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Purchasing Power and Buyers' Cartels – Note by the European Union

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Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

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European Union

1. Introduction

1. Competition law scrutiny is often focused on the behavior of sellers or suppliers. Still, the conduct of buyers may also require attention especially when they are teaming up to bring down purchasing prices. First, buyer cooperation may amount to outright cartel behavior that deserves the same enforcement priority as more traditional seller cartels. Secondly, agreements between competing buyers may bring a useful counterweight to sellers' bargaining power and consequently constrain price increases, which is particularly relevant in a context of high inflation. Finally, specific legislation based on fairness considerations has recently been adopted at EU level to protect smaller suppliers in their relations with stronger buyers in the agricultural and food supply chain. This contribution touches upon each of these three scenarios and describes the way in which these issues are addressed at EU level.

2. Enforcement of buyer cartels

2. While in a seller price-fixing cartel the companies involved agree to increase prices charged downstream, a buyer cartel addresses the opposite scenario where companies collude to reduce the purchase price paid to their upstream suppliers. Even if buyer cartels are less common in the European Commission's ('the Commission') enforcement practice, EU competition law makes no distinction between cartels among sellers and those among buyers. In fact, the cartel prohibition in Article 101 of the Treaty on the Functioning of the European Union ('TFEU') explicitly mentions as examples of prohibited types of agreements, those that "*(a) directly or indirectly fix purchase or selling prices or any other trading conditions"* and those that *"(c) share markets or sources of supply*" (emphasis added).

3. Buyer cartels belong to the category of "by object" restrictions of competition. Already some twenty years ago, the Commission sanctioned a number of agreements between buyers to fix maximum purchase prices for raw tobacco paid to growers or packers in Spain[1] and in Italy.[2] In both cases, the General Court equated the agreements among

[1] Commission decision of 20 October 2004, case AT.38238 – Raw Tobacco Spain, https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_38238. The Commission's decision was upheld on appeal but the General Court reduced some of the fines, see Judgment of 27 October 2010, *Alliance One v Commission*, T-24/05, EU:T:2010:453; Judgment of 8 September 2010, *Deltafina v Commission*, T-29/05, EU:T:2010:355; Judgment of 3 February 2011, *Cetarsa v Commission*, T-33/05, EU:T:2011:24; Judgment of 12 October 2011, *Agroexpansión v Commission*, T-38/05, EU:T:2011:585; Judgment of 8 March 2011, *World Wide Tobacco España v Commission*, T-37/05, EU:T:2011:76. The judgments of the General Court were all upheld on appeal by the Court of Justice, see Order of 12 July 2011, *Deltafina v Commission*, C-537/10 P, EU:C:2011:475; Judgment of 12 July 2011, *Cetarsa v Commission*, C-181/11 P, EU:C:2012:455; Judgment of 26 September 2013, *Alliance One v Commission*, C-668/11 P, EU:C:2013:614; Order of 3 May 2012, *World Wide Tobacco España v Commission*, C-240/11 P, EU:C:2012:269; Judgment of 19 July 2012, *Alliance One (formerly Standard Commercial Corp) and Standard Commercial Tobacco v Commission*, C-628/10 P and C-14/11 P, EU:C:2012:479.

[2] Commission decision of 20 October 2005, case AT.38281 – Raw Tobacco Italy, https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_38281

buyers with clear-cut 'price cartel' type infringements of the competition rules "*since they involve direct interference with the essential parameters of competition on the relevant market*".[3]

2.1. Recent enforcement practice against buyer cartels

4. Two recent cases illustrate the Commission's approach to buyer cartels.

5. The first recent case, Car Battery Recycling, concerns a Commission decision from 2017 prohibiting a cartel among four battery-recycling companies fixing the purchase prices of scrap lead-acid automotive batteries paid to scrap dealers and collectors for used car batteries in Belgium, France, Germany, and the Netherlands from 2009 to 2012.[4] Three participants received fines totalling €68 million whereas the fourth company was not fined because it revealed the existence of the cartel to the Commission under its leniency program. Battery-recycling companies purchase used automotive batteries (from cars, vans or trucks) from scrap dealers or scrap collectors. These mostly small and medium-sized operators obtain used batteries from collection points such as garages, maintenance and repair workshops, battery distributors, scrapyards and other waste disposal sites. Recycling companies buy these used batteries from scrap dealers and scrap collectors and carry out a treatment and recovery of scrap batteries and sell recycled lead, mostly to battery manufacturers, who use it to make new car batteries.

6. The Car Battery Recycling cartel aimed at coordinating the purchase price policy through the fixing of target prices, maximum prices and fixed-amount price reductions, mainly through exchanging commercially sensitive information. In doing so, the cartelists lowered the value of used batteries sold for scrap to the detriment of used battery sellers and disrupted the normal functioning of the scrap battery purchasing market by preventing competition on price. The three fined companies challenged the Commission decision in court but, in 2019, the General Court of the European Union ('General Court') dismissed the appeals and upheld the Commission decision in full, including on the fines.[5] In its judgment, the General Court held that "*such coordination of purchase prices, with the aim of reducing or preventing their increase and thus, ultimately, increasing the cartel participants' profit margins, reveals a sufficient degree of harm to competition that there is no need to examine its effects*".[6] It added with specific reference to the first example in Article 101(1)(a) TFEU that "*it involves inherent restrictions on competition in the internal market*".

7. In 2020, the Commission sanctioned a second buyer cartel, this time on the ethylene merchant market and imposed fines totalling €260 million on three companies engaging in

[3] Judgment of 8 September 2010, *Deltafina v Commission*, T-29/05, EU:T:2010:355, paragraph 239; Judgment of 5 October 2011, *Romana Tabacchi v. Commission*, T-11/06, EU:T:2011:560, paragraph 83; Judgment of 5 October 2011, *Transcatab v Commission*, T-39/06, EU:T:2011:562, para 160.

[4] Commission Decision of 8.2.2017 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union (AT.40018 – Car battery recycling), C(2017) 900 final, see https://ec.europa.eu/competition/antitrust/cases/dec_docs/40018/40018_2611_3.pdf

[5] See Judgment of 23 May 2019, *Recylex*, T-222/17, EU:T:2019:356; Judgment of 7 November 2019, *Campine*, T-240/17, EU:T:2019:778; The judgment of General Court in Recylex was upheld by the European Court of Justice, see Judgment of 3 June 2022, *Recylex*, C-563/19 P, ECLI:EU:C:2021:428.

[6] Ibid., *Campine*, paragraph 297 and 305.

purchase price coordination.[7] As in the previous Car Battery Recycling cartel, a fourth company involved in the Ethylene cartel did not receive a fine as it revealed the cartel to the Commission under its leniency program. Moreover, all four companies acknowledged their involvement in the collusion to buy ethylene at the lowest possible price and agreed to settle the case. Clariant, the cartelist receiving the highest fine, partly due to a 50% increase for recidivism, appealed the settlement decision before the General Court where the case is currently pending.[8]

8. Ethylene purchasers usually buy ethylene under supply agreements. As the purchase price of ethylene is very volatile, in order to reduce risks, ethylene supply agreements often contain a pricing formula that is (at least partially) based on a so-called "Monthly Contract Price" ('MCP'). The MCP is an industry price reference resulting from individual negotiations between ethylene buyers and sellers. During the process of establishing the MCP in the period from December 2011 to March 2017, the four ethylene purchasers colluded to lower the MCP of ethylene to the detriment of ethylene sellers. They coordinated their price negotiation strategies before and during their bilateral MCP 'settlement' negotiations with ethylene sellers to push the MCP down to their advantage. In addition, they also exchanged price-related information.

9. These two recent cases are a useful reminder for companies that buyer cartels do not enjoy a more lenient treatment by the Commission than the more commonly enforced seller cartels. As the explicit example in Article 101(1)(a) TFEU confirms, buyer cartels have been prohibited from the start in the same way as seller cartels. Therefore, the Car Battery Recycling and Ethylene cases do not represent a novelty in the Commission's enforcement practice.

10. For completeness, also the Dutch Bitumen case from 2006 included an agreement among buyers, but unlike the other buyer cartels, it was not a traditional agreement to fix the purchase price at which the cartelists would buy the product.[9] Instead, the cartel included both bitumen suppliers and some buyers, namely large road construction companies in the Netherlands. The cartelists fixed, on the seller side, the gross price of road pavement bitumen and the eight suppliers of bitumen agreed with six involved buyers uniform minimum rebates and a smaller maximum rebate for all other road builders that were not part of the cartel arrangement. This restricted price competition and disadvantaged

[7] Commission decision of 14 July 2020, case AT.40410 - Ethylene, recitals 38 and 39, https://ec.europa.eu/competition/antitrust/cases/dec_docs/40410/40410_1654_6.pdf.

[8] See pending appeal in case T-590/20.

[9] Commission decision of 13 September 2006 in case AT.38456 – Bitumen Nederland, https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_38456

smaller road building companies. The General Court dismissed 14 out of 16 appeals against the Commission decision in their entirety[10] and reduced the fines in two instances.[11]

11. As with all cartels pursued by the Commission, such agreements between buyers are qualified as by object infringements of the cartel prohibition in Article 101 TFEU. The EU Courts have regularly confirmed their by object nature in the abovementioned cases.[12] This has important consequences for the assessment of such cases. It means that there is no need for the Commission to demonstrate effects on competition, neither upstream nor downstream. Indeed, according to established case law, a horizontal price-fixing cartel reveals in itself a sufficient degree of harm to competition so that it is not necessary to assess its effects. In practical terms, the Commission does not need to define any relevant markets in such cases,[13] nor to consider market shares of the involved buyers or the affected sellers. Agreements that have an anti-competitive object constitute, by their nature and independently of any concrete effect that they may have, an appreciable restriction on competition.[14] Finally, parties to an agreement that is regarded as restrictive by object may still defend it under Article 101(3) TFEU by claiming efficiencies. However, the burden of proof is on them to provide convincing evidence demonstrating such benefits and that also the other requirements of Article 101(3) are satisfied.

12. Buyer cartels face the same practical challenges in terms of investigation as seller cartels. Cartels are mostly operated in a clandestine fashion. The leniency tool, information from whistle-blowers, unannounced inspections, including inspections of private homes, and improving detection technology to secure evidence on fast evolving communication channels, are important instruments also for uncovering buyer cartels.

[10] See Judgment of 27 September 2012, *Total SA v Commission*, T-344/06, EU:T:2012:479; Judgment of 27 September 20122012, *Nynäs Petroleum v Commission*, T-347/06, EU:T:2012:480; Judgment of 27 September 2012, *Total Nederland v Commission*, T-348/06, EU:T:2012:481; Judgment of 27 September 2012, *Dura Vermeer Groep v Commission*, T-351/06, EU:T:2012:482; Judgment of 27 September 2012, *Dura Vermeer Infra v Commission*, T-352/06, EU:T:2012:483; Judgment of 27 September 2012, Vermeer *Infrastructuur v Commission*, T-353/06, EU:T:2012:484; Judgment of 27 September 2012, *BAM NBM Wegenbouw v Commission*, T-354/06, EU:T:2012:485; Judgment of 27 September 2012, *Koninklijke BAM Groep v Commission*, T-355/06, EU:T:2012:486; Judgment of 27 September 2012, *Koninklijke Volker Wessels Stevin v Commission*, T-356/06, EU:T:2012:487; Judgment of 27 September 2012, *Koninkliijke Wegenbouw Stevin (KWS) v Commission*, T-357/06, EU:T:2012:488; Judgment of 27 September 2012, *Heijmans Infrastructuur v Commission*, T-359/06, EU:T:2012:489; Judgment of 27 September 2012, *Heijmans NV v Commission*, T-360/06, EU:T:2012:490; Judgment of 27 September 2012, *Ballast Nedam Infra v Commission*, T-362/06, EU:T:2012:492 ; and Judgment of 27 September 2012, *Kuwait Petroleum Corp v Commission*, T-370/06, EU:T:2012:493.

[11] The General Court reduced the fine imposed on Shell as it was not convinced by the Commission's claim that Shell had played the role of instigator and leader in the cartel. See Judgment of 27 September 2012, *Shell Petroleum NV v Commission*, T-343/06, EU:T:2012:478. In addition, the Court of Justice reduced Ballast Nedam's fine due to a procedural error. See Judgment of 27 March 2014, *Ballast Nedam v Commission*, C-612/12 P, EU:C:2014:193.

[12] See above fn. 3 and 7.

[13] Especially where there are no doubts that the cartel is able to affect trade between Member States. See to that effect the Judgment of 30 March 2022, *Air Canada*, T-326/17, EU:T:2022:177, paragraph 287.

[14] Judgment of 13 December 2012, *Expedia*, C-226/11, EU:C:2012:795, paragraph 37.

2.2. Fines calculation in buyer cartels

13. The Commission applies the same methodology as for other infringements of the EU competition rules, currently the 2006 Guidelines on fines,[15] when imposing fines on participants in a buyer cartel. However, it may require establishing a proxy for the affected purchases in a buyer cartel. The recent decisions by the Commission in the Car Battery Recycling and Ethylene cartels applied such approach.[16] The Court confirmed that the Commission can rely on the relevant value of purchases, instead of the value of sales, as a starting point for the fines calculation.[17] The Commission determines an amount of the relevant value of purchases (related to the investigated infringement) reflecting the gravity of the infringement, multiplied by the number of years that the respective cartelist participated in the infringement ("duration multiplier"). An entry fee, a one-time increase for participation in a cartel, is added to arrive at the basic amount of the fine before taking into account any possible further adjustments related to mitigating and aggravating circumstances.

14. In the two recent buyer cartel cases, the Commission applied an upward adaption of the basic amount under point 37 of the 2006 Guidelines on fines. The application of the uplift was confirmed by the General Court in the *Campine* and *Recylex* judgments.[18] The Court agreed that the value of purchases in a buyer cartel constitutes an imperfect basis for ensuring a sufficiently deterrent fine in comparison to seller cartels. While a seller cartel is generally aimed at increasing or maintaining sales prices, the purpose of a buyer cartel to the contrary is to prevent an increase of or to reduce the purchasing price. Therefore, the more successful a buyer cartel is, the lower the amount of the value of purchases and, thus, the amount of the fine would be. This makes it unlikely that the value of purchases will be an appropriate proxy for reflecting the economic importance of the infringement. Additionally, the Court noted that in an operating company, purchases are lower than sales in value terms, thus giving a systematic lower starting point for the calculation of the basic amount of the fine in the case of a buyer cartel. Following this judgment, the Commission applied the same uplift in the Ethylene case. An appeal is currently pending specifically on this point of the Ethylene settlement decision.[19]

3. Horizontal Guidelines – dedicated chapter on purchasing agreements

15. Contrary to illegal buyer collusion harming the proper functioning of normal competition, certain forms of cooperation among buyers may also bring benefits. Indeed, by pooling their purchasing power, buyers can try to obtain better prices and/or terms and conditions from suppliers, which can also benefit consumers. In its 2011 Guidelines on

[15] OJ C 201 of 1.9.2006, p.2.

[16] Commission decision of 14.7.2020 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union - AT.40410 – Ethylene, recitals 38 and 39, https://ec.europa.eu/competition/antitrust/cases/dec_docs/40410/40410_1654_6.pdf.

[17] See above fn. 5.

[18] Ibid., *Campine*, paragraph 349, *Recylex*, paragraph 126.

[19] See above fn. 8.

horizontal cooperation agreements ('Horizontal Guidelines' or 'Guidelines'),[20] the Commission dedicates a specific chapter to the analysis of joint purchasing agreements in which it explicitly recognizes that such agreements usually aim at the creation of buying power which can lead to lower prices or better quality products or services for consumers. However, the Horizontal Guidelines also identify certain competition concerns linked to buyer cooperation such as increased prices, reduced output, product quality or variety, or innovation, market allocation, or anti-competitive foreclosure of other possible purchasers. With these Horizontal Guidelines, the Commission aims to provide appropriate guidance to companies involved in such buyer cooperation as to how they can self-assess such agreements, to which they are or want to become a party, under Article 101 TFEU.

3.1. Ongoing review of the chapter on purchasing agreements

16. The Horizontal Guidelines, including the specific chapter on purchasing agreements, are currently subject to a review process. On 1 March 2022, the Commission published draft revised Horizontal Guidelines for stakeholder comments by 26 April 2022.[21] The public consultation aimed at gathering stakeholder feedback on the changes the Commission proposes to address the issues identified in the evaluation of the rules current in force. The consultation triggered more than 100 contributions from stakeholders with comments and feedback on the draft texts.[22] Not all of these contributions address the chapter on purchasing agreements. The Commission is currently reviewing all the feedback received and will assess whether and how to integrate it in the final version of the Horizontal Guidelines that are foreseen to be adopted by the end of 2022. In view of the ongoing review, this contribution will provide a general overview of the chapter on purchasing agreements in the Guidelines and make specific reference to certain changes proposed in the draft revised Horizontal Guidelines when relevant.

17. The review of the Horizontal Guidelines started in 2019 with an evaluation. In that context, the Commission sought feedback from stakeholders about their experience in applying the guidelines and the legal certainty they provide. The evaluation showed that the chapter on purchasing agreements is generally perceived as a useful instrument in terms of providing such legal certainty.[23] However, stakeholders considered that the guidance on purchasing agreements should take into account recent market developments, in particular reflecting the increased importance of retail alliances in the EU,[24] and give more consideration to potential negative effects on upstream suppliers. In addition, stakeholders requested to increase the safe harbour for purchasing agreements by raising the market share thresholds in line with other areas of EU competition law. Finally, stakeholders also indicated that it lacks clarity, in particular, on the distinction between legitimate

[20] Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.1.2011, p. 1, paragraph 194.

[21] See https://ec.europa.eu/competition-policy/public-consultations/2022-hbers_en

[22] The stakeholder contributions will be published together with a summary under the abovementioned link.

[23] Commission Staff Working Document of 6 May 2021, Evaluation of the Horizontal Block Exemption Regulations, SWD(2021) 103 final, page 51. See https://ec.europa.eu/competition-policy/system/files/2021-05/HBERs_evaluation_SWD_en.pdf

[24] Such alliances are defined in para 196 of the Horizontal Guidelines as an association of undertakings formed by a group of retailers for the joint purchasing of products.

cooperation among buyers through joint purchasing agreements, and illegal buyer cartels. Many of the stakeholders explicitly referred to the enforcement practice by the Commission in the Car Battery Recycling and Ethylene buyer cartels as a source of this legal uncertainty.

3.2. Distinction between buyer cartels and purchasing agreements

18. The distinction between purchasing agreements and buyer cartels is currently addressed in paragraphs 205 and 206 of the Horizontal Guidelines. The guidance indicates that agreements between buyers that do not truly concern joint purchasing but serve as a tool to engage in a disguised cartel restrict competition by object. Moreover, agreements involving the fixing of purchase prices *can* have the object of restricting competition within the meaning of Article 101(1) TFEU. In other words, if a joint purchasing agreement is used to cover up a cartel between buyers, on the upstream purchasing or downstream selling market, this is clearly problematic. However, the current somewhat limited guidance leaves the delicate element of the distinction untouched, namely that both buyer cartels and purchasing agreements usually involve an agreement on purchasing prices among buyers. So when does such agreement between buyers on the purchasing price qualify as a buyer cartel restricting competition by object and when does it require a proper effects assessment before one can conclude that it is problematic from a competition enforcement point of view?

19. In order to come up with a clear and well considered answer to this question, the Commission decided to seek independent expert advice combining an academic and practitioner's view to assist it in providing more detailed guidance and increased legal certainty for companies involved or considering participating in joint purchasing agreements. The experts' report is published on the Commission's website and accompanied by a useful case overview of buyer cartels and purchasing agreements investigated by the Commission, the national competition authorities of the EU Member States and from certain third countries, together with relevant case law.[25] Based on this case analysis and a literature review, the report proposes a definition of 'buyer cartel' and 'joint purchasing agreement', and suggests a framework of analysis for distinguishing agreements restricting competition by object from those that may have restrictive effects on competition pursuant to Article 101 TFEU.

20. According to the report, in the case of a buyer cartel, undertakings agree with one another on how they will *individually* interact with suppliers, or they exchange commercially sensitive information with one another about how they will *individually* deal with suppliers, thus removing competitive uncertainty that would otherwise have existed between them. By contrast, a joint purchasing agreement involves a common organisation representing purchasers and acting as interface with suppliers. The essence of joint purchasing is that a group of purchasers, by bargaining *collectively or jointly* through a negotiator acting on behalf of its members, seeks to negotiate more favourable terms and conditions than would have been obtained if each purchaser had acted alone. This distinction between both types of agreements also explains the difference in treatment of what in both situations can involve an agreement fixing purchasing prices. Such fixing or sharing of (maximum) purchase prices or minimum rebates among the participants in a buyer cartel, that each member of the cartel individually negotiates or agrees with the supplier, amounts to a restriction of competition by object. Conversely, an agreement fixing

[25] Richard Whish and David Bailey, Horizontal Guidelines on purchasing agreements: Delineation between by object and by effect restrictions, Luxembourg, Publications Office of the European Union, 2022, available at https://ec.europa.eu/competition-policy/system/files/2022-03/kd0722013enn_purchasing_agreements.pdf

the (maximum) purchase price or minimum rebate that a joint purchasing arrangement can collectively negotiate or agree on behalf of its members with a supplier, requires an assessment of the overall restrictive effects on competition that the purchasing agreement is likely to give rise to.

21. The report also usefully confirms, based on the case review conducted, that while buyer cartels have been fined, both within the EU and in third countries, no fine has been imposed in a case of joint purchasing where purchasers exercised their bargaining power collectively. Therefore, the report concludes that the category of by object restrictions should be limited to buyer cartels and suggests that joint purchasing should always require effects analysis. More specifically, according to the report, the category of object restrictions would include agreements on, or the exchange of information about:

- maximum prices to be paid, including agreements on elements of prices, discounts and other aspects of prices;
- price negotiation strategy, such as regular updates among buyers about the status of their separate negotiations with the supplier(s);
- the parties' joint evaluation of market trends, price developments and factors relevant for the purchase price formation;
- terms and conditions;
- sources of supply, both as to suppliers and territories;
- volumes and quantities;
- quality;
- other parameters of competition, for example innovation and sustainability.

22. Finally, the expert report confirms that none of the following factors are relevant for characterising a purchasing agreement as by object restrictive of competition: (i) whether the buyers are competing downstream, (ii) the aggregated share of the buyers in total demand in the (upstream) purchasing market, (iii) the degree of concentration of sellers in the (upstream) purchasing market; and (iv) the aggregated market share of the buyers in the (downstream) selling market. The report clarifies that also secrecy, namely the fact that the buyer cooperation is secret towards suppliers, is irrelevant for qualifying it as a restriction by object or effect. Indeed, in its judgment in *BIDS* the Court of Justice found that an agreement to reduce the total capacity of the Irish beef processing industry had the object of restricting competition, even though the agreement was in the public domain and had the support of the Irish government.[26] However, secrecy may have an influence on the level of the fine in a buyer cartel case as a factor that can accentuate the gravity of the infringement.[27]

23. In its review of the chapter on purchasing agreements, the Commission took account of the recommendations in the expert report, the earlier mentioned stakeholder feedback, and the NCAs' and its own enforcement experience. This resulted in more extensive guidance in the draft revised Horizontal Guidelines on the distinction between restrictions of competition by object and those that require an effects analysis. In short, the

[26] Judgment of 20 November 2008, *Beef Industry Development and Barry Brothers*, C-209/07, EU:C:2008:643.

[27] Judgment of 9 September 2011, *Deltafina SpA v Commission*, T-12/06, EU:T:2011:441, para 239, upheld on appeal by judgment of 12 June 2014, *Deltafina v Commission*, C-578/11 P, EU:C:2014:1742.

draft revised chapter clarifies that buyer cartels qualify as by object restrictions that have to be distinguished from purchasing agreements requiring an effects assessment. The distinguishing factor between a genuine purchasing agreement and a buyer cartel is whether the buyers, be it together or through a type of intermediary, collectively negotiate and conclude an agreement with a supplier. Conversely, if each buyer interacts individually with a supplier while coordinating its behaviour with other buyers, for example on their price negotiation strategy or through exchanges on the status of their individual negotiations, this amounts to a buyer cartel. In other words, the distinguishing factor is whether buyers present themselves jointly to a supplier in their negotiations or purchases or whether they seemingly act individually but nevertheless coordinate their behaviour with other buyers.

24. In order to assist companies in their self-assessment of the agreements that they are or want to become party to and especially to avoid being involved in a buyer cartel, the draft revised Horizontal Guidelines provide some further elements for companies to consider. First, buyers should check, when an intermediary is respresenting them, whether the latter has made it clear to suppliers that it jointly negotiates and binds its members on terms and conditions of their individual purchases or purchases jointly for them. This is to ensure transparency in the commercial relations between buyers and suppliers and to avoid any doubts on the side of a supplier as to whom he is dealing with and what the buyer group represents in terms of economic strenght. Consequently, in practice, genuine joint purchasing agreements will most likley never be secret as the supplier should normally know, even in case of an intermediary on the buyer side, that he is dealing with several buyers at the same time. Therefore, all secret agreements or exchanges of information among buyers are likely to amount to a by object restriction while the opposite, namely the fact that a certain buyer cooperation is public, does not shield it from a by object qualification. In other words, secrecy is not a distinguishing factor but it can certainly provide an indication. Secondly, parties to a joint purchasing agreement should consider whether it is useful to define the form of their cooperation, its scope and its functioning in a written agreement. In case later on disputes arise, compliance of such agreement with Article 101 TFEU can be verified more easily and checked against its actual operation. Of course, it should be borne in mind that such written agreement cannot shield a purchasing agreement from competition law scrutiny. At least, there would be a framework in place against which its lawfulness can be assessed.

25. Finally, the draft revised chapter on purchasing agreements identifies two additional categories of object restrictions. First, it covers the situation where a purchasing agreement is used by the buyers involved as a tool to engage in a disguised seller cartel on the downstream selling market or markets. The Commission is currently investigating such case involving potential downstream coordination by supermarkets in the framework of their upstream buying alliance.[28] Secondly, an agreement between purchasers to exclude another purchaser from the same level of the market qualifies as a collective boycott and also amounts to a restriction of competition by object. The Commission so far has had no experience with this type of constellation specifically in the context of purchasing agreements.

3.3. Purchasing agreements assessed by effect

26. Apart from addressing the distinction between buyer cartels and joint purchasing agreements, the Horizontal Guidelines also provide a framework for assessing such

[28] See https://ec.europa.eu/commission/presscorner/detail/it/ip_19_6216

purchasing agreements. It notes that these can take many different forms. Joint purchasing can happen through a jointly controlled company, a company in which the different purchasers have non-controling stakes, or through even looser types of intermediaries or forms of cooperation. Such buyer cooperation does not require any (prior) authorisation or registration in order to be lawful. To the contrary, with the abolition in 2004 of the notification system for agreements at EU level, companies operating in the EU are required to self-asses the compliance with Article 101 TFEU of the agreements that they enter into and the Horizontal Guidelines are designed to help them in conducting such self-assessment.

27. The revised draft Horizontal Guidelines explicitly note that purchasing agreements can be found in all sectors of the economy and can cover both the purchase of inputs that companies use for their own production activities as well as of products that are simply resold by purchasers. Moreover, the draft revised Guidelines also indicate that the same type of assessment applies not only to actual joint purchasing from a supplier but also to joint negotiations by groups of buyers of certain terms and conditions with a supplier under which they subsequently purchase the products individually. This is, for example, the case in the retail sector where the actual purchases on a weekly or similar basis are done individually based on certain jointly negotiated terms and conditions in the context of a retail alliance.

28. The Guidelines make clear that joint purchasing agreements, unlike buyer cartels, have to be analysed in their legal and economic context with regard to their actual and likely restrictive effects on competition. Such effects analysis should cover the negative effects on both the upstream purchasing market or markets, where the joint purchasing arrangement interacts with suppliers, and on the downstream selling market or markets, where the parties to the purchasing agreement may compete as sellers. The Guidelines, however, recognise that joint purchasing agreements are less likely to give rise to competition concerns when the parties do not have market power on the downstream selling market or markets. Therefore, where competing purchasers co-operate who are not active on the same relevant downstream selling market, joint purchasing is unlikely to have restrictive effects on competition unless the parties have a market position in the upstream purchasing markets that is likely to be used to harm the competitive position of other players in their respective downstream selling markets.

29. The Guidelines do not set an absolute threshold above which it can be presumed that the parties to a joint purchasing agreement have market power so that the joint purchasing arrangement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1) TFEU. To the contrary, they explicitly foresee a soft safe harbour for purchasing agreements below which the parties are presumed not to have market power. The soft safe harbour in the Guidelines applies when the parties to a joint purchasing agreement have a combined market share not exceeding 15% on both the purchasing market or markets and the selling market or markets. In such scenario it is likely that the conditions for an exemption under Article 101(3) TFEU are fulfilled. However, this does not automatically imply that a joint purchasing agreement where the parties have a combined market share above 15% in one or both relevant markets, is likely to give rise to restrictive effects on competition. It only means that in such situation where they exceed 15% market share on any of the relevant markets, a detailed assessment of the effects of their purchasing agreement on the market(s) needs to be carried out. While many stakeholders have called on the Commission to increase the soft safe harbour to a combined market share of at least 20% but even going up to 30%, the revised draft Horizontal Guidelines maintain it at the currently foreseen 15% combined market share.

30. The draft revised Horizontal Guidelines address two other points that have been raised by stakeholders and that in particular relate to recurring discussions between, on the one hand, retailers and their retail alliances and, on the other hand, large brand manufacturers. These concern the assessment of certain bargaining practices, such as so-called collective delisting, by retail alliances and the need to assess potential upstream harm to suppliers as a result of purchasing agreements, instead of mainly focussing on downstream benefits for consumers.

31. Retail alliances have attracted particular attention at EU level in the legislative process leading up to the adoption of the Directive on unfair trading practices in business-to-business relationships in the agricultural and food supply chain,[29] that will be briefly touched upon in the next section, and continue to raise concerns from the European Parliament.[30] In response to the initial call from the Parliament, the Commission organized a workshop on retail alliances in the agricultural and food supply chain, gathering all relevant stakeholders. The findings of the workshop are compiled in a JRC Report.[31] The report concluded that the current EU legal framework provides adequate tools to address potential concerns about the practices of retail alliances and to protect both consumers and suppliers. Such tools include Article 101 TFEU and the accompanying guidance in the chapter of the Horizontal Guidelines on purchasing agreements, and legislation on unfair trading practices both at EU and national level.[32] However, given the limited case law and practice regarding the potential harm to upstream suppliers, the JRC Report suggested to give increased attention and orientation for this issue in guidelines by competition authorities.

32. In light of the feedback received in the evaluation and the JRC Report, the revised draft Horizontal Guidelines give more prominence to potential scenarios of upstream harm to suppliers from purchasing agreements where the parties have a significant degree of buying power on the purchasing market. Such jointly exercised buying power may harm investment incentives and force suppliers to reduce the range or quality of products they produce. This may bring about restrictive effects on competition such as quality reductions, lessening of innovation efforts, or ultimately sub-optimal supply. The draft revised chapter indicates that such risk of discouraging investments or innovations benefitting consumers may be larger for large purchasers that jointly account for a large proportion of purchases

[29] European Parliament legislative resolution of 12 March 2019 on the proposal for a directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain, Annex to the legislative resolution (COM(2018)0173 – C8-0139/2018 – 2018/0082(COD), available at: http://www.europarl.europa.eu/doceo/document/TA-8-2019-0152_EN.html

[30] See European Parliament Resolution of 5 May 2022 on competition policy – annual report 2021 (2021/2185(INI)), point 73, available at https://www.europarl.europa.eu/doceo/document/TA-9-2022-0202_EN.pdf

[31] See Colen, L., Bouamra-Mechemache. Z., Daskalova, V., Nes, K., Retail alliances in the agricultural and food supply chain, EUR 30206 EN, European Commission, 2020, ISBN 978-92-76-18585-7, doi:10.2760/33720, JRC120271, available at https://publications.jrc.ec.europa.eu/repository/handle/JRC120271, referred to as 'JRC Report'. The report defines retail alliances as horizontal alliances of retailers, retail chains or retailer groups that cooperate in pooling some of their resources or activities, most importantly relating to sourcing supplies.

[32] Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, OJ L111, 25.4.2019, p. 59.

– in particular when dealing with small suppliers. It is less likely to occur if suppliers have a significant degree of countervailing seller power (which does not necessarily amount to dominance) on the purchasing market or markets, for example, because they sell products or services that purchasers need to have in order to compete on the downstream selling market or markets.

33. At the same time, the draft revised Guidelines clarify how to deal with threats by, for example, retail alliances in their joint negotiations with suppliers to abandon negotiations or to temporarily stop purchasing certain products unless they are offered better terms or lower prices. Such threats should not be looked at in isolation but considered as part of a wider bargaining process. According to the draft revised Guidelines, they do not usually amount to a restriction of competition by object and any negative effects arising from such collective threats will have to be assessed in the light of the overall effects of the joint purchasing agreement.

4. Specific rules on fairness in contractual relations with stronger buyers in the agricultural and food supply chain

34. The issue of bargaining power of buyers and, in particular, of imbalances in bargaining power between strong buyers and weaker suppliers have been discussed for a long time at EU level specifically as regards the food supply chain.[33] The resulting imbalances in bilateral trading relationships only rarely amount to an infringement of competition law. Still, such situations may merit being addressed through other policy tools, such as contract law or unfair commercial practices rules.

35. On 17 April 2019, the European Parliament and the Council adopted such specific legislation in the form of Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain ('the Directive').[34] The Directive is introduced on the agricultural legal basis of the Treaty (Article 43 TFEU) and is not at all linked to competition policy. It aims to afford protection along the entire agricultural and food supply chain by protecting certain suppliers selling agricultural products and products processed from these products for use as food.

36. The Directive takes into account the negative impact of unfair trading practices for farmers both as direct victims of such practices but also as indirect victims of a possible cascading effect of such practices when they occur further downstream in the food supply chain.[35] Many EU Member States had already certain national rules in place or promoted various forms of self-regulation before the Directive was adopted. The adoption of rules at

[33] See High Level Forum for a Better Functioning Food Supply Chain (2011), led by the European Commission, which endorsed a set of principles of good practice in vertical relations in the food supply chain, agreed by organisations representing most operators in the food supply chain. This led to the launch of the Supply Chain Initiative in 2013. The following are some recent interventions: by the European Parliament: Resolution of 7 June 2016 on unfair trading practices in the food supply chain; by the Council: Conclusions of 12 December 2016 on Strengthening farmers' position in the food supply chain and tackling unfair trading practices; by the Commission: Communication of the Commission of 28 October 2009 on a better functioning of the food supply chain in Europe; Communication of the Commission of 15 July 2014 on tackling unfair trading practices in the business-to-business food supply chain; and Report of the Commission of 29 January 2016 on unfair business-to-business trading practices in the food supply chain.

[34] See above fn 34.

[35] Recital 7 of the Directive.

the EU level introduces a minimum harmonisation and avoids further fragmentation of the legal framework.[36]

37. The Directive provides for the protection of weaker suppliers against stronger buyers, which includes any supplier of agricultural and food products with a turnover of up to €350 million, with differentiated levels of protection provided below that threshold.[37] The protection offered by the Directive depends on the relative size of the companies and relies on a so-called 'step approach' based on turnover figures which serve as a proxy to reflect the difference in bargaining power of suppliers and buyers (Article 1). It aims only at protecting those suppliers which due to their weak bargaining position need such protection. Suppliers with bargaining power above €350 million turnover are not covered. The Directive covers farmers, producer organisations and distributors below the threshold and also applies to suppliers and buyers located outside the EU, provided one of the parties is located within the EU.

38. The Directive does not prohibit unfair trading practices in general[38] but Article 3 targets sixteen specific practices and distinguishes between ten 'black' and six 'grey' practices.[39] Whereas black unfair trading practices are prohibited by Article 3(1), whatever the circumstances, grey practices are allowed under Article 3(2) if the supplier and the buyer agree on them beforehand in a clear and unambiguous manner. The list of ten black-listed practices include, for example: (i) payments later than 30 days for perishable agricultural and food products, (ii) payment later than 60 days for other agri-food products, (iii) short-notice cancellations of perishable agri-food products, (iv) unilateral contract changes by the buyer. The six grey-listed unfair trading practices cover in particular activities of promotion, marketing and advertising for which the buyer offers certain services to the supplier to better promote his products, but expects the supplier to contribute to the costs: (i) return of unsold products, (ii) payment of the supplier for stocking, display and listing, (iii) payment of the supplier for promotion, (iv) payment of the supplier for marketing, (v) payment of the supplier for advertising, (vi) payment of the supplier for staff of the buyer, fitting out premises.

39. The Directive is binding on all 27 Member States and provides minimum harmonisation on unfair trading practices in all EU countries. This will ensure a level playing field on the 16 practices covered by the Directive, which were identified as the most problematic. It also lays down minimum rules on the scope of its application and the main definitions as well as on the enforcement of those prohibitions and the coordination

[36] Recital 8 of the Directive. See also Cafaggi, F. and Iamiceli, P., Unfair trading practices in the business-to-business retail supply chain (JRC112654).

[37] The relevant turnover is established according to the criteria of the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ L 124, 20.5.2003, p. 36–41. This means that in order to establish the turnover of a supplier or a buyer, account needs to be taken of the turnover of the entire group to which they belong.

[38] According to Article 1(1) such practices grossly deviate from good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner on another.

[39] The basis for this distinction between black and grey practices was laid down in a contribution by the Directorate-General for Competition's Chief Economist that suggested to preserve efficient arrangements between suppliers and buyers. See Commission Staff Working Document Impact Assessment Initiative to improve the food supply chain (unfair trading practices), SWD(2018) 92 of 12.4.2018, and in particular Annex H: Economic impact of unfair trading practices regulations in the food supply chain, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018SC0092&from=EN.

between enforcement authorities of the different Member States. Given that it concerns minimum harmonisation, Member States may adopt or maintain national rules that go beyond those in the Directive provided that such national rules are compatible with the rules on the functioning of the internal market. However, Member States cannot offer less protection at national level than what is foreseen by the Directive.

40. On 27 October 2021, the Commission published an interim report on the state of the transposition and implementation of the Directive by the Member States.[40] A more comprehensive view of the state of transposition will emerge once the remaining Member States submit their notifications. An evaluation of the Directive at EU level is due end of 2025.

[40] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the state of the transposition and implementation of Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2021:652:FIN