

**United Kingdom National Report – LIDC Congress Gothenburg 2023**

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

**Background/Context:**

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

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

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

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

*Different jurisdictions have taken a range of approaches, which have evolved and changed over time. What is the current situation in these jurisdictions and what are the LIDC National Chapters' and members' respective experiences – is the line between legitimate and infringing conduct sufficiently clear or is further guidance from authorities and courts required?*

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

This Report has been prepared to assist the International Rapporteur in reporting to the LIDC Congress in Gothenburg in September 2023. A draft version of this report was circulated to members of the Competition Law Association ("CLA") in July 2023. This version of the Report incorporates the views expressed by CLA members at the meeting.

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## 1 Introduction

- (1) To date there has been limited enforcement in the context of joint purchasing arrangements, including buying groups. This is largely because competition authorities have generally focused on supply-side rather than buy-side conduct in both the UK and the EU. Additionally, joint buying is often expected to be beneficial for consumers on the basis that collective bargaining that yields reduced input costs, will likely lead to lower prices for consumers.
- (2) Despite this, it has been widely accepted that purchaser cooperation may lead to negative effects in certain circumstances, including where it involves market power or is a disguised cartel or is otherwise a conduit for collusive behaviour.
- (3) This has been the focus of the limited enforcement relating to purchasing cooperation in the EU. We are aware of seven decisions on buyer cartels from the European Commission (“**EC**”) and 11 decisions from National Competition Authorities (“**NCA**s”) being taken in the last twenty years, with fines as high as EUR 799 million.<sup>2</sup> While there are also a number of other EC and NCA decisions where joint purchasing arrangements which did not amount to buyer cartels were considered, these decisions did not result in fines.<sup>3</sup> In the UK, no decisions have been taken to date regarding joint purchasing or buying groups but this may change as the CMA takes more cases post-Brexit.
- (4) The increasing interest in purchasing cooperation has recently been reflected in the revised guidance on horizontal agreements in both the EU and the UK, with both attempting to provide more concrete guidance, delineating between harmful buyer cartels and “true” joint purchasing agreements.
- (5) In this report, we consider whether developments in enforcement, case law and guidance from competition authorities and regulators in the UK to-date, have made the delineation between legitimate joint purchasing arrangements and infringing conduct sufficiently clear in practice, such that buying groups can meaningfully assess their conduct.
- (6) The report focuses on buy-side behaviour in the context of buying groups and broadly covers:
  - A brief overview of buying groups in the UK;
  - Legal framework for analysing buying groups, including:
    - the Chapter I Competition Act 1998 (“**CA98**”) prohibition on agreements (horizontal and vertical) which harm competition, and associated guidance, including, the draft UK guidance on the application of the Chapter I prohibition to horizontal agreements (“**Draft Horizontal Guidance**”), the CMA’s Draft Guidelines on Environmental Sustainability Agreements (“**Draft Sustainability Guidelines**”), and the new Vertical Agreements Block Exemption Order (“**VABEO**”);

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<sup>2</sup> EC, Horizontal Guidelines on purchasing agreements: Delineation between by object and by effect restrictions (Richard Whish and David Bailey) at para 4.8.

<sup>3</sup> See: *Carrefour Belgium, Provera Benelux* (Belgium), *Central Italiana* (Italy), *Glassmatix System* (Ireland), *National Sulphuric Acid Association, Eurovision* (EC); EC, Horizontal Guidelines on purchasing agreements: Delineation between by object and by effect restrictions (Richard Whish and David Bailey) at para 4.11.

- the Chapter II CA98 prohibition, which prohibits abuse of a dominant position and is a relevant consideration for buying groups (or their members) who might have collective market power;
  - the extent to which a buying group would be subject to *ex ante* merger control; and
  - the ability of the UK's market inquiry regime to address competitive effects of purchasing power related to buying groups.
- Enforcement mechanism under the above-mentioned antitrust tools.

## 2 Buying groups in the UK

- (7) Buying groups and cooperatives have been operating in the UK since the mid-twentieth century; organising, negotiating and purchasing on behalf of constituent businesses, across sectors up and down the supply chain. Across Europe, the grocery industry (retail and wholesale) has arguably been at the epicentre of buying group activity. However, buying groups are also present in a variety of other sectors, including consumer goods, construction, healthcare, energy and farming, and the UK has seen examples of buying groups operating across a range of industries.<sup>4</sup>
- (8) In addition to growing organically, buying groups have seen numerous mergers and amalgamations in the UK, including Landmark and Today's Group merger in 2018 to become Unitas, the UK's largest food and drink wholesale buying group.<sup>5</sup> A number of buying groups and buying consortiums have also dissolved in recent years.<sup>6</sup>

## 3 Legal framework

- (9) The main antitrust rules in the UK applicable to buying groups are under Chapter I CA98, which prohibits anti-competitive agreements (horizontal and vertical) between businesses (Chapter I prohibition), and Chapter II CA98, which prohibits abuse by an entity with a dominant position (Chapter II prohibition). Along with the powers to investigate and enforce these provisions, the UK antitrust regime also allows for much broader investigations into

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<sup>4</sup> For example, The *Company of Master Jewellers*, which (founded in 1980) is the largest UK watch and jewellery buying group operating on behalf of jeweller independent retailers and suppliers; *Sugro UK*, a buying co-operative of independent wholesale members in the UK operates across a wide breadth of product verticals ranging from confectionery to beauty; The *Caterfood Buying Group* has as its members a collection of independent UK foodservice suppliers; *Associated Independent Stores* is the UK's "leading" buying group for fashion, home, and leisure for independent retailers, and dates back to 1948; *National Buying Group* and *The Independent Buying Consortium* have, following their creation in the 2000s, served independent building merchants in the UK; There are various buying groups set up to support health and social care providers, including *LMC Buying Group*, *Healthcare Buying Group* and *Londonwide LMCs Buying Group*; The energy consultancy, *Zenergi*, has set up a buying group, in which organisations can collectively purchase their energy; In the agricultural sector, fuelled by the "continuing consolidation of the agricultural supply chain" and triggered by the transition from EU to UK agricultural policy, in April 2023, three of the UK's largest farming buying groups, Suffolk-based *Fram Farmers*, Norfolk-based *AF Group* and Lincolnshire-based *Woldmarsh Producers*, announced the launch of a new purchasing alliance, *Agri Procurement Alliance*.

<sup>5</sup> In 1993, ANEW, the largest independent electrical wholesale group in the UK was formed by the merger of two leading buying groups, CREW and NEDA, followed by a further merger with EMMA in 2001. In 2007, the Farmers' buying group, Framlingham Farmers merged with Atlas Agriculture, creating a combined membership of 1,000 members with 222,000 hectares. In 2018, Landmark and Today's Group merged to become Unitas, the UK's largest food and drink wholesale buying group. In 2021, MWI Buying Group became the largest animal health group purchasing organisation in the UK when the two buying groups, St Francis Group and VetsWest combined.

<sup>6</sup> Allied Buying Group UK Limited dissolved in May 2022; The E Buying Consortium Limited dissolved 19 July 2016; PIC Buying Consortium Limited dissolved in September 2019; Medical Buying Group Ltd dissolved 27 December 2022; Universal Buying Merchant Group Ltd dissolved on 30 May 2023; Encore Buying Group Ltd dissolved on 20 July 2021.

competition harms under market study and investigation powers. There is also a possibility that certain permutations of buying groups could be subject to *ex ante* merger control.

### 3.1 Chapter I prohibition

- (10) The Chapter I prohibition, like its EU equivalent Article 101 of the Treaty of the Functioning of the European Union (“**TFEU**”), prohibits anticompetitive conduct. It governs both: (i) agreements between competitors or potential competitors (horizontal agreements); and (ii) agreements at different levels of the supply chain, such as between purchasers and suppliers (vertical agreements).
- (11) Chapter I prohibits agreements that have as their “*object or effect the prevention, restriction or distortion of competition within the UK.*” By object restrictions are those that, by their very nature, are harmful to the proper functioning of competition.<sup>7</sup> If the CMA establishes that certain conduct is a “by object” restriction, the CMA does not need to examine its effects to conclude an infringement of Chapter I.<sup>8</sup> Otherwise, if conduct is not considered to be a by object restriction of competition, it must be analysed to confirm whether it results in an anti-competitive effect.
- (12) Where an arrangement is found to infringe Chapter I, it can potentially be justified on the basis of an efficiencies defence (though “by object” restrictions are less likely to be justifiable).<sup>9</sup> The burden of proof to establish an efficiencies defence remains on the defendant.
- (13) Purchasing arrangements and other such agreements between buying group members are not subject to *ex ante* approval by the CMA. Instead, buying groups and their members must self-assess whether their arrangements contravene the Chapter I prohibition.
- (14) In the context of purchasing arrangements, this assessment will typically require a two-step analysis.
- First, the joint purchasing arrangement of the buying group should be assessed with regards to the applicable horizontal guidance in the UK (which are currently being revised).
  - Secondly, (if there are vertical agreements in place between the buying group and members and/or suppliers) those should be assessed with regard to the VABEO.
- (15) Notably, the Sustainability Guidelines, once they come into force, may also be relevant.

#### 3.1.1 Limited enforcement to date

- (16) There has been very little enforcement against buying group or collective purchasing conduct in the UK over the last 20 years. Generally, enforcement by UK authorities has focused primarily on supply-side issues. This may be partly explained by the fact that many

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<sup>7</sup> Draft Horizontal Guidance at para 3.32.

<sup>8</sup> *BGL (Holdings) Limited & Others v CMA* [2022] CAT 36 at para 203.

<sup>9</sup> CA98, Section 9. *An efficiencies defence requires that the agreement: (a) contributes to: (i) improving production or distribution, or (ii) promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; and (b) does not - (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.*

of the larger or cross-border cases involving buying groups or collective purchasing would have been dealt with by the EC while the UK was still in the EU.<sup>10</sup>

- (17) As a result, and in spite of the broad investigation powers in the UK, we are only aware of two instances in the past 20 years involving joint purchasing conduct. These were the first short-form opinion issued by the CMA's predecessor, the Office of Fair Trading ("OFT"), on the P&H/Makro Joint Purchasing Agreement (27 April 2010) ("**P&H/Makro**"),<sup>11</sup> and the decisions relating to *Cityhook Limited & Cityhook (Cornwall) Limited* ("**Cityhook**"),<sup>12</sup> which involved collective boycotts and joint purchasing issues.

**(a) P&H/Makro**

- (18) The *P&H/Makro* opinion concerned a prospective joint purchasing agreement between a membership-only cash and carry supplier, Makro, and the (then) largest independent wholesaler in the UK, P&H. Makro's parent company, Metro, was reported to be a partner in numerous similar buying alliances across Europe.<sup>13</sup>
- (19) Under the agreement, through a jointly owned service company (PalMak), the parties would jointly negotiate purchase conditions (including overall discounts and promotional contributions) for food and other products with certain agreed suppliers. The agreement allowed an initial harmonisation of buying terms, aiming to ensure that Makro and P&H both benefited from the best terms offered to either of the parties individually by several selected suppliers. The parties were free to negotiate with suppliers outside the remit of the agreement (independently of PalMak and confidentially from each other).
- (20) In its opinion, the OFT found that a joint purchasing agreement would be "unlikely" to have as its object the restriction of competition (unless it facilitates a cartel among the parties or upstream suppliers).<sup>14</sup> As such, the joint purchasing agreement should be assessed for anti-competitive effects.<sup>15</sup>
- (21) The OFT noted that where the parties have no downstream market power and/or where there are not close competitors downstream, joint purchasing arrangements were considered unlikely to have an adverse effect on competition (although excluding situations where there are parallel networks of similar joint purchasing arrangements, which could dampen competition).<sup>16</sup> This was the case for the parties whose combined downstream market shares was below 10% (i.e. below the 15% safe harbour) and who were not considered to be close competitors. In a footnote, the OFT noted that in some circumstances, consumer harm may also arise in the absence of market power downstream but where the parties have market power upstream.<sup>17</sup> The ability of the purchasers to use their market power to negotiate further discounts with upstream suppliers could harm the suppliers' incentives to innovate and invest in their products.

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<sup>10</sup> See: *Gottrup-Klim v Dansk* (1994); *AOK Bunderverband v Ichthyol-Gesellschaft Cordes* (2004); *T-Mobile v Raand bestuur van de Nederlandse Mededingingsautoriteit* (2009); *FNCBV v Commission* ("French Beef") (2003); *Deltafina v Commission* ("Spanish Raw Tobacco") (2004); *Transcatav v Commission* ("Italian Raw Tobacco") (2005); *Koninklijke Wegenbouw Stevin v Commission* ("Dutch Bitumen") (2006); *Campine v Commission* ("Car Battery Recycling") (2017).

<sup>11</sup> See [Short form opinion of the OFT P&H/Makro Joint Purchasing Agreement](#) (27 April 2010).

<sup>12</sup> See *Cityhook Limited & Cityhook (Cornwall) Limited* [2007] CAT 18; *R (Cityhook) v OFT* [2009] EWHC 57.

<sup>13</sup> See Parties' Statement of Facts at paras 1.1 -1.2; [METRO AG's press release](#) on 2 July 2018.

<sup>14</sup> *OFT P&H/Makro* at para 6.1.

<sup>15</sup> *OFT P&H/Makro* at para 6.2.

<sup>16</sup> *OFT P&H/Makro* at para 6.3.

<sup>17</sup> *OFT P&H/Makro* at footnote 25.

- (22) Additionally, the OFT was asked to comment on the degree of commonality and transparency of costs that would likely lead to adverse competition effects. In that case, approximately 45-55% of the parties' total variable costs were affected by the joint purchasing. The OFT stated that a higher commonality of costs could lead to efficiencies in the form of reduced marginal costs of production in the downstream market, which are more likely to be passed on to final consumers.<sup>18</sup> It also noted that a high degree of cost commonality would not be a concern to the extent the parties did not have downstream market power so the arrangement would not reduce competition downstream or raise the possibility of coordination across the downstream market.<sup>19</sup>
- (23) On the basis of parties' claim that they do not have downstream market power, the OFT concluded that the agreement was considered unlikely to raise concerns and did not further consider the efficiency exemption.<sup>20</sup>
- (24) The OFT also provided some helpful guidance on exchanges of information under joint purchasing arrangements, which need to be assessed based on the market characteristics and the type and detail of the information exchanged.<sup>21</sup> It noted that exchanges of payment calculations on a regular basis, disaggregated by supplier, could allow reverse engineering of level of purchases by specific suppliers. Such granular detail could aid coordination between the parties (as the ability to monitor the members' recent level of purchasing activity on a regular basis could potentially support an agreement to limit output), falling under Article 101 TFEU and the Chapter I prohibition. The OFT requested (and the parties agreed) for payments to be calculated and aggregated across all suppliers by an independent consultant.<sup>22</sup>
- (25) The OFT's short form opinion was part of a (then) new procedure to provide non-binding guidance to parties seeking clarification on how the law applies to their prospective collaboration agreements between competitors.<sup>23</sup> While the OFT's views did not bind the parties in this case, this decision provided the parties (and continues to provide future parties), with one of the only practical (albeit dated) insights into how UK competition authorities might assess joint purchasing arrangements. Notably, much of the guidance continues to be reflected in the Draft Horizontal Guidance.

**(b) Cityhook**

- (26) In 2002, Cityhook - a company formed to exploit a technology for laying and landing sub-sea cables - complained to the OFT that it was a victim of an alleged collective (buy-side) boycott by the United Kingdom Cable Protection Committee ("**UKCPC**") (a trade association of submarine cable owners, operators and suppliers). It argued that its technology was being unlawfully excluded from the market because UKCPC and some of its members were collectively refusing to purchase from Cityhook, and that this amounted to a collective boycott.

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<sup>18</sup> OFT P&H/Makro at para 6.14.

<sup>19</sup> OFT P&H/Makro at para 6.15.

<sup>20</sup> OFT P&H/Makro at para 6.10.

<sup>21</sup> OFT P&H/Makro at para 7.6.

<sup>22</sup> OFT P&H/Makro at para 7.9.

<sup>23</sup> See [CMA's Approach to Short-form Opinions \(publishing.service.gov.uk\)](https://publishing.service.gov.uk) for guidance on the approach of UK competition authorities in respect of short-form opinions.

- (27) The OFT subsequently opened an investigation into the alleged collective boycott and broadened this to cover concerns regarding collective setting of “wayleave” fees paid for landing cables on land. This was ultimately closed years later, on the basis of “administrative priorities” in June 2006.
- (28) This decision by the OFT to close the investigation was challenged before the Competition Appeal Tribunal (“**CAT**”) (resulting in a unanimous decision that the appeal was inadmissible) and this in turn subject to judicial review before the High Court (where the judge upheld the CAT decision and accepted that the OFT had acted reasonably in closing its investigation). There was no formal decision by the OFT. Much of our understanding of the reasoning of the OFT in this case comes therefore from the CAT and High Court decisions.
- (29) When assessing the alleged collective boycott by UKCPC (the purchasers), the OFT’s draft Statement of Objections had categorised the infringement as both object and effects infringement. However, there was found to be insufficient evidence to show this.<sup>24</sup> Notably, the OFT’s Case Review Panel considered that unless the collective fee setting conduct in question was linked to an underlying cartel or was aimed at eliminating a competitor, it concerned a joint purchasing arrangement instead of a buyer cartel, and so the alleged collective boycott was considered under an effects analysis.<sup>25</sup> This was subsequently subject to considerable debate within the OFT, such that no decision was conclusively reached.
- (30) The evidence examined by the CAT suggests that the OFT was ultimately edging towards categorising the infringement as effects-based. For example, the OFT’s final case closure letter of 19 June 2006 makes no reference to an object-based infringement, referencing instead “a more thorough analysis” needed “of the effect of the parties’ behaviour on competition”.<sup>26</sup> However, the CAT treated this as referring to the OFT’s view on the evidence and not to the question of law as to whether the collective boycott case could be categorised as having an anti-competitive object.
- (31) In addition, although the OFT stated in its case closure letter to the parties that “the alleged collective boycott case does not constitute a hard-core infringement of the Act”, the CAT found that the use of “hard-core” was not intended to be a synonym for an object-based infringement, and so the OFT was not taken to have decided either expressly or by implication, that there was no object-based infringement in the collective boycott case.<sup>27</sup> The CAT ultimately found that whilst the OFT considered that there was evidence of a potential effect-based infringement, it did not consider, at that stage, that it had sufficient information to reach a final decision on that issue.<sup>28</sup>
- (32) It is notable that much of the internal deliberation within the OFT appears to have derived from “the lack of clear legal precedent concerning how to treat purchase-side restrictions similar to those in the cases under investigation”.<sup>29</sup> Considering it further would have required the OFT to pursue new lines of enquiry, which were not considered a priority, for numerous substantive and administrative priority reasons, including the lack of consumer

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<sup>24</sup> *Cityhook Limited & Cityhook (Cornwall) Limited* [2007] CAT 18 at para 293.

<sup>25</sup> *Cityhook* at paras 50, 51 and 59.

<sup>26</sup> *Cityhook* at paras 59 and 279.

<sup>27</sup> *Cityhook* at paras 263 – 265.

<sup>28</sup> *Cityhook* at para 93.

<sup>29</sup> *Cityhook* at para 61.

detriment caused by the alleged infringement. However, the inconsistency in its terminology and lack of clarity in the OFT's approach to the case were criticised by the CAT in its decision.<sup>30</sup>

- (33) Given the level of debate which the conduct in question generated within the OFT, this case seems a missed opportunity for welcome clarity on how purchaser-side conduct should be treated from a UK competition perspective.

### (c) Investigations into buy-side conduct

- (34) Despite an apparent lack of historic enforcement, UK authorities have occasionally taken interest in (and sometimes action against) buy-side conduct outside the joint purchasing space.<sup>31</sup> The CMA currently also has a number of open cases which appear to relate to buy-side conduct, including:

- In July 2022, the CMA opened an investigation into a potential wage fixing cartel, which since expanded to cover at least six companies (including BT Group plc, ITV plc and Sky UK Limited) involved in the production and broadcasting of sports content.<sup>32</sup> The investigation reportedly relates to the rate paid for freelance services and marks the CMA's first cartel probe into labour markets – part of a wider trend globally towards increased enforcement into labour markets and HR restrictions.
- In March 2022, the CMA opened an investigation into potential collusion among companies involved in the recycling of old or written-off so called “end-of-life vehicles” (“ELVs”) (a parallel investigation was launched by the EC on the same day). Vehicle manufacturers have a duty to offer a free service for recycling ELVs, which is often outsourced to third parties. One of the allegations being explored concerns agreements between vehicle manufacturers refraining from paying third parties to take back, dismantle and recycle ELVs.<sup>33</sup>

- (35) Given these investigations are ongoing, the full detail of the allegations involved are not in the public domain. At this early stage, based on the information to hand, they appear focused on cartel-like behaviour, rather than joint purchasing or buying groups per se. As such, while they may provide some insight into the CMA's approach to by object restrictions, they appear less likely to clarify how the effects analysis will be applied to joint purchasing arrangements. Nevertheless, they should provide insight into the CMA's approach to buy-side conduct more generally, in the event it takes enforcement action or publishes a reasoned decision if it decides to close its investigations.

#### 3.1.2 Horizontal guidance

- (36) Given the lack of UK case law, the horizontal guidance on competition cooperation agreements is the key guidance for buying groups and joint purchasing more generally in the UK. The existing horizontal guidance in the UK is an imported version of the Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements 2011 (the “**EC Horizontal Guidelines 2011**”) which were retained in UK law after Brexit

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<sup>30</sup> *Cityhook at para 296.*

<sup>31</sup> Note, there are several cases where the CMA and its predecessors have found that both the supplier and purchaser that are party to an anti-competitive arrangement have infringed competition law, such as in certain resale price maintenance cases and in so-called “hub-and-spoke” cases. These cases are not discussed here.

<sup>32</sup> See [Suspected anti-competitive behaviour relating to freelance and employed labour in the production and broadcasting of sports content - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/suspected-anti-competitive-behaviour-relating-to-freelance-and-employed-labour-in-the-production-and-broadcasting-of-sports-content).

<sup>33</sup> Penalty Notice, Case 510982, *Bayerische Motoren Werke AG*, 6 December 2022, at para 2.1.

(“**Retained Horizontal Guidelines**”).<sup>34</sup> However, these have now expired in the EU, and have been replaced in the EU by new and updated horizontal guidance.<sup>35</sup> Similarly, the CMA is currently consulting on its Draft Horizontal Guidance, published in January 2023.<sup>36</sup> The Draft Horizontal Guidance provides detailed guidance on applying the Chapter I prohibition to joint purchasing arrangements, and once finalised will replace the EC Horizontal Guidelines 2011. The CMA sought and received feedback on its Draft Horizontal Guidance in early March 2023, but the outcome of its consultation is still pending.

- (37) We set out below (i) a brief summary of the current position under the Retained Horizontal Guidance and (ii) the updated analytical framework for purchasing arrangements (including buying groups) presented under the Draft Horizontal Guidance in the UK, including some observations on whether the revised guidance provides greater clarity to firms trying to assess their participation in buying groups.

### 3.1.3 The Retained Horizontal Guidance

- (38) The Retained Horizontal Guidelines contain a short section on purchasing agreements. The section notes that “*joint purchasing agreements usually aim at the creation of buyer power which can lead to lower prices or better quality products or services for consumers.*”<sup>37</sup> The guidance also sets out competition concerns that may arise from joint purchasing agreements by object, by restrictive effect, and the circumstances in which they might benefit from the efficiency exemption.
- (39) The Retained Horizontal Guidelines accept that joint purchasing can be carried out in many *forms*, including by a jointly controlled company, by a company in which many other companies hold non-controlling stakes, by a contractual arrangement or by even looser forms of co-operation.<sup>38</sup> The *activities* associated with joint purchasing agreements are defined narrowly, being limited to joint “purchasing” and nothing else (e.g. joint negotiation).
- (40) Short guidance then follows covering the following topics:
- **Restrictions of competition by object.** Joint purchasing agreements that do not “truly” concern joint purchasing but act as a tool to engage in a “disguised cartel” (i.e. involving price fixing, output limitation or market allocation) are by object restrictions. However, fixing purchase prices that a joint purchasing arrangement is to pay to suppliers is not necessarily a restriction by object, and must be assessed in light of the overall effects of the agreement on the market.<sup>39</sup>
  - **Restrictive effects on competition.** The Retained Horizontal Guidelines provide for a two-pronged analysis relating to: (i) market power: the guidance sets a 15% combined

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<sup>34</sup> See: CMA125, CMA, Guidance on the functions of the CMA after the end of the Transition Period (1 December 2020). The EC Guidelines 2011 were retained as guidance relevant in interpreting the Retained Block Exemption Regulations under CA98, section 10. Also note that the OFT’s 2004 Guidance on Agreements and Concerted Practices (OFT401) technically remains and runs concurrent to the EC Guidelines 2011. However, the OFT guidance provides very limited commentary on joint purchasing arrangements, and in any event deferred to the EC’s guidance. It is therefore not discussed in this paper.

<sup>35</sup> Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023).

<sup>36</sup> CMA 174. Draft Horizontal Guidance (2023).

<sup>37</sup> EC Horizontal Guidelines 2011 *at para 194*.

<sup>38</sup> *Ibid.*

<sup>39</sup> EC Horizontal Guidelines 2011 *at paras 205 – 206*.

market share safe harbour threshold for both the purchasing and selling market and briefly outlines the factors relevant to the effects assessment where the threshold is exceeded (i.e. buying power, market concentration, countervailing power of strong suppliers, and activity of the jointly purchasing parties on the selling market); and (ii) collusive outcome in the downstream selling market, where the relevant factors for assessment include commonality of costs, market power, market characteristics, and the level of commercially sensitive information shared among members of the purchasing arrangement.<sup>40</sup>

- **Efficiencies.** The Retained Horizontal Guidelines then cover briefly the efficiencies exemption.

(41) In 2022, at the request of the European Commission<sup>41</sup>, Richard Whish and David Bailey published an advisory report, entitled “*Horizontal Guidelines on purchasing agreements: Delineation between by object and by effects restrictions*” (the “**Whish and Bailey Report**”).<sup>42</sup> This was a detailed review of the EC Horizontal Guidelines 2011 as they apply to joint purchasing and of the relevant decisions and case law relating to joint purchasing, and raised several critiques about the guidance. Some of the critiques of the EC Horizontal Guidelines 2011 (which equally apply to the Retained Horizontal Guidelines) in the Whish and Bailey Report were:

- Joint purchasing was defined too narrowly and limited to a narrow range of activity which did not accurately reflect the range of activities that a buying group could be involved in, including joint negotiation but not necessarily the “purchase” of products.<sup>43</sup>
- There was no proper guidance on how joint purchasing is distinguishable from a buyer cartel.<sup>44</sup>
- There was no distinction between horizontal collective boycotts against competitors at the same level of the market, and vertical collective boycotts, where purchasers agree not to deal with suppliers at a different level of the market. This could make the pursuit of sustainability objectives difficult, where a group of purchasers may want to agree to only purchase from sustainable suppliers.<sup>45</sup>

(42) The Whish and Bailey Report heavily influenced the EC’s drafting of the 2022 Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (“**EC Draft Horizontal Guidelines**”) and, in turn, also influenced the UK’s Draft Horizontal Guidance. In fact, the Draft Horizontal Guidance proposed by the CMA mirrors to a significant extent (in wording, principles, and case law) the Final Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (“**2023 EU Horizontal Guidelines**”) (which were finalised in June 2023) as they apply to

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<sup>40</sup> EC Horizontal Guidelines 2011 *at paras 208 – 216*.

<sup>41</sup> The EC sought expert advice on the delineation between joint purchasing agreements that have to be assessed as a restriction of competition by effect under Article 101 TFEU and those that qualify as a restriction of competition by object.

<sup>42</sup> EC, Horizontal Guidelines on purchasing agreements: Delineation between by object and by effect restrictions (Richard Whish and David Bailey).

<sup>43</sup> The Whish and Bailey Report *at para 5.7*.

<sup>44</sup> The Whish and Bailey Report *at paras 5.10, 7.2*.

<sup>45</sup> The Whish and Bailey Report *at 7.3*.

joint purchasing.<sup>46</sup> And while there are a few differences between the guidance adopted by the EC, and that proposed by the CMA, the divergence is not significant.

### 3.1.4 New Draft Horizontal Guidance

- (43) The Draft Horizontal Guidance, when compared with the Retained Horizontal Guidance, provides a more detailed analytical framework for buying groups and joint purchasing arrangements more generally.

#### (i) Buying groups and “joint purchasing” arrangements

- (44) The Draft Horizontal Guidance does not define buying groups specifically, but rather focuses on “joint purchasing” arrangements, broadly defining them as “*agreements concerning multiple undertakings jointly negotiating with and purchasing from suppliers*”.<sup>47</sup> This no doubt would capture a buying group. Considering both *form* and *function*, the scope of “joint purchasing” in the Draft Horizontal Guidance represents a marked improvement on the Retained Horizontal Guidelines. In this respect, the Draft Horizontal Guidance goes some way to (albeit not perfectly – as this paper will discuss) clarify what joint purchasing “*truly*” means, and as such, its distinction from buyer cartel conduct. This important clarification appears to have been a response to the recommendations of the Whish and Bailey Report.
- (45) The Draft Horizontal Guidance appreciates that joint purchasing can take many *forms*, enumerating a longer (and more explicitly open) list when compared to the Retained Horizontal Guidelines (see paragraph (34) above), including through a jointly controlled company, a company in which different undertakings hold non-controlling stakes, a cooperative or a cooperative of cooperatives, a contractual arrangement or by even looser forms of cooperation, for example, where one purchaser or negotiator represents a group of purchasers.<sup>48</sup>
- (46) As noted in paragraph (34) above, the Retained Horizontal Guidelines confine joint purchasing conduct to “purchasing” only.<sup>49</sup> The Draft Horizontal Guidance is much more flexible on the role that a buying group may serve, in that buying groups would still fall within the definition of a “joint purchasing” arrangement whether they pool actual purchases of members or merely serve as a common tool for joint negotiation of the purchase price or other terms and conditions, while leaving actual purchases to individual members.<sup>50</sup>
- (47) Another helpful revision in the Draft Horizontal Guidance, is that it recognises that the *functional* scope of joint purchasing arrangements is not limited solely to purchasing behaviour, but may also involve additional activities such as joint distribution, quality control and warehousing (thereby avoiding duplication of delivery costs).<sup>51</sup> This seemingly recognises the wide variety of potential arrangements that buying groups may be engaged in, and ensures guidance is available across a larger spectrum of activities.

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<sup>46</sup> 2023 EU Horizontal Guidelines.

<sup>47</sup> Draft Horizontal Guidance at para 6.1.

<sup>48</sup> Draft Horizontal Guidance at para 6.3; EC Horizontal Guidelines 2011 at para 194; The Whish and Bailey Report at paras 5.6-5.14.

<sup>49</sup> The EC Horizontal Guidelines at paras 194-196.

<sup>50</sup> Draft Horizontal Guidance at para 6.2.

<sup>51</sup> Ibid.

(ii) **By object or effect - agreements that “truly concern joint purchasing” and those that do not**

- (48) The Draft Horizontal Guidance expressly clarifies that joint purchasing arrangements do not “normally” amount to a restriction of competition by object if they “truly” concern joint purchasing.<sup>52</sup> This largely reflects previous EC and NCA jurisprudence where, as observed by the Whish and Bailey Report, while buyer cartels have almost entirely been treated as by object restrictions, joint purchasing arrangements were generally not (with one limited exception<sup>53</sup>), unless they were also found to be a buyer cartel.<sup>54</sup>
- (49) Given the gravity of a finding of a by object restriction, managing compliance risk around conduct that may fall in that category is critical for businesses, and identifying which side of the line an agreement falls on will be a crucial step in self-assessment. As such, central to the Draft Horizontal Guidance’s clarification of what, functionally speaking, joint purchasing “truly” involves and how it is different from buyer cartel conduct, is the explanation of what is meant by “joint” purchasing. The Draft Horizontal Guidance builds on one of the central recommendations of the Whish and Bailey Report by recognising that the question as to whether joint purchasing conduct is indeed “joint” weighs heavily on how that conduct is assessed under Chapter I.
- (50) The Draft Horizontal Guidance delineate between agreements that truly concern joint purchasing and those that do not (i.e. buyer cartels) as follows.<sup>55</sup> First, it clarifies that the existence of a *common* organisation acting on behalf of buyers to “collectively negotiate and/or conclude an agreement with any given supplier of one or more trading terms” is what distinguishes an arrangement that “truly” concerns joint purchasing from arrangements such as buyer cartels (where coordination revolves around *individualised* rather than *joint* behaviour towards suppliers).<sup>56</sup> Secondly, the guidance sets out factors which can make a joint purchasing arrangement a by object restriction (which includes buyer cartels), as well as providing a non-exhaustive list of factors which indicate an arrangement is *not* a buyer cartel (which must be assessed on a case by case basis). These factors are taken in turn.

(a) **Factors relevant to finding a by object restriction**

- (51) Assessing whether buying group conduct is a by object restriction requires consideration of whether an arrangement is aimed at coordinating how purchasers will behave individually toward suppliers rather than jointly through a common organisation acting on their behalf.<sup>57</sup> Specifically, the Draft Horizontal Guidance sets out the following conduct that may result in by object restrictions in the context of purchasing arrangements:
- **Upstream collusive conduct (buyer cartel).**<sup>58</sup> A buying group or joint purchasing conduct may amount to a “buyer cartel” where purchasers (i) coordinate how they

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<sup>52</sup> Draft Horizontal Guidance at para 6.8.

<sup>53</sup> See: *Eurovision* OJ [1993] L 179/23. In that case, the Commission found that the joint negotiation and joint purchasing of television rights to international sports events restricted competition by object and effect because both eliminated competition between broadcasters participating in the event and gave them a considerable advantage over their competitors.

<sup>54</sup> The Whish and Bailey Report at para 4.18. See also: *Eurovision* OJ [1993] L 179/23.

<sup>55</sup> Draft Horizontal Guidance at paras 6.8-6.16.

<sup>56</sup> Draft Horizontal Guidance at para 6.9.

<sup>57</sup> *Ibid.*; The Whish and Bailey Report at paras. 5.4.

<sup>58</sup> Draft Horizontal Guidance at para 6.9.

will behave *individually* towards suppliers (e.g. fixing the purchase prices, wages or other trading conditions before each purchaser subsequently negotiates and purchases individually from the supplier); and (ii) influence their individual negotiations or purchases from suppliers (e.g. coordinating price negotiation strategies).<sup>59</sup> There may also be a buyer cartel where the parties exchange commercially sensitive information about their individual purchasing intentions or negotiations with suppliers “*outside any genuine joint purchasing arrangements*”.<sup>60</sup>

- **Collusive conduct in downstream / related market.** A buying group may also facilitate a cartel in a downstream selling market or a related market (i.e. by fixing prices, limiting output or sharing markets or customers on downstream or related markets), resulting in a by object restriction.<sup>61</sup>
- **Collective boycott.** Where a buying group seeks to exclude an actual or potential competitor from competing with the members of the buying group, this would also amount to a by object restriction.<sup>62</sup>

(52) However, the above is not a “closed” list of criteria for when a buying group (or other joint purchasing arrangement) constitutes a by object restriction. Arrangements outside of these may still amount to a restriction by object.

**(b) Factors relevant to finding a joint purchasing arrangement is not a buyer cartel**

(53) The Draft Horizontal Guidance also sets out a list of non-exhaustive factors which will indicate that an agreement is *not* a buyer cartel. The addition of these factors is new and although it largely mirrors what was proposed in the EC Draft Horizontal Guidelines, on some points it risks creating uncertainty. Specifically:

- **Secrecy.** The Draft Horizontal Guidance provides that a joint purchasing arrangement such as a buying group may be able to evidence that it is not a buyer cartel where it can show that suppliers were informed that the buying group involves joint negotiation and that it binds its members (though this does not require the exact identity of the members be disclosed).<sup>63</sup> A footnote, however, then specifies that “*secrecy is not a requirement for finding a restriction of competition by object, and agreements in the public domain may restrict competition by object*”.<sup>64</sup>

On the one hand, disclosure to suppliers can indicate there is *not* a buyer cartel. On the other hand, disclosure would not save a buyer cartel. What is not expressly stated, although presumably implied, is whether secrecy will infer a finding of a buyer cartel. The wording may create some uncertainty for purchasers seeking to

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<sup>59</sup> Ibid.

<sup>60</sup> Commercially sensitive information includes purchase prices (including maximum prices, minimum discounts and other aspects of prices), terms and conditions, sources of supply (both in terms of suppliers and territories), volumes and quantities, quality or other parameters of competition (for example, timing, delivery and innovation); Draft Horizontal Guidance at para 6.12.

<sup>61</sup> Draft Horizontal Guidance at para 6.15.

<sup>62</sup> Draft Horizontal Guidance at para 6.16.

<sup>63</sup> Draft Horizontal Guidance at para 6.13(a).

<sup>64</sup> Draft Horizontal Guidance at footnote 255.

self-assess whether secrecy would make a finding of a buyer cartel certain or likely.

- **Written agreements.** A second factor that weighs in favour of finding a genuine joint purchasing arrangement is the existence of a “formal agreement” between members.<sup>65</sup> While this is useful clarification, it raises the question of what the absence of a formal agreement means, whether an informal buying group would be more likely to be seen as a buyer cartel. Similar to the footnote on secrecy, the guidance specifies that a written agreement cannot “*shield the arrangement from competition law scrutiny*”. The same question arises whether the lack of formal agreement would then infer the existence of a buyer cartel or whether a formal agreement is just an evidentiary tool to verify whether the buying group is acting within its given mandate.

### (iii) Assessment of effects

- (54) Even if a buying group can be characterised as a true joint purchasing arrangement (and not a by object restriction), it still needs to be assessed for effects.
- (55) To this end, the effects of a joint purchasing arrangement are analysed “on a case-by-case basis in their legal and economic context with regard to their actual and likely effects on competition.”<sup>66</sup>
- (56) The effects assessment is not static. The review should extend beyond the initial formation of the buying group but into the continued conduct of the buying group throughout its lifetime, taking into account the way group members interact with each other, with suppliers (and others on the market) and into the (constantly evolving) dynamics relevant to the market(s) within which the members operate. They must also consider the impact on both the purchasing markets, and the selling markets where the parties to the joint purchasing arrangement may compete as sellers.<sup>67</sup>

### (a) Assessment of negative effects and theories of harm

- (57) When assessing the effects of a joint purchasing arrangement, there are a number of relevant qualitative and quantitative considerations, including the impact on variety, increased prices (or price coordination), reduced output, product quality, innovation, market allocation and anti-competitive foreclosure of other possible purchasers.<sup>68</sup>
- (58) An underlying question will be whether the arrangements allow (and incentivise) a buying group to act in a way that harms consumer interests, as this would indicate that the joint purchasing arrangement has a restrictive effect on competition.
- (59) Assessing the effects of a purchaser arrangement requires consideration of a number of factors, including: (i) whether the arrangements will result in the buying group having too much market power (upstream and or downstream) which would give it the ability and incentive to foreclose competing purchasers or otherwise harm consumers (i.e. indirect effects);<sup>69</sup> or (ii) whether they will lead to coordination between the buying group members

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<sup>65</sup> Draft Horizontal Guidance at para 6.13(b).

<sup>66</sup> Draft Horizontal Guidance at para 6.17.

<sup>67</sup> Ibid.

<sup>68</sup> Draft Horizontal Guidance at paras 6.7 and 6.29.

<sup>69</sup> Draft Horizontal Guidance at para 6.7; [The competitive effect of buyer groups](#), a report prepared by RBB Economics for the OFT (2007), at paras 1.41-1.72. Indirect restrictions include foreclosure and waterbed effects.

(resulting in increased prices, reduced output, reduced quality or variety, less innovation, or market allocation) (i.e. direct effects).<sup>70</sup>

**(b) Factors relevant to assessing market power (indirect effects)**

- (60) Input foreclosure has been described as the most likely form of cost raising strategy (or indirect effect) that a buying group would employ,<sup>71</sup> and the Draft Horizontal Guidance contemplates that buying power of the parties to a purchasing arrangement could be used to foreclose competing purchasers from the market by limiting their access to efficient suppliers.<sup>72</sup> This can occur in a couple of ways, for example: (i) where there are only a limited number of suppliers and there are barriers to entry on the supply side of the upstream purchasing market;<sup>73</sup> (ii) there are exclusivity arrangements in place between the buying group and supplier which result in other purchasers outside the buying group from being unable to access an important resource required to compete; (iii) the buying group paying the owner of an important resource not to supply to anyone other than the buying group, denying rival buyers access to a resource needed to compete downstream;<sup>74</sup> or (iv) the buying group over-purchases an input, leaving insufficient stock for rival buyers to compete downstream.<sup>75</sup> In any of these scenarios, the inability of the rival buyers to compete downstream would lead to an increase in the buying group's downstream power, increasing the ability and incentives of buying group members to raise their prices downstream.
- (61) Another less common theory of harm is the waterbed effect.<sup>76</sup> Here, lower input prices for the buying group result in an increase in the wholesale prices to rival buyers, which then may result in an increase in prices to downstream consumers (as rival buyers seek to recoup their increased costs). This is more likely to occur where suppliers can price discriminate based on supplier size.<sup>77</sup>
- (62) The first consideration when assessing indirect effects is the market position of the buying group members. While there is no absolute threshold above which it can be assumed that market power is such that the agreement will have restrictive effects, the Draft Horizontal Guidance state that it is unlikely that market power exists if the combined market shares are 15% or less on the purchasing market as well as less than 15% on the downstream selling markets. The inclusion of a 15% threshold is not new, and the Retained Horizontal Guidelines contained an equivalent threshold for the purchasing and selling markets. Nevertheless, this was the topic of some discussion during the consultation process in both the EU and the UK. Some suggested different thresholds for the upstream and downstream market<sup>78</sup> while others thought the safe harbour for both should be increased to 30%<sup>79</sup> or 25%.<sup>80</sup> Ultimately, the 15% threshold was retained in the 2023 EU Horizontal

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<sup>70</sup> Draft Horizontal Guidance at para 6.7. [The competitive effect of buyer groups](#), a report prepared by RBB Economics for the OFT (2007), at paras 1.41-1.72. Direct restrictions include things such as explicit and tacit collusion.

<sup>71</sup> [The competitive effects of buyer groups](#), a report prepared by RBB Economics for the OFT (2007), at para 6.8.

<sup>72</sup> Draft Horizontal Guidance at para 6.28.

<sup>73</sup> Ibid.

<sup>74</sup> [The competitive effects of buyer groups](#), a report prepared by RBB Economics for the OFT (2007), at para 6.9.

<sup>75</sup> Ibid. at para 6.10.

<sup>76</sup> See: [Price Effects of Participation in National Buying Groups](#), Frontier Economics, at paras 2.27 – 2.29.

<sup>77</sup> [The competitive effects of buyer groups](#), a report prepared by RBB Economics for the OFT (2007) at para 6.26.

<sup>78</sup> Independent Retail Europe (“IRE”) submission.

<sup>79</sup> Baker McKenzie submission.

<sup>80</sup> European Competition Lawyers Forum (“ECLF”) submission.

Guidelines, and it will be interesting to see whether this threshold is also retained by the UK.

- (63) Where there are more than 15% combined shares, a detailed assessment is required of a number of factors including market power and market concentration, an assessment of profit margins and of possible countervailing power of strong suppliers.<sup>81</sup>

#### (I) Buying power upstream

- (64) The Draft Horizontal Guidance now expressly links the existence of buying power on the purchasing market to the ability to cause harm to consumers in the downstream market,<sup>82</sup> which the Retained Horizontal Guidelines did not do. The envisaged harm upstream includes the possibility that the joint purchasing by a buying group with market power may dampen incentives of the affected suppliers to invest and innovate and the possibility of forcing suppliers to reduce quantity or quality of their products.<sup>83</sup> A similar linkage between upstream market power and downstream harm was also made in the 2023 EU Horizontal Guidelines, and is reflective of EU jurisprudence as well as economic analysis on the subject.<sup>84</sup>
- (65) As noted above, the starting point for assessing buyer power will be market share. Other factors are also relevant, such as the number and intensity of links (for example, other purchasing arrangements) between competitors in the purchasing market.<sup>85</sup>
- (66) According to the Draft Horizontal Guidance, harm to innovation/investments is likely to arise if purchasers of the buying group account for a large proportion of total purchases in the market. The Draft Horizontal Guidance specifically mention the impact of buyer power on small suppliers, flagging that small suppliers may be particularly vulnerable to a reduction in profits as a result of the buyer power exercised by a buying group (or other purchasing arrangements), especially when small suppliers have made specific investments for supplying the members of the buying group.<sup>86</sup> The other side of the coin of course is that if suppliers have a significant degree of countervailing seller power (which does not necessarily amount to dominance), this would counteract the buying power of the buying group.
- (67) Buyer power can also be used to foreclose competing purchasers from the market by limiting their access to efficient suppliers – and an arrangement that seeks to do this in order to exclude that competitor from competing downstream is a collective boycott (which is an object restriction, as discussed above at para(52)).<sup>87</sup>

#### (II) Market power downstream

- (68) Where buying group members have market power downstream in the selling market, the Draft Horizontal Guidance suggest that benefits of joint purchasing are less likely to pass

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<sup>81</sup> Draft Horizontal Guidance at para 6.25.

<sup>82</sup> Draft Horizontal Guidance at para 6.26.

<sup>83</sup> Ibid.

<sup>84</sup> See: *National Sulphuric Acid Association* (1980) and (1989) (the EC found that the buying pool had a knock-on effect on the downstream competition for sulphuric acid, since sulphur accounts for 80% of the cost of sulphuric acid); and [The competitive effects of buyer groups](#), a report prepared by RBB Economics for the OFT (2007), at paras 1.54-1.60.

<sup>85</sup> Draft Horizontal Guidance at para 6.31.

<sup>86</sup> Draft Horizontal Guidance at para 6.27.

<sup>87</sup> Draft Horizontal Guidance at para 6.28.

to consumers.<sup>88</sup> Additionally, where the members of a buying group are actual or potential downstream competitors, their incentive for price competition on the downstream selling market may be reduced when they purchase a significant part of their products together.<sup>89</sup> In contrast, buying groups are treated as less likely to give rise to competition concerns where the members are not active on the same downstream/selling market, provided they also do not have significant buyer power upstream.<sup>90</sup> However, even where the members of a buying group are competitors on the selling market(s), the joint purchasing arrangement may not necessarily be anticompetitive. For example, the parties may be competitors, but have insufficient combined market power in the selling market to have any effect on competition, or there may be features of the market (countervailing power, low barriers to entry, etc) which mean the buying group is unlikely to have an anticompetitive effect, despite their level of combined market power downstream.

### (III) Supplier (and market) characteristics

- (69) As mentioned above, agreements are less likely to give rise to indirect effects where suppliers have a significant degree of countervailing seller power on the purchasing market(s),<sup>91</sup> while the presence of small suppliers increases the risk.
- (70) The Draft Horizontal Guidance specifically provide that restrictive effects are less likely if suppliers have a “*significant degree of countervailing seller power*” on the purchasing market because, for example, they sell products or services that purchasers need in order to compete on the downstream selling markets.<sup>92</sup> This guidance was not in the Retained Horizontal Guidelines, and identical wording was proposed in the EC Draft Horizontal Guidelines - though this was ultimately amended in the 2023 EU Horizontal Guidelines to add the proviso that the necessary products or services also need to be difficult to substitute.<sup>93</sup> This addition reflects submissions made during the consultation process,<sup>94</sup> and it will be interesting to see if this clarification is also made in the UK following consultation.
- (71) While supplier size and countervailing power of suppliers is important, the existence of small suppliers does not necessitate a finding of restrictive effects. Assessment of effects requires a holistic approach, of which relative supplier size and power will only be one component. For example, a buying group may be able to extract better terms from small suppliers, but whether this harms innovation / investment incentives will depend on whether: (i) suppliers of similar products with strong bargaining position (i.e. larger suppliers) would continue to innovate, (ii) small suppliers are savvy enough to anticipate their reliance on the buying group and capable of protecting themselves by negotiating better terms; and (iii) whether the buying group would have the incentive to allow innovation to suffer.<sup>95</sup>

### (c) Assessing collusive outcomes (direct effects)

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<sup>88</sup> Draft Horizontal Guidance at para 6.30.

<sup>89</sup> Draft Horizontal Guidance at para 6.29.

<sup>90</sup> Draft Horizontal Guidance at para 6.18.

<sup>91</sup> Draft Horizontal Guidance at para 6.27.

<sup>92</sup> Draft Horizontal Guidance at para 6.27.

<sup>93</sup> EC Draft Horizontal Guidelines at para 332 and 2023 EU Horizontal Guidelines at para 295.

<sup>94</sup> Independent Retail Europe (“IRE”) submission.

<sup>95</sup> [The competitive effects of buyer groups](#), a report prepared by RBB Economics for the OFT (2007) at para 1.74.

- (72) Even genuine buying groups can lead to collusive outcomes if they facilitate coordination of the members' behaviour on the selling market where they compete.<sup>96</sup> Collusion can be explicit or tacit. Tacit collusion (also called direct effects) is typically more difficult to establish than explicit collusion,<sup>97</sup> as it requires an analysis of the factors which would make collusive effects more likely (similar to an analysis of coordinated effects in merger control).<sup>98</sup>
- (73) Collusive outcomes are more likely if the selling market is conducive to collusion because it is concentrated or transparent, though this is not the only factor. The key factors to consider when assessing whether direct effects (or collusive outcomes) are likely are: (i) whether there is market power downstream; (ii) the terms of arrangements between purchasers; (iii) whether the market structure is conducive to collusion; (iv) commonality of costs; and (v) the level of information exchanged.<sup>99</sup>

#### (I) Market power downstream

- (74) The Draft Horizontal Guidance clarifies that collusive outcomes are more likely where the buying group members have significant downstream market power.<sup>100</sup> This clarification was not present in the Retained Horizontal Guidelines, and its inclusion in the Draft Horizontal Guidance reflects European jurisprudence,<sup>101</sup> as well as criticism received by the EC on its EC Draft Horizontal Guidelines (where the wording originally referred to "a significant number of undertakings in the selling market" rather than the collective market power).<sup>102</sup>

#### (II) Terms of arrangements between purchasers

- (75) It will also be relevant whether the purchasing arrangements extend beyond mere joint negotiating of purchasing terms and conditions.<sup>103</sup> For example, where the arrangements fix the purchasing volumes of its members, thereby limiting significantly the scope for buying group members to compete on the selling market, this is more likely to result in coordination, especially when considering other factors (like downstream market power and commonality of costs). This clarification is also new to the Draft Horizontal Guidance (and the 2023 EU Horizontal Guidelines),<sup>104</sup> and was not present in the Retained Horizontal Guidelines.

#### (III) Market characteristics

- (76) The Draft Horizontal Guidance now also clarifies that selling markets that are concentrated or transparent could increase the likelihood of coordinated behaviour.<sup>105</sup> Interestingly, the guidance leaves open what level of concentration would be of concern for assessing collusive effects.

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<sup>96</sup> Draft Horizontal Guidance *at para* 6.33.

<sup>97</sup> [The competitive effects of buyer groups](#), a report prepared by RBB Economics for the OFT (2007) *at para* 1.48.

<sup>98</sup> CMA129 *at para* 6.3.

<sup>99</sup> Draft Horizontal Guidance *at para* 6.33.

<sup>100</sup> Draft Horizontal Guidance *at para* 6.33.

<sup>101</sup> *Italy – Centrale Italiana* (2004). It was found the alliance would facilitate collusion in the downstream markets because members made most of their purchases through the alliance and held shares of between 40-50%.

<sup>102</sup> EC Draft Horizontal Guidelines *at para* 338, Submission by Associazione Antitrust Italiana ("AAI").

<sup>103</sup> Draft Horizontal Guidance *at para* 6.33.

<sup>104</sup> 2023 EU Horizontal Guidelines *at para* 299.

<sup>105</sup> Draft Horizontal Guidance *at para* 6.33.

- (77) The lack of guidance on levels of concentration is particularly notable, considering this is provided for other sections of the Draft Horizontal Guidance. For example, the guidance on production agreements clarifies that a combined share of 20% does not imply a highly concentrated market.<sup>106</sup> Additionally, it is not clear whether the concern is with “concentrated” markets or “highly concentrated” markets, as this wording is used interchangeably throughout the guidance (along with “fairly concentrated” and “quite concentrated”), without expressly distinguishing between the different concepts.

#### (IV) Commonality of costs

- (78) Whether the buying group enables its members to achieve a high degree of commonality in costs,<sup>107</sup> or whether the members have a significant portion of variable costs in the selling market in common<sup>108</sup> will be relevant considerations for the assessment of potential tacit collusion. This is because commonality of costs increases the risk of tacit coordination, or coordinated effects, in the downstream market.
- (79) With respect to commonality of costs, the Draft Horizontal Guidance now clarifies that achieving commonality of costs through joint purchasing is really only a concern where the parties have market power in the selling market and the market is conducive to collusion.<sup>109</sup> This clarification was not present in the Retained Horizontal Guidelines, and reflects the finding in *P&H/Makro* that the joint purchasing agreement did not give rise to anticompetitive effects despite commonality of input costs because the parties did not have market power in the selling market.<sup>110</sup>
- (80) However, the Draft Horizontal Guidance does not clarify what a high degree of commonality of costs would be – for example, whether this would be above 50%, or something different. Equivalent wording in the EC Draft Horizontal Guidelines was criticised for this reason during consultation, with commentators requesting further guidance on this point.<sup>111</sup> The EC Draft Horizontal Guidelines did not address this point.
- (81) It may be that the Draft Horizontal Guidance appears to leave this intentionally open, as a footnote elsewhere in the guidance (relating to production agreements) notes that the level at which variable costs in common are considered high will vary depending on the industry involved.<sup>112</sup>
- (82) However, examples included for joint purchasing (in both the revised EC Draft Horizontal Guidelines and the Draft Horizontal Guidance) do give the example of a joint purchasing agreement accounting for roughly 80% of parties’ variable costs being an arrangement that results in a “significant commonality of costs”. Similarly, the example of a joint purchasing arrangement that accounts for “roughly 50% of each retailer’s total costs”, and goes on to describe this as resulting in the parties achieving a “high degree of commonality of costs”.

#### (V) Information exchange

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<sup>106</sup> Draft Horizontal Guidance at para 5.35.

<sup>107</sup> Draft Horizontal Guidance at para 6.34.

<sup>108</sup> Draft Horizontal Guidance at para 6.35.

<sup>109</sup> Draft Horizontal Guidance at para 6.34.

<sup>110</sup> *OFT P&H/Makro* at paras 1.6 and 6.13 – 6.16; The Whish and Bailey Report at para 297.

<sup>111</sup> Association of Inhouse Competition Lawyers (“ICLA”) submission.

<sup>112</sup> Draft Horizontal Guidance at footnote 214.

- (83) The exchange of commercially sensitive information by members of the buying group will increase the risk of coordination, albeit necessary information shared for the functioning of the buying group or joint purchasing arrangement will be assessed in the context of the overall effects of the arrangement.<sup>113</sup> Notably, where the sharing of sensitive information occurs through the buying group, the buying group itself could be held liable, in addition to its members, for an infringement of Chapter I as a facilitator.<sup>114</sup>
- (84) The extent and nature of information exchanged (particularly competitively sensitive information) is a relevant consideration.<sup>115</sup> For example, pricing (including margin<sup>116</sup>) and volume information would likely fall within the scope of competitively sensitive information.<sup>117</sup>
- (85) That is not to say competitively sensitive information cannot be shared in a buying group where exchanges are legitimately necessary for the functioning of the buying group,<sup>118</sup> provided the appropriate safeguards are put in place (i.e. limits on who can access the information, aggregation etc).<sup>119</sup>

**(d) Ancillary restraints and contractual restrictions**

- (86) Contractual restrictions that may be contained in the purchasing arrangements of buying groups would need to be assessed both in the context of the competitive effects for the buying group itself but also separately for consistency with Chapter I.
- (87) The first port of call when assessing contractual restrictions which are part of a buying group arrangement will be to establish whether they are ancillary restraints, and therefore fall outside the Chapter I prohibition. This will be the case when they are “*directly related and necessary to the implementation*” of the main non-restrictive commercial activity, namely that it is “objectively necessary” for the implementation and “proportionate” to the activity.<sup>120</sup>
- (88) If the restrictions are not ancillary, then restrictions would need to be assessed in their own right under Chapter I and, where the restrictions are vertical arrangements, with regard to the VABEO.
- (89) The Draft Horizontal Guidance starts off by stating that restrictions which are limited to what is “objectively necessary” to ensure the buying group’s proper functioning and the exercise of its buying power vis a vis suppliers “may not restrict competition” under Chapter I.<sup>121</sup> The example provided for this is where parties to the joint purchasing

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<sup>113</sup> Draft Horizontal Guidance at para 6.36.

<sup>114</sup> Draft Horizontal Guidance at para 8.60.

<sup>115</sup> Draft Horizontal Guidance at para 6.36.

<sup>116</sup> See, for example the OFT’s RBS and Barclays loan pricing case (20 January 2011), where the OFT suggested that sharing margin information may “eliminate uncertainty and replaces the risks of competition and the hazards of competitors’ spontaneous reactions by cooperation” and may therefore be an object restriction.

<sup>117</sup> Draft Horizontal Guidance at para 6.36.

<sup>118</sup> Draft Horizontal Guidance at para 6.37.

<sup>119</sup> Draft Horizontal Guidance at paras 6.36, 8.63-8.67.

<sup>120</sup> Guidelines on the application of Article 101(3) of the Treaty (2004/C 101/08). See also for example Judgment of 11 September 2014, *MasterCard v Commission*, C-382/12 P, EU:C:2014:2201; and *Asda v MasterCard* [2017] EWHC 93, paras 118-233.

<sup>121</sup> Draft Horizontal Guidance at para 6.19.

arrangement are prohibited from participating in other competing arrangements where that would jeopardise the joint purchasing arrangements operations and buying power.<sup>122</sup>

- (90) The above formulation in the Draft Horizontal Guidance seems to be a misstatement of the ancillary restraints doctrine. While the Draft Horizontal Guidance states that restrictions which are limited to what is objectively necessary “may not” restrict competition,<sup>123</sup> under the ancillary restraints doctrine, if a restraint is objectively necessary (and proportionate) to facilitate the main commercial activity (ie the joint negotiation/purchasing), then Chapter I should not be applicable to the restraint in the first place.
- (91) Identical wording in the EC Draft Horizontal Guidelines was subject to criticism during the consultation process for this reason,<sup>124</sup> and were ultimately amended to better reflect the ancillary restraints doctrine. The 2023 EU Horizontal Guidelines therefore state that restraints that are “objectively necessary and proportionate” to the proper functioning of the purchasing arrangement “may fall outside the scope of Article 101(1)” (that is, the equivalent of Chapter I).<sup>125</sup> It will be interesting to see whether the UK’s Draft Horizontal Guidance is subject to similar criticism, and whether similar changes are made.
- (92) Additionally, the Draft Horizontal Guidance specifically call out restrictions involving an exclusivity obligation on members of a buying group / joint purchasing arrangement to purchase all or most of their requirements through the buying group. Such exclusivity obligations are not considered ancillary and require a Chapter I assessment, which requires consideration of: (i) the extent of the obligation; (ii) the market share of the joint purchasing arrangement on the selling market; (iii) the degree of concentration of suppliers on the purchasing market; and (iv) whether the obligation is necessary to ensure buying power vis a vis strong suppliers.<sup>126</sup> There is a higher risk of finding restrictive effects with the exclusivity obligation if the parties have market power upstream/downstream, or where the supplier is a vulnerable supplier, the effects of the ancillary restraints themselves need to be assessed separately. To this end, contractual restrictions need to be considered separately, but also in light of the respective power of the parties and the market dynamics.

#### (e) Temporary stops

- (93) When jointly negotiating terms and conditions with suppliers, a buying group may exert its buying power by threatening to abandon negotiations or stop purchasing unless the supplier offers better terms or prices. These types of collective negotiation threats are referred to as “temporary stops”.
- (94) The Draft Horizontal Guidance clarifies that temporary stops do not usually give rise to a by object restriction, but may give rise to negative effects, and also distinguishing them from collective boycotts<sup>127</sup> and “delisting”.<sup>128</sup> The Draft Horizontal Guidance also helpfully

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<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

<sup>124</sup> EuroCommerce submission.

<sup>125</sup> EU Horizontal Guidelines *at para 287*. “Certain restrictions imposed by a joint purchasing arrangement on its members may fall outside the scope of Article 101(1) where they are limited to what is objectively necessary and proportionate to ensure that the arrangement functions properly and enables the members to exercise buying power vis-à-vis suppliers”. However, similar wording was not added to para 297 (the EU equivalent of 6.29), but instead, reference to the arrangement requiring an assessment of the restrictive effects on competition was removed.

<sup>126</sup> Draft Horizontal Guidance *at para 6.29*.

<sup>127</sup> For example, joint purchasing arrangements that aim to exclude a competitor from competing with members of the joint purchasing arrangement.

clarifies that the effects of temporary stops “*should not be assessed separately, but should be assessed in the light of the overall effects of the joint purchasing arrangement*”.<sup>129</sup>

- (95) Similar guidance was introduced in the EC Draft Horizontal Guidelines, and was subject to some criticism. One critique was that treating collective stops as part of the joint purchasing arrangement meant treating them as inherently ancillary to the joint purchasing arrangement, which ignored that temporary stops may overshoot by going beyond the scope of the negotiations.<sup>130</sup> However, other submissions on the draft took the opposite view, and agreed that they should be assessed in light of the overall effect of the purchasing agreement<sup>131</sup>, with some asking the guidance to go even further, by expressly stating that temporary stops are “typically part of the bargaining process”.<sup>132</sup> The final 2023 EU Horizontal Guidelines ultimately kept the “overall effect” approach.
- (96) However, unlike the Draft Horizontal Guidance, the EC Draft Horizontal Guidelines do not expressly distinguish temporary stops from collective boycotts and delisting. The inclusion of delisting in a footnote<sup>133</sup> to the guidance on temporary stops may create confusion as it is not clear what the status of delisting is and how it should be treated in comparison to temporary stops.

**(iv) Pro-competitive effects and efficiencies**

- (97) Even if a buying group or other joint purchasing arrangement is found to have negative effects, the parties can consider if it can be justified on the basis of an efficiencies defence.
- (98) In order to claim the efficiencies defence, the parties will need to show that the relevant restrictive nature of the buying group or any of its restrictions are: (i) justified by efficiencies which outweigh the restrictive effects, (ii) indispensable to achieving those efficiencies. Further (iii) the benefit of the efficiencies are passed on to consumers (predominantly in the form of cost-savings); and (iv) there is no elimination of competition.<sup>134</sup>
- (99) There is not an exhaustive list of what might count as efficiencies for the purpose of claiming the defence for a joint purchasing arrangement. However, the Draft Horizontal Guidance mentions cost savings (such as lower purchase prices or reduced transaction, transport and storage costs) and qualitative efficiencies leading to innovation and the introduction of new or improved products on the market as examples of efficiencies for joint purchasing.
- (100) Some other efficiencies not specifically mentioned in the joint purchasing section of the Draft Horizontal Guidance are the integration of resources and activities are also a plausible source of efficiencies<sup>135</sup> and increased variety.<sup>136</sup>

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<sup>128</sup> Where a retailer permanently removes certain products of a supplier from its assortment and gives up the associated space on its shelves.

<sup>129</sup> Draft Horizontal Guidance at para 6.38.

<sup>130</sup> Association des Industries de Marque (“AIM”) submission.

<sup>131</sup> Independent Retail Europe (“IRE”) submission.

<sup>132</sup> European Competition Lawyers Forum submission.

<sup>133</sup> Draft Horizontal Guidance at footnote 262.

<sup>134</sup> Draft Horizontal Guidance at paras 6.40 – 6.44.

<sup>135</sup> EC Horizontal Guidelines 2011.

<sup>136</sup> Draft Horizontal Guidance at para 6.4. “The buying power of a joint purchasing arrangement can lead to lower prices, more variety, or better-quality products for consumers.”

- (101) With respect to the obligation to “pass-on” efficiencies to consumers, the Draft Horizontal Guidance provide some guidance on where this is unlikely to take place. Buying groups with high market power downstream are considered less likely to pass a benefit of a price reduction on to consumers.<sup>137</sup> Additionally, a buying group / joint purchasing arrangement that limits or “disincentivises” members from purchasing additional volumes (through or outside the buying group) is unlikely to result in lower sales prices in the first place (this is a change from “limiting” members from purchasing additional volumes).<sup>138</sup>
- (102) It is up to buying group to self-assess whether or it can claim the efficiencies defence, with the CMA largely looking at arrangements on an *ex post* basis where there are competition concerns, and so there are limited examples of what efficiencies buying groups may claim in practice (also given the limited decisions on joint purchasing arrangements in general).

### 3.1.5 Sustainability

- (103) In addition to the Draft Horizontal Guidance, the Draft Sustainability Guidelines, that are currently subject to consultation, intend to provide more certainty for businesses that enter into agreements aimed at achieving sustainability goals and to ensure that businesses are not “*unnecessarily or erroneously deterred*” from working together by the risk of competition law breaches.
- (104) As to its impact on buying groups (and broader joint purchasing arrangements amongst buyers), the Draft Sustainability Guidelines provide helpful clarification and guidance on how conduct is likely to be treated under UK rules, where cooperation has a sustainable objective. Examples considered under the guidelines include where buyers: (i) pool information on the sustainability credentials of suppliers (considered unlikely to be problematic unless competitively sensitive information is shared); (ii) enter into certain restraints to achieve sustainability goals (for example, agree to stop using a particular type of packaging); and (iii) agree to only purchase from suppliers that sell sustainable products. Importantly, the guidelines provide that some by object restrictions may be treated as ancillary where they are directly related and necessary to a sustainability objective.
- (105) The Draft Sustainability Guidelines also clarifies that where some restrictions can fall under both by object and by effect categories e.g. in a collective boycott, if the intention is to ensure sustainable alternatives are phased in, it may be subject to an effects analysis. It gives the example of environmental sustainability agreements which involve a group of competing purchasers only agreeing to purchase from suppliers that sell sustainable products, noting this would be unlikely to restrict competition by object, despite it being a form of collective boycott. Unlike a horizontal boycott, which aims to eliminate an actual or potential competitor, and is treated as a by object restriction, the aim of such an agreement would be to eliminate unsuitable products from the supply chain and so should typically be the subject of an effects analysis.<sup>139</sup>
- (106) The ability for some joint boycotts to be treated to an effects analysis reflects some of the commentary made in this space, including in the Whish and Bailey Report on boycotts, which focused on the distinction between horizontal and vertical boycotts. Horizontal

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<sup>137</sup> Draft Horizontal Guidance at para 6.30.

<sup>138</sup> Draft Horizontal Guidance at para 6.43. The Guidance clarifies that a joint purchasing arrangement that disincentivises members from purchasing additional volumes is unlikely to result in lower sales prices and therefore less likely to benefit from the efficiencies to defence. The EC Draft Horizontal Guidelines at para 347 reaches this conclusion with respect to arrangements that “limit” members from purchasing additional volumes.

<sup>139</sup> Draft Sustainability Guidelines at para 4.11; Draft Horizontal Guidance at para 6.16.

boycotts are where a collective boycott intends to eliminate a competitor from the same level of the market as the boycotting parties, while a vertical boycott involves a group of purchasers agreeing not to purchase from a supplier or suppliers at a different level of the market.<sup>140</sup> There is more likely to be a legitimate objective (such as sustainability concerns) in a vertical boycott, rather than in a horizontal boycott where the parties are seeking to eliminate a competitor at the same level of the market. The detriment to competition is therefore less obvious, and an effects analysis is more appropriate.<sup>141</sup>

- (107) However, it remains unclear whether or not vertical collective boycotts which do not relate to sustainability should also be analysed based on their effects. Although the Draft Horizontal Guidance states that horizontal collective boycotts are prohibited by object, they are silent on the status of vertical collective boycotts in general and outside the sustainability context in particular.
- (108) In practice, the complexity of supply chains may mean that certain players are active at several levels of the supply chain and are competitors with respect to various products. This could lead to a more complex analysis being required even for vertical collective boycotts.

### 3.1.6 VABEO

- (109) As noted above, the Draft Horizontal Guidance also notes that joint purchasing arrangements may involve both horizontal and vertical agreements<sup>142</sup> and buying groups often involve vertical agreements between the parties to the joint purchasing arrangement, and members and/or suppliers.
- (110) Some examples of such arrangements in a buying group context might be:
- agreement between a buying group and a supplier that the supplier will only sell to the buying group, or will supply a certain high percentage of its product to the buying group (**exclusive supply**);
  - agreement between a buying group and a supplier that the buying group would only purchase from, or will purchase a certain high percent of its requirements from the supplier (**exclusive purchasing**);
  - agreement between a buying group and its members that the members would only purchase through, or would purchase a certain high percent of their requirements, from/through the buying group (**exclusive purchasing**).
- (111) With respect to exclusive supply, the concern would be whether the arrangements foreclose other buyers, while for exclusive purchasing, the concern would be whether they foreclose the market to competing and potential suppliers or buying groups.<sup>143</sup>
- (112) Where the joint purchasing arrangement does not give rise to horizontal competition concerns and where vertical arrangements are employed in a buying group context, they

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<sup>140</sup> The Whish and Bailey Report *at page 3*.

<sup>141</sup> The Whish and Bailey Report *at para 2.34*.

<sup>142</sup> Draft Horizontal Guidance *at para 6.5*.

<sup>143</sup> Draft Horizontal Guidance *at para 6.19*.

are to be assessed under the VABEO Guidance to see whether they are in breach of the Chapter I prohibition (i.e. whether they have the object or effect of harming competition).<sup>144</sup>

### 3.1.7 HR guidelines

- (113) Another form of joint purchasing that is under the spotlight in the UK (but also further afield) relates to the purchase of labour. In February 2023, the CMA published short guidance for employers on how to “*avoid breaking competition law*” in their behaviour as buyers in labour markets.<sup>145</sup> This includes cautioning against: (i) entering into no-poaching agreements, (ii) entering into wage-fixing agreements, and (iii) sharing sensitive information regarding employment terms and conditions with other businesses.<sup>146</sup>
- (114) This clear warning against coordination on labour markets is also reflected specifically in the Draft Horizontal Guidance’s analysis of purchasing groups, where it cites as an example of possible “buyer cartel” conduct, fixing or coordinating aspects of pricing, including “agreements fixing wages”.<sup>147</sup>
- (115) The EC Draft Horizontal Guidelines also referred to “wage fixing” as an example of possible buyer cartel conduct, and likely stems from the EC’s statements that it intends to pay more attention to agreements restricting competition on the labour market, and particularly that:<sup>148</sup>

*“Some buyer cartels do have a very direct effect on individuals, as well as on competition, when companies collude to fix the wages they pay; or when they use so-called “no-poach” agreements as an indirect way to keep wages down, restricting talent from moving where it serves the economy the best”.*

- (116) The inclusion of wage fixing received some criticism during the consultation process as the EC Draft Horizontal Guidelines do not include an example of when “wage fixing” arrangements might be viewed as buyer cartels, and when undertakings can legitimately work together to discuss wages with others, nor does it address whether a wage fixing agreement between non-competitors would be treated as an object restriction.<sup>149</sup>
- (117) This criticism does not appear to have been heeded in the final 2023 EU Horizontal Guidelines, and it will be interesting to see whether the CMA comes under similar pressure during the consultation process to provide further guidance on what type of wage discussions might be permissible.

## 3.2 Chapter II prohibition

- (118) The Chapter II prohibition (equivalent of Article 102 TFEU) prohibits abuse of a dominant position by “one or more undertakings”. As such, it is a relevant consideration for members of the buying group (collectively or individually) who might have collective market power, as well as for the buying group itself (where the structure of the buying group qualifies it as

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<sup>144</sup> Draft Horizontal Guidance *at para 6.6*.

<sup>145</sup> [Avoid breaking competition law: Advice for employers - GOV.UK \(www.gov.uk\)](#); [Employers advice on how to avoid anti-competitive behaviour - GOV.UK \(www.gov.uk\)](#).

<sup>146</sup> [Employers advice on how to avoid anti-competitive behaviour - GOV.UK \(www.gov.uk\)](#)

<sup>147</sup> Draft Horizontal Guidelines *at para 6.09*.

<sup>148</sup> EC, Speech by EVP M. Vestager at the Italian Antitrust Association Annual Conference – “[A new era of cartel enforcement](#)” (22 October 2021).

<sup>149</sup> International Chamber of Commerce (“ICC”) submission.

an “undertaking”). Abusive conduct includes directly or indirectly imposing unfair prices, among other things.

- (119) As with Chapter I, the CMA has released guidance on dominance abuses. This guidance makes it clear that undertakings with strong buyer power may be dominant.<sup>150</sup> The Guidance is, however, short and does not provide buyer-group specific examples of infringing conduct.
- (120) While the OFT has previously examined a case relating to an accusation of abuse of dominance by a purchaser of social care services for offering allegedly unfairly low prices and unfair terms in its purchases from a supplier (BetterCare Group),<sup>151</sup> we are not aware of any UK investigations of a buying group under Chapter II.<sup>152</sup>
- (121) Nevertheless, it is likely that if a buying group was investigated under Chapter I (as a joint purchasing arrangement) it could also be investigated under Chapter II to the extent that it could be said to have market power. One of the key considerations in assessing the effects of a joint purchasing arrangement under Chapter I is whether or not there is market power in the upstream and downstream markets, and the effect of that power on competition. This overlaps with Chapter II, where the primary concern will be whether there is market power, and if that market power is abused so as to harm competition.
- (122) Indeed, when the CMA brings investigations under Chapter I, it typically brings an investigation under Chapter II at the same time, where the entity subject to the Chapter I investigation has market power. An example of this is the recent investigations into conduct by large tech companies and pharmaceutical companies, where the CMA has investigated both agreements and use of market power.<sup>153</sup>

### 3.3 Other considerations

#### 3.3.1 Mergers

- (123) The UK merger control regime is technically a voluntary regime. The CMA may review a merger where two or more enterprises “cease to be distinct” and the jurisdictional thresholds (of either turnover or share of supply) are met.<sup>154</sup> Notification is not compulsory where thresholds are met, but the CMA has the ability to call in a transaction up to four

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<sup>150</sup> OFT 402, [“Abuse of a dominant position: Understanding competition law”](#), at footnote 17.

<sup>151</sup> See *North & West Belfast Health and Social Services Trust (“N&W”) (2002)*. This OFT case involved allegations that N&W, being a main customer of BetterCare, was abusing its dominant position by offering unreasonably low prices and unfair terms when purchasing social care services from BetterCare (see OFT decision on 30 April 2002). These allegations, however, were rejected by the Director General of Fair Trading as no grounds for action were found under Chapter II on the basis that the purchaser was not carrying out those purchases as an “undertaking” and it was playing a “public” role. BetterCare appealed the OFT’s decision and the appeal was upheld by the Competition Commission Appeal Tribunal. The case was remitted to the OFT for reconsideration. The OFT, following remittance of the case, found that N&W has not infringed the Chapter II prohibition as (i) N&W does not itself have responsibility for setting the prices at which it purchases residential and nursing home care (see *para 58* of the OFT decision on 18 December 2003) and (ii) the purchasing price tariffs are set by other public bodies which were not engaged in economic activities within the meaning of the Competition Act (see *para 69* of the OFT decision on 18 December 2003).

<sup>152</sup> There have, however, been market reviews involving buyer power. See, for example, the CMA’s Private healthcare market investigation (2004) and the Groceries market investigation (2008).

<sup>153</sup> [Investigation into suspected anti-competitive agreement between Google and Meta and behaviour by Google in relation to header bidding - GOV.UK \(www.gov.uk\)](#); [Hydrocortisone tablets: alleged excessive and unfair pricing, anti-competitive agreements and abusive conduct](#).

<sup>154</sup> Enterprise Act 2002, sections 23(1) and 28(1). The jurisdictional merger control thresholds are met where either: (i) the UK turnover associated with the enterprise being acquired exceeds £70 million; OR (i) the merger results in a share of supply or purchase of at least 25% or more in a given market.

months post-closing and has the ability to impose interim measures when reviewing, preventing integration.

- (124) The definition of an “enterprise” under the UK rules includes the activities, or part of the activities, of a business.<sup>155</sup> It requires more than a simple commercial agreement, or the transfer of bare assets.<sup>156</sup> However a JV may amount to an “enterprise” more easily in the UK, than under the EU Merger Regulation (EUMR) thresholds, as there is no “full functionality” requirement in the UK. As a result, a JV may qualify as a relevant merger situation in the UK in circumstances where it does not qualify as a concentration under the EUMR.
- (125) To the extent there are such enterprises involved, they cease to be distinct when they come under common ownership or control. This can be satisfied by the ability of an entity with as little as 15% of voting rights (and, exceptionally, less than 15%), to “materially influence policy”. Material influence can be obtained other than through share acquisition (for example, through board representation or contractual rights). In light of this and the wide definition of “enterprise” under the UK rules, the types of situations where a merger filing could be triggered remains fairly broad.
- (126) However, “greenfield” joint ventures (i.e. those which commence a new business activity, without the transfer of existing activities/assets) are not generally notifiable in the UK as they would likely fail the test of enterprises “ceasing to be distinct” and would also not meet the share of supply or turnover jurisdictional thresholds. As a result, many ventures set up by buying groups would not be likely to qualify for merger review, given they do not often involve the transfer of an existing business activity, usually involving the creation of a new one.
- (127) This is reflected in the absence of any merger clearance decisions to date involving establishment or enlargement of a buying group – despite the fact that there have been a number of buying group mergers.<sup>157</sup> However, we cannot exclude that some buying groups that did trigger the CMA’s jurisdiction were not notified (given that the UK is a voluntary regime) or dealt with by way of an informal briefing paper to the CMA satisfying it that there are no competition concerns that would require it to call in the transaction.
- (128) There have, however, been limited UK merger decisions involving buying groups as parties (i.e. as the target or acquirer).<sup>158</sup> Additionally, a number of merger decisions considered the merging parties’ participation in buying groups as part of the competitive assessment (for

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<sup>155</sup> “Enterprise” is defined broadly and does not have to be profit making – though it must constitute something more than bare assets. See Lord Sumption in *Société Coopérative de Production SeaFrance SA (Respondent) v The Competition and Markets Authority and another (Appellants)*, at paras 39 and 40. See also [Mergers: Guidance on the CMA's jurisdiction and procedure \(publishing.service.gov.uk\)](#), at para 4.9.

<sup>156</sup> See e.g. [the OFT's decision in Project Canvas](#), for an example of where a JV between various partners for a particular project was deemed insufficient to amount to an “enterprise”.

<sup>157</sup> In 1993, ANEW, the largest independent electrical wholesale group in the UK was formed by the merger of two leading buying groups, CREW and NEDA, followed by a further merger with EMMA in 2001. In 2007, the Farmers’ buying group, Framlingham Farmers merged with Atlas Agriculture, creating a combined membership of 1,000 members with 222,000 hectares. In 2018, Landmark and Today’s Group merged to become Unitas, the UK’s largest food and drink wholesale buying group. In 2021, MWI Buying Group became the largest animal health group purchasing organisation in the UK when the two buying groups, St Francis Group and VetsWest combined.

<sup>158</sup> See: OFT, [Anticipated acquisition by Co-operative Group Limited of Somerfield Limited ME/377/08](#) (17 November 2008); [Thomas Cook/Co-operative Group/Midlands Co-operative merger inquiry](#) (16 August 2011); and CMA, [Anticipated acquisition by Yorkshire Purchasing Organisation of Findel Education Limited, Provisional findings report](#) (notified 16 October 2020).

example, *Sainsbury/Asda*,<sup>159</sup> *Co-operative/Somerfield*<sup>160</sup> and *Thomas Cook/ Co-op Group / Midlands*).<sup>161</sup>

### 3.3.2 Market Studies

- (129) Alongside the powers to investigate and enforce infringements of Chapter I and Chapter II, the UK's market inquiry regime allows the CMA to undertake broad investigations into competition harms. These generally involve a 12-month market study and may be followed by a subsequent 18-24 month in-depth market investigation.<sup>162</sup>
- (130) In contrast to its competition enforcement powers under Chapter I or Chapter II, there is no need for a buying group or member to be suspected of infringing competition law for the CMA to commence a market review, to conclude that the market is not working effectively, or to recommend remedies.<sup>163</sup> Market studies can lead to several outcomes, ranging from the CMA finding that the market has no issues, to making recommendations that the government change regulation or policy, to taking enforcement action against individual market participants.<sup>164</sup> In the context of a market investigation, the CMA also has the power to issue behavioural and structural remedies.<sup>165</sup>
- (131) The Markets regime is highly sector focused, but we are aware of studies where buyer conduct has been examined, most notably in the 2007 investigation by the Competition Commission (the "CC") (a predecessor to the CMA) into the supply of groceries in the UK, which included consideration of buyer power (exercised individually and collectively) (the "**2006-2008 Groceries Investigation**"). This study led the CC to impose remedies, which included establishing a Groceries Supply Code of Practice which includes provisions on prices and payment terms, promotions, and varying terms or changes to supply chain procedures.<sup>166</sup>
- (132) This is a powerful tool in the CMA's legal toolbox and can be deployed to capture many different types of conduct. Market studies allow the CMA to study buying groups and purchasing power and their effects on competition within a particular UK market.<sup>167</sup> As such, they can provide an alternative means to address the competitive effect of

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<sup>159</sup> CMA, [Anticipated merger between J Sainsbury PLC and Asda Group Ltd, Final Report](#) (25 April 2019) ("*Sainsbury/Asda*"). The CMA considered whether a potential increase in the buyer power of the parties would distort competition by: 1) reducing incentives or ability of suppliers to invest and innovate; and 2) causing suppliers to raise prices and hence the purchasing costs of rival retailers, resulting in price increases to rival retailers' customers (the "waterbed effect"). However, it ultimately found that this was not likely to result from the merger.

<sup>160</sup> OFT, [Anticipated acquisition by Co-operative Group Limited of Somerfield Limited ME/377/08](#) (17 November 2008).

<sup>161</sup> [Thomas Cook/Co-operative Group/Midlands Co-operative merger inquiry](#) (16 August 2011).

<sup>162</sup> CMA3, [Market Studies and Market Investigations: Supplemental guidance on the CMA's approach](#) at paras. 2.9 and 3.5-3.6. (January 2014, revised July 2017).

<sup>163</sup> OFT519, [Guidance on how market studies are conducted](#) (1 June 2010) at Part 5; CMA3, [Market Studies and Market Investigations: Supplemental guidance on the CMA's approach](#) (January 2014, revised July 2017).

<sup>164</sup> CMA3, [Market Studies and Market Investigations: Supplemental guidance on the CMA's approach](#), at paras 1.5-1.6. (January 2014, revised July 2017).

<sup>165</sup> CMA3, [Market Studies and Market Investigations: Supplemental guidance on the CMA's approach](#), at para 3.37. (January 2014, revised July 2017).

<sup>166</sup> [Groceries Supply Code of Practice](#), 4 August 2009. Note, the CMA announced in May 2023 that it is stepping up its work in the retail grocery market, where it will be undertaking a targeted review, with the impetus to "help contain cost of living pressures".

<sup>167</sup> [Purchasing Power and Buyers' Cartels: OECD Competition Policy Roundtable Background Note](#), **The OECD** (2022), at p32.

purchasing power, particularly if those effects relate to the market in general rather than the specific conduct engaged in by identifiable firms.<sup>168</sup>

- (133) As such, market studies also create some additional uncertainty, as buying groups may comply with Chapter I and Chapter II, but still be reviewed under the market studies regime and be subject to obligations and requirements. This makes it more difficult for businesses seeking to engage in joint purchasing to know whether or not they are at risk of scrutiny by the CMA, even when they have taken steps to ensure they do not infringe competition law.

### 3.4 Antitrust enforcement

- (134) If a buying group was accused of infringing competition law, it is most likely to be investigated by the CMA, the principal competition authority in the UK. In addition to the CMA, there are a number of sector regulators who have shared powers with the CMA to enforce competition law in their sector namely:

- Civil Aviation Authority. Airport operation and air traffic services.
- Office of Communications. Broadcasting, electronic communications and postal services.
- Gas and Electricity Markets Authority. Electricity and gas in Great Britain.
- Financial Conduct Authority. Financial services in the UK and provision of claims management services in Great Britain.
- Payment Systems Regulator. Participation in payment systems.
- Office of Rail and Road. Railway services.
- Water Service Regulation Authority. Water and sewerage services in England and Wales.
- Northern Ireland Authority for Utility Regulation. Electricity, gas, water and sewerage services in Northern Ireland.

- (135) The CMA has published Guidance on the concurrent application of competition law to regulated industries, which sets out the concurrent power of the relevant sector regulators and explains how the concurrency regime works in practice.<sup>169</sup> In particular, when a complaint has been made to the CMA or a relevant regulator and it gives rise to concurrent jurisdiction between the two or more UK authorities, the guidance provides various factors (such as knowledge and experience of the subject matter) which the CMA or the relevant regulators will consider when deciding who is better placed to deal with the matter.<sup>170</sup>

- (136) Therefore, it is possible that if a buying group was accused of anti-competitive conduct in one of the above sectors, the investigation could be carried out by the relevant sector regulator. They would, however, apply the same rules as the CMA (Chapter I and Chapter II of the CA98). Like the CMA, these regulators can also conduct market studies and make market investigation references in their sectors.<sup>171</sup>

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<sup>168</sup> Ibid.

<sup>169</sup> CMA, [Regulated industries: Guidance on concurrent application of competition law to regulated industries](#).

<sup>170</sup> Ibid. at para 3.22.

<sup>171</sup> Ibid. at para 2.7.

- (137) While each of the sector authorities will have different sector-specific objectives alongside the shared objective of promoting competition, there are mechanisms in place to obtain consistency in competition law enforcement. The Enterprise and Regulatory Reform Act 2013 (“**ERRA13**”) seeks to ensure consistency and quality of decision-making across regulators, as well as more generally encourage the promotion of competitive outcomes. Additionally, the CMA holds bi-lateral meetings with the sector regulators and cooperation occurs multi-laterally through the UK Competition Network (“**UKCN**”), which aims to ensure consistency in the application of the competition regime, and facilitate the sharing of best practices and knowledge.<sup>172</sup> Further, any appeal of substantive competition law decisions of the CMA and the sector regulators under Chapter I or Chapter II of the CA98 would be made to the same body: the Competition and Appeals Tribunal (the “**Tribunal**”).
- (138) Appeals may be made to the Court of Appeal on a point of law or on the amount of an award of damages or other sum (other than the amount of costs or expenses).<sup>173</sup> Any appeal requires the permission of either the Tribunal or the Court of Appeal.<sup>174</sup> When considering whether to grant the permission to appeal, the Tribunal will consider whether the appeal would have a real prospect of success, or there is some other compelling reason why the appeal should be heard.<sup>175</sup> A further appeal of a judgement of the Court of Appeal may be made to the Supreme Court on a point of law, with permission.

#### 3.4.1 Complaints procedure

- (139) The CMA has a complaints procedure through which businesses and consumers can make submissions regarding competition concerns.<sup>176</sup> This procedure is, however, confidential, and no register of complaints received is published. Nor does the CMA usually comment on complaints made. It is therefore not possible to confirm the existence or nature of complaints that may have been made relating to buying groups.
- (140) A complaint may become known if the complainant chooses to announce it publicly (for example, as part of a strategy to raise the profile of the issue and put pressure on the CMA to investigate) or if the CMA opens a formal investigation into the issue in which they specify a complaint as the origin of the case.<sup>177</sup> As above, we are not aware of any previous CMA investigations into buying groups.
- (141) Following the analysis of the evidence, if the CMA’s provisional view is that there is an infringement of Chapter I or Chapter II, it will issue a Statement of Objections (“**SO**”) to each business it considers responsible, setting out these views.<sup>178</sup> Addresses of the SO will usually also be provided non-confidential versions of the written representations

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<sup>172</sup> CMA, [Corporate report: Promoting competition in service we rely on – The annual concurrency report 2023](#) (10 May 2023).

<sup>173</sup> CAT, [Guide to proceedings 2015 \(catribunal.org.uk\)](#), at para 8.22.

<sup>174</sup> CAT, [Guide to proceedings 2015 \(catribunal.org.uk\)](#), at para 8.23.

<sup>175</sup> CPR Rule 52.3(6).

<sup>176</sup> CMA, [Guidance: Report a competition or market problem](#) (14 January 2016). Businesses can also report issues to one of the concurrent sector regulators.

<sup>177</sup> The CMA is not required to open a formal investigation into each complaint. The CMA uses its Prioritisation Principles to decide which cases to investigate when it receives a complaint. These take into account the likely impact of the investigation in the form of direct or indirect benefits to consumers, the strategic significance of the case, the risks involved in taking the case, and the resources required to carry out the investigation. CMA, [Guidance: Report a competition or market problem](#) (14 January 2016).

<sup>178</sup> CMA8, at para 11.1.

submitted by any relevant complainant at that time to allow them to respond to the allegations.<sup>179</sup>

- (142) While the CMA is considering whether or not to pursue a complaint, it will keep the identity of the complainant confidential, if so requested.<sup>180</sup> However, if the CMA does decide to investigate a complaint, confidentiality will be an issue of potential concern for the defendant and the CMA may need to reveal the complainant's identity to allow the businesses under investigation to respond – although the CMA will not usually do so without a complainant's agreement until a SO is issued.<sup>181</sup> Additionally, the complainant will have the opportunity to make submissions on the confidentiality of the evidence they provided.

### 3.4.2 Role of economic evidence in investigations

- (143) While the CMA has formal rules and best practices when analysing and reviewing evidence received in Chapter I and Chapter II investigations,<sup>182</sup> these rules are less formulaic than court procedure. In practice, economic studies and expert reports may be submitted by the parties and the CMA's guidance states that it will consider evidence submitted within the specified time limit before reaching a final view.<sup>183</sup> The CMA itself will also allocate CMA economists to their internal case team to analyse relevant evidence and inform decision-making.
- (144) However, the guidance does not comment on what the relative weight of different types of evidence are. In practice, the importance of economic evidence is likely to depend on the precise nature of the allegation made in the particular case, and whether the particular "theory of harm" can be defended on the basis of economic evidence, as well as the robustness of the material presented.
- (145) Given the lack of enforcement in the UK relating to buyer's groups, we do not have practical examples of how the CMA would weigh economic evidence in practice in these cases. However, we can assume that economic analyses may be relevant to establishing market shares of the buying group and its members upstream and downstream, assessing the harm as well as efficiencies in effects cases. Notably, aside from economic evidence, the CMA places significant weight on the parties' internal documents (such as internal business reports, copies of emails, and other internal data)<sup>184</sup> when making its competitive assessment.

## 4 Conclusion

- (146) Although UK jurisprudence relating to buying groups is limited, buying groups can draw on a number of sources to help them stay on the right side of the law when establishing and operating joint buying organisations. In particular, the Draft Horizontal Guidance is a key piece of guidance for self-assessing joint purchasing arrangements, alongside recent guidance on sustainability and vertical arrangements. There is also significant jurisprudence from the EU which remains relevant to assessing joint purchasing

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<sup>179</sup> CMA8, at para 12.11.

<sup>180</sup> CMA8, at para 3.20.

<sup>181</sup> CMA8, at para 3.21.

<sup>182</sup> CMA8, at para 9.1.

<sup>183</sup> CMA8, at para 10.8.

<sup>184</sup> CMA8, at para 6.2-6.4.

arrangements, despite Brexit, particularly in light of the EU and UK's parallel progression with amending their respective Horizontal Guidelines.

- (147) Nevertheless, overall, the new Draft Horizontal provide significant and welcome clarifications and additional guidance regarding what true joint purchasing entails, in respect of both form and function, and how businesses can discern it from (and avoid) cartel conduct. Some uncertainties remain, however, particularly with respect to the mechanics for establishing a buyer cartel, what type of evidence will be relevant to assessing the effects of sustainability objectives, the status of vertical collateral boycotts and the distinction between temporary stops and delisting.
- (148) However, some areas of uncertainty may be addressed as the CMA considers submissions as part of the consultation on the Draft Horizontal Guidance and the Draft Guidance on Sustainability.