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Competition law enforcement issues raised by monopsonies

Summary

Monopsony power is an area of competition law enforcement that has not received commensurate enforcement attention compared with cases of monopoly power. Enforcement in cases of market concentration and anticompetitive agreements has increased exponentially over the years, but enforcement in cases of monopsony power has not increased at the same pace. However, research indicates that the abuse of monopsony power can be as damaging as any other anticompetitive conduct. Monopsonies raise concerns in labour markets regarding wage suppression, as workers are unable to negotiate higher wages when there is a single employer. Buyer power in the retail sector has also come into the debate, regarding small producers and suppliers that face unbalanced and abusive transaction terms and conditions. Competition authorities are increasingly monitoring anticompetitive practices in monopsonistic markets and discussions are taking place in various forums as to how competition issues in such markets can be addressed.

An overview of member State experiences with regard to competition law enforcement and challenges in dealing with monopsony-related cases in labour and product markets is provided in this note. In addition, challenges faced by competition authorities are identified, actions to curb abuse by monopsonies are proposed and conclusions and areas for further work in this area of competition law enforcement are provided.



I. Introduction

1. The Intergovernmental Group of Experts on Competition Law and Policy, at its twentieth session, requested the UNCTAD secretariat to prepare reports and studies as background documentation for the twenty-first session on the topic of “competition law enforcement issues raised by monopsonies”.¹
2. Monopsony can be defined as a position in a market where there is one buyer and many sellers of goods and services.² In labour markets, an employer with monopsony power has market power in hiring workers. Monopsony can also occur in product markets in which there is only one buyer and many sellers.
3. In labour markets, monopsony power is associated with lower wages for workers, which can lead to income disparities and inequality in society.³ Firms with monopsony power may also exercise monopoly power, whereby they may sell goods at higher prices, to the detriment of both consumers and workers. Such firms may not consider the conditions of work, since they can yield market power and reduce the alternatives available to workers.
4. In product markets, monopsony power, or buyer power, is associated with small-scale suppliers not usually having alternative markets where they can effectively sell their products. In other circumstances, in retail markets, an oligopsony situation may exist, whereby a few companies cover nearly the entire distribution chain, and there is a likelihood of collusion that may negatively affect both consumers and worker wages.
5. Competition law enforcement has developed over time, and competition authorities have improved the tools and methodologies used to deal with anticompetitive practices across economic sectors. A review of case law shows that competition authorities worldwide have mainly focused on the repression of cartels and abuses of dominant position and on the prohibition of mergers likely to lessen competition in the market. Anticompetitive practices of a monopsonistic nature are not common and may not be as well understood as those related to monopoly power. However, this area has gained attention in recent years, particularly with regard to the interactions of supermarket chains with producers and suppliers, including farmers and small businesses.⁴
6. Most competition laws do not include a definition of monopsony, but prohibit it in the same way as monopoly when it distorts competition. Some competition laws, such as those in Germany, India, Mauritius, Mexico and the United States of America, state that they aim to maintain competition regardless of whether it is between sellers or buyers. Monopsony can be captured by competition laws in the context of abuse of dominant position or of superior bargaining position, which exists when a party in a position of relative buying power imposes disadvantages or unfavourable trading conditions on smaller trading partners that are economically dependent on the party without the possibility of switching. In Kenya, for example, “buyer power” is defined in Competition Act of 2010 as revised in 2019 as “the ability of a buyer to obtain terms of supply more favourable than a supplier’s ordinary contractual terms” and, while the term monopsony power is not used, “bargaining buyer power” is applied to examine cases based on conditions outlined in the law.⁵
7. Monopsonies may be as harmful to workers and consumers as monopolies. Research has shown that the “economic consequences of labour market power are analogous to those

¹ TD/B/C.I/CLP/66, paragraph 15.

² See <https://www.economicshelp.org/labour-markets/monopsony>.

Notes: All websites referred to in footnotes were accessed in April 2023.

Mention of any firm or licensed process does not imply the endorsement of the United Nations.

³ See <https://journals.sagepub.com/doi/full/10.1177/0019793920922499> and <https://equitablegrowth.org/working-papers/antitrust-remedies-for-labor-market-power>.

⁴ Responses to UNCTAD questionnaire from Canada and Kenya (see footnote 7).

⁵ See <https://cak.go.ke/buyer-power>.

of product market power". The latter redistributes consumers to a firm, whereby consumers must pay more for products and the firm earns greater profits at their expense, which creates a market inefficiency caused by a mismatch between consumption and demand, or a deadweight loss.⁶ Monopsony power redistributes from workers to employers by lowering wages and also creates waste and unemployment that would not occur if workers were paid at competitive rates.⁷

8. One study shows how the monopsony power of one firm led to worse labour market outcomes in the form of wage decreases (see chapter II, box). Due to such reasons, enforcers may need to focus more on understanding and addressing monopsonistic practices wherever they arise.

9. An overview of member State experiences with regard to competition law enforcement and challenges in dealing with monopsony-related cases is provided in this note, drawing on research and information provided by competition authorities in response to an UNCTAD questionnaire.⁸

II. Monopsony power in labour and product markets: Why it should be a concern for competition authorities

10. Monopsonies can may be as harmful as monopolies, yet competition laws have been applied less vigorously in labour markets than in product markets. Labour markets involve unions and laws on minimum wage, which are expected to curb monopsony power and related practices and may therefore not be an area requiring competition regulation. However, in the United States for example, research shows that there are low rates of unionization and that the real minimum wage at the federal level is falling.⁹ In addition, practices such as outsourcing and non-compete agreements have negatively affected wage growth in the low-wage sector. However, antitrust law enforcement can fill the enforcement gap, as labour issues affecting wages can be handled through enforcement that addresses anticompetitive agreements and mergers. Competition authorities are increasingly becoming aware that it is important to examine labour and product market power and deal with associated monopsonistic violations. According to responses to the UNCTAD questionnaire, some States are taking action with regard to monopsony-related cases, such as India, Kenya, Mexico, Serbia and the United States.

11. In the United States, studies have shown that antitrust laws apply to both labour and product markets but that antitrust enforcement has mostly targeted the latter.¹⁰ In addition, as competition for labour has been reduced, worker power and rights have diminished due to the lack of application of antitrust laws in labour markets.¹¹ This leads to questions on the link between antitrust, employment and labour laws and whether collective reforms should be undertaken that could help increase competition in labour markets.

12. Studies show that market power exercised by some companies has led to noticeable inequalities in wages and to stagnating economic growth, attributed to the lack of application of antitrust laws in labour markets, although the legal provisions cover practices that hinder market rivalry in the same way as those in product markets.¹² This situation could be due to many factors, including the fact that cases related to product markets have

⁶ See <https://www.investopedia.com/terms/d/deadweightloss.asp>.

⁷ See <https://equitablegrowth.org/working-papers/antitrust-remedies-for-labor-market-power/>.

⁸ Respondents included the following: Algeria, Australia, Austria, Bangladesh, Bulgaria, Canada, Czechia, El Salvador, Germany, Hungary, India, Indonesia, Kenya, Lithuania, Luxembourg, Malawi, Mauritius, Mexico, Peru, Poland, Russian Federation, Serbia, Slovenia, Spain, Sweden, Sudan, Türkiye, United Kingdom of Great Britain and Northern Ireland, United States and European Union.

⁹ See https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3793677.

¹⁰ See https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3960332.

¹¹ See <https://www.bls.gov/opub/mlr/2022/book-review/antitrust-enforcement.htm> and <https://econfp.org/policy-briefs/antitrust-and-labor-market-power/>.

¹² See https://harvardlawreview.org/wp-content/uploads/2018/12/536-601_Online.pdf.

been more frequently brought by regulatory agencies, compared with those related to labour markets. Some factors inhibiting competition law enforcement with regard to monopsonistic markets, as highlighted in responses to the UNCTAD questionnaire, include the following areas (see chapter IV): economic dependency of sellers on buyers (Australia, Kenya); information-gathering and resource needs (Australia, Turkey, Serbia); narrow interpretations of consumer welfare (Austria, Mauritius); legal interpretations and application of the law (Canada, Russian Federation); high level of burden of proof (Hungary); lack of experience (Mauritius); and market definition complexities (United States). In addition, although most competition laws have provisions that prohibit collusive anticompetitive practices, including among employers, enforcement actions are, in general, not evident, based on available case law examples.¹³

13. Research in recent decades has shown that in many instances, labour markets, particularly in low-wage sectors, are monopsonistic in nature. In comparison with other segments, labour markets tend to exhibit elasticities that are significantly low (see box).¹⁴

Walmart: Exercise of monopsony power over workers

In the United States, research shows that monopsony power negatively influenced employment and earnings in the case of the entry of supercentres owned by Walmart into county markets, whereby, following an initial rise in the wage bill, employment and earnings were greatly reduced in counties with a Walmart supercentre. The entry of Walmart supercentres is considered to have crowded out labour demand from incumbent local firms, providing Walmart an outsized role in the market for less-skilled labour. However, it is also possible that the ability to use monopsony power might have been fuelled by the availability of earned income tax credits, which encouraged workers to not negotiate for higher wages in order to remain within a low-to-moderate income bracket and qualify for certain refunds. Walmart has gained and applies monopsony power, which adversely affects minimum-wage workers. Such situations lack the characteristics of a competitive labour market and may be subject to competition law enforcement.

Source: See <https://equitablegrowth.org/working-papers/walmart-supercenters-and-monopsony-power-how-a-large-low-wage-employer-impacts-local-labor-markets/> and <https://equitablegrowth.org/walmart-is-a-monopsonist-that-depresses-earnings-and-employment-beyond-its-own-walls-but-u-s-policy-makers-can-do-something-about-it/>.

14. Monopsony in labour markets is analogous to that of monopoly in product markets, yet work remains to be done to understand dynamics in monopsonistic markets. Judicial responses to monopsony, particularly in labour markets, have been limited.¹⁵ Judicial responses and enforcement have also been limited with regard to the effects of monopsonies in product markets, where suppliers of large retail chains may have a relatively low bargaining power with regard to prices and supply conditions for goods or services. Even in sectors characterized by goods and services with high levels of demand, which tend to attract higher wages, wage agreements between competitors are often prevalent, leading to complexities in dealing with monopsony-related cases. For example, the Organisation for Economic Co-operation and Development has held discussions on competition law enforcement in labour markets, which has been limited, and cases involving monopsony power have been rare; competition authorities can play a role in addressing anticompetitive agreements and mergers in labour markets that are likely to create monopsony power and consequential abuses.¹⁶

¹³ See <https://academic.oup.com/jeea/article/19/6/2929/6368338>.

¹⁴ See <https://equitablegrowth.org/working-papers/antitrust-remedies-for-labor-market-power>.

¹⁵ See <https://academic.oup.com/antitrust/advance-article/doi/10.1093/jaenfo/jnac021/6695439>.

¹⁶ See <http://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm>.

15. As noted, competition law enforcement that addresses monopsonies has been limited to date.¹⁷ From a competition enforcement point of view, there is a need to adapt analytical tools currently used in the analysis of product markets. In labour markets, for example, the monopoly test for market definition, “small but significant non-transitory increase in price”, is used to determine the relevant market when evaluating an abuse of dominance and in approving or blocking mergers in product markets. This may not be relevant for monopsonistic markets, however, and the “small but significant and non-transitory decrease in wages” test may be better suited for such analysis. There is a need to adapt the definition of monopolist to suit monopsony and to examine whether the same logic and results are applicable to both concepts. Further, a more systematic analysis of labour and product markets is necessary to address enforcement challenges.

III. Enforcement experiences among member States

16. Monopsonistic practices are prohibited by competition laws in most jurisdictions. The term monopsony is not often used in competition laws but existing provisions are deemed sufficient, particularly those dealing with monopolies, anticompetitive agreements and mergers. For example, in Japan, the competition law applies the same approach to both monopoly (by a seller) and monopsony (by a buyer).¹⁸ In the Republic of Korea, the competition law has a similar provision, linking a “market-dominant business entity” to a supplier or customer, which can be applied in both monopoly and monopsony-related cases.¹⁹ In recent years, competition authorities in developed countries and some authorities in developing countries have made efforts to limit such practices. However, the pace has been slow and the assessment of anticompetitive practices of a monopsonistic nature is a difficult task.

17. Examples of experiences in monopsony-related cases in labour and product markets are highlighted in this chapter. Such experiences help inform research and policy, with a view to enhancing coverage and competition enforcement related to such cases.

A. Experiences of competition authorities in developed countries

1. Labour markets

18. In Poland, in 2021, the Office of Competition and Consumer Protection launched two investigations into labour market cartels concerning the following: a no-poach agreement involving 16 basketball clubs and the leading domestic basketball league, which also enabled the clubs to coordinate the terms for terminating player contracts and to withhold remuneration; and an alleged wage cartel involving the automobile and motorcycle federation and various speedway organizers and speedway clubs, a further step in the investigation of the capping of rider salaries. This case was analysed under article 101 of the Treaty on the Functioning of the European Union as the remuneration scheme might have a cross-border effect in other member States of the European Union and could strengthen the cross-border impact of the conduct under investigation. The investigations show that the Office is actively enforcing competition rules in the labour market, particularly in professional sports.²⁰

¹⁷ See Organisation for Economic Co-operation and Development, 2021, Executive summary of the round table on competition issues in labour markets, available at <https://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm>.

¹⁸ See https://www.jftc.go.jp/en/policy_enforcement/21041301.pdf.

¹⁹ See https://www.ftc.go.kr/eng/cop/bbs/selectBoardList.do?key=2835&bbsId=BBSMSTR_000000003631&bbsTyCode=BBST11.

²⁰ See <https://www.twobirds.com/en/insights/2022/poland/polish-competition-authority-investigates-wage-fixing-practices> and <https://www.bureaubrandeis.com/a-new-era-for-competition-enforcement-restrictions-on-competition-in-the-labour-market/?lang=en>.

19. In Romania, in January 2022, the Competition Council opened an investigation on the possible anticompetitive behaviour of undertakings in the market of skilled labour in the field of motor vehicle production and other related activities.

20. In the United States, the Federal Trade Commission and the Department of Justice have recently increased focus on monopsonistic conduct in labour markets, given increasing evidence that labour market concentration suppresses wages and contributes to increases in restrictive employment arrangements, particularly no-poach agreements and non-compete agreements. Rather than the monopolization of output, whereby collusive practices are mainly aimed at increasing prices, monopsonistic activity involves collusion to lower the costs of inputs, resulting in lower wages, reduced benefits and substandard working conditions. The Department of Justice has initiated cases with regard to anticompetitive agreements, such as by prosecuting the following: the former owner and former clinical director of a physical therapist staffing company, for a wage-fixing agreement to lower wages paid to contracted therapists and assistants; and a kidney dialysis company and the former chief executive officer, for a no-poach agreement, to allocate employees through agreements with competitors to not recruit one another's employees. Both cases ended in jury acquittals with regard to the antitrust violations yet, in each case, the courts stated that the alleged agreement type was subject to per se treatment under antitrust laws.²¹

21. The Federal Trade Commission has raised concerns about anticompetitive practices in monopsonistic labour markets.²² According to Commission investigations, non-compete clauses systemically drive down wages, even for workers not bound by such a clause. Such vertical agreements restrict the ability of workers to accept employment with competing firms. Each worker unable to change jobs represents a position that is not open for someone else and, if an employer is aware that workers cannot leave, may have less incentive to offer competitive pay and benefits, which puts downward pressure on wages for all workers in the sector. In January 2023, the Federal Trade Commission took legal action against firms that had imposed non-compete restrictions on workers in positions ranging from low-wage security guards and manufacturing workers to engineers.²³ The cases were resolved through the issuance of orders against the firms, prohibiting them from enforcing, threatening to enforce or imposing non-compete restrictions against employees and banning them from telling employees or other employers that an employee was subject to a non-compete agreement and other relief measures to vitiate the effects of existing agreements.²⁴

22. Previously, in October 2022, the Department of Justice secured a permanent injunction blocking the proposed acquisition of publisher Simon and Schuster by Penguin Random House. The merger would have resulted in the two largest publishers controlling more than two thirds of the market, leaving many authors with few alternatives and less leverage towards publishers, and the combined post-merger enterprise would have had substantial market power in negotiations with authors, that is, it would have had monopsony power due to a superior bargaining position that could have negatively affected author advances and contract terms. The District Court for the District of Columbia upheld the decision, stating that the proposed merger would negatively affect the market by substantially lessening competition criteria for publishing rights to anticipated top-selling books, and that "if consummated, this merger would likely result in substantial harm to authors of anticipated top-selling books and ultimately, consumers".²⁵ This milestone case

²¹ Response to UNCTAD questionnaire from the United States. See <https://www.justice.gov/opa/press-release/file/1344191/download> and <https://www.justice.gov/opa/press-release/file/1412606/download>.

²² See <https://www.nytimes.com/2023/01/09/opinion/linakhan-ftc-noncompete.html>.

²³ See <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers>.

²⁴ Response to UNCTAD questionnaire from the United States.

²⁵ See <https://www.justice.gov/opa/pr/justice-department-obtains-permanent-injunction-blocking-penguin-random-house-s-proposed> and <https://www.justice.gov/opa/press-release/file/1445916/download>.

determination shows that there is increased understanding on the judicial side that monopsony-related cases can be effectively adjudicated.

23. The competition authorities of member States of the European Union have handled cases concerning no-poach agreements or wage-fixing agreements and restrictions of participation in non-authorized sports events, for example in Lithuania, Portugal and the European Union. A request for a preliminary ruling has been submitted to the Court of Justice of the European Union by the Super League in a case on the creation of a competitive football tournament.²⁶

24. Such cases show the increased focus on monopsonies in labour markets and how monopsonies can harm workers. However, their relative scarcity shows that such monopsonies do not draw as much attention as traditional anticompetitive activities, such as product market monopolies. Work must be done to understand and address emerging monopsony issues.

2. Product markets

25. In Canada, in recent years, buyer power has been considered in certain merger cases. In December 2022, the Competition Bureau entered into a consent agreement to address competition concerns with regard to a proposed acquisition in the pulp and paper sector. If the acquisition had been permitted, it would have allowed the company to pay lower than competitive prices to suppliers of wood fibre; the settlement involved an agreement to sell a pulp mill and a pulp and paper mill to two independent purchasers approved by the Competition Bureau. In 2022, the Bureau reached an agreement to address competition concerns with regard to the merger of two of the largest pulp and paper manufacturers in Canada.²⁷ In addition, the Bureau challenged the acquisition of a primary grain elevator in Manitoba, but the Competition Tribunal dismissed the application for an order requiring the company to sell either its elevator in Saskatchewan or the newly acquired elevator in Manitoba, ruling in favour of the company's market definition and concluding that the Bureau had not proved that the acquisition would substantially lessen competition in the markets for the purchase of wheat and canola in the relevant geographic market.²⁸

26. In Germany, in 2014, the Federal Cartel Office addressed anticompetitive practices by purchasers with a relatively strong market position through a case decision that found that the supermarket corporation Edeka had violated the Act against Restraints of Competition following its takeover of a discount chain. In the proceedings, the criteria "dependent" and "benefit without objective justification" were, for the first time, subject to an evaluation. In addition, the proceedings raised several issues with a relevance beyond the case in question and the Federal Cartel Office decided to conduct administrative proceedings that could be closed with a declaratory decision under the Act against Restraints of Competition.²⁹

27. In Hungary, the Competition Authority has dealt with cases related to buyer power. For example, the Authority initiated a proceeding against the domestic subsidiary of a multinational retailer, that imposed unfair conditions on its suppliers, mostly small or medium-sized companies, with regard to the payment of progressive bonuses. The investigation concluded that the practices used placed an unjustified and unilateral burden on a significant portion (80 per cent) of suppliers that entered into an agreement to pay a bonus. The infringement was settled through an administrative sanction decision, whereby

²⁶ Ibid. See <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-12/cp220205en.pdf> and <https://www.ashurst.com/en/news-and-insights/legal-updates/avocate-general-rantos-supports-uefa-in-its-defence-of-the-european-sports-model>.

²⁷ Response to UNCTAD questionnaire from Canada.

²⁸ See <https://decisia.lexum.com/ct-tc/cdo/en/item/465284/index.do> and <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/521058/index.do>.

²⁹ Response to UNCTAD questionnaire from Germany. See <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2014/B2-52-14.html>.

the retailer was required to establish six regional supply centres aimed at improving opportunities for domestic small producers, thereby contributing to the development of the local economy and stimulating demand for local goods.

28. In the United Kingdom, in 2008, the Competition and Markets Authority conducted a market investigation in the grocery sector, assessing the buyer power of grocery retailers. The Authority found that several retailers had strong positions in several local markets. Barriers faced by competing retailers that could otherwise enter grocery markets meant that consumers received a poorer retail offer in terms of price, quality and service than they might otherwise be offered. In addition, grocery retailers with strong local market positions earned additional profits due to weak competition in the markets. The Authority also found that the transfer of excessive risks and unexpected costs by grocery retailers to suppliers through various supply chain practices, if unchecked, would have an adverse effect on investment and innovation in the supply chain and, ultimately, on consumers. The Authority took several steps to address the identified problems and recommended to the Government and concerned administrations that a competition test be applied, as part of the planning process for proposed new stores and proposed extensions to existing stores. The test would favour new entrants and grocery retailers rather than those that already had a significant local market share. The Authority also required grocery retailers in highly concentrated markets to relinquish control over land acquired for expansion, to give new entrants an opportunity to enter the market and establish business premises, and the Authority would, in future, limit the ability of retailers to prevent land being used by competitors.³⁰

29. The European Commission and the Court of Justice of the European Union have investigated the effects of monopsonies on vertical relationships. Based on the decision in a case involving a company in the food retailing sector, a firm in a monopsony position could have the power to influence demand patterns for end products.³¹ However, such harm is uncertain and appears only in the long term, making action against such firms difficult; and abuse of dominance is not considered the best criterion for dealing with monopsonies. The European Commission is paying increased attention to buyer collusion, particularly in the food retail sector. In 2019, the Commission opened an antitrust investigation into a joint purchasing venture between two retailers, examining whether there was evidence of coordinated behaviour with regard to the development of supermarket networks or pricing policies.³²

30. Enforcers have not won all cases, yet the fact that they were opened demonstrates a new focus on monopsony power in product markets. Such a focus can be invaluable for suppliers, workers and consumers. Continued study and international cooperation are necessary to develop the product market area more effectively.

B. Experiences of competition authorities in developing countries

1. Labour markets

31. In Mexico, in 2021, the Competition Authority imposed fines totalling Mex\$177.6 million to 17 clubs of the National Football Federation for responsibility in conducting monopolistic practices and, for collaborating in these practices, to the Federation and eight natural persons.³³

³⁰ See <https://www.gov.uk/cma-cases/groceries-market-investigation-cc>.

³¹ See <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31999D0674&from=DE>.

³² Response to UNCTAD questionnaire from the European Commission.

³³ See https://www.cofece.mx/wp-content/uploads/2021/09/COFECE-028-2021_ENG.pdf and https://www.cofece.mx/wp-content/uploads/2021/02/COFECE-001-2021_English.pdf.

2. Product markets

32. Generally, monopsony-related cases in product markets are less highlighted in the literature than those in labour markets. Competition authorities in Indonesia, the Sudan and Türkiye have intervened in certain agricultural product market sectors, such as bananas, cherries and sugar, to address possible monopsonistic behaviour.³⁴ However, the investigations have not yet concluded.

33. In Kenya, according to the Competition Authority, the sectors with the greatest prevalence of abuse of buyer power cases are insurance, retail and manufacturing (44, 34 and 6 per cent of all investigated cases in financial year 2020/2021 and 72, 18 and 3 per cent, in 2021/2022, respectively). Other sectors in which investigations and enforcement have taken place include telecommunications, agriculture, construction and transport/distribution.³⁵

34. In India, the Competition Commission has dealt with cases involving dominant buyers or monopsonistic markets. In one case, on the alleged abuse of dominant position by the Oil and Natural Gas Corporation, the Commission did not find any infringement; however, the Corporation was a dominant buyer, not a monopsonist, in the market examined by the Commission. In another case, the Commission considered the conduct of a party in the market for the wholesale procurement of branded alcoholic beverages and held that its unilateral conduct impacted interbrand competition, whereby procurement had been carried out in a manner that adversely affected competition in the market and discriminated between different manufacturers and suppliers of Indian-made foreign liquor.³⁶

35. In the Russian Federation, in the railway transportation sector, a dominant firm, as the largest consumer of transport services provided on railways (97.9 per cent market share), violated antimonopoly legislation by refusing to pay for services rendered by providers. The decision of the regional office of the Federal Antimonopoly Service was upheld by the arbitration court as a violation of the federal law on the protection of competition.³⁷

36. In Serbia, the Commission for Protection of Competition investigated a monopsony involving two joint-stock companies with the same owner and determined that the companies held a dominant position, as a single undertaking, in the relevant market (raw milk intended for further industrial processing on domestic dairy farms) and that they had abused the position through both the imposition of unfair business terms (mainly on milk producers) and the application of dissimilar business terms for the same transactions with different companies.³⁸

IV. Enforcement challenges faced by competition authorities in monopsony-related cases

A. General

37. Efforts are increasingly being made to understand the slow growth in monopsony-related case law; one challenge is related to the narrow interpretation of the consumer welfare standard and the evidence required to prove negative impacts on end consumers by an employer in a monopsony position.³⁹ This may impose an additional burden on enforcement agencies, particularly in cases where workers, not necessarily consumers, are harmed.

³⁴ Responses to UNCTAD questionnaire from Indonesia, the Sudan and Türkiye.

³⁵ Response to UNCTAD questionnaire from Kenya.

³⁶ Response to UNCTAD questionnaire from India.

³⁷ Response to UNCTAD questionnaire from the Russian Federation.

³⁸ Response to UNCTAD questionnaire from Serbia.

³⁹ Organisation for Economic Co-operation and Development, 2021.

38. Antitrust law may be insufficient to deal with wage suppression due to challenges related to the difficulty and cost of seeking employment (search frictions) and dissimilarity between jobs at different firms within the same market (job differentiation).⁴⁰ The Organisation for Economic Co-operation and Development states that, given the increase in unbalanced power relationships between workers and employers, a reassessment is required of how regulation can address the consequences and sources of such imbalances.⁴¹

39. Regulations and their effective enforcement can limit monopsony power in labour markets through various channels, such as by extending the coverage of labour market regulations to address the effects of monopsonies on worker well-being, enforcing competition law against collusive practices among employers and using regulations to guide information flows between employers and workers. The exercise of monopsony power by employers and related conduct in labour markets continues, and existing regulations do not seem to effectively deal with effects on workers. There are legal and other instruments in many jurisdictions that may be sufficient in dealing with worker issues, including minimum wage laws,⁴² tax and wage subsidies, labour laws and labour unions. Such tools may assist in handling labour issues and the harm caused by monopsonies, yet employers may still exploit workers in the exercise of monopsony power. The situation requires collaborative efforts between different regulators and law enforcers. Competition law enforcement has a central role in such cases.

B. Limitations of legal applications and interpretations among member States

40. Some competition authorities, such as that of the United Kingdom, state that the challenges presented in the assessment of monopsonies appear the same as those related to assessments of other anticompetitive practices.⁴³ Other challenges are outlined in this chapter.

1. Buyer power-related challenges

41. In response to the UNCTAD questionnaire, some member States cited buyer power as one of the challenges faced in assessing collusive conduct of a monopsonistic nature.

42. In Australia, responses to enforcement challenges are based on a case against a supermarket chain, involving documentation and interviews with parties who had knowledge concerning the conduct. Small businesses affected by the conduct were reluctant to provide information and some suppliers were concerned about retaliation from key clients. In addition, compulsory notices to suppliers imposed a burden on businesses. For the Competition and Consumer Commission, such large-scale investigations can be time-consuming and resource intensive.⁴⁴

43. In Canada, three major supermarket chains, in a concerted manner, terminated the payment of bonuses to frontline workers at the onset of the pandemic and Members of Parliament sought the application of Competition Act, section 45 on conspiracies, agreements or arrangements between competitors. However, the Competition Bureau was unable to act, as section 45 only covers vendor-side conspiracies. This interpretation lowered cartel-like conduct and its seriousness to a civil case, which would be limited to the issuance of a prohibition order if an investigation proved anticompetitive conduct. This

⁴⁰ See <https://www.bls.gov/opub/mlr/2022/book-review/antitrust-enforcement.htm>.

⁴¹ See <https://www.oecd-ilibrary.org/sites/b40da5b7-en/index.html?itemId=/content/component/b40da5b7-en>.

⁴² See <https://www.consilium.europa.eu/en/policies/adequate-minimum-wages/>.

⁴³ Response to UNCTAD questionnaire from the United Kingdom.

⁴⁴ Response to UNCTAD questionnaire from Australia.

legal limitation may have led to the amendment of the law in June 2022 to criminalize wage-fixing agreements and no-poach agreements between employers.⁴⁵

44. In Kenya, the Competition Act addresses the unilateral exercise of purchasing power and prohibits any conduct that amounts to abuse of buyer power in a domestic market.⁴⁶ There is no need to prove that there is a monopsony; rather, the requirement is that a buyer has a significantly superior bargaining position towards a supplier or the supplier is in a position of economic dependency upon the buyer. This introduces the concept of superior bargaining position and its application to other sectors, deviating from monopsony power mainly associated with labour markets.

2. Legal enforcement challenges

45. In assessing a geographic market, skilled and non-skilled workers and professional differences are considered, as well as, among other issues, commute distances, willingness to relocate, barriers to licensing requirements, housing costs, remote-working opportunities, data availability and the ease of entry and exit for unskilled labour. This could cast doubt on the use of “non-transitory increase of price” and how this would lower wages. Vertical monopsony through non-compete agreements might pose a challenge, in assessing this practice when enforcing competition law, under different scenarios and the application of the rule of reason criterion, which requires justifications such as the protection of consumers and trade secrets and human capital development initiatives. The analysis of cases with different dimensions complicates the process of assessment and the application of laws in this regard.

46. In Austria, there are challenges related to the interpretation of consumer welfare, which requires evidence of negative impacts on consumers due to the conduct of a monopsonist employer. This interpretation is deemed to impose an extra burden on agencies, making it difficult to pursue cases. This may help explain the low caseload with regard to anticompetitive practices in labour markets. This interpretation also leads to a lack of effectiveness in capturing cases that harm workers who may not necessarily be classified as consumers.⁴⁷

47. In Hungary, there have not been any recent monopsony-related cases. The threshold for dominance in buyer markets, even if companies engage in exploitative or exclusionary practices that may harm competition, involves a high burden of proof and may pose a challenge in case determination.

48. In India, under Competition Act 2002, the Competition Commission may deal with cases related to both products and sellers and buyers, whereby a dominant enterprise may be a manufacturer, supplier or buyer. Sectors other than labour markets in which most monopsony-related cases are prevalent include shipping, alcoholic beverages and rice milling.⁴⁸

49. In Indonesia, there is a lack of experience in handling monopsony-related cases, due to difficulties in obtaining the required information from companies and limited powers to conduct search and seizure actions.⁴⁹

50. In Mauritius, there are challenges in finding a balance between effects on competition and consumer welfare before taking action, in particular if a monopsonist

⁴⁵ Response to UNCTAD questionnaire from Canada.

⁴⁶ See <https://cak.go.ke/sites/default/files/Competition-Act-No-1-%20of%202010-Amended-as-at-2019.pdf>.

⁴⁷ Response to UNCTAD questionnaire from Austria. See Organisation for Economic Co-operation and Development, 2021.

⁴⁸ Response to UNCTAD questionnaire from India.

⁴⁹ Response to UNCTAD questionnaire from Indonesia.

engages in price reduction, which may be beneficial to consumers. Due to a lack of case law globally, there is relatively little guidance in the assessment of such cases.⁵⁰

51. In the Russian Federation, there are difficulties in assessing anticompetitive practices of a monopsonistic nature due to the absence of a definition in the legislation of “monopsonistic low prices” and methodological approaches to proving monopsonistic practices, when considering complaints regarding low purchase prices.⁵¹

52. In the United States, challenges relate to complexities in understanding labour market behaviour and to the assessment of market definition and market power based on traditional “small but significant non-transitory increase in price” and translating it to “small but significant and non-transitory decrease in wages”. In practical terms, this is challenging due to the complexities of labour market dynamics, which could be a mixture of distinct categories of workers in the same company.⁵²

53. The European Commission has not recently handled a monopsony-related case, nor has the Court of Justice of the European Union. At present, there is one ongoing case involving a grocery buying alliance and several decisions of national competition authorities regarding such alliances.⁵³

3. Sectoral challenges

54. In Serbia, there are challenges on the buyer side related to how to define and analyse the relevant market and dominant positions in the case of many producers, for example, milk farmers. This is further complicated by the time and resources required to obtain statements from a large group of market actors.⁵⁴

55. In Türkiye, there are challenges arising from cases in the agricultural sector. Due to factors such as the large number of small-scale farms and their locations across the country, it is difficult to investigate anticompetitive conduct through a thorough analysis of the agricultural value chain, given limited time and resource allocations.⁵⁵

C. Action taken by competition authorities to mitigate challenges

1. Advocacy

56. In Australia, in recent years, the Competition and Consumer Commission has not explicitly dealt with anticompetitive practices of a monopsonistic nature. However, it is closely monitoring monopsonistic practices and conducting related advocacy work, such as sectoral inquiries, to raise awareness.⁵⁶

57. In Austria, the Federal Competition Authority is monitoring monopsonistic practices and planning to engage in advocacy work to raise awareness through sectoral inquiries. Such an inquiry was planned for the food sector in October 2022. It is expected that within this context, issues related to monopsonistic practices will also be analysed.⁵⁷

58. In the United States, the Federal Trade Commission and the Department of Justice have initiated various initiatives to gather public input on the understanding of recent developments at the intersection between antitrust and labour markets and to clarify how competition enforcement and rule-making can protect and empower workers. In 2021, an advocacy workshop was held to seek public inputs on labour market issues and to review

⁵⁰ Response to UNCTAD questionnaire from Mauritius.

⁵¹ Response to UNCTAD questionnaire from the Russian Federation.

⁵² Response to UNCTAD questionnaire from the United States.

⁵³ Response to UNCTAD questionnaire from the European Commission.

⁵⁴ Response to UNCTAD questionnaire from Serbia.

⁵⁵ Response to UNCTAD questionnaire from Türkiye.

⁵⁶ Response to UNCTAD questionnaire from Australia.

⁵⁷ Response to UNCTAD questionnaire from Austria.

merger guidelines, to comprehensively cover issues related to monopsony power, particularly in labour markets.⁵⁸

2. Legislative and regulatory reforms

59. Canada has introduced amendments to the Competition Act that prohibit wage-fixing agreements and no-poach agreements between employers, to come into effect in June 2023.

60. In Hungary, to address the loophole of the threshold for dominance in buyer markets, the Competition Authority introduced legal instruments that go beyond conventional competition law and do not require the existence of a dominant position in an antitrust sense. Hungary has introduced legal instruments to address the absolute or relative market power of buyers. In the non-food sector, under the Act on Trade, the legal instrument “abuse of significant market power” (lower-level threshold for abuse of dominance) is also suitable for addressing unfair buying practices.⁵⁹ To address such practices in the food sector, Act XCV of 2009, on the prohibition of unfair trading practices against suppliers of agricultural and food products, is *lex specialis*.⁶⁰ Buyer power does not always reach the required threshold to trigger action under competition law, but the law in Hungary includes provisions on buyer power and unfair practices, which are both used to assess unfair buying practices.

61. In Lithuania, in addition to competition law, there is a dedicated law on limiting the use of market power by retailers, to ensure the balance of interests between retailers and food and beverage suppliers. The law prohibits practices contrary to fair business practices that transfer the risk of retailer activities to suppliers or impose additional obligations on them or that restrict the ability of suppliers to freely operate in the market and that are expressed in the form of demands on or requirements from suppliers.⁶¹

62. In Sweden, rules prohibiting unfair trading practices in the agricultural and food supply chain have been in place since November 2021, implementing European Union Directive 2019/633 of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain; the rules are intended to restrict certain forms of buying practices by large buyers.⁶²

63. In the United Kingdom, the Competition and Markets Authority has established a groceries supply code of practice, to remedy concerns arising from the transfer of excessive risks and unexpected costs by grocery retailers to suppliers through various supply chain practices, such as by prohibiting large grocery retailers from making retrospective adjustments to terms and conditions of supply.⁶³

64. In the United States, in 2016, to address monopsony in labour markets, the Federal Trade Commission and the Department of Justice issued antitrust guidance for human resource professionals, given the need to curb the prevalence of agreements between employers that limited or fixed the terms of employment regarding wages, salaries, benefits or job opportunities. Human resources professionals were perceived as best placed to ensure that the hiring practices of the companies for which they worked did not violate antitrust laws; the guidance states: “just as competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality products and services, more choices and greater innovation, competition among employers helps actual and potential employees through higher wages, better benefits or other terms of

⁵⁸ Response to UNCTAD questionnaire from the United States.

⁵⁹ Response to UNCTAD questionnaire from Hungary.

⁶⁰ The doctrine that specialized laws prevail over general laws in case of a conflict in application. See https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2575076.

⁶¹ Response to UNCTAD questionnaire from Lithuania.

⁶² Response to UNCTAD questionnaire from Sweden.

⁶³ Response to UNCTAD questionnaire from the United Kingdom. See <https://www.gov.uk/government/publications/groceries-supply-code-of-practice/groceries-supply-code-of-practice>.

employment. Consumers can also gain from competition among employers because a more competitive workforce may create more or better goods and services.”⁶⁴

65. Such guidance is an example of attempts by antitrust authorities to coordinate with other agencies dealing with labour market issues, given the complexities of antitrust enforcement in labour markets. In October 2022, the Department of Justice signed a memorandum of understanding with the Department of Labour, a step towards addressing anticompetitive conduct that harms workers in labour markets, as the Departments can share the responsibility of protecting workers against collusion to reduce wages and the use of business models aimed at circumventing legal accountability.⁶⁵ The Executive Order on Promoting Competition in the American Economy states that “for workers, a competitive marketplace creates more high-quality jobs and the economic freedom to switch jobs or negotiate a higher wage”.⁶⁶ In addition, the Federal Trade Commission has proposed a rule banning non-compete clauses, with limited exceptions.⁶⁷

3. Other actions

66. In Mauritius, the Competition Commission has conducted enquiries with regard to monopsony concerns related to abuse of dominance, merger control and buyer cartels in such sectors as energy, extra neutral alcohol and medical insurance.⁶⁸

V. Conclusion and issues for further discussion

67. Competition enforcement experiences among member States in dealing with cases related to monopsony power, in both labour and product markets, are detailed in this note. Research shows that, in labour markets, monopsony power is associated with distortions that depress wages for workers which, in turn, promotes income disparities and inequality in society. As shown in the present note, the monitoring of monopsonistic conduct is a recent phenomenon in the work of competition authorities worldwide, yet authorities in developed countries are more active in this area and authorities in developing countries face obstacles in dealing with monopsony power in labour markets and a superior bargaining position (buyer power) in other markets. Challenges faced by competition authorities in assessing monopsony-related cases, which are similar to those faced in the assessment of other anticompetitive practices, are highlighted in the note. Mitigating actions to overcome such challenges as reported by member States include legislative and regulatory reforms, advocacy initiatives and collaboration with other sectoral regulators and public bodies.

68. Delegates at the twenty-first session of the Intergovernmental Group of Experts on Competition Law and Policy may wish to consider the following questions:

- (a) What justifies the emerging interest of competition authorities in regulating the behaviour of firms with monopsony power in both labour and product markets?
- (b) What measures should competition authorities take to overcome enforcement challenges when assessing monopsony-related cases?
- (c) What lessons can be learned from the current situation, to improve case law in dealing with monopsonistic conduct, particularly in developing countries?
- (d) What might be possible policy actions and areas for further research?

⁶⁴ See <https://www.justice.gov/atr/file/903511/download>.

⁶⁵ Response to UNCTAD questionnaire from the United States.

⁶⁶ Ibid. See <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

⁶⁷ See <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition>.

⁶⁸ Response to UNCTAD questionnaire from Mauritius.