"GOOD" AND "BAD" BUYER COLLABORATION – SPOTTING THE DIFFERENCE

BUYER BEWARE: WHEN DOES A BUYING ALLIANCE BECOME A BUYING CARTEL?

Historically, much of European cartel enforcement has focused on sell-side collusion. Cases of sellers, retailers and manufacturers meeting in dark smoky rooms to implement price rises and carve-up markets between them have attracted enormous fines for their obvious competition harms: when those who manufacture and those who sell goods collude rather than compete, consumers invariably suffer (either as direct purchasers or as harms start to cascade down the supply chain).

But what about buy-side collusion? When buyers club together to squeeze better terms from suppliers, does that always mean better outcomes for consumers? Is a bit of buyer power ever a bad thing? Or should suppliers enjoy the benefits of competition just as much as buyers?

Recent cases and guidance have provided some further clarity on the difference between 'good' and 'bad' buyer collaboration.

For example, enforcers have traditionally drawn a distinction between two concepts: **"joint purchasing"**, which will be lawful unless and until an anti-competitive effect can be proven, and a **"buyer cartel"**, which will be presumed to restrict competition. The difference between the two remains elusive, but the CMA and the Commission have both published revised horizontal co-operation guidance (at the time of writing, these are in draft and in final form respectively) which provides some new practical pointers. Their guidance suggests that buyers who are party to a joint purchasing agreement tend to be upfront about this, leaving suppliers in no doubt that they are participating in a joint negotiation. Joint buyers also generally define the form and scope of their cooperation in a formal written document which includes appropriate safeguards and firewalls to prevent collusion on matters outside the remit of joint purchasing. By contrast, in a buyer cartel, suppliers usually unilaterally negotiate with different buyers unaware that each negotiation has effectively been rigged by the buyers behind the scenes. And the parties to a buyer cartel tend to try and leave little written trace of their collusion, lest it be subject to competition law scrutiny. By way of example, in 2020, the Commission fined three ethylene purchasers a total of €260 million for colluding to buy ethylene at the lowest possible price; the cartelists had secretly coordinated their price negotiation strategies behind closed doors and ultimately agreed to settle their case with the Commission to avoid even more serious sanction.

Earlier this year, draft guidance from the CMA on **sustainability agreements** shed further light on how buyer collaboration aimed at furthering environmental goals will be analysed. The draft guidance lists several kinds of joint environmental sustainability initiatives which are "unlikely" to infringe competition law, including when buyers pool information about the environmental sustainability credentials of suppliers or set industry-wide targets for their supply chains. The guidance also suggests that an agreement between buyers to jointly purchase inputs with a low carbon footprint from large suppliers would not restrict competition 'by object'; and nor would an agreement to only purchase from suppliers that sell sustainable products.

The draft guidance documents also provide further pointers on **restrictions** imposed by one buyer alliance **on membership of a rival alliance**. The CMA's draft horizontal co-operation guidance confirms that restrictions on dual membership can be necessary to ensure the pro-competitive effects of buying alliances are realised (insofar as the alliance's buying power may be jeopardised by splinter groups and rival alliances), but can also restrict competition when these restrictions go further than is necessary (e.g. spilling over into requirements for members to purchase all or most of their requirements through the alliance). This guidance is nothing new, but the CMA's recent draft sustainability guidance has reiterated it in a sustainability context, suggesting that such a restriction on dual membership may be necessary in the context of an alliance designed to facilitate joint purchasing of inputs with a low carbon footprint.

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At the same time, recent cases have shown authorities provide further insights on the circumstances in which buyer collusion will be unacceptable.

For example, authorities have closely scrutinised purchasing alliances to ensure they are not also used as a **forum for seller collusion**. In 2021, the Belgian authority secured commitments from Carrefour Belgium in relation to its purchasing alliance with Provera Belux. The commitments, which included Carrefour divesting its entire purchasing department to a separate entity, ensured that information exchanged between the two would strictly relate to the buying arrangement only. And in 2017, the Commission was only too eager to open an investigation into the INCAA purchasing alliance and its members (Casino and Intermarché). The Commission carried out dawn raids over suspicions that the alliance was also being used to coordinate the development of their shop networks and pricing policy towards customers. In March 2023, the Commission's initial inspection decisions were annulled by the Court of Justice, which concluded that the Commission had not respected key procedural rights during the course of its investigation. Although this led to the closure of the Commission's investigation, the case nevertheless demonstrates a willingness within Brussels to challenge buyer collaboration. Although the alliance had applied only in France, the Commission took on the case itself because of its belief that it was an example of a broader systemic issue across Europe.

Antitrust scrutiny has also increased over buyer collusion in an **employer employee context**. Earlier this year, the CMA published guidance warning employers against entering into 'no-poach' agreements (where two or more businesses agree not to approach or hire each other's employees) and wage-fixing agreements (where two or more businesses agree to fix employees' pay or other employee benefits). The CMA has made it clear that it considers these kinds of agreements to unacceptably harm competition for employees and place downward pressure on wages, regardless of the benefits this may have for an employer's bottom line.

In the **current inflationary environment**, the CMA has explicitly stated that competition law enforcement relating to cost of living issues is a key priority. Earlier this month, it published an update confirming that it is looking closely at the prices being charged by retailers for fuel at the pump and groceries at the till; the update makes clear that the CMA will be looking at competition at all levels of the market (the CMA followed this up with an open letter to the groceries sector reiterating similar themes). And in a recent speech, Commissioner Vestager heralded a "new era of cartel enforcement" in which atypical cartels would become an increasing focus, specifically calling out buyer cartels and employer collusion. In light of these trends, we expect buyer collusion to be examined **ever more closely** – both for their pro-competitive effects (e.g. securing better prices from those higher up the chain) and also their potential for consumer harm.

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