# RECENT EU DEVELOPMENTS IN BUYER-SIDE CARTELS

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## Recent EU Developments in Buyer-Side Cartels

*By Stepan Svoboda & Brigitta Renner-Loquenz*

Recent Commission decisions and judgments of the Court of Justice of the European Union concerning purchasing cartels offer insights as to how the Commission treats such cartels under applicable EU competition rules. Last year, the Commission adopted a decision to sanction a cartel on the ethylene purchasing market and imposed heavy fines on three companies engaging in price coordination on that market. The year before, the General Court confirmed the Commission´s decision on a purchasing cartel in the Car Battery Recycling case. Importantly, the General Court fully confirmed some aspects of the fines methodology the Commission applied to ensure that the fines imposed in case of purchasing cartels are deterrent. These cases show that purchasing cartels, which are prohibited under Article 101 of the Treaty on the Functioning of the European Union ("TFEU") as much as the more frequent sales cartels, do not enjoy a more lenient treatment by Europe's competition authorities.

# I. INTRODUCTION

Article 101 TFEU prohibits arrangements that *"directly or indirectly fix purchase or selling prices or any other trading conditions."* Overall, the Court considers purchasing cartels to be as harmful as sales cartels[2] and qualifies both types of collusion as by-object infringements. The Commission applies the same fining methodology, currently the 2006 Guidelines on fines,[3] with certain (upward) adaptations to purchasing cartels when establishing a proxy for the affected purchases. The recent decisions by the Commission on two purchasing cartels confirm this practice.[4] National competition authorities also continue pursuing purchasing cartels.[5]

This article offers an analysis of recent investigative action by the Commission and National Competition Authorities in their efforts to sanction purchasing cartels. It can also be a useful reminder of the illegality of purchasing cartels. While recent decisions follow previous case practice as confirmed by the Courts, they may be of interest for attorneys and in-house lawyers involved in competition compliance programs.

# II. RECENT COMMISSION CASES

### *A. Car Battery Recycling Case*

In March 2017, the European Commission adopted a cartel decision in which it sanctioned a purchasing cartel for the first time under the 2006 Fines Guidelines[6]. The Commission found that four undertakings – *Campine, Eco-Bat Technologies, Recylex* and *Johnson Controls* – active in the sector of recycling lead-acid batteries, engaged in collusive practices aimed at fixing prices for purchasing (used) scrap automotive batteries for recycling and reselling purposes in breach of Article 101 TFEU. The investigation had started in 2012 with *Johnson Controls* applying for immunity under the Commission's 2006 leniency notice.[7] *Johnson Controls* was the first company to disclose the existence of the purchasing cartel to the Commission and thus escaped the fines. The total fine imposed on the three remaining cartel members amounted to EUR 68 million.

The cartel lasted from September 2009 to September 2012. The cartelists participated in a single and continuous infringement. They coordinated their pricing behavior vis-à-vis suppliers of used lead-acid batteries in Germany, Belgium, France, and the Netherlands. Their illegal exchanges concerned target prices, maximum prices, and fixed-amount price reductions for the purchase of scrap lead-acid automotive batteries. Overall, the parties aimed at reducing the price of the batteries they purchased. Although purchasing cartels are less frequent than sales cartels, we can see that both are driven by a company's attempt to unduly increase their profit margin[8] either by artificially increasing the selling prices of their products (sales cartels) or by artificially decreasing the prices of inputs for their own activities (purchasing cartels).

This decision was adopted via the ordinary procedure, as opposed to the settlement procedure[9]. As such, more details on the collusive conduct are available. Two companies fined in the *Car Battery Recycling* case – namely *Recylex* and *Campine* – appealed the decision. The General Court delivered both judgments in 2019 and confirmed the Commission decision. These rulings provide more insight in the assessment of purchasing cartels.[10]

2 Judgment in *Recylex*, T-222/17, ECLI:EU:T:2019:356, paragraph 113.

3 OJ C 201 of 1.9.2006, p.2.

4 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.

5 See e.g. the investigative effort of the Dutch NCA on purchasing cartels in the sectors of the recycled cooking oil and the other for chicken eggs. Further information under the following links https://www.acm.nl/nl/publicaties/acm-onderzoekt-inkoopkartel-herbruikbare-afvalstoffen, https://www.acm.nl/nl/publicaties/acm-onderzoekt-inkoopkartel-de-agrarische-sector. The German Bundeskartellamt adopted a decision in November 2019 fining three car manufacturers for anticompetitive practices in the purchase of steel. See more information under https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/21_11_2019_Bussgeld_Stahl.html;jsessionid=E88632222930FE8FF4A428986581573A.2_cid390?nn=3591568. See the decision of the French Competition Authority dated 16 July 2020 as reported under the link https://www.autoritedelaconcurrence.fr/fr/decision/relative-des-pratiques-mises-en-oeuvre-dans-le-secteur-des-achats-et-ventes-des-pieces-de.

6 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003, (2006/C/2010/02).

7 Commission notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11), OJ C 298, 8.12.2006, p.17.

8 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, recital 40. https://ec.europa.eu/competition/antitrust/cases/dec_docs/40018/40018_2611_3.pdf.

9 Settlement decisions are adopted via a simplified and faster procedure and are typically much shorter and include fewer details.

10 Judgments in *Recylex*, T-222/17, ECLI:EU:T:2019:356 and Campine, T-240/17, ECLI:EU:T:2019:778.

The Commission decision describes the collusive conduct in detail.[11] The parties agreed to reduce or keep unchanged the prices they were offering to suppliers; jointly discussed what price reductions they should or should not demand from suppliers; and informed each other about on-going negotiations with suppliers and what maximum prices they should offer to them. On many occasions, they also discussed pricing trends and market developments and made sure that the colluded prices offered to suppliers would not be so low as to push the suppliers to start looking for alternative customers.

The Commission investigation thus uncovered a sophisticated system of collusion put in place by several buyers. Disclosing of future pricing policy and discussions of prices and price reductions clearly belong to the most harmful (so called hard-core) competition infringements. Such collusion goes against the very principle of competition law – confirmed by the European Courts – that each and every competitor should determine their own (future) pricing and commercial policy independently.[12]

### *B. Ethylene Case*

In July 2020, the Commission continued its investigative effort on the purchasing side of markets and adopted another purchasing cartel decision. In that settlement decision, the Commission found four undertakings – *Westlake, Clariant, Celanese* and *Orbia* – liable for participating in a single and continuous infringement, which consisted in the exchange of sensitive commercial and pricing-related information and the fixing of a part of the ethylene purchase price on the ethylene purchasing market. The parties´ objective was to influence the price negotiations with the suppliers with the aim of buying ethylene at the lowest possible price. Overall, the infringement lasted from December 2011 to March 2017. The total fine imposed on three undertakings (all except the immunity applicant) was EUR 260 million.

The cartel operated alongside a reference price system, the so called MCP settlement system.[13] Compared to the *Car Battery Recycling* case, the parties did not fix purchasing prices as such; rather they coordinated their price-negotiation strategies to influence the outcome of the so-called monthly contract price of ethylene ("MCP"), which was part of the pricing formula in their ethylene supply agreements. The system of bilateral interactions between ethylene buyers and suppliers was established within the industry to limit the volatility of ethylene prices. The system depended on different elements, in particular the price of naphtha. To establish an ethylene MCP for a given upcoming month, two separate but identical bilateral agreements – called 'settlements' – between two different pairs of suppliers and buyers had to be reached (the so called 2+2 rule). After a supplier-buyer pair reached an agreement on the price for the following month, they communicated it to one of a number of reporting agencies, who would report it to the market as so-called *initial settlement*. When a second supplier-buyer pair settled at an identical price, that price would become the MCP for the following month via a publication by those agencies.

Instead of negotiating independently with their contractual suppliers, the buyers who had set up the cartel coordinated their price-negotiation strategies. They agreed the prices they intended to use at the start of their negotiations and the prices they ultimately wanted to achieve as settled MCP applicable to the ethylene industry.[14] As in the *Car Battery Recycling case*, the buyers did not determine their pricing policies independently and illegally colluded to jointly *"influence the MCP negotiations to the buyer's advantage with the aim of buying ethylene at lowest possible price accepted by sellers in the 'settlement' process."*[15]

11 *Ibid.* recitals 41 et seq.

12 See judgment in *Suiker Unie and Others v. Commission* C-40/73, ECLI:EU:C:1975:174, paragraph 174.

13 Commission decision in *Ethylene*, recitals 8 – 10.

14 *Ibid.* recital 40-43.

15 *Ibid.* recital 39.

# III. DISCUSSION

### *A. Legitimate Joint Purchasing*

EU competition law does not prohibit all types of horizontal cooperation between (potential) competitors but allows such companies to cooperate as long as they do not restrict competition by object or by effect (such as pricing cartels qualified as hard-core by object infringements).

In particular, some types of cooperation on the purchasing side, including some form of coordination on purchasing prices are provided for in Chapter 5 of the Horizontal Guidelines on purchasing agreements.[16] Such 'joint purchasing arrangements' usually aim "*at the creation of buying power which can lead to lower prices or better quality products or services for consumers."*[17] They are usually carried out *"by a jointly controlled company, by a company in which many other companies hold non-controlling stakes, by a contractual arrangement or by even looser forms of co-operation."*[18] In other words, the Horizontal Guidelines envisage certain forms of cooperation with some form of integration among the parties to the joint purchasing arrangement. However, point 205 of the Horizontal Guidelines read that *"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."* Such arrangements of simple price collusion – in other words purchasing cartels – do not serve any other purpose but to restrict competition to the advantage of colluding buyers.

A similar requirement of integration of companies existed also on the selling side as one of the conditions for agricultural producers or farmers to benefit from certain exemptions from the application of general EU competition law in the agricultural sector. This was the case for selling arrangements of the producers in several agricultural sectors governed by the Common Market Organisation.[19] The Commission adopted for this purpose Guidelines on the application of the specific rules set out at that time in Articles 169, 170 and 171 of the CMO Regulation for the olive oil, beef and veal, and arable crops sectors.[20] Even if these exemptions have already become obsolete,[21] lessons can be drawn from these rules. The old exemptions read that *"the producer organisation fulfils the objectives mentioned in this paragraph provided that the pursuit of these objectives leads to the integration of activities and this integration is likely to generate significant efficiencies…"*[22]

In contrast, the Commission investigations did not reveal any form of integration efforts along the lines set out in the Horizontal Guidelines in neither the above-mentioned cartels. The parties did not establish any joint purchasing alliance for the cartelized products or seek other (looser) forms of cooperation. To outside observers, all cartelists pretended to act as independent competitors vying against each other for the given products.

16 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 (Text with EEA relevance) (2011/C 11/01).

17 *Ibid.* point 194.

18 *Ibid.*

19 Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products, Articles 169-171 in the then wording before 1 January 2018 (OJ L 347, 20.12.2013).

20 Commission Notice, Guidelines on the application of the specific rules set out in Articles 169, 170 and 171 of the CMO Regulation for the olive oil, beef and veal and arable crops sectors (2015/C 431/01).

21 Those exemptions were repealed by the Regulation (EU) 2017/2393 of the European Parliament and of the Council of 13 December 2017 amending Regulations (EU) No 1305/2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), (EU) No 1306/2013 on the financing, management and monitoring of the common agricultural policy, (EU) No 1307/2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy, (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products and (EU) No 652/2014 laying down provisions for the management of expenditure relating to the food chain, animal health and animal welfare, and relating to plant health and plant reproductive material (OJ L 350, 29.12.2017).

22 Guidelines on the application of the specific rules set out in Articles 169, 170 and 171 of the CMO Regulation for the olive oil, beef and veal and arable crops sectors, paragraph 65 et seq. Some concrete examples of integrated activities were given, such as joint organisation of the distribution, joint storage activities.

The purpose of the collusion in the above cases appeared to create a *"united front" vis-à-vis* the suppliers to coordinate price negotiation strategies and maximize price cuts and/or minimize price increases. Thus, the buyers participating in the *Ethylene* cartel *"exchanged information about sellers' willingness to enter into 'settlement'*[23] *and at what level, with a view to influencing the MCP to the buyers' advantage, in order to make it possible for them to buy ethylene at the lowest possible."*[24] In the *Car Battery Recycling* case, the parties to the cartel *"reached agreements to reduce or to maintain the prices offered to suppliers at a certain level, or to reduce the prices offered to suppliers by a certain amount, sometimes in phased reductions over a set period of time."*[25]

Examples of enforcement action against purchasing cartels can also be found in the decision practice of EU national competition authorities. The French Competition Authority (*Autorité de la concurrence*) investigated a purchasing cartel in the meat processing sector. As established in a decision dated 16 July 2020,[26] several French meat processors coordinated the prices of certain types of ham in their negotiations with the slaughterers. The French Competition Authority explicitly called their consensus a "common front" (*"front commun"*) against the slaughterers, so that the former could better resist price increases or obtain more beneficial price reductions. The decision does not appear to describe any attempt to integrate the purchasing activities of the meat butchers either and build on the violation of the key competition principle of independent pricing when acting on the market.

Another purchasing cartel was investigated by the German Bundeskartellamt. Three leading German car producers colluded within the German association for steel and metal processing to set the levels of scrap and alloy surcharges, which account for a substantial part of the purchase prices for long steel. The German Bundeskartellamt made clear when announcing the adoption of the decision in November 2019 that *"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."*[27]

### *B. Purchasing Cartels as By-object Infringements*

Not surprisingly, the Commission treated both cartels of horizontal price coordination on the purchasing markets as by-object infringements (i.e. hard-core infringements being harmful at first sight to the proper functioning of normal competition). In the *Ethylene* decision, the Commission concluded that the established infringement has *"as its object the restriction of competition on the ethylene purchasing market within the meaning of Article 101(1) of the TFEU and that there is no need to take into account the effects of the conduct."*[28] The Commission took the same line also in the *Car Battery Recycling case*[29] despite the fact that both *Recylex* and *Campine* argued the absence of effects of the investigated conduct both in the administrative proceedings[30] and before the General Court.[31] The Court dismissed these arguments.[32]

The Commission did not define the relevant market in either case or elaborate on the cartelists' market shares. This approach follows a long-standing Commission practice. The underlying idea is that, no matter how small the cartelists' market share, their hard-core cartel conduct (such as price fixing or market allocation) is always considered harmful on the EEA market.[33]

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23 The collusion among the ethylene buyers concerned a specific "settlement pricing mechanism operated on a monthly basis to establish a so called *"ethylene monthly contract price."* The Ethylene decision describes the pricing mechanism in its recitals 8-10.

24 See Commission decision in Ethylene, recital 42.

25 See Commission decision in Car battery recycling, recital 42.

26 See the decision of the French Competition Authority dated 16 July 2020 as reported under the link https://www.autoritedelaconcurrence.fr/fr/decision/relative-des-pratiques-mises-en-oeuvre-dans-le-secteur-des-achats-et-ventes-des-pieces-de.

27 See under the following webpage: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/21_11_2019_Bussgeld_Stahl.html;jsessionid=4C2CBB51C884234028E4F0EF1BC7287A.2_cid371?nn=3591568.

28 See Commission decision in Ethylene, recital 71.

29 See Commission decision in Car battery recycling, recitals 231, 236 and 237.

30 See Commission decision in Car battery recycling, recital 234.

31 Judgments in *Recylex*, T-222/17, ECLI:EU:T:2019:356, para 111, and *Campine*, T-240/17, ECLI:EU:T:2019:778, para 220.

32 Judgment in *Campine*, T-240/17, ECLI:EU:T:2019:778, para 288-290, 297.

33 If further criteria (such as effect on trade between Member States) are fulfilled. Judgment in *Expedia v. Autorité de la concurrence and Others*, C-226/11, ECLI:EU:2012:795, paragraph 37.

It is worth recalling that in the *Car Battery Recycling* case the Commission concluded that not all undertakings were active on the same downstream market.[34] This finding did not prevent the Commission from establishing a purchasing cartel. The Commission's analysis about the restriction of competition[35] was limited to the finding that the parties coordinated their pricing behavior on the purchasing market and that such conduct is in any case to be qualified as a by-object infringement. As to the *Ethylene* decision, it does not include any finding concerning the conduct of the cartelists on the downstream market(s). The underlying logic in both cases is that the parties to the purchasing cartel distorted the competitive process on the purchasing side of the market to the detriment of the respective sellers, who could not obtain the prices that would have resulted from a competitive process.[36] The Commission did not extend its examination of that possible harm or benefits caused on the downstream markets and denied the application of Article 101(3) TFEU in both cases.

### *C. Fining Aspects of Purchasing Cartels*

In the *Car Battery Recycling* decision, the Commission used the 2006 Fines Guidelines in a purchasing cartel for the first time. For these reasons, it is worth reviewing the key aspects of the fining methodology applied in the case. The 2006 Fines Guidelines were designed with sales cartels in mind, as evidenced by the terminology used in the text which adopts the value of sales as a starting point to establish the appropriate proxy for calculating fines.

The *Car Battery Recycling* decision did not take the relevant value of sales of the parties as a starting point. It explained that (i) not all parties were active on the same downstream sales market, so it would be impossible to establish the sales of the same product for all cartelists and (ii) the cartel related to the price coordination on the purchasing (upstream) market.[37] For those reasons, the Commission decided to take the relevant value of purchase as a starting point, despite the wording of the 2006 Fines Guidelines. In both *Recyclex* and *Campine* judgments, the General confirmed that methodology.[38] To setting the fines' variable amounts – the so-called gravity parameter – the Commission applied the standard approach for hard core sales cartels in line with point 23 of the Fines Guidelines and set the gravity parameter at 15 percent in both cases, which sits at the higher end of the scale.

A new aspect in the Commission´s fining methodology of purchasing cartels compared to the fines for sales cartels is a specific application of point 37 of the 2006 Fines Guidelines. Point 37 allow the Commission to depart upwards or downwards from the standard principles of the Guidelines to account for "*the particularities of a given case or the need to achieve deterrence in a particular case*." The Commission compared the objective of a sales cartel with the one of a purchasing cartel and explained in the decision that the objective of a purchasing cartel was not to increase the (purchase) price but, to the contrary, to reduce it or prevent its increase. It also explained that the more successful a purchase cartel is, the lower the amount of the value of purchases and thus the amount of the fine would be. The Commission went on to argue that purchases (of an input) are lower than sales in value terms, which would produce a systematically lower starting point for the calculation of the basic amount of the fine.[39]

Therefore, the Commission took the view that without an adjustment under point 37, the fine would not achieve a sufficiently deterrent effect, which is necessary to sanction the undertakings concerned in this case (so called specific deterrence) and to deter other undertakings from engaging in this type of infringement (so called general deterrence). The particularities of the case led the Commission to increase the fines for all undertakings by 10 percent.

34 It denied any application of Article 101(3), strengthening the line that the purchasing cartels, should be forbidden already because of its likely harmful effects on the upstream market.

35 *Ibid*. recitals 235 et seq.

36 See the Commission press release in the Ethylene case: "*Unlike in most cartels where companies conspire to increase their sales prices, the four companies colluded to lower the value of ethylene, to the detriment of ethylene sellers.*" https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1348.

37 See Commission decision in Car battery recycling, recital 298.

38 Judgments in *Recylex*, T-222/17, ECLI:EU:T:2019:356, para 124, and *Campine*, T-240/17, ECLI:EU:T:2019:778, para 335.

39 See Commission decision in Car battery recycling, recital 364.

In the Court proceedings, both companies appealing the Commission decision disagreed with the Commission on that point. They argued that that reasoning was based on the wrong premise that the cartel was successful and had effects on the purchasing prices of scrap batteries, which were not analyzed and proved by the Commission in the decision.[40] *Recylex* also argued that such a conclusion would worsen the companies´ position before the civil court in private damages proceedings, as the Commission actually established the existence of anticompetitive effects of the conduct without any evidence. Finally, *Recylex* argued that the deterrence of the fine did not require any adjustment under point 37 as it was already ensured through the application of the 15 percent gravity parameter.[41]

The General Court fully confirmed the Commission´s fines methodology on that point. In particular, the Court agreed that the Commission was right to apply an increase under point 37, which has a different objective of deterrence than other aspects of the fining methodology and is therefore distinct from them. These other points include, for instance, point 30, which concerns an increase of the fine for sufficient deterrence in case of companies with particularly large turnover and point 25, which concerns the possibility to increase the fine in order to deter undertakings from entering into horizontal hard-core cartels. The Commission was entitled to take the above-mentioned criteria into account, and the Court considered them sufficiently clear and precise to justify the deviation from the standard fining methodology under point 37 of the 2006 Fines Guidelines.

The Court also confirmed that the reasoning of the Commission was not based on the premise that the cartel was successful,[42] arguing that the "*lack of analysis of the effects of the cartel on prices does not mean that the Commission made an error of assessment. Indeed it does not claim that the cartel had any effects on purchase prices.*"[43] With the same argument the Court also rejected the companies´ concerns that such reasoning for fines would worsen their position before the civil courts concerning the private damages claims.

Both judgments confirming the Commission´s fines methodology for purchasing cartels were rendered before the adoption of the *Ethylene* decision. As a result, the Commission followed the same line of reasoning when justifying the adjustment of the fines also in the *Ethylene* decision, again by applying a 10 percent increase under point 37 of the 2006 Fines Guidelines. The decision by the Commission in the Ethylene case is currently under appeal by one of the parties, inter alia on the application of the uplift on the value of purchases.[44]

## IV. CONCLUSION

The Commission and national competition authorities investigate not only sales cartels but also purchasing cartels. The harm caused by the latter is obvious; price-collusion practices have the same power to distort the parameters of normal competition. For this reason, competition authorities regard purchasing cartels as hard-core, by-object infringements in the same way as sales cartels. As a result, the legal qualification of purchasing and sales cartels do not differ, and the same legal tests apply to establish infringements. Finally, the key aspects of the fines methodology for sales cartels were also applied to both purchasing-cartel cases discussed earlier with upwards adjustments. Thus, the resulting fines for engaging in those cartels could be set at substantial and deterrent levels. A Court's ruling related to the first case confirmed the Commission's fining methodology.

40 Judgments in *Recylex*, T-222/17, ECLI:EU:T:2019:356, para 111, and *Campine*, T-240/17, ECLI:EU:T:2019:778, para 317.

41 Judgment in *Recylex*, T-222/17, ECLI:EU:T:2019:356, para 112 and 113.

42 Judgment in *Campine*, T-240/17, ECLI:EU:T:2019:778, para 345.

43 *Ibid*. para 125 and 127.

44 See the case T-590/20 *Clariant AG and Clariant International AG v. European Commission*.

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