

Question A

Do recent developments in enforcement, case-law, and guidance from competition authorities and regulators make the delineation between legitimate and efficient purchasing and supply arrangements and infringing conduct sufficiently clear in practice that businesses and their advisors know how to stay on the right side of the law?

Background/Context:

We are seeing consumer prices rising at pace globally, central banks have increased rates, and events such as the Covid pandemic, the war in Ukraine, and Brexit continue to stress supply chains.

Against this backdrop, it is important that companies are able to distinguish clearly between legitimate and efficient conduct and infringements of the applicable rules and to assess the impact on their commercial relationships.

In addition to focusing on sellers and the conditions on which they sell their products or services to buyers, buyers' conduct in their interactions with suppliers and markets when purchasing goods and services has recently come under increased scrutiny from competition law, enforcement and guidance (e.g. the Horizontal Guidelines).

From co-ordinated conduct by buyers, such as joint purchasing/buying alliances (e.g. rules for purchasing alliances in the food retail sector in France), buyers' cartels and purchase price fixing (e.g. the Ethylene and Car Battery Recycling cases), to unilateral conduct by buyers that hold substantial purchasing power. As regards the latter, new rules and cases (e.g. in Belgium) have considered the "abuse of economic dependence", which targets situations where a company abuses the relative economic dependence of another company (supplier or customer).

Different jurisdictions have taken a range of approaches, which have evolved and changed over time.

What is the current situation in these jurisdictions and what are the LIDC National Chapters' and members' respective experiences – is the line between legitimate and infringing conduct sufficiently clear or is further guidance from authorities and courts required?

In order to facilitate a targeted and comparative approach National Rapporteurs are invited to focus on buy-side considerations.

1. Historical background

Can you describe the development of buying groups in your country over the last 15 years?

- The sectors concerned (food, non-food, health, other...);
- Have there been any waves of partnership, agreement, mergers and/or the disappearance of any significant buying groups?

Has this news been commented in the legal/economic/public press in accessible and understandable terms?

2. Substantive analysis

2.1. Procedural aspect

Can you describe the evolution of the legal framework (summary description of the legal environment for buying groups; description of ex ante and ex post controls), highlighting new legislation, regulations, or soft law (guidelines, advocacy, comfort or evaluation letters etc.)?

What is the place of national and competition authorities in the handling of cases? Are there differences in analysis between each institution (details/length of decisions, comments, accessibility, etc.)?

Do companies in relationship with buying groups initiate cases (complaints, denunciations, etc.)? How the confidentiality of the information communicated by third parties is managed?

2.2. Substantive law

Does the competition law review fall exclusively within the scope of antitrust law, or abuse of dominant position (individual or collective) or abuse of economic dependence, or a law with distinct objectives (unfair commercial practices, restrictive competition practices, etc.)?

Do merger laws apply to buying groups? Is it an effective tool (in terms of the number of cases handled and effective control by the authorities)?

Does the buying group's contractual structure influence the qualification (partnership, joint venture, cooperative company, etc.) and does the nature of the contractual relationship affect the competitive analysis (mandate, brokerage, etc.)?

Are buying groups analysed from the point of view of the anti-competitive object (per se?) or the anti-competitive effect? or based on other parameters (market structure, barriers to market access, for example, according to legislation in other fields: urban planning, commercial, price regulation, etc.)? If so, does the analysis extend beyond a single review of the share of purchases made by the buying group (consideration of imbalances with competitor buyers' analysis of the probability and scope of the benefits passed on to consumers? etc.)?

Is there a difference in treatment between buying groups that bring together non-competing companies in the downstream market and those that bring together competitors?

Does the influence of the central buying groups on the sharing of margins appear in the decisions?

Does the analysis of the buying group differ according to the characteristics of its suppliers? For example, are buying groups dealing with SMEs considered more carefully by regulators than those dealing with large international groups? If so, how are the most "vulnerable" suppliers identified?

How does your positive law deal with the "mandatory passage" aspect of the partners of the buying group?

Has the reduction in the diversity of supply been commented on or analysed by the authorities?

Do the authorities conduct an analysis of the pro-competitive effects (anti-inflation effect)? How accessible is it?

What is the place and perception of the economic studies provided by the parties? Are they important for the competition authorities' analysis? Is their function faithfully reflected in the decisions and can they be re-used in other cases?

Is the impact of buying groups on a relative homogenization of prices sufficiently analysed?

3. Qualitative and conclusive analysis

Overall, what is your opinion on the foreseeability of rules for buying groups in relation to the more traditional approach to horizontal agreements?

Do you support the implementation or preservation (if your legislation provides for it) of turnover and market share thresholds, either general or sectorial?

Do you support a more specific approach to the parameters for qualifying buying groups under competition law (*cf.* those listed in 2)? Do you think it is necessary to adopt specific guidelines on buying groups?