of common interests and decide, independently, to align their conduct in the market, thereby appearing to that market as a collective entity.[1171] The finding of a collective dominant position may therefore be based on other connecting factors than structural or contractual links between firms and in fact depend, in particular, on an assessment of the structure of the market in question.[1172]

According to the case law of the European courts, three cumulative conditions are necessary for a finding of collective dominance:

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one followed under the Merger Regulation. With regard to cases dealt with under Article 102 TFEU, see for examples: Joined cases T-68, 77 and 78/89, *Societa Italiana Vietro ("Flat Glass")* [1992] ECR II-1403; C-393/92, *Almelo v NV Energiebedrijkf Ijsselmij* [1994] ECR I-1477; Joined cases C-395 and 396/96 P, *Compagnie Maritime Belge Transports SA and others v Commission* [2000] ECR I-1365; With regard to cases dealt with under the Merger Regulation, see for examples: C-68/94 and 30/95, *France v Commission (Kali und Salz)* [1998] ECR I-1375; T-102/96, *Gencor v Commission* [1999] ECR II-753; T-342/99, *Airtours v Commission* [2002] ECR II-2585, annulling the Commission's prohibition decision in *Airtours/First Choice,* Case IV/M.1524, Commission Decision of 22 September 1999.

[1170] Joined cases C-395 and 396/96 P, *Compagnie Maritime Belge Transports SA and others v Commission* [2000] ECR I-1365, at 36. This case was an appeal from the General Court's judgment upholding the Commission's decision. See: Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie Maritime Belge Transports and Others* v *Commission* [1996] ECR II-1201 and *Cewal,* Case IV/32.448 and IV/32.450, Commission Decision of 23 December 1992.

[1171] R.Wish, *Competition Law,* 6th ed. (2009), at 564. See also: T-102/96, *Gencor v Commission* [1999] ECR II-753. In that case, the General Court made it clear that cases exhibiting tacit coordination but not involving structural links between the firms concerned were covered by the definition of collective dominance. "There is no reason whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly within which, in a market with the appropriate characteristics, in particular in terms of market concentrations, transparency and product homogeneity, those parties are in a position to anticipate one another's behavior and are therefore strongly encouraged to align their conduct in the market (…). In such a context, each trader is aware that highly competitive action on its part designed to increase its market share (for example a price cut) would provoke identical action by the others, so that it would derive no benefit from its initiative. All the traders would thus be affected by the reduction in price levels (…). Each undertaking may become aware of common interests and, in particular, cause prices to increase without having an agreement or resort concerted practice" (276-277).

[1172] Joined cases C-395 and 396/96 P, *Compagnie Maritime Belge Transports SA and others v Commission* [2000] ECR I-1365, at 45.

- Each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy (transparency);

- The situation of tacit coordination must be sustainable over time, meaning that there must be an incentive not to depart from the common policy on the market (possibility of retaliation) and;

- The foreseeable reaction of current and future competitors, as well as of consumers, must not jeopardise the results expected from the common policy (absence of competitive constraints).[1173]

Where those market characteristics are present, it may be assumed that the members of the oligopoly are able and incited to reach terms of coordination and to detect and punish any deviation from those terms.[1174] As a result, they may be regarded as collectively dominant in the relevant market and be subject to Article 102 TFEU if they engage into abusive conduct.

ii. Collective dominance in the grocery procurement market?

Determining whether large retail chains could be regarded as holding a collective dominant position in the upstream grocery procurement market could be the subject of another entire thesis as the concept of collective dominance is already in itself a very complex and controversial issue in competition law.[1175] Our objective is therefore only to render some possible positions in this respect and to show that, in any case, an abuse of collective dominance in the upstream buyer market by grocery retailers is very unlikely to be found.

The Commission analysed the possible existence of a collective dominant position between large retail chains in the upstream buyer market when assessing the merger case *Carrefour/Promodes*. Where one could have raised doubts about the possibility to include a collective buying dominant position into the concept of collective dominance, this case has the virtue of confirming the ability of competition authorities to control the creation or

[1173] See: T-342/99, *Airtours v Commission, op.cit.* and T-193/02, *Laurent Piau v Commission* [2005] ECR II-209, at 111. Note that those conditions were reaffirmed in the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31 of 05.02.2004, at 39-57.

[1174] R.O'Donoghue & A.J.Padilla, *op.cit.,* at 150.

[1175] An enormous body of literature has indeed developed on that matter. See for examples: R.Wish and B.Sufrin, *Oligopolistic Markets and EC Competition Law,* 12 Oxford Yearbook of European Law 59 (1992); B.J.Rodger, *Oligopolistic Market Failure: Collective Dominance versus Complex Monopoly,* 16 European Competition law Review 21 (1995); T.Soames, *An Analysis of the Principles of Concerted Practice and Collective Dominance: a Distinction without a Difference,* 17 European Competition law Review 24 (1996); G.Monti, *The Scope of Collective dominance under Article 82,* 38 Common Market law Review 131 (2001); N.Petit, *The "Oligopoly Problem" in EU Competition Law,* in Research Handbook in European Competition Law, I. Liannos and D. Geradin (eds.) (2013), available at SSRN: http://ssrn.com/abstract=1999829

strengthening, through a merger, of such a position, either in the downstream seller market or in the upstream buyer market. As the basic principles for defining collective dominance are essentially the same under Article 102 TFEU and under the Merger Regulation[1176], this therefore means that conduct of collectively dominant buyers may also be examined and sanctioned under Article 102 TFEU.

In *Carrefour/Promodes*, the Commission pointed out that, following the merger, the level of concentration would be particularly high in the French and Spanish grocery procurement market since the three leading entities would represent respectively in those countries more than 60-70% and 55-65% of the demand.[1177] However, the Commission maintained that the necessary conditions for the finding of a collective dominant position mentioned above were not met in that case because the structure and operation of the three leading purchasing centers were different; there were not structural ties between the distributors; the market positions held by the different actors had not been stable in the previous years; the procurement market was not stagnating; the products concerned were not homogeneous and; the procurement market was not transparent, in particular with regard to commercial payments and conditions.[1178]

In contrast, the Basque competition court concluded in a report on distribution of daily consumer goods that the Spanish grocery market is characterized by the existence of a collective dominant position, both in the downstream retail market and in the upstream procurement market.[1179] The report analyzes the different conditions that make an oligopoly - in this case an oligopsoly -, equivalent to a collective dominant position.

Firstly, the report points out the high level of concentration in the procurement market which is further increased by the presence of purchasing centres. Each of the three leading

[1176] It is indeed referred in dominance cases to the conditions established in merger cases. See for example: T-193/02, *Laurent Piau v Commission, op.cit*. In that case the General Court cited the *Airtours* conditions with full approval.
[1177] *Carrefour/Promodes*, Case No COMP/M.1684, Commission Decision of 25 January 2000, at 98 and 131-132.
[1178] *Ibid*., at 99. The Commission did however not rule out that, in the future, a situation of collective dominance could arise since, the market becoming more concentrated, transparency in negotiation conditions between suppliers and large retailers is likely to increase. (at 104)
[1179] Basque Competition Court, *Distribution of daily consumer goods: competition, oligopoly and tacit collusion,* April 2009, available at: http://www.ogasun.ejgv.euskadi.net/r51-14000/es/contenidos/informacion/imformes_mercados/es_infomerc/adjuntos/090519%20ESTUDIO%20DISTRIBUCION%20COMERCIAL%20ENGLISH%20VERSION.pdf On the downstream retail side, the report points out that all of the necessary conditions to facilitate collusive oligopoly are fulfilled: market concentration of large grocery retail outlets, product identity and homogeneity of services offered; price transparency and commercial discounts; ease to adapt prices to those of the competition; enormous barriers to entry; and inelasticity of aggregate demand. According to the Basque competition court, this results in price parallelism in supracompetitive levels.

companies (almost) account for 20% of the suppliers' sales.[1180] **Secondly**, the procurement market is considered to be particularly transparent. All grocery chains stock indeed identical daily consumer goods (absolute homogeneity) and significant homogeneity exists also with regard to private label products.[1181] Unlike the European Commission, the Basque competition court considers that the existence of commercial payments attests of the oligopolistic structure in the retail and procurement markets as it shows that competition in the negotiation of prices has been significantly reduced. Large retail chains are in fact aware of the advantages associated with less price competition and have therefore transferred the center of negotiations to commercial conditions. In addition, it is affirmed in the report that reduced price competition with suppliers and exclusion of brands producers to benefit private labels is feasible even if there is no absolute transparency in commercial payments.[1182] **Thirdly**, with regard to the possibility of retaliation, the Basque competition court highlights the ability of grocery retailers to engage into intense price competition through a series of price lowering negotiations with suppliers which would be reflected in lower prices in the downstream retail market.[1183] Retaliation would therefore have consequences both in the procurement market and in the retail market where large retail chains are also considered to hold an oligopolistic position. **Fourthly**, the analysis of the Spanish procurement market shows that competing retailers, suppliers or consumers are unable to counteract the collusive conduct of large retail chains.[1184]

As a result, it is concluded to the existence of a collective dominant position in the Spanish procurement market. Recognizing that such a position does not constitute an infringement of the competition rules, the Basque competition court pursues its analysis by showing that tacit collusion between large retail chains restricts competition and damage the welfare of consumers through, in particular, a reduction of competition in purchase prices and the

[1180] *Ibid.,* at 146. This is above the "threat point" established by the Commission in different merger decisions. It is considered that when a retailer's share in a supplier's turnover exceeds 22%, it is economically impossible for the latter to replace that part of its business by switching to alternative customers. See: *Rewe/Meinl,* Case No IV/M.1221, Commission Decision of 3 February 1999 and *Carrefour/Promodes*, Case No COMP/M.1684, Commission Decision of 25 January 2000. See also: Part II, Chapter I, Section II, Point B, 2.
[1181] *Ibid.,* at 149.
[1182] *Ibid.,* at 149-150.
[1183] *Ibid*., at 150. "A sales price war may influence purchase prices, also affecting the supplier's income. If a price reduction is negotiated with the company and this reduction is passed on to its retail prices, an automatic alarm will go off in its competitors, who will proceed to equal their prices. If the sales price set by the 'free rider' is lower than the purchase price of competitors with buyer power in the supply market, these will automatically force the supplier to offer them the same favourable prices as those offered to the 'free rider'."
[1184] *Ibid*., at 152. Smaller retailers are unable to engage into price wars facing large competitors. Suppliers do not have sufficient market power to reject commercial conditions demanded by large retail chains. Consumers, given their loyalty to a store, prefer to more expensive products with, for example, the retailer's own-brands, instead of switching stores.

exclusion of brands producers. On the one hand, the increase of commercial payments leads to a reduction in price competition in the procurement market and thereby to an increase in retail prices to the detriment of consumers. On the other hand, commercial payments increase economic barriers to entry, excluding weaker suppliers and reducing competition in the product market. In addition, remaining suppliers are put at a competitive disadvantage as the need to finance these commercial payments with higher transfer prices makes them less competitive against private labels.[1185]

Although the assessment of a possible collective dominant position in the grocery procurement market is worth being carried out given the oligopsolistic nature of that market, the conclusion of the Basque competition court on that matter cannot but raise questions as to its accuracy and to the probability to effectively subject such alleged collective dominance to Article 102 TFEU. One may indeed consider that concluding to the existence of a dominant collective position between retail chains constitutes too a hasty conclusion and that the enforcement of Article 102 TFEU through that concept is unrealistic.

Proving the existence of a collective dominant position based only on market interactions may turn out to be a difficult task. It is indeed much easier to prove tacit collusion where agreements lead the firms to behave as a collective entity. To date, collective dominance under Article 102 TFEU has in fact only been successfully established in cases where conduct alignment resulted from agreements between competitors. The Treaty provision on dominance has thus not yet been enforced against mere tacit collusion.[1186] In addition, whilst *ex ante* and *ex post* approaches to collective dominance are based on similar substantive grounds, the standard of proof in merger control is different from that under Article 102 TFEU. In the first case, the Commission is required to produce convincing evidence that the merger would change the market structure in such a way that tacit collusion is likely to occur. This involves a forward-looking assessment so that the object of proof is the likelihood of collusion. In the second case, the standard of proof should be higher and involve evidence of actual coordination of conduct.[1187]

Such a high standard of proof is arguably unlikely to be met in the grocery procurement market. Where the heart of the negotiations has, to some extent, shifted from prices to

[1185] *Ibid.,* at 153-154.
[1186] R.O'Donoghue & A.J.Padilla, *op.cit.*, at 151. See also:); N.Petit, *The "Oligopoly Problem" in EU Competition Law,* in Research Handbook in European Competition Law, I. Liannos and D. Geradin (eds.) (2013), at 48, available at SSRN: http://ssrn.com/abstract=1999829
[1187] M.Filippelli, *Collective dominance and collusion: Parallelism in EU and US competition law* (2013), at 113. See also: R.O'Donoghue & A.J.Padilla, *op.cit.*, at 152.

commercial payments and services, it cannot be concluded that retail chains have stopped exerting their market power to get lower prices. Obtaining the lowest possible prices remains indeed of particular importance, in particular for some products which, if priced low, can draw consumers into the retailer's stores where they are likely to buy other products. For example, popular brands, that have earned consumers' loyalty, can be used by the later to benchmark the price competitiveness of the different supermarket chains. Price competition with regard to those products may thus be relatively fierce and lead retailers to drive a hard bargain in the procurement market to lower purchase prices.[1188] The core of the negotiation is therefore likely to vary from one supplier to another and/or from one product to another. Furthermore, the grocery procurement market is far from totally transparent. Although some practices used by large retail chains increase transparency in that market, such as most-favoured-customer clauses, transactions between retailers and producers remain confidentially negotiated so that one can assume that many aspects of the retailer-supplier negotiations remain unknown to competitors. As result, and given the very large number of grocery products belonging to the assortment bought by supermarket chains and offered to consumer, coordination as regards the purchase conditions of each of those products is unlikely to be reached or, at least, to be proved.

In any case, given the difficulties and/or the reluctance already encountered with regard to the application of Article 102 TFEU to purely tacit collusion between market players emanating from an oligopolistic market structure (on the sell-side), the enforcement of that provision against possible abusive conduct resulting from a tacitly agreed course of action in a oligopsolistic market (on the buy-side) is very likely to remain a purely theoretical scenario, at least for the time being. One can therefore conclude that it is not under the concept of collective dominance that competition authorities will be able to effectively tackle the actual or potential anticompetitive use of buyer power in the grocery sector.

3. Merger Regulation

While buyer power in the grocery sector is unlikely to be tackled under Articles 101 or 102 TFEU, it may raise competition concerns and be addressed under the Merger policy. As developed above, in a few merger cases, the Commission indeed blocked a merger operation between large retail chains or subjected it to undertakings due, in particular, to the significant buyer power which the merging

[1188] Especially in countries where below-cost pricing is prohibited since the purchase price will constitute the minimum retail price in those countries.

parties would have acquired following the transaction.[1189] In *Kesko/Tuko, Rewe/Meinl* and *Carrefour/Promodes,* different arguments were put forward to establish that the merger would create or strengthen the parties' dominant position in the upstream procurement market, namely the gatekeeper position of those retail chains, the particular role of private labels, the economic dependency of suppliers and the large number of alternative producers.

One can point out that the *ex ante* competition assessment carried out in merger cases differs from the *ex post* control carried out under the Treaty provision on abuse of dominance. As the name suggests, the former precedes any possible anticompetitive conduct committed by the merged entity and does therefore not require the proof of an abuse. In addition, where mergers creating or strengthening a dominant position will be declared incompatible with the common market, the substantive test in merger control is not based exclusively on the concept of dominance. Accordingly, a merger that does not create or strengthen a dominant position in the relevant market can nevertheless be blocked by competition authorities. Under the approach endorsed in the 2004 Merger Regulation, the Commission can indeed stand in the way of any concentration which is likely to significantly impede effective competition in the common market (SIEC test).[1190] Although the creation or strengthening of a dominant position is a primary form of such competitive harm and has been the most common basis for blocking a merger, intervention may thus occur in a larger number of cases.

Despite that latter difference, it remains that, such as in the assessment of dominance, the compatibility of a merger with the common market is primarily examined on the basis of market shares and concentration levels.[1191] On that matter, the same thresholds as those used under Article 102 TFEU apply to establish the (non-)existence of a dominant market position. Accordingly, in the Guidelines of the assessment of horizontal mergers, it is considered that very large market shares (> 50%) may in themselves be evidence of the existence of dominance. Below 40%, the Commission is though very unlikely to find that the merger in question would lead to the creation or the strengthening of a dominant position, unless the strength and number of competitors is low, there are no sufficient capacity constraints and/or the products of the merging parties are close

[1189] See Part II, Chapter 1, Section II, Point B.

[1190] See : Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29/01/2004, Article 2. Under the old Merger Regulation, the assessment of the Commission was based on the "dominance test" which allowed the Commission to challenge only concentration that "creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or a substantial part of it". (Article 3(2) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, *OJ* L 395)

[1191] Guidelines on the assessment of horizontal merger, *op.cit.*, at 14.

substitutes.[1192] With regard to concentrations that do not create or strengthen a dominant position, the Commission relies upon another threshold and considers that, when the market share of the merging firms does not exceed 25%, the operation is not liable to impede effective competition and may therefore be presumed to be compatible with the common market.[1193]

However, in the three merger cases mentioned above where buyer power constituted a particular competition concern, the Commission strayed to some extent from those market share thresholds.[1194] Instead of focusing on the merging parties market shares in the upstream procurement market, the Commission rather highlighted the strong dependency of most suppliers to conclude that the merger would create a dominant position in the upstream procurement market. For example, in *Rewe/Meinl,* the Commission concluded that the merger would create a dominant position in the procurement market where the merging parties had a combined market of only 25-35% in most product markets.[1195] In *Carrefour/Promodes,* in its assessment of single dominance in the procurement market, the Commission considered that the merger could significantly impede effective competition due to a spiral where the parties' market power in the upstream and downstream markets would mutually reinforce each other.[1196] The merged entity's market share in the relevant procurement market was though not exceeding 25%.[1197] In fact, in those decisions, the Commission put a greater emphasis on the suppliers' economic dependency on the merging parties that was deemed to exist as the latter represented more than 22% of the suppliers' turnover. This was indeed the maximum share of revenues which a producer could afford to lose in those cases.[1198]

In view of these cases, it turns out that, in merger transactions involving large retail chains, the assessment of buyer power is not primarily based on the traditional market share thresholds of dominance but on the concept of economic dependence. On that basis, grocery retailers may be regarded as dominant in the procurement market even though their market shares are below 40%.

[1192] *Ibid.,* at 17.
[1193] *Ibid.,* at 18.
[1194] The three merger cases have been dealt with by the Commission before the publication of the 2004 Merger Regulation which introduced the test of "significant impediment to effective competition". Under the old Regulation on merger control (Regulation 4064/89), the test to appraise concentrations was focused on the concept of dominance. The Commission could therefore only block mergers that led to the creation or strengthening of a dominant position.
[1195] *Rewe/Meinl,* Case No IV/M.1221, *op.cit.*, at 98-117.
[1196] That spiral effect was also highlighted in the *Rewe/Meinl* case. The Commission pointed out that, because of its buyer power in the procurement market, the merged entity will be able to obtain much better purchase conditions than competitors. This will enable it to strengthen its position in the downstream retail market through lower-prices or other strategies. This in turn will further reinforce its position in the upstream procurement market, and so on. See Part II, Chapter 1, Section II, B, 2, c), ii.
[1197] *Carrefour/Promodes*, Case No COMP/M.1684, *op.cit.*, at 47-89.
[1198] On the « threat point » of 22%, see the analysis of the *Rewe/Meinl* decision above in Part II, Chapter 1, Section 2, Point B, 2, c), iii.

Such a specific approach is meant to prevent the emergence of firms that could affect competition by misusing their buyer power. In order to ensure certain coherence in the enforcement of the competition rules, the assessment of a buyer's dominance under Article 102 TFEU should, to some extent, be inspired by the criteria developed under the merger policy. This could enable competition authorities to keep a check on possible anticompetitive practices used by retail chains which have gained significant buyer power not through concentrations but through internal growth.

B. SUGGESTION OF HARMONISED CRITERIA TO ADDRESS BUYER POWER

The analysis carried out above shows that the treaty provisions fall short of addressing buyer power in the grocery industry. Only the merger rules have proved, although in few cases, to be able to tackle buyer power concerns. Despite Articles 101 and 102 TFEU being drafted so as to include anticompetitive use of market power, either on the sell-side or on the buy-side, it appears indeed that the criteria defined in the enforcement of those competition rules are ill-adapted to the specificities of buyer power. Such unsuitability could thus be resolved without affecting the cornerstone of EU competition law, namely the Treaty provisions, by defining a specific approach to be followed by competition authorities when dealing with buyer power in the grocery sector.

As many practices used by large retail chains constitute genuinely unilateral conduct, the issue to focus on would be abuses of buyer power. In order to prevent anticompetitive use of buyer power, new criteria of dominance should be defined on the buy-side of the market so as to make each supermarket chain that has sufficient buyer power to restrict or distort competition through its conduct, either by affecting prices or by reducing product quality, innovation or consumer choice, subject to supervision of competition authorities and to the competition rules. This would prevent that conduct affecting competition goes unchecked because the buyers in question do not reach the threshold of 40% market share in the upstream buyer market. Although the focus should be on abuses of buyer power, the new criteria to be defined to assess dominance should also transpire in the rules applicable to restrictive agreements. Some buyer practices may indeed be part of an arrangement with suppliers and lead to restrictive horizontal or vertical agreements

1. Harmonization of national legislation in the grocery retail sector

To make the assessment of abuse of dominance suited to buyer power cases, we would suggest EU action but working at national level through harmonization of national legislation. Different reasons may be put forward to support such a rapprochement of national legislation through the adoption of

a Directive by EU institutions. Concerning the legal basis, inspiration may be drawn from the recent proposal for a Directive on antitrust damages actions.[1199]

a) Legal basis and justification

As pointed out above in Section I[1200], the difference in legal rules on buyer power within the European Union is likely to limit cross-border trade and create unequal market conditions leading to competition distortions. A common action at EU level, through the adoption of a harmonizing instrument, to remove barriers to trade and restore a level playing field in the internal market would hence be justified.

Such a harmonizing instrument aiming at preventing anticompetitive use of buyer power by large retail chains in the grocery industry could be based on both Article 103 and 114 TFEU.

i. Article 103 TFEU

According to Article 103 TFEU, on a proposal from the Commission and after consulting the European Parliament, the Council can lay down the appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 TFEU.[1201] With regard to the issue of buyer power, we have highlighted that supermarket chains' conduct is likely to restrict or distort competition in the grocery sector and thereby to impede the achievement of the objectives of EU competition law that Articles 101 and 102 TFEU are meant to protect. These objectives would be put at risk if it was not possible to effectively enforce the Treaty provisions against abuses of buyer power in the grocery industry. In seeking to protect the competition process and consumer welfare by subjecting large retail chains

[1199] Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404 final, Strasbourg, 11/06/2013.

[1200] See, Section I of this Chapter, Point B, 1.

[1201] Article 103 TFEU reads as follows :

"1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.

2. The regulations or directives referred to in paragraph 1 shall be designed in particular:
(a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments;
(b) to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;
(c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102;
(d) to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph;
(e) to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article."

with substantial market power - that is those which hold sufficient market power to adversely affect competition through their conduct - to Article 102 TFEU, a Directive or Regulation would therefore give effect to this provision. This means that such a harmonizing instrument could be based on Article 103 TFEU.

ii. Article 114 TFEU

The aim of harmonizing national rules on buyer power in the grocery sector could be considered to be wider than giving effect to Article 102 TFEU. We have indeed pointed out that diverging legislative developments have taken place at national level within the Union resulting in uncertainties as regards the rules applicable to retailer-supplier relationships but also to inequalities. The discrepancies between national laws mean indeed that firms are exposed to different forms of repression depending on the Member State(s) they are acting in. This may result in a competitive advantage for large retail chains that are active in "favourable" Member States where no rules are provided for to address abuses of buyer power or where the legislation on that matter is not effectively enforced. Conversely, supermarkets carrying out activities in Member States where stricter rules are applicable to practices used in the grocery procurement market may be put at a competitive disadvantage. To ensure a more level playing field in the internal market, it would hence be appropriate to increase legal certainty and to reduce the differences between Member States as to the national rules governing the exercise of buyer power by large supermarket chains. It follows that the aim of pursuing undistorted competition in the internal market can be regarded as going beyond giving effect to Article 102 TFEU so that the Directive on buyer power should also be based on Article 114 TFEU. The latter provision gives the power to the EU institutions to

> "adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."

According to the interpretation given by the Court of Justice in the *Tobacco Advertising I* case, a measure may be validly adopted on the basis of Article 114 TFEU if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws or to eliminate appreciable distortions of competition.[1202] A mere finding of disparities

[1202] C-376/98, *Germany v Parliament & Council (Tobacco Advertising I)* [2000] ECR I-8417, at 86 and 106. On that case, See for examples: T.Hervey, *Up in smoke? Community (Anti) Tobacco Law and Policy*, 26 European Law Review 101 (2001); S.Weatherill, *Competence creep and competence control*, 21 Year Book of European Law 1 (2004); M.Kumm, *Constitutionalising subsidiarity in integrated markets: the case of Tobacco Regulation in the European Union*, 12 European Law Journal 503 (2006). On Article 114 TFEU as legal basis for

between national rules is hence not sufficient to recourse to that provision as a legal basis. What matters is whether the measure contributes to removing (future) obstacles to interstate trade or to removing distortions of competition.[1203]

With regard to buyer power in the European Union, if it is indeed established that discrepancies in national rules effectively raise barriers in the internal market or cause distortions of competition, a harmonizing measure could be adopted on the basis of Article 114 TFEU so as to eliminate those problems.

In addition, a Directive or Regulation defining specific criteria to address buyer practices may be regarded as giving effect to the Treaty provisions but also as introducing stricter rules on dominance at national level. With regard to Article 102 TFEU, as provided by Regulation 1/2003, a system of parallel competences empowers the EU Commission but also national competition authorities and national courts to apply Articles 101 and 102 TFEU.[1204] A harmonizing instrument establishing a framework for the treatment of abuses of buyer power in the grocery sector could hence be considered as an instrument ensuring that the prohibition under Article 102 TFEU, which concerns both abuse of seller power and abuse of buyer power, is effectively enforced by national authorities. However, one may consider that the new criteria so-defined would, to a certain extent, stray from the current principles defined in EU guidelines and case law and would, as a result, lead to the introduction of stricter rules in national laws as regards abuse of dominance. Under that perspective, the Directive in question would go beyond giving effect to Article 102 TFEU and should thus also be based on Article 114 TFEU. Such a stricter approach introduced at national level would be in line with EU law since Article 3(2) of Regulation 1/2003 provides that:

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harmonization, See also: S.Weatherill, *The limits of legislative harmonization then years after* Tobacco Advertising*: How the Court's Case Law has become "Drafting Guide",* 12 German Law Journal 827 (2011)

[1203] D.Chalmers, G.Daviers & G.Monti, *European Union Law,* 2nd ed. (2010), at 690. It is acceptable to prevent obstacles arising rather than removing existing barriers but those future obstacles must be likely. See: C-58/08, *Vodafone, O2 and others v. Secretary of State* [2010] ECR I-4999, at 32-33.

[1204] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty(Text with EEA relevance), O.J. L 1/1 of 04/01/2003, Article 3(1). National courts can apply Articles 101 and 102 TFEU without it being necessary to apply national competition law in parallel. However, where national authorities apply national competition law to agreements, decisions or practices which may affect trade between EU countries within the meaning of Article 101(1) TFEU or to any abuse prohibited by Article 102 TFEU, they also have to apply EU competition rules to those practices. Cooperation between national authorities and the Commission is governed by the Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, *JO* C 101 of 27/04/2004 and the Commission Notice on cooperation within the Network of Competition Authorities *OJ* C 101 of 27/04/2004.

> "Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings".

The aim and the content of the suggested harmonizing instrument on grocery retailers' buyer power should therefore lead the European institutions to base the adoption of that instrument on both Articles 103 and 114 TFEU.

iii. Principle of subsidiarity [1205]

Harmonization of the rules on buyer power would be in line with the subsidiarity principle since the objective to eliminate obstacles and to prevent competition distortions in the internal market could not sufficiently be achieved by the Member States. A legally binding act at EU level would be better capable of ensuring that full effect is given to Articles 101 and 102 TFEU and that a more level playing field is established in the European Union.[1206]

Most Member States do not provide, on their own initiative, for effective measures to prevent anticompetitive use of buyer power in the grocery sector. Incentives at European level are therefore needed to tackle that issue. In addition, the cross-border dimension of the competition rules and their intrinsic link to the functioning of the internal market would also justify action at the EU level.

b) The most appropriate legally binding instrument: Regulation versus Directive

A legally binding instrument applicable to the grocery sector is needed to address potential anticompetitive practices used by large retail chains in that sector. As mentioned above, most Member States do not provide for an effective competition law framework to address abuses of

[1205] The principle of subsidiarity is set out in Article 5 (3) TEU: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States (…) but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level." See also: Protocol No 2 on the application of the principles of subsidiarity and proportionality, OJ C 83/06 of 30/03/2010. On that principle, see, for example: G.Barett, *Monti II: The Subsidiarity Review Process Comes of Age...Or Then Again Maybe It Doesn't,* 19 Maastricht Journal of European and Comparative Law 595 (2012); J.-P.Jacqué, *Droit institutionnel de l'Union européenne,* 7th ed. (2012), at 173-183; K.Lenaerts & P.Van Nuffel, *European Union Law* (2011), at 131-140; P.Kiiver, *The Treaty of Lisbon, the National Parliaments and the Principle of Subsidiarity,* 15 Maastricht Journal of European and Comparative Law 77 (2008); I.Cooper, *The watchdogs of subsidiarity: national parliaments and the logic of arguing in the EU,* 44 Journal of Common Market Studies 281 (2006).

[1206] See the arguments put forward in the proposal for a Directive on private damages for justifying compliance with the subsidiarity principle: Proposal for a Directive on certain rules governing actions for damages, *op.cit.,* at 3.2.

buyer power or fail to effectively enforce it. Given that lack of self-initiative from the side of Member States, it appears that only action at EU level can create a common legal framework to protect competition in the grocery sector.

Before addressing the issue of which types of legally binding instrument could be adopted to harmonize national legislation of the Member states, a few words can be said about two other ways of intiating the use of a specific approach to handle buyer power cases in EU competition law and about the reasons we do not give preference to those alternatives.

Firstly, we can mention the ruling of the European Court of Justice that might impose a new interpretation to be given to the concepts of market power in buyer power cases and strengthen the assessment of buyers' conduct. The case law of the European Court of Justice is indeed binding and might therefore lead to the implementation of a common approach within the European Union as regards buyer power cases. However, should a case involving buyer power issues reach the European Court of Justice, which would require first the Commission to investigate and make a decision on such a case, a real consideration by the European judge of the specificites of buyer power as needed to prevent harmful buyer conduct on the markets is unlikely due, in particular, to the difficulty in changing a well-established case law on market power as the one defined in seller power cases.

Secondly, one could argue that a "softer" way of redefining the criteria to be applied in buyer power cases would be to introduce a specific definition of buyer power in the Guidelines of the Commission. Although adopting such a soft law instrument would probably be, to some extent, easier as this would avoid passing through a likely delicate law-making process needed to adopt a legally binding instrument, it is important to mention that Guidelines are not binding, either for the European Court of Justice or for national authorities. There would therefore be no absolute certainty about how the specificites of buyer power would be taken into consideration in practice. In addition, it is unlikely that national authorities apply the principles and criteria defined in the Commission Guidelines before that a case was dealt with at EU level according to those new principles and critiera and maybe even confirmed by the European judge. Given what was mentioned above, that is that one can hardly expect a radical change in the case law of the European Court of Justice, we would therefore opt for the adoption of a binding instrument.

Common rules can be introduced through the adoption of a Regulation or a Directive.[1207] The former constitutes the most centralizing instrument and ensure complete uniformity across the European Union on a specific issue. Regulations do not need to be transposed in national law so that they

[1207] On the types of legislative act in EU law, See: D.Chalmers and others, *op.cit.,* at 98-99; J.-P.Jacqué, *Droit institutionnel de l'Union européenne,* 7th ed. (2012), at 546-552.

automatically form part of the national legal order of each Member State. The adoption of a Regulation on buyer power in the grocery retail sector would therefore ensure all market participants are subject to the same rules and prevent Member States from adopting implementing measures as these might contain variations which would affect the uniform application of the Regulation.

Directives are binding as to the result to be achieved but national authorities are left the choice of the form and methods to be used to implement it and achieve the prescribed result.[1208] When adopting measures implementing a Directive in their national legislation, Member States are therefore given some discretion to take into account specific national circumstances.

Given those differences between Regulations and Directives, we consider that a Directive would constitute the most appropriate legally binding instrument to harmonize national rules on buyer power in the European Union. The choice of a Directive instead of a Regulation ensures indeed certain flexibility by giving national authorities some leeway to implement it in the way they find best for their own situation. This means that the concepts, criteria and rules that would be established in the Directive could be transposed by taking into consideration the specificities of the grocery market in each Member State. We have pointed out that supermarkets' buyer power may vary from one Member State to another due, for example, to a different level of concentration or to a different degree of private label penetration. By allowing Member States to choose the means, within a common framework, for preventing and sanctioning abuses of buyer power in the grocery industry, those differences existing between Member States could hence be taken into consideration. The criteria to be used when enforcing the rules could be adapted to the relevant market characteristics so as to make sure that only firms with substantial market power and in a position to restrict competition could be liable under the competition rules if they abuse their position.

In addition, the choice of a Directive could be considered more in line with the proportionality principle set out in Article 5(4) TEU which requires that the content and form of Union action does not exceed what is necessary to achieve the objectives of the Treaties.[1209]

c) Minimum versus full harmonization

When harmonizing measures are taken pursuant Article 114 TFEU in the context of the completion of the internal market, the European institutions are free to choose between minimum and full

[1208] D.Chalmers and others, *op.cit.,* at 99.

[1209] On the proportionality principle, see, for example: K.Lenaerts & P.Van Nuffel, *op.cit.,* at 141-147; T.Tridimas, *The General Principles of EU Law* (2007), Chapters 3-5; T.I.Harbo, *The function of the proportionality principle in EU Law,* 16 European Law Journal 158 (2010); G.de Burca, *The principle of proportionality and its application in EC law,* 13 Yearbook of European Law 105 (1998).

harmonisation.[1210] With regard to Article 103 TFEU as a legal basis, nothing precludes either the European Union from opting for full harmonization.[1211]

Minimum harmonization introduces a minimum standard but leaves Member States free to adopt stricter rules. The impact of legal differences is in fact not eliminated, but only reduced.[1212] Market participants might hence still face different rules depending on the Member State they are acting in. By contrast, legislative measures taken on the basis of full harmonization prevent Member States from maintaining or introducing more or less stringent provisions than those provided for in the harmonizing instrument. Full harmonization therefore creates a level playing field for all market participants in the European Union.

With regard to a Directive harmonizing the rules on buyer power, we would suggest to follow the full harmonization approach as this would be the only mean to remove legal uncertainty on that matter and eliminate competition distortions.[1213] Such an approach would in fact create an exception in the grocery retail sector to the principle set out in Article 3(2), *in fine* of Regulation 1/2003.[1214] The latter provides indeed that Member States are allowed to adopt and apply on their territory stricter national rules which prohibit or sanction unilateral conduct engaged in by undertakings. Full harmonization of national laws concerning the use of buyer power in the grocery retail industry

[1210] See: C-183/00, *Maria Victoria Gonzalez Sanchez v Medicina Asturiana SA* [2002] ECR I-3901, at 25. See also: M.B.M.Loos, *Full harmonization as a regulatory concept and its consequences for the national legal orders. The example of the Consumer rights directive,* Centre for the Study of European Contract Law, Working Paper Series No 2010/03, at 4, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1639436; P.Rott, Minimum harmonization for the completion of the internal market? The example of consumer sales law, 40 Common Market Law Review 1130 (2003). On the differing degree of harmonization, see, for example: S.R.Weatherill, *Maximum versus minimum harmonization: choosing between unity and diversity in the search of the soul of the internal market,* in From single market to economic Union*,* Nic Shuibhne & Gormley (eds) (2012), at 175-201; J.Stuyck, *Harmonisatieniveau,* 84 Consumentenrecht/Droit de la Consommation 7 (2010); S.R.Weatherill, *Supply of and demand for internal market regulation: strategies, preferences and interpretation,* in Regulating the Internal Market, Nic Shuibhne (ed) (2006), at 29-60.

[1211] In some policy areas, measures adopted by the European Union can only be based on minimum harmonization. See for example: Article 169 (4) TFEU concerning consumer protection. This explains why the internal market dimension is sometimes emphasized in the proposals of the Commission so as to use Article 114 TFEU as a legal basis instead of Article 169 TFEU. See: M.B.M.Loos, *Full harmonization as a regulatory concept…, op.cit.,* at 4.

[1212] D.Chalmers, G.Davies & G.Monti, *op.cit.,* at 701.

[1213] See *Contra,* M.Faure, Towards a maximum harmonization of consumer contract law?!?, 15 Maastricht Journal of European and Competition Law 433 (2008). The author criticizes the use of full harmonization, in particular in the domain of consumer contract law. "The mere fact that legal rules differ between Member States is, from an economic perspective, not problematic but rather desirable. The advantage of different legal rules is that legislators can provide rules that correspond to the preferences of citizens and that learning processes can take place. In some cases, legislators can learn from (in some cases superior) alternatives abroad to improve national legislation." (at 437) According to M.Faure, the costs of doing business for industry result less from the differences in contractual rights across the Union than from the differences in language, culture and tax level. (at 439)

[1214] Council Regulation (EC) No 1/2003, *op.cit*.

would therefore preclude Member States from enacting rules different from those prescribed in the suggested Directive.

2. Empowering national competition authorities to address buyer power

A harmonizing instrument, such as a directive, would force Member States to take suitable measures to prevent grocery retail chains from using practices that, for example, have effects on competition within their territory or are implemented or originate from their territory. This would stress the essential role which national authorities have to play in the supervision of retailers' conduct in the grocery procurement market. Member States' authorities may indeed be regarded as better placed to gather evidence and/or to bring an infringement to an end and/or to sanction it adequately.

In practice, the Directive would impose on Member States to give their national competition authority the power to pursue and sanction anticompetitive conduct committed by dominant buyer retailers in the grocery sector by applying specific criteria suited to buyer power cases. Once implemented, these specific criteria would be part of the Member States' national competition law and applied by competition authorities or national courts to practices which may affect trade between Member States.

As underlined above, competition authorities are undoubtedly better placed to ensure compliance with the rules on buyer power. They are indeed independent, solving to some extent the "fear factor" problem, and are supposed to have at their disposal effective and appropriate means of enforcement and powers to impose severe sanctions on infringing firms. In order to comply with the obligations resulting from the suggested Directive, Member States would have to give national competition authorities the power and the means to scrutinize retail chains' conduct so as to prevent anticompetitive practices in the grocery procurement market. In order to achieve that objective, national implementing measures would have to be issued by the Member States.

3. Revised criteria applicable to abuses of buyer power

To address adequately grocery retailers' buyer power, specific criteria should be defined for each step making up the traditional assessment of dominance. Accordingly, the common framework introduced in the Member States should include: guiding principles to define the relevant procurement market; criteria to measure the degree of buyer power and assess the ability of a retail chain to affect competition and; specifications about abuses of buyer power.

a) *Relevant procurement market*

The definition of the relevant market is of crucial importance in the competition assessment as the degree of a firm's market power depends on the boundaries of the market in product and geographical terms.[1215] The objective of defining a market is to identify the competitive constraints that face the firms involved so as to make it possible the assessment of dominance in the second step of the competition assessment.

The Commission Notice on the definition of the relevant market focuses on the seller's side. The relevant product market is defined as one that

> "comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and intended use".[1216]

With regard to the relevant geographic market, the Commission defines it as

> "the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas".[1217]

However, the Notice falls short of providing guidance as regards the process of market definition on the buyer's side of the market.

Some indications on how to define the relevant upstream market are nevertheless given in the three merger decisions already mentioned above, namely *Kesko/Tuko, Rewe/Meinl* and *Carrefour/Promodes.* With regard to the relevant product market, the critical factors are the suppliers' flexibility in producing another product and the alternative sales channels open to them. The concept of substitutability is indeed an essential concept for defining the relevant market. Whilst on the seller's side demand substitution constitutes the most immediate and effective competitive constraint[1218], on the buyer's side the market definition process concentrates on supply substitution. Accordingly, the market definition process focuses on the ability of suppliers to find alternative

[1215] I.Kokkoris, *Buyer Power Assessment in Competition Law : A Boon or a Menace ?,* 29 World Competition 139, at 145 (2006)
[1216] Commission notice on the definition of the relevant market for the purposes of Community competition law, O.J. C372 of 09/12/1997, at 7.
[1217] *Ibid.,* at 8. On market power on the seller's side, see: I.Kokkoris, *The Concept of Market Definition and the SSNIP test in the Merger Appraisal,* 26 European Competition law Review 209 (2005).
[1218] The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. Those substitutes which constrain the ability of a firm to raise prices or reduce output are included in the relevant market;

buyers. In the grocery sector, this depends on whether suppliers view grocery retailers and other outlets, such as specialized shops, cash-and-carry shops, delicatessens or drugstores, as reasonably interchangeable distribution channels for their products.[1219] In the merger cases mentioned above, the Commission considered that the retailing trade was by far the most important sales channel for most grocery products and that turning to other supply avenues would require considerable investment and adaptation.[1220] The number of alternatives available to suppliers also depends on their ability to switch their production to another product. Supply substitutes may indeed be considered an effective competitive constraint where suppliers are able to switch their production to those products in a short period of time without incurring significant additional costs or risks.[1221] The flexibility in changing the type of products manufactured is though very limited in the grocery industry. Finding alternative buyers would, in addition, require a radical change in the suppliers' production since producers will face the same limit as regards the availability of alternative distribution channels for all grocery products.

With regard to the geographic market, the relevant question is in what geographic areas manufacturers can supply their products. If distant outlets may be regarded as reasonable substitutes, they should be regarded as part of the relevant geographic market.[1222] Transportation costs as well as timing issues are of particular importance when defining the geographic market. In the grocery sector, due, in particular, to consumer preferences for national products and to the convenience and necessity for suppliers to have a production on the national territory, the Commission defined the relevant geographic market as national.[1223]

[1219] Professors Blair and Harrison refer to the availability of competing uses for the seller's output. The number of possible uses determines the ability of sellers to switch to other buyers. They point out that "the availability of reasonably substitutable uses decreases the likelihood that any one buyer can force prices down and maintain them below a competitive market level". See: R.D.Blair & J.L.Harrison, *Monopsony in Law and Economics* (2010), at 62.

[1220] *Rewe/Meinl,* Case No IV/M.1221, *op.cit.*, at 79 and *Carrefour/Promodes,* Case No COMP/M.1984, *op.cit.*, at 15.

[1221] I.Kokkoris, *Buyer Power Assessment in Competition Law, op.cit.,* at 147.

[1222] R.D.Blair & J.L.Harrison, *op.cit.,* at 62.

[1223] See: *Rewe/Meinl,* Case No IV/M.1221, *op.cit.,* at 83, 85 and 86 and *Carrefour/Promodes,* Case No COMP/M.1984, *op.cit.,* at 29 and 30. The Commission pointed out that consumer demand for national products is generally higher. Even for international branded goods, the procurement is effected almost exclusively through national establishments because the content of the products in question often vary from one country to another according to consumer preferences. Supplying abroad may, in addition, be difficult due to the perishability of some products but also to red tape, formal declaration and packaging. The Commission also considered that services required by retailers, such as shelf maintenance and market research, could only be provided through a presence on the national territory.

Interchangeability or substitutability can be measured by using a test equivalent to the SSNIP test (Small but Significant Non-transitory Increase in Price)[1224], namely the SSNDP test (Small but Significant Non-transitory Decrease in Price). Under that test, the question would be whether producers would switch to readily available substitutes or to buyers located elsewhere in response to a hypothetical small (in the range 5 % to 10 %) but permanent relative price decrease in the products and areas being considered, so as the price reduction to be unprofitable for the buyer. If substitution were enough to make the price decrease unprofitable because of the resulting loss of supply sources, additional buyers or geographic areas are added to the relevant market. This process continues until a set of buyers and geographic areas is such that small, permanent decreases in relative prices would be accepted by the suppliers and thus would be profitable.[1225]

Defining correctly the relevant market is essential in competition cases. The level of the market shares is indeed the primary factor to be taken into consideration when assessing firms' market power and, in particular, the existence of a dominant position. Market shares yet depend on how the market is defined. The narrower the market definition the higher the market share(s) of the firm(s) involved in that market and *vice versa*.[1226] However, within the relevant market, other factors are also likely to significantly influence the market position of a firm. This is all the more true in buyer power cases where the market share of the buyers involved in the procurement market does not always reflect the real degree of the latter's market power in that market.

b) Dominance

Once the relevant market has been correctly defined, competition authorities have to measure the degree of market power of the retail chain concerned in order to determine whether the latter is or not in a dominant position. Whereas, on the sell-side, the firm's market share is the prime indicator of market power, the criteria to be used in buyer power cases should rather focus on the state of

[1224] The SSNIP test is used to define the relevant market in seller power cases. The test is explained in the Commission Notice on the relevant market as follows: "The question to be answered is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5 % to 10 %) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the set of products and geographical areas is such that small, permanent increases in relative prices would be profitable". (at 17)

[1225] I.Kokkoris, *Buyer Power Assessment in Competition Law, op.cit.,* at 147. The author adds that "care must be taken in applying the SSNDP test to assess the buyer power of a firm, because the "starting price" may have been determined in the absence of competition and hence may be below the competitive level (Cellophane fallacy)". On that issue, see: OFT, *The role of market definition in monopoly and dominance inquiries,* Economic Discussion Paper 2, A Report prepared for the Office of Fair Trading by National Economic Research Associates, July 2001, available at: http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft342.pdf

[1226] R.D.Blair & J.L.Harrison, *op.cit.,* at 61. As a result, plaintiffs typically argue for a narrow market definition while defendants argue for a broad definition.

dependency of suppliers and on the existence and degree of competitive constraint exerted on the buyer. Extending the approach developed in seller power cases to buyer power cases by focusing on market shares as a measure of market power is indeed likely to result in incorrect conclusion as regards the ability of the buyer to prevent effective competition from being maintained on the relevant market, especially in the grocery sector.

The definition of buyer power relies mainly on the concept of economic dependence. The issue of significant market power or dominance on the buy-side should therefore be assessed under that concept. In this respect, a supplier is regarded as dependent on a grocery chain when the latter represents a large share of its turnover and that no equivalent alternative is available. Those two aspects are in fact interdependent. Producers are less likely to be affected by the loss of a large customer if they have switching possibilities so as to make up for the loss of sales accounted for by that customer. On the other hand, the lack of alternatives is unlikely to lead to a situation of economic dependency if the lost customer represented only a tiny part of the producer's business. It is obvious that the larger the share accounted for by a buyer the higher the risk no to find equivalent or sufficient alternatives to replace that customer. The share of a producer's turnover accounted for by a retail chain constitutes a risk rate or threat rate if above that share the viability of the producer would be threatened should the retail chain in question switch to other suppliers.[1227] In these circumstances, and provided that no alternative buyers are available, it can be concluded that the producer concerned is economically dependent on its customer. [1228]

It is difficult to determine what proportion of turnover with a given customer could not be switched to other sales channels without difficulty. However, this may be estimated in each case by asking suppliers the figure above which a customer can be replaced only at the cost of very heavy financial losses, if at all, as it was done for example in the *Rewe/Meinl* merger case.[1229]

[1227] P.Këllezi, *Abuse below the Threshold of Dominance? Market Power, market Dominance, and Abuse of Economic Dependence,* in *Abuse of Dominant position, new Interpretation, New Enforcement Mechanism?,* M.-O.Mackenrodt, B.Conde Gallego & S.Enchelmaier (eds) (2008), at 70.

[1228] The ability of suppliers to find alternatives depends on the elasticity of supply and the demand elasticity. The former refers to the extent that suppliers can switch production facilities from one product to another and the latter refers to their ability to find new customers. "The ability of sellers to vary output in the monopsony context is analogous to the ability of consumers to shift their demand in the monopoly context. Similarly, the capacity of sellers to find new customers in the monopsony context is analogous to the ability of buyers to turn to new sources of supply in the monopoly context". See: R.D.Blair & J.L.Harrison, *op.cit.,* at 64. With regard to manufacturers of grocery products, moving into another industry would be difficult as converting their plant to new uses would entail high costs and risks. In addition, besides the few big supermarket chains active in each Member States, other buyers are unlikely to significantly increase their purchases.

[1229] In that case, it transpired that a producer behaving in a economically realistic manner cannot withstand turnover reductions of 22%. See: *Rewe/Meinl,* Case No IV/M.1221, *op.cit.*, at 101.

In addition, the state of dependency of grocery suppliers is also to be assessed with regard to the popularity of the retail chain and the importance of its market shares in the downstream retail market. Supermarket chains accounting for a large share of the retail market and arousing high consumer loyalty play indeed a role of gatekeeper so that they become unavoidable trading partners for most grocery suppliers. Each of those customers is indispensable to reach consumers on a large scale. The "gatekeeper effect" depends on retailers' market share in the downstream retail market but may arise even if none of those retailers detain a dominant position in that market. It may be considered that a part of 20-30% of the market is sufficient to create such an effect.

The unavoidable character of large supermarket chains is due to the importance of the grocery-retailing trade. Although producers may diversify their distribution channels, the grocery-retailing trade is indeed by far the most important sales avenue for most product categories and is hence not interchangeable with any other. The concentration of the sales in large retail chains is therefore not a deliberate choice but rather a necessity that has to be taken into consideration by competition authorities.[1230]

Where the concept of dependency should be the primary factor to be assessed in buyer power cases, the traditional criteria used in seller power cases cannot yet be disregarded.[1231] They can in practice be included in the assessment of suppliers' dependency. Firstly, the market position of the retail chain concerned and of its competitors in the upstream buyer market and in the downstream seller market provide information on the number of (equivalent) alternatives available for producers and on the existence of a possible gatekeeper function performed by those market participants. Secondly, with regard to competitive constraints exerted by (potential) rival retailers, particular attention should be drawn on barriers to entry and expansion in the grocery sector. These may indeed be various and numerous, ranging from legal or administrative barriers to economic barriers, and make timely entry or expansion of a sufficient magnitude in that industry difficult. Thirdly, on the buy-side, possible competitive constraints exerted by suppliers have to be examined.[1232] Some

[1230] The reasons why a supplier's sales are mostly concentrated in a particular retailer are also taken into consideration in France to assess the existence of a state of economic dependency. The French Competition authority use four criteria in its assessment: Firstly, the popularity of the retail chain and the importance of its market shares in the downstream market; Secondly, the share of the retailer's purchases in the supplier turnover; Thirdly, the reasons why the supplier's sales are mostly concentrated in the retailer, namely whether it is a deliberate choice based on a commercial strategy or whether the supplier could not but deal mainly with that customer; and Fourthly, the existence of equivalent alternatives for the supplier. See: Part II, Chapter 2, Section I, Point C, 2.

[1231] On the approach generally followed to assessed the degree of competitive constraint in the relevant market, see : Guidance on its enforcement priorities in applying Article 82 of the Treaty, *op.cit.,* p.7. See also: Part I, Chapter 1, Section I, Point A, 1.

[1232] On the sell-side, competition authorities take into consideration competitive constraints exerted by the firm's customers. Buyers' countervailing power may indeed be used to stimulate competition among sellers

producers may be in a position to exert countervailing power and prevent retail chains from exploiting their buyer power. That factor must therefore be taken into consideration by competition authorities. The lack of alternatives is, however, likely to limit the leeway of manufacturers, even of large processing companies, reducing thereby significantly their market power. Furthermore, countervailing seller power may not be found to sufficiently off-set retail chains' buyer power if it only ensures that a particular or limited segment of producers is shielded from that buyer power.[1233] Where the competitive constraint exerted by some producers is unlikely to be of a sufficient magnitude to deter large retailers from exploiting their buyer power, it is nonetheless an element to be examined in the competition assessment.

At the end of the assessment, if it is concluded that most suppliers are dependent on a particular retail chain and that no competitive constraint is likely to deter the latter from exploiting its market power in the procurement market, it should be considered that the retailer in question holds a dominant position in that market. One particularity of such an approach in buyer power cases would be that suppliers could be dependent on more than one supermarket chain. As a result, the prohibition on abusive buyer conduct in the grocery sector would be applicable to all firms that are likely to affect competition through their conduct in a given market.

Unlike in seller power cases where customers' economic dependency is regarded as a consequence of the dominant position of the selling firm concerned, the dependency of suppliers on large retail chains is to be considered a source of dominance in buyer power cases. Such a state of dependency is therefore not highlighted to merely confirm the finding of a dominant position on basis of the traditional analysis of the firm's market share but, rather, constitutes an essential factor in the dominance assessment that can lead competition authorities to conclude to the existence of a dominant position in the grocery procurement market despite the relatively low market share of the buyer's involved. As a result, competition authorities would be entitled to effectively supervise conduct of firms that have the power to influence the market conditions and sanction them if they use methods different from competition on the merits. The ability of large retail chains to influence the market conditions and affect competition depends indeed more on the state of dependency of their suppliers than on the level of their market shares.

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and constraint a selling firm's competitive behavior. See: Guidance on its enforcement priorities in applying Article 82 of the Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24/02/2009, at 18.

[1233] See, by analogy on the sell-side : Guidance on its enforcement priorities in applying Article 82 of the Treaty, *op.cit.,* at 18. "If countervailing power is of a sufficient magnitude, it may deter or defeat an attempt by the undertaking to profitably increase prices. Buyer power may not, however, be considered a sufficiently effective constraint if it only ensures that a particular or limited segment of customers is shielded from the market power of the dominant undertaking".

c) Abuses

i. General definition

In seller power cases, an abuse has been defined as conduct of firm

> "which, through recourse to methods different from those governing normal competition in products or services on the basis of transaction of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition".[1234]

Any conduct which restricts competition and cannot be regarded as legitimate competition or competition on the merits based on quality and price must hence be considered an abuse under this definition.[1235] It has also been suggested that a dominant firm has a special responsibility towards the competitive process "not to allow its conduct to impair genuine undistorted competition on the common market".[1236]

The same approach should be followed in buyer power cases. Any conduct that is likely to distort or restrict competition should be prohibited, provided it is committed by a retail chain in a dominant position under the criteria defined above. Some examples of abusive practices could be given to illustrate the way market power may be abused in the upstream buyer market. However, no *per se* prohibition should be established. Whereas enacting a list of abusive practices offers some advantages in terms of predictability, it also shows drawbacks. On the one hand, prohibiting *per se* some practices may lead to a false positive that is to an incorrect conclusion that procompetitive behaviour is abusive.[1237] As the likely positive or negative effects of buyer power depend on the circumstances of the case, buyer conduct should be addressed on a case-by-case basis in order to determine its actual or potential impact on competition. On the other hand, establishing a close-list of abuses in the grocery sector would exclude any adaptability and flexibility in the enforcement of the rules while buyer practices may in fact evolve and change. This may results in retailers circumventing the rules by using practices that are not as such prohibited but which cause similar negative effects on competition. Therefore, it would be recommended to introduce a general

[1234] Case 85/76, *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461, at 91.
[1235] R.O'Donoghue & A.J.Padilla, *op.cit.,* at 175. See also: *ECS/AKZO*, Case IV/30.698, Commission Decision of 14 December 1985, upheld on appeal in Case C-62/86, *AKZO Chemie BV v Commission* [1991] ECR I-3359. The Commission made it clear in that case that nothing prevents a dominant firm from competing on the merits.
[1236] See : Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] ECR 3461, at 10.
[1237] R.Wish & D.Bailey, *Competition Law,* Seventh edition (2012), at 193. Conversely, a false negative occurs where it is incorrectly concluded that anticompetitive conduct is not illegal.

prohibition on abusive conduct that could include various practices depending on their effects on competition.

ii. Exploitative / exclusionary abuse

Two types of abuses may be distinguished: exploitative abuses and exclusionary abuses. By analogy with the definition given in seller power cases, exploitative abuses are practices which consist in extracting concession from suppliers that could not have been obtained by a non-dominant firm or to take advantage of suppliers in some other way. Excessively low pricing is an obvious example but a large number of abusive practices may fall in that category.[1238] Although exploitative buyer conduct aims at abusing suppliers and not as such consumers, it may nevertheless result in consumer harm. For example, excessive payments required by large supermarket chains may discourage producers from investing and thereby lead to lower quality products. In addition, those payments may force producers to increase transfer prices and cause a price rise at the retail level to the detriment of consumers. We have also mentioned practices used to weaken branded products and increase the share of private labels which, consequently, affect consumer choice.

Exclusionary abuses concern strategic acts directed against competitors which limit their ability to compete on an equal playing field.[1239] Exclusion of rivals through practices which are not related to pricing or quality must be considered abusive because it reduces competitive constraints and reinforces the firm's position without bringing any benefit to consumers. Among possible exclusionary practices in the grocery sector, we can for example mention exclusive dealing, incitement to boycott new retailers or reprisal abuses which consist in punishing a supplier for dealing with or offering better conditions to a rival retailer.[1240] Abusive conduct may also involve situations in which a dominant firm affects the ability of grocery manufacturers to compete with private label products. To some extent, retail chains indeed compete with brands producers through their own-brands. They can therefore exert their buyer power to get illegitimate competitive advantages and thereby promote private labels to the detriment of competing branded products. We can for example mention the use of sensitive confidential information about the launch or promotion of (new) branded products so as to adapt the marketing of private label lines accordingly or even to

[1238] On exploitative abuses on the sell-side, see : R.O'Donoghue & A.J.Padilla, *op.cit.*, at 174. "Exploitative abuses are pricing and other practices that result in a direct loss of consumer welfare. In economic terms, the dominant firm takes advantage of its market power to extract 'rents' from consumers that could not have been obtained by a non-dominant firm or to take advantage of consumers in some other way".
[1239] R.O'Donoghue & A.J.Padilla, *op.cit.*, at 175.
[1240] On examples of reprisal abuses on the sell-side, see : *Chiquita,* Case No IV/26699, Commission Decision of 17 December 1975, confirmed by the Court of Justice in Case 27/76, *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207 and *BBI/Boosey & Hawkes – Interim measures,* Commission Decision of 29 July 1987.

bypass the introduction of those branded products by giving priority to the launch of similar private label products developed on the basis of the information obtained. Exclusionary practices may thus be directed against rival retailers but also against brands manufacturers.

iii. Hub-and-spoke conspiracy under Article 102 TFEU

In addition, the concept of abuse should also include incitement to collude. It was indeed highlighted above that large retail chains are able to orchestrate coordination either between suppliers or with competing retailers (hub & spoke conspiracies).[1241] Whilst A-B-C arrangements are generally sanctioned under the provisions on restrictive agreements, specific emphasis should be drawn on the initiator of such practices when the latter holds a dominant position in the relevant market by enforcing, in addition, the rules on abusive conduct.

iv. Dominant position and abuse in different markets

It is worth mentioning that the dominant position and the abusive conduct must not necessarily exist in the same market. It has indeed been maintained in seller power cases that

> "Certain conduct on markets other than the dominated market and having effects either on the dominated markets or on the non-dominated markets themselves can be categorized as abusive".[1242]

In fact, the prohibition on abusive conduct occurring on a market distinct from, but nevertheless associated with, the dominated market can be justified by special circumstances such as where a firm uses means other than reliance on its own merits in order to weaken competition in one of these markets and thereby strengthen its market position.[1243]

[1241] A supermarket chain may for example convince suppliers not to deal with a competing retailer and give each of these supplier assurances that their rivals would not cheat on that arrangement. This results in an anticompetitive horizontal agreement between suppliers but initiated under the pressure of a powerful retailer. On the other hand, suppliers can be used as intermediaries to discipline competing retailers and implement a common policy at the retail level. On the different possible A-B-C agreements, see, above, Chapter 1, Section II, Point C.

[1242] C-52/09, *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR, I-0527, at 85. See also: C-333/94 P, *Tetra Pak International SA v Commission* [1996] ECR I-5951, at 25.

[1243] C-52/09, *Konkurrensverket v TeliaSonera Sverige AB, op.cit.,* at 86. The Court held that "while the application of Article 102 TFEU presupposes a link between the dominant position and the alleged abusive conduct, which is normally not present where conduct on a market distinct from the dominated market produces effects on that distinct market, the fact remains that in the case of distinct, but associated, markets, the application of Article 102 TFEU to conduct found on the associated, non-dominated, market and having effects on that associated market can be justified by special circumstances".

In the grocery sector, different situations involving two markets, namely the upstream buyer dominant market and the downstream seller non-dominant market, may occur.[1244] In each of these situations, it is thus assumed that the retail chain concerned is in a dominant position in the procurement market under the criteria described above.

The first situation is where the abusive conduct takes place on the dominant upstream market but lead to negative effects on the downstream retail market in which the retail chain in question is not dominant. In most Member States, the largest supermarket chains are not in a dominant position in the retail market under the criteria used in seller power cases. None of them indeed holds a market share of more than 30% while dominance is unlikely to be found below 40%. Among possible abuses committed in the upstream procurement market, we can for example mention the delisting of branded products by a dominant buyer whose intention is to strengthen the position of its own-brands in the downstream retail market. Arrangements restricting suppliers' freedom to deal with other buyers also aim at limiting competition in the downstream retail market as the rival buyers concerned will not be able to compete effectively in that latter market with regard to some product categories.

The second situation is where the abuse is committed on the non-dominant retail market but has the effect of strengthening the retailer's position in the upstream dominant market. For example, a retailer may decide to unfavourably place a particular branded product on the shelves or to raise the price of that product in order to put it in a weaker position. This would result in reinforcing the bargaining strength of the retailer in question in the upstream procurement market. On the one hand, by weakening branded products, the retailer may increase the demand for private labels and thereby create new alternatives in the procurement market. Since the degree of buyer power is closely related to the ability of buyers to switch to alternative producers, this would hence strengthen the position of the dominant retailer in that market. On the other hand, the sales of the branded product concerned are likely to drop due to the competitive disadvantages faced by the producer in the retail market, despite the latter's possible efforts to meet consumer demand. Consequently, the retailer would be in a stronger position to extract additional concessions from that producer, invoking the poor sales results of its products.

[1244] The different situations where abusive conduct and dominance occur in different markets are described by O'Donoghue and Padilla with reference to EU case law on that matter in seller power cases. We take inspiration from the analysis made by the authors to provide examples of abuses in the grocery sector involving different markets. See: R.O'Donoghue & A.J.Padilla, *op.cit.,* at 211-212.

The third situation is where the abuse takes place in the downstream retail market and aims at reinforcing the retailer's position in that market. In such a case, it would be essential to show that the retailer's dominant position in the upstream buyer market allows it to exploit the links between that market and the downstream non-dominant retail market so as to use its dominance to commit an abuse in the latter market. To put it in other words, there would be no basis for finding abusive conduct if dominance and the abuse take place in different and unrelated markets.[1245] The Court of Justice held on that matter that:

> "It is true that application of Article [102] presupposes a link between the dominant position and the alleged abusive conduct, which is normally not present where conduct on a market distinct from the dominated market produces effects on that distinct market. In the case of distinct, but associated, markets, […] application of Article [102] to conduct found on the associated, non-dominated, market and having effects on that associated market can only be justified by special circumstances".[1246]

The EU case law on that matter suggests that an abuse on a non-dominant market will only be found in very rare cases.[1247] In the grocery sector, one may considered that close links exist between the upstream procurement market and the downstream retail market. We have indeed pointed out that a strong position in the former market is likely to provide retail chains with competitive advantages in the latter market so that a retailer could leverage its dominant buyer position to gain unfair advantages at the retail level. Given the existence of substantial interconnections between the two markets, it is hence not excluded that leveraging conduct amounts to an abuse. However, in order to find an abuse prohibited under the competition rules, competition authorities will have to establish that a grocery retailer uses its dominant buyer position to commit an abuse and restrict competition in the related retail market. A

[1245] R.O'Donoghue & A.J.Padilla, *op.cit.*, at 212.
[1246] C-333/94 P, *Tetra Pak International SA v Commission* [1996] ECR I-5951, at 27.
[1247] Such « links » between the dominant and non-dominant markets have only been found in two cases, namely in *Tetra Pak II* and in *Microsoft.* In the first case, the Court of Justice considered that there were sufficient "associative links" between the dominant aseptic carton market and the non-dominant non-aseptic carton market so as to treat predatory pricing on the latter market as an abuse. Different factors lead the Court to that conclusion. See: C-333/94 P, *Tetra Pak International SA v Commission* [1996] ECR I-5951, at 28-31. In the second case, the market of PC operating systems and the one of work group servers were considered to be interrelated. Microsoft was sanctioned for leveraging its dominant market position from the PC operating system market to the work group operating system market. See: *Microsoft,* Case COMP/C-3/37.792, Commission Decision of 24 March 2004, upheld on appeal in case T-201/04, *Microsoft Corp. v Commission* [2007] ECR II-3601.

causal connection needs indeed to be shown between the dominance and the abusive conduct.[1248]

v. Refusal to list, delisting and the essential facilities doctrine

The essential facilities doctrine specifies when the owner of an "essential" or bottleneck" facility is obliged to give competitors access to that facility, against a reasonable fee, so as to enable those competitors to do business. [1249] As stated by Advocate General Jacobs in the *Oscar Bronner* case,

> "according to that doctrine a company which has a dominant position in the provision of facilities which are essential for the supply of goods or services in another market abuses tis dominant position where, without objective justification, it refuses access to those facilities. Thus, in certain cases, a dominant undertaking must not merely refrain from anti-competitive action but must actively promote competition by allowing potential competitors access to the facilities which it has developed".[1250]

Essential facilities cases involve two related markets: an upstream market where a dominant firm controls the supply of a particular asset and a downstream market where the production of goods or services requires access to the asset in question. If a refusal by the dominant firm

[1248] R.O'Donoghue & A.J.Padilla, *op.cit.,* at 210.

[1249] OECD, *The essential facilities concept,* Policy Roundtables, 1996, OECD/GD(96)113, available at: http://www.oecd.org/competition/abuse/1920021.pdf On that doctrine, see also: J.T. Lang, *Defining legitimate competition: Companies' duties to supply competitors and access to essential facilities,* 18 Fordham International Law Journal 439 (1994); J.T.Lang, *The Principle of Essential Facilities in European Community Competition Law – The Position since Bronner,* 1 Journal of Network Industries 375 (2000); S.J.Evrard, *Essential facilities in the European Union:* Bronner *and Beyond,* 10 Columbia Journal of European Law 491 (2003-2004); R.O'Donoghue & A.J.Padilla, *op.cit.*, at 407-476; V.Hatzopoulos, The EC essential facilities doctrine, in EC Competition Law: A Critical Assessment, Guiliano Amato and Claus-Dieter Ehlermann (ed.) (2007), at 333-375. The duty of a dominant firm to grant access to essential facilities was developed in cases referring to essential transport infrastructure for which there was no effective alternative, such as railroad, port or airport. Following the liberalization of public utilities, the doctrine has become important because access to networks, such as telecommunication, electricity, postal, rail or gas networks, is essential for competitors willing to provide services in the downstream market. In many cases, access obligations have resulted in EU legislation confirming duties to share facilities. See: *Liberalization of network industries – Economic implications and main policy issues,* European Commission - Directorate-General for Economic and Financial Affairs, Reports and Studies No 4, 1999, available at: http://ec.europa.eu/economy_finance/publications/publication8093_en.pdf ; D.Geradin, *Remedies in network industries: EC competition law Vs. sector-specific regulation* (2004)

[1250] Opinion of AG Jacobs, delivered on 28th May 1998, Case 7/97, *Oscar Bronner* [1998] ECR I-7791, at 34.

to deal with third parties in the upstream market would eliminate competition in the relevant downstream market, a duty to provide access to the essential asset may arise.[1251]

In the grocery retail sector, one may wonder whether shelf-space of dominant retailers under the criteria defined above could be considered as an essential infrastructure, the access of which is needed for grocery manufacturers so as to provide their products to consumers in the downstream retail market. To answer that question, we will look over the legal conditions under which access to an essential facility should be ordered. As such, the facility must be indispensable to compete in the downstream market (1); the refusal to deal would eliminate competition in the downstream market (2) and; no objective considerations justify the refusal to deal (3).[1252]

Before examining these conditions, it must be underlined that a private distribution network, such as a grocery retail network, may constitute a facility.[1253] In the grocery retail sector, it could therefore be considered that large retail chains control an essential facility and could restrict competition in the downstream retail market by refusing access to their shelf-space to grocery manufacturers. As, in a way, supermarket chains compete with those manufacturers in the downstream retail market through their private label lines, they could use their control over shelf-space to leverage their position in that downstream market. However, this may not necessarily be sufficient to mandate large retailers to grant shelf-space to food producers. The freedom to choose ones' trading partner and dispose of one's property is indeed the general rule, even for dominant companies. The refusal to deal is therefore not in itself an abuse and any incursion on that freedom requires careful justification and is subject to the following conditions.[1254]

(1) The facility must be essential, in the sense that it is indispensable to compete in the downstream market, there is no alternative and it cannot be duplicated or only at an

[1251] The concept of refusal to deal also covers situations where the dominant firm makes access to the essential facility subject to objectively unreasonable terms or uses dilatory tactics tantamount to a refusal to deal. See, for example: *Deutsche Post AG – Interception of cross-border mail,* Case No COMP/C-1/36.915, Commission Decision of 25 July 2001; *Sea Containers v Stena Sealink – Interim measures,* Case No IV/39.689, Commission Decision of 21 December 1993; *Cleastream (Clearing and Settlement),* Case No COMP/38.096, Commission Decision of 4 June 2004.

[1252] These conditions have been set out in different cases. See, for examples: T-69/89, *Radio Telefis Eireann (RTE) v Commission* [1991] ECR II-485; C-7/97, *Oscar Bronner v Mediaprint* [1998] ECR I-7791; Joined cases T-374/94, T-375/94, T-384/94 and T-388/94, *European Night Services Ltd (ENS) & Co v Commission* [1998] ECR II-3141; C-418/01, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* [2004] ECR I-3401; T-201/04, *Microsoft Corp. v Commission* [2007] ECR II-3601.

[1253] The Court of Justice indeed held in *Oscar Bronner* that a private distribution network for newspapers may constitute a facility.

[1254] See: Opinion of AG Jacobs in *Bronner, op.cit.*, at 56.

uneconomic cost.[1255] The Court of Justice in *Bronner* made it clear that the test is objective and not based on the capacities of a particular company seeking access to the facility.[1256] The objective is indeed to protect competition, not competitors. The question is therefore whether it would be economically viable to create another network with comparable size/economies of scale. In this respect, AG Jacobs maintained that a facility might be deemed essential where

> "duplication of the facility is impossible or extremely difficult owing to physical, geographical or legal constraints or is highly undesirable for reasons of public policy. It is not sufficient that the undertaking's control over a facility should give it a competitive advantage.
>
> […] The cost of duplicating a facility might alone constitute an insuperable barrier to entry. That might be so particularly in cases in which the creation of the facility took place under non-competitive conditions, for example, partly through public funding. […]If the cost of duplicating the facility alone is the barrier to entry, it must be such as to deter any prudent undertaking from entering the market".[1257]

Consequently, one may affirm that a private grocery retail network developed under competitive conditions is unlikely to meet the test of indispensability. The presence of different supermarket chains controlling their own distribution network and the emergence of new competing retailers, such as hard-discounters, show that a company operating on the same scale as a dominant supermarket chain in the upstream market could develop another distribution network.

(2) The second condition for the finding of an abuse is that the refusal to deal substantially affects competition in the downstream market. The elimination of one competitor is hence unlikely to be sufficient to meet that condition, provided that the downstream market remains competitive without it.[1258] In fact, the condition related to the risk of elimination of competition requires that dominance in the upstream market is combined with or would lead to dominance in the downstream market as a result of the refusal.

In the grocery sector, despite the growing presence of private label products, it cannot be considered that a supermarket chain holds a dominant position in any product category. Competition is indeed

[1255] R.O'Donoghue & A.J.Padilla, *op.cit.,* at 434.
[1256] C-7/97, *Oscar Bronner, op.cit.,* at 44-46.
[1257] Opinion of AG Jacobs in *Bronner, op.cit.,* at 65-66.
[1258] J.T.Lang, *The Principle of Essential Facilities in European Community Competition Law – The Position since Bronner,* 1 Journal of Network Industries 375, at 383 (2000)

still effective between a retailer's private label lines and branded products as well as brands owned by competing retailers. The refusal to deal with a particular supplier is therefore unlikely to substantially eliminate competition in the downstream retail market.

(3) The final condition for a duty to deal is that the refusal cannot be objectively justified. Among the objective reasons that might be invoked to justify a refusal to deal, we can for example mention a lack of creditworthiness of the company seeking access, a difficulty of providing access to the facility, a reduction in efficiency or a possible quality or security degradation if access was granted or the absence of available capacity.[1259] That last reason is of particular relevance in the grocery retail sector where shelf-space is already fully used in supermarket stores. Given that competition remains effective between grocery products, large retail chains could argue that there would be little increase in competition if it were required to reduce the presence of existing products on the shelves to let in another competitor supplying the same kind of product.[1260]

One could argue that, if the firm which request access does not intent to limit itself essentially to duplicating the goods already offered by the dominant retailer in the downstream market, but is planning to offer a new kind of or an improved product, not comparable to any existing product on a retailer's shelves, a refusal to list that product is more likely to stifle competition and thereby constitute an abuse, so that, despite limited capacity availability, a duty to give access should be mandated.[1261] However, as the conditions for imposing a duty to deal are cumulative, the failure to meet the test of indispensability would, anyway, tilt the balance of interests at stake in favour of the retailers' freedom to choose their trading partners.

In addition, the fact that grocery retail networks have been developed by purely private means, within a genuinely competitive environment, is of particular importance. Indeed, it should be underlined that the essential facilities doctrine has mostly been used for the deregulation and liberalization of state-owned natural monopolies. In those sectors such as port, airport, railway, electricity or telecommunication, the facility used to provide public services has been financed by public funds and controlled by a monopolist. Ordering access to such a facility under the conditions developed here above may therefore be thought most likely to confer the greatest benefit to competition and the least harm to the facility owner.[1262] Similar arguments can be held when private

[1259] R.O'Donoghue & A.J.Padilla, *op.cit.,* at 450-454.
[1260] J.T. Lang, *Defining legitimate competition: Companies' duties to supply competitors and access to essential facilities,* 18 Fordham International Law Journal 439, at 493 (1994)
[1261] See in this sense: Guidance on the Commission's enforcement priorities in applying Article 102 of the EC Treaty, *op.cit.,* at 87.
[1262] R.O'Donoghue & A.J.Padilla, *op.cit.*, at 463. See also: V.Hatzopoulos, The EC essential facilities doctrine, in EC Competition Law: A Critical Assessment, Guiliano Amato and Claus-Dieter Ehlermann (ed.) (2007), at 368.

companies enjoyed special or exclusive rights with regard to exploitation of facilities developed by them. Conversely, in the grocery retail sector, no privilege has been granted to the existing supermarket chains and nothing prevents competitors from entering the market.

vi. Effect-based approach

In any case, the prohibition on abusive conduct in the grocery sector should be based on clear evidence that a given practice restricts or is likely to restrict competition and thereby prevents the competition rules from achieving their objectives. The competition assessment must be based on the impact of dominant retailers' practices on the competitive process and on the resulting harm that they may cause to consumers, not only in terms of price but also in terms of quality and choice. The balancing test used in competition cases which aims at weighing the positive and negative effects of business conduct is undoubtedly the best means not to inhibit significantly retailers' freedom of negotiation through overly prescriptive rules and not to deter practices whose positive effects on competition prevail over the negative ones.

4. Revised criteria applicable to vertical and collusive arrangements

If the new criteria suggested above were to be adopted to assess abuses of dominance in the grocery retail sector, a similar approach should be adopted with regard to vertical agreements imposed by large retailers on their suppliers, as well as those leading to an indirect exchange of information between competitors within a hub-and-spoke system, so as to ensure consistency in the enforcement of the competition rules.

a) Vertical agreements

Market share thresholds are not only used in the competition assessment of single-firm conduct but also in cases involving vertical agreements. We have indeed already mentioned that vertical agreements are likely to fall within the scope of the General Block Exemption Regulation if the market share held by the supplier does not exceed 30% of the relevant market on which it sells the

According to M.Hatzopoulos, the fact that the R&D for and construction of the facility have been financed by public funds, policy considerations argue in favour of enlarged access rights. M.O'Donoghue & Padilla, however, consider that it is hard to see why the public source of the funding for the property should lead to a stricter legal standard. "The public source of [the funding of the property rights] may explain why certain refusal to deal cases are pursued, but it does not offer a useful legal test for determining the legal conditions under which a duty to deal is appropriate. At most, the fact that a facility is a natural monopoly, the result of a former statutory monopoly, or publicly-owned helps explain the type of cases that, as a matter of policy, are thought most likely to confer the greatest benefit to competition in ordering access and the least harm to the property owner. Limiting the use of the doctrine of forced sharing to these situations is therefore a convenient policy argument to place general restrictions on the duty to share in order to limit its harmful effects rather than a substantive principle."

contract goods or services and that the market share held by the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services.[1263] The same inadequacy hence appears with regard to the criterion used to assess buyers' market power in the upstream procurement market. The market share held in that market is indeed unlikely to reflect the degree of market power of the buyer involved.

As a result, the criteria developed above with regard to the assessment of buyer power should also be used in vertical agreement cases. This would be particularly relevant when such an agreement is obviously initiated by a buyer, such as in case of restrictions concerning the supply of goods to competing buyers.

b) The issue of hub & spoke conspiracy

Some arrangements cannot be classified either as vertical or horizontal because they involve vertical relationships leading to horizontal collusion as illustrated above.[1264] We suggested in Point 3 that Article 102 TFEU be applicable to a dominant retailer inducing suppliers to engage in a collective boycott or to pass on information to competitors in order to help them implement a collusive strategy at the retail level. However, an abuse under that provision could only be found if it is established that the retailer's conduct generate horizontal anticompetitive effects.

There are no EU cases dealing specifically with the issue of a concerted practice resulting from an A-B-C information exchange. However, with regard to hub-and-spoke strategy leading to indirect contact between competing retailers via a common supplier, different UK decisions, and, in particular, the decision rendered in the cheese sector by the Competition Appeal Tribunal[1265], may shed some light on the conditions to be met to consider that the parties involved in such a strategy are in fact part of a concerted practice restricting competition.

The concept of concerted practice was briefly developed in Part II.[1266] It is defined by the Court of Justice as

> "a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition".[1267]

[1263] Commission Regulation on the application of Article 101(3) of the Treaty to categories of vertical agreements and concerted practices , *op.cit.,* Article 3(1).
[1264] See above, Chapter 1, Section II, Point C.
[1265] Competition Appeal Tribunal, *Tesco Stores Ltd Tesco Holdings Ltd Tesco Plc v Office of Fair Trading,* Cases 1188/1/1/11 [2012] CAT 31. On that decision, see above, Chapter 1, Section II, Point C.
[1266] See : Part II, Chapter 1, Section I, Point A, 1, c).

Economic operators must in fact determine independently their trade policy. Even though they are free to adapt themselves intelligently to the existing and anticipated conduct of competitors, the Court of Justice made it clear that the requirement of independence does

> "preclude any direct or indirect contact between such operators, the object or effect whereof Is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market".[1268]

The UK Competition Appeal Tribunal pointed out that concerted practices can take many different forms so that the assessment as to whether such a practice exists must be fact-specific.[1269] With regard to the issue of indirect exchange of information, it may be considered that a concerted practice arise in circumstances where (1) retailer A discloses to supplier B its future pricing intentions and may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is or may be one), (2) B does, in fact, pass that information to C where C may be taken to know the circumstances in which the information was disclosed by A to B and (3) C does, in fact, use the information in determining its own future pricing intentions.[1270]

The mental element in each of the 'A to B' and the 'B to C' communications is of particular importance. Disclosures of information by a retailer to its supplier in relation to matters such as retail prices or profit margins are indeed often part of normal commercial vertical discussions. However, where such information is disclosed by the supplier to other retailer-customers and that these retailers involved act with the relevant state of mind, this triangular exchange of information may amount to the knowing substitution of practical cooperation for the risks of competition and hence constitute an anticompetitive practice.

With regard to the 'A to B' communication (1), it is therefore incumbent on competition authorities to establish that retailer A may be taken to have intended, or actually foresaw, that its future intentions would be conveyed to its competitor, retailer C.[1271]Establishing such a

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[1267] Joined cases 48, 49 and 51-57/69, *ICI v Commission* [1979] ECR 619, at 64.
[1268] Joined cases 40-48, 50, 54-56, 111, 113, 114/73, *Coöperatieve Vereniging « Suiker Unie » UA and others v Commission* [1975] ECR 1669, at 174.
[1269] Competition Appeal Tribunal, *Tesco Stores Ltd Tesco Holdings Ltd Tesco Plc v Office of Fair Trading,* Cases 1188/1/1/11 [2012] CAT 31, at 56.
[1270] *Ibid*., at 57.
[1271] *Ibid.,* at 66. This requirement is meant to avoid A being held strictly liable for the conduct of B, over whom it may have limited control.

state of mind is a question of fact which may hence be inferred from the circumstances. For example, the UK Competition Appeal Tribunal maintained that

> "the absence of any legitimate commercial reason for a disclosure by retailer A of its future pricing intentions to supplier B may be indicative of the requisite state of mind, when viewed in light of all the circumstances known to the disclosing party at the time of the communication."[1272]

Similarly, concerning the 'B to C' communication (2), competition authorities have to prove that retailer C may be taken to have known the circumstances in which A disclosed its future retail pricing intentions to B. On that matter, the UK Competition Appeal Tribunal considered that

> "if, for example, [retailer C] knows that his supplier, B, is in negotiations with retailer A about cost and retail price increases, and B subsequently tells him that A will be increasing its prices on a particular date, it will scarcely be credible for [retailer C] to maintain that it never occurred to him that the information came from A".[1273]

The Competition Appeal Tribunal also noted that the proof of a concerted practice would be all the stronger if there is reciprocity, that is, if, after receiving information on A's intentions, C discloses to supplier B its own pricing intentions, intending that B will convey that information to A.[1274]

Requiring that the competing retailers be aware of the role being played by the supplier is in fact in line with the definition of a concerted practice given above which refers to firms *knowingly* substituting practical cooperation between them for the risks of competition.

When the requisite mental element accompanying the exchange of information has been proved, it remains to examine whether retailer C used the information in determining its own future pricing intentions (3). In fact, a causal link between the concerted practice and the

[1272] *Ibid.,* at 72. On that matter, « it is important to distinguish between communications to the effect that a retailer will reduce its prices, on the one hand, and that a retailer will maintain or increase its prices, on the other. In the case of a planned reduction in the retail price, the retailer might legitimately relay its intentions to the supplier, for example, in an attempt to secure a lower cost price to help fund the anticipated loss of margin. There may be fewer legitimate commercial reasons for the transmission of a retailer's intentions to maintain or increase its prices."
[1273] *Ibid.,* at 83.
[1274] *Ibid.,* at 70.

subsequent conduct of the firms involved must be established.[1275] In this respect, the Court of Justice held that:

> "subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market".[1276]

It is hence presumed that competing firms take into account their rivals' planned strategy when determining their own conduct on the market. Although the Court referred to that presumption in cases of direct contact between competitors, a similar approach should be adopted when information is exchanged indirectly via a common trading partner.[1277] To rebut that presumption, the participating firms will have to prove that their concerted action did not alter whatsoever their behavior.

Provided that the aforementioned conditions are met, hub-and-spoke conspiracy would amount to an anticompetitive concerted practice and be pursued accordingly by competition authorities. The use of buyer power to induce suppliers to enter in a triangular arrangement could therefore be severely sanctioned due to the resulting adverse horizontal effects. All parties involved, retailers and suppliers, would in fact be subject to the rules and sanctions applicable in cases of restrictive agreements. However, we would suggest that, when a hub-and-spoke cartel is successfully implemented only due to pressure exerted by one (or more) retailer(s) on its (their) suppliers, emphasis be put on the exercise of buyer power which is behind such collusive conduct.

As already mentioned, it would be possible to highlight the conduct at the root of the A-B-C arrangement by enforcing, concurrently to the rules on restrictive agreements, these on abusive conduct under the new criteria defined here above so as to sanction more severely

[1275] See: C-49/92P, *Commission v Anic Partecipazioni* [1999] ECR I-4125. The Court of Justice maintained: "It follows that, as is clear from the very terms of Article [101(1)] of the Treaty, a concerted practice implies, besides undertakings' concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two". (at 118)

[1276] C-49/92P, *Commission v Anic Partecipazioni, op.cit.,* at 121. See also: C-8/08, *T-Mobile Netherlands BV and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, at 61.

[1277] This is the opinion of the UK Competition Appeal Tribunal which maintained that "although there is no EU authority on the point, it was common ground that the *Anic* presumption applied to the indirect exchange between competitors of confidential future pricing intentions". (at 53)

misuse of buyer power. In addition, competition authorities could look into the interests of each party in participating in the information exchange arrangement and be more lenient with suppliers which are in fact also "victims" of such conduct. Accordingly, competition authorities could decline to fine suppliers or reduce the penalty imposed on them where it turns out that the latter acted under retailers' threats and were thereby forced to pass on information between competitors.[1278]

One element to be considered when assessing the possible coercion exerted by powerful retailers upon their suppliers is for example the benefit suppliers gained or were likely to gain by engaging in the exchange of information. If it appears that they had no economic interest in conveying information or that their interest was quite unlike the benefit obtained by their customer retailers, it could be presumed that the arrangement was initiated by the latter. It is worth noting that, in case of a hub-and-spoke cartel meant to maintain higher retail prices, suppliers do not necessarily profit by those high prices when they face customers with buyer power. Indeed, the increase in prices of branded products will lead to a reduced demand for these products and benefit competing private labels. In addition, unlike in cases of monopoly prices imposed by powerful sellers, suppliers are unlikely to raise their margins by participating in a resale price realignment orchestrated by large retailers. Due to their significant market power, the latter will indeed be able to extract the most part of profits engendered by the collusion. Although retailers' objective could not be achieved without suppliers' participation in the hub-and-spoke strategy, the latter's position of weakness and, in particular, their state of economic dependency, should hence be taken into consideration by competition authorities when sanctioning such practices.

CONCLUSION PART III

Where authorities are reluctant to act against buyer power because it is assumed that such buyer power brings lower prices to consumers, the analysis of the objectives of EU competition law shows that the competition rules are not only meant to ensure lower prices for consumers . The concept of

[1278] We have indeed mentioned above that, even though suppliers were unwilling to engage in an anticompetitive exchange of information, they could not escape from the application of the competition rules. However, competition authorities can take those circumstances into consideration when deciding the sanction to be imposed on each firm involved. See above, Point A, 1, b) and the related case law.

consumer welfare indeed includes other aspects such as quality and choice. In order to protect all these values, EU competition authorities focus on protecting the competition process and do not only base the competition assessment on price effects in the downstream seller market.

Under that perspective, it turns out that large retail chains' buyer power could affect the competition law goals. The grocery retail sector presents specificities that amplify buyers' market power due, in particular, to the growing presence of private labels, the gatekeeper effect and high consumer loyalty to their supermarket. As a result, suppliers are dependent on large grocery chains.

We have pointed out that some practices may raise consumer prices, in particular when negotiations focus on commercial payments or other concessions extracted from suppliers rather than lower purchase prices or when retailers aim at favoring their own-brands. Supermarket chains' conduct may also affect product quality and consumer choice.

In fact, retailers are customers of suppliers but also their competitors and suppliers of commercial services which give them many opportunities to (ab)use their market power.

Despite the likely anticompetitive impact of buyers' practices in the grocery sector, competition rules fall short of addressing buyer power concerns, especially the rules on dominance. Under Article 102 TFEU and in most Member States which follow the EU principles when enforcing their national competition legislation, retail chains are not regarded as dominant so that they escape from the prohibition on abusive conduct.

In order to remedy that situation, we suggest harmonizing the Member States' national legislation through a Directive so as to introduce new criteria to assess retail chains' buyer conduct. Such Directive would aim at preventing harmful effects of buyer power on competition and drawbacks which result from discrepancies between national laws on this matter. The suggested common rules would be defined under the competition law policy so as to increase deterrence and give an independent authority the power to enforce the rules.

In addition, such action would be limited to the grocery sector where large buyer retailers' practices have been raising high concerns. Competition authorities would have thus the responsibility to oversee supermarkets' conduct and enforce the prohibition on abusive conduct when the latter are in a dominant position.

Under the new criteria, it would be concluded to the existence of a dominant position in the upstream procurement market when the lack of alternative buyers and the high share the retail chain concerned represents in suppliers' turnover make the latter dependent and that no other

competitive constraints are likely to dissuade the retail chain in question from exploiting its buyer power. In such circumstances, a retailer could limit competition, in particular by favoring its own-brands or by extracting concessions from suppliers which do not benefit consumers. Similar criteria should also be used to assess vertical agreements between large retail chains and their supplier in order not to exempt arrangements which may in fact affect effective competition on the markets.

GENERAL CONCLUSION

Buyer power is a complex issue and there is no straightforward answer to the question of how to address that power. The analysis made in this thesis though shows that addressing buyer power within the scope of EU competition law and on the basis of specific criteria would be justified on various grounds.

Although seller power and buyer power are the two facets of a same concept, namely the concept of market power, these two types of power need to be assessed differently. Seller power has been extensively analyzed by competition authorities and the European Commission has set clear guidelines to measure that power in competition cases. The primary criterion to be used to assess sellers' market power is the market share of the firm(s) involved. Under Article 102 TFEU, a position of dominance is unlikely to be found where the firm's share of the relevant market is below 40%. Under Article 101 TFEU, vertical agreements are generally exempted if the market shares of the firms taking part in those agreements do not exceed 30%. Those criteria defined in seller power cases are, however, ill-suited to measure the degree of buyer power.

The description of buyer power reveals indeed that a buyer's market share in the relevant upstream buyer market is not the main factor to be considered when assessing the ability of that firm to exert buyer power. Such ability results instead from the state of economic dependency of its suppliers. Accordingly, the degree of buyer power is mainly linked to the number of alternatives available for suppliers and to the buyer's share in these suppliers' turnover. A buyer customer is indeed in a position to dictate the rules in the upstream buyer market if it can threat to switch to other suppliers while the latter cannot find equivalent alternatives to sell their products and would see their economic viability put at risk should they lose that customer. Measuring buyer power according to the criteria and market share thresholds established in the assessment of sellers' market power might hence lead competition authorities to underestimating the ability of buyers to exert market power in the upstream buyer market and to affect competition.

Buyer power is rarely used in terms of monopsony power. It is rather envisaged either as countervailing buyer power, that is the ability to curb sellers' market power, or as buyer power *senso stricto*, referring to a buyer's ability to decrease price or extract other concessions from suppliers without reducing the quantity purchased. In the first case, it is commonly accepted that buyer power constitutes a positive strength which prevents sellers from misusing their market power. In the second case, however, there is no consensus about the effects of buyer power on the markets so that controversies have arisen with regard to the need to constrain or not that power. Those uncertainties concerning the potential harmful effect of buyer power have in fact led EU and national authorities to follow a cautious approach on this matter. Where new initiatives have been taken in

some Member States to address buyer power concerns, it turns out that these remain relatively timid and that national authorities walk on thin ice when it comes to enforce them.

In EU law, no specific action has been adopted to address buyer practices so that one and the same set of rules apply to both buyer and seller cases. The focus is hence put on the firm's market share to assess its degree of market power. The state of economic dependency of the firm's trading partners is not considered in itself as a source of market power but rather as a consequence of the firm's dominance in the relevant market. The Commission put greater emphasis on the bilateral relationships between buyers and suppliers and on the relative dependence that may exist between them only when buyer power is assessed in the sense of countervailing power. The specificities of buyer power are though not taken into consideration when competition concerns arise from buyer and not seller practices, except in a few merger cases where the Commission concluded that the operation would create a dominant position in the relevant upstream buyer market due to the strong dependency of suppliers on the merged entity.

The application of similar criteria in seller and buyer power cases would not generate discussion if buyers with a market share below the thresholds commonly used in the former cases were not able to distort competition. However, in view of the objectives of EU competition law, we have pointed out that some buyers' practices fall outside the scope of the competition rules despite their potential harmful effect on competition. The objective of EU competition law is indeed to enhance consumer welfare through the protection of the competition process. Although the exercise of buyer power may, at first sight, appear positive from a competition law perspective as it is likely to lower consumer prices, we pointed out that, in some circumstances, buyer practices may have an adverse impact on those prices. For example, in the grocery retail sector, large retailers can take advantage of their suppliers' weaker position through various practices which do not necessarily lower the purchasing prices. They may even be incited to do so as higher prices for branded products are beneficial for private labels. In addition, the concept of consumer welfare includes other values such as product quality and choice which could also be affected by some buyers' conduct. Excessive pressure exerted on producers may indeed force them to reduce investments in new or improved products while the choice offered to consumers is likely to be tailored to retailers' own interests which may not be in line with those of consumers. Even though some practices may bring about lower prices at the retail level, the assessment of the effects of buyers' conduct on competition can therefore not be limited to looking at the impact of such conduct in terms of price but must include a longer-term and dynamic vision of competition.

Despite their ability to limit competition, none of the largest retail chains in the European Union meet the criteria of dominance. The protection of effective competition hence requires new initiatives in EU competition law to tackle anticompetitive buyer practices. Action at EU level would be all the more justified in that no effective action has been taken by national authorities and that discrepancies in national laws are likely to create competition distortion and barriers to trade in the Union. The objective would be to give independent authorities, namely national competition authorities, the responsibility to supervise buyers' conduct. The possible intervention of independent authorities would in fact remedy, to some extent, the actual climate of fear which dissuades suppliers from denouncing some buyer practices. Furthermore, the severe sanctions that may be applied on the top of competition law investigations would create a strong deterrent effect.

The action suggested in this thesis takes the form of a Directive whose scope would be limited to the grocery retail sector. The limitation of intervention to that sector is justified by the fact that large supermarket chains are able to exert significant buyer power due to the presence of different factors that are rarely encountered all together in other sectors. In addition, grocery retailers are strongly incited to exploit their power because, in particular, of their triple role of commercial services provider, customer and competitor of brands producers. It was also noted that the high degree of concentration in the grocery sector, both in the up- and downstream markets, raises the risk of hub-and-spoke collusion. It is indeed easier to orchestrate and to succeed in implementing horizontal arrangements, such as price realignments, through the intervention of a common trading partner in those circumstances.

The suggested Directive would in fact introduce specific criteria to be used in buyer power cases with regard to the definition of the relevant upstream buyer market and the assessment of dominance and abusive conduct in that market. These criteria are in line with the analysis made by the Commission in three merger cases, namely in *Kesko/Tuko, Rewe/MeinI* and *Carrefour/Promodes,* where the dominant position of the merged entity was mainly based on the suppliers' state of economic dependency. Under this new definition of dominance, more than one grocery retailer could be regarded as dominant in the upstream buyer market, each of whom would have a special responsibility not to hinder effective competition and not to incite other market participants to engage in restrictive conduct. This specific approach defined to address buyer power should also be considered in case of vertical agreements so as to prevent the exemption of arrangements between large retailers and their suppliers on the grounds that the parties' market shares are below 30%. Retail chains with a market share below that threshold are indeed able to coerce suppliers into participating in anticompetitive practices. Such pressure exerted on suppliers may also lead to a so-called A-B-C arrangement which could be assimilated to and sanctioned as an unlawful information

exchange between competitors if the latter were aware of the role played by their common trading partner.

The objective is to protect no more than effective competition in the European Union. Intervention in the grocery retail sector must hence be strictly defined and subject to clear rules so as to prevent excessive intrusion into buyer-supplier relationships. The suggested new approach to address supermarkets' practices takes account of the reality of the grocery retail sector where market power is now in the hands of retail buyers. Given the large debate about the potential harmful effect of supermarket chains' buyer power and the disparate initiatives taken by national authorities, this new approach tries in fact to introduce some coherence within the Union and address the competition concerns raised in this respect.

The specific approach suggested in this thesis is not meant to close down the debate on how to address buyer power but it will, at least, contribute to feeding and enriching that debate.

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