

Assessment of buyer power in recent market investigations and mergers

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Interest about the relevance of buyer power for competition has been growing in the last decades, as the markets of retail distribution were subject to a process of consolidation, if at different speed, in most European countries. The attention has heightened in the last few years due to a number of factors: *inter alia*, the level of concentration of the retail sector in many countries (notably the Nordic countries, the UK, Germany, France and Austria), the tendency of food prices to increase and the preoccupation that increased retailers power along the supply chain may have contributed to the rise in prices and to make them sticky.

These preoccupations are reflected in recent documents and positions by the European Institutions.¹ In this paper we examine how the issue of buyer power has been assessed in some recent market inquiries, mergers and application of competition law by the EC Commission and National Authorities (NCA).

1. Buyer power: its definition and role in competition policy

a. Definition and origin of buyer power

Buyer power is generally recognized as a bilateral asymmetric relation between retailer and supplier, driving from the ability of leading retailers "*to obtain from suppliers more favourable terms than those available to other buyers, or which would be expected under normal competitive conditions*", i.e. these conditions do not depend on efficiencies related to size or other factors (Dobson, 2005).

Some examples of more favourable terms are: low prices and higher discounts; other contractual obligations and financial benefits extracted from suppliers (such as additional discounts, listing fees, slotting allowances, retroactive discounts, contribution to retail expenses, most favourable treatment clause; shift of risk to suppliers (such as sale-or-return conditions, rebates or discounts related to sale targets, payment delays); limits on range of products offered.

The bilateral asymmetric relation between retailer and supplier arises when the retailer has control of a relevant part of the market for the supplier's product and gives rise to a state of economic dependence of the supplier from the buyer. Estimates of the market share threshold for the existence of buyer power vary according to the different criteria being used: it may be, for instance, an 8 per cent of grocery purchasers for resale from stores² or 22 per cent of the relevant product category.³

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Food prices in Europe", 9 December 2008 (COM(2008) 821 final); see also the Economic and Social Committee Opinion of April 2005 (2005/C 255/08)) and recent inquiries by the EC Commission on competition in the food markets.

² UK Competition Commission - Supermarkets: a report on the supply of groceries from multiple stores in the United Kingdom (2000).

³ EC Commission in Rewe/ Meini (decision of 3 February 1999, COMP IV/M.1221) and Carrefour/ Promodes (decision of 2 December 1999, COMP M/16847).

Another other sources of asymmetry is the multiple role of retailers with respect to suppliers (Dobson 2005). Indeed, retailer is:

- *customer*, and may use its asymmetric market power, but also
- *competitor*, as a supplier of Private Label Brands (**PLB**), which have gained a sizable role throughout European markets. Therefore, secondary brands are substituted by PLB, while primary brands must compete in a context in which retailers are integrated with PLB, and tend to favour them, and use them to obtain better conditions from suppliers;
- *supplier of shelf space*, in competition with PLB and other products competing for limited space. In this way retailers may extract further rents from suppliers, and have an additional bargaining instrument;
- *gatekeeper* in so far as retailers may decide which products and kind of offers are worth commercializing.

b. Buyer power and competition

Traditionally, competition law considers bilateral relations only in so far as they have an impact on the final market and on 'consumer welfare'. Buyer power would then have effects on the final market only if it is associated with market power on the selling side.

As the UK Competition Commission stated in 2000, in its investigation on supermarkets "*Where the retail market is competitive, buyer power can be used to counterbalance the market power of large suppliers, and this may result in lower wholesale prices and hence lower retail prices than would otherwise be the case. Where the retail market is not competitive, buyer power may mean lower wholesale prices, but these may not be passed on to consumers [...]*".⁴

Regarding the product dimension, competition in the retail market takes place among the providers of services which are considered substitutable from the point of view of demand. Therefore different distribution channels are or not in competition depending on consumers' habits and preferences. The EC Commission, and most continental NCAs consider competition to take place in a wide market for large distribution, in which hypermarkets and supermarkets are included.

From a geographic point of view, the retail market has two dimensions: customer demand is local, therefore, local concentration and the conditions of entry at local level determine the choices available to consumers; however, competition takes also place at national level, because a number of competitive variables, including purchasing conditions, advertising and distribution costs depend on national decisions or size.

The procurement markets are the ones where retailers acquire the products from suppliers. Given the different commercialization methods, procurement for large distribution is considered a different market from procurement for specialty outlets. Due to consumer tastes and retailers' and suppliers' commercial strategies, the geographic market is national. Therefore the position of retailers in their selling markets is reflected in their position as purchasers in the procurement markets. Buyer power is usually evaluated with respect to product categories defined on the basis of products substitutability from the point of view of suppliers.

⁴ UK Competition Commission – 2000 Report, par.2.441.

Buyer power depends on the market share of each retailer in the retail market for the products belonging to each product category. The EC Commission and many NCAs consider that when retailers have a market share of 22 per cent or more in a certain category, suppliers of products in that category are in a state of *economic dependence*, because they cannot renounce to supply them. Shares between 10 and 20 per cent give a strong negotiating power to retailers, while below 10 per cent there would not be an asymmetric situation. The UK Competition Commission in its 2000 Report on groceries defines as a proxy for dependence an aggregate threshold of 8 per cent of purchases for resale for a certain retail channel.

Because of the interrelation between the markets, buyer power may have effects both in the market for retail distribution and in the market in the procurement markets.

With respect to the market of retail distribution, buyer power has an anticompetitive effect if unilateral or collective market power prevents improvements in conditions from suppliers to be transferred to the consumers. Despite national retail markets are increasingly concentrated, market shares of retailers at national level are generally below the thresholds which would be considered sufficient to allow a retailer to exercise market power independently from the competition (which is around 40 per cent).

Attention is therefore given to the condition and practices facilitating collusion. Furthermore the exercise of buyer power by the largest retailers may lead to raising costs of other retailers, and to increase in barriers to entry for new competitors. The high level of concentration, as measured by the market share of the first five retailers, may lead in many cases to collusion, either tacit or explicit. According to the Competition Commission 2008 Report,⁵ the UK presents many characteristics which could induce tacit parallelism as the market is sufficiently concentrated to give way to a recognition of the participant firms of their interdependence of their price and sales. This would lead to deter price cuts and encourage price rises and decreased investments in innovation and quality improvement.

However, according to the EC Commission, such parallelism would be made difficult by the difficulty of monitoring both price and non-price factors. While examining the *Carrefour-Promodes* merger in 1999, the EC Commission ruled out the possibility of collective dominance in France, also on the bases of the lack of homogeneity of supply and the lack of transparency of the market conditions.⁶ It did argue however that further concentration could make more likely the conditions for parallel behaviour and collective dominance. Collusion may be facilitated by mechanisms which make the market more transparent, such as exchange of information.

While buyer power is a bilateral relation between a supplier and a retailer, in fact a *web of such vertical relations exists*, among competing retailers and suppliers. Such a web of vertical relations based on buyer power may have effects on transparency of the market and coordination among retailers: it may facilitate the exchange of information and represent a mechanism for enforcing common policies which give rise to stickier prices (for instance, price rebounds).

Furthermore, buyer power in vertical relations may affect competition in retailing by raising barriers to new entrants and by strengthening the effects of already high concentration. The exercise of buyer power may lead suppliers to discriminate against smaller retailers, recovering losses through higher prices. This leads to the further weakening of smaller retailers, and of their ability to constrain large retailers (*waterbed effect*). Also, the better conditions enjoyed by large retailers allow them to strengthen their position in the market, therefore driving out smaller competitors (*spiral effect*, in EC mergers of late 1990).

5 UK Competition Commission - Groceries Market investigation, Final Report, 30 April 2008.

6 Carrefour/ Promodes, par. 99-103.

With respect to the market for procurement, buyer power may lead to negative effects on investment and innovation.⁷ For example, practices which without justification shift the risk from retailers to suppliers may also affect innovation, as they make production riskier; this result may also be the direct consequence of practices which limit the presence of suppliers on the shelves, discourage investment in new products investment.

Also, PLB play a key role since they substitute for second level brands. Differently from these brands, however, PLB are often opportunistic followers, therefore the substitution of PLB for them may lead to a deterioration of the rate of product, innovation may fall and markets may become less dynamic. This effect may be amplified by the fact that primary brands must compete in a context in with retailers are integrated with PLB, tend to favour them, and use them to obtain better conditions from suppliers.

c. The treatment of buyer power under EC competition law

Traditionally, competition authorities have tended to downplay the anti-competitive effects of buyer power. For a long time consolidation in the retail sector has been considered favourably, as it could allow better exploitation of economies of scale and decrease costs of transportation and logistics. Competition among inefficient small shops was substituted by competition by efficient retailers with great benefits for the consumer in terms of lower prices and better quality.

Buyer power allows efficient competitor to rip better conditions. Absence of market power on the selling side compels retailers to transfer to consumers the preferential conditions they have obtained. These principles are reflected in the Guidelines for the evaluations of horizontal mergers:⁸

"The Commission may also analyze to what extent a merged entity will increase its buyer power in upstream markets. On the one hand, a merger that creates or strengthens the market power of a buyer may significantly impede effective competition, in particular by creating or strengthening a dominant position. The merged firm may be in a position to obtain lower prices by reducing its purchase of inputs. This may, in turn, lead it also to lower its level of output in the final product market, and thus harm consumer welfare. Such effects may in particular arise when upstream sellers are relatively fragmented. Competition in the downstream markets could also be adversely affected if, in particular, the merged entity were likely to use its buyer power vis-à-vis its suppliers to foreclose its rivals. On the other hand, increased buyer power may be beneficial for competition. If increased buyer power lowers input costs without restricting downstream competition or total output, then a proportion of these cost reductions are likely to be passed onto consumers in the form of lower prices."

Even when the buyer has market power on the final market, its buying power may be considered favourably, if it compensates market power on the sellers side.⁹ The Commission and NCAs have often seen buyer power as competitive constraint against the creation or strengthening of a dominant position, even in case of increasing/strong consolidation on the supply side.¹⁰

7 UK Competition Commission, 2008 Report.

8 EC Commission Notice, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, par 61-62.

9 See par. 64 of the Guidelines.

10 See EC cases The Coca-Cola Company/Carlsberg A/S (decision of 25 March 1997 in case IV/M.833); Guinness/ Grand Metropolitan (decision of 16 May 1997 in case IV/M.938), Masterfoods/Royal Canin (decision of 3 January 2002, COMP/M.2544). An analogous approach has been followed in the national jurisdictions: see Italian case, C8971 Bolton Alimentari/Rami D'azienda Di Brands, 20 December 2007.

As for purchasing alliances, while the Commission has long declined to examine them, arguing that they would be better examined by NCAs, they have often been considered in light of the criteria set by the Commission on the Communication on minor agreements,¹¹ which considers them not to affect competition as long as they concern less than 10 per cent of the market and do not lead to coordination downstream. Furthermore, the Communication on horizontal agreements¹² exempts purchasing agreements as long as retailers share is below 15 per cent of the market. Efficiency effects have been found even with higher market shares.¹³

d. Renewed interest

The preoccupation with the effect that buyer power could have on competition has increased during the last few years due to a number of factors we have already mentioned. These preoccupations are reflected in recent documents and positions by the European Institutions and in studies being undertaken by NCAs throughout Europe. In its recent Communication "Food prices in Europe"¹⁴ the Commission stated:

"Against the background of the economic slowdown, it is more important than ever to ensure that downwards movements in commodity prices are transmitted to consumers without delay and to raise the competitiveness of the agricultural, food processing and distribution sectors. This is fully in the spirit of the European Economic Recovery Plan put forward by the Commission on 26 November 2008, which highlights the need to swiftly stimulate demand and boost consumer and business confidence".

The European Commission recently also declared that it will closely monitor the increasing number of buying alliances in the food sector, especially where joint purchasing agreements are accompanied by collusion downstream.¹⁵

11 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).

12 Commission Notice - Guidelines on the applicability of Article 81 to horizontal co-operation agreements.

13 See Italian cases I414 - Coop Italia-Conad/Italia Distribuzione, 29 March 2001 and I184 - Generale Supermercati-Standa/Supercentrale/Ill gigante, 17 April 1997.

14 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Food prices in Europe", 9 December 2008 (COM(2008) 821 final).

15 In another circumstance (briefing for MEPs – October 2007) the Commission affirmed: "alongside groceries, supermarkets are increasingly moving into other sectors, such as clothes, home entertainment, pharmaceuticals and banking. As supermarket chains grow in size, the balance of power between them and other actors in the supply chain, from workers through to consumers, is being disrupted, with serious consequences. See also the Economic and Social Committee Opinion of April 2005 (2005/C 255/08)). Ms Kroes also stressed that her staff was "aware that the size and number of buying alliances in the food sector has grown considerably throughout the EU" and added that while these alliances can be considered a "good tool [...] to counterbalance the market power of large food industry multinationals and limit market segmentation" [...] "such agreements may serve as a tool for foreclosing rivals' access to essential inputs at competitive conditions and/or for competitors to engage in collusive behaviour on downstream markets [...]. The involvement of larger buyers in such alliances has led to increasing concerns expressed by producers of both processed and unprocessed food, as well as farmers" (Letter to an European MP).

2. The assessment of buyer power in market inquiries

The sector inquiries often aim to investigate specific sectors of trade (for instance food retailing) and to analyse the causes of price rises. It is in this context that buyer power is analysed; the analysis examines both the existence of dependence and the existence of conditions leading to its anticompetitive effects.¹⁶

a. Avis of the French Competition Council concerning the conditions of competition in large retail distribution

The French Competition Council (FCC) examined the issue of buyer power in connection with a request to examine some public measures which prevent sale below cost, defining costs as the one resulting from invoices (*Loi Galland*).¹⁷

The FCC evaluates whether the existence of buyer power could be inferred by the relative behaviour of prices and the various kinds of discounts. According to the FCC, between 1998 and 2003 retail prices of large retailers increased by 1,1 per cent, while the price of discounts decreases by 1,1 per cent. Prices of national must carry brands increase of more than prices of low price or PLB brands; margins as resulting from invoices decreased from 4,4 per cent to 3,5 per cent; however, margins not reflected in invoices increased from 22 to 32 per cent. Therefore, the increase in prices was the result of the increase in retailers margins, in turn allowed by the reliance in non invoiced rebates and discounts. This more extensive use of out of invoice discounts reflects retailers' buyer power. The *Loi Galland*, forbidding sales below costs, as calculated on the bases of invoiced costs, contributed to coordination in pricing.

The FCC argues, however, that the practice of relying on off-invoice discounts could also be facilitated by suppliers, as in this way they would be able to exercise control on retail prices, instrumental to concertation among suppliers. Therefore the FCC envisaged a two-party cooperative games among all market participants, where buyer power played a considerable role.

b. Report of the Nordic competition authorities "Nordic Food Markets - a taste for competition" – November 2005

The Report of the Nordic Countries Competition Authorities (NCC) originate from preoccupation for the high price of foodstuff in countries where the concentration of both retail and supply of foodstuff is very high.¹⁸

16 In this section we examine the following inquiries:

- Avis of the French Competition Council concerning the conditions of competition in large retail distribution, October 2004;
- Report of the Nordic Competition Authorities –"Nordic Food Markets - a taste for competition", November 2005;
- The Report on Food Distribution Sector of the Austrian Competition Authority, June 2007;
- The Report of the Italian Competition Authority on the distribution of fruit and vegetables, June 2007;
- UK - Competition Commission Groceries Market Investigation Final Report, April 2008;

Report on Groceries Distribution by the Basque Tribunal for Competition Protection, April 2009.

17 Loi n° 96-588 du 1er juillet 1996 sur la loyauté et l'équilibre des relations commerciales.

18 C3 varies between 82-90 per cent depending on the country.

The NCC finds that retailers exploit their power on the purchasing market by practicing low prices and obtaining marketing allowances, which represent 20 per cent of retailers rebates. The NCC finds that this raises barriers to the entry of new suppliers, and puts smaller ones at disadvantage, and may explain the concentration in the supply side of the procurement market.

Retailers' buyer power is also enhanced by PLB. The share of PLB in Nordic countries is lower than in other countries with concentrated markets, such as Denmark, United Kingdom and Netherlands.

Finally, the NCC argue that the high concentration of the market, the very sophisticated techniques of market tracking and the homogeneity of supply could facilitate tacit parallelism, while development of PLB is liable to determine a fall in R&D investment.

c. The Report on Food Distribution Sector of the Austrian Competition Authority, June 2007

The Report of the Austrian Competition Authority (Bundeswettbewerbsbehörde, BWB) was particularly focused on buyer power in an highly concentrated retail market (two largest retail groups had in 2005 a combined market share of 57%). In the examination of the existence of buyer power, the BWB followed the criteria defined by the EC Commission in *Rewe-Meinl* and *Carrefour-Promodes*, both in terms of definition of product categories and of the thresholds for relevance of buyer power, and therefore identified nine distinct procurement markets capable of giving competition concerns. The BWB also considers vertical integration, in particular the existence of PBL, and of arbitrary excluding certain products from the retailers' shelves.

The BWB finds that retailers negotiate a number of conditions (rebates and bonus payments) once a year. However, in addition to yearly negotiations, retailers impose retroactive rebates or *ex-post* negotiations which may affect, without objective justifications, the business plans of the suppliers, and undermine their investment activity.

The BWB concludes that there are indications of buyer power in the Austrian food distribution sector. Since Art. 4 (3) of the Austrian Competition Act prohibits the abuse of economic dependence, the BWB has argued about the possibility of using its power in this respect with regard to the investigated practice.

d. The Report of the Italian Competition Authority on the distribution of fruit and vegetables, June 2007

The Italian retail market is among the less concentrated. The Report of the Italian Competition Authority concerns the distribution of fresh food and vegetables, and points out that the very slow transition to a modern distribution system has affected the organization of trade upwards, so that modern distribution chains are at a disadvantage with specialized trade in the provision of most commodities, because of the lack of centralised trading structure from the supply side and the higher flexibility of small retailers. In this very specific field buyer power does not appear to be of any relevance for the Italian market.

e. UK - Competition Commission Groceries Market Investigation Final Report, April 2008

The UK Competition Commission's inquiry concerned the competitive situation of the whole groceries market. It was initiated on request of the Office of Fair Trading, after various complaints, in particular from the Association of (smaller) grocery retailers. In particular these complaints concerned the buyer power of the large UK retailers, which lead to higher costs and barriers to entry for small retailers and new entrants due to waterbed effects; the Competition Commission also investigated the existence of tacit coordination among larger retailers, also through exchange of information from category management.

The Competition Commission received 700 submissions and held 80 hearings; it recognized that the UK groceries markets are in fact characterized by buyer power, as substantiated in a number of practices which shift the burden of risk to the supplier and increase the margin of retailers.

However, there is no sign that this buyer power does not sip through to the consumer. In fact, despite the very high level of concentration of the retail market for groceries in the UK at national level, there appear to be competition among the main retailers.

The market is sufficiently concentrated to give way to a recognition of the participant firms of their interdependence of their price and sales. However, according to the Competition Commission, such tacit collusion would be made unlikely by the difficulty of monitoring prices of thousands of different commodities. Schemes which could facilitate collusion, such as exchanges of information, would fall under competition law and would be tackled by the Office of Fair Trading.

While larger retailers are able to rip better conditions from suppliers, and therefore to practice better prices, there is no sign that this translates into higher costs for smaller competitors. The Competition Commission excludes waterbed effects. It also notices that smaller competitors have ample room to improve their purchasing conditions, by joining larger buying groups. The Competition Commission also does not find evidence of predatory pricing in the large retailers practices. Therefore it concludes that "*in many important respects competition in the UK groceries industry is effective and delivers good outcomes for consumers*".

However the Competition Commission outlines two main concerns: the existence of market concentration in retail at local level, which is facilitated by administrative barriers to entry and by contractual arrangements with suppliers which favour local incumbents; secondly, the bargaining practices of the large retailers make the market less predictable for suppliers, give rise to a transfer of risk to them, and therefore reduce innovation and investment in new and better products.

In order to address these two concerns the Competition Commission makes a number of proposals aimed at: facilitating entry by competitors at local level, by removing administrative barriers (and even suggesting a "competition test" for new outlets subject to criticism by the Competition); eliminating contractual conditions which would make difficult a entry of competitors at local level (for instance facilitating exclusives); introducing a strengthened Code of Conduct for large retailers, which would rule out practices which could lead to unjustified shifts in the distribution of commercial risk.¹⁹

f. Report on Groceries Distribution by the Basque Tribunal for Competition Protection, April 2009.

The Basque Tribunal for Competition Protection has examined in its reports the structure of the Spanish groceries market which, during the 90's, registered a substantial increase in the degree of concentration. The attention of the Tribunal is on the oligopolistic structure of the market, where the three main competitors controlled more than 40% of the market. According to the Tribunal, the concentration of the market, the similar range of products offered and transparency in market conditions would favour collusion. This would be further proven by the fact that the prices of a basket of goods traded by the main retailers tend to move together.

The buying-power analysis of the Tribunal is based on the criteria set by the Commission in the examination in *Rewe/Meinl*, i.e. on the consideration of the market share for each of the product categories characterising the grocery market. The Tribunal knows that while the Commission sets a 22 per cent threshold for the retail channel being indispensable for the supplier, even shares between 10 and 20 per cent indicate buyer power: the largest Spanish retailers have a 20 per cent share in most categories.

19 See the Groceries Supply Code of Practice (GSCOP) and the establishment of a GSCOP Ombudsman to monitor and enforce compliance with the GSCOP.

Finally, the Tribunal reports evidence of a tendency to increase the role of discretionary *ex-post* discounts and rebates in the negotiations between retailers and suppliers, which would provide an indication of the former's buyer power, and it provides evidence of abusive behaviour with respect to supplier as in the case of "Wedding Gifts" in the *Euroski-Caprabo* merger, where Euroski imposed discounts to suppliers retroactively from 2006.²⁰

g. Conclusions on market inquiries

With the exception of the Italian inquiry, concerning a very specific sector, all the above markets inquiries show the existence of buyer power in at least some procurement markets. There is evidence of the diffusion of contractual or negotiation practices which give a growing role to discretionary allowances and rebates. The buyer power deriving from the role of retailers in demand is enhanced by a vertical integration through PBL, the introduction of low-price brands and the management of shelves space.

All sector inquiries are concerned with the effects of buyer power on the sharing of risk between retailers and suppliers and their effects on innovation and investment particularly in R&D. The evaluations differ whether buyer power may or may not affect negatively consumer welfare in the short run. The Basque Tribunal or the NCCs suggest that the retail market is characterised by at least tacit collusion, the UK Competition Commission argues that while some conditions for tacit collusion are present in the market, the difficulty in monitoring the market does not make collusion difficult, even in a concentrated market like the British one. The FCC finds that public intervention aimed at protecting small retailers through the prohibition of sale below cost may in fact facilitate collusion and therefore negatively affect consumer welfare.

While the UK Competition Commission excludes waterbed effects and argues that new entrants and smaller retailers may improve the bargaining conditions by joining buyers' group, most of the other reports, with the exception of the FCC reports, which does not deal with the issue, envisage the existence of negative comparative effects on newcomers and small retailers.

3. The assessment of buyer power in recent merger cases

In recent European and national mergers cases case law consider a number of ways in which interaction of buyer and selling power may affect competition: *a.* increased buyer power feeding into the retail market; *b.* effects in procurement markets of increases in sellers market power.

a. Increased buyer power feeding into the retail market

Starting from some leading EC cases in the late 1990's, the European Commission and the National Authorities have started investigating effects of mergers in the retail market on the bases not only of their effects on concentration in local and national markets, but also on the bases of the way in which increases in buying power stemming from the merger would raise barriers to entry so to further restrain competition in the retail market, therefore giving rise to a "*spiral effect*".

In the early EC cases, based on the original ECMR²¹, the increase in buyer power was recognized to lead to single or collective dominance of the retail market by the merged entities. The analysis was based on the evaluation of the effects of the merger on the procurement market according to the interested product categories.

20 Case n. 107/2007 Eroski/Caprabo, 25 September 2007.

21 The EC Merger Regulation in force since 2004, Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, replaced, since 1 May 2004, by Regulation (EC) No 139/2004 of 20 January 2004.

*Kesko/Tuko*²² was the first case in which the EC Commission envisaged a "spiral effect" which would lead to a continuous strengthening of the entity after the merger. The mergers would have given rise to market share close to 60 per cent in the national market for daily consumer goods. The Commission considered that this high market share would have resulted in a very high buying power in the corresponding procurement market, to give rise to an insurmountable barrier to the entry of new competitors. In fact most suppliers indicated their dependency on Kesko and Tuko for approximately 50-75% of their sales total sale in Finland. The Commission also found that buyer power was increased by the presence of PLB, the development of which could be fostered by the control by the retailer of important information about consumers behaviour. Given the already high concentration of the Finnish market, no remedy was available to allow the merger to take place.

In *Rewe/Meinl*, the Commission held that the proposed merger between would have had horizontal effects on the Austrian retail market, both at national level and in the specific region of East Austria. The Commission explicitly examines the interplay between dominance of the new entity in the procurement market, and the position in the retail market. In particular it identified 19 product categories affected by the merger and found that it would give rise to a state of dependence (a market share for the concerned category of more than 22 per cent) in at least 10 of those markets. According to the "spiral effect" approach, buyer power in the procurement market would feed into dominance in the retail market. The transaction was therefore allowed only after it was retrenched to 162 out of 341 outlets. This appears to solve most of the horizontal problems, as well as to reduce the buyer power of the new entity.

The vertical relationship between procurement and retail distribution market is also at the basis of the Commission evaluation in *Carrefour/Promodès*, where the asymmetric dependency relation between suppliers and retailers takes place in 4 out of 23 markets. As a result, the Commission accepted as a remedy the sale of Carrefour 40 per cent shareholdings in Cora, another distributor, therefore severing any link between the new unit and the purchasing alliance Opera, and a three years freeze on purchase conditions with respect to buyers. The Commission also considers the possibility of joint dominance, which was ruled out because of the characteristics of the markets and the changes deriving from divestment of Cora.

Most cases in the retail sector examined by the Commission in the more recent years appear non-problematic. However, the approach undertaken in the leading cases has been recently adopted in the *Rewe Plus – Discount Case*,²³ which was referred to the Czech Authority, after the Commission had argued that the interplay between the companies buyer power and their position in the retail market could give rise to a substantial weakening of competition, according to art. 9, par. 2 of the ECMR.

The effect of buying power on the retail markets plays an important role in some recent decisions of NCAs as, for instance, the decision taken by German Bundeskartellamt with respect to the joint venture *Edeka/Tengelmann*.²⁴ Edeka is a cooperative network of more than 3800 grocery retailers, operating in the supermarkets segment with the Edeka brand and in the discount segment with the brand Netto, with sales exceeding 11 billion Euro, with a market share of 25 per cent of the German food market. Tengelmann is a group which at the time was operating in soft discount with the brand Plus and in supermarket with the brand Kaiser. The JV consisted of a purchase by Edeka of the Plus brand, a joint venture for the joint procurement for Edeka and Tengelmann remaining brands (among which Kaiser supermarkets).

According to the Bundeskartellamt, the merger had important horizontal effects in the German markets for food products, as the two companies overlap in most of the regional markets which by itself would have given rise to a substantial increase in the market power of Edeka, liable to become dominant; Edeka position would have been further fed by the consolidation on the buying side.

22 Commission's decision of 20 November 1996, case IV/M.784.

23 Commission's decision of 3 July 2008 in case COMP/M.5112.

24 Bundeskartellamt's decision of 30 June 2008 in case B2-333-07 Tengelmann/Edeka.

The Bundeskartellamt found the joint venture in the procurement market inadmissible. It authorized the merger only subject to commitments concerning both its horizontal and vertical effects. Commitments concerned the divestiture of 400 outlets (horizontal effects) and a commitment to a separate purchase arrangement for Tengelmann brands different from Plus, so to dampen the effect on buyer power.

In Spain, in the *Eroski/Caprabio* merger, the Spanish Competition Authority explicitly examines the procurement market but finds market shares unlikely to give rise to competition concerns. Competition concerns regarding possible horizontal coordination were detected with regard to local markets

b. Effects in procurement markets of increases in sellers' market power

The negative effects on innovation of increased market power were relevant in the UK Competition Commission 2003 review of competing offers for the retailer Safeway.²⁵ In particular, the Commission found that the acquisition of Safeway by one of the three largest national retailers, by increasing concentration in the downstream markets would have made very difficult for sellers to find alternative purchasers. This was held likely to discourage new products.

Buyer power analysis is routinely performed in the review of mergers, even if often it does not lead to negative results (ex. *Sainsbury's-Coop*, which lead to a massive divestiture of outlets, because of the overlap in the local presence of the two entities, but which did not lead to a sizable increase of market power).

In Croatia, the merger *Konzum/Lokica*²⁶ posed the issue of an increase in concentration in retail market the Šibenik-Knin county, and of the position of the merged entity with respect to local suppliers. The Croatian Authority authorized the merger after divestiture of a number of outlets and the freezing of purchasing conditions from suppliers for a period of two years, deemed sufficient to allow retailers to enter the market.

25 UK Competition Commission - Safeway plc Inquiry (proposed acquisition of Safeway Plc by each of Asda Group Limited; WM Morrison Supermarkets PLC; J Sainsbury plc; Tesco plc.), 2003. The Competition Commission affirms: "[...] The acquisition of Safeway by Asda, Sainsbury's or Tesco would be expected to aggravate further the imbalance in the respective bargaining positions of these parties and their suppliers[...]. We would in broad terms expect competitive prices to emerge where there was a reasonable balance of bargaining power as between competitive suppliers and competitive buyers; but would not expect them to emerge with such a degree of imbalance as exists in the one-stop grocery market[...]. We expect the acquisition of Safeway by any of the three parties to increase the successful acquirer's power to influence outcomes to its own advantage in a manner and to an extent that would not be possible in a more symmetrically competitive situation. The consequences may include waterbed effects or a further general weakening of the bargaining position of some suppliers. In the latter case, some grocery manufacturers are likely to find investment in new products or advanced manufacturing techniques no longer worthwhile. This will be especially exacerbated by the fact that suppliers are, generally speaking, likely to secure less disadvantageous conditions and prices with four national grocery retailers than with three" (par. 2.257).

26 Decision 30 December 2008, UP/I-030-02/2008-02/06

4. Conditions for buyer power and application of competition law

Despite national retail markets are increasingly concentrated, market shares of retailers at national level are generally below the thresholds which would be considered sufficient to allow a retailer to exercise market power independently from the competition (which is around 40 per cent). Attention is therefore given to the condition and practices facilitating collusion.

a. Horizontal Agreements: exchange of information

In a number of cases the Commission and NCAs have investigated and sanctioned mechanisms for the exchange of information. In one case these concerned the gathering and circulation of information at point of sale. These information could therefore make the market transparent, and allow coordination in price policies on the market for retail distribution, therefore preventing the transfer downward of benefits generated by buyer power.

In 2007, The Finnish Competition Authority (FCA) opened an investigation into the exchange of confidential information between Kesko, Suomen Osuuskauppojen Keskuskunta (SOK) and Tradeka Oy, the three largest retail groups in Finland with a combined market share in the Finnish market for retail trade of daily consumer goods of approximately 85 per cent. The exchange of information was carried out through *ScanTrack*, an information service provided by the market research company AC Nielsen. The information collected at point of sale from supermarkets and other retail outlets and transmitted to *ScanTrack's* customers after being processed by AC Nielsen included, inter alia, value and volume of sales, consumer price and market share segmented into product group, segment, producer, brand and brand name at both national and regional level.

The FCA found that the group level information exchanged through the *ScanTrack* service directly revealed the value and volume of sales and the weighted average price per product of each of Kesko, SOK and Tradeka to their competitors. Further, the FCA found that the concentrated market structure in conjunction with the recent and detailed store level information exchanged through the *ScanTrack* service had enabled the two largest retail groups, Kesko and SOK, to monitor each other's prices and to find out even small changes in each other's prices. The FCA found the exchange of information to be in violation of the Finnish Competition Act and Article 81 of the EC Treaty. However, the FCA did not propose that the Market Court impose a fine on the companies, since the FCA's investigation was initiated as a result of contacts from Kesko and SOK and, after the initiation of the investigation, both Kesko and SOK had ceased using the *ScanTrack* service.

In Norway, following the Norwegian Competition Authority's (NC) assessment on the AC Nielsen's system of supermarket data collection, the latter has taken commitments to modify such system. The NC held that the grocery chains were exchanging, on a weekly basis, detailed information on each other's individual prices. Moreover, the exchange covered a great number of products (approximately 50-60.000) and the prices that were being charged within a given geographical area

b. Web of Vertical Agreements and cooperation between distributors and suppliers

During the last few years the Commission and a number of NCAs have opened a number of cases with respect to resale price maintenance (RPM). In certain cases the schemes appeared to be a cooperative arrangements by suppliers and retailers to monitor the reciprocal price behaviour. Other cases concerned "hybrid" RPM. These practices included action by suppliers to maintain recommended maximum retail prices across retailers. However these practices appear also to correspond to a common willingness of distributors to align prices. Therefore the suppliers were actually used to transfer information and monitor price alignment among retailers.

In April 2008, the OFT issued a Statement of Objections, setting out its allegations against two tobacco manufacturers and eleven retailers, among which the largest ones, concerning arrangements between each manufacturer and each retailer that restricted the ability of each of these retailers to determine its selling prices independently, by linking the retail price of a manufacturer's brand to the retail price of a competing brand of another manufacturer. In a number of cases manufacturers or retailers exchanged information about future prices by way of a corresponding retailer/manufacturer.

While in this case buyer power may not be directly involved, the mechanism shows the way in which RPM may be used to monitor retailers pricing policies.²⁷

c. Hybrid Resale Price Maintenance

An early application of "hybrid" RPM is represented by the *France Jouet* case (2007).²⁸ The suppliers concerned reached agreements with their distributors in order to fix their products' resale prices in all the retail outlets. Suppliers also monitored the market and retail pricing policies, practices in which the distributors concerned actively participated. Retail prices recommended by manufacturers were communicated to the retailers through pre-printed Christmas catalogues. Distributors were involved in monitoring practices (in particular, Carrefour had set up a promotional campaign stating that it would refund ten times the price difference if customers could find certain toys cheaply elsewhere; Carrefour then asked suppliers to ensure that lower prices were not offered to its competitors, through the so called "letter to Father Christmas"). The FCC interpreted these practices as aiming at limiting competition inter-brand among toy producers. However it also finds evidence of buyer power. Moreover, the Council demonstrated that prices recommended in the Christmas catalogues were substantially applied by the distributors. The following standard of proof was applied: based on precise quantitative test, where 80 per cent of prices applied by a distributor was the recommended prices, no other evidence was required.

Recent cases by the EC Commission and a number of NCAs in the field of detergents and personal care have involved "hybrid" RPM, where suppliers action to maintain resale prices is really instrumental to monitor distributors price realignment. After an investigation of the Bundeskartellamt on the German market, the case has been initiated by a leniency application to the Commission and a number of NCAs, concerning "hybrid" RPM practices in the markets for detergents and personal care. The Commission decided to open proceeding with respect to conducts in the market for detergents, while NCA in Italy, Spain (and previously in France and Belgium) opened procedures with respect to conducts in the market for personal care.

The typical dynamics of retail price realignments can be represented as follows: the suppliers fix maximum resale prices and, in a given geographical market, some distributors comply with such prices while others significantly depart from them. With a view to avoiding to adapt prices downwards (with consequential erosions of first level margins), one or more distributors exert pressures on the supplier so that it arranges for a price realignment towards the recommended price. The supplier then contacts all distributors in the relevant geographic market and arranges for a collective realignment of resale prices towards a given "target price"; then, all distributors adapt their resale prices to the "target price" suggested by the supplier.

27See, for instance, the Office of Fair Trading 2003 case Umbro, concerning an indirect exchange of information between competing retailers via a common supplier, by indicating the minimum price retailers would be ready to practice.

28 Decision of December 7, 2007, D-50, relative à des pratiques mises en oeuvre dans le secteur de la distribution de jouets. It must be noted that the case closely resembles the 1997 US case with respect to Toy Are US, where the US retailer forced a combined action by its main suppliers, to boycott new entrants in the market.

These dynamics suggest however that the retail price realignments led by the supplier might have a different *ratio* than securing collusion among them. At least in some cases, retail price realignments seem to be the consequence of direct requests coming from retailers. Retailers compete at a local level and in certain geographic areas competition may become so fierce on specific references that the relevant margins shrink to a level which is not sustainable on the basis of the purchase terms negotiated by the affiliated chain at a national level. In this context, retailers - instead of starting a new negotiation with the supplier on the commercial terms - tend to exploit their buyer power, by threatening the supplier to de-list its reference and asking him to persuade the other retailers to realign their prices to a sustainable level.

Put in a different way, resale price realignments are not necessarily a clue of abuse or collusion at the supply level, but they might well be a consequence of market power (and/or collusive environment) on the retail side.

5. Abuse of dependence and effects on competition

Many of the practices characterizing buyer power are really unfair practices.²⁹ A significant number of these practices can in fact affect competition, through their effects on innovation and investment by suppliers. However, it is difficult to catch them through antitrust law. Many of the practices are in fact unilateral. Even assuming that they may constitute agreements, under the EC Guidelines for the evaluation of Vertical Agreements,³⁰ bilateral relations between suppliers and retailers are presumed not to infringe article 81, unless they contain black list clauses, such as exclusivity and maximum retail prices, as long as the market shares of the parties involved are below 30 per cent of the relevant market. Even in this case, it would be difficult to assess the practices at hand in the framework of Vertical Agreements, unless they lead to exclusion of competitors.

Rules concerning abuse of a dominant position are usually concerned with the position of the dominance in the market: the undertaking must be able to behave independently of customers (and suppliers) and competitors. Asymmetric bilateral relations between retailers and suppliers do not imply dominance in either the procurement or the retail distribution market and only imply economic dependence. Market shares of retailers in the retail or procurement market are well below those indicating the possibility of dominance.

The existence of joint dominance has sometimes been claimed, but there are no specific proceeding.³¹

In some constituencies legislation exists concerning abuse of economic dependence. In France, art. L420-2 of the Code de Commerce³² prohibits the exploitation of state of economic dependence of clients or suppliers.

29 The UK Competition Commission 2000 Supermarket lists 52 of them: category management practices of grocery retailers (3 practices); possible coordination between grocery retailers or between grocery retailers and their suppliers (2 practices); supply of own-label goods by grocery retailers (1 practice); actions by grocery retailers aimed at influencing the costs of supply or product availability for competing grocery retailers (5 practices); product mislabeling (3 practices); lump-sum payments by suppliers to grocery retailers (4 practices); practices that have the potential to create uncertainty for suppliers regarding their revenues or costs as a result of the transfer of excessive risks or unexpected costs to suppliers (26 practices); practices in a range of areas, such as price negotiations, that we do not consider raise concerns in terms of preventing, restricting or distorting competition (9 practices).

30 Commission notice - Guidelines on Vertical Restraints, Official Journal C 291, 13 October 2000.

31 See the Basque Authority 2009 Report; in the UK, the Groceries Supply Code of Practice (GSCOP) regulates practices by large Retailers; the Competition Commission has asked a further strengthening of its application.

32 In France, art. L 420-2 of the Code de Commerce, as amended by Loi n°2005-882 of 2 August 2005 - art. 40 JORF 3 August 2005, reads: "Est prohibée, dans les conditions prévues à l'article L. 420-1, l'exploitation abusive par une entreprise ou un groupe d'entreprises d'une position dominante sur le marché intérieur ou une partie substantielle de celui-ci. Ces abus peuvent notamment consister en refus de vente, en ventes liées ou en conditions de vente discriminatoires ainsi que dans la rupture de relations commerciales établies, au seul motif que le partenaire refuse de se soumettre à des conditions commerciales injustifiées. Est en outre prohibée, dès lors qu'elle est susceptible d'affecter le fonctionnement ou la structure de la concurrence, l'exploitation abusive par une entreprise ou un groupe d'entreprises de l'état de dépendance économique dans lequel se trouve à son égard une entreprise cliente ou fournisseur. Ces abus

In Italy, art. 9 of Law n. 192/1998³³ reads:

"[i]t is forbidden for one or more enterprises to abuse of the state of economic dependence of their customers or suppliers. Economic dependence shall be a situation in which an enterprise, in the course of its relationships with another enterprise, is in condition to determine excessive lack of balance between rights and obligations. Economic Dependence is determined by taking into account the real possibility, for the party afflicted by its abuse, to find satisfactory alternatives in the market.

Abuse could consist, among others, in the refusal to purchase or sell, in the imposition of vexatory contractual conditions, in the arbitrary interruption of the existing commercial relations.

Clauses incorporating an abuse of economic dependence are null and void. The ordinary judge will be competent for any legal actions in relation to abuse of economic dependence, including injunctive relieves and liquidation of damages suffered.

Without prejudice to article 3 of the Law 287/1990 [article 3 of the Italian Antitrust Law relates to abuse of dominant position], the Competition Authority may issue – where abuses of economic dependence become relevant from a competition standpoint – warnings and sanctions as provided by article 15 of the Law 287/1990 against the enterprise or enterprises which committed the abuse".

Also, in Germany, art. 20 of the Act against restraint of competition³⁴ prohibits discrimination and unfair hindrance:

"[d]ominant undertakings, associations of competing undertakings [...] and undertakings which set retail prices [...] shall not directly or indirectly hinder in an unfair manner another undertaking in business activities which are usually open to similar undertakings, nor directly or indirectly treat it differently from similar undertakings without any objective justification.

Paragraph 1 shall also apply to undertakings and associations of undertakings insofar as small or medium-sized enterprises as suppliers or purchasers of certain kinds of goods or commercial services depend on them in such a way that sufficient and reasonable possibilities of resorting to other undertakings do not exist. A supplier of a certain kind of goods or commercial services shall be presumed to depend on a purchaser within the meaning of sentence 1 if this purchaser regularly obtains from this supplier, in addition to discounts customary in the trade or other remuneration, special benefits which are not granted to similar purchasers.

Dominant undertakings and associations of undertakings within the meaning of paragraph 1 shall not use their market position to invite or to cause other undertakings in business activities to grant them advantages without any objective justification. Sentence 1 shall also apply to undertakings and associations of undertakings in relation to the undertakings which depend on them."

In Italy and France the Competition Authorities have been reluctant to apply these rules, as they require that economic dependence affects competition in the market and therefore imply a situation of dominance. In Italy there has not been any application of the law by the CA.

peuvent notamment consister en refus de vente, en ventes liées, en pratiques discriminatoires visées au I de l'article L. 442-6 ou en accords de gamme".

33 Art. 9 of Law n. 192 of 18 June 1998 as amended by art.11 of Law n. 57 of 5 March 2001.

34 Gesetz gegen Wettbewerbsbeschränkungen, GWB, in the version of 15 July 2005, Federal Law Gazette, I 2005, p. 2114.

In France, the Competition Council concluded in 2003 an investigation on the practices of the *Opera* purchasing alliance with respect to suppliers. While it recorded that practices aiming at exploiting buyer power could have taken place, it concluded that the case had no ground because the law requires that the practices affect competition in the market, and it found that the retailers in *Opera* were far from having market power in the retail market of the concerned products, both at national and local level, while *Opera* only had a 14 per cent market share in the procurement market for personal care, one of the product market concerned.³⁵

However, on the bases of the discussion above it could be argued that the practices under consideration could have effect on the working of competition, in particular if it were found that they are widespread among retailers.

Conclusions

The preoccupation with the effect that buyer power could have on competition has increased during the last few years due to a number of factors: *inter alia*, the increasing consolidation in the retail sector, the tendency of food prices to increase and the preoccupation that increased retailers power along the supply chain may have contributed to make price sticky. The existence of buyer power of large retailers in concentrated distribution markets, characterized by asymmetry in the relative market power of suppliers and distributors, is generally recognized by Competition Authorities.

During the last few years a number of market investigations by the Competition Authorities have in fact found evidence of practices which seem to indicate that retailers have some form of buyer power: high discounts for more powerful retailers, not related to efficiency of scale or transportation; modifications in the usual negotiated conditions, such as additional discounts; listing fees; slotting allowances; retroactive discounts; contribution to retail expenses; most favourable treatment clause; modifications in the terms of payment. There is also evidence of discretionary power of the retailer in the access to shelves.

However, whether the harm to the suppliers deriving from buyer power results in a damage for competition in the market is subject to much debate. Traditionally Competition Authorities consider bilateral relations only in so far as they have an impact on the final market and on "consumer welfare". Therefore they have tended to downplay the anti-competitive effects of buyer power, unless it is associated with market power on the selling side: absence of such a market power compels retailers to transfer to consumers the preferential conditions they have obtained. If the retail market is competitive, buyer power may be seen both a result and an instrument of the competitive process. Therefore, the effects of buyer power must be examined in light of the interrelation between retail and procurement markets.

In particular, in the context of merger analysis Competition Authorities have examined whether the strengthening of the market position in the downstream market may lead to such a level of buyer power in the procurement market to in turn increase barriers to entry in the retail market ("*spiral effect*"). Also, increase of concentration in the retail market was found to affect directly incentives to compete of the suppliers.

35 French Competition Council, decision of 21 February 2003: "Même si les accords et pratiques susmentionnés aboutissent à des transferts de ressources des producteurs vers les distributeurs dont la puissance d'achat s'est accrue par le biais de la création d'une centrale commune de référencement, ces accords et pratiques ne peuvent être qualifiés au regard des dispositions du livre IV du code de commerce que dans le cas où il est établi qu'ils ont pour objet ou peuvent avoir pour effet de limiter la concurrence soit sur les marchés des produits en cause, en portant atteinte à la présence des producteurs sur ces marchés, soit entre le distributeur qui a bénéficié de ces transferts et d'autres distributeurs. Ainsi [les pratiques concernées] pourrait être visé par les dispositions de l'article L. 420-1 du code de commerce, si ces demandes avaient pour objet ou pour effet de restreindre le jeu de la concurrence sur un marché. Une telle pratique pourrait également apparaître comme prohibée par les dispositions de l'article L. 420-2 du code de commerce, si elle émanait d'une entreprise détenant une position dominante ou tenant dans sa dépendance les fournisseurs considérés et était susceptible d'affecter le fonctionnement ou la structure de la concurrence sur un marché " (par. 68).

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However, in their examination of national retail markets Competition Authorities do not reach uniform conclusions about whether buyer power is likely to result in a competitive harm, absent other practices which could favour collusion in the retail market. While there is general consensus that certain practices could result in reduced incentives for suppliers to invest and innovate, there is no general agreement about the existence of tacit collusion, or whether buyer power increases barriers to entry for new or smaller competitors through *waterbed effects*.

Recent investigations concerning exchanges of information, and hybrid price retail schemes suggest however that the retail distribution market could be prone to parallel conduct. Absent the identification of schemes aimed at coordinating conduct, it remains however difficult to tackle buyer power under existing competition rules. Many of the practices are in fact unilateral. Even assuming that they may constitute agreements, under the EC Guidelines for the evaluation of Vertical Agreements, bilateral relations between suppliers and retailers are presumed not to infringe article 81, unless they contain black list clauses, such as exclusivity and maximum retail prices, as long as the market shares of the parties involved are below 30 per cent of the relevant market. Even in this case, it would be difficult to assess the practices at hand in the framework of Vertical Agreements.

It must be noted, however, that the issue has recently been addressed by the Commission, against the background of the current revision of EC competition rules applicable to Vertical Agreements. article 3 of the new Block Exemption Regulation³⁶ provides that the exemption from the application of art. 81(1) shall apply on condition that the market share held by *each* of the undertakings party to the agreement does not exceed 30 % on any of the relevant markets affected by the agreement.

Rules concerning abuse of a dominant position are usually concerned with the position of the dominance in the market: the undertaking must be able to behave independently of customers (and suppliers) and competitors. Asymmetric bilateral relations between retailers and suppliers do not imply dominance in either the procurement or the retail distribution market and only imply economic dependence. Market shares of retailers in the retail or procurement market are well below those indicating the possibility of dominance.

One possibility is to resort of Codes of conducts to guide the conduct of large retailers, restraining the use of the most controversial practices. However, unless these Codes are required by the Public Authorities, as it is in the UK case, there is the risk that they may be considered as potentially restrictive agreements under competition law.

Another option is to examine these conducts under the legislation prohibiting the abuse of economic dependence, where it exists (like in Germany, Italy and France). While in certain jurisdictions these provisions have been rarely used, because an infringement is found only if there is an effect of the conduct on competition in the market, the criteria and the results of recent market inquiries may contribute to evaluate the practices in a wider context.

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³⁶ Draft Commission Regulation (EC) 330/2010 on the application of Article 101(3) of the Treaty to categories of vertical agreements and concerted practices, (C(2009) 5365/2). See also the draft Commission Notice - Guidelines on Vertical Restraint, Section V - Market definition and market share calculation.