



**BUNDESKARTELLAMT**

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**Buyer Power in Competition Law -  
Status and Perspectives**

**Meeting of the Working Group on Competition Law  
on 18 September 2008**

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**- Background paper -**

## A. Introduction

The issue of buyer power has recently been the subject of an increasing number of expert and political discussions. Examples are the takeover of Plus by EDEKA that was examined by the Bundeskartellamt<sup>1</sup>, the UK Competition Commission's current sector inquiry into groceries retailing<sup>2</sup> and the recent call by the European Parliament upon the European Commission to take a closer look at retailers' buyer power<sup>3</sup>. In the US the issue met with great interest within the context of the *Supreme Court's Weyerhaeuser* decision<sup>4</sup>. The discussion is by no means confined to the food retail sector. Issues relating to buyer power also arise in other sectors such as the supply industry, energy procurement or public sector demand.

Economic theory has long neglected buyer power. More recent research has meanwhile produced differentiated insights (see Chapter B.).

In the competition authorities' practice buyer power has mainly played a role in the following three case constellations: (i) two or more large buyers merge to form one buyer, (ii) buyers conclude joint purchasing agreements, and (iii) dominant or powerful buyers induce suppliers who depend on them to grant them advantages without any objective justification (see Chapter C.).

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<sup>1</sup> See the Bundeskartellamt's English press release at [http://www.bundeskartellamt.de/wEnglisch/Publications/Working\\_Group.php](http://www.bundeskartellamt.de/wEnglisch/Publications/Working_Group.php). The decision is available in German at [http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion08/B2-333-07\\_Internet.pdf](http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion08/B2-333-07_Internet.pdf).

<sup>2</sup> The sector inquiry is available at <http://www.competition-commission.org.uk/>.

<sup>3</sup> Written declaration of the European Parliament (0088/2007) on investigating and remedying the abuse of power by large supermarkets operating in the European Union, <http://www.europarl.europa.eu>.

<sup>4</sup> *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 127 S. Ct. 1069 (2007); cf. Werden, Monopsony and the Sherman Act: Consumer Welfare in a New Light, available at <http://ssrn.com/abstract=975992>.

The assessment of buyer power under competition law is substantially influenced by the general competition policy concept. Depending on this concept's "strategic approach", buyer competition appears to be more or less worthy of protection. Beyond its theoretical definition and the practical approach to it, buyer power must therefore also be discussed in terms of the basic objectives of competition law (see Chapter D.).

As regards the question as to whether competition law protects competition only in one specific direction, it is remarkable that European competition law excludes the state as a pure buyer from the area of application of competition law (see Chapter E.).

## **B. Buyer power in economic theory**

### **I. The theoretical analytical framework**

Economic theory offers several analytical instruments to examine buyer power<sup>5</sup>. The so-called monopsony model has established itself as the standard instrument. In analogy to the analysis of supply-side market power the assumption is that one powerful buyer faces a large number of suppliers. As a mirror image of a monopolist's behaviour, a monopsonist can take advantage of his market power by reducing his demand. In this way he can achieve a procurement price below the competitive level.

However, the simple monopsony model often does not adequately reflect the reality of procurement markets. In many cases both sides of the market are concentrated to a certain extent. Furthermore, the transactions are not concluded as part of anonymous exchange deals, but in bilateral negotiations which leave room for individual contract conditions regarding prices and rebates, terms and conditions of supply etc. For this reason current literature

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<sup>5</sup> A clear general overview is provided by Inderst/Wey, [Die Wettbewerbsanalyse von Nachfragemacht aus verhandlungstheoretischer Sicht](#), DIW Research Notes 25/2007, available at [www.diw.de](http://www.diw.de).

often interprets buyer power as bargaining power and examines it within the context of bargaining theory models. Demand-side market power is not expressed by a strategic reduction of quantities, but in bilaterally negotiated individual prices and rebates as well as other purchase conditions.

## **II. Welfare effects**

In the simple monopsony model the reduction in quantity traded leads to allocative inefficiencies and therefore to a welfare loss. If, however, the use of buyer power does not lead to a reduction in quantity (as in the bargaining model), allocative inefficiencies and welfare loss caused by them will not occur. There will merely be a redistribution of economic rent among suppliers and buyers with a neutral effect in terms of welfare theory.

However, even without a direct reduction of supply, the use of buyer or bargaining power in bilateral negotiations can still have a negative effect on welfare. If, due to his bargaining power, one buyer has better procurement conditions than other buyers, he can use these to strengthen his market position in the sales market. A strengthened position in the sales market can in turn improve his procurement situation, e.g. as he is in a position to negotiate additional quantity discounts. This mechanism is known in the literature under the term "spiral effect". As a result, less efficient (smaller) competitors are squeezed out of the market. In the long term, however, this could lead to price increases if, due to decreasing competitive pressure, the remaining companies are no longer forced to pass on their procurement advantages.

Furthermore, recent literature has also discussed negative competitive effects resulting from the so-called "waterbed effect"<sup>6</sup>. According to this theory the expansion of a large buyer's bargaining power weakens the negotiating position of smaller buyers who will have to pay higher prices due, on the one hand, to their smaller sales volumes, and on the other, to the fact that manufacturers

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<sup>6</sup> For an overview, see Inderst/Wey, loc. cit. Cf. also the European Commission's Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ of 6.1.2001, C 3/02, paras. 126 and 135.

have to compensate for high discounts granted to customers with considerable buyer power by raising prices for smaller customers. According to the model described above, their choice of action is restricted. It is questionable, however, whether price increases for smaller companies will occur at all, whether they will be considerable enough to compensate for the price reductions made by the larger companies, and whether they will lead to a higher price level in the overall market<sup>7</sup>.

In view of dynamic welfare effects it is generally assumed that the use of buyer power reduces the suppliers' opportunities for investment and innovation because it reduces their profits. However, the economic literature has developed some explanations on why, under certain circumstances, buyer power can also have investment incentive effects, and thus positive welfare effects. A large, powerful buyer could thus be prepared to share the high initial investment costs of a product because this could also increase his own profit; any free rider behaviour, which smaller buyers might possibly adopt, would be less likely in the case of large buyers. Furthermore, if they are faced with powerful buyers, suppliers might have a greater incentive to invest in the quality and brand of their product in order to increase their bargaining power vis-à-vis these buyers.

## **C. Buyer power in the competition authorities' practice**

### **I. Control of Concentrations**

Within the context of the control of concentrations, buyer power plays a particular role with regard to the creation or strengthening of a dominant position. Buyer power can create a dominant position directly in the procurement market concerned (see para. 2 below). It can, however, also have

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<sup>7</sup> The Competition Commission's recent sector inquiry reached the conclusion that, to the extent that any waterbed effect existed in the UK grocery retailing sector, it would only be of limited impact, Appendix 5.4., [The waterbed effect in supplier pricing](http://www.competition-commission.org.uk), available at <http://www.competition-commission.org.uk>.

an effect within the framework of the assessment of a supply-side market position (see para. 3 below) under the aspect of access to procurement markets. Moreover, buyer power is sometimes used as an objection to relativize a dominant position which would otherwise exist (see para. 4 below).

## 1. Market definition

As for market definition, the demand-side oriented market concept which is tailored to supply markets has gained acceptance in practice. Under this concept it is primarily the actual ability of the opposite market side to resort to other sources which limits a supplier's scope of action<sup>8</sup>. In the case of buyer power it is the procurement markets, not the supply markets, which have to be defined. The demand-side oriented market concept is applied inversely in this context. From the suppliers' point of view the market definition is thus based on their ability to switch to alternative sales opportunities. The definition focuses on the products the supplier is offering or would be able to offer without any significant problems. With these products in view it has to be asked which (alternative) sales channels could be serviced in an economically viable manner.

In practice, the inverse application of the demand-side oriented market concept to procurement markets leads to application problems. In those cases of buyer power which are relevant in practice, the number of companies on the demand side, and usually also on the supply side, is relatively low. In such a constellation the companies' individual differences in the products they produce, their individual sales alternatives and individual flexibility to switch to other sources, become much more apparent.

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<sup>8</sup> In certain cases it is also necessary to take into account the suppliers' ability to adjust their supply at short notice to meet the demand side's requirements (cf. German Federal Court of Justice (BGH) decision of 16 January 2007 WuW/E DE-R 1925, 1928 – "*National Geographic II*"). A competition between substitutes with an equal effect on all competitors only comes into play in the competition analysis of the relevant market (cf. BGH of 2 October 1985, WuW/E BGH 1027 – "*Gruner + Jahr/Zeit I*"; BGH of 4.3.2008, WuW/E DE-R 2268 – "*Soda-Club II*"). The same applies to potential competition (cf. *Commission Notice on the definition of the relevant market*, OJ of 9.12.1997, C 372/5, para. 24.)

Not least because of the time limits which have to be observed in merger control proceedings, the competition authorities' practice with regard to procurement markets is generally limited to establishing sufficiently significant product groups. This applies in particular to the food retail sector<sup>9</sup>.

## 2. Assessment of dominance

The definition of the market is followed by the issue of market dominance. In the case of supply markets the consideration of market shares generally allows for statements about the supplier's position vis-à-vis his competitors and the opposite side of the market. This approach cannot easily be applied to procurement markets. In this area, buyer power is less often expressed in the classical sense as market power affecting the opposite market side as a whole, but more often in the form of bargaining power exercised bilaterally vis-à-vis individual suppliers. However, market dominance cannot simply be equated with an imbalance in bilateral power relationships. This would ultimately lower the requirements down to the level of relative market power (dependence). According to the Berlin Higher Regional Court's fundamental decision in the Coop/Wandmaker case, only actors who can influence the opposite side of the market as a whole can "dominate" the market<sup>10</sup>. It therefore remains to be discussed to what extent the partial proof that a greater share of the suppliers depend on one powerful buyer can be used as an element for proving the existence of market dominance.

In the European Commission's practice the assessment of relative economic dependencies ("threat points") on an average basis has become a decisive element in the assessment of a buyer's market dominance. In two cases

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<sup>9</sup> For the Commission's practice, see decision of 3 February 1999, COMP IV/M.1221 – "REWE/Meinl", para. 76 ff.; for the Bundeskartellamt's practice see decision of 25 August 2005, B9 27/05, para. 35 – "Edeka/Spar", decision of 30 June 2008, B2-333/07, – "Edeka/Plus", available in German at [http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion08/B2-333-07\\_Internet.pdf](http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion08/B2-333-07_Internet.pdf); fundamental decision of the Berlin Higher Regional Court (Kammergericht), 5 November 1986, Kart. 14/84, WuW OLG 3917, 3928 – "Coop/Wandmaker".

<sup>10</sup> Berlin Higher Regional Court, decision of 5 November 1986, Kart. 14/84, WuW OLG 3917, 3928 – "Coop/Wandmaker".

concerning the food retail market the Commission focused on the fact that, on an average basis, a share of turnover accounted for by a buyer was indispensable to the supplier if it amounted to more than 22 per cent of the turnover<sup>11</sup>. To determine whether market dominance exists in a procurement market it also appears feasible to consider the average procurement share particularly against the background of proven cases of individual dependency<sup>12</sup>.

### 3. Access to procurement markets

Access to procurement markets is one of the criteria which could be of significance for evaluation under Section 19 (1) no.2 of the Act against Restraints of Competition (ARC)<sup>13</sup> of whether a paramount market position vis-à-vis other competitors, and thus dominance, exists in a downstream sales market. The European Commission thus also used dominance in procurement markets to prove the existence of dominance in sales markets (and vice versa)<sup>14</sup>. A similar line of argument was adopted by the Bundeskartellamt in its recent decision in the Edeka/Plus case: To prove the existence of a dominant position in the regional sales markets in the food retail sector the Bundeskartellamt inter alia assumed the creation of paramount access to the procurement markets<sup>15</sup>.

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<sup>11</sup> Decision of 3 February 1999, COMP IV/M.1221 – “REWE/Meinl”, para. 98 ff. in particular 101; see also decision of 3 February 1999, COMP IV/M.1221 – “Carrefour/Promodes”, where the Commission applied the same criteria; and the recent decision of 23 June 2008, COMP/M.5047, para. 93 ff. – “REWE/ADEGK”, in which the Commission again referred to this standard.

<sup>12</sup> Cf. Bundeskartellamt, decision of 30 June 2008, B2-333/07, – “Edeka/Plus”; however, under the aspect of access to procurement markets. The decision is available in German at [http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion08/B2-333-07\\_Internet.pdf](http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion08/B2-333-07_Internet.pdf).

<sup>13</sup> For an English version of the ARC, see [http://www.bundeskartellamt.de/wEnglisch/download/pdf/06\\_GWB\\_7\\_\\_Novelle\\_e.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/06_GWB_7__Novelle_e.pdf).

<sup>14</sup> Decision of 3 February 1999, COMP IV/M.1221 – “REWE/Meinl”, para. 54 f.; 115; cf. also recent decision of 23 June 2008, COMP/M.5047, para. 96 ff. – “REWE/ADEGK”.

<sup>15</sup> See English press release at [http://www.bundeskartellamt.de/wEnglisch/News/press/2008\\_07\\_01.php](http://www.bundeskartellamt.de/wEnglisch/News/press/2008_07_01.php). The decision is available in German at



#### 4. Countervailing buyer power

A company's power to supply can not only be limited by competitors but, under certain circumstances, also by countervailing buyer power<sup>16</sup>.

A powerful buyer can thus counteract the effect of (relative) power of supply, if he can credibly threaten to switch to another supplier within a short time frame or to take other effective retaliatory measures.

Moreover, a powerful buyer can feel induced (and, above all, feel able) to distribute his demand over several suppliers (who are possibly entering the market for this particular purpose). He can thus already prevent the emergence of market power on the supply side. It is another question, however, under which circumstances countervailing buyer power and strategic buyer behaviour could eliminate a dominant position which otherwise is to be assumed on the supply side in an equivalent manner ("equivalent to effective competition")<sup>17</sup>. This seems problematic if countervailing market power has an equal effect on all suppliers. The suppliers' market positions in relation to one another remain largely the same. However, it also seems problematic to have only some buyers benefit from the exercise of countervailing buyer power<sup>18</sup>.

## II. Purchasing agreements

Before the 7<sup>th</sup> Amendment of the ARC, German case law on the application of Section 1 ARC to purchasing agreements (i.e. agreements concerning the joint buying of products) focused in particular on the freedom to act competitively

[http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion08/B2-333-07\\_Internet.pdf](http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion08/B2-333-07_Internet.pdf).

<sup>16</sup> Cf. European Commission, decision of 19 July 2000, IV/M.1882, para. 77-80 – "*Pirelli/BICC*"; Bundeskartellamt, decision of 14 December 2004, B9-101/04, para. 34 f. – "*Belgian New Fruit Wharf / HHLA / Stein*".

<sup>17</sup> Cf. Bundeskartellamt, decision of 3 February 2004, B3-112/03, S. 15 – "*Freudenberg / Bergmann*"; fundamental decision of the Berlin Higher Regional Court of 7 February 1978, WuW/E OLG 1921, 1924 – "*Thyssen / Hüller*"; cf. also Federal Court of Justice, decision of 21 February 1978, WuW/E BGH 1501, 1504 – "*Kfz-Kupplungen*"; Federal Court of Justice, decision of 2 Dezember 1980, WuW/E 1749, 1754 – "*Klöckner / Becorit*".

<sup>18</sup> ICN Merger Guidelines Workbook, p. 42, available at <http://www.internationalcompetitionnetwork.org>

Purchasing agreements with exclusive purchase commitments were considered *per se* to be anti-competitive<sup>19</sup>. The courts were of the opinion that even where there was no explicit purchase commitment, the freedom to act (and therefore competition) was restricted where a purchasing agreement resulted in a maximum price agreement. This case-law did not differentiate between a restriction of supply or demand competition. Consequently, it envisaged the one type of competition as a mirror image of the other. Accordingly, agreements between buyers on maximum prices and agreements between suppliers on minimum prices were to be assessed alike. Neither a balance of interests nor counterbalancing aspects were essential to fulfil the elements of anticompetitive conduct. Since the focus was exclusively on competition on the demand side, it was of no consequence whether the respective buyers were also competitors on the sales side. Possible effects on the down-stream sales markets were to be assessed separately where applicable.

The Commission's Guidelines on the applicability of Article 81 EC to horizontal co-operation agreements are based on a different competition concept. Apparently, they assume that the fixing of prices or other business conditions by competing buyers on the demand side does not have as its object a restriction of competition, while the same behaviour by suppliers on the supply side does<sup>20</sup>. A purchasing agreement is said not to appreciably restrict competition if the aggregate market share of the parties to the agreement does not exceed 10 per cent<sup>21</sup>. As a general rule a competition restraint is to be denied where the buyers are merely competitors on the demand side but not simultaneously on the supply side<sup>22</sup>. According to the guidelines, purchasing agreements are *per*

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<sup>19</sup> The case law was based on the old version of Section 1 ARC: Federal Court of Justice "Holzschutzmittel; Berlin Higher Regional Court "HFGE", in particular Berlin Higher Regional Court "Selex – Tania"; in reaction to this case law the legislator created for the benefit of small and medium-sized companies the possibility to exempt purchasing cooperations under Section 5c ARC<sup>old</sup> (later section 4 (2) ARC<sup>old</sup>). This possibility has been incorporated in the general exemption rule of Section 2 ARC.

<sup>20</sup> Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), OJ of 22.12.2001, C 368/13, para. 7.

<sup>21</sup> *loc. cit.*, para. 11.

<sup>22</sup> Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ of 6.1.2001, C 3/02, para. 123.

se only anti-competitive where they serve as a tool to cover up a cartel agreement (on the sales side!)<sup>23</sup>. In all other cases their anti-competitiveness depends on the effects of the purchasing agreement. To assess these, not only the purchasing markets but also the sales markets would have to be examined. The Commission's primary concerns about buying power are that lower purchasing prices may not be passed on to customers further downstream and that it may cause cost increases for the purchasers' competitors in the sales markets<sup>24</sup>. According to the Commission, only joint buying with a market share significantly above 15 per cent in a concentrated market is likely to come under Article 81 (1) EC<sup>25</sup>.

As regards Sections 1 and 2 of the current version of the ARC, the Bundeskartellamt arrives at similar conclusions as the Commission in assessing purchasing cooperations that lack market power; however, it still assumes a competition restraint even in those cases where there is no market power in the sales market. Ultimately the Bundeskartellamt arrives at the same conclusion as the Commission because it typically assumes efficiency gains in the case of a purchasing cooperation with a relatively low market share which would be likely to result in an exemption<sup>26</sup>. So far, there has been no relevant case law of the European Court of Justice which would clarify the legal situation on this matter<sup>27</sup>.

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<sup>23</sup> loc. cit., para. 124.

<sup>24</sup> loc. cit., para. 126.

<sup>25</sup> loc. cit., para. 131.

<sup>26</sup> Cf. the Bundeskartellamt's information leaflet on cooperation possibilities for small and medium-sized companies, para. 38. The leaflet is available in English at [http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/0711KMU\\_Merkblatt.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/0711KMU_Merkblatt.pdf).

<sup>27</sup> Difficult to assess in this context is the ECJ's "order for reference" in the DLG case in 1994 which remained an isolated decision. The Court had to decide whether and under what circumstances the prohibition of a dual membership in a cooperative purchasing association was compatible with Article 81 (1) EC. Whether the cooperative purchasing association as such was compatible with competition law was not the subject of the decision (cf. on this issue in general: the Monopolies Commission, *Die Konzentration im Lebensmittelhandel (Concentration in the food retail sector)*, special opinion no 14, p. 53 ff., as well as KG (Berlin Higher Regional Court) WuW/E OLG 2745 - "HFGE". Rather, the relevant issue was the prohibition restricting the opportunity for members of such an

### III. Passive discrimination

Under Section 20 (3) ARC, undertakings with purchasing power are prohibited from inviting or causing other companies in business activities to grant them advantages without any objective justification. Under the latest amendment<sup>28</sup> the scope of application of this provision has been extended beyond small and medium-sized enterprises. It now comprises all cases where a supplier is dependent on a buyer.

The extension of the scope of application raises the question of whether the protective purpose of Section 20 (3) has been amended, too. The prohibition of unfair hindrance within the meaning of Section 20 (3) ARC<sup>old</sup> primarily addressed distortions of competition by which a dominant competitor hinders other buyers. Whether the purpose of the provision was also to protect dependent suppliers from being exploited, was open to controversy<sup>29</sup>. According to the relevant recommendation of the Parliamentary Committee on Economics and Technology *“Section 20 (3) shall in future protect all undertakings irrespective of their size from demands for preferential terms if they are dependent on the demanding undertaking.”* This could be viewed as a clarification of the protective purpose of the provision.

The substance of an assessment under Section 20 (3) is open to wide interpretation. Primarily, assessments are based on the principle of commensurability with performance (*Leistungsgerechtigkeit*) of the demanded/granted advantages, whereby this term requires further clarification. The assessment is all the more difficult since the advantages have to be evaluated in relation to service provided in return. Rebates and other advantages as a part of remuneration cannot be assessed separately<sup>30</sup>. The

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association to join *other competing types of cooperation* and thus obtain supplies elsewhere.

<sup>28</sup> See critical opinion by the Monopolies Commission, [http://www.monopolkommission.de/sg\\_47/text\\_s47.pdf](http://www.monopolkommission.de/sg_47/text_s47.pdf).

<sup>29</sup> Left open in Federal Court of Justice decision of 24 September 2002 WuW/E DE-R 984, 990 – *“Konditionen Anpassung”*.

<sup>30</sup> Cf. for abusive pricing Federal Court of Justice, WuW/E BGH 2103 – *“Favorit:”* *“Gesamtbetrachtung des Leistungsbündels”*.

assessment process is ultimately similar to that applied to abusive pricing and raises the same concerns and problems: Under the aspect of commensurability of advantages, it remains difficult to distinguish an anticompetitive advantage from a merely low price.

The decision-making practice of the competition authorities and courts on Section 20 (3) ARC is transparent and confined to clear-cut cases (e.g. where there is a simultaneous violation of the rules of fair competition). In the majority of the cases the competition authorities have concluded the instituted proceedings without a formal decision. The decided cases concerned retroactive “wedding rebates”, i.e. the retroactive adjustment of purchase conditions after the merger with a buyer who, as only became evident during the merger proceedings, had been granted better conditions.

#### **D. Buyer power and guiding principle for competition policy**

The European Commission pursues a competition policy which is aimed predominantly at maximising consumer welfare. Accordingly, it is distinctly more lenient of restraints of demand competition than it is of those that affect supply competition. With an eye on the end consumer, the Commission focuses in its assessment mainly on the effects in downstream sales markets. This is an intrinsically logical approach. Detriment to suppliers caused by the exercise of buyer power does not necessarily go hand in hand with detriment caused to end consumers downstream of the relevant market. If competition policy is consistently focused on the welfare of the end consumer, those suppliers disadvantaged by buyer power could now and then find themselves in a rather defenceless position. Discussing how to address buyer power under competition law therefore also offers us an opportunity to consider the guiding principle for competition policy on which the existing law is based. The question is whether competition law protects demand competition in the same way that it protects supply competition.

The classical German and European approach understands competition as an open-ended process. This is revealed particularly well in the example of buyer

power and buyer cartels<sup>31</sup>. Article 82 sentence 2 lit. a) EC prohibits in equal measure not only the imposition of unfair selling prices and conditions but also that of unfair purchase prices and conditions. It prohibits in equal measure the direct fixing of selling and purchase prices. This view is consistent with the understanding of Section 1 ARC in the version before the 7<sup>th</sup> amendment<sup>32</sup> It is not clear from the materials that the amendment was meant to change this. One can go from the assumption that the existing law aims to protect the competition process “in all directions”<sup>33</sup> Detriment to consumer welfare is not a compelling precondition for this, least of all evidence of such harm.

Evidence of a direct link between the protection of demand competition and the competition policy concept can be seen from a glance at the American debate, in which *consumer welfare* is widely undisputed as the aim of competition policy. Yet there is intensive discussion about what this concept really means. This is clear from the current debate, triggered by the Supreme Court’s decision in the *Weyerhaeuser case*<sup>34</sup>, about the treatment of buyer power under American antitrust law<sup>35</sup>. One of the questions raised here is whether the term *consumer* means only the end consumer on the downstream market or whether ultimately the long-term well-being of all is at stake (*aggregated welfare*). Understood in the latter meaning the term *consumer welfare* attains such a level of abstraction that it can well be used as an overall concept but not as a standard for deciding specific cases. However, if competition as a process is protected with the aim to attain *consumer welfare* as defined above, the practical differences to the German approach can be put into perspective<sup>36</sup>.

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<sup>31</sup> Cf. Zimmer, Thesen zur Praxistauglichkeit des More Economic Approach, DIW – Roundtable, 26.10.2007, accessible at: <http://www.diw.de>.

<sup>32</sup> For the treatment of purchase cooperations see aforementioned under 3.2.

<sup>33</sup> Zimmer, loc. cit.

<sup>34</sup> *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 127 S. Ct. 1069 (2007): In this case a dominant buyer was accused of squeezing buyers in competition with it out of the market by demanding excessive purchase prices – a constellation mirroring the “predatory prices” case group.

<sup>35</sup> Cf. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, with further references, accessible at: <http://ssrn.com/abstract=975992>.

<sup>36</sup> Cf. Werden, loc. cit.

## E. The concept of an undertaking and “pure” purchasing activity

In cases in which European courts recently had to deal with buyer power, this involved the purely purchasing activity of the state. However, according to the European Court of Justice, the state as a buyer only then engages in an activity as an undertaking if the subsequent use of the products purchased can also be seen in connection with an economic activity<sup>37</sup>. The Court came to this result because it defines the concept of an undertaking from the supply side. Purchasing activity is assessed in dependence on an activity on the supply side (accessoriness approach). The exclusion of “pure purchasing activity” stands in contrast to the case-law of the Federal Court of Justice on the concept of an undertaking within the meaning of the ARC whereby, in terms of the purpose of the law to protect the freedom of competition, principally every form of activity in business transactions, including the procurement activity of public authorities for their own use, fulfils the concept of an undertaking<sup>38</sup>.

The jurisdiction of the European Court of Justice on the concept of an undertaking is criticized by writers in Germany because it lacks convincing results<sup>39</sup>. The question has also been raised whether the European Court of Justice is displaying a change of course in competition policy in favour of end consumers, which could put the hitherto equal treatment of demand and supply

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<sup>37</sup> ECJ of 11 July 2006, Case C-205/03 – FENIN, preceded by ECJ of 4 March 2003, Case T-319/99. In the more recent Selex decision (ECJ, decision of 12.12.2006, T-155/04) the ECJ rejects the argument that the scope of the FENIN decision is limited to social institutions. This rule can be applied to every institution which buys products for non-economic activities.

<sup>38</sup> In 2002 the Federal Court of Justice (BGH) still qualified the collective purchase of fire-fighting equipment by local authorities as an economic activity of the public sector and insofar confirmed that this constituted an undertaking, see BGH decision of 12.11.2002, WuW DE-R 1087, 1089. However, in a more recent decision, the Court left this explicitly open, decision 19.6.2007, file KVR 23/98 WuW DE-R – 2161 ff. – Tariftreueerklärung III. According to Bornkamm, German law should take account of the ECJ's reasoning; see Bornkamm, *Hoheitliches und unternehmerisches Handeln der öffentlichen Hand im Visier des europäischen Kartellrechts – Der autonome Unternehmensbegriff der Art. 81, 82 EG*, Festschrift für Günther Hirsch, 2008, p. 231 ff.

<sup>39</sup> Convincing statement by *Roth*, *Zum Unternehmensbegriff im europäischen Kartellrecht*, Festschrift Bechtold, 2006, p. 393, 402 und 404: Whether, e.g. universities offer their services free of charge or on the open market (thereby considering social criteria if necessary), can have no bearing on which competition law restrictions their purchasing activity is subject to; see also critical comment by Bornkamm, Festschrift Hirsch, p. 232 ff.

competition to the test<sup>40</sup>. How this will affect the concept of an undertaking within the meaning of the ARC remains to be seen<sup>41</sup>

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<sup>40</sup> Bornkamm, Festschrift Hirsch, p. 232.

<sup>41</sup> See Federal Court of Justice decision of 19.6.2007, file KVR 23/98, WuW DE-R 2161 ff. – Tariftreueerklärung III; primacy of European law does not stand in conflict with a more comprehensive concept of an undertaking under German law. This definitely applies to abuse regulations, where simple primacy applies. Since the introduction of Regulation 1/2003 extended primacy applies with regard to the European ban on cartels. However, agreements between purely buyers – at least in the literal sense – are not “agreements between undertakings” within the meaning of Art. 3 (2) of Regulation 1/2003. Even if Section 1 ARC were to be interpreted according to Art. 81 EC based on an autonomous decision under German law, Section 130 ARC would have to be taken into consideration, which extends the scope of application to a purely “state” purchasing activity.; loc.cit. Bornkamm, Festschrift Hirsch, p. 238 f., whose argument of a level playing field in the area of non-economic activity (from a European point of view) is, however, unconvincing.



## F. Questions

1. Is demand competition a self-contained object of protection of existing competition law or should it only be protected where there are anticompetitive effects on downstream sales markets? What importance should be placed on possible detriment to the end consumer? Is such detriment only conceivable where buyer and supply power occur simultaneously?
2. Buyer power can be classified in theory in terms of classical market power or (bilateral) bargaining power. Does one model preclude the other? Or is one model better suited for this?
3. What distinguishes the normative concept of dominance from the detection of (relative) buyer power? What criteria should be applied to define whether the relevant market is dominated by a powerful buyer? To what extent can market and/or (average) supply shares be taken as reliable indicators? Can proven bilateral dependencies constitute an element of justification?
4. Are “spiral” and “waterbed” effects only theoretical considerations or possible effects of the exercise of buyer power which should also be taken seriously in practice? What criteria could be applied to assess the risk of their occurrence?
5. Should a cartel between buyers be subject to the (European) prohibition of cartels in the same way as a cartel between suppliers? What consequences would this have for the treatment of purchase cooperations under cartel law?
6. How is the practical effectiveness of German rules on passive discrimination to be assessed?
7. Should the concept of an undertaking in the ARC, in contrast to European competition law, also be applied to purely purchasing activities (especially of public authorities)? Does the primacy of European law stand in conflict to this?