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Joint Purchasing & Buyer Cartels: a distinction without a difference?

Tuesday 19 July 2022, 6pm

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JOINT PURCHASING & BUYER CARTELS

OVERVIEW

- BACKGROUND
- THE CONUNDRUM
- CURRENT GUIDELINES
- JOINT PURCHASING v. BUYER CARTELS
- DRAFT GUIDELINES

JOINT PURCHASING & BUYER CARTELS

BACKGROUND

- FIRST CASE IN 1968: **S.O.D.E.M.A.S**
- FIRST JUDGMENT IN 1994: ***GØTTRUP-KLIM***
- FIRST GUIDELINES IN 2001
- CURRENT GUIDELINES IN 2011
- ONGOING REVIEW OF 2011 GUIDELINES
- NEW GUIDELINES IN 2023

JOINT PURCHASING & BUYER CARTELS

THE CONUNDRUM

- IF THERE IS JOINT PURCHASING, THERE IS AN AGREED PURCHASE PRICE
- A BUYER CARTEL ALSO TYPICALLY FIXES (OR AIMS TO FIX) PURCHASE PRICES
- SO, WHAT IS THE DIFFERENCE?

JOINT PURCHASING & BUYER CARTELS

THE CURRENT 2011 GUIDELINES

- JOINT PURCHASING: PARAS 194–196
- COMPETITION CONCERNS: PARAS 200–204
- RESTRICTION BY OBJECT: PARAS 205–206
- RESTRICTION BY EFFECT: PARAS 207–216
- ARTICLE 101(3): PARAS 217–200

JOINT PURCHASING & BUYER CARTELS

ONGOING REVIEW OF THE GUIDELINES

- DO THE 2011 GUIDELINES SUCCESSFULLY DISTINGUISH JOINT PURCHASING FROM BUYER CARTELS?
- CAN JOINT PURCHASING EVER BE AN OBJECT RESTRICTION?
- IS JOINT PURCHASING LIKELY TO BE FINED?
- CAN JOINT PURCHASING BE DONE TO PURSUE SUSTAINABILITY OBJECTIVES?

GØTTRUP-KLIM



JOINT PURCHASING & BUYER CARTELS

GØTTRUP-KLIM

- **THREE KEY FACTS:**
 - DLG WAS A COOPERATIVE PURCHASING ASSOCIATION FOR AGRICULTURAL PRODUCTS
 - DLG BANNED MEMBERS FROM BELONGING TO A COMPETING ORGANISATION
 - GØTTRUP-KLIM BREACHED THIS RULE AND WAS EXPELLED FROM DLG

JOINT PURCHASING & BUYER CARTELS

GØTTRUP-KLIM

- **THE COURT OF JUSTICE HELD:**
- “32. IN A MARKET WHERE PRODUCT PRICES VARY ACCORDING TO THE VOLUME OF ORDERS, THE ACTIVITIES OF COOPERATIVE PURCHASING ASSOCIATIONS MAY, DEPENDING ON THE SIZE OF THEIR MEMBERSHIP, CONSTITUTE A SIGNIFICANT COUNTERWEIGHT TO THE CONTRACTUAL POWER OF LARGE PRODUCERS AND MAKE WAY FOR MORE EFFECTIVE COMPETITION.”

JOINT PURCHASING & BUYER CARTELS

GØTTRUP-KLIM

- THE COURT OF JUSTICE HELD:
- “35. IN ORDER TO ESCAPE THE PROHIBITION LAID DOWN IN ARTICLE [101(1)] OF THE TREATY, THE RESTRICTIONS IMPOSED ON MEMBERS BY THE STATUTES OF COOPERATIVE PURCHASING ASSOCIATIONS MUST BE LIMITED TO WHAT IS NECESSARY TO ENSURE THAT THE COOPERATIVE FUNCTIONS PROPERLY AND MAINTAINS ITS CONTRACTUAL POWER IN RELATION TO PRODUCERS.”

JOINT PURCHASING & BUYER CARTELS

GØTTRUP-KLIM

- **THREE KEY POINTS:**

#1: JUDGMENT RECOGNISES THE PRO-COMPETITIVE POTENTIAL OF JOINT PURCHASING

#2: JUDGMENT RECOGNISES THAT THE BAN ON DUAL MEMBERSHIP MIGHT HAVE ANTI-COMPETITIVE EFFECTS

#3: ON THE FACTS THE BAN WAS OBJECTIVELY NECESSARY FOR THE FUNCTIONS OF THE COOP

JOINT PURCHASING & BUYER CARTELS



JOINT PURCHASING & BUYER CARTELS

CAR BATTERY RECYCLING

- **THREE KEY FACTS:**
 - USED CAR BATTERIES ARE THE MOST RECYCLED PRODUCT IN THE EU: 50 MILLION A YEAR!
 - CAMPINE, ECO-BAT, JOHNSON & RECYCLEX AGREED TO REDUCE PRICES PAID TO SCRAP DEALERS FOR USED BATTERIES
 - THEY ALSO EXCHANGED INFORMATION ON CURRENT PRICES, VOLUMES, INTENTIONS

JOINT PURCHASING & BUYER CARTELS

CAR BATTERY RECYCLING

- INFRINGEMENT DECISION OF 8 FEBRUARY 2017:
 - BUYER CARTEL IN BELGIUM, FRANCE, GERMANY AND THE NETHERLANDS
 - LASTED FOR 3 YEARS: 2009–2012
 - IMPOSED FINES TOTALLING €68 MILLION
 - DECISION SUBSTANTIALLY UPHELD ON APPEAL

JOINT PURCHASING & BUYER CARTELS

CAR BATTERY RECYCLING

- **THREE KEY POINTS:**

#1: A PRICE CARTEL IS, BY ITS NATURE, HARMFUL TO THE PROPER FUNCTIONING OF COMPETITION: CASE T-240/17, *CAMPINE v COMMISSION* AT PARA 297

#2: THE COMMISSION AND GENERAL COURT BOTH RELIED ON PROHIBITION IN ARTICLE 101(1)(A) TFEU

#3: COMPETITION CONCERN CENTRED ON DISTORTION OF THE PROCESS OF COMPETITION IN THE BUYING MARKET

JOINT PURCHASING & BUYER CARTELS

ETHYLENE

- **THREE KEY FACTS:**

- ETHYLENE SUPPLY AGREEMENTS USE A STANDARD PRICING FORMULA TO REDUCE THE VOLATILITY OF PRICES: IT'S CALLED 'MCP'
- WESTLAKE, ORBIA, CLARIANT & CELANESE DISCUSSED THEIR PRICING STRATEGIES IN ORDER TO TRY TO PUSH THE MCP DOWN
- THEY ALSO EXCHANGED PRICING INFORMATION

JOINT PURCHASING & BUYER CARTELS

ETHYLENE

- INFRINGEMENT DECISION OF 14 JULY 2020:
 - BUYER CARTEL IN BELGIUM, FRANCE, GERMANY AND THE NETHERLANDS
 - LASTED FOR 6 YEARS: 2011–2017
 - IMPOSED FINES TOTALLING €260 MILLION
 - NB: THIS WAS A SETTLEMENT DECISION
 - BUT CLARIANT HAS APPEALED: CASE T-590/20

JOINT PURCHASING & BUYER CARTELS

ETHYLENE

- **THREE KEY POINTS:**

#1: THE CARTELISTS DIDN'T FIX PRICES; THEY COORDINATED PRICING STRATEGIES & EXCHANGED PRICING INFORMATION

#2: TOTAL FINES WERE €260m; WESTLAKE BLEW THE WHISTLE & ESCAPED A FINE OF €190m

#3: THEORY OF HARM WAS THAT THE CARTELISTS FAILED TO DECIDE THEIR PURCHASE PRICES INDEPENDENTLY

JOINT PURCHASING & BUYER CARTELS

ANOTHER CONUNDRUM

- IS AN AGREEMENT TO PURCHASE ONLY SUSTAINABLE PRODUCTS A RESTRICTION BY OBJECT?
 - NOT LIKE HORIZONTAL BOYCOTTS: cf. *PRE-INSULATED PIPE* AND *SLOVAK BANKS*
 - FEW CASES ON PURCHASER BOYCOTTS: *CITYHOOK*
 - OBJECT RESTRICTIONS SHOULD BE INTERPRETED NARROWLY: *CARTES BANCAIRES*

JOINT PURCHASING & BUYER CARTELS

ANOTHER CONUNDRUM (CONT'D)

- COULD AN AGREEMENT CREATE **SUSTAINABILITY BENEFITS** THAT AMOUNT TO QUALITATIVE EFFICIENCIES UNDER ARTICLE 101(3)? EG
 - REPLACE A NON-SUSTAINABLE INPUT WITH A SUSTAINABLE ONE WHICH IMPROVES THE QUALITY OR LONGEVITY OF THE PRODUCT

JOINT PURCHASING & BUYER CARTELS

HOW ARE THEY DIFFERENT? (1)

- **JOINT PURCHASING:**
 - **JOINT:** SOME FORM OF COMMON ORGANISATION SEEKS TO NEGOTIATE MORE FAVOURABLE TERMS THAN WOULD HAVE BEEN OBTAINED BY EACH BUYER ALONE
 - **PURCHASING:** EITHER BUY TOGETHER OR AT LEAST NEGOTIATE PRICES, TERMS TOGETHER (IN SOME SECTORS IT MAY INVOLVING LICENSING)

JOINT PURCHASING & BUYER CARTELS

HOW ARE THEY DIFFERENT? (2)

- **BUYER CARTELS:**
 - TYPICALLY **SECRET** – BUT IS THAT SUFFICIENT?
 - TYPICALLY FIX LOWER PURCHASE PRICES IN THE CARTELISTS' OWN COMMERCIAL INTERESTS
 - TYPICALLY HAVE **NO REDEEMING VIRTUE** – NO OTHER ACTIVITIES: WAREHOUSING, FINANCING, JOINT DISTRIBUTION, QUALITY CONTROL, ETC.

JOINT PURCHASING & BUYER CARTELS

HOW ARE THEY DIFFERENT? (3)

- UNLIKE JOINT PURCHASING BUYER CARTELS:
 - DO NOT INVOLVE JOINT BEHAVIOUR BY THE CARTELISTS, OTHER THAN THE BARE AGREEMENT BETWEEN THEM NOT TO PAY MORE THAN A GIVEN PURCHASE PRICE
 - DO NOT INVOLVE ANY INTEGRATION OR COOPERATION RE. SUPPLY CHAIN

JOINT PURCHASING & BUYER CARTELS

HOW ARE THEY DIFFERENT? (4)

- ASIDE FROM THEIR FACTUAL DIFFERENCES, THERE ARE **IMPORTANT LEGAL DIFFERENCES**:
 - BUYER CARTELS ARE OBJECT RESTRICTIONS
 - JOINT PURCHASING HAS ALWAYS BEEN SUBJECT TO EFFECTS ANALYSIS – EXCEPT FOR *EUROVISION* (2000)
 - THERE HAS **NEVER** BEEN A FINE IN A CASE OF JOINT PURCHASING ANYWHERE IN THE WORLD TO DATE

JOINT PURCHASING & BUYER CARTELS

WHAT DO THE DRAFT GUIDELINES SAY?

- JOINT PURCHASING: PARAS 311-314
- RESTRICTIONS BY OBJECT: PARAS 316-322
- RESTRICTIONS BY EFFECT: PARA 323-343
- EXEMPTION: PARAS 344-348

JOINT PURCHASING & BUYER CARTELS

WHAT DO THE DRAFT GUIDELINES SAY?

- PARA 319: NON-EXHAUSTIVE LIST OF 2 FACTORS TO DISTINGUISH JOINT PURCHASING FROM A BUYER CARTEL:
 - THE JOINT PURCHASING ARRANGEMENT (JV, COOP, A LEAD PURCHASER) TELLS SUPPLIERS THAT IT JOINTLY NEGOTIATES AND BINDS A GROUP OF PURCHASERS
 - THERE IS A WRITTEN AGREEMENT SETTING OUT THE FORM, SCOPE AND AIM OF THE JOINT PURCHASING ARRANGEMENT

JOINT PURCHASING & BUYER CARTELS

THE ROAD AHEAD

- CURRENT EU RULES AND RETAINED HBER EXPIRE ON 31 DEC 2022
- EU CONSULTATION CLOSED IN APRIL 2022
- CMA RECOMMENDED THAT THE SECRETARY OF STATE ISSUE NEW 'HORIZONTAL BLOCK EXEMPTION ORDERS' ON 28 JUNE 2022
- NEW EU AND UK RULES REQUIRED BY 1 JANUARY 2023

JOINT PURCHASING & BUYER CARTELS

FURTHER READING

Expert report on Horizontal Guidelines on purchasing agreements: Delineation between by object and by effect restrictions

Richard Whish & David Bailey

1 March 2022

https://ec.europa.eu/competition-policy/document/download/5b6ac519-dddf-471d-ae07-c30242cef815_en?filename=kd0722013enn_purchasing_agreements.pdf

THANK YOU FOR YOUR ATTENTION!