LIDC Contributions on Antitrust Law,
Intellectual Property and Unfair Competition

Bruce Kilpatrick
Pierre Kobel *Editors*

Joint Purchasing-framework for Competition Law Analysis & Mechanisms to Address Overly-broad Trademark Usage

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In each volume of the LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition, two topics are discussed, one focusing on competition law, the other on intellectual property and/or unfair competition.

Practitioners and academics from different industrial countries contribute national reports on each topic, followed by an analysis and a comparison of the respective national situations as well as an international report. The national reports include essential and hard-to-find case law analysis. The common trends and principles identified in the international reports serve as a basis for more general recommendations, some of which have been presented to national and international authorities.

The series is produced by the International League of Competition Law (LIDC), an association that brings together national associations for antitrust law, intellectual property and unfair competition law. Created in 1930 by a German lawyer who subsequently became Professor of Law at the University of Saint Louis in the United States, the LIDC has a long standing reputation for scientific exploration, debate and work.

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Man can do nothing good or bad except by associating—Pierre Waldeck-Rousseau

1.1 Introduction

The International League of Competition Law has chosen to focus on the subject of purchasing groups reflecting the LIDC's desire to get as close as possible to the news or even to anticipate it. Indeed, if the subject of the submission of groupings to purchase is not new and has been examined by many jurisdictions. The recent COVID-19 crisis and the consequences of the war in Ukraine have contributed to the resurgence of inflation. It led to questioning the advantages and disadvantages of this form of buyers' association when faced with suppliers forced to consider the grip of the power thus created to fight against their influence. The clash of interest between suppliers and buyers is well known. Depending on where one stands, the view of the power balance can seem totally contradictory.

This dual approach is reflected in the authorities' ambiguity when faced with a technique that can be idealized as the best tool for stimulating competition by exerting pressure on suppliers' prices which will be passed on to the downstream market. This efficiency against inflation may justify a benevolent approach while suppliers will portray a fictitious accumulation of turnover of competing buyers who will use any means (delisting, boycott . . .) to obtain a reduction in prices and margins.

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Table 1.1 National Reports

Country	National Rapporteur
Austria	Stefan Wartinger, Gerhard Fussenegger
Brazil	João Marcelo de Lima Assafim
France	Guillaume Melot, Maud Boukhris, Mathilde Boudou, Nizar Lajnef, Lauren Mechri
Hong Kong	Catrina Lam, Joshua Yeung
Hungary	Márton Kocsis
Italy	Mrs. Elisa Teti, Alessandro Raffaelli
Nordic Group	Per Karlsson, Dr. Robert Moldén, Henrik Nilsson
Romania	Anca Buta-Mușat
Switzerland	Johana Cau
UK	Sima Ostrovsky

The update is underlined by the adoption in June 2023 of the European Union guidelines and in August 2023 of the UK guidance which deals specifically with group purchasing issues.

Nevertheless, the duality of approaches (positive and negative) is still topical. Positive for those who see it as a good tool for stimulating competition, negative for those who do not understand that the authorities let competitors join forces raises very understandable competition questions. What rules should be implemented to provide a framework for purchasing agreements and anticipate with sufficient legal certainty prohibited practices by those authorized or at least to know the conditions for choosing between good and evil?

To enlighten us, ten National Reports have been prepared (see Table 1.1). Their quality should be highlighted, especially as the timetable for the National and International Reports was very tight.

Two additional reports and/or comments have been sent to the international rapporteurs after the LIDC congress, one for Belgium by Carmen Verdonck and Nina Methens and one for Poland by Joanna Affre and Mateusz Restel.

All the reports were very useful and detailed on the latest developments in each national law and allowed the International Rapporteur to give a synthetic summary of the legal framework of buying power.

This International Report will be supplemented by information collected on other countries, particularly in OECD documents.

Therefore, predictability is crucial for companies, their board of directors, and managers in the understanding of purchasing groups (I); adequacy of control and sanction procedures are also necessary (II).

1.2 Purchasing Groups: An Anti-Competitive or Pro-Competitive Agreement?

The nature of the buying group has obviously a link with the applicable law. Therefore, it is necessary to clarify what is a purchasing group.

1.2.1 What Is Behind the Concept of a Purchasing Group?

Each national reporter has used various understandings of the joint purchasing group. Some pointed out the various forms that could be noticed.

Hungary mentioned focusing "on buying groups in the sense of a company / association / other entity that centralizes purchases for its members or affiliates." It covers structural rather than informal representation/mandate, but the same report quotes a definition in the Act on Trade: "*an agreement between two or more undertakings to implement their purchasing or sales strategy, to carry out or coordinate a part or all of their purchasing or sales activities*" including more informal implementation.[1]

The French report makes a great difference "between central purchasing bodies and service centers, which are less well known."[2] This distinction is then insisting on the range of activities more than on the purchasing group's organization.

The Brazilian report even refers to "so-called purchasing groups." The various forms/levels of purchasing groups explain the difficulty of harmonizing the understanding of a purchasing group. The national reports have not given a common definition and notice the lack of definition in some national laws.[3]

The EU guidelines give a wide definition of joint purchasing covering all national reports approach as it "involves the pooling of purchasing activities and can be carried out in various ways, including through a jointly controlled company, through a company in which undertakings hold non-controlling stakes, through a cooperative, by a contractual arrangement or more flexible forms of cooperation, for example where a representative negotiates or concludes purchases on behalf of several undertakings (collectively referred to as 'joint' purchasing arrangements)." This very large definition could include all kinds of cooperation with all types of buyers even public/state entities as the French report mentions.[4] Many reports highlighted that the EU definition will be a good help in understanding purchasing agreements.[5]

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[1] See in this volume, Kocsis (Hungary), Sects. 5.1.1 and 5.2.2.1.

[2] See in this volume, Melot et al. (France), Sect. 4.1.

[3] Verdonck & Methens, Belgian report.

[4] *Dictionnaire droit de la concurrence "centrales d'achats" Stéphane de La Rosa edition Concurrences https://www.concurrences.com/fr/dictionnaire/centrale-d-achat#part-biblio*.

[5] Verdonck & Methens, Belgian report.

The EU definition could also include vertical agreement. Some usual agreements like franchises can include a purchaser's group but in other fields, it can be a very binding structural relationship between members (cooperative society, joint venture . . .).

As concluded by the Italian Report the "structural and organizational characteristics of the chain itself can vary considerably" and "the structure of the buying groups does not appear to influence the Authority's analysis."[6] Then the regime can also vary, and the scope of the control could be light without looking at the ancillary clauses or more rigorous.

But the investigation will also be determined by the sector and the market affected.

1.2.1.1 A Much Wider Variety than Just the Field of Mass Distribution

Purchasing groups are not a recent topic, but all countries do not have the same level and field of influence. The British report points out that "Buying groups and cooperatives have been operating in the UK since at least the mid-twentieth century; organizing, negotiating and purchasing on behalf of constituent businesses, across sectors up and down the supply chain."[7]

This observation can be found in most reports although some agreed that buying groups did not play a major role on the enforcement level over the last 15 years.[8] For Romania, "The creation of buying groups in Romania has taken place rather rarely and randomly over the last 15 years" but the first case had to deal with ship owners and port operators (a very specific market different from food retail).[9]

For many countries, the mass retailer sector (food and non-food) is one of the main sectors where purchasing groups have been successful[10] both on the domestic level and international for many years (association of national retailers in European alliances such as Coopernic, Eurauchan, BIGS, and METSPA, and more recently, Agecore, Interdis, Eurelec. . . .).[11]

Almost 30 years ago, an OECD report was published on the "Purchasing Power of Multiproduct Retailers."[12] It confirms that the retail and food sectors were key sectors for cooperation. This study shows that many OECD countries' competition agencies have been under pressure to act against the exercise of buyer power by large

[6] See in this volume, de Teti (Italy), Sect. 6.1.

[7] See in this volume, Ostrovsky (UK), Sect. 8.2.

[8] See in this volume, Wartinger & Fussenegger (Austria).

[9] *AOPFR 2005.*

[10] See in this volume, Cau (Switzerland); Kocsis et al. (Sweden); de Lima Assafim (Brazil); Melot et al. (France). Verdonck & Methens, Belgian report.

[11] See in this volume, Kocsis (Hungary) & Melot et al. (France). Verdonck and Methens, Belgian report.

[12] *DAFFE/CLP(99)21.*

multiproduct retailers. In several countries, such pressure has been accompanied by the adoption of legal provisions designed to counter abuses of "economic dependence" or to strengthen prohibitions attaching to price discrimination and loss leading. Although there may be valid efficiency justifications for prohibiting the exercise of buyer power by multiproduct retailers, there are also significant risks in doing so. A misguided application could amount to protecting inefficient distributors at the expense of consumers.

However, other sectors are developing purchasing groups in other field than retail: health, newspapers, timber[13] furniture for public hospitals, insurance companies,[14] medical fees,[15] media,[16] energy,[17] technology, and construction[18] such as brick market,[19] textile, and kitchen furniture.[20]

More recently online platform allows companies to gather their volume of purchases in various sectors. This new activity could aim for a "more rigorous analysis."[21]

1.2.2 Effect or Object Prohibition for True Purchasing Groups?

It is commonly recognized that to be caught by a prohibition an agreement must have as its "object or effect" the prevention, restriction, or distortion of competition on the market. The essential criterion for ascertaining whether an agreement involves a restriction of competition "by object" is the finding that such an agreement reveals in itself a sufficient degree of harm to competition for it to be considered that it is not necessary to assess its effects. Horizontal price-fixing by cartels may be considered so likely to have negative effects and then this comment should be applied or not to the purchasing agreement.

Some National reports explained the difference between "true" purchasing groups and "purchasing cartels."[22] It suggested that "true purchasing groups" generally do

[13] See in this volume, Karlsson, et al. (Sweden).

[14] See in this volume, Cau (Switzerland).

[15] See in this volume, de Lima Assafim (Brazil).

[16] See in this volume, Karlsson (Sweden).

[17] See in this volume, Buta Musat (Romania).

[18] See in this volume, Ostrovsky (UK).

[19] Report on the accelerated sector inquiry on the Hungarian brick market. https://www.gvh.hu/pfile/file?path=/dontesek/agazati_vizsgalatok_piacelemzesek/agazati_vizsgalatok/Agazati_vizsgalat_Magyarorszagi_keramia-falazoelemek_piacan_lefolytatott_gyorsitott_agazati_vizsgalat_-_Jelentes_vegleges_210923.pdf1&inline=true.

[20] Verdonck & Methens, Belgian report.

[21] See in this volume, de Lima Assafim (Brazil).

[22] See in this volume, Karlsson, et al. (UK); Melot (France).

not amount to a competition restriction by object if they genuinely refer to joint purchasing and have a pro-competitive efficiency: "small buyers concluding group purchasing agreements could also benefit from cost reductions that they can then pass on to consumers by lowering their prices and thereby establishing economic efficiency."[23]

On the other hand, purchasing cartels should be prohibited despite the effect on competition. EU competition law has already condemned purchasing cartels as a per object restriction and more easily illegal.[24] The Belgium report gave the example of the Carrefour Provera alliance which analyzed the BCA mainly on the effects caused by the association on retailers.[25] The exchange of sensitive information between competitors could have a significant impact on both upstream and downstream markets. Carrefour and Provera decided to change the framework of the alliance reducing the uncompetitive effects to get a BCA's approval.

Some competition authority like the French one, rather seeks to assess, on a case-by-case basis, whether a shift in the sharing of margins would be on balance pro- or anti-competitive given the nature of the agreement and the position of its members.[26] However, the Swedish report mentioned that "competition law enforcement is inherently more conspicuous within the terrain of sales compared to joint purchasing collaboration."

The Hong Kong report based on national guidelines states that joint purchasing agreements "*frequently allows SME undertakings to achieve purchasing efficiencies similar to their larger competitors. This may result in lower prices in the market where the joint buying takes place, lower transaction costs, and/or distribution efficiencies for the SMEs. Joint buying of this kind seldom gives rise to competition concerns*."[27] Thus, a "*joint buying arrangement would typically not be considered by the Commission to have the object of harming competition unless it is a disguised buyers' cartel*."[28]

The Hungarian Competition Authority established that joint purchasing agreements are not considered to be anti-competitive by object, as their goal is not exclusively the setting of prices by the parties to the joint purchasing agreement. Consequently, the HCA stated that joint purchasing agreements are not excluded from the category of *de minimis* agreements.[29]

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[23] *Swiss report and footnote DIKE Kommentar Kartellgesetz, 2018 – Zirlick/Bangerter, Art. 5 N 561; OECD, DAF/COMP(2022)4, Puissance d'achat et ententes entre acheteurs, 22 June 2022, p. 5, retrievable (in French) under: https://one.oecd.org/document/DAF/COMP(2022)4/fr/pdf.*

[24] For example, *Judgment of 7 November 2019, Campine, T-240/17, EU:T:2019:778, para 297; see also judgment of 4 June 2009, T-Mobile Netherlands and Others, C-8/08, EU:C:2009:343, para 37; judgment of 13 December 2006, French Beef, joined cases T-217/03 and T-245/03, EU:T:2006: 391, para 83 and following. And scenario proposed by the Hungary report.*

[25] Belgian Competition Authority case CONC I/0-19/0013 of 28 April 2021.

[26] See in this volume, Melot et al. (France)

[27] *FCR Guideline, para 6.33.*

[28] *FCR Guideline, para 6.34.*

[29] Case No. VJ-176/2003/8 of the Hungarian Competition Authority, para 26.

In this way, the purchasing group can "disguise" a purchasing cartel. The difference is somewhat difficult to understand and operationalize. The disguised consequences can be very severe (fine, damages claim, litigation, press release…) for the undertaking.

The UK report showed the same caution with this peculiarity: "the Draft Horizontal Guidance expressly clarifies that joint purchasing arrangements do not 'normally' amount to a restriction of competition by object if they 'truly' concern joint purchasing."[30] As commented, the UK guidelines set out a list of non-exhaustive factors that will indicate that a buying group or a purchasing arrangement is less likely to be a buyer cartel. Specifically: **Joint negotiation with the supplier** through a *common or member organization*[31]*;* **Secrecy (**disclosure to suppliers can indicate that a buying group is likely *not* a buyer cartel); **Written agreement** between members.[32]

The EU guidelines have tried to make it clearer: *Purchasers cartels are agreements or concerted practices between two or more purchasers which, without engaging in joint negotiations with the supplier:*

> *coordinate those purchasers' individual competitive behavior on the purchasing market or influencing the relevant parameters of competition between them through practices such as, but not limited to, the fixing or coordination of purchase prices or components thereof (including, for example, agreements to fix wages or not to pay a certain price for a product); the allocation of purchase quotas or the sharing of markets and suppliers; or*
>
> *influence those purchasers' individual negotiations with suppliers or their individual purchases from suppliers, for example through coordination of the purchasers' negotiation strategies or exchanges on the status of such negotiations with suppliers*

This distinction is not clear-cut and does not completely cover the by-object prohibition. Even in this case, the competition authority could not fine the members without a study of the context and the certainty of a sufficient degree of harm to competition. It has been repeatedly decided by the court that a "restriction of competition by object must be interpreted restrictively" and *"within the meaning of Article 101(1) TFEU, account must be taken of the content of its provisions, its objectives and the economic and legal context in which it operates. When determining that context, it is also necessary to take into consideration the nature of the products or services affected, as well as the real conditions of the functioning and structure of the market or markets in question* (judgment of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 53)."[33]

It can then be concluded from the description of a buying group that there is no "regular/typical joint purchasing agreement" neither by a market, structure, size of the members, market power, etc. The Chile authority quoted its ruling in the TV plasma case on the effect of the behavior "This purchasing power will be exploited

[30] *Draft Horizontal Guidance at para 6.8.*

[31] *Horizontal Guidance at para 6.13(a).*

[32] *Horizontal Guidance at para 6.13(c).*

[33] *Judgement 2 April 2020 C-228/18, Gazdasági Versenyhivatal.*

with greater intensity as the exit barriers increase for suppliers."[34] It should be added that the precedents and controls applied locally are also very different from one place of the world to the other. Chinese Tapei underlined the complex analysis that should be done in downstream markets: "In some situations, the superior bargaining power may occur in the form of buyers' cartel, substantial purchasing power or joint procurement that will directly bring out anti-competitive effects on the relevant upstream market. However, for downstream businesses and end consumers, these effects are not as noticeable as those resulting from abuse of monopoly (or cartels among sellers/suppliers), which can pose challenges to the CTFTC's law enforcement activities."[35]

The EU competition law and the recent guidelines "provide a useful guidance"[36] and is a good way to control purchasing groups within the member states. However, it is difficult to state that all buying groups even disguising a purchaser cartel, could be analyzed as a by-object prohibition without considering the context (market, market power, legal framework, etc.) and more frequently the effect and the efficiency. It underlines the "difficulties in distinguishing between legitimate purchasing alliance and their practices, as opposed to illegitimate purchasing cartel and their anticompetitive behavior."[37]

1.3 Appropriate But Diversified Control Procedures

1.3.1 Application of the Usual Rules of Competition Law

Most national reporters informed the league that no specific substantive law was applicable to buying groups and that the general provisions on anti-competitive practices would be the main way of control. The two main prohibitions would be unlawful agreement and abuse of dominant position. These two rules are ex-post control. The Hong Kong report seemed to regret that "the empirical effectiveness of competition law in regulating purchasing groups is therefore unclear at this stage." Some countries have also specific regulations and have introduced the definition of "significant market power" as *"a market position that makes the trader a reasonably indispensable or irreplaceable contractual partner for suppliers in the delivery of their products to final consumers."*[38]

[34] https://one.oecd.org/document/DAF/COMP/WD(2022)6/en/pdf.

[35] https://one.oecd.org/document/DAF/COMP/WD(2022)19/en/pdf.

[36] See in this volume, Karlsson (Sweden).

[37] Verdonck & Methens, Belgian report.

[38] Hungarian Act on Trade.

1.3.1.1 Agreement

All national reporters recall the ambiguity of the buying group. Brazil recognized that "buying groups have different configurations, with different types of participants, structures, rules and forms of activity, factors that can impact competitive analysis. Furthermore, there is no clear and uniform definition of the nature of buying groups, which has led to economic and doctrinal divergence, **the main discussion being whether the agreement constitutes lawful cooperation or collusion.**"

The buying power of a joint purchasing arrangement can in accordance with EU guidelines "lead to lower prices, more variety, or better-quality products for consumers. It may also allow the members, in particular smaller undertakings, to obtain better purchasing terms and thereby remain competitive on the downstream selling market(s) when faced with strong competitors. Undertakings may also engage in joint purchasing in order to prevent shortages or address interruptions in the production of certain products, thus avoiding disruption to the supply chain. However, in certain circumstances, joint purchasing may also give rise to competition concerns."[39]

Some practices are looked at by national reporters to decide whether they could be efficient or restrictive; good or bad.

One of the best examples of uncertainty is the threat of delisting or refusal to buy. The UK report mentioned that the draft of the national guidelines referred to the distinction between delisting and order stops but this was removed in the final version.[40] Switzerland quoted the Comco consultation in 2022. The reporter l adds that "it remains unclear which specific measures to pressure suppliers, such as collective letters, discussions at management level, or delisting of products or whether 'mandatory passage' may already qualify as unlawful practices. The to-be-issued decision in the MARKANT case is expected to bring clarification for future cases." The Hungarian report recalled the Act on Trade prohibiting calls for boycott and passing-off "although, there is no case law for this."

The EU guidelines consider that *"an agreement between purchasers to no longer buy products from certain suppliers due to particular product characteristics, production processes or working conditions, for example because the products offered are unsustainable whereas the purchasers want to buy only sustainable products, does not have the object of restricting competition. Vertical boycotts must therefore be considered in their legal and economic context to assess their actual or likely effects on competition."*

[39] See Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023/C 259/01) (eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023XC0721(01)) at para 20.

[40] "The Horizontal Guidance expressly distinguishes order stops from horizontal boycotts but interestingly, the distinction from 'delisting' was removed following consultation on the Draft Horizontal Guidance."

An economic study based on empirical comparison on prices to consumers before and after an alliance of buyers shows evidence of a countervailing buyer power effect that reduces retail prices by roughly 7%. By exploring determinants of buyer power, the results find that changes in retailers' bargaining ability play an important role in the countervailing force exerted by the alliances which, otherwise, would have not been profitable.[41] The same working group in 2022 stated that "this price drop was accompanied by a substantial reduction in producers' profits as well as the value generated by the industry."[42]

In a different sector (drugs procurement), another study based on empirical analysis and exhaustive data on drug sales quantities and expenditures over several years for forty important molecules showed the efficiency of buying groups. The conclusion was that "Centralized procurement of drugs by the public sector allows much lower prices but that the induced price reduction is smaller when the supply side is more concentrated"[43] so the power of each side is the key point for reducing the price.

Thanks to the international documentation, the positive benefit for the economy of some buying groups can be confirmed. In Australia, in the energy sector, the ACCC decided to grant authorization to undertake the pooling of their demand and collectively tender for and negotiate a Power Purchase Agreement for 12.5 years. The ACCC considered the following public benefits: transaction cost savings, environmental benefits through a reduction in greenhouse gas emissions, greater investment in and competition for the supply of electricity. The aggregated demands of undertaking were, for the ACCC, unlikely to be large enough to create competition concerns.[44]

The general interest of buying groups has also been explained in the healthcare market in the USA. GAO considered that increases in healthcare expenditures in recent years have intensified congressional scrutiny of the costs of medical care. Federal spending for healthcare services was expected to continue to rise. The increase in federal spending for healthcare services can be attributed, in part, to the growth in healthcare costs, and a significant component of those costs is the cost of products that hospitals and other healthcare providers purchase to provide care.[45]

[41] *Hugo Molina French National Institute for Agriculture, Food and Environment (INRAE); Paris-Saclay Applied Economics, September 12, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3452497.*

[42] *Marie-Laure Allain, Rémi Avignon, Claire Chambolle, Hugo Molina Nopte IPP February 2022.*

[43] *Pooled Procurement of Drugs in Low and Middle Income Countries, Pierre Dubois, Yassine Lefouili, and Stéphane Straub, www.cgdev.org.*

[44] *Application for authorisation AA1000561 lodged by Barwon Water and Ors in respect of establishing a joint renewable energy purchasing group (the 'Barwon Region Renewable Energy Project') Authorisation number: AA1000561 26 August 2021.*

[45] *The United States Government Accountability Office Washington, DC20548, GAO -12-339 Group Purchasing Organizations: Federal Oversight and Self-Regulation.*

1.3.1.2 Abuse of Domination and Economic Dependency

On the abuse of a dominant position, few judgments or cases have been reported because a company in a dominant position has less interest in being part of a buying group. Nevertheless, the analysis would be similar to the efficiency proof. The disparity between seller and buyer could be more important and the power on the downstream market probably higher too.

The Hungarian report mentioned that the Act on Trade generally prohibits the abuse of significant market power against a supplier.[46] The commercial judge can cancel any agreement in violation of this prohibition.

In France, three cumulative criteria are necessary to characterize an abuse of economic dependence under Article L.420-2 of the French Commercial Code: (i) the existence of a situation of economic dependence, (ii) abusive exploitation of this situation, and (iii) an actual or potential effect on the operation or structure of competition on the market. The jurisprudence of the competition authority and the Paris Court of Appeal assess an abuse of economic dependence when the supplier does not have an equivalent solution, which makes it difficult to prove the state of dependence.[47] So, in fact, very rare condemnations have been published.

In Belgium since March 2019 and similarly to French law, the victims of buying power have been protected. A new Article I.6, 4° CEL defined economic dependence as "an undertaking's position of submissiveness towards one or more other undertakings that is characterized by the absence of a reasonable equivalent alternative, available within a reasonable period of time, and under reasonable conditions and costs, allowing this or each of these undertakings to impose obligations or conditions that cannot be obtained under normal market circumstances." The Act did not contain further indications on how such a position of economic dependence should be assessed. Elements that can be relevant to this regard could include: the relative market power of an undertaking, the share of the other undertaking in one's own turnover, the technology or know-how held by an undertaking, the strong reputation of a brand or the scarcity of a product, the purchasing loyalty of consumers, and the access to essential resources or infrastructure by the economically dependent undertaking. "The finding of a position of economic dependence must, however, just like the finding of a dominant position, be determined on a case-by-case basis," and the abusive behavior will be probably in line with the abuse of the dominant position.[48]

[46] *Section 7 (1) of the Act on Trade.*

[47] *Cass. com., 9 April 2002, n° 00-13.921; Cass. Com., 12 February 2013, n°12-13.603; CA Paris, 30 September 2021, n°20/07846; Report on the situation and practices of large retailers and their groupings in their commercial relations with suppliers, 25 Sept. 2019. https://www.assemblee-nationale.fr/dyn/15/rapports/cegrdist/l15b2268-t1_rapport-enquete.*

[48] Verdonck & Methens, Belgian report.

1.3.2 Possible Application of Merger Law and Ex Ante Control

A buying group could be controlled if the joint venture and/or the long-term agreement gives rise to a full-function enterprise. The full-function requirement is fulfilled when *(i)* the joint venture has sufficient financial resources and tangible and intangible assets to be able to engage in economic activity on a lasting basis; *(ii)* it has the capacity to direct the undertaking with its own, independent management; *(iii)* it is capable of performing all the functions normally performed by the other undertakings active on the same market independently of the parent companies; *(iv)* the economic activity undertaken is of a stable and lasting nature.[49]

The analysis will in such cases mainly focus on the market power of the entity. In a recent decision, the Italian Antitrust Authority decided that "*the market power of a* buying *group in the supply markets must also be assessed by taking into account the market shares that the member companies jointly hold in the local markets of the large-scale retail trade: the distribution of sales quotas over the territory may in fact influence the purchasing power of the group.*"[50]

France made some developments in the *ex-ante* control of large purchasing groups.

The French commercial code has a specific provision that made compulsory to notify the Competition authority of "any agreement to negotiate the purchase or listing of products or the sale of services to suppliers on a group basis,"[51] without this notification subsequently requiring authorization. In addition, this obligation to provide prior information is subject to a two-fold turnover threshold being exceeded: on the one hand, the total worldwide turnover excluding tax of all the companies or groups of individuals or legal entities party to the agreements must exceed €10 billion, and on the other, the total turnover excluding tax achieved on purchases in France under these agreements by all the companies or groups of individuals or legal entities party to the agreements must exceed €3 billion.[52] This kind of ex-ante control shows that the investigation delay could be inadequate with a change of alliance.

The EU opens the box of specific regulation in the directive on unfair trading practices in business-to-business relationships in the agricultural and food supply chain. The EU considers that "Unfair trading practices are particularly harmful for small and medium-sized enterprises (SMEs) in the agricultural and food supply chain. Enterprises larger than SMEs, but with an annual turnover not exceeding EUR 350,000,000, should also be protected against unfair trading practices to avoid the costs of such practices being passed on to agricultural producers. The cascading

[49] See in this volume, Teti (Italy).

[50] *See C12247B - BDC Italia-Conad/Auchan, decision No. 28064b, 4 January 2020.*

[51] *Article 37 Law no. 2015-990 of 6 August 2015 for growth, activity and equal economic opportunities, creating Article L.462-10 of the French Commercial Code.*

[52] *Article R.462-5 of the French Commercial Code French National report.*

effect on agricultural producers appears to be particularly significant for enterprises with an annual turnover of up to EUR 350,000,000. The protection of intermediary suppliers of agricultural and food products, including processed products, can also serve to avoid the diversion of trade away from agricultural producers and their associations which produce processed products to non-protected suppliers." Therefore, a list of forbidden practices has been adopted and implemented by the member states.

In Belgium, contrary to the Directive's text, in order not to give even more bargaining power to the "big players," the Belgian legislator has chosen to protect only those suppliers whose annual turnover is less than EUR 350 million. For suppliers, whose consolidated turnover exceeds EUR 350 million, the protection of the law does not apply. Although the law aims at protecting SME's suppliers, which are considered to be more vulnerable than larger suppliers. This turnover threshold can be deplorable because even bigger suppliers are nowadays faced with the enormous pressure exerted by purchasing groups. The balance of power between large (international) suppliers and buying groups is indeed growing to be more and more unequal in favor of the purchasing groups.[53]

In Poland, the implementation of the EU directive allowed the Office of Competition and Consumer Protection (OCCP) to fine buyers using unfair practices towards suppliers. Applying additional discount at the end of the contract,[54] or unjustified fees[55] and other cases are under proceedings.

1.4 Conclusion: Some Improvements but Can We Do Better?

Many reports recognized that there are very few legal and/or lack of academic economic comments on purchasing groups.[56] For Hong Kong, the foreseeability is rather unclear, "due to the dearth of jurisprudence or guidance." Other reports are more optimistic on the communication on this subject and some economic studies are available even if they should be updated.[57] The LIDC could be a useful help by explaining the rules.

Guidelines from various countries (EU, UK, Hong Kong) are a good way to understand the approach of competition authorities but could be understood as non-evolutive and dated. Some reporters require specific guidelines on purchasing groups.[58] During the COVID-19 crisis, many competition authorities have admitted

[53] Verdonck & Methens, Belgian report.

[54] Jeronimo Martin Polska.

[55] Eurocash.

[56] Austria, Romania, Italy.

[57] See in this volume, de Lima Assafim (Brazil).

[58] See in this volume, Kocsis (Hungary).

purchasing groups and some practical application of the competition law by letters guidelines. Could security be improved to offer more certainty to companies?

Some ways could be inspired by national practice or advice and ordered in two categories.

1.4.1 First One Would Be on Developing Soft Law Guidance

One way could be public opinion on various cases.[59] National competition authority could maybe collect various information and make official market studies, guidelines and advocacy on competition law applied specifically to buying groups.[60] Allowing and/or encouraging a code of conduct could also be of some help for the undertakings.[61] Australian Competition and Consumer Commission noticed that "industry codes (like the Dairy Code, the Horticulture Code, and the Food & Grocery Code) provide sector-specific protections that focus on particular problems that arise from significant purchasing power in those sectors."[62] This could be a way to apply without condemnation competition to purchasing groups and differentiate the genuine ones from the cartels.[63] This solution could be a smart way. However, it is also an informal regulation.

In the same way, a specific threshold based on the market share on the purchase market and offering security for small-size businesses as proposed in the EU guidelines.

1.4.2 The Second Category Is Attached to a Regulation

One way could be like the French approach to introduce in national laws a method of notifying the competition authority for large purchasing groups.

Would a per se specific regulation for B2B relationships (and similar laws allowing to control unfair contract terms[64] for all sectors or limited to the food supply chain[65]) to reduce the effect of purchasing power could be a way to prevent

[59] See in this volume, Cau (Switzerland).

[60] *UK notice market studies as a powerful tool.*

[61] See in this volume, Kocsis (Hungary).

[62] https://one.oecd.org/document/DAF/COMP/WD(2022)5/en/pdf.

[63] Brazil insists on the qualification of the buying group.

[64] Australia https://one.oecd.org/document/DAF/COMP/WD(2022)5/en/pdf.

[65] UE Directive 2019 April 17 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain and its transposition in members states regulation: Swedish: Lag (2021, 579) om förbud mot otillbörliga handelsmetoder vid köp av jordbruks- och livsmedelsprodukter.

unfair effects as some countries have tried?[66] However, the effectiveness of those texts was discussed. This last approach underlines the difficulty of an ex-post regulation and the delay in applying prohibition. However, the EU has already made some changes in the digital market.

The LIDC congress in Gotheborg allowed all members, reporters, and those in attendance to give their preference on those options in a specific period where inflation is back and threatens the consumer in many countries. A common view was to develop soft laws and make sure that all competition authorities could explain their understanding of uncompetitive buying groups. Nevertheless, B2B legislations on unfair practices should not be left in the dark. National regulations adopted in European member states' agricultural and food supply chains allowed the sanctioning of unfair behavior quickly and efficiently.

[66] See in this volume, Melot et al. (France); Kocsis (Hungary).

Chapter 2
Austria

Stefan Wartinger and Gerhard Fussenegger

2.1 Historical Background

Buying groups did not play a major role in Austrian competition law in terms of antitrust law enforcement or in the academic debate. There is only a very limited number of contributions in scientific journals[1] or newspapers[2] about buying groups under competition law. The same also holds true for the legal commentary literature: in the relevant Austrian legal commentary literature[3] concerning competition law, the topic of "buying groups" and "joint purchasing" is only addressed fundamentally. A profound analysis remains absent insofar as almost exclusively the European

[1] For example, the topic of purchasing groups is briefly mentioned in a publication in the context of the coronavirus pandemic and the accompanying disruption of supply chains. (See, *BINDER GRÖSSWANG/Hoffer/Imarhiagbe,* Kartellrecht und Coronavirus – Preiserhöhung und Kooperationen (Stand 30.03.2020)).

[2] In *derStandard*, an Austrian Newspaper, buying groups in the context of gas procurement during the Russian aggression in Ukraine were discussed. (Strobl, EU-Gasbeschaffung: Gutes Kartell, 2022), https://www.derstandard.at/story/2000140131737/eu-gasbeschaffung-gutes-kartell.

[3] Inter alia, *Petsche/Urlesberger/Vartian*, (Hrsg.) KartG 2005[2] (2016); *Gugerbauer*, KartG und WettbG[3] (2017), *Egger/Harsdorf-Borsch* (Hrsg), Kartellrecht (2022).

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B. Kilpatrick, P. Kobel (eds.), *Joint Purchasing-framework for Competition Law Analysis & Mechanisms to Address Overly-broad Trademark Usage*, LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition,
https://doi.org/10.1007/978-3-031-71963-9_2

Commission's ("**Commission**") Guidelines on horizontal agreements[4] ("**Guidelines**") are used as sources by the commentators.[5]

While competition law proceedings concerning buying groups and especially buyers' cartels took place across Europe in a variety of different industries and jurisdictions,[6] there was no observable activity in Austria in this regard. As far as can be seen, there are no (publicly available) decisions in Austria under competition law regarding buying groups.

In contrast, there has been increased enforcement of antitrust law against buyers' cartels in the biochemicals / chemicals sector at the EU level. In November 2022, the Commission imposed fines of EUR 157 million on five purchasers of styrene monomer also involved in a buyers' cartel colluding on price negotiation strategies.[7] The sixth undertaking which took part in the cartel revealed the cartel to the Commission and was awarded full immunity under the leniency notice. Purchasers of styrene monomer buy styrene monomer on the basis of both long-term contracts and on the spot market. To counteract the volatility of styrene prices, styrene supply contracts in the EEA can refer to the "Styrene Monthly Contract Price" (SMCP). The SMCP is not a net price for styrene but forms part of the pricing formula in such contracts. The SMCP is the result of bilateral negotiations between individual styrene purchasers and merchants. From 2012 to 2018, the six styrene purchasers coordinated their pricing strategies strategy vis-à-vis the styrene sellers to influence the SMCP to their advantage (i.e. to lower the value of styrene, to the detriment of styrene sellers).

In July 2020, the Commission imposed fines of EUR 260 million on three ethylene purchasers involved in a buyers' cartel colluding on price negotiation strategies to purchase ethylene at the lowest possible price.[8] The fourth undertaking who took part in the cartel revealed the cartel to the Commission and was awarded full immunity under the leniency notice. Similar to ethylene buyers, ethylene purchasers usually buy ethylene under supply agreements. The purchase price of ethylene is very volatile and to reduce the risk of price volatility, ethylene supply agreements refer to a pricing formula, which often includes a so-called "Monthly Contract Price" (MCP), an industry price reference resulting from individual negotiations between ethylene buyers and sellers. From 2011 to 2017, the four ethylene

[4] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11/1. The commentaries refer to the "old" guidelines dated 2011, because at the time the commentaries were published, the "new" horizontal Guidelines were not yet on the horizon.

[5] The current Austrian commentary literature base their view on the (old) Guidelines on horizontal agreements dated 2011. It can be assumed that new commentary literature will also take the new horizontal guidelines as a reference.

[6] For example, in France, Germany, Spain and the Netherlands (A good overview provides *Burholt/Galaski*, Die kartellrechtliche Würdigung von Einkaufsgemeinschaften, Grundlage und aktuelle Entwicklungen, WRP 2021, 1133.).

[7] Commission, Case AT.40547 - *Styrene Monomer.*

[8] Commission, Case AT.40410 – *Ethylene.*

purchasers coordinated their pricing strategies strategy vis-à-vis the ethylene sellers to influence the MCP to their advantage (i.e. to lower the value of ethylene, to the detriment of ethylene sellers).

In February 2017, the Commission imposed fines of EUR 68 million on three battery recycling companies involved in a buyers' cartel colluding on purchase prices for scrap lead-acid automotive batteries in certain EU countries.[9] The fourth undertaking who took part in the cartel revealed the cartel to the Commission and was awarded full immunity under the leniency notice. Recycling companies purchase used automotive batteries (from cars, vans or trucks) from scrap dealers or scrap collectors. The four recycling companies colluded to reduce the purchase price paid to scrap dealers and collectors for used car batteries.

2.2 Substantive Analysis

2.2.1 Procedural Aspect

First, it needs to be noted that there is no specific legal (procedural) framework in place in Austria addressing buying groups or buyers' cartels under competition law.

In general, the Austrian competition law enforcement system is a dual system insofar as the Federal Competition Authority ("**FCA**") is an independent authority empowered to investigate infringements of competition law but has no powers to issue binding decisions in substantive matters. It needs to initiate court proceedings before the Cartel Court[10] and to request the Cartel Court to issue a decision. The types of decisions that can be taken by the Cartel Court include decisions finding an infringement, decisions ordering an undertaking to bring an infringement to an end, commitment decisions, interim measures and fining decisions. Certain investigation measures of the FCA such as dawn raids also need to be approved by the Cartel Court. In addition to the FCA, the Federal Cartel Prosecutor ("**FCP**"), which is subject to instructions from the Federal Minister of Justice, may also initiate proceedings before the Cartel Court.

Next to actions by the FCA and FCP, private enforcement motions may also be brought before the Cartel Court to obtain cease-and-desist orders and declaratory judgments, but not to obtain fines.

In terms of confidentiality, there is no general right to access the files of the FCA or FCP. Generally, proceedings before the Cartel Court are open to the public.

[9] Commission, Case AT.40018 – *Car battery.*

[10] The Cartel Court is a section of the Higher Regional Court of Vienna. Cases before the Cartel Court are heard and decided by senates composed of two professional judges and two expert lay judges. The expert lay judges in the Cartel Court's senates are normally nominated by the Federal Chamber of Labour and the Chamber of Commerce. Decisions of the Cartel Court can be appealed to the Supreme Court acting as Appellate Cartel Court for procedural errors and for errors of law. An appeal for errors of fact is only possible under very limited circumstances.

However, parties can apply to the court to exclude the general public (partially or fully) from oral hearings if doing so is necessary to protect business secrets. The Cartel Court is obliged to publish final decisions granting, rejecting or dismissing an action, on the following: (i) the termination of an infringement; (ii) the finding of an infringement; or (iii) the imposition of fines.

Access to file remains a hot topic in Austria. While the implementation of the EU Damages Directive in Austria now enables parties to submit a justified reasoned application for disclosure of evidence to the civil court either with or after having lodged an action for damages, it is important to note that leniency statements and settlement submissions are not themselves subject to disclosure. However, there is an ongoing dispute about whether these restrictions also apply to parallel criminal investigations (which may be initiated in case of bid rigging) if leniency statements and settlement submissions have also become part of the public prosecutor's file. As private parties pursuing civil claims also have access to the public prosecutor's file, the protection of leniency statements and settlement submissions from disclosure would be circumvented if they were granted unrestricted access to this file. The pending preliminary ruling before the ECJ CJEU will hopefully bring some clarity in this respect.

2.2.2 Substantive Law

As indicated above, buying groups did not play a major role in Austrian competition law, neither on the enforcement level nor in the academic discussion. The (important) developments affecting Austria the most, all take place at the EU level—e.g., the amendment of the horizontal Guidelines (in the following "**New Guidelines**"). Since this article is first and foremost about Austria and not the EU, we will only briefly discuss the New Guidelines. As the Guidelines, the New Guidelines also have a chapter dedicated to the analysis of buying groups. A comparison between the old and New Guidelines shows that the chapter concerning buying groups is more detailed in the new guidelines than in the previous one. The chapter is expanded, provides more clarity, and reflects recent case practice. However, there are no substantive changes found in the New Guidelines, only clarifications and more detailed descriptions.

Notably, the New Guidelines explicitly refer to the difference between buying groups and buying cartels, also providing examples when a buying cartel is present (for example when the buyers share commercially sensible information outside any genuine joint purchasing arrangement).[11] The New Guidelines continue to adhere to the 15% threshold, according to which a market share of less than 15% of a buying group is not likely to give rise to restrictive effects.[12] Also, the New Guidelines

[11] New Guidelines, para 279.

[12] New Guidelines, para 291.

provide clarification concerning potential upstream harm to suppliers,[13] and Clarification of circumstances in which it is less likely that lower prices will be passed onto consumers.[14] To summarise, the New Guidelines provide additional guidance on when joint purchasing activities and buying groups may violate EU competition law. The detailed provisions of the new Guideline are of course most welcome from the Austrian point of view, as they provide more information and thus indirectly[15] more legal certainty for the users of the law, be it the competition authorities or lawyers.

Arguably, buying groups are also covered by the EU's De Minimis Notice,[16] if the aggregate market share held by the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement. Following Section 2 (2) Austrian Cartel Act 2005 ("**Cartel Act**") cartels are exempted from the general cartel prohibition (cf. Section 1 Cartel Act) if they refer to agreements or coordination between competitors, who, together, have a share of the relevant market not exceeding 10%, or cartels involving undertakings, which are not in competition which each other (e.g., in vertical agreements) and who each have a market share on the relevant market not exceeding 15%, provided that the agreements / coordination do not have as their object the fixing of sales prices, the restriction of production or sales, or the sharing of markets ("de minimis" cartels). Buying groups are therefore also exempted under Austrian national competition law. This is also confirmed in legal commentary.[17]

In addition to cartel law, the Austrian Fair Competition Act ("*Faire-Wettbewerbsbedingungen-Gesetz*," "Federal law for the improvement of local supply and competitive conditions," thereafter "FWBG")[18] includes provisions on "good business behaviour" ("*Kaufmännisches Wohlverhalten*").

Notably (and in difference to competition law), the FWBG also applies to the unilateral behaviour of non-dominant undertakings. Under the general clause in § 1 (1) FWBG, business practices between undertakings can be interdicted as far as they are likely to threaten "performance-related competition."[19] Section 2(1) and

[13] New Guidelines, para 282.

[14] New Guidelines, para 307.

[15] Indirectly since the Guidelines are considered only "soft-law."

[16] Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), 2014/C 291/01.

[17] Linde, Kartellrecht, Egger / Harsdorf (Hrsg), § 1, para 156, FN 416.

[18] Faire-Wettbewerbsbedingungen-Gesetz, FWBG, BGBl. (Federal Law Gazette) No. BGBl. I Nr. 239/2021.

[19] The law (§ 1 (2) FWBG) refers by way of example to "the offering or demanding, granting or accepting of money or other benefits, including discounts, special conditions, special equipment, obligations to take back goods or the assumption of liability, between suppliers and resellers that are not objectively justified, especially if additional benefits are not matched by corresponding counter-performance."

(2) NVG provides for a ban on discrimination.[20] Moreover, under § 4 FWBG, suppliers may be obliged to supply their goods to retailers, if the refusal to supply would threaten the local supply or significantly affect the competitiveness of the final seller on the relevant market.[21]

In its amendment in 2021, the FWBG did not only get its new name.[22] The Austrian legislator also implemented the EU Directive 2019/633 on unfair trading practices in the agricultural and food supply chain.[23] Besides establishing rules concerning the enforcement of those prohibitions and arrangements for coordination between enforcement authorities, the FWBG establishes a minimum list of prohibited unfair trading practices in relations between buyers and suppliers in the agricultural and food supply chain. If there is an economic imbalance in favour of the buyer,[24] the latter is prohibited from applying certain practices on the supplier, e.g., delayed payments, cancellations on short notice, etc. The FWBG hereby lists practices in two annexes ("Anhang 1 und Anhang 2"). While all practices in Annex A are generally prohibited, the practices in Annex 2 may only be applied if they have been clearly and unambiguously agreed beforehand in the supply agreement or a subsequent agreement between the supplier and the buyer.

Remarkably, the term "buyer" also refers "to a group of such natural and legal persons,"[25] i.e. joint purchasing. Based on the FWBG, suppliers of agricultural products and food supply, which are respectively smaller than their contractual counterparts and therefore on joint purchasing on a group of buyers,[26] may rely on the FWBG—a legal basis that is independent of competition law standards.

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[20] If the supplier "*grants or offers different conditions to authorized resellers without objective justification or if the reseller requests or accepts objectively unjustified conditions from suppliers*," an injunctive relief may be filed.

[21] See also § 3 NVG (which corresponds to § 6 Cartel Act), which provides that proceedings under § 1 and 2 NVG may not be taken as a reason by the defendant to exclude the undertaking affected (by conduct as defined by those provisions) from further supply or demand on reasonable conditions.

[22] Until 2021, the act's name was the "Act on Local Supply" ("*Nahversorgungsgesetz*," "Federal Law on Improvement of Local Supply and Competitive Conditions"), Nahversorgungsgesetz, NahVersG, BGBl. (Federal Law Gazette) No. 392/1977 as amended.

[23] Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, PE/4/2019/REV/2, OJ L 111, 25.4.2019, pp. 59–72.

[24] Based on differences in turnover, cf., § 5a FWBG.

[25] Section 5b FWBG.

[26] Following § 5a FWBG, the section on unfair trading practices in agricultural and food supply chains only applies if the agreement / cooperation in question is made between: 1) Suppliers who have an annual turnover of two million euros or less and buyers who have an annual turnover of more than two million euros; 2) Suppliers who have an annual turnover of more than two million euros and not more than ten million euros, to buyers who have an annual turnover of more than ten million euros; 3) Suppliers who have an annual turnover of more than ten million euros and not more than 50 million euros, to buyers who have an annual turnover of more than 50 million euros; 4) Suppliers who have annual sales of more than 50 million euros and not more than 150 million euros to buyers who have annual sales of more than 150 million euros; 5) Suppliers who have

Independent from certain business areas (and therefore not exclusively focusing on the agricultural and food supply chain), the FCA published in October 2018 a "Fairness Catalogue for Enterprises – Point of View for Corporate Good Behaviour" ("Fairnesskatalog für Unternehmen, Standpunkt für unternehmerisches Wohlverhalten," thereafter "Catalogue").[27] The declared aim of the (legally-non binding) Catalogue was *"above all to create awareness of fair behaviour"* and to *"provide comprehensive guidance on how to proceed when affected by unfair business practices.*"

The Catalogue mainly focuses on unfair corporate behaviour such as "*the refusal to conclude in writing contracts*," *"the unilateral retroactive amendment of contractual obligations"* or "*demanding payments or other monetary benefits without appropriate consideration,*" but also "*discrimination*" (in pursuit of unfair purposes, use of illicit means or if otherwise contrary to the law) might be considered as an unfair corporate behaviour.

Arguably,[28] especially in light of the wider scope of the FWBG, the Catalogue might be applicable to joint purchasing / a group of buyers as well.

2.3 Qualitative and Conclusive Analysis

In terms of the predictability of the rules for buyer groups, there are, as mentioned, several recent decisions of the EU Commission in this area (or at least buying cartels). In addition, the New Guidelines (once again) provide for market share thresholds which are very valuable in practice. If the undertakings concerned are below the corresponding market share thresholds, buying groups can be implemented quickly and without risk (safe harbour).

Nevertheless, in terms of buying groups, it would have been desirable if the New Guidelines had also provided for a second safe harbour provision in the event that the level of procurement quota does not exceed a certain level (e.g., 10% of the total procurement volume / value for the respective product or total demand across all product groups). The main concern associated with buying groups is that they may lead to the commonality of costs between the competing undertakings. Thus, the lower the volume of goods that are jointly procured (via buying groups) in relation to the total procurement volume (for the respective product or total demand across all

annual sales of more than 150 million euros and not more than 350 million euros to buyers who have annual sales of more than 350 million euros and 6) Suppliers who have annual sales of more than 350 million euros and not more than 1 billion euros, to buyers who have annual sales of more than 5 billion euros.

[27] Catalogue only available in German, cf., https://www.bwb.gv.at/fileadmin/user_upload/BWB_Fairnesskatalog_final.pdf.

[28] The Catalogue does not explicitly refer to joint purchasing or group of buyers.