



EU Competition Law – Buying Alliances, Cartels and Purchase Price Fixing

Analysis

Buyer power –

- Monopsony
- Collusive monopsony
- Oligopsony
- Bilateral negotiation
- Bargaining theory

TFEU -

- Article 102 TFEU – focus on buyer power (single or collective dominance)
- Article 101 TFEU – focus on collusion

Fixing of purchase price – Article 101 TFEU

- Object or effects?

Analysis

- Spectrum of effects – from efficiencies to welfare loss

Purchase Price Fixing – Effect of Restricting Competition

- Asymmetric approach to the pricing of output and procured input.
- Possible justifications:
 - Narrow approach as to the goals of the competition regime.

‘the direct effects of the exercise of buyer power fall upon upstream firms. However, both the OFT and the CC take their decisions with regard to detrimental effects on consumers.’
 - Challenge the buyer power theories of harm.
 - Focus on efficiencies - Price fixing ancillary to main purchasing agreement

Cost commonality gives rise to concern only when coordination reduces competition downstream.
- Transparent buying consortiums
 - *National Sulphuric Acid Association*
 - *Coöperatieve Stremsel-en Kleurselfabriek v Commission*
- The approach is driven from a market/buyer power perspective

Purchase Price Fixing – Effect of Restricting Competition

- Focus on buyer power – market share as threshold for intervention
- Efficiencies and passing-on assumption used to justify input price collusion as possibly legal, subject to analysis of effect.
- However:

Passing-on depends on the firms' lack of downstream market power.

Reduction in rivalry increases risk of price collusion downstream.

Object of Restricting Competition

- Article 101 TFEU – symmetric approach to input and output price fixing.
- The object approach is *independent of the presence of buyer power*.
 - Social costs of collusive price fixing outweigh the benefits.
 - Efficiencies can be attained without the fixing of input price.
- Object, regardless of the presence of downstream collusion.

Object of Restricting Competition

- *Raw Tobacco Italy*

‘... purchase price is a fundamental aspect of the competitive conduct...’

- *BNIC v Clair*

‘it is unnecessary to take account of the actual effects... By its very nature, an agreement fixing a minimum price for a product... is intended to distort competition on that market.’

- *AOK Bundesverband v Ichthyol-Gesellschaft Cordes*

‘... an agreement or decision on the part of buyers to fix the purchase price on a given market must be understood to have as its object to restrict competition, without the need, at that stage of the analysis, for any investigation of its competitive effects.’

- *T-Mobile Netherlands*

Anti competitive object even though there is no direct connection between that practice and consumer prices...

Object v Effect

Under or over enforcement?

- The starting point of the analysis differs, but *not* the end result.
- Article 101(3) TFEU as a balancing instrument regardless of initial object or effect approach.
- See for example the approach in Germany,

Enforcement

- Signal as to the legality of price fixing.
- Leniency programme.

Policy

- The choice between the two options is policy oriented.

Consistent Signal?

Horizontal Co-operation Guidelines

‘Joint purchasing arrangements restrict competition by **object** if they do not truly concern joint purchasing, but serve as a tool to engage in a disguised cartel, that is to say, otherwise prohibited **price fixing**, **output limitation** or **market allocation**.’

‘...while the fixing of purchase prices can have the object of restricting competition, this does not apply where the parties to a joint purchasing arrangement *agree on the purchasing prices* [that] the joint purchasing arrangement may pay to its suppliers for the products subject to the supply contract...’

Horizontal Co-operation Guidelines

- Ambivalence as to the legality of purchase price fixing.
- Focus on downstream collusion?
 - Disregards the case law and the wording of Article 101 TFEU.
- Focus on purchase price fixing?
 - Distinguishes between ‘true purchasing agreement’ and disguised cartel.
 - Transparency as a dividing line?
 - *No clear distinction between buyer cartels and buying alliances.*

Concluding Remarks

- Transparent alliance as a possible distinguishing feature?
 - Article 101(3) TFEU as key to mitigate the risk of over enforcement.
 - Object approach does not amount to categorical condemnation.
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- The goals of competition law
 - Clear and consistent signal – Commission and Court.