

Antitrust and Group Purchasing

BY MICHAEL A. LINDSAY

GROUP PURCHASING ORGANIZATIONS (“GPOs” or “buying groups”) are far more common than one might think. For example, many privately owned independent groceries¹ and franchised fast-food restaurants² belong to purchasing cooperatives, as do hospitals³ and local governments.⁴ GPOs take various legal forms, including member-owned cooperatives or LLCs, member-governed nonprofit corporations, for-profit member “clubs,” and government agencies. Some buying groups take title and resell products, while others negotiate terms under which members purchase directly from vendors. Some buying groups manufacture all or part of the products that members buy through the group, but it is more common for buying groups to outsource from independent suppliers.

Most GPOs aggregate purchases as a way to obtain better buying prices and other terms for members.⁵ Although any conduct that entails coordination among competitors in matters of pricing may present potential antitrust concerns, even on buying rather than selling prices, most GPOs provide cost savings and other benefits for members in a lawful and procompetitive manner. The discussion that follows offers guidelines for mitigating potential antitrust concerns in structuring and operating GPOs.

Buyer Cartels, Monopsony, Collusion, and the Rule of Reason

Most buying groups are an efficient way to reduce transaction costs and input prices, and they are far cry from a “buyer’s cartel” or naked agreement on maximum prices that cartel members will pay for inputs.⁶ The U.S. Supreme Court recognized in *Northwest Wholesale Stationers* that buying groups are “designed to increase economic efficiency and render markets more, rather than less, competitive.”⁷ A buying group “permits the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensures ready access to a stock of goods that might otherwise be unavailable on short notice.”⁸ These “cost savings

and order-filling guarantees enable smaller retailers to reduce prices and maintain their retail stock so as to compete more effectively with larger retailers.”⁹ Consequently, a buying group is “not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects.”¹⁰

The Antitrust Division has issued a series of business review letters (BRLs) in recent years that provide useful guidance for evaluating buying groups. The two critical issues on which the Division has focused are whether the buying group will have monopsony power over vendors with which it deals, and whether the group’s activities will facilitate collusion or otherwise reduce competition among its members in output markets.

Monopsony and Purchasing Share. Any buying group worth its salt will seek to achieve better input prices for its members, and many groups also take steps to improve quality, reliability, and service for members’ purchasing activities. A buying group’s aggregation of its members’ purchases can reduce vendors’ selling costs (for example, by reducing the need for multiple sales calls or negotiations over contract terms). Aggregation can also put group members in a better position to get the same treatment as their larger rivals. Indeed, buying groups are particularly common in industries where group members face larger or more integrated competitors that achieve lower input pricing through their own purchases.

The first major concern with group purchasing is that the buying group may amass so much power—monopsony power, or oligopsony power when wielded by a group—to be able to force input prices below a competitive level.¹¹ The Antitrust Division has been sensitive to oligopsony concerns,¹² and its BRLs typically note the percentage of the total market for the purchased inputs that the buying group represents. Some products that buying groups purchase are not specific to the industry in which the group’s members compete, and in such cases the buying group’s share of total purchases may be low and anticompetitive effects highly unlikely.¹³ If the group purchases products that are specialized to the members’ industry, the Antitrust Division may use the members’ aggregate market share in the output market as a proxy for their purchasing share.¹⁴ For products that are semi-specialized to the members’ industry, the Antitrust Division may consider both purchasing and output market shares.¹⁵

What share of total purchases should cause concern? The Antitrust Division’s BRLs have frequently invoked the 35 percent level used in the Health Care Guidelines,¹⁶ and at least one court has used a similar figure (40 percent) to confirm that a bottlers’ cooperative did not have market power.¹⁷ The Antitrust Division recently challenged a purchasing group with an alleged share of 78–84 percent,¹⁸ and a federal district court held that a plaintiff could proceed with a claim alleging that a health care insurer with a 60 percent market share was exercising monopsony power.¹⁹ In short, a purchasing share of 35 percent (or a little higher) is unlikely to

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give rise to oligopsony concerns, and a share of 60 percent or more will definitely warrant caution.

Collusion Due to Standardized Input Costs. The second major concern is that a buying group will reduce competition among its members in output markets. This concern can arise if collectively purchased products account for too large a percentage of members' input costs, because knowledge of other members' input costs through the group purchasing program may facilitate price fixing or other forms of collusion among members.²⁰ The Health Care Guidelines recognize a safe harbor where the joint purchases account in the aggregate for "less than 20 percent of the total revenues from all health care services of each competing participant,"²¹ and several BRLs dismiss collusion concerns for joint purchases below this level.²²

The 20 percent figure is far from absolute. First, the existence of significant competition from firms outside the buying group will make any kind of reduction in output-market competition unlikely. For example, in the Containers America BRL, the proposed joint purchases may have comprised 50 percent of materials cost for producing steel drums, but the Antitrust Division believed that anticompetitive effects in output markets were unlikely due to the existence of significant non-member competition in each of the members' respective local markets, coupled with other safeguards. Second, as noted in the Health Care Guidelines, the 20 percent safe harbor applies where some or all members are direct competitors.²³ In the NCTC BRL, the Antitrust Division found no danger that NCTC's group-purchasing of programming content for independent cable operators would facilitate retail price collusion among members, because the vast majority of members did not compete with each other (97 percent of subscribers for members' services lived in areas served by only one active member cable system), and the few members who did also faced competition from other cable or direct broadcast satellite operators.²⁴

Information Restraints. Restrictions on the kinds of information shared among members will also reduce collusion concerns, as numerous business review letters have noted,²⁵ and serve to remind members about legal limits on their collective activities. A buying group should carefully evaluate how it gathers information from its members, as well as whether and what information should be shared among members. The group should ask itself how the sharing of information might make the purchasing process more efficient or effective, and whether any anticompetitive harm might flow from the sharing.

Meetings and communications among GPO members can present the same kinds of antitrust risks as any meeting of competitors (if the buying group's members are actual or potential competitors). Both to protect the buying group itself and to remind its members of the legal limits on permissible cooperation, a buying group should have a written antitrust policy controlling what can happen at group-sponsored activities, and members should be required to agree that

they will comply. Beyond merely obtaining signatures on a member agreement, a buying group should assess the antitrust risks in its specific industry and factual setting (including the antitrust training that members receive from their own counsel) and consider the most effective means of communicating the antitrust policy to ensure compliance. Antitrust training is particularly important for member representatives involved in any policy-making, governance, or administrative functions for the buying group.

Procompetitive Justification. *Northwest Wholesale Stationers* extolled the pro-competitive benefits of cooperatives in helping members to reduce costs, maintain or expand offerings, and charge lower prices to consumers.²⁶ The Antitrust Division's business review letters usually include a reference to the potential for achieving these efficiencies.²⁷ A buying group is likely to have many business reasons to explain what it does and how it helps its members (anything from a formal mission statement to a marketing brochure for potential members or potential vendors), and these documents are a good place to emphasize the buying group's pro-competitive goals and justifications.

Special Case for Health Care GPOs? GPOs in the health care industry have been the focus of government investigation and private litigation in the past decade. For example, the U.S. Department of Justice and the Federal Trade Commission conducted a joint workshop on competition in the health care industry and issued a report discussing, among other topics, the role of GPOs and the extent to which specific GPO practices may give rise to antitrust liability.²⁸ The DOJ/FTC report noted that some observers believed supplier-paid administrative fees caused hospital GPOs to represent the interests of suppliers rather than purchasers, and that some GPO practices may injure competition: tying, bundling, sole-source contracts, and "commitment" agreements.²⁹ Private plaintiffs have challenged such conduct, although typically by asserting antitrust claims against a vendor with a large market share rather than the GPO.³⁰ Congress has investigated health care GPOs in the past and likely will continue monitoring the competitive impact of these groups.³¹

Membership Decisions and Territories

A buying group can have legitimate membership criteria and generally has no obligation to admit all applicants or to retain all members who have joined. As *Northwest Wholesale Stationers* explained, a buying group "must establish and enforce reasonable rules in order to function effectively,"³² and one of those rules is membership criteria. Ordinarily, the rule of reason should apply to policies and conduct with respect to membership status.³³

Market Power or Exclusive Control of Essential Element. *Northwest Wholesale Stationers* suggests that a buying group may not deny membership, or at least not refuse to deal with rivals of existing members,³⁴ if the buying group "possesses market power or exclusive access to an element

essential to effective competition.”³⁵ Although such circumstances may be rare, one rejected applicant recently challenged the denial of its application and survived a motion to dismiss its complaint.³⁶ *Consumers Warehouse Center* involved a buying group of small and mid-size retailers of household appliances whose members compete with each other for retail sales. A retailer of high-end products seeking to expand into mid-level products applied for membership, but its application was “voted down,” with no reason given for the denial. The rejected retailer challenged the membership denial and alleged that it was “impossible to compete in the Long Island retail market for mid-level appliances without . . . membership” in the buying group.³⁷ In essence, the plaintiff parroted the “exceptions” in *Northwest Wholesale Stationers*, and the court permitted the complaint to survive a preliminary motion to dismiss.³⁸

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Territories and Allocation. Buying groups may want to select members and exclude other applicants based on the applicant’s geographic service area in output markets. GPOs also may wish to restrict territories that members can serve or locations from which they can make sales. The Antitrust Division has recognized in recent BRLs that such conduct may further legitimate procompetitive goals, but the Supreme Court’s 1972 decision in *Topco*³⁹ presents a continuing concern, at least with respect to output restraints on members.

Topco was a buying group for small-to-medium sized regional supermarket chains that sought to provide high-quality merchandise under private labels to facilitate its members’ competition against larger national and regional chains. The group distributed over 1,000 different products under *Topco* brand names, but none of the members did business under the “*Topco*” name as such. The membership agreement prohibited members from selling *Topco*-branded products outside their assigned territories, which the U.S. Supreme Court ruled was a per se illegal horizontal agreement to divide territories.⁴⁰

The Antitrust Division has issued BRLs that reflect a more approving view of territorial restraints in GPO membership policies. For example, in the NCTC BRL, the Antitrust Division noted the virtual nonexistence of competitive overlap among the buying group’s members as a reason why the GPO would not have anticompetitive effects.⁴¹ Similarly, in the Containers America BRL, the Antitrust Division noted

that the geographic locations of GPO members effectively precluded them from competing against each other except in rare circumstances, and this factor appears to support the Division’s conclusion that the proposed joint purchasing would not “diminish local regional price rivalry.”⁴²

A buying group that wishes to define member territories should consult closely with counsel and confirm that there are legitimate procompetitive business purposes for the restraint (e.g., to induce members to promote a common brand within a given geography with protection against free riding). The group should also consider the nature of the restraint. For example, a group might license a member to resell the group’s branded products and use the group’s trademarks at a specific location but without guaranteeing the member the right to some broader territory should it wish to expand. Naturally, the group should also consider its collective national market share, its members’ share in any smaller potentially relevant geographic market, and the nature and extent of competition. Finally, the group should consider who will assign territories or locations and how such decisions will be made. In general, decisions on territorial restraints will present less antitrust risk if made by independent staff of the GPO, based on general factors that are set in advance to further the group’s procompetitive goals, such as whether the group is under-represented in a particular geographic area, and whether the restraint is warranted to assure that group members do not account for too large a share of jointly purchased inputs or aggregate sales in output markets.

Commitment to Purchase

A buying group’s bargaining position is strongest if it can commit to delivering a volume of business, and vendor pricing may be less favorable if the group offers only a prospect of member purchases rather than a guarantee. The Antitrust Division often comments favorably in BRLs on the voluntary nature of participation in any specific program of a buying group, but the buying group may need purchase commitments from participants to obtain favorable pricing from vendors. For example, in the Containers America BRL, the Antitrust Division noted that participation was voluntary but that members “would be asked to specify how much of a particular input they would buy at a particular price and to agree to use common specifications.”⁴³

In the NCTC BRL, the buying group required that members submit “reserve terms” on acceptable pricing and purchase quantities that the buying group would use to negotiate with vendors. If the group achieved an agreement that met a member’s terms, the member was obligated to complete the purchase; if the group agreement did not meet the terms, the member was free to negotiate its own agreement with the vendor, but only at a price equal to or below its own reserve terms. If the vendor did not meet the member’s reserve price in direct negotiations, the member was required to refrain from carrying the relevant programming for as long as two years. The Antitrust Division concluded that

this procedure did not present competitive concerns because members could decline to participate in any master contract for a particular program network and because “members of a joint purchasing cooperative may be asked to commit to purchase voluntarily specified volumes of an input at specified prices.”⁴⁴

In short, commitment agreements may play an essential role in permitting a buying group to deliver business and thus negotiate better terms, and are not likely to create antitrust problems if members are free to decline to participate in a particular program. The danger can become real, however, where a vendor has a significant market share and commitment agreements in buying group contracts might exclude the vendor’s rivals from access to the members’ market.⁴⁵

Member Resale Prices

Can a buying group set minimum resale prices for products purchased through the group? A typical buying group will have no reason to set member resale prices. The buying group exists to achieve buying efficiencies, but what a member does with those efficiencies is up to that member. The case against setting member resale prices is particularly stark if the decision is made by the members themselves or a member-controlled board, because it may be difficult to distinguish such conduct from any other price-fixing conspiracy. Even if the buying group has staff independent of its members to make decisions on output pricing restraints, the answer would still likely be no. If a vendor to the buying group wishes to ensure that a discount is passed through to customers of the group’s members, however, a vertical agreement between the vendor and the buying group (binding the group’s members) would be judged under the rule of reason.⁴⁶

A buying group can also have joint marketing or sales programs, for which some forms of joint output pricing by members may be lawful and procompetitive, but that conduct normally is justified on the basis of the joint marketing program and not the GPO’s separate group purchasing program. For example, the buying group in the Armored Transport BRL also served as a joint marketing agent for members, negotiating joint bids for members with large customers that none of the members was able to serve on its own. The group communicated separately with each member about joint bids, customers did not receive any breakdown of a joint bid that disclosed individual member bids, and members were free not to participate in a joint bid and even to bid separate from the group for any job.⁴⁷

Similarly, in the Containers America BRL, the Antitrust Division declined to challenge a buying group’s joint marketing plans.⁴⁸ Once again, the members were smaller, regional players banding together to bid on national contracts that none of them had been able to win on their own. The buying group proposed to have resale price discussions among members, but these discussions would be “limited to information necessary to prepare national or multi-regional bids,” with no exchange of any other nonpublic information.⁴⁹ The

Antitrust Division noted that the price discussions for these bids were not likely to have any anticompetitive effect because none of the members had yet been able to win even one national contract.⁵⁰

These BRLs show that GPOs may have lawful and procompetitive reasons to facilitate joint pricing in connection with joint marketing and sales programs, and that such conduct typically is justified independent of the GPO’s group purchasing activities. The BRLs also show that careful planning and administration of joint pricing arrangements is warranted to avoid the risk of spillover collusion among members beyond the scope of lawful joint pricing.

Price Discrimination

Buying groups may face three kinds of price discrimination issues: (1) inducing or receiving discriminatorily favorable vendor prices or promotional programs for group members compared to others customers of the vendor who compete with members for resale of the products in question; (2) arranging or charging members lower prices for vendor products compared to non-members who participate in the group; and (3) arranging or charging lower prices for vendor products for some members (e.g., large-volume buyers), than for other members.

Discrimination Favoring Cooperatives. If a buying group’s driving purpose is to get better prices for its members, doesn’t that imply that the buying group is seeking discriminatory pricing, and walking right into the jaws of the Robinson-Patman Act? Not necessarily, because buying groups seek better prices than members received in the past, which often are less favorable than prices that larger competitors of buying group members can and do command. In some instances, the vendor’s conduct may not satisfy the elements for a claim under the Robinson-Patman Act,⁵¹ or the causal chain for a damages claim may be broken if the products purchased by or through the group are not resold in an unaltered form.⁵²

Section 2(f) of the Robinson-Patman Act prohibits the knowing inducement or receipt of an unlawfully discriminatory benefit,⁵³ and it applies to GPOs that actually purchase and re-sell vendor products.⁵⁴ Several appellate courts addressed group purchasing for auto parts in the early 1960s and sustained FTC rulings that GPOs were liable under Section 2(f).⁵⁵ The general theme of these decisions was that the GPOs did not provide cost savings for suppliers and did not bring any benefits to their members other than by aggregating purchases to qualify for vendors’ pre-existing volume discounts.⁵⁶

Courts today are unlikely to reach the same results as these Eisenhower/Kennedy-era decisions. Indeed, the Antitrust Division declined to challenge group purchasing in the Containers America BRL even though the program included echoes of the decades-old auto-parts cases. According to the BRL, members needed group purchasing due to “the availability of quantity discounts on the steel and other prod-

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two advantages in dealings with non-members.

ucts needed to manufacture steel drums,” which enabled large multi-plant manufacturers to purchase inputs comprising more than 50 percent of the cost of steel drums at significantly lower prices.⁵⁷ To overcome this “substantial cost advantage,” the GPO “proposes to purchase sufficient quantities of various steel and other inputs to qualify for quantity discounts.”⁵⁸ Yet, unlike the auto-parts cases, the Containers America BRL made no mention of the other small manufacturers who were not members of Containers America or any other buying group—and who therefore would be put at a price disadvantage relative to Containers America’s members.

Some buying groups today do provide the value-added services that the auto-parts courts thought were missing.⁵⁹ A buying group that provides services, such as warehousing, inventory management, physical distribution, order-aggregation, and payment/credit functions, can create greater value for its members and suppliers and reduce any antitrust risk that these older cases may still imply by providing grounds to assert a “functional discount” defense.⁶⁰ Courts today are more likely to recognize other efficiencies (such as reduced transaction costs through common negotiation of terms and streamlining of members’ own purchasing staffs), so that the defensive value of other “functions” is relatively less than it would have been in the auto-parts cases.

This will be particularly true if the buying group can also demonstrate the likely availability of a “meeting competition” defense. The courts in the auto-parts cases emphasized that suppliers were not meeting competition,⁶¹ although the courts likely underestimated the ability of the buying groups to shift business from one supplier to another if the volume discounts were not granted. For the modern buying group, playing one vendor off against another and thereby inducing each vendor to meet competition provides business value to the members and also may reduce risks under Section 2(f).

There is little case law on the meeting-competition defense in the specific context of buying groups.⁶² Nevertheless, a buying group will be well served by documenting its efforts to secure better pricing by playing off competing vendors.

Discrimination Between Members and Non-Members. Some buying groups deal only with members but others allow non-members to participate. Buying groups that are open to non-members may face potential price discrimination concerns if group members receive lower vendor prices than non-member participants. For the most part, normal price discrimination standards apply to such conduct, but the focus of potential claims may depend on how the buying group structures vendor transactions. Some groups purchase and re-sell vendor products; others negotiate prices based on

aggregate purchase commitments of participants, but the vendors sell directly to participants. Whether a court will assign any significance to these different models is unclear.

Organizing a buying group as a cooperative carries two advantages in dealings with non-members. First, Section 4 of the Robinson-Patman Act expressly permits a cooperative to favor its members by returning to them a periodic rebate or dividend as a pro rata share of net earnings proportionate to the member’s share of purchases from the group.⁶³ The Supreme Court has described this as “a narrow immunity from the price discrimination prohibitions of the Robinson-Patman Act” that “has never been construed as granting cooperatives a blanket exception from the Robinson-Patman Act.”⁶⁴ It may be difficult for a cooperative to argue that Section 4 grants a “blanket exemption” for discrimination between members and non-members in prices at the time of sale, but it would also be difficult for a non-member to prove damages if the “price discrimination” simply accelerated payment of all or some portion of what the member eventually would have received as its pro rata share of net earnings.

Second, buyer cooperatives may be sufficiently integrated that “resales” of vendor products to members are deemed to be internal transfers that do not satisfy the “two sales” requirement of the Robinson-Patman Act. For example, rural electric cooperatives may be members of an electric-generation cooperative from which they buy some of the electricity they distribute. In *City of Mt. Pleasant*,⁶⁵ the Eighth Circuit held that the rural electric cooperatives in that case should be treated as a single entity for both Sherman Act and Robinson-Patman Act purposes.⁶⁶ Similarly, in *Bell v. Fur Breeders Agricultural Cooperative*,⁶⁷ the Tenth Circuit found that an agricultural supply cooperative and its members should be viewed as a single enterprise, “with its main purpose to supply feed to members at a lower cost.”⁶⁸ Practitioners should be cautious about extending the reasoning of *Mt. Pleasant* and *Bell* too readily, however. In both cases, the cooperative owned some or all of the producing assets in which members had made substantial capital investments, which may distinguish their groups from a pure “buying” group. Moreover, the electric cooperatives in *Mt. Pleasant* had statutorily defined exclusive territories prescribed by state law and, unlike the retailers in *Topco*, were not “actual or potential competitors of each other.”⁶⁹ A buying group could protect itself from price discrimination claims by choosing not to sell to any non-members, or to those who resell in members’ territories. (Of course, if Internet sales are common in the members’ industry, this approach may not be viable.)

Discrimination Among Members. Can a buying group discriminate among its members, either through different prices or disproportionate shares of profits? Some buying groups (particularly those organized as cooperatives) operate on egalitarian principles and would not consider arranging or charging lower prices to larger members. Other groups may believe that they must or should offer lower prices to large

members because they contribute a larger share of aggregate purchases and could achieve better input prices than smaller members apart from the buying group, particularly if large members can easily shift purchases to other buying groups.

Antitrust law certainly does not compel a buying group to favor larger members, but in some circumstances buying groups may do so without exposing the group or larger members to significant antitrust risk. First, the differential rewards may come in the form of different shares of profits. Section 4 of the Robinson-Patman Act would not protect a rebate that is disproportionate to the buying group member's share of purchases, but the absence of an exemption does not necessarily mean that such conduct is unlawful. For example, large members may have made disproportionate capital contributions, or purchased shares in the group at an earlier and more uncertain time. Second, at least in a cooperative, intra-group transfers may not satisfy the "two sales" requirements. The agricultural cooperative in *Bell* charged members prices that included delivery costs, and added a separate surcharge if the member was outside a normal delivery route, based on the additional mileage from the feed route to the ranch.⁷⁰ A member that was outside the delivery route challenged this pricing. Viewing the cooperative and its members as a single enterprise, the court concluded that the "pricing" to members was an "internal policy" and that the resulting "sale" was a transfer within a single enterprise. Third, a buying group also could offer ways for disfavored members to avoid the differential pricing. For example, in *Bell*, the cooperative gave disfavored members the option of picking up products at the cooperative's plant, avoiding the surcharge and receiving a discount that reflected the delivery cost embedded in the product price.

Conclusion

Buying groups provide an efficient and cost-effective means to aggregate buyers, reduce transaction costs, enhance competition among vendors, and lower input costs. As with any collaboration between competitors, however, counsel for buy-

ing groups and their members must be mindful of antitrust risks and adopt policies and procedures to manage such risks:

- Avoid buying power and monopsony concerns by monitoring the group's share of total purchases in input markets, using the 35 percent share figure in the Health Care Statements as a guide or at least a trigger for more focused market analysis.
- Control the risk that group purchasing will facilitate collusion among members in output markets, using the 20 percent share figure in the Health Care Statements as a guide or as a trigger for further analysis and potential safeguards.
- Adopt policies and procedures to prohibit "spillover collusion" among members on competitively sensitive matters that are beyond the scope of legitimate group purchasing activity, including a prohibition against members sharing competitively sensitive information, or entering into any agreement or understanding on prices or other competitive conduct in output markets. Such conduct is easier to avoid if the buying group is owned and managed by a firm that does not participate in the members' output markets. Conversely, the group must be particularly sensitive to such risks if members have a direct role in management or administration of group purchasing activities.
- Assess legitimate business justifications and potential competitive effects before restricting members' territories or locations for sales in output markets, and consider the legal risk of any such restrictions.
- Evaluate potential price discrimination concerns arising from favorable prices achieved through group purchasing, in particular if the group purchases goods and proposes to re-sell at different prices to competing resellers.

By using these and other appropriate safeguards, buying groups can ensure that members achieve lower input pricing, efficiencies in procurements, and other recognized procompetitive benefits of group purchasing programs without exposing the group or its members to unwarranted antitrust risks. ■

¹ See, e.g., Unified Grocers Web site, <http://www.unifiedgrocers.com/AboutUs/Pages/default.aspx>.

² See, e.g., *Franchise Partnership with Yum! Led to Creation of World's Largest Purchasing Cooperative*, NATION'S RESTAURANT NEWS (Oct. 15, 2007), available at http://findarticles.com/p/articles/mi_m3190/is_41_41/ai_n27413573/pg_1 (GPO established by franchisor and franchisees of KFC and Pizza Hut brands).

³ See Health Industry Group Purchasing Association Web site, <http://www.higpa.org/>.

⁴ See, e.g., Texas Association of School Boards purchasing cooperative Web site, http://www.tasb.org/services/cooperative_purchasing/faqs.aspx.

⁵ Buyer-side participants in buying groups are referred to here as "members" regardless of the legal form of the buying group entity.

⁶ The classic case is *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948). See also ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS (6th ed. 2007) 456 & nn.132-33 [hereinafter ALD VI]

(citing authorities). An agreement that does nothing more than set maximum prices that buyers will pay may not generate any procompetitive efficiencies.

⁷ *Northwest Wholesale Stationers v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985).

⁸ *Id.* at 295.

⁹ *Id.*

¹⁰ *Id.* The Court did not specify any minimum set of services that are required for the rule of reason rather than the per se rule to apply, including for buying groups that do nothing but negotiate favorable pricing based on members' aggregate purchases. Conduct that reduces input prices offers strong prospects for benefiting consumers through reduced output prices, and courts are likely to apply the rule of reason unless group purchasing activities actually cause members' prices to consumers to increase above competitive levels. Cf. U.S. Dep't of Justice & Federal Trade Comm'n, *Statements of Antitrust Enforcement Policy in Health Care Statement 7A* (Aug. 1996) [hereinafter *Health Care Guidelines*], available at [S U M M E R 2 0 0 9 · 7 1](http://www.</p></div><div data-bbox=)

- usdoj.gov/atr/public/guidelines/1791.htm (“Most joint purchasing arrangements among hospitals or other health care providers do not raise antitrust concerns. Such collaborative activities typically allow the participants to achieve efficiencies that will benefit consumers.” (emphasis added)). See also ABA SECTION OF ANTITRUST LAW, ANTITRUST AND ASSOCIATIONS HANDBOOK 165–67 (2009) [hereinafter ASSOCIATIONS HANDBOOK] (procompetitive benefits of joint purchasing groups).
- ¹¹ See *generally* *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 549 U.S. 312, 320–21 (2007) (“A predatory bidder ultimately aims to exercise the monopsony power gained from bidding up input prices. To that end, once the predatory bidder has caused competing buyers to exit the market for purchasing inputs, it will seek to ‘restrict its input purchases below the competitive level,’” thus “reduc[ing] the unit price for the remaining input[s] it purchases.” (quoting Steven Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669, 672 (2005)); ASSOCIATIONS HANDBOOK, *supra* note 10, at 166–67 (discussing “buyer power” issues).
- ¹² U.S. Dep’t of Justice Business Review Letter to Containers America LLC (Mar. 8, 2000) [hereinafter Containers America BRL], available at <http://www.usdoj.gov/atr/public/busreview/4287.htm> (“Nor do we believe that the proposed joint purchasing raises any danger of oligopsonistic pricing.”).
- ¹³ See, e.g., U.S. Dep’t of Justice Business Review Letter to Armored Transport Alliance (Mar. 12, 1998) [hereinafter Armored Transport BRL], available at <http://www.usdoj.gov/atr/public/busreview/211368.htm> (“members would appear to purchase such a small share of commonly-used items such as trucks, tires, insurance, software, etc., as to make it unlikely that ATA would be able to exercise any undue market power vis-à-vis suppliers of such items”).
- ¹⁴ See, e.g., U.S. Dep’t of Justice Business Review Letter to The National Cable Television Cooperative, Inc. (Oct. 17, 2003) [hereinafter NCTC BRL], available at <http://www.usdoj.gov/atr/public/busreview/201379.htm> (15.8% of output market); U.S. Dep’t of Justice Business Review Letter to NSM Purchasing Association (Jan. 13, 1999) [hereinafter NSM Purchasing BRL], available at <http://www.usdoj.gov/atr/public/busreview/2175.htm> (founders accounting for 6.3 percent of output market; founders propose to cap membership to prevent it from exceeding 35 percent of U.S. purchases of input).
- ¹⁵ See, e.g., Containers America BRL, *supra* note 12 (“fact that Containers America’s members collectively account for slightly less than fifteen percent of United States steel drum sales means that it is unlikely that they could exercise oligopsony power with respect to the steel, paint or other supplies that they purchase. This seems particularly true because the steel drum industry accounts for only a small percentage of the rolled steel and paint products sold in the United States.”).
- ¹⁶ Health Care Guidelines Statement 7A, *supra* note 10 (using 35 percent as proxy “to determine whether the joint purchasing arrangement might be able to drive down the price of the product or service being purchased below competitive levels”). The Health Care Guidelines are cited in the NCTC BRL and alluded to in the NSM Purchasing BRL.
- ¹⁷ *Sewell Plastics, Inc. v. Coca-Cola Co.*, 720 F. Supp. 1196, 1211–13, 1219 (W.D.N.C. 1989), *aff’d mem.*, 912 F.2d 463 (4th Cir. 1990).
- ¹⁸ See Complaint ¶¶ 54–55, *U.S. v. Arizona Hospital and Healthcare Association*, Case No. CV07-1030-PHX (D. Ariz. May 22, 2007), available at <http://www.usdoj.gov/atr/cases/f223400/223477.htm>.
- ¹⁹ *Powderly v. Blue Cross & Blue Shield of N.C.*, No. 3:08-cv-00109-W (W.D.N.C. Sep. 4, 2008) (order) (“it is beyond serious dispute that a provider of health insurance services is also a buyer of health care services capable of exercising monopsony power over the market for doctors’ services”).
- ²⁰ Health Care Guidelines Statement 7A, *supra* note 10.
- ²¹ *Id.*
- ²² See, e.g., NSM Purchasing BRL, *supra* note 14 (funeral directors’ joint purchase of caskets accounting for 16.91 percent of an adult funeral’s cost; “the ratio of casket costs to funeral service prices, and the prophylactic measures that will be adopted to reduce antitrust risk lead us to conclude that NSM’s proposal should not harm any seller or consumer interest.”).
- ²³ Health Care Guidelines Statement 7A, *supra* note 10 (“For example, if a nationwide purchasing cooperative limits its membership to one hospital in each geographic area, there is not likely to be any concern about reduction of competition among its members.”).
- ²⁴ NCTC BRL, *supra* note 14.
- ²⁵ See, e.g., Armored Transport BRL, *supra* note 13 (“if ATA does not allow itself or its members to exchange price, customer or other competitively sensitive information, neither its establishment nor its activities should raise risks to competition”); NSM BRL, *supra* note 14 (“independent buying agent will keep all competitively sensitive information confidential, i.e., it will not disseminate any such information among its members. . . . Legal counsel will be present at all meetings of the joint venture and acceptance of an antitrust compliance policy will be a condition of membership in the joint venture.”); ASSOCIATIONS HANDBOOK, *supra* note 10, at 167.
- ²⁶ See *supra* text at notes 7–10.
- ²⁷ See, e.g., NCTC BRL, *supra* note 14 (“to the extent the contemplated changes to the joint purchasing procedures result in lower programming costs to members that are passed along to consumers, the proposed conduct could have procompetitive effects.”); NSM Purchasing BRL, *supra* note 14 (“to the extent that the proposed joint purchasing reduces NSM members’ costs and such savings are shared with consumers, the proposal could have a procompetitive effect.”); Armored Transport BRL, *supra* note 13 (“To the extent that the proposed joint purchasing by ATA resulted in economies of scale or scope that reduced the costs of its members, such efficiencies could have the pro-competitive effect of increasing output and reducing prices to customers.”).
- ²⁸ See *generally* FED. TRADE COMM’N, IMPROVING HEALTH CARE: A DOSE OF COMPETITION ch. 4, part VII (2004), available at <http://www.ftc.gov/reports/healthcare/040723healthcarerept.pdf>.
- ²⁹ *Id.* ch. 4, pt. VII at pp. 37–40.
- ³⁰ See, e.g., *Southeast Missouri Hosp. v. C.R. Bard, Inc.*, 2008 WL 4372741 (E.D. Mo. Sept. 22, 2008) (certifying class action challenge to exclusionary dealing contracts, market share maintenance, and compliance contracts with GPOs); *Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int’l, Ltd.*, 247 F.R.D. 253 (D. Mass. 2008) (deferring class ruling on challenge to market-share purchase requirements, bundling agreements, and sole-source/dual-source agreements).
- ³¹ See, e.g., Press Release, *Hatch, Kohl Announce Antitrust Subcommittee Agenda for the 111th Congress*, available at http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=3ef7fc4-1b78-be3e-e0f2-ffe8a743037d&Month=3&Year=2009 (noting past hearings and oversight of Senate Judiciary Committee’s Antitrust Subcommittee on hospital GPOs and resulting self-regulation; stating subcommittee will examine whether self-regulation is adequate, permanent, and enforceable).
- ³² *Northwest Wholesale Stationers v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 296 (1985).
- ³³ See *generally* 13 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2214 (2d ed. 2005).
- ³⁴ In *Northwest Wholesale Stationers*, the refusal to deal with an expelled member was not absolute because non-members could make purchases from the buying group, although non-members did not qualify for rebates. 472 U.S. at 286.
- ³⁵ *Id.* at 296. See also ASSOCIATIONS HANDBOOK, *supra* note 10, at 63–69 (member admission and expulsions), 69–72, 167, 170 (obligation to deal with non-members).
- ³⁶ *Consumers Warehouse Center, Inc. v. Intercounty Appliance Corp.*, 2007 WL 922423 (E.D.N.Y. Mar. 26, 2007). The case actually involved both a local cooperative and a larger buying group whose members were smaller buying groups, but that detail is unimportant to the discussion.
- ³⁷ 2007 WL 922423 at *1.
- ³⁸ *Id.* at *4 (“CWC can take a hint”).
- ³⁹ *United States v. Topco Assocs.*, 405 U.S. 596 (1972). Some later court decisions may be inconsistent with this ruling and even suggest that Topco

- has been overruled. See, e.g., *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 226 (D.C. Cir. 1986) (“If *Topco* and *Sealy*, rather than *Addyston Pipe & Steel*, state the law of horizontal restraints, the restraints imposed by Atlas would appear to be a per se violation of the Sherman Act. An examination of more recent Supreme Court decisions, however, demonstrates that, to the extent that *Topco* and *Sealy* stand for the proposition that all horizontal restraints are illegal per se, they must be regarded as effectively overruled.”). But the Supreme Court cited *Topco* approvingly as recently as 1990. See *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49 (1990).
- ⁴⁰ To the same effect, see *United States v. Sealy*, 388 U.S. 350 (1967). Approximately thirty Sealy “licensees” owned substantially all of Sealy’s stock, and the directors who managed and controlled Sealy’s business were stockholders or stockholder-licensees’ nominees. Sealy assigned an exclusive territory to each licensee, and each licensee agreed not to sell Sealy-branded products outside its territory. *Sealy* also involved allegations of price fixing, so it was a more difficult case in any event, but the Court also held that the licensing arrangement was per se unlawful.
- ⁴¹ NCTC BRL, *supra* note 14.
- ⁴² Containers America BRL, *supra* note 12.
- ⁴³ *Id.*
- ⁴⁴ NCTC BRL, *supra* note 14.
- ⁴⁵ See *supra* note 30 (citing cases).
- ⁴⁶ See *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (maximum resale price agreements judged under rule of reason); ALD VI, *supra* note 6, at 142–44 (discussing pass-through agreements generally). Application of the rule of reason does not mean that the vendor-imposed price restraint would automatically be legal. The Supreme Court in *Khan* warned about the possibility of minimum resale price agreements “disguised” as maximum price agreements. 522 U.S. at 17. Although vertical minimum price agreements now are judged under the rule of reason, at least under federal law, the Supreme Court has cautioned that the source of the restraint is important to the analysis of competitive effects. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2719 (2007) (“If there is evidence retailers were the impetus for a vertical price restraint, there is a greater likelihood that the restraint facilitates a retailer cartel or supports a dominant, inefficient retailer.”).
- ⁴⁷ *Id.*
- ⁴⁸ Containers America BRL, *supra* note 12.
- ⁴⁹ *Id.*
- ⁵⁰ *Id.* (“Since none of the members has been successful to date in landing a national contract, any exchange of pricing information relative to national or multi-regional customers should not have any adverse competitive effect in the market for such customers. Moreover, since the price discussions among the members will be limited to information necessary to prepare bids on national and multi-regional contracts, not regional markets that can be served by individual members, and members generally face significant competition from non-member rivals for local regional business, we would not expect those price discussions or the common input costs that could result from the proposed joint purchasing to diminish local regional price rivalry.”).
- ⁵¹ See, e.g., *Walco Int’l, Inc. v. Ivy Animal Health, Inc.*, 2005 WL 265216 (N.D. Tex. Feb. 3, 2005) (Robinson-Patman elements not satisfied; accepting meeting competition defense).
- ⁵² *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 796 (7th Cir. 1951), cert. dismissed, 344 U.S. 206 (1952).
- ⁵³ 15 U.S.C. § 13(f).
- ⁵⁴ *Northwest Wholesale Stationers v. Pacific Stationery & Printing*, 472 U.S. 284 (1985). See also ALD VI, *supra* note 6, at 542 & n.437 (citing authorities). The buying group may not in fact be a purchaser, but the 1960s auto-parts cases (discussed below) appear to have ignored this distinction. But see ASSOCIATIONS HANDBOOK, *supra* note 10, at 173 (“an association that functions as a purchasing agent for its members may avoid liability if the association does not purchase and take title, though its members may face claims . . .”). On identification of the vendor’s customer, see also *Guides for Advertising Allowances and Other Merchandising Payments and Services*, 16 C.F.R. § 240.5, examples 2 and 3 (Fred Meyer Guides).
- ⁵⁵ ALD VI, *supra* note 6, at 542 & n.437 (collecting cases).
- ⁵⁶ See, e.g., *Mid-South Distributors v. FTC*, 287 F.2d 512, 519 (5th Cir. 1961) (“The Co-ops were formed to get from Suppliers who were already committed to the volume rebate practices the benefit of that competitive method for individual jobbers through the pooling of orders.”); *American Motor Specialties Co. v. FTC*, 278 F.2d 225, 227 (2d Cir. 1960) (“The reason for this group buying arrangement is clear . . . [I]t was a frequent practice of manufacturers to grant annual rebates to buyers in the form of a percentage of the buyer’s orders for the year, the percentage of rebate to sales increasing with the total dollar volume of orders. Thus, from the mere fact that an organization of buyers was able to persuade a manufacturer to treat the orders of the various individual member firms as coming from a single source, the amount of rebate for each member firm’s dollar of order was increased, thereby placing each member firm at an advantage over its unorganized competitors. [The buying groups] appear to concede that [they] were formed for the purpose of obtaining increased rebates.”).
- ⁵⁷ Containers America BRL, *supra* note 12.
- ⁵⁸ *Id.* See also NSM Purchasing BRL, *supra* note 14 (“seeks to form a joint purchasing entity that would aggregate the casket purchases of NSM’s members so that they could obtain the type of quantity discounts (up to 40 percent) that you say the casket manufacturers are currently offering to the larger corporate providers of funeral services.”).
- ⁵⁹ Compare *Mid-South Distributors*, 287 F.2d at 519 n.15; cf. *American Motor Specialties*, 278 F.2d at 227 (describing limited functions performed by buying group).
- ⁶⁰ See generally *Texaco Inc. v. Hasbrouck*, 496 U.S. 593 (1990).
- ⁶¹ See, e.g., *Mid-South Distributors*, 287 F.2d at 519.
- ⁶² In the *Brand Name Prescription Drug Antitrust Litigation*, the court noted that, unlike the managed care organizations that received discounts, retail drug stores and their buying groups may not have been able to move market share. See, e.g., *In re Brand Name Prescription Drugs Antitrust Litig.*, 1999 WL 33889 at *1 (N.D. Ill. Jan. 19, 1999) (describing defense theory of “material differences in the abilities of retail pharmacies to move market share when compared to entities receiving discounts not available to retail pharmacies”).
- ⁶³ 15 U.S.C. § 13b (“Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association”). In other words, the Act permits discrimination between members and non-members, at least with respect to rebates or dividends paid to members in proportion to their purchases.
- ⁶⁴ *Northwest Wholesale Stationers v. Pac. Stationery & Printing*, 472 U.S. 284, 292 (1985).
- ⁶⁵ *City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268 (8th Cir. 1988).
- ⁶⁶ *Id.* at 276, 278–79.
- ⁶⁷ 348 F.3d 1224 (10th Cir. 2003).
- ⁶⁸ *Id.* at 1237.
- ⁶⁹ *Id.*
- ⁷⁰ *Id.* at 1228. A member could avoid the surcharge by picking up the feed at one of the cooperative’s plants.