CHAPTER 11

Market structure and buyer power

1. Introduction

There is no doubt that in order to ascertain whether an infringement of Article 101 TFEU or Article 102 TFEU has taken place by a CPB, it is necessary to consider the structure of the market in which the CPB operates. The market structure refers to the characteristics and number of firms in the market, and a prerequisite for studying the market structure is to define and limit the relevant market.

A market definition identifies the market(s) in which the CPB operates, and without a market definition there are no boundaries within which it can be measured whether an agreement has as its object or effect the prevention, restriction or distortion of competition or whether there is a dominant position.

Although the intermediate CPB does not purchase as such itself, it enters into agreements with suppliers on behalf of contracting authorities and thus establishes framework agreements which apply between the contracting authorities and the suppliers.1 In doing so, the CPB intermediates potentially large purchases which may account for a large share of the market. When intermediating large purchases, the CPB may be the only – or one in a few – buyers (or, more specifically, intermediators of purchases),2 which gives it some degree of buyer power.

Buyer power thus needs to be examined, and by doing so, a buyer market definition is established. The CPB puts out contracts to tender, and due to the CPB’s size and the magnitude of the total purchases that it represents, i.e.

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1 As mentioned in Chapter 6, the CPBs have two »roles«; they act as contracting parties when establishing the framework agreement, but in relation to the agreement between the contracting authorities and the suppliers, the call-off, the CPBs have the role as middlemen or mediators.

2 The theory on buyer power concerns buyers, so to avoid confusion CPBs are referred to as buyers, although this author is aware that they are not.
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the maximum estimated value envisaged for the total term of the framework agreement, cf. Articles 4 and 5(5) of Directive 2014/24/EU, it may be possible to get much better terms regarding price, quality etc. than had a small municipality put out a contract to tender on its own.

With the CPBs’ size and the magnitude of the purchases, there is a risk that they can take advantage of their position, either because the framework agreements that they establish may cause the call-offs to affect trade between Member States or because the framework agreements have as their object or effect the prevention, restriction or distortion of competition within the internal market. There is also a risk that CPBs abuse their potential dominant position.3

With that, Section 2 of this chapter commences with a definition of buyer power, including an examination of monopsony power and countervailing power. In continuation hereof, in Section 3, the buyer power assessment will be scrutinized; the buyer power assessment allows for the identification of the suppliers and buyers that are active on the market, and subsequently, it is possible to calculate the market size and market shares for each supplier based on the sales of the relevant products in the relevant area. Lastly, Section 4 rounds off the chapter with a few words on the practical application. This is done to create a frame for establishing which acts of infringements of Articles 101 and 102 TFEU CPBs can be cause.

2. Definition of buyer power

In order for competition law to have an impact on public procurement, it is a precondition that the contracting authority possesses buyer power.4

Many commentators have attempted to make definitions of buyer power, many of which contain different characteristics. One commentator in particular has tried to review the existing definitions in order to come up with a preferred definition that covers the essential characteristics.5 On this basis, the commentator in question asserts that buyer power ought to

1. mirror the traditional definition of market power (i.e. monopoly power) and

3 See more on this in Chapters 12-13, which deal with these issues in depth.