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Buyer Beware! – are purchase price fixing cases exempt from the consumer welfare standard?

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Caveat emptor, buyer beware. A familiar civil law principle that requires buyers to do their pre-contractual due diligence or face the consequences. And, as it happens, also a principle that is increasingly appropriate to describe the caution that professional buyers need to exercise in an antitrust context. Indeed, many stakeholders are calling for enforcement that curbs – or at least takes greater account of – market power on the buyer side.

By way of example, one of the hot topics in the recent VBER consultation and ongoing review is whether the vertical restraints framework needs to strike a fairer balance between the interests of brand-owners on one hand and retailers & market platforms on the other. There is some consensus within the brand-owner community that the current framework has become skewed in favour of the buyer side to a higher extent than what consumer welfare can justify. Another (legislative) example is the recently adopted *Directive on unfair trading practices in the food supply chain* which has the express purpose of strengthening producers' bargaining position against the often large and professional buyers that they face.

When engaging in antitrust punditry, it's easy to fall into the trap of labelling even the slightest cluster of marginally similar cases as being a trend or change in enforcement priority. That said, and with the spotlight on buyer power in mind, we do seem to be spotting quite a few recent, high-profile cases on buyer collusion.

A subcategory of buyer collusion cases – purchase price fixing – is quite clearly at odds with the consumer welfare standard, at least when condemned on a 'by object' basis. Enforcers who want to credibly claim that consumer welfare is the ultimate objective and yardstick behind all enforcement will have difficulty in justifying intervention in these cases.

Spill-over cases vs. purchase price fixing

When seeking to identify the buyer collusion cases that lack a theory of harm based on the consumer welfare standard, it is important, first, to weed out those cases where the buyer aspect is incidental or serves only as background to the infringement. For example, on 4 November 2019, DG COMP announced that it has opened an investigation into possible collusion by two French retailers in a purchasing alliance. In the *press release*, DG COMP states the following:

> "The Commission is concerned that Casino and Intermarché went beyond the purpose of their alliance and engaged in an anticompetitive conduct. In particular, the Commission will investigate whether Casino and Intermarché coordinated their activities on the development of their shop networks and their pricing policy towards consumers."

Judging from the press release, the concern is not the coordination of buying behavior (the upstream conduct) but instead whether this cooperation has *spilled over* into alignment of sales price policies and the locations of new stores (downstream conduct). In these spill-over cases, the cooperation on buying is not instrumental to the theory of harm and the buying alliance is nothing more than the venue in which the suspect behavior occurs.

German long steel

A very recent example of a seemingly pure purchase price fixing case is the Bundeskartellamt's decision of 21 November 2019 in which it fined German car manufacturers EUR 100 million for aligning scrap and alloy surcharges which forms part of the purchase price for steel.

The case summary is not yet available but the Bundeskartellamt's reasoning is quite clearly reflected in President Andreas Mundt's statement in the *press release*:

> "Insofar as the surcharges were no longer negotiated individually with the suppliers as a consequence of these talks, price competition between the companies on these price components was eliminated."

The statement reflects classic 'by object', cartel-infringement language in that economic operators are required to determine independently their commercial policies on the market and are prohibited from replacing the inherent uncertainty about competitors' behavior with cooperation.

Car batteries

The most recent European Commission decision on purchasing price collusion was upheld by the General Court on 23 May 2019 in case T-222/17, *Recyclex and others*. The infringement is described as follows in the original decision:

> "Under normal market conditions, in a market where demand exceeds supply, […] recycling companies would compete with each other as buyers and would therefore generally seek to offer sufficiently high prices to attract the required supply of scrap batteries. However, in the present case, the parties coordinated their pricing behaviour and exchanged information by agreeing on target prices and maximum prices at which to buy from suppliers and by agreeing on intended volumes of purchases." (underlining added)

Again, the language and reasoning is completely aligned with classic cartel decisions in that competitors cannot replace uncertainty and competition with coordination. In the decision, the European Commission presents a counterfactual scenario of sorts by stressing that ordinary competitive dynamics would have resulted in higher prices offered to the suppliers – and that the recycling companies as buyers colluded to curtail this dynamic with the aim of keeping prices low.

Endorsement in the Damages Directive?

The idea that purchase price fixing should be treated in the same way as sales price fixing actually finds some textual support in the Damages Directive as the term 'cartel' as defined in Article 2 includes competitors fixing purchase prices. This, in turn, means that purchase price fixing triggers the presumption of harm under Article 17(2). The presumption of harm in a purchase price fixing case would presumably be an 'undercharge' by the supplier to the buyer which would then be accompanied by a debate on pass-on (or would it be 'pass-off', 'pass-up'?) to the supplier's supplier. Thought experiments on how these cases would play out quickly get quite curious. For example, can suppliers of non-infringing purchasers sue for umbrella purchase pricing in such follow-off damages?

The economics of purchase price fixing

As a layman's rule of thumb, whenever competitors successfully collude, it has the potential to cause a domino effect where the effect caused by the collusion trickles down through each level of the supply chain ultimately ending with consumers. This is the whole premise for antitrust enforcers saying that cartels hurt consumers even when the collusion is not at retail level. However, if inflated prices trickle down and hurt consumers, the reverse must also be true in that deflated prices trickle down and *benefit* consumers. The likelihood of price changes – whether positive or negative – trickling down through the various levels of the supply chain will of course depend on the factors extensively addressed in the 2016 *Study on the passing on of overcharges*. However – all other things being equal – an undercharge as a result of purchase price fixing ought to have the same likelihood of *benefiting* consumers as an overcharge has of *harming* them.

And therein lies the crux of the problem with intervention against purchase price fixing on a 'by object' basis in a world with enforcement based on the consumer welfare standard. You can debate to what extent purchase price fixing will ultimately *benefit* consumers in the same way you can debate whether any cost saving is passed on to consumers. What antitrust enforcers cannot credibly argue, however, is that purchase price fixing is capable of *harming* consumers by its very nature. If buyer collusion is effective, it results in lower purchase prices compared to the counterfactual scenario. If it is ineffective, prices remain the same as in the counterfactual. In no situation, mind you, do prices under such 'buyer cartels' become higher than in the counterfactual which, in turn, means that there is no potential for consumer harm – at least when looking at price as the main competitive parameter.

It therefore begs the question whether purchase price fixing cases like *German steel* and *car batteries* are entirely exempt from the consumer welfare standard (?). Admittedly, buyer collusion carries the potential for other theories of harm to competition such as the buyers achieving such a degree of commonality of (variable) costs that they are in a better position to predict each other's downstream prices. And there is also the foreclosure issue of raising rivals' costs; the so-called 'water bed' effect. However, these border on unrealistic academic theories of harm that cannot possibly justify treating purchase price fixing as a 'by object' infringement.

Is competition an *end* or a *means* to an end?

In the *car batteries* case, the European Commission's reasoning is that buyers cannot bypass the ordinary dynamics of outbidding each other through higher prices in order to obtain scarce supplies. This principle seems to treat competition as an *end in itself* which arguably goes against the general consensus that safeguarding the competitive process is rather a *means* to promote consumer welfare or – depending who you ask – total welfare.

The term 'buyer cartel' is therefore unquestionably a misnomer if enforcement policy and principles for intervention are to be based on the consumer welfare standard. As competition authorities rarely shy away from reminding all stakeholders that enforcement resources are scarce, it is surprising that we still see cases like *car* *batteries* and *German steel* that seem to do very little, if anything, for consumers.

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