

The competition law of joint purchasing

Joint Purchasing of Energy Seminar
ARQUS Alliance – Lyon 15 June 2022
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Current gas prices

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NATURAL GAS (HENRY HUB) Commodity

9.36 +0.02 (+0.21%)

04:33:00 AM MI Indication

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Commodity Snapshot

9.34

Prev. Close

9.34

Open

9.30

Day Low

9.43

Day High

9.35

3.09

52 Week Low

9.54

52 Week High

9.35

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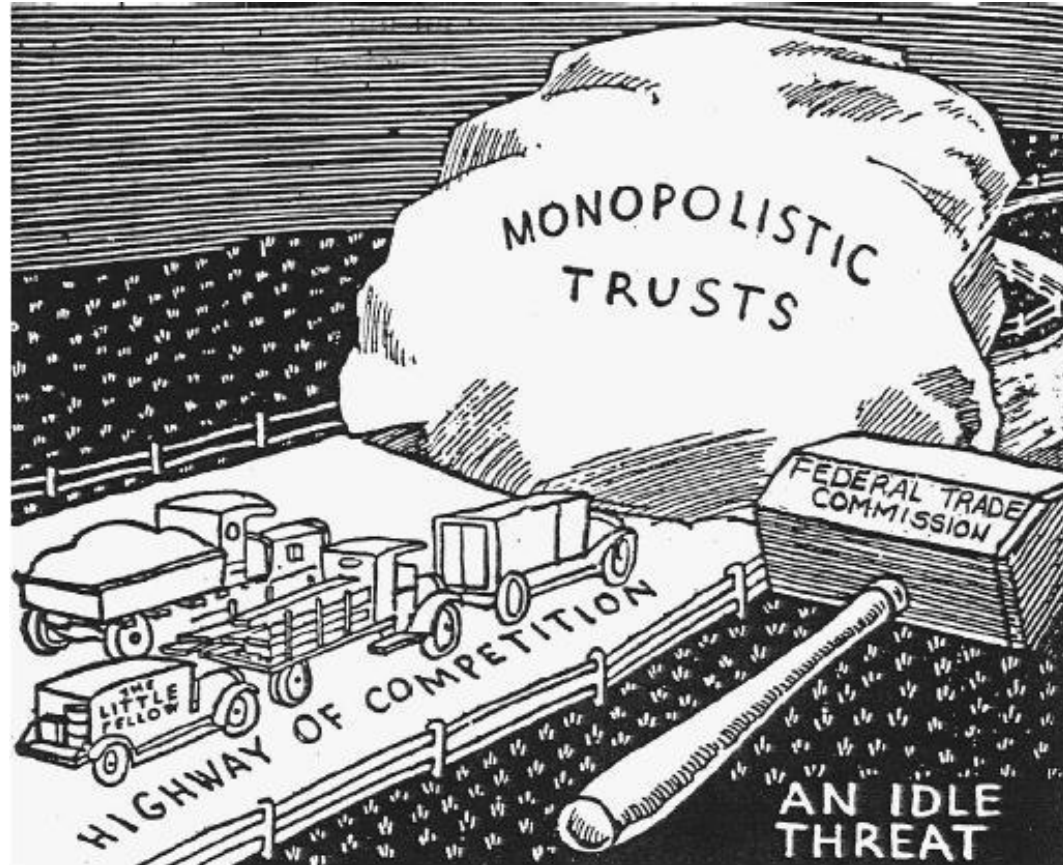
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EU Joint purchasing mechanism

- Part of RePowerEU + Energy Platform Task Force
 - demand aggregation, coordination of capacity and negotiation of energy supplies
- Combines with the EU External Energy Strategy
- The **joint purchasing mechanism** currently being discussed
 - Negotiate gas purchases *on behalf of Member States*
 - Not for undertakings/private actors
 - Joint purchasing of renewable hydrogen
 - To foster demand and create a market?
 - operationalise the European Global Hydrogen Facility
- Operating in winter?
- Based on the [vaccine joint purchasing programme?](#)

EU/EEA Competition Law

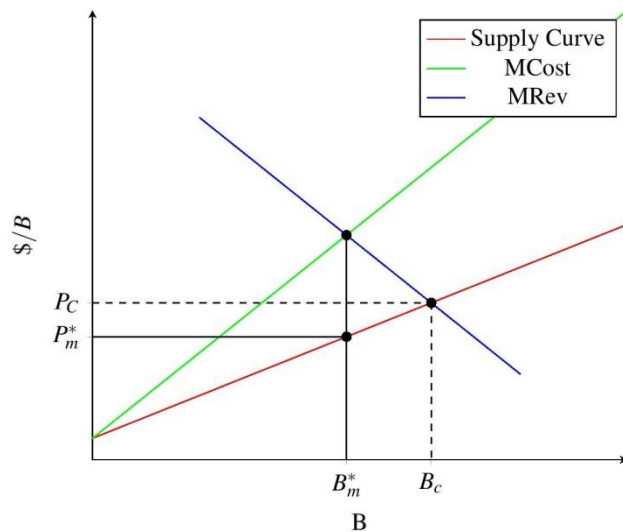


EU/EEA Competition Law

- Three main themes
- Prohibition of anticompetitive agreements
 - Cartels and Article 101 TFEU
- Dominant position (monopoly/monopsony power)
 - Article 102 TFEU
- Merger control
 - Merger Control Regulation: significant impediment to effective competition
- Energy sector is covered by the competition rules &
- Special sectoral regulation
 - And institutions such as the European Agency for Cooperation of Energy Regulators

What is Buyer Power?

- Umbrella definition
- Monopsony power \neq ‘bargaining’ power
- Monopsony is the ‘old’ approach to buyer power
 - Requires demand withholding to reduce purchasing prices
 - “Mirror” image of monopoly



Implies a “withholding effect”

It is always inefficient

Does not happen much
in real life

Why not a lot of monopsony?

- It is not economically rational
 - Too much monopsony will **push out suppliers** (marginal suppliers first, then more!)
 - **No alternative suppliers, no buyer power**
 - Why withhold demand **if I can get lower prices and more input?**
 - Use bargaining power instead and sell cheaper = profit maximizing
 - Monopsony **reduces prices for all buyers**, why help competitors?

What is bargaining power?

- Bargaining power is the other side of buyer power. Tends to be welfare enhancing *if* downstream market is competitive
- Its exercise affects 2 markets: upstream and downstream

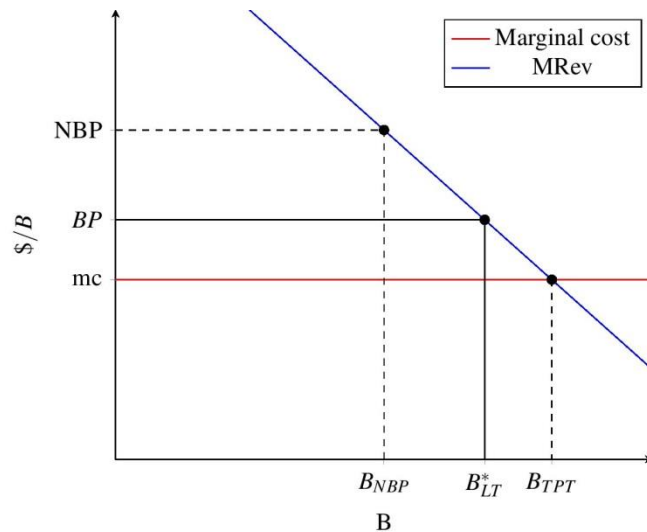
Bargaining power does not:

- Involve withholding
- May be efficient,
 - If passes price reductions
- May neutralize seller power
 - Countervailing buyer power (Galbraith, 1957)

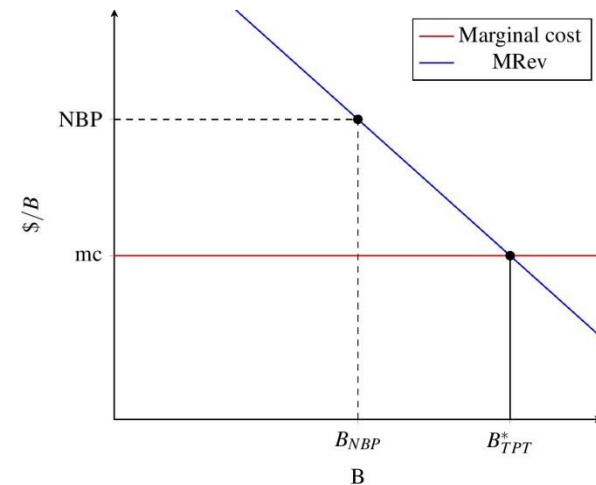


Two types of bargaining power

- Depending on the type of contract employed



Linear contract



Two-part tariff contract

Buyers' cartels and joint purchasing alliances

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Purchasing agreements

- Potentially a **101 TFEU problem** - Scrutinized by the EU Commission Guidelines on Horizontal Agreements (being reviewed)
- May take **many forms**: jointly controlled company (**JV**), company that is not controlled, cooperative, **contractual arrangement**
- Besides buying, engage in **joint distribution**, quality control, avoid duplication of **delivery** costs
- May be used for **own consumption** or **re-sale**
- Geared to the creation of *buyer power*
- Have effects **upstream and downstream**
 - Horizontal and vertical as well

Buyer cartel

- Tend to **fix prices, limit output** and **share markets** or customers
- **Coordinate** competitive **behavior** upstream and/or downstream
- Facilitate **exchange of information**
- In principle no need to define relevant market
- ***Why are they prohibited?***
 - Buyers' cartels create inefficiency
 - Even if in principle means lower prices
 - They change the way prices are formed

Buying alliances/joint purchasing schemes

- Usually **pro-competitive**: lower end prices, larger output/quality, increase innovation.
 - If “they are limited to what is **objectively necessary** to ensure the arrangement’s proper functioning and exercise its **buying power in relation to suppliers**” (EU Commission, 2022)
- Joint purchasing is about **collective activity** against sellers and members are bound to the rules in it
- Form of cooperation is **pre-agreed** and not including aspects of cartel
- **Joint purchasing mechanism modelled after?**

Differences with cartels?

- Difference on whether the purchasing agreement may lead to a **collusive outcome** by facilitating the **coordination** on the **downstream market**.
- Cartels facilitate exchange of **sensitive information**
- Purchasing is **made by an agent (independent) and stable/permanent**
- These forms of buying do *not* imply demand withholding
- They generate **positive bargaining power**
 - Reducing prices based on volume, eliminating transactions, being more efficient and no need to abuse market power

Buyers cartel: fixing purchasing prices and quotas

- There is some limited case law
 - Raw Tobacco **Spain**
 - Dual cartel: buyer – seller
 - Fixing maximum delivery price: lead to restriction of competition among members
 - **Object restriction**
 - Raw Tobacco **Italy**
 - Set purchasing quotas (Art. 101(a), (b), (c)).
 - **Object restriction**
 - Coordinated pricing policies downstream
 - Consumer harm
- US
 - *National Macaroni Manufacturers Association v. Federal Trade Commission*: controlled production of wheat and maximum amount to use in recipe. Manipulation and limiting purchases was per se violation.

Buying alliances under 101(3) TFEU

- *Sulphuric Acid Association*
 - Centralized purchasing fell under 101(1) but granted exemption under 101(3).
 - Not a cartel because: prices paid were agreed by a «central committee», quantities fixed in advance, sulphur resold within the alliance, pool did not fix purchasing prices vis-à-vis suppliers
 - Limited competition among members but not outside
 - Assessment under 101(3) was pro-competitive
- *Coöperatieve Stremsel- en Kleurselfabriek v Commission*
 - Different outcome: not exempted under 101(3) - exclusive purchasing obligation in breach of 101(1)
 - Member obliged to purchase all goods (cheese production) or fine imposed
 - No 101(3) because:
 - Not proportional
 - Eliminated competition among members in Netherlands



More purchasing alliance than cartel?



Ideas proposed so far

- **Voluntary** ‘joint purchasing mechanism’
 - Buying on behalf of **Member States**
- Covers **aggregated gas demand** and **competitive release to the market**
- May be organized as a **JV** (to get pre-approval?) or a **business-owned entity**
 - Subject to competition rules and a review
- Platform to **spread effects** to **non-EU MS** but partners: the Energy Community Secretariat

How can the joint purchasing work in practice?

- **EU Energy Platform** will **identify and aggregate** contestable volumes of gas, based on expiring long-term contracts and flexible volumes
 - Encourage diversification of supply
- Optimise and make **transparent use of the import, storage and transmission gas infrastructure**
 - maximising security of supply and replenishment of storage
- A mechanism and an IT tool will improve the transparency in **infrastructure bookings** (available capacity, reouting, secondary markets, etc)

Some food for thought?

- Alliance *for* Member States
 - We might have to think about state action doctrine/breach of long term contracts
 - What about private bodies?
 - Suggestion by Mario Draghi
- Big issue related to the **distribution of purchased gas**
 - Who gets what and where?
 - Prohibition on **destination clauses** ('old' Gazprom cases – 2014)
- Hard to **coordinate vs 30+ sellers**
- Very distortive of the gas market

Some food for thought?

- Voluntary is good but...
- Problems related to the **stability of the alliance**
 - Prisoner's dilemma issues
- Very **criticized by Eurogas** (gas company)
 - Should be last resort
 - But out of competition law
 - Include market actors and not states
 - Is there any buyer to press/squeeze?
 - Limited gas availability in the world - market is structurally undersupplied



Buyer Power in EU Competition Law

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Foreword by Dr. Albert Sánchez Graells

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