

Buying alliances and the analysis of market power

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Overview

- Buying alliances
 - EU views
 - Recent practice of national competition authorities (focus on France)
- Concept of market power
 - Critical element in assessment
- Focus on Article 101 TFEU/corresponding provisions national competition law

Buying alliances

- Distinction between two types of buying alliances or joint purchasing agreements (German Competition Authority, Food retail sector inquiry)
- Traditional pooling of purchasing volumes
- “New generation” joint purchasing cooperation
 - Go beyond pooling of purchasing volumes: assimilation of product ranges, including private label, sometimes territorial protection, etc.
 - Long term view/often structural links (concentrative elements)
 - Certain degree of influence over smaller partners
 - Less evident for smaller partner to withdraw
 - Can be pre-stage of a merger
- Enforcement focus on new generation type of agreements

EU: Horizontal Guidelines

- Starting point in Article 101 TFEU analysis: EU Horizontal Cooperation Guidelines, Chapter 5 (2011)
- Effects analysis (unless disguised cartel)
- Critical concept: market power
 - Market power on *selling market* (sales to consumers)
 - Risk that better purchase conditions are not passed on to consumers
 - Market power on *procurement market* (buying power of retailers)
 - Risk of reduced output, quality, innovation
 - Risk of foreclosure effect on competing purchasers

EU: Horizontal Guidelines

- Market power concept defined in Horizontal Guidelines, §39
- Essentially the same concept in context of Articles 101/102 TFEU but question of degree
 - Substantial degree required in context of Article 102 TFEU
- Market shares are first point of reference
- Other factors: stability of market shares, entry barriers, countervailing power

“Market power is the ability to profitably maintain prices above competitive levels” or “to profitably maintain output [...] below competitive levels”

EU: Horizontal Guidelines

- Preliminary step: market definition
 - Commission Notice on market definition and Horizontal Guidelines
 - Private label vs. branded products
 - Geographic dimension
- Horizontal Guidelines contain negative threshold: unlikely competition concern if market shares $\leq 15\%$ on purchasing and selling markets (safe harbour)
- Above 15% market share threshold: no presumptions but detailed assessment of the effects
 - Market concentration (suppliers and retailers)
 - Procurement market: countervailing power of suppliers (must-have brands)
 - German sector inquiry: only 6% must-have

EU: Horizontal Guidelines

- Commission also points to risk of collusion between buying alliance partners
- Conditions
 - Market power
 - Market characteristics conducive to coordination
- Commonality of variable costs is important factor
- Level and intensity of exchange of information
 - Commercially sensitive data ?
- Comments on Article 101(3) TFEU assessment
 - Efficiency gains and pass-on to consumers

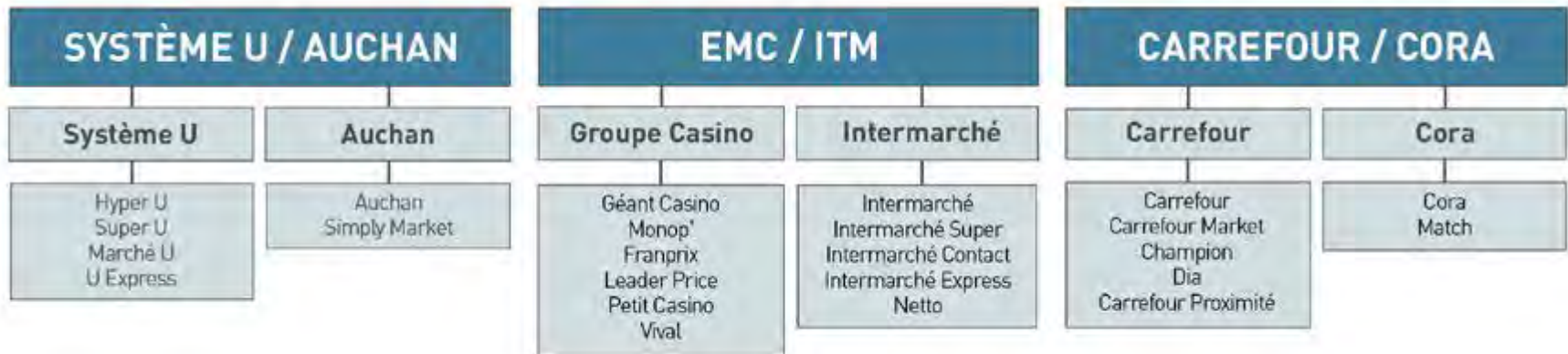
National competition authorities

- German Competition Authority
 - Food retail sector inquiry (2014)

- Italian Competition Authority
 - Centrale Italiana (September 2014)
 - Buying alliance between Coop Italia, Despar, Gartico, Discoverde and Sigma (Centrale Italiana)
 - Commitment decision
 - Termination Centrale Italiana buying alliance
 - Limited purchasing cooperation between Coop Italia, Discoverde and Sigma (combined market shares on procurement markets <20%)

- French Competition Authority

France



- Agreements concluded between September and December 2014
- Three alliance agreements between 6 of the main retail groups
- Combined market share >70%
 - Together with E. Leclerc combined market share >90% in France

France

- Government and Senate seek opinion from French Competition Authority (FCA)
 - Concerns on impact of buying alliances on competition
- Opinion 15-A-06 of 31 March 2015
- Opinion and not a decision
 - FCA sets out its views on how it will assess buying alliances
- Opinion in part already overtaken by subsequent events
 - Buying alliance partners Système U and Auchan have announced further integration
 - Will be important test case

France

- Background to formation of buying alliances: price war between retail distributors
 - Drop in margins
 - Retailers claim that buying alliances are necessary to re-establish competitiveness
- High degree of concentration on both sides (suppliers and retail distributors)
- Form and scope of three buying alliances different
 - Range of products covered, but private label products always excluded
 - Purely contractual cooperation or separate legal structure

France

- FCA follows approach Horizontal Guidelines
- First step: presence of market power ?
- Market definition (procurement markets)
 - Groups of products (“families”)
 - Status of private label products to be assessed on a case by case basis
 - National markets
- Market shares >15% on selling markets and on certain procurement markets
- Countervailing power of suppliers/entry barriers to be further examined
- Likelihood that retail distributors have market power

France

- Next step: assessment of competition risks
 - Selling and procurement markets
- Selling market: risk of collusion (exchange of information/commonality of costs)
 - Significant risk (most important one for FCA)
 - Difficulty to distinguish pure price negotiations from discussion on counterparts from distributors (promotions, business plan, etc.)
 - Risk even when distinct legal entity is set up (e.g., hub&spoke via supplier)
 - FCA notes that market characteristics are conducive to coordination
 - Closer look at degree of competition at local level required
- Selling market: risk of foreclosure of other distributors
 - “*Spiraling effect*”: FCA sceptical – effect uncertain and probably limited

France

- Purchasing market: risk of negative impact on output, innovation, quality, etc.
 - FCA not convinced at first sight, unless specific tailor-made investments made by suppliers
- Purchasing market: risk of foreclosure of other suppliers
 - Impact possible but to be further examined
 - FCA notes need to select suppliers on objective grounds
- Efficiency gains and pass-on to consumers
 - FCA takes no position but case appears to be difficult

France

- Towards a notification obligation for buying alliances ?
 - Recommendation of FCA

- Draft amendment to French Competition Act
 - Notification of joint purchasing agreements to FCA at least two months before their implementation
 - Minimum turnover thresholds to be defined

- Information obligation
 - Option for FCA to intervene

Conclusion

- Case by case assessment
- Fast moving world – area to watch out for
 - National competition authorities likely to take the lead
 - France: Système U/Auchan will be important test case

“Thus, as many economists suggest, sometimes joint purchasing can be problematic; sometimes it can bring benefits.”
(Bellamy & Child, 7th ed., §6.067)



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Thank you !

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