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Buyer Cartels

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

The cardinal sin under antitrust rules is a conspiracy to fix prices. Competition legislation throughout the world therefore universally sets out, as its first prohibition, a rule forbidding any agreement to fix (or otherwise coordinate) price levels. This is evidenced by Section 1 of the U.S. Sherman Act, Article 101 TFEU, and the opening salvos of countless pieces of national legislation worldwide.

This archetypal prohibition typically applies to suppliers conspiring to extract higher prices from consumers, and, indeed, this type of situation forms the basis for the bulk of enforcement activity. But the cardinal prohibition also applies to powerful buyers conspiring to extract sub-competitive prices from suppliers. Market power can take the form of monopoly or monopsony, and antitrust rules are agnostic: any distortion of free competition is equally worthy of investigation, and, if necessary, prohibition and penalization.

While the abuse of buyer power is relatively rare, it is no less anti-competitive than any cartel. It arises particularly in the case of labor markets, where powerful employers may conspire to extract sub-competitive wages from workers. Similarly, powerful commodity buyers might conspire to fix prices from fragmented suppliers of certain inputs. That said, there are, of course, also situations where buyers may legitimately coordinate to ensure that powerful suppliers do not extract supra-competitive prices and ultimately exploit consumers.

The key challenges for enforcers are to identify illegitimate demand-side coordination, define circumstances that give rise to the need for appropriate enforcement action, and distinguish such from legitimate means to reduce prices to the ultimate benefit of consumers.

The pieces in this Chronicle place the treatment of buyer cartels in its historical context, and apply the lessons of the past to current-day challenges. Each author brings a unique perspective from their particular jurisdiction, and discusses the latest salient developments in the context of the ever-evolving dialogue surrounding the correct manner in which to regulate market power.

As always, thank you to our great panel of authors.

Sincerely,

CPI Team

SUMMARIES

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Buyer Cartels: Defining Appropriate Competition Policy

By Peter C. Carstensen

Buyer power issues are of increasing concern for competition law and policy. This includes buyer cartels. It is important to distinguish cartels from legitimate buying groups although the later can also cause competitive harms. Buyer cartels are not the mirror image of seller cartels because buyer power arises from smaller market shares, buyers have less incentive to defect from a buyer cartel, such cartels can include more participants, and they can employ tacit collusion more readily. Under most law such cartels are illegal, but the arguments for that conclusion are weaker than they should be because of a failure to consider the impact on the competitive process. Buyer cartels should have more attention and appropriate legal policies.

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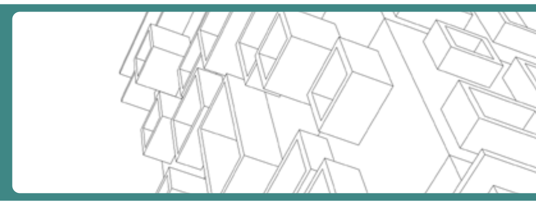

Buyers' Cartels: Prevalence and Undercharges

By John M. Connor

This article supplements information on 24 U.S. domestic buyers' cartels cited in a 2010 book by Blair & Harrison by assembling and analyzing a sample of 49 episodes of buyers' cartels that have international membership or multijurisdictional price effects. It appears that such cartels comprise less than 8 percent of the total, that they are clustered in primary-products and services industries, that they employ bid rigging conduct to a greater extent than sellers' cartels, and that undercharges average close to 20 percent of the but-for price. These quantitative characteristics are supplemented by sketches of the conduct and prosecutions of a few of the better-documented cases of buyers' cartels.

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Where Have We Been, and Where Are We Going? The Criminal Prosecution of Buyer Cartels

By Lisa M. Phelan, Joseph Charles Folio III & Hannah Elson

The announcement in October 2016 that the Antitrust Division of the U.S. Department of Justice intended "to criminally investigate naked no-poaching or wage-fixing agreements," or buyer cartels for labor, was widely viewed as a momentous shift in enforcement policy. This was not only because of the focus on labor as a commodity was previously not a significant area of interest for antitrust enforcement — much less criminal enforcement — but also because it represented a buyer-side agreement. But, in light of the Division's history prosecuting other buyer cartels, particularly auction bidders, why has this new criminalization policy sent shock waves through the business world? Does the difference between buyer and seller cartels matter and, if so, how? As the Division enters this brave new world of prosecuting buyer cartels for labor, answers to these questions will help establish guideposts for understanding what the Division is doing, why it is doing it, and some of the likely consequences. Time will tell if courts support the Division's aggressive interpretation of its authority or reject the assertion that this is *per se* conduct that the Division just didn't bother pursuing criminally for the past 130 plus years since the Sherman Act was passed.

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The NCAA: A Cartel in Sheepskin Clothing

By Roger D. Blair & Wenche Wang

In spite of enjoying substantial commercial success, the National Collegiate Athletic Association ("NCAA") continues to limit the compensation of student-athletes through collusive monopsonistic restraints. The NCAA benefits from an antitrust exemption that can be traced to the *Board of Regents* (468 U.S. 85 (1984)) decision in 1984. In this paper, we examine the NCAA's unique buyer cartel operation when antitrust attack is no longer a concern, including its organization structure and implementation of a wide array of restrictions. We further analyze the vitality of the antitrust exemption and the NCAA's recent antitrust challenges.

SUMMARIES

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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.

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European Competition Law Scrutiny of Purchasing Alliances

By Liliane Gam

It seems undeniable that within the EU interest is growing in purchasing alliances and particularly in the grocery retail sector. However, care must be taken to avoid drifting into a buyer cartel. The decisional practice of the EC and NCAs shows a clear distinction between buyer cartels and legitimate joint purchasing agreements. On the one hand, buyer cartels are viewed as restriction of competition by object and are *per se* prohibited. As a result, when such infringements are assessed, hefty fines are usually imposed. On the other hand, investigations into legitimate purchasing alliances, which are subject to an effects-based analysis, are rarely subject to fines, but rather, are often resolved by commitments. Only where joint purchasing agreements are used as a trojan horse for buyer cartels are they assessed more harshly.

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Buyer Cartel Doctrine: Lessons From Labor Antitrust

By Sergei Zaslavsky & Laura Kaufmann

While there is general agreement that buyer collusion can be as anticompetitive (and illegal) as seller collusion, the sparse caselaw on buyer cartels leaves many specific doctrinal questions unanswered. However, while buyer cartel cases have been relatively rare, one particular subtype of buyer power has been making consistent antitrust headlines. Employers are "buyers" of their employees' labor, and cases involving employer wage-fixing and no-poach agreements can shed light on buyer cartel doctrine more generally. In this article, we analyze recent developments in labor antitrust and trace their implications for other buyer power cases, focusing in particular on three doctrinal questions: whether a case falls under the rule of reason or the *per se* rubric, what kind of competitive harm the plaintiff must show, and how to define the relevant market.

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Buyer Cartels: A Theoretical and Policy Framework

By Sayantan Ghosal

This paper contains a theoretical analysis cartel formation by buyers in thin markets where with a small number of buyers and sellers. Limiting the impact of buyer cartels depends critically on whether such a cartel can create barriers to entry to exclude non-cartel members from the trading process. In addition, for a buyer's cartel to exist, cartel members need to be able to make side payments to each other which do not go through markets but are made directly each other. Allowing for bilateral cartels, the analysis shows that the formation of a cartel of sellers induces the formation of a cartel of sellers yielding a "balance" in market power on the two sides of the market.

WHAT'S NEXT?

For July 2021, we will feature Chronicles focused on issues related to (1) **Foreign Direct Investments**; and (2) **The New Madison Approach**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2021, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES AUGUST 2021

For August 2021, we will feature Chronicles focused on issues related to (1) **State AGs**; and (2) **EAB Antipasto**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

BUYER CARTELS: DEFINING APPROPRIATE COMPETITION POLICY

BY PETER C. CARSTENSEN[1]

1 Fred W. & Vi Miller Chair in Law Emeritus, University of Wisconsin Law School. This piece draws substantially on my earlier work on this topic. Peter C. Carstensen, Competition Policy and Buyer Power: A Global Issue, Ch. 7 (2017) (hereafter Competition Policy); and *Buyer Cartels versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy*, 1 William & Mary Bus. L. Rev. 1 (2010) and a chapter on buyer cartels to be included in Research Handbook on Cartels, Peter Whelan, Ed., forthcoming 2022.

Both buyer cartels and buying groups have received increasing notice in the last fifteen years with growing awareness of buyer power's potential for harmful competitive effects.[2] The most recent area of interest is labor markets where buyer power appears to be much more pervasive than conventional labor market theory had postulated.[3]

Buyer cartels pose serious risks to the market process and have no persuasive justification. Hence, unless regulated, they should be unlawful under all circumstances, despite the potential negative effects of seller power on buyers. But because buying groups can have utility, it is essential to distinguish between two types of horizontal agreements. At the same time, buying groups can result in cartelistic competitive harm if they have sufficient power in the buying market. Hence, there should be stricter oversight of such entities than currently exists. However, that is a topic for a different presentation.[4]

Buyer power can arise from much smaller market shares than is usually associated with seller power. Moreover, buyer cartels can include more participants and face lower risks of defection because of the strong incentives to comply. Consequently, such cartels can be more informal, or even tacit. Thus, buyer cartel issues require a fuller recognition of the incentives that motivate and facilitate such conduct, as well as the need to modify the conventional criteria to infer the existence of a cartel, considering these economic incentives.

I. RECOGNIZING BUYER CARTELS

Distinguishing a buyer cartel from a legitimate buying group is easy at a conceptual level. but in application, the two activities exist on a continuum ranging from a pure cartel to a buying group that integrates the purchase of all inputs.

A. Buyer Cartels

A cartel is a group of competitors who have agreed to limit or eliminate their competition in some economically relevant dimension. The objective of such a combination is to create, allocate, and exploit power in the market. While conventional monopsony theory posits primarily exploitive explanations, i.e. collusive, or unilateral conduct to reduce input prices, buyer cartels can also use their collective power to exclude or restrain their competitors in the markets in which they buy goods or otherwise regulate the nonprice dimensions of the supply market as a means of entrenching their own dominance in both upstream and downstream markets.[5] A buyer cartel eliminates competition for input purchases. Buyers may collude even though they sell in highly competitive markets where seller cartelization is unlikely.[6] Such buyer collusion may eventually reduce the total output in the market.[7] A significant reduction in output can affect the downstream market by reducing the volume of the output produced, resulting in higher prices for the remaining production.[8]

2 In addition to my own work, see note 1, other notable examples include: Roger D. Blair, Jeffery L. Harrison, Monopsony in Law and Economics (2012) (hereafter 2012); Id., Monopsony: Antirust Law and Economics (1993) (hereafter 1993); Roger G. Noll, *"Buyer Power" and Economic Policy,* 72 Antitrust L. J. 589 (2005); John B. Kirkwood, *Powerful Buyers and Merger Enforcement,* 92 Boston U. L. Rev. 1485 (2012; C. Scott Hemphill, Nancy L. Ross, *Mergers that Harm Sellers*, 127 Yale L. Rev. 2078 (2018).

3 See, e.g. Alan Manning, *Monopsony in Labor Markets*, 74 ILR Rev. 3 (2021) (extensive citations to relevant work); Suresh Naidu, Eric A. Posner, E. Glen Weyl, *Antitrust Remedies for Labor Market Power,* 132 Harv. L. Rev. 537 (2018).

4 I have addressed these issues in the works cited in note 1, *supra.*

5 See, e.g. *Klor's, Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207, 212–13 (1959) (buyer induced or coerced suppliers to engage in a collective refusal to deal); *Montague v. Lowry*, 193 U.S. 38, 45 (1904) (buyer organization induced sellers to refuse to deal with nonmembers and to enforce resale price maintenance); *Toys "R" Us, Inc. v. Fed. Trade Comm'n*, 221 F.3d 928, 936–38 (7th Cir. 2000) (major toy buyer induced sellers of toys to agree to refuse to sell selected toys to competitors of the buyer).

6 A good example is the timber buyer's cartel in Alaska that drove down the price of trees in the regions where those companies operated, but which had no effect on the overall price of the lumber produced from those trees because that lumber competed in a much broader geographic market. *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1303 (9th Cir. 1983).

7 The likelihood of this effect and its substantiality are functions of the elasticity of supply, see, Carstensen, Competition Policy, supra note 1, Chap. 3.

8 This effect is discussed in Roger D. Blair & Jeffrey L. Harrison (1993), *supra* note 2, 36–42. See also Richard Sexton & Mingxia Zhang, *An Assessment of the Impact of Food Industry Market Power on U.S. Consumers,* 17 Agribusiness 59 (2001); Chris Doyle & Martijn A. Han, *Expropriating Monopoly Rents through Stable Buyer Groups* (Amsterdam Ctr. for L. & Econ., Working Paper No. 2009-03); Martijn A. Han, *How Buyer Groups Can Effectively Operate as Stable Cartels*, 62 Aenorm 14 (2009).

Use of cartel power varies depending on the goals and interests of the participants, but also, importantly, on the nature of the supply market. If supply is relatively price inelastic, then colluding buyers have a strong incentive to drive down price because it will not significantly reduce the supply of the input. In other cases, supply maybe more price elastic and reducing price would result in an inadequate supply;[9] but buyers can still use their collective power to compel their suppliers to discriminate in price or refuse to deal with new entrants or marginal buyers.[10] Thus, supply elasticity will affect the methods used by a cartel but may not alter its goals.[11]

B. Legitimate Buying Groups

A buying group is a set of potentially competing buyers that pool their purchase orders and jointly or through an agent negotiate for the inputs they seek. The fundamental distinction between a legitimate buying group and a cartel is that a buying group acts to gain the efficiencies of a joint enterprise. The buyer-participants have integrated some of their input acquisition function by participating in the buying group. Efficiencies can result from longer production runs, reductions in transaction costs, or lower costs per unit of quality control, and can include protection against defective or dangerous products, preferred status with shipping services based on high volume, and improved ability to develop new products. In addition, buying cooperative can bargain for better prices. A buyer seeking a large volume is likely to make a more extensive search of the market for suppliers and generate a more active bidding process as a result. Therefore, in a market where competition is imperfect but workable, buyers can gain a price advantage by employing more sophisticated and effective searches for the inputs they need.

C. Distinguishing Buying Groups from Cartels

There are no fixed parameters for a buying group. A legitimate buying group involves some integration of activities, but it is limited to facilitating the functioning of the enterprise.[12] One way to distinguish a buying group from a buyer cartel is to focus on its functional goals. If the participants make an investment in, and consolidate, coordinate, and administer some aspects of their buying activity, then they are prima facie a buying group. Conversely, if the group exists only to agree on how the parties will conduct their own purchases, it is prima facie a cartel.

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9 If, however, buyers can obtain additional inputs from another, more competitive market, they may be able to exploit one set of suppliers while still filling their residual supply needs. They will then be somewhat less concerned about supplier reaction.

10 The collective volume of purchases gives a cartel significant leverage over any individual seller because that seller must engage in a costly and time-consuming search for other buyers. See Peter C. Carstensen, *Buyer Power, Competition Policy, and Antitrust: The Competitive Effects of Discrimination among Suppliers,* 53 Antitrust Bull. 271, 281, 284 (2008).

11 Doyle & Han, *supra* note 8, posit a buyer cartel that requires suppliers to raise their prices, thus causing some reduction in sales but generating significant profits for the sellers, which the sellers then rebate to the buyers in the form of slotting fees or other kickbacks. See *Discon v. NYNEX*, 525 U.S. 128 (1998) (supplier got contract with higher price by agreeing to pay parent company a large sum thus evading rate regulation); *NicSand v. 3M*, 507 F.3d 442 (6th Cir. 2007) (large firm drove small supplier from market by offering large payments to buyers who also raised prices once supply competition was eliminated).

12 See Paul W. Dobson, *Exploiting Buyer Power: Lessons from the British Grocery Trade,* 72 Antitrust L.J. 529, 543–44 (2005) (discussing integrated buying groups in the British grocery industry).

II. DIFFERENCES BETWEEN BUYER CARTELS AND SELLER CARTELS

There are four ways in which buyer cartels present different characteristics from conventional seller cartel models. The differences make buyer cartels more likely and harder to detect.

First, buyer power arises are much lower market shares than is generally assumed to be the case on the selling side of the market.[13] Thus, the EU has found that a buyer taking as little as 20 percent of a grocery input has the capacity to distort competition.[14] In the UK, power was found in groceries where the buyer took as little as 10 percent of the branded goods.[15] Toys R Us had only about a 20 percent share of the toy retail market but was able to coerce its major suppliers into refusing to deal with third parties.[16] Because the buyer decides whether to buy and from whom to buy, this creates significant leverage especially when suppliers face significant costs in seeking alternative outlets.

Second, because buyers share an interest in keeping input costs down, the risks of defection from a cartel agreement are low. A defector must bid up the price, process the input into a larger volume of goods that will expand output and so is likely to lower sales prices even as its costs increase. In contrast, in a sellers' cartel defection can yield an immediate gain to the defector by increasing volume even if the price per unit is lower. Thus, buyer cartels are generally more durable and also require less explicit organization and monitoring.

Third, taken together, the lower market share necessary for power and the greater durability of buyer cartels leads to making such organizations more varied. One result is that they can be more inclusive. Hence even in markets with a substantial number of competing buyers, cartelistic agreements are possible because the mutual interest of the participants gives them a strong incentive to cooperate.[17] But for the same reasons, it is also possible to have cartels that have limited participation from competitors, and which can focus on limited objectives. The no-poach agreements in employment are examples of this. The participants agree not to compete for each other's employees but remain free to compete for new entrants and for employees of non-participants.[18]

Fourth, again, because of the nature of buyer power, tacit collusion is a significant risk in buyer markets. If buyers respect each other's suppliers and do not compete head-to-head for their services, each has somewhat more freedom to impose burdens on its suppliers because those suppliers will have few, if any, alternative outlets for their products or services.

Taken together these four factors makes buyer cartels more likely but also harder to identify and more challenging to remedy. Indeed, where the restraints are once established, tacit understandings can maintain them more easily on the buying side than on the selling side.

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13 This analysis is elaborated in Carstensen, Competition Policy, supra note 1, at 65-75.

14 See European Union, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, 2011 O.J. (C 11) 1, ¶ 204; see also Case 1v/M.1221, Rewe/Meinl, C(1999) 228 final, at 99 (survey of sellers showed that on average a buyer taking twenty-two percent or more of a commodity had substantial power over the seller).

15 See Dobson, *supra* note 12.

16 See *Toys R Us v. FTC*, 221 F.3d 928 (7th Cir. 2000) (major toy buyer induced sellers of toys to agree to refuse to sell selected toys to competitors of the buyer).

17 *Todd v. Exxon,* 275 F.3d 191 (2d Cir. 2001) (upholding treble damages in class action complaint charging a conspiracy to stabilize wage rates for various classes of technical workers at major oil and gas companies);

18 See Final Judgment, *United States v. Adobe Sys. Inc.*, No. 1:10-cv-01629 (D.D.C. Mar. 18, 2011), available at https://www.justice.gov/atr/case/us-v-adobe-systems-inc-et-al. (computer hardware and software companies consented to decree prohibiting restraints in competition for employees).

III. THE LEGAL TREATMENT AND COMPETITION POLICY ANALYSIS OF BUYER CARTELS

A. Legal Treatment of Buyer Cartels

Competition laws generally prohibit cartel agreements among buyers. The oldest known cartel case involved a grain buying conspiracy in ancient Athens.[19] In the United States it is unlawful, as well as a basis for treble damage liability, for buyers to agree (1) on what they individually will pay for goods or services, (2) that they will not bid against each other for particular items at an auction, or (3) that they will restrict wage or employment competition.[20] Canada has similar decisions.[21] The European Union ("EU") has held such conduct to be absolutely illegal.[22] EU state competition authorities have also been aggressive in challenging them.[23] This is consistent with the express terms of Article 101(1) of the Treaty on the Functioning of the European Union.[24] Indeed globally, there is general recognition that buyer cartels are anticompetitive and should be prohibited. This is more consistent with the goal of facilitating the competitive process than with the narrow focus on consumer welfare.[25]

B. Buyer Cartels and the Per Se Illegal Standard

Conventional analysis says that buyer cartels cause economic harm similar to that caused by seller cartels. But as with seller cartels, some scholars defend buyer cartels as enhancing efficiency in some circumstances.[26] The credibility of these arguments depends in large part on the goals of competition policy against which those arguments are measured. Although the conventional explanation of why buyer cartels are undesirable has serious limitations, there remain substantial reasons to object to such cartels and the justifications probably overestimate the potential gains to the competitive process.

1. Theories of Competitive Harm

The conventional economic welfare argument against buyer cartels rests on the assumptions that buyers purchase in discrete units and resell in a market in which they are the only sellers, and that producers face increasing unit costs as volume increases. Under these assumptions, when the price paid for inputs is reduced, output of that commodity declines. As a result, the static comparison of a world with and without a buyer cartel shows that the cartel causes a reduction in production and a consequent increase in prices to consumers. The conclusion, therefore, is that buyer cartels harm consumers as well as aggregate welfare.[27]

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19 See Lamabros E. Kotsiris, *An Antitrust Case in Ancient Greek Law*, 22 Int'l Law 451 (1988).

20 See, e.g. *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944) (conspiracy to allocate motion pictures); *Swift & Co. v. United States*, 196 U.S. 375 (1905) (conspiracy to limit the price paid for cattle); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979 (9th Cir. 2000) (conspiracy and/or unilateral conduct to reduce price of milk); *United States v. Romer*, 148 F.3d 359 (4th Cir. 1998) (conspiracy to limit prices on real estate); *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292 (9th Cir. 1983) (conspiracy to allocate timber). See John Asker, *A Study of the Internal Organization of a Bidding Cartel*, 100 Am. Econ. Rev. 724 (2010) (describing the operation of a postage stamp cartel). For cases dealing with employment issues, see, e.g. *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001) (upholding treble damages in class action complaint charging a conspiracy to stabilize wage rates for various classes of technical workers at major oil and gas companies);). See also, Final Judgment, *United States v. Adobe Sys. Inc.*, No. 1:10-cv-01629 (D.D.C. Mar. 18, 2011), available at https://www.justice.gov/atr/case/us-v-adobe-systems-inc-et-al. (computer hardware and software companies consented to decree prohibiting restraints in competition for employees).

21 See, e.g. *R. v. Abitibi Power & Paper Co.*, 36 C.P.R. 1888 (Que. Q.B.) (seventeen pulp wood buyers unlawful conspired to avoid competition in buying); 321665 *Alberta Ltd. v. Mobil Oil Can.* Ltd., 2011 ABQB 292 (Can.) (unlawful conspiracy to boycott a supplier).

22 See, e.g. Case C-209/07, *Competition Authority v. Beef Industry Dev. Soc'y Ltd.*, 2008 E.C.R. 1-08637; Case COMP/C.38.238/B.2, Raw Tobacco Spain (Commission, 2004).

23 See European Competition Network (ECN), ECN Activities in the Food Sector (2012), available at http://ec.europa.eu/competition/ecn/food_report_en.pdf.

24 "The following shall be prohibited . . . all agreements [that] directly or indirectly fix purchase . . . prices or any other trading conditions. . . ." Consolidated Version of the Treaty on the Functioning of the European Union art. 101, May 9, 2008, 2008 O.J. (C 115) 47.

25 Victoria Daskalova, *Consumer Welfare in EU Competition Law: What Is It (Not) About?* 20–22 (TILEC Discussion Paper 2015-011, 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605777&rec=1&srcabs=2586584&alg=1&pos=10 (pointing out that despite a nominal goal of "consumer welfare," EU competition law provided protections against exploitation and exclusion of producers even in the absence of an immediate harm to consumers).

26 See Alan Devlin, *Questioning the Per Se Standard in Cases of Concerted Monopsony, 3* Hastings Bus. L.J. *223, 241–43 (2007)* Christopher Leslie*, Achieving Efficiency Through Collusion: A Market Failure Defense to Horizontal Price-Fixing, 81* Cal. L. Rev. *243 (1993);* Roger D. Blair & D. Daniel Sokol*, The Rule of Reason and the Goals of Antitrust: An Economic Approach, 78* Antitrust L.J. *471, 487–90 (2012).*

27 See, e.g. Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled*? 45 J. Corp. L. 101, 115-117 (2020).

The force of this economic theory is contingent on the validity of its assumptions. The argument loses force if the cartel uses all-or-nothing contracts. Such contracts compel producers to deliver approximately the competitive output but at a lower price.[28] Further, if the cartel members compete with many other producers who have different sources of inputs, they would have no incentive or capacity to raise the prices of their output.[29] In such a situation, the cartel's output will be lower than it would have been, but overall prices will not be noticeably affected because volume in the downstream market will not change appreciably. In either case, there would be no adverse effect on the price-output parameters on which consumer welfare is measured.

Thus, a focus on consumer welfare as the goal of competition law weakens the argument that buyer cartels are necessarily undesirable. But if the primary goal of competition law is the protection and advancement of economic competition as a process, two related policy arguments support a broader condemnation of buyer cartels. First, buyer cartels, like seller cartels, directly distort the market process through private agreement.[30] By preempting the market, any cartel undermines the fundamental goal of ensuring the goods and services clear markets at competitively determined prices.

Second, a buyer cartel distorts incentives and causes a misallocation of economic rewards over time, undermining the core goals of a competitive market system. Competition policy should focus on the dynamic interest of providing incentives to invest and develop new, innovative solutions to problems. Buyer cartels, however, diminish the rewards to a producer below the level that a competitive market would have provided,[31] which sends the wrong signal to investors and innovators. Indeed, the strategic responses to cartels, such as vertical integration, although rational, can, in dynamic terms, result in further distortions of the market process away from better structural options.[32]

2. The Argument for Legalizing Certain Types of Buyer Cartels

The primary argument in favor of certain types of buyer cartels rests on a notion of countervailing power.[33] Small buyers facing a monopoly or oligopoly-seller market are individually powerless to bargain for lower prices;[34] they are therefore compelled to accept the monopoly or oligopoly price. However, if these buyers together can make a credible threat that they will withhold their purchases unless they receive lower prices, they might succeed. For example, at one point, independent pharmacies in the U.S. sought an antitrust exemption that would enable them to bargain collectively over prices and reimbursement rates with oligopolistic wholesalers.[35] These pharmacies claimed to believe that such an arrangement would lead to lower prices and higher reimbursement rates for the prescription drugs they happened to resell.[36]

This argument was based on a competition policy goal of static consumer welfare. The theory is that the successful buyer cartel will induce the seller to reduce prices and increase output, moving the market toward competitive price and output levels.[37] This assumes that the buyer cartel has sufficient power to do so and passes on its gains to consumers. But this outcome is contingent on the relative options of each side, as well as the bargaining skill and sophistication of the parties. Powerful sellers can disrupt the group by offering some participants secret discounts to defect. In the short run, the defector would gain a head start in competing with the other members of the group in processing the input and producing saleable output. Under these circumstances, cartels might prove ineffective.

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28 Carstensen, Competition Policy, supra note 1, at 42-46, 80-81.

29 See, e.g. *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292 (9th Cir. 1983) (sawmills had no capacity to increase downstream lumber prices but could collude on timber purchases); see also, *Mandeville Island Farms, v. American Crystal Sugar*, 334 U.S. 219 (1948) (sugar beet buyer cartel could not affect national or global prices for sugar, but it could limit prices paid for beets from the narrow geographic market in which they are competing for beets).

30 See, e.g. *Swift& Co.v.United States*, 196U.S.375 (1905) (conspiracy to limit prices paid for cattle); *Todd v. Exxon,* 275 F.3d 191 (2nd Cir. 2001) (conspiracy to limit compensation to employees).

31 See Blair & Harrison (1993), *supra* note 2, at 156–63.

32 See *Omega Envtl. Inc. v. Gibarco, Inc.,* 127 F.3d 1157 (9th Cir. 1997) (upholding a vertical exclusive dealing scheme foreclosing an alternative distribution plan even though serious questions existed as to whether exclusivity served efficiency interests of consumers).

33 John Kenneth Galbraith, American Capitalism: The Concept of Countervailing Power 109–12 (1952); see also Blair & Sokol, *supra* note 26, at 487-490.

34 See generally Thomas Campbell, *Bilateral Monopoly in Mergers,* 74 Antitrust L.J. 521 (2007) (small sellers should be allowed to merge to monopoly). This article produced some strong disagreement, see, Jonathan B. Baker, Joseph Farrell & Carl Shapiro, *Merger to Monopoly to Serve a Single Buyer: Comment,* 75 Antitrust L.J. 637, 637–46 (2008) (contesting the claim that bilateral monopoly is economically more efficient than competitive markets on at least one side of the marketplace).

35 See *Impact of Our Antitrust Laws on Community Pharmacies and Their Patients: Hearing Before the Task Force on Antitrust and Competition Policy of the H. Comm. on the Judiciary*, lI0th Cong. (2007); and *Id.* at 82–83 (statement of David A. Balto, representing the pharmacies).

36 *Id.* at 11 (statement of Rep. Weiner).

37 See Devlin, *supra* note 26 at 241-43; Blair & Sokol, *supra* note 26, at 487-90.

The case for buyer cartels is plausible in the short run only if no other reasonable alternative exists. Monopoly profits at the producer level ought, over time, to induce other responses, such as creating or sponsoring an entity to produce the input, finding substitute inputs, or creating a legitimate buying group. Entry or innovation would reduce or avoid the need for the monopolized product. Therefore, unless there is a strong argument that the seller's power is not likely to dissipate even in the long run, the justification for a buyer cartel is weak.[38] However, if a buyer cartel is the least bad option for establishing equitable prices and services, then an appropriate public regulatory body should oversee the cartel process—the interests of private parties will not necessarily be congruent with the public interest.

IV. RETHINKING COMPETITION POLICY FOR BUYER COMBINATIONS

Competition laws relating to buyer combinations need thoughtful reappraisal today.

A. Buyer Cartels More Likely Than Generally Realized

The general paucity of buyer cartel cases stands in stark contrast to data which show that input prices are vulnerable to exploitation.[39] This suggests that there is substantial potential for conspiracies among competing buyers to affect prices. The recent empirical work on labor markets showing the scope of monopsony and oligopsony power has highlighted the capacity of employers in these markets unilaterally or collusively to exploit the labor input in their products and service.[40] The resulting emergence of litigation focused on such exploitation through "no-poach" agreements underlines the scope of risk.

The experience with labor markets and the underlying data on price effects in input markets generally strongly suggest that more enforcement resources should be invested in examination of buyer side collusion. There are metrics that can provide clues such as unexplained increases margins between input and output prices either in an entire market or in regional input markets.

B. Buyer Cartels Should Remain Per Se Illegal

The weakness of the arguments for a general acceptance of buyer cartels when they provide countervailing power provides strong support for retaining a *per se* rule except when there is express authorization for a cartel. Any short-term gains are likely to be offset by longer term harms. Moreover, the development and implementation of appropriate criteria for any general basis to allow such cartels would be extremely difficult if not impossible. As William Howard Taft observed more than 100 years ago:

> . . .[W]here the sole object. . . is merely to restrain competition . . . there . . . is no measure of what is necessary . . . except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition.[41]

Taft warned that courts would "set sail on sea of doubt" if they undertook to decide with respect to agreements with "no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not." [42] Hence, a *per se* rule prohibiting unregulated buyer cartels remains the best public policy.

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38 In addition, a buyer cartel can result in coordination on the downstream side of the market if the buyers constitute a substantial part of the resale market. If that occurs, the buyer cartel would morph into a seller cartel whose function would be to raise price and reduce output to the customers of its participants.

39 C. Edward Fee & Shawn Thomas, *Sources of Gains in Horizontal Mergers: Evidence from Customer, Supplier, and Rival Firms,* 74 J. Fin. Econ. 423, 424–27 (2004) (major cost savings from lower input prices); Sugato Bhattacharyya & Amrita Nain, *Horizontal Acquisitions and Buying Power: A Product Market Analysis*, 99 J. Fin. Econ. 97 (2011) (id.). Other studies have found substantial losses to sellers resulting from buyer cartels. See John E. Kwoka, Jr., *The Price Effects of Bidding Conspiracies: Evidence from Real Estate Auction "Knockouts,"* 42 Antitrust Bull. 503, 503 (1997) (finding that a thirty-two percent price decrease resulted from bid-rigging in real estate auctions); Jon P. Nelson, *Comparative Antitrust Damages in Bid-Rigging Cases: Some Findings from a Used Vehicle Auction,* 38 Antitrust Bull. 369, 386 tbl.4, 392–94 (1993) (finding that a significant price decrease resulted from bid rigging in auctions for used police cars).

40 See references at note 2, *supra*.

41 *United States v. Addyston Pipe Steel*, 85 F. 271, 282-283 (6th Cir. 1898)

42 *Id.* 283-284.

C. Buyer Cartels Require Buyer Side Criteria

The preceding analysis shows that there is need for criteria appropriate to the buyer side of the market. First, buyer power arises at relatively low market shares in comparison to standard analysis of seller side risks. Hence, a buyer cartel can incorporate a lower share of the overall market and still have the capacity to exploit suppliers or exclude some competitors from market access. This is most evident in the cases involving "no-poaching" agreements. The conspiracy among some, but not all the leading Silicon Valley technology firms is an example.[43] The implication of this insight is that enforcers need to be more attentive to evidence of collusion among any set of buyers regardless of their overall position in the market.

Second, buyer cartels can include more participants and are less likely to require detailed policing or overt understanding. The incentives to collude in many circumstances where supply is price inelastic, combined with the disincentives to defect mean that there is less need for the kind of verification that is frequently looked for in seller cartels where the incentives to defect are greater. Hence, the relative fewness of potential participants as well as the absence of overt policing mechanisms are less likely to be evident on the buyer side. This makes detection harder. But in the absence of such indicia, if other elements suggest a cartel, this should nonetheless encourage further investigation.

Indeed, the criteria used to exclude "tacit" collusion from condemnation themselves merit reconsideration on the buying side of the market. Rather, the central issue should be remedy and not the absence of more formal collusion. If a remedy can restore workable competition to the supply side of the market, that ought to justify intervention given the inherent incentives to exploit buyer power.

V. CONCLUSION

Both buyer cartels and legitimate buying groups present serious challenges to maintaining a strong and viable competitive process. Despite some plausible arguments that buyer cartels provide countervailing market power to a concentrated sellers' market, the demands of a workable competitive process preclude accepting this justification as a defense. Naked restraints of competition by buyers should be absolutely illegal unless subject to direct public regulation. Enforcement authorities also ought to look more broadly at the impact of parallel buying practices—especially in markets with relatively few buyers and many sellers.

43 See Final Judgment, *United States v. Adobe Sys. Inc.*, No. 1:10-cv-01629 (D.D.C. Mar. 18, 2011), available at https://www.justice.gov/atr/case/us-v-adobe-systems-inc-et-al. (computer hardware and software companies consented to decree prohibiting restraints in competition for employees).

BUYERS' CARTELS: PREVALENCE AND UNDERCHARGES

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I. INTRODUCTION

The economic theory of buyers' price fixing is well established. If buyers are small enough in number and sufficiently cooperative, they may be able to form oligopsonies that can force down the prices of common inputs below the prices that would have reigned in a more competitive procurement market. In other words, powerful buyers can *undercharge* their input suppliers. Other facilitating conditions may have to be present to generate significant negative price effects. Among them are opportunities for intra-buyer communications behind a wall of secrecy, relatively atomistic suppliers, homogeneous products, geographic isolation, inelastic demand, and barriers for sellers to detect the undercharges.

Because of the economic power of effective buyers' cartels, little or none of the lower costs need be passed on to their customers on the selling side, undercharges will widen cartel members' operating margins and generate higher joint economic profits. Indeed, powerful business groups can in principle simultaneously raise selling prices *and* lower buying prices, garnering two streams of monopoly profits from each side of their businesses. Empirically, absent the detailed data typically revealed in damages cases, such mixed collusive strategies may be difficult to distinguish in practice.

Blair & Harrison (2010) is perhaps the only book-length treatment of the economics of buyer power to be written in the past couple of decades.[2] One of their principal themes is that monopsony and oligopsony are frequent in natural markets yet are given short shrift empirically in economics and are rarely prosecuted.[3] However the empirical evidence they collected is quite modest. Restricting their purview to cases brought in U.S. courts[4] or documented in publications by American economists, by my count they assemble a sample of 24 documented buyers' cartels. A large share of these buyers' cartels appear to have been organized by bidding rings comprised of firms or individuals domiciled in one urban area or nation. Moreover their sample appears to be comprised entirely of domestic U.S. buyers' cartels. They do not present more than one or two examples of empirical buyer-power estimates.

Blair and Harrison opine that court cases alleging illegal buyers' collusion are infrequent in part because of the mistaken belief that if buyer power forces down prices below competitive level then consumers must benefit. In fact, if buyers have the power to explicitly collude on the price of a procured input, then an undercharge[5] is likely to be imposed on suppliers; the undercharge to suppliers is symmetric to the antitrust damages created by overcharges on buyers from sellers' cartels (*ibid.* pp. 157-163). In both cases, industry output contracts from the level that would be seen in purely competitive or noncooperative oligopsonistic procurement markets and allocative inefficiency is created.

In this article, I collect and analyze information on *international* buyers' cartels throughout history, where international refers to the membership composition of the cartel. The sample is larger than that of Blair and Harrison (2010) and does not overlap with theirs. Most importantly, the international sample is drawn from publications by economists that contain serious, disinterested estimates of the undercharges achieved by the buyers' cartels.

2 A second contender is Marshall & Marx (2012), a very formal monograph of the theory of bidding rings with practically no empirical content. Marshall, Robert C. and Leslie M. Marx. *The Economics of Collusion: Cartels and Bidding Rings.* Cambridge: The MIT Press (2012).

3 Blair & Harrison (2010) assert that " [buyers' cartels are] ...far more prevalent than many have recognized" (pp. 1-14). Blair, Roger D. & Jeffrey L. Harrison. Monopsony in Law and Economics. Cambridge: Cambridge University Press (2010).

4 They include some cases in which plaintiffs were denied standing or lost their cases.

5 Oddly, this term does not appear in Blair and Harrison's book. They stick to the more rigidly formal economic jargon of a "Buyer Power Index."

II. THREE HISTORICAL EXAMPLES OF BUYERS' PRICE-FIXING CARTELS

Case studies of historical buyers' cartels can illuminate the cooperative conducts that will generate customer undercharges. Three are particularly well studied and documented.

The London coal cartels are among the oldest historical cartels in the empirical legal-economic literature. They affected the wholesale market for heating coal brought by coastal ships sailing from northern England (principally Newcastle) to London via the Thames River. It is certainly an old market.[6] Records of taxes paid on "sea coal" in London go back more than 800 years to 1213 (Levy 1927: 9). From at least the 16th century, "Newcastle Coal" became the popular name for maritime coal sold in London.[7]

In my opinion, *London Coal* appears to be two radically different cartels. The London *coal-buyers'* cartel began as early as 1595 and persisted on and off for about 150 years.[8] The buyers were lightermen – wholesale coal merchants who operated river barges and purchased large quantities directly from the owners of coal-laden ships in London's harbor. At times, they were few enough in number that they were able to manipulate the prices paid in London.[9] Frequent complaints about high coal prices were forwarded to Parliament, and multiple parliamentary investigations confirmed that the lightermen were enjoying extraordinary financial returns at the expense of homeowners, hospitals, and the like. In 1729, a Parliamentary investigation found that ten lightermen controlled 67 percent of purchases in London, and the committee's report specifically blamed them for 1722-1729 price increases.[10]

Sometime between 1690 and 1770, the locus of power in the London sea-coal market moved north and upstream the supply chain. London consumers of coal were thenceforward exploited by a *sellers'* cartel of coalmine owners.[11] It is the Coal Gild of Northeastern England (later known as the "Newcastle Vend") formally organized in 1770. An informal predecessor made its first recorded collusive agreement on London coal prices in 1699. This so-called Newcastle Vend kept meticulous price archives and became among the first cartels to be studied by modern scholars who were interested in applying quantitative methods to price-fixing conduct. The availability of detailed purchase records has permitted sophisticated econometric modeling of the London coal cartels. A notable pair of studies by Hausman (1980, 1984) examines the coal markets from 1699 to 1845.[12] The oldest, informal episodes (1699 to 1770) were ineffectual in raising retail prices, but 11 more formal Vend episodes from 1770 to 1845 showed overcharges that averaged about 7 percent to 8 percent. In the early 19th century when the Vend was best organized, Tan (2003: 22) estimates that five episodes during 1821-1845 resulted in coal overcharges of from 12 percent to 16 percent.[13] Although highly unstable, the Vend did not finally collapse until 1845, 146 years after its birth. One or both London coal cartels operated for 250 years, making them the most durable cartels I have recorded.[14]

The English Government took many public actions in response to the coal cartels. Acts of Parliament forbidding bid rigging were passed in 1642 and 1665, but with no penalties specified. Other UK government actions came too late to affect the buyers' cartel of lightermen.[15]

6 However, the oldest written record of an illegal buyers' price-fixing cartel is *Wholesale Grain Trading* in ancient Athens, 328-324 BC (Connor 2007c: 31-34).

7 Reliable time-series price data (from the records paid for coal by London hospitals) begin around 1700. A 1699-1700 coal bid-rigging episode in London is the second-oldest overcharge estimate in Connor (2021).

8 Coal was mined in many parts of Britain, but high land transportation costs conferred a monopoly on the Vend over a wide range of delivered London prices. UK coal-cartel studies with overcharge estimates include Ashton and Sykes (1964), Levy (1927), Sweezy (1938), Hausman (1980), and Tan (2003). Newcastle coal was also shipped to France and other European ports. Sweezy, Paul M. *Monopoly and Competition in the English Coal Trade 1550-1850*. Cambridge: Harvard University Press (1938).

9 They were also assisted in setting prices by their trade association or guild, The Company of Lightermen. Lightermen were recognized by English laws dating from 1558 (*Oxford English Dictionary* online). The most egregious episodes of "engrossing," as the practice was called at the time in English Law, occurred when the R. Thames froze.

10 There are insufficient historical records to perform overcharge estimates.

11 Mine owners who sent coal by coastal ships from Newcastle to London controlled this cartel. The number of mines was quite large at times. Output was reduced through closing smaller mines and paying the owners compensation ("side-payments"). The lightermen's buyers' cartel may have overlapped with the Newcastle mine-owners' sellers' cartel during 1700-1750.

12 Hausman, William J. A Model of the London Coal Trade in the Eighteenth Century. *Quarterly Journal of Economics* 94 (1980): 1-14.

13 Tan, Elaine S. *Economic Regulation and Rent Protection: A Study of the Coal Cartel in the First Industrial Revolution: WP03-23.* Ann Arbor: Michigan Business School (October 25, 2003).

14 When railroads from the Midlands of England reached London in the early 1840s, the Newcastle owners' transportation-cost advantage disappeared and so did the Vend.

15 The first proposed remedy in 1744 set up price controls for London coal, to be administered by three judges. In 1788, a law made any agreements among or partnerships of more than five coal buyers illegal "combinations in restraint of trade." Whether these laws had more than fitful, short-term effects on this buyers' cartel is doubtful; shame rarely is as effective as monetary penalties in changing illegal, profitable conduct.

A second buyers' cartel involved small numbers of UK copper smelters, most in Swansea district of So. Wales. They initially began rigging bids for ore purchased from numerous miners during 1719-1726 and later rigged bids for export copper. The first buyers' cartel consisted of four smelters and suppressed copper ore prices during 1719-1726. A second more formal written agreement ("Associated Smelters") endured from 1737 to 1779. One historian says the second episode was "quite effective" at lowering ore prices *and* raising copper prices, but no quantitative estimate is provided.

A third of the better documented historical bidding rings is a *Rare Books Auction* held at Ruxley Lodge in Claygate, Surrey, UK.[16] The large ring of professional booksellers was able to leverage its superior knowledge of retail prices to the disadvantage of the Lodge's recent inheritor. It suppressed purchase prices by about 400 percent, which is the oldest buyers' cartel for which an undercharge is available. A leading economist writes:

"At an **auction of rare books** held at Claygate Estate, Surrey, England over 10 days in October 1919, 81 book sellers formed a bidding ring for 447 of the 641 lots of 13,600 volumes sold; one of the dealers kept a detailed diary of the bidding ring published in 1990; bid rigging was made illegal in the UK in 1927. The ring met secretly later to hold 4 'knockout' auctions among themselves; prices advanced each time; total knockout sales (an undercharge yardstick) were £19,696, up from £3714 paid to the estate at the original auction" (Porter 1992: 434).

III. CONTEMPORARY EXAMPLES OF BUYERS' CARTELS

Additional examples of successful buyers' cartels have in the past few decades continued to be documented by inquisitve economists. They include the procurement of fresh canning tomatoes in California's Central Valley (Just and Chern 1980),[17] collusion by millers on the auction prices of wheat in India (Banerji and Meenakshi 2004),[18] bidding rings in auctions of stamps (Asker 2010),[19] and auctions of houses seized for back taxes (Kwoka 1997).[20] More recently, novel civil and criminal antitrust litigation has been launched against "no-poach" agreements that suppress the wages of high-tech employees, college basketball players, and "gig-economy" jobs (Delrahim 2019).[21] For many contemporary buyers' cartels, estimation of price effects using acceptable forensic quantitative methods of analysis is not always possible.[22]

IV. UNDERCHARGES BY BUYERS' PRICE-FIXING CARTELS

The limited survey of historical examples of buyers' cartels above illustrates that the basic characteristics of many such cartels have been documented, but going the extra step to determine market price effects was too difficult or of less interest than describing their methods of conduct. Quantitative analyses of the size of *buyers'* cartels' undercharges are hard to locate and began to be published mainly from 1980. Stocking and Watkins (1948) were pioneers in estimating undercharges; they discussed three undercharges for the 1937-1939 international *Sugar Cane* cartel organized by several sugar-producing and -importing nations, including the United States. More sophisticated econometric estimation with detailed transactions micro data began later. Daggett and Narasimhanm (1981) seem to be the first to have published such a study. They test an model with detailed time-series data from the domestic *Titanium* cartel that operated in North America during the years 1970-1976.

16 The Lodge was expanded and renamed Ruxley Towers in the 1870s. The knockout auctions were held in rented space in the nearby town of Claygate.

17 Just, Richard E. and Wen S. Chern. Tomatoes, Technology, and Oligopsony. Bell Journal of Economics 11 (1980): 584-602.

18 Banerji, A. and J. V. Meenakshi. Buyer Collusion and Efficiency of Government Intervention in Wheat Markets in Northern India: An Asymmetric Structural Auctions Analysis. *American Journal of Agricultural Economics* 86 (2004): 236-253.

19 Asker, John. A Study of the Internal Organization of a Bidding Cartel: Working Paper. New York: Stern School of Business, New York University (July 2008). [See also The American Economic Review (2010): 724-762] http://pages.stern.nyu.edu/~jasker/stamps070628.pdf.

20 Kwoka, John E. The Price Effect of Bidding Conspiracies: Evidence from Real Estate "Knockouts." *Antitrust Bulletin* 42 (1997): 503-516.

21 Delrahim, Makan. Remarks at the Public Workshop on Competition in labor Markets: DOJ Press Release. Washington, DC. (September 23, 2019). https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-public-workshop-competition.

22 On the range of various court-approved methods, see Connor, John M. Forensic Economics Applied to Price-Fixing Overcharges. *Journal of Competition Law & Economics* Vol. 4, No. 1 (October 2007): 31-59.

Drawing upon a broad, deep data set of cartels with price-fixing overcharges' estimates, I analyze descriptive statistics of the prevalence and economic characteristics using a sample of 46 buyers' cartels (Table 1).[23] This sample comprises 85 estimates of undercharges because three cartels had multiple episodes, and 14 cartels benefitted from the availability of multiple estimates.[24]

Table 1. Buyers' Cartels with Episodic Overcharges' Estimates, 1919 - 2017

Market	Collusion Began	Collusion Ended	Episodes	Estimates
Antiques Auction, Surrey, UK (One Week)	1964	1964	1	1
Auction Houses, Fine-Art, world prices	1993	2000	1	8
Auctions, Houses in DC, U.S.	1967	1990	1	1
Auctions, Used Police Cars, NYC	1990	1991	1	2
Banks, Mexico sovereign bonds, MX & U.S.	2006	2017	1	1
Basmati rice auctions, farmer-wholesalers, Panipat, India	1999	1999	1	2
Beef in California, U.S.	1953	1970	1	1
Bitumen, Netherlands	1994	2002	1	2
Blueberries, Wild, Purchases, farmer-processor in ME, U.S.	1996	1999	1	1
Bond Underwriting, U.S.	1959	1967	1	1
Cattle auctions, cull-cow, Monroe Wis., U.S.	2000	2009	1	1
Cattle, Fed, U.S.	1994	2002	1	1
Cheese, aged, wholesale U.S. prices	1988	1993	1	1
Construction, public works, Quebec, CA	2000	2009	1	1
Dairy Processing /Milk, U.S.	1972	1975	1	1
Frozen Fish, U.S.	1986	1988	1	3
Futures Contracts, Potatoes, Maine, U.S.	1976	1976	1	1
High Tech Employees 2, Film Studios, U.S.	1986	2014	1	1
Insurance, brokers' contingent fees, U.S.	2001	2004	1	7
Lease oil royalties, U.S.	1986	1993	1	1
Oil and Gas Rights in Michigan, U.S.	2010	2010	1	1
Petroleum, Govt. Offshore Leases, Auctions, U.S.	1954	1975	1	1
Petroleum, Military fuels in Korea, KR & U.S.	1998	2016	2	4
Private equity buyouts, U.S.	1985	2007	2	2
Procurement, several products, by U.S. Defense Department, U.S.	1960	1969	1	1
Rail industry, skilled employees, no-poach, U.S.	2009	2016	1	1

23 An analysis of a slightly smaller sample of buyers' cartels was begun by Liu (2011). She drew upon the 2011 edition of the *Price-Fixing Overcharges* collection (for details see Connor 2014). I rely on the expanded 2021 Edition of *Price-Fixing Overcharges,* which contains nearly 2500 quantitative overcharge estimates covering the past three centuries drawn from publications about 706 cartels with 1934 separate episodes. Liu, Jing. *Buyers' Cartels: An Empirical Study of Prevalence and Economic Characteristics: Honor's Thesis.* West Lafayette: Department of Agricultural Economics, Purdue University (February 25, 2011).

24 Some of the episodes were studied by more than one author and occasionally a publication contained more than one equally plausible estimate by a single author.

Rare books auction, Surrey, UK	1919	1919	1	1
Real estate auction, Wash. DC, U.S.	1989	1989	1	1
Round Wood Buying, Sweden	1971	1984	1	4
Scholarships, Graduate, U.S.	1958	1991	1	1
Shrimp, Wholesalers/freezers, North Sea Shrimp 2, in NL, EC	1997	2000	1	1
Stamp auctions in NY City and UK, world effect	1980	1997	1	2
Sugar Beets, procurement, farmer-processor, Midwest, U.S.	1939	1941	1	1
Sugar, Cane, world prices	1938	1939	1	4
Timber cutting rights, U.S.	1982	1990	1	4
Timber, procurement, NW U.S. Auctions	1975	1981	1	1
Titanium Metal, U.S.	1970	1976	1	1
Tobacco, leaf, procurement, auctions, U.S.	1996	2001	1	1
Tobacco, leaf, procurement, Italy	1995	2002	1	1
Tobacco, leaf, procurement, various grades in Spain, EC	1996	2000	2	9
Vanadium Ore, Colorado, U.S.	1933	1948	1	2
Wheat auctions, farmer-wholesalers, Nerala, India	1999	1999	1	1
Total 46 cartels			**49**	**85**

There are four notable characteristics. First, the number of buyers' cartels with overcharge estimates is a small (4.3 percent) but growing share of all such cartels. During the pasr three centuries of available data, only 5.7 percent of all reported cartel price effects were undercharges by collusive buyer groups, but that ratio had risen from practically zero before 1990 to above 8 percent after 1990. An alternative measure of prevalence is the number of undercharge estimates, which is 85 out of about 2500 (3.4 percent). Because most cartels are hidden throughout their lives and there are no other large collections focused on buyers' cartels, it is difficult to know whether 3 percent to 8 percent more accurately reflects the proportion of buyers' cartels to total cartels.[25] The rise in prevalence after 1990 suggests that either prosecutorial interests or the priorities of empirical researchers shifted about 30 or 40 years ago.[26]

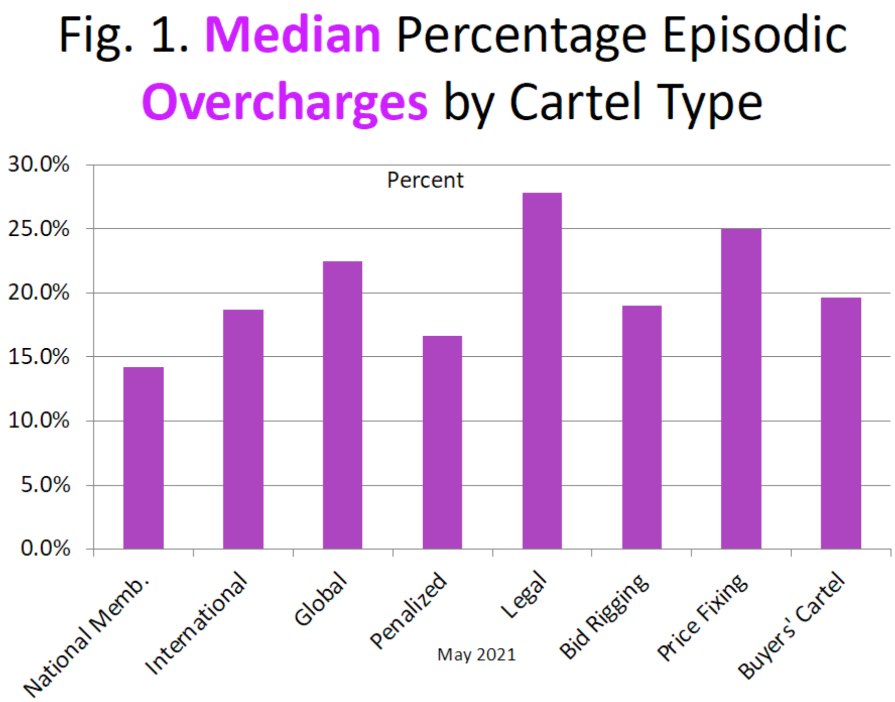
Second, buyers' cartels are typically found in only a few industry groups. While sellers' cartels are mainly in manufacturing of industrial inputs, buyers' cartels are preponderantly discovered in the food, tobacco, raw materials, and services industries (Liu 2011: Table 4). This pattern is consistent with the better case studies highlighted above, products like coal, logging, canning tomatoes, and auctions for collectables.

Third, buyers' cartels are much more likely to be *penalized bid-rigging* schemes than other types of cartels. Of the 83 overcharge estimates for buyers' cartels, 59 (71 percent) are bidding rings and 69 (83 percent) were "guilty" (caught and penalized by one or more antitrust authority). Buyers' cartels also tend to be slightly more oriented toward domestic-membership composition (46 percent versus 32 percent for all the estimates).

25 As mentioned previously, Blair and Harrison (2010) have a sample of 24 buyers' cartels, but nowhere do the authors attempt to determine the proportion of all cartels the 24 represents.

26 Cutting-edge empirical studies of many buyers' cartels were made possible by the data available through "sunshine laws" passed by governments in the late 1970s. At the same time, antitrust class actions became more frequent, which made compensatory damages actions by small dispersed victims (farmers, consumers, local governments, and the like) feasible. Finally, testifying experts found ways to replicate their testimonial analyses of sellers' cartels for buyers' cartels.

Fourth, the median average but-for[27] price effect of buyers' cartels is 19.6 percent, which is quite injurious but 17 percent weaker than those of sellers' cartels (Figure 1). Median undercharges of buyers' cartels are comparable to the overcharges of the penalized and bid-rigging cartel types. Like most other overcharges, undercharges have declined slightly over time; for the 45 episodes begun since the year 1990, the median average undercharge declined to 18.2 percent, compared to the median of 22.5 percent for episodes launched in earlier years (1919 to 1989). The reasons for this decline are unsettled in the cartel-studies literature. The trend may be due to superior data, improved estimation techniques, a change in the mix of cartelized industries (specifically more service industries), the global spread of and more effective detection by antitrust enforcement, or strategic behavior of cartelists.



V. NOTABLE ENFORCEMENT ACTIONS AGAINST BUYERS' CARTELS: VIGNETTES[28]

- In 328-326 BC, during wartime, several **Athenian wholesale grain merchants** formed a trade association to collude on bids made to importers of grain at Athens's port (a buyers' cartel). In 326 BC they were defendants at a public antitrust jury trial, where they argued that they had passed on the lower prices to citizens. However, they were convicted of illegal hoarding and sentenced to death. The prosecutor's famous speech written by Lysias survived.

- A 1952 U.S. court decision concluded that three beet-sugar refiners had conspired to undercharge **sugar-beet** farmers in the 1939-1941 crop years by $0.25 /ton.

- Damages were obtained in a case of bid rigging of three of 13 English oral auctions of 340 quality-graded **used 1988 Chevrolet Caprice police cars**, sold by the City of New York, January 1990 to May 1991. A subsequent statistical study found that members of the alleged bidding ring reduced prices received by the City, which settled out of court.

- Concentration (the numbers of firms bidding) effected the spreads of U.S. **tax-exempt bond underwriting auctions**. An empirical study of 9420 bond issues during 1959-1967 found evidence of bid-rigging behavior by bond buyers (buyers' cartel) against the seller, the U.S. Treasury, when the number of biders was few.

- Similar the case above, but for 2221 **auctions for government offshore oil leases** from the U.S. Department of the Interior 1954-1975. Statistical indications were found of bid-rigging behavior by smaller numbers of buyers.

27 That is, the percentages cited herein are relative to affected commerce *absent collusion* rather than the oft-cited proportion of total, overcharge-bloated affected commerce.

28 The sources of information on these vignettes can be found in Appendix Tables 1 and 2 in Connor, John M. *Price-Fixing Overcharges: Revised 3rd Edition: SSRN Working Paper* (February 24, 2014a). [http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400780].

- Allegations of **tobacco leaf** bid rigging by buyers (cigarette manufacturers) against sellers in US auctions 1996-2001 was upheld in an antitrust class action by 400,000 tobacco growers and quota holders, which was was settled by the four defendants in May 2003.

- A published 1989 study of the **Swedish roundwood (timber) procurement** market in 1954-1984 found evidence of oligopsonistic pricing behavior by paper buyers against forest owners in two interrelated sub markets: sawtimber and pulpwood. An EC antitrust probe was launched in 2004 but apparently passed on to the Swedish and Finnish competition authorities. No action was taken in Sweden, but three paper companies were fined by Finland in December 2006.

- A knockout-auction bidding ring of 11 dealers from the US, UK, and France colluded against other buyers in **stamp auctions** from about 1980 to July 1997, mostly in New York City auction houses, but also in the UK. Criminal U.S. federal convictions were imposed on some of the U.S. and UK ringleaders.

- In the United States, two California-based antitrust class actions successfully obtained substantial monetary relief for highly **skilled workers** injured by **secret no-poach agreements**. The first is the *Silicon Valley High-Tech Employees* case in which eight companies signed DOJ consent decrees and paid civil damages, and the other is *Film Studios Software Animation Engineers* in which the Disney company and three others were found guilty. The U.S. DOJ played a minor roles in investigating these buyers' cartels.[29]

- However, recently the head of the Antitrust Division announced in a major policy speech that the Division was launching new investigations into oligopsony in U.S. labor markets, so-called no-poach agreements (Delrahim 2019). This announcement followed the third no-poach case to be concluded by the DOJ; in 2018 two manufacturers were convicted civilly for suppressing the wages of skilled manufacturing workers of *Railroad Braking Equipment*. Their consent decrees were followed by a quick 2020 class-action settlement.[30]

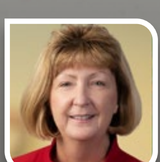
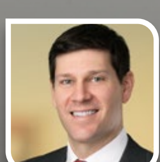
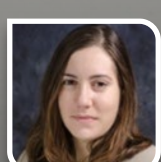
As of mid-2021, there is little evidence that the DOJ has made no-poach agreements a top priority. The fact that indictments in no-poach cases have all so far been treated as civil infractions is further evidence that the Division is not serious about this priority. And the class-action settlements have wressted compensation that is at most 20 percent of the lost wages estimated by plaintiffs' experts.

29 *In re: High-Tech Employee Antitrust Litigation* (U.S. District Court, Northern District of California 11-cv-2509) and ROBERT A. NITSCH, et al. v. DREAMWORKS ANIMATION SKG INC., et al. (U.S. District Court, Northern District of California 14-cv-04062-LHK).

30 IN RE: RAILWAY INDUSTRY EMPLOYEE NO-POACH ANTITRUST LITIGATION
(U.S. District Court, Western District of Pennsylvania Master Docket Misc. No. 18-798, MDL No. 2850).

WHERE HAVE WE BEEN, AND WHERE ARE WE GOING? THE CRIMINAL PROSECUTION OF BUYER CARTELS

BY LISA M. PHELAN, JOSEPH CHARLES FOLIO III & HANNAH ELSON[1]

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The prosecution of buyer cartels as conduct contrary to antitrust laws is not new. Although buyer cartels are a minority of the cartel prosecutions by the U.S. Department of Justice's Antitrust Division, they have been a regular feature of the Division's enforcement efforts over decades. In fact, the Division has prosecuted a variety of buyer cartels, though until recently most involved collusion during auctions.

Despite this history, in October 2016, when the Division announced that it intended "to criminally investigate naked no-poaching or wage-fixing agreements,"[2] or buyer cartels for labor, it was widely viewed as a momentous shift in policy. Perhaps in recognition that this was a somewhat shocking change in policy and interpretation of its criminal authority, rather than charge such cases right away, the Division instead filed a handful of statements of interest in civil wage-fixing and no-poach cases, while its leadership addressed the contours of the new policy across several public speeches. As perhaps an implicit acknowledgement of the significance of this policy shift, the Division waited more than four years to charge its first criminal wage-fixing and no-poach cases. To better understand the expansion of the Division's scope of criminal enforcement and its implications, it is helpful to place the newfound focus on prosecuting buyer cartels for labor in context with both the Division's history of prosecuting buyer cartels and the underlying economics of the risk of harm posed by buyer cartels.

I. GASOLINE, BILLBOARDS, AND MOVIE THEATERS . . . BUT MOSTLY AUCTIONS

Although buyer cartel prosecutions may be less frequent, they are not insignificant. The Supreme Court's seminal decision holding that price fixing is illegal *per se* involved an agreement between buyers of gasoline.[3] Over the years, the Division has prosecuted billboard companies for colluding on the rents they would pay to property owners[4] and movie theaters for agreeing to allocate the rights to show different films.[5]

By far, however, the majority of buyer cartel prosecutions have involved auctions. Between 1997 and 2006, all 70 criminal cases brought by the Division against buyer cartels involved collusion among auction bidders.[6] In 2014 and 2015, the Division prosecuted more than 50 individuals for conspiring not to bid against one another at public real estate foreclosure auctions.[7] While the country was reeling from the 2008 recession, the conspirators agreed before the auctions who would win certain properties, thereby ensuring an artificially lower price, and then held follow-on auctions among themselves to ensure the equitable distribution of properties.[8] As of January 2021, the Division had charged 139 individuals and three companies in these real estate foreclosure conspiracies.[9] Over 120 individuals pleaded or were found guilty, the longest prison sentence was for 21 months, and the criminal fines totaled more than $1,400,000.[10]

In 2019, the Division charged individuals for colluding during auctions hosted by the General Services Administration ("GSA"), the federal government's primary administration agency. GSA auctions allowed the public to bid electronically on various federal assets no longer needed by the government, such as old computer equipment,[11] and the proceeds would go the U.S. Treasury or the agencies themselves.[12] The Division alleged that the co-conspirators agreed on who would submit bids for particular lots and who would win each lot, and then later they would agree on how to divide the assets they won among themselves.[13] Two of the three individuals charged in the investigation have pleaded guilty.[14]

2 Press Release, U.S. Dep't of Justice, Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation (Oct. 20, 2016), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals.

3 *U.S. v. Socony-Vacuum Oil Co.*, 310 US. 150 (1940).

4 See *U.S. v. Brown*, 936 F.2d 1042 (9th Cir. 1991).

5 *U.S. v. Plitt So. Theaters, Inc.*, 1987 WL 19346 (W.D.N.C. Aug. 10, 1987).

6 Roundtable on Monopsony and Buyer Power: Note by the United States to the Organization for Economic Co-operation and Development (Oct. 13, 2008), https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/monopsony.pdf.

7 Press Release, U.S. Dep't of Justice, Northern California Real Estate Investor Agrees to Plead Guilty to Bid Rigging at Public Foreclosure Auctions (May 4, 2015), https://www.justice.gov/opa/pr/northern-california-real-estate-investor-agrees-plead-guilty-bid-rigging-public-foreclosure-6.

8 Information at 3, *U.S. v. Alvin Florida, Jr.*, No. 17-10330, 4:14-cr-00582 (N.D. Cal. Nov. 19, 2014).

9 DOJ Public Real Estate Foreclosure Auction Cartels Investigation Chart, WestLaw Practical Law Antitrust (Dec. 2020).

10 *Id.*

11 U.S. Gen. Serv. Admin., https://gsaauctions.gov/html/static/about.htm (last visited May 9, 2021).

12 Press Release, U.S. Dep't of Justice, Texas Bidder Pleads Guilty To Rigging Bids at Online Auctions for Surplus Government Equipment (Apr. 10, 2019), https://www.justice.gov/opa/pr/texas-bidder-pleads-guilty-rigging-bids-online-auctions-surplus-government-equipment.

13 *Id.*

14 Press Release, U.S. Dep't of Justice, Missouri Businessman Arrested on Antitrust Charge for Rigging Bids at Online Government Auctions (Feb. 5, 2020), https://www.justice.gov/opa/pr/missouri-businessman-arrested-antitrust-charge-rigging-bids-online-government-auctions.

II. [*ENTER STAGE RIGHT, SLOWLY*] WAGE-FIXING AND NO-POACH PROSECUTIONS

In October 2016, at the tail-end of the Obama administration, the Division and Federal Trade Commission ("FTC") unveiled Antitrust Guidance for Human Resource Professionals. Notably, the guidance made clear that, "[g]oing forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements."[15] According to those Guidelines, "[t]h[o]se types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocation customers, which have traditionally been criminally investigated."[16]

Rather than start charging cases, the Antitrust Division spent the next few years filing statements of interest in several civil cases involving wage-fixing or no-poach claims.[17] Of particular note is the statement of interest the Division filed in the case concerning allegations of no-poach agreement between fast-food franchisors and their franchisees. There, the Division argued that the more flexible rule of reason should apply when determining whether the plaintiffs had stated a Section 1 claim because the alleged agreements were vertical rather than horizontal, and "[v]ertical arrangements are almost always assessed under the rule of reason."[18]

It was not until December 2020 — more than four years after issuance of this guidance — that the Division filed its first criminal charges for both wage-fixing (*U.S. v. Jindal*, December 2020)[19] and no-poach (*U.S. v. Surgical Care Affiliates LLC*, January 2021)[20] agreements. The fact that the Division waited several years to allow its "prosecutorial intent" to sink-in seems to be an implicit recognition of the significance in this shift in enforcement.

III. WHAT MAKES A BUYER CARTEL "NAKED," AND WILL YOU KNOW IT WHEN YOU SEE IT?

According to Phillip Areeda and Herbert Hovenkamp, "[p]roperly defined naked price fixing by buyers raises the same issues and poses the same dangers as price fixing by sellers,"[21] and therefore "most" buyer cartels "are readily condemned under the *per se* rule."[22] Like the DOJ-FTC Guidance for Human Resources Professionals, Areeda & Hovenkamp do not condemn all buyer agreements, only "naked" buyer agreements. This stands in stark contrast with seller cartels, which are labeled almost uniformly as *per se* antitrust violations. But what makes a buyer agreement "naked," and what does it mean to be "[p]roperly defined"?

In the DOJ-FTC guidance, the agencies defined a "naked" agreement as one that is "separate from or not reasonably necessary to a larger legitimate collaboration between the employers."[23] This definition is consistent with Areeda's and Hovenkamp's use of the term "naked," which they define as "cartels where the only or principal purpose of the agreement is to fix the buying price or output and where the challenged restraint cannot be said to be ancillary to a significant integration of the firms' operations."[24]

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15 U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidance for Human Resources Professionals at 4 (2016) (hereinafter DOJ-FTC Guidance For HR Professionals).

16 *Id.*

17 See *In re: Railway Industry Employee No-Poach Antitrust Litig.*, 18-mc-0798, ECF No. 158 (W.D. Pa. Feb. 8, 2019); *Seaman v. Duke Univ.*, 15-cv-0462, ECF No. 325 (M.D.N.C. Mar. 7, 2019); *and Stigar v. Dough, Inc.*, 18-cv-0244, ECF No. 38 (E.D. Wash. Mar. 8, 2019).

18 Corrected Statement of Interest of the United States, *Harris v. CJ Star, LLC*, 2:18-cv-00247 at 7 (E.D. Wash. Mar. 8, 2019) (citation omitted).

19 Press Release, U.S. Dep't of Justice, Former Owner of Health Care Staffing Company Indicted for Wage Fixing (Dec. 10, 2020), https://www.justice.gov/opa/pr/former-owner-health-care-staffing-company-indicted-wage-fixing.

20 Press Release, U.S. Dep't of Justice, Health Care Company Indicted for Labor Market Collusion (Jan. 7, 2021), https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion.

21 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis Of Antitrust Principles And Their Application ¶ 2010 (4th ed. 2015) (hereinafter Areeda & Hovencamp, Antitrust Law).

22 *Id.*

23 DOJ-FTC Guidance For HR Professionals at 3.

24 Areeda & Hovencamp, Antitrust Law at ¶ 2010.

An example of a buyer arrangement that academics, economists, and government antitrust agencies have not identified as "naked" is joint purchasing agreements.[25] The purported virtues of a joint purchasing agreement are reduced transaction costs (e.g. purchasing, transportation, storage, etc.) and increased negotiating power (i.e. lower prices).[26] In their examination of these types of arrangements, Areeda and Hovenkamp conclude that, "whenever the joint purchasers engage in some significant productive activity in addition to setting a price or restricting output, the restraint should generally not be considered as naked."[27]

Consistent with that assessment, federal agencies have exempted certain types of buyer arrangements from antitrust scrutiny. The 2000 DOJ-FTC Antitrust Guidelines for Collaborations Among Competitors created "safety zones" for collaborations, both general and specific to research and development efforts, to protect allegedly procompetitive conduct.[28] In 1996, the DOJ and FTC issued a joint statement of enforcement policy about the health care industry declaring, among other things, that "[m]ost joint purchasing arrangements among hospitals or other health care providers do not raise antitrust concern" because "[s]uch collaborative activity typically allows the participants to achieve efficiencies that will benefit consumers."[29] Both the Guidelines for Collaboration and the policy statement about the health care industry expressly note, however, that neither applies to agreements that are *per se* illegal.[30] In fact, the policy statement makes clear that it does not apply to "an agreement among competitors as to the prices for health care services or the wages to be paid to health care employees," which it described as "unlawful *per se*."[31]

IV. ARE BUYER CARTELS DIFFERENT, AND DOES THAT MATTER?

Although Areeda and Hovenkamp classify naked cartels by both buyers and sellers as "equally harmful,"[32] the economic consequences are not the same.[33] The primary concerns with buyer cartels are that they risk a reduction in production,[34] an increase in price,[35] and a distortion of market signals.[36] One possible consequence of distorted market signals is that pricing below a competitive level undermines investment and innovation.[37]

But in practice, unlike seller cartels, a buyer cartel does not necessarily result in higher prices for consumers. When buyers collude and pay less for an input, less of the affected input is produced.[38] If the market for the sale of the finished product is competitive, prices do not increase; but if the buyers have market power for the sale of the finished product, prices would likely increase as supply diminishes.[39] However, even if a buyer cartel does not result in higher prices for consumers, as many economists and academics have argued,[40] there is a cost — though perhaps less visible — to producers and to consumers in the form of foregone investment and innovation.

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25 *Id.* at ¶2012b.

26 *Id.* at ¶2010; *see also* Peter C. Carstensen, *Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy*, 1 Wm. & Mary Bus. L. Rev. 1 30, (2010).

27 Areeda & Hovencamp, Antitrust Law at ¶2012b.

28 Fed. Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors at §§4.2–4.3 (2000) (hereinafter Guidelines for Collaborations Among Competitors), https://www.justice.gov/atr/page/file/1098461/download.

29 U.S. Dep't of Justice & Fed. Trade Comm'n, Statements of Antitrust Enforcement Policy in Health Care at 53 (1996) (hereinafter DOJ-FTC Enforcement Policy in Health Care), https://www.justice.gov/atr/page/file/1197731/download.

30 *Id.*; Guidelines for Collaborations Among Competitors at §4.2.

31 DOJ-FTC Enforcement Policy in Health Care at 52.

32 Areeda & Hovencamp, Antitrust Law at ¶ 2011.

33 *Id.* at ¶ 2011b.

34 Carstensen, *supra* note 26 at 20–21.

35 *Id.*

36 *Id.* at 24-25.

37 *Id.* at 25.

38 Areeda & Hovencamp, Antitrust Law at ¶ 2011b.

39 *Id.*

40 Roger D. Blair and Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 Cornell L. Rev. 297, 299 (1991).

Although Areeda and Hovenkamp state that "most" buyer cartels "are readily condemned under the *per se* rule,"[41] the economic effects also seem to vary based on the type of buyer cartel. On one end of the spectrum, Areeda and Hovenkamp have described buyer cartels in auctions as "very common."[42] As they see it, auctions present ideal circumstances for a buyer cartel to be successful: it involves a discrete market composed of the potential buyers in attendance, the conspiracy between buyers needs to last for only a short time, and the prompt and public announcement of the results is an effective deterrent for cheating.[43] This seems to explain why most of the Division's prosecutions of buyer cartels to date have focused on auctions.

On the other end of the spectrum, Areeda and Hovenkamp, as well as the DOJ and FTC, have acknowledged that joint purchasing agreements are appropriate in certain circumstances. What is the difference between a joint purchasing agreement and a "buyer cartel"? A typical defense of buying groups highlights the benefit to consumers from lower prices and reduced transaction costs. Buying groups are often viewed as a means for pushing back against sellers who have amassed some amount of market power.[44] But these benefits do not mean that buying groups are harmless. Like buyer cartels, joint purchasing agreements also typically result in a lower price for sellers, which risks decreasing production and distorting market signals. Interestingly, the primary justification for a buying group — the need for "countervailing power" — is also the primary argument in support of buyer cartels.[45] In fact, comparing buying arrangements in auctions and purchasing, arguably the harms caused during an auction are more fleeting because that market exists for only a short period of time.

So, although some academics and federal antitrust authorities have labeled "naked" buyer cartels as *per se* illegal[46] and joint purchasing groups as generally lawful, the difference between the two may not be as stark as those labels suggest. The primary characteristics that seem to distinguish joint purchasing groups are the fact that the economic benefits to consumers are "more visible,"[47] and that they operate openly and notoriously pursuant to the exemptions set forth by antitrust authorities. But the likely lack of harm to consumers, and the historical absence of enforcement seem to raise a real question as to whether there is a clear, defensible distinction to be made — or that a court will feel justified in making — when criminal penalties are on the line.

The similarities between buyer cartels that the Division now seeks to charge criminally and other buying arrangements that the Division has treated as acceptable create fertile ground for defendants to challenge their indictments. The Division is likely to face numerous arguments about the applicable standard of review and whether pro-competitive aspects of a buyer arrangement should be considered.[48] For example, in the labor market, arrangements between buyers may serve a number of different pro-competitive ends: companies may be seeking to protect investments they make in employees (e.g. advanced training), to provide continuity of operations (i.e. avoid frequent turnover that harms productivity), or to create stability in the market (e.g. seek to avoid retaliation from competitors).[49] Even if the reasoning for such an arrangement was not set forth in a formal agreement, like joint purchasing groups typically do, a court may still entertain them. And companies in some buying arrangements that the Division may seek to investigate criminally may choose to start operating openly and notoriously so that, like a joint purchasing agreement, their conduct would be subject to the rule-of-reason rather than be consider *per se* illegal.[50]

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41 Areeda & Hovencamp, Antitrust Law at ¶ 2010.

42 *Id.* at ¶2011c.

43 *Id.* at ¶ 2011a & 2011c.

44 Chris Doyle & Martijn A. Han, *Efficient Cartelization Through Buyer Groups* (Amsterdam Ctr. for Law & Economics, Working Paper No. 2009-03, 2010).

45 Carstensen, *supra* note 26 at 25.

46 DOJ-FTC Guidance For HR Professionals at 3.

47 Areeda & Hovencamp, Antitrust Law at ¶2010.

48 In 2010, the Division reached a civil settlement with six major tech companies based on the principle that a no-poach agreement will not be prohibited if it (1) is ancillary ("reasonably necessary") to a legitimate business agreement; (2) is "narrowly tailored to affect only employees who are anticipated to be directly involved in the agreement"; (3) "identif[ies] with reasonable specificity the employees who are subject to the agreement"; and (4) "contain[s] a specific termination date or event." *U.S. v. Adobe Sys., Inc., et al.*, No. 1:10-cv-01629-RBW (D.D.C. Mar. 18, 2011).

49 See also, e.g. *AYA Healthcare Services, Inc. v. AMN Healthcare, Inc.,* 2018 WL 3032552 at *10–12, *15 (S.D. Cal. June 19, 2018) (finding it plausible that defendants were engaged in a joint venture); *Eichorn v. AT&T Corp.*, 248 F.3d 131, 143–45 (3d Cir. 2001) (allowing a no-poach agreement that was conditioned on the sale of a business).

50 *Cf.* Richard Vanderford, *Canada Competition Bureau on lookout for 'sham' agreements, agency says in new collaboration guidelines*, MLex (May 6, 2021), https://content.mlex.com/#/content/1291286 (explaining that Canada's Competition Bureau "was 'cognizant' that certain companies might be structuring agreements to deliberately avoid scrutiny under section 45 of the Competition Act, which allows criminal sanctions for nakedly anticompetitive agreements among companies").

The Division claimed that it would criminally prosecute naked wage-fixing or no-poaching agreements because they "eliminate competition in the *same* irredeemable way as agreements to fix produce prices or allocate customers."[51] But unlike seller cartels that the Division almost uniformly seeks to prosecute in all forms, the Division has long tolerated certain forms of buyer arrangements. Additionally, even for the buyer arrangements it could not tolerate, the Division has historically pursued most of those — the primary exception being collusion during auctions — in civil actions. As the Division starts to re-think how it treats different types of buyer arrangements, and especially as it starts to prosecute some criminally, the focus on the differences between them will intensify. That focus may well reveal that the line between legal and illegal buyer arrangements may not be as clear as the Division and others suggest.

V. WHERE DO WE GO FROM HERE?

The Division's focus on bringing wage-fixing and no-poach cases, which it re-emphasized as recently as March 2021 in both speeches and charges filed, is likely to consume a significant amount of its time for the foreseeable future. The Division spent more than four years laying the groundwork for execution on this shift in enforcement, and now, having finally brought cases, cartel prosecutors are going to work hard to ensure that those cases are successful.

It will be an uphill battle. Case in point, on March 26, 2021, former solicitor general Paul Clement filed a motion to dismiss the indictment against Surgical Care Affiliates LLC — the first company the Division charged with a no-poach violation — that raised several constitutional challenges, some of which were based on the Division's historical treatment of this type of conduct.[52]

In additional to historical treatment, the Division continues to treat different types of buyer cartels differently — ranging from acceptance, to civil enforcement, to criminal enforcement — despite material similarities in the economic harm they cause. These differences are invitations for defendants to challenge how they are charged, how the case is tried, or otherwise to provide justifications for their conduct. It is not the type of clarity upon which criminal law thrives.[53]

But, in a world in which the Division successfully expands its prosecution of buyer cartels, it may be increasingly willing to consider stricter enforcement, including criminal prosecution, for other types of buyer arrangements. As explained previously, joint purchasing agreements have long been accepted in some form, but the underlying economics shows that the government could argue that they pose similar and possibly more risk of harm.[54]

This is a pivotal moment for enforcement against buyer cartels, and for businesses trying to understand and follow shifting policies in both the buying, labor, and human resources spaces. By expanding the scope of its prosecutorial gaze, the Division is inviting companies and courts to examine these issues more closely than they have in the past. In so doing, this extra scrutiny may have drastic consequences, not only for the future of Division's enforcement efforts in this area, but also for the companies and individuals the Division is seeking to hold criminally liable for their conduct. However, until the courts have spoken about whether this conduct is rightly the subject of criminal cartel enforcement, companies would be wise to err on the side of caution.

51 DOJ-FTC Guidance For HR Professionals at 4 (emphasis added).

52 Mot. to Dismiss Indictment, *U.S. v. Surgical Care Affiliates LLC*, ECF No. 38-1 (N.D. Tex. Mar. 26, 2021).

53 *Id.* at 5 (arguing that a criminal rule-of-reason case would be anathema to bedrock principles of fair notice and due process).

54 Carstensen, *supra* note 26 at 7 (warning that the risks posed by "legitimate buying groups, [which] although efficient responses to the needs of their participants, can also pose real threats to the long-term competitiveness of both the supply and demand sides of the market"); *Id.* at 32 (noting that, once established, "a buying group [] provides a means to coordinate [sale] prices, create[s] a culture of price stability and avoidance of competition").

THE NCAA: A CARTEL IN SHEEPSKIN CLOTHING

BY ROGER D. BLAIR & WENCHE WANG[1]

1 We owe this description to Nobel Laureate Gary S. Becker. Gary S. Becker, *The NCAA: A Cartel in Sheepskin Clothing*, Business Week, Sep. 14, 1987, p. 24. Professor, Department of Economics, University of Florida and Affiliate Faculty. Levin College of Law, University of Florida. Assistant Professor, Sport Management, University of Michigan.

I. INTRODUCTION

The National Collegiate Athletic Association (NCAA) is a 1200-member cartel that exercises considerable monopsony power in the market for collegiate athletes. Ordinarily, buyer cartels are unlawful *per se*, but the NCAA enjoys a peculiar antitrust exemption when it comes to its employment of collegiate athletes. This exemption can be traced to the Supreme Court's misguided decision in its *Board of Regents* opinion.[2] As a result of this antitrust exemption, the NCAA cartel operates openly for all the world to see. Since its operations need not be clandestine, organizing and implementing the cartel is less complicated. Moreover, since the cartel rules are spelled out in its *Operations Manual*, cartel communication is facilitated.[3]

In this article, in Section II, we begin with a brief discussion of the Supreme Court's blunder in its *Board of Regents* opinion, which granted antitrust immunity to the NCAA in the athlete labor market. In Section III, we present the standard, bare bones model of monopsony and explain the adverse economic consequences. In Section IV, we explore the NCAA as a buyer cartel and examine the wide array of restrictions aimed at improving cartel profit. In Section V, we analyze the current vitality of the antitrust exemption along with current antitrust challenges. In Section VI, we close with some concluding remarks.

II. ANTITRUST EXEMPTION

President Theodore Roosevelt's concern over the safety of college athletes resulted in the formation of what has become the NCAA. From its somewhat humble beginnings, the NCAA has flourished over the last century. Currently, there are over 1,200 member institutions. These colleges and universities are divided into Division I, II, and III. The rules vary a bit across the three divisions in ways that reflect each institution's emphasis on athletics. Our focus is on Division I, which contains the largest and most prominent athletic programs.

The NCAA is a reasonably big business. The colleges and universities vary considerably in their size and profitability. Collectively, however, their budgets amount to several billion dollars. In Table 1, we set out the 10 athletic departments with the highest revenue in 2019.

Table 1. Top Ten Athletic Budgets

Rank	School	Revenue
1	University of Texas	$223,879,781
2	Texas A&M University	$212,748,002
3	Ohio State University	$210,548,239
4	University of Michigan	$197,820,410
5	University of Georgia	$174,042,482
6	Pennsylvania State University	$164,529,326
7	University of Alabama	$164,090,889
8	University of Oklahoma	$163,126,695
9	University of Florida	$159,706,937
10	Louisiana State University	$157,787,782

Note: Data were obtained from USA Today. https://sports.usatoday.com/ncaa/finances

2 *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984). The central antitrust issue in *Board of Regents* involved NCAA restraints on television contracts. The Court found these restraints to be impermissible, but then went on to permit collusive monopsony in the athlete labor market.

3 NCAA (2020). 2020-2021 NCAA Division I Manual. The Manual is available to the public at https://www.ncaapublications.com/p-4605-2020-2021-ncaa-division-i-manual.aspx. There are similar manuals for Divisions II and III.

Coaches and administrators are paid handsomely. For example, Mark Emmert, president of the NCAA, enjoyed a salary of $2.7 million for the 2018 calendar year[4]; Grey Sankey, the Commissioner of the Southeast Conference, earned $2.6 million in the 2019 fiscal year[5]. Football coaches can earn multi-million dollar salaries.[6] Everyone — well, almost everyone — associated with college sports is paid well. The most prominent exception is the athletes. Due to the monopsonistic collusion of the NCAA and its members, employment has been limited[7] and the wage paid has been depressed.[8] In other labor markets, this conduct would amount to a *per se* violation of Section 1 of the Sherman Act. But the NCAA enjoys an antitrust exemption, which can be traced to the Supreme Court's unfortunate ruling in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*.[9] The NCAA had been controlling football television rights since the 1950s.

It limited the number of football games aired on TV over the concern of a shift away from game attendance. In 1977, a group of universities with prominent football programs formed the College Football Association ("CFA") in order to negotiate better TV contracts to televise college football games. In 1981, the CFA negotiated a more favorable contract with NBC. In response, the NCAA threatened to sanction any school that participated in the NBC deal and the punishment would extend beyond the football program. This led to the *Board of Regents* antitrust suit. The district court found that the NCAA's restrictive TV plan raised prices, reduced quantity, and was unresponsive to consumer demand. Accordingly, the court found that the plan was a *per se* violation of §1 of the Sherman Act. On appeal, the circuit court agreed with the district court. The NCAA appealed the rulings to the Supreme Court, which granted *certiorari*. In reviewing the lower court decisions, the Supreme Court found that the NCAA's TV plan restrained competition by restricting the number of televised games and eliminating price competition. In most circumstances, such agreements would be unlawful *per se*. However, the Supreme Court found that the NCAA's restraints warrant rule-of-reason treatment.[10]

In its attempts to justify a clearly unreasonable restraint, the NCAA argued that it was necessary to protect amateurism. While the Supreme Court did not excuse the NCAA's conduct with regard to television contracts, it did agree that the NCAA had to preserve the "revered tradition of amateurism" in intercollegiate athletics. Thus, the Supreme Court conferred an antitrust exemption for the NCAA's dealings in the athlete labor market.

> Our decision not to apply a per se rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved. It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics… The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act. But consistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die…[11]

The NCAA alleges that it has a pro-competitive justification for its panoply of restraints that limit the compensation of student-athletes.[12] Specifically, the NCAA claims that these restraints preserve amateurism, which it argues is crucial to the success of the intercollegiate athletic programs of its members. The Supreme Court has thus far agreed with the NCAA's position and held that the NCAA could require student athletes to be amateurs but failed to recognize that an amateur apparently is anyone so designated by the NCAA.[13]

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4 S. Berkowitz, (2020, June 2). NCAA president Mark Emmert credited with $2.7 million in total pay for 2018 calendar year. *USA Today*. Retrieved from: https://www.usatoday.com/story/sports/2020/06/02/mark-emmert-total-pay-2018-calendar-year/3123547001/.

5 S. Berkowitz, (2020, July 12). Power Five conferences had over $2.9 billion in revenue in fiscal 2019, new tax records show. *USA Today*. Retrieved from: https://www.statesman.com/story/sports/college/2020/07/12/power-five-conferences-had-over-29-billion-in-revenue-in-fiscal-2019-new-tax-records-show/113870976/.

6 There are 82 football coaches in Division I who were paid at least $1.0 million in 2020. At the top is Alabama's Nick Saban with a salary of $9.3 million per year. NCAA Salaries. USA Today. Retrieved from: https://sports.usatoday.com/ncaa/salaries/.

7 Employment (with grant-in-aids) by sport is spelled out in detail in NCAA Bylaws 15.5.

8 The maximum payment is spelled out in detail in NCAA Bylaws 15.0.

9 *Ibid*.

10 For a critical look at the Court's reasoning, see Herbert Hovenkamp, *The NCAA and the Rule of Reason*, 52 Review of Industrial Organization 323. (2018)

11 *Board of Regents* at 117, 120.

12 Indeed, the term "student athlete" was invented in 1964 by Walter Byers (the first executive director of the NCAA) to avoid liability for workers' compensation. Under the guise of amateurism, they can restrict compensation below the competitive level to reduce their costs and thereby improve their profits.

13 According to Google's Online Dictionary, an amateur is a person who engages in a pursuit – especially a sport – on an unpaid basis.

The scholarship student athletes are not amateurs. They are paid in kind: tuition and fees, room and board, and books. It is also permissible to include additional money to bring the scholarship up to "full cost of attendance." At private schools, the full cost of attendance may exceed $70,000, which is $10,000 above the median household income in the United States. The benefits also expand to preferential registration to accommodate practice schedules, tutoring as needed, and supervised strength and conditioning in and out of season. Student athletes are still considered amateurs simply because the NCAA says so. With the legal protection provided by the Supreme Court's *Board of Regents* decision, the NCAA and its members could safely restrict competition in the market for student-athletes in a variety of ways, such as restrictions on the number of employees, limitations on grants-in-aid, limits on contract duration, onerous transfer rules, and bans on sports agents.

III. THE ECONOMICS OF BUYER CARTELS

For many years no one paid much attention to employer cartels. Recently, however, they have attracted a good deal of attention from the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") as well as classes of underpaid employees. In fact, the DOJ and the FTC issued *Antitrust Guidance for Human Resource Professionals*[14] to alert employers that collusion in the labor market will be challenged as a *per se* violation of Section 1 of the Sherman Act. The Agencies underscored their competitive concerns with an admonition that they would file criminal, rather than civil, suits. In addition to government actions, there have been numerous antitrust class actions filed on behalf of employees who have been injured.

Employer cartels have emerged in the markets for temporary duty nurses,[15] hospital nurses,[16] hardware and software engineers,[17] digital animators,[18] au pairs,[19] fashion models,[20] medical school personnel,[21] and mixed martial arts fighters.[22]

The economic effects of these employer cartels are easily understood with a simple model of collusive monopsony.

In Figure 1, D represents the demand for labor services and S represents supply. If this labor market is competitive the equilibrium wage and employment level would be w_1, and L_1, respectively.

Employer surplus is the triangular area abw_1, while employee surplus is captured by the triangular area w_1bc. Social welfare (or total welfare) is the sum of employer and employee surplus, which is area abc in Figure 1. Given the supply and demand in this labor market, social welfare is maximized at the competitive equilibrium. The maximization of social welfare is the economic rationale for protecting and promoting the competitive process.

14 Department of Justice and Federal Trade Commission. *Antitrust Guidance for Human Resource Professionals.* (2016). Available at: https://www.justice.gov/atr/file/903511/download.

15 *All Care Nursing Service, Inc. v. Bethesda Memorial Hospital* 135 F. 3d 740 (11th Cir. 1981).

16 *Cason-Merenda. v. Detroit Medical Center*, Case No. 2:06-cv-15601.

17 *United States v. Adobe Systems, Inc.* 10-cv-01629-RBW (2011).

18 *United States v. Lucas Film, Ltd.* 10-cv-02220-RBW (2010).

19 *Beltran v. InterExchange Inc.*, No. 17-1359 (10th Cir. 2018).

20 The Council of Fashion Designers of America, Docket C-3621. (1995)

21 *Seaman v. Duke University*, 15-cv-00462 (2019).

22 *Le et al. v. Zuffa, LLC, d/b/a/ Ultimate Fighting Championship and UFC* Case No. 2:15-cv-01045 RFB-BNW (D. Nev. 2018)

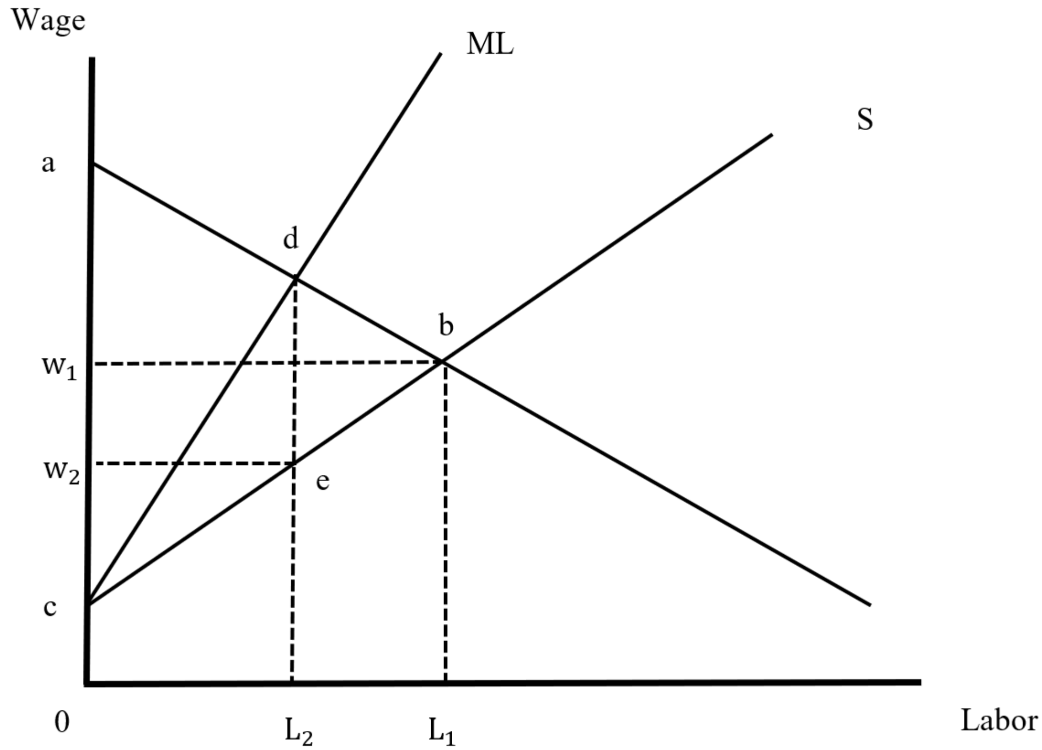

Figure 1: Competition and Monopsony in the Labor Market

If the employers join forces in an employer cartel, undesirable economic effects emerge. In order to maximize cartel profits, the cartel members must restrict total employment to the point where the demand is equal to the marginal expenditure on labor.[23]

In order to maximize profit, the collaborators will reduce employment from L_1 to L_2 and reduce the wage paid from w_1 to w_2. The employer surplus then rises from area abw_1 to $abew_2$. Employee surplus falls from w_1bc to w_2ec. The triangular shaded area deb represents the loss in social welfare. Employee surplus equal to $(w_1 - w_2)L_2$ is converted into employer surplus. The main economic objection to buyer cartels is the loss in social welfare. But the importance of the wealth redistribution from labor to the firms should not be ignored. With these economic principles in mind, we turn our attention to a more detailed examination of the NCAA cartel as it pertains to intercollegiate athletes.

IV. THE NCAA CARTEL

In most cases, organizing and implementing a buyer cartel is no mean feat. First, the prospective cartel members must agree to settle on a scheme to reduce employment in order to reduce wages and thereby improve profits. Second, they have to work out the details of the collusive arrangement and a plan for implementation. Finally, they have to monitor one another to correct any misunderstandings and detect any cheating that may occur. Ordinarily, buyer cartels are *per se* violations of the Sherman Act and, therefore, the cartel must proceed in a clandestine fashion. This last problem is of no concern to the NCAA and its members.

Since the NCAA enjoys an antitrust exemption, it can operate openly, which reduces the dangers of miscommunication or misunderstanding. The members meet once a year, but the work of committees and sub-committees goes on all year long. Proposals for changes in the rules are debated and votes are taken. The current rules governing the business of intercollegiate athletics are spelled out in the Operations Manual. With respect to the athletes, the rules appear to be aimed at maximizing the cartel profit.[24]

23 For the technical details, see Roger D. Blair and Christine Piette Durrance, *The Economics of Monopsony* in W. Dale Collins, ed. Issues in Competition Law and Policy (2008).

24 Our focus is on Division I where athletics, especially football and men's basketball, are big business.

A. Employment and Wages

In the previous section, we have seen that both employment levels and wages must be restricted in order to maximize cartel profit. In football, a school may not employ more than 85 players. In men's basketball, the limit is 13. In both sports, the school may pay the athletes in kind — room, board, tuition, fees, and books, which is referred to as a "grant-in-aid." The school may add to this sum an amount that raises the payment to the estimated full cost of attendance. Consequently, it is simply not true that the athletes are amateurs.[25]

Although this payment seems like pretty hefty compensation, it is still a binding constraint on the schools. Left to their own devices, the compensation for at least some of the athletes would be higher than the prescribed maximum. If a school is caught paying more than the total cost of attendance, the NCAA can impose some heavy sanctions: loss of bowl revenue, loss of TV money, ban on championships, loss of scholarships, among others.

B. Revenue Sharing

In our bare bones model of collusive monopsony, we ignored an extremely important issue: dividing the spoils. Most schools are members of conferences, which are configured and occasionally rearranged for economic reasons. The Big Ten, for example, used to include natural, regional rivalries. Its members included Illinois, Indiana, Iowa, Michigan, Michigan State, Minnesota, Northwestern, Ohio State, Purdue, and Wisconsin. Now, the Big Ten also includes Maryland, Nebraska, Penn State, and Rutgers.

There is substantial revenue sharing within conferences. For example, bowl revenues, television revenues, play-off revenues, and the revenues generated by March Madness are shared according to some agreed upon formula.[26] For members of the major conferences, the shared revenues are substantial. The University of Florida, a member of the Southeast Conference, was awarded $44.6 million for the 2018 - 2019 fiscal year[27] and $45.5 million for the 2019-2020 fiscal year[28] as its share of television agreements, post season bowl games, the College Football Playoff, the SEC Football Championship, the SEC Men's Basketball Tournament, and NCAA championships. Additionally, member schools that participated in football bowl games retained a combined total of $26.8 million for 2018-2019 and $20 million for 2019-2020 to "offset travel and other related bowl expenses."

C. Non-Price Competition

Many years ago, George Stigler pointed out that non-price competition could raise cartel costs and dissipate cartel profits.[29] In other words, it does no good to restrict employment and reduce the wage to profit-maximizing levels without similarly restricting non-wage competition. It is clear that the NCAA and its members have taken this economic lesson to heart. In addition to obvious limits on wage and employment levels, the NCAA's rules restrict non-price competition in an effort to minimize costs and thereby maximize cartel profits.

Cartel profit can be enhanced through other cost cutting measures, i.e. further restraints on competition in the athlete labor market. We examine a few of the additional restraints here.

D. Transfer Rules

Until recently, once an athlete committed to playing for a school, he or she faced major difficulties in transferring to another school, since they required permission from the school. The coach who signed the player could change jobs, but the player was stuck. Additionally, schools may not compete for talent by encouraging another school's athletes to transfer. In other words, the receiving school may not initiate the process. The extent to which the transfer rules restrained mobility was revealed by the extensive activity in the new transfer portal.[30]

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25 The athletes are amateurs simply because the NCAA says that they are amateurs. It revises its definition of "amateur" when it is convenient for the NCAA and its members to do so.

26 Not all revenue is shared. Stadium revenue, concessions, and endorsement money are not.

27 SEC announces 2018-2019 revenue sharing. Retrieved from: https://www.secsports.com/article/28600022/sec-announces-2018-2019-revenue-distribution.

28 SEC announces 2019-2020 revenue sharing. Retrieved from: https://www.secsports.com/article/30834010/sec-announces-2019-20-revenue-distribution.

29 George J. Stigler, Price and Non-price Competition, 76 Journal of Political Economy 149 (1968).

30 Roger D. Blair and Wenche Wang. *The NCAA's Transfer Rules: An Antitrust Analysis*. 11 Harvard Journal of Sports & Entertainment Law 1 (2020).

E. Contract Duration

In spite of restrictive transfer rules, between 1973 and 2012, the NCAA rules allowed only one-year contracts for the players. If a player was injured and could not perform, he or she could have been denied a scholarship for the next year.[31] The benefit of the one-year rule to the school is obvious. It shifts the financial risk of a career-ending injury from the employer to the employee. With a one-year contract that can be renewable for up to four additional years, if a player is injured and can no longer compete, the contract may not be renewed. If the athlete had received a multi-year contract, even if the player cannot compete, the school will still be responsible for the student's tuition and other stipends. Therefore, the expected costs for renewable one-year contracts are much lower than multi-year contracts.

In the traditional labor market, renewable short-term contracts may work in the employees' favor. A competitive employee may be able to negotiate for a better contract at renewal, which may not have happened with a long-term contract. But, better terms are not possible with the NCAA contracts. The grant-in-aids provided to the student-athletes are always capped at tuition and cost of living. Therefore, student athletes are always better off if they were at least guaranteed a long-term contract, with no hope of gaining a better contract after their one-year contract.

F. Limits on Recruiting

Recruiting can be expensive, so it is in the economic interest of the NCAA's members to keep down those costs. They do this in a variety of ways. The number of fully paid official visits for each athlete is limited. Although the limit varies by sport, each athlete's total number of official visits is limited. Perhaps more importantly the duration of an official visit is restricted to 48 hours. While the prospective recruit does not have to stay at the "Sleep Cheap Motel," the accommodations must be modest and the meals may not be lavish. The visiting athlete does not have to take a bus, but he or she must fly coach rather than first class[32].

G. Extraordinary Benefits

There are numerous ways in which a student athlete might receive extra benefits. Cash payments from coaches or supporters are strictly forbidden. Less obvious are things like free game tickets, jerseys and other athletic gear. The NCAA bylaws clearly lays out the restriction on such non-monetary benefits. For example, during a perspective student's official visit, there is a $75 dollar limit a day to cover the entertainment costs of the visitor. Additionally, this $75 cannot be used to buy T-shirts or any other school mementos[33].

V. ANTITRUST TROUBLES ON THE HORIZON

The NCAA has been able to fend off several antitrust challenges over the past three decades by pointing to its *Board of Regents* decision. But there are cracks in the foundation. The larger cases may do some serious damage to NCAA's antitrust immunity.

A. O' Bannon v. NCAA[34]

Ed O'Bannon was a star player on UCLA's NCAA Champion team in 1995. In fact, he was the tournament's most outstanding player. Years later, O'Bannon discovered that his image and likeness were being used without his permission. O'Bannon could see his likeness in a sports video game *NCAA Basketball 09* by Electronic Arts[35]. In July 2009, O'Bannon filed a lawsuit against the NCAA and the Collegiate Licensing Company for denying him a share of the profits earned by the NCAA through sale of television, online reruns, jerseys, video games and other paraphernalia. He alleged that the NCAA had violated the Sherman Act due to the agreement of the NCAA and its members to withhold from the athletes any returns on the use of his or her name, image, and likeness. This lawsuit was soon joined by NBA legends Oscar Robertson and Bill Russell, eight former college football and basketball players, as well as six active college football players. The named plaintiffs filed an antitrust class action against the NCAA to challenge its restriction on compensation for student athletes for their name, image, and likeness. The Electronic Arts and Collegiate Licensing Company settled with the class for $40 million but the trial against the NCAA lasted till 2014.

31 The NCAA now permits multi-year contracts, but it is up to the school and the coach.

32 The NCAA Bylaws 13.6 Official (Paid) Visit details policies and restrictions on official visit during the recruiting process.

33 See NCAA Bylaw 13.6 for more detailed restrictions.

34 *O'Bannon et al. v. National Collegiate Athletic Association, 802 F.3d 1049 (9th Cir.2015).*

35 The game featured an unnamed forward from UCLA that matches O'Bannon's height, weight, skin stone, No. 31 jersey, and left-handed shot.

On August, 2014, District Court Judge Claudia Wilken from the Northern District Court of California ruled that NCAA's rule forbidding compensation to the athlete for the use of his or her name, image, and likeness violated Section 1 of the Sherman Act. She suggested that the NCAA's practice had a significant anticompetitive effect on the college education market. In 2015, the Ninth Circuit Court of appeals affirmed the District Court's ruling in part. The NCAA was ordered to pay the plaintiffs $42.2 million in fees and costs. The NCAA subsequently appealed to the Supreme Court arguing that Judge Wilken did not apply the ruling from *Board of Regents*. The Supreme Court denied the NCAA's appeal.

B. Alston v. NCAA[36]

Following *O'Bannon*, a number of class action lawsuits were filed by student athletes against the NCAA to challenge its restrictions on compensation. Led by Shawne Alston and Justine Hartman, these cases were combined with *Alston v. NCAA* at the Northern District Court of California.

In March 2019, Judge Wilken found that the NCAA's restrictions on "non-cash education-related benefits" violated the Sherman Act and required that the NCAA allow certain types of academic benefits beyond full scholarships that was established from *O'Bannon*. The NCAA appealed to the Ninth Circuit. Though the Ninth Circuit panel agreed that the NCAA had a necessary interest in "preserving amateurism and thus improving consumer choice by maintaining a distinction between college and professional sports," their practices still violated antitrust law, thus upheld the District Court's decision. The NCAA and the American Athletic Conference filed petitions to the Supreme Court in October 2020 to hear their appeal. The Supreme Court granted *certiorari* to both petitions in December 2020. The oral arguments were heard on March 21, 2021 and the Court's ruling is still pending.

C. Implications

In May 2019, the California Assembly passed the Fair Pay to Play Act[37] that will allow student athletes to secure compensation from sponsors and endorsers. This means that student athletes will no longer be banned from collaboration with companies to promote their products, earn income from selling their autographs or photos. They may even be able to hire agents to help with their career. This bill will take effect in 2023.

Subsequently, in October 2019, the National Football League Players Association (NFLPA) announced a collaboration with the College Players Association to discuss how athletes can receive compensation for their name, image, and likeness, ensure licensing representation, and receive reimbursement for their medical expenses.

The NCAA responded to California's Fair Pay to Play Act by threatening to ban all schools in California. But it quickly altered its course, when Colorado, Florida, New York, New Jersey and Illinois also introduced similar bills. In the meantime, the NCAA has outlined a plan to allow student-athletes to make endorsement bills starting from the 2021-2022 academic year. The new NCAA plan would allow student-athletes to be social media influencers, appear in commercials, and get paid for autograph sessions, and endorsements. All payments must come from third parties rather than the colleges and universities. Although all of the details have not been ironed out, this development seems to be a step in the right direction.

VI. CONCLUDING REMARKS

The goal of antitrust policy is elusive. It could be the promotion and protection of competition as a means of allocating scarce resources. Or it could be the protection of consumer welfare or social welfare. When it comes to buyer cartels, however, it does not matter because the competitive process is impaired and both labor surplus and social welfare decline. Both the DOJ and the FTC have condemned employer cartels. In the *Antitrust Guidance for Human Resource Professionals*, the Agencies have taken the position that collusion in labor markets is a *per se* violation of Section 1 of the Sherman Act. Moreover, they have decided to file criminal, as opposed to civil, suits. This, of course, means that some conspirators may be facing prison time. In our view, there is no principled reason for treating the NCAA and its members more leniently than any other employer.

36 *Alston v. National Collegiate Athletic Association, No. 19-15566 (9th Cir. 2020).*

37 This Act is mis-named. It does not involve pay for play. Instead, it deals with third party payment to athletes for their names, images and likenesses.

RECENT EU DEVELOPMENTS IN BUYER-SIDE CARTELS

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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]

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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*.

EUROPEAN COMPETITION LAW SCRUTINY OF PURCHASING ALLIANCES

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I. INTRODUCTION

Competition policy and enforcement action against collusion in Europe has largely focused on horizontal coordination among suppliers. However, in recent years there has also been a heightened interest in joint purchasing agreements or purchasing alliances by competition authorities, with increased competition enforcement, especially in the retail sector.

Unlike buyer cartels, which are regarded as having as their object the restriction of competition and are thus prohibited by competition law, joint purchasing agreements are usually unlikely to have as their object the restriction of competition since it is primarily a means of increasing bargaining power. Such agreements require an effects-based analysis.

This paper provides an introduction to the sharpened focus on purchasing alliances in European competition policy (Section II), followed by an overview of the legal framework for the analysis of purchasing alliance and their distinction from buyer cartels (Section III), as well as a summary of the recent enforcement practice of NCAs and the EC (Section IV). Finally, some key considerations to take account of when setting up a purchasing alliance are provided (Section V).

II. EUROPEAN POLICY ACTION CONCERNING PURCHASING ALLIANCES

There is a growing sense in European competition policy that more attention needs to be placed on joint purchasing agreements. Last decade, the European Commission ("EC") and National Competition Authorities ("NCAs") began to take a closer interest in joint purchasing agreements in the course of their retail market monitoring work. A 2010 report[2] notes that while joint purchasing agreements are normally pro-competitive, when concluded among market players to achieve volumes and discounts similar to their bigger competitors, large transactional purchasing alliances may in certain circumstances raise concerns as to their effect on competition and ultimately, on consumers, especially where they "*reduce the participants' incentives to expand into each other's domestic markets or may contribute to a standardisation of their purchasing policies, which could have a negative longer term impact on product variety and/or the ability of food suppliers to innovate.*"[3]

A couple of years later, the Food Subgroup of the European Competition Network ("ECN") published a report which pointed to a growing phenomenon of international purchasing, which needed to be monitored.[4] This may be, among others, one of the reasons why the EC subsequently created a Food Task Force within DG COMP.[5] The growing concerns towards purchasing alliances was also evident in a number of sector inquiries conducted by NCAs.

For instance, in 2014, the German Federal Cartel Office ("FCO") concluded a sector inquiry into the food sector where it considered purchasing alliances alongside concerns about increasing concentration and complaints about buyer power. It noted that purchasing alliances involving large retailers should be carefully examined as they could be regarded as a pre-stage of a merger.[6]

At the same time in France, a significant number of purchasing alliances were concluded, which prompted a request from the Government for an opinion from the French Competition Authority ("FCA") on the impact of such alliances on competition. In its opinion[7], the FCA expressed concerns that they may give rise to competition risks on both the upstream and downstream markets. The FCA recommended the introduction of a pre-closing filing obligation. Since then, any purchasing agreement in the retail sector must be communicated to the FCA if the turnover exceeds certain thresholds.[8] In addition, the FCA may carry out a competitive assessment of the agreement's implementation.[9] If a buying agreement raises competition concerns, the parties must submit commitments.

2 Commission SWD on Retail Services in the Internal Market – Accompanying document to the Report on Retail Market Monitoring: "Towards more efficient and fairer retail services in the Internal Market for 2020," July 5, 2010, SEC(2010)807.

3 *Ibid*. p. 47.

4 Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector, May 2012.

5 Speech of Joaquín Almunia VP of the EC responsible for Competition Policy, "Competition policy as a pan-European effort," Nicosia, October 2, 2012.

6 Bundeskartellamt, Summary of the Final Report of the Sector Inquiry into the food retail sector, September 24, 2014, p. 16.

7 Avis 15-A-06 du 31 mars 2015, relatif au rapprochement des centrales d'achat et de référencement dans le secteur de la grande distribution.

8 Loi Macron: "LOI n° 2015-990 du 6 août 2015." See also Article L.462-10 of the French Commercial Code.

9 Loi Egalim: "LOI n° 2018-938 du 30 octobre 2018." See also Article L.462-10 of the French Commercial Code.

This context of increased focus on purchasing alliances in the retail sector resulted in several investigations by NCAs. While there have also been a number of investigations in relation to traditional buyer cartels, the investigations into purchasing alliances show that the frontier between legitimate purchasing alliances and buying cartels may not be easy to draw. As Margrethe Vestager stated recently, it is important to "*keep a careful eye on how such alliances work in practice, in order to make sure they are not a cover for cartel behaviour.*"[10]

Finally, in EU competition law, purchasing alliances are assessed under the framework of the EC's Horizontal Guidelines,[11] which are currently subject to reform. The EC recently published a staff working document on this topic, indicating that further clarification was required regarding the distinction between buyer cartels and joint purchasing agreements. This seems to confirm that provisions laid down in the Horizontal Guidelines regarding joint purchasing agreements may no longer be regarded to be adapted to market developments. An overhaul of these provisions is thus to be expected in the upcoming months.

III. FRAMEWORK OF ANALYSIS FOR PURCHASING ALLIANCES

Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU") prohibits agreements or concerted practices between undertakings which have as their 'object' or 'effect' an appreciable prevention, restriction, or distortion of competition within the internal market and may affect trade between Member States, unless they fall within an excluded category or are otherwise exemptible in accordance with Article 101(3) of the TFEU.

As stated above, the Horizontal Guidelines provide a framework for the assessment under Article 101 TFEU of purchasing alliances. The latter can contravene competition law by (i) constituting an object restriction or (ii) having the effect of restricting competition. These Horizontal Guidelines are a (non-binding) soft law tool.

A. Restrictions of Competition by Object

A joint purchasing arrangement is unlikely to have the 'object' of restricting competition. Only where such a purchasing arrangement facilitates a cartel among its participants will there be an object restriction.[12] An object restriction of this sort might take the form of output limitation (demand withholding), market sharing/allocation (e.g. through purchasing quotas), price fixing or 'profit allocation' with upstream suppliers.

Normally, agreements that involve fixing a purchase price will be an object restriction.[13] This does not apply to joint purchasing arrangements provided that they are not a disguised cartel.[14]

Where there is no obvious anticompetitive object, it is necessary to consider whether the arrangement has an appreciable effect on competition.

B. Restriction of Competition by Effect

As to the legal assessment, the EC will analyze two markets regarding joint purchasing: the purchasing market (upstream), where the parties jointly purchase their supplies, and the selling market (downstream), where the parties sell individually their respective products.

Joint purchasing arrangements are unlikely to fall under Article 101(1) TFEU where the parties – due to lack of market power – would not be able to buy certain supplies without the agreement.[15] This may be the case, for example, where a supplier will not deliver goods below a certain quantity threshold.

10 EuroCommerce Policy Talk Webinar, Keynote speech, March 12, 2021.

11 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01) ("Horizontal Guidelines").

12 Horizontal Guidelines, para. 205.

13 For example, Judgment of September 24, 2019, *HSBC Holdings and Others v. Commission*, T-105/17, EU:T:2019:675, para. 64.

14 Horizontal Guidelines, para. 206.

15 By analogy with Horizontal Guidelines, para. 237.

C. Safe Harbor

The Horizontal Guidelines further define a general safe harbor for agreements that have a market share of at most 15 percent on both the upstream[16] (i.e. their purchases account for less than 15 percent of total purchases on that market) and the downstream markets.[17] Those agreements are said to be unlikely to have restrictive effects on competition. One exception to this would be where there are parallel networks of similar joint purchasing arrangements that could dampen competition.

D. Analysis Beyond the Safe Harbor

A more detailed assessment needs to be conducted to assess the risks, taking into account factors such as: (i) the parties' market shares in both the purchasing and selling markets; (ii) the level of market concentration (market shares of the parties' competitors in both markets); (iii) whether the sellers have countervailing power; (iv) whether the parties have similar cost structures; or (v) whether there is information exchange – or measures limiting it – which could lead to a collusive outcome.

1. Upstream

The Horizontal Guidelines note that from an upstream perspective, anticompetitive buying power is likely to arise if an agreement accounts for a sufficiently large proportion of the total volume of a purchasing market so that access to the market may be foreclosed to competing purchasers.[18]

2. Downstream

From a downstream perspective, a high commonality of costs may facilitate the coordination of behavior. The Horizontal Guidelines also note that information exchange may give rise to concerns, but that if the information exchanged does not exceed the sharing of data necessary for purchasing then the agreement would be more likely to meet the criteria of Article 101(3) TFEU.[19]

3. Individual exemptions

If a joint purchasing arrangement infringes Article 101(1) TFEU, it may nevertheless be exemptible under Article 101(3) TFEU provided that it meets the four cumulative conditions of that paragraph, namely (i) efficiency gains; (ii) indispensability; (iii) pass-on to consumers; (iv) no elimination of competition. Regarding purchasing agreements, these conditions are detailed in paragraphs 217-220 Horizontal Guidelines.

Joint purchasing arrangements can give rise to efficiency gains. In particular, they can lead to discounts from volume bundling; increased supply chain efficiency (e.g. reduced transport costs); economies of scale (e.g. centralized ordering); transaction cost savings (e.g. negotiation costs); and counteracting significant supplier power in the selling market,[20] provided that the cost savings are passed on to the purchasers' customers; and any restrictions on competition are essential to create the cost savings or economic benefits.

16 That is the market from the supplier's perspective (i.e. if there were a 5-10 percent increase in price, what goods or services could the supplier switch to).

17 Horizontal Guidelines, para. 208.

18 Horizontal Guidelines, para. 210.

19 Horizontal Guidelines, para. 216.

20 Judgment of December 15, 1994, *Gottrup-Klim and Others Grovvareforeninger v. Dansk Landbrugs Grovvareselskab*, C-250/92, EU:C:1994:413, para. 32.

IV. RECENT ENFORCEMENT PRACTICE FOR PURCHASING ALLIANCES

In the past ten years, enforcement activity has been increased in relation to purchasing alliance and buyer cartels. While the EC's practice has so far mostly focused on buyer cartels, at NCA level the focus has been on purchasing alliances. Below we first take a look at the rather classic buyer cartels at both EC and Member State level (IV.A) and then at investigations into purchasers alliances between retailers (IV.B).

A. Enforcement Action Involving Purchasing Cartels

1. Billa/Julius Meinl (Czech Republic)

On October 13, 2003, the Czech Republic Competition Authority imposed fines totaling CZK 51 million on the retail chains Billa and Julius Meinl for a price-fixing cartel in the purchase of goods.[21]

In the context of their cooperation, parties exchanged information about their respective purchase prices and bonus and discount systems, compared them, and required suppliers to provide them with the same financial terms (under the threat of de-listing). The entire agreement was prohibited.

2. Raw Tobacco (EC)

On October 20, 2005, the EC imposed fines totaling EUR 56 million on four tobacco processors for colluding on the prices paid to tobacco growers or intermediaries and on the allocation of suppliers.[22] The EC also imposed fines on the Italian trade associations of processors and tobacco growers for engaging in collective price negotiations.

Parties breached Article 101(1) TFEU by exchanging sensitive information, coordinating bids for public auctions or prices to be paid to growers, and allocating suppliers (growers and intermediaries) and quantities among themselves.

3. Car Battery Recycling (EC)

On February 8, 2017, the EC imposed fines totaling EUR 68 million[23] on three undertakings for fixing prices for purchasing automotive batteries in Belgium, France, Germany, and the Netherlands.[24]

In this case, communications relating to purchase prices showed the parties' intention to influence purchase prices. The aim was to undercut the amount they owed for used batteries. This collusion took the form of frequent discussions between undertakings. Moreover, the undertakings were well aware of the illegal character of their contacts as they used a coded language (e.g. weather conditions).

4. Ethylene (EC)

The most recent decision issued by the EC in relation to a buyer cartel relates to the so-called ethylene cartel.[25] On July 14, 2020, the EC imposed fines totaling EUR 260 million on three undertakings for taking part in a price-fixing cartel for the purchase of Ethylene.

Companies buying ethylene usually do so under supply agreements. However, given that the ethylene market is characterized by a highly volatile price, a formula is used to determine the price on a monthly basis. The monthly contract price results from individual negotiations between buyers and suppliers of ethylene. The investigation revealed that these undertakings coordinated their negotiation strategies with suppliers in order to influence the price to their advantage. The coordination involved the exchange of a great deal of sensitive information.[26]

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21 Press release, Cartel Agreement *Billa/Julius Meinl*, September 21, 2006.

22 Commission decision of October 20, 2005 (COMP/C.38281.B2) – *Raw Tobacco IT*.

23 One of the parties successfully appealed on the basis of evidence of a time-limited involvement. See Judgment of November 7, 2019, *Campine and Campine Recycling v. Commission*, T-240/17, EU:T:2019:778.

24 Commission decision of February 8, 2017 (AT.40018 – *Car battery recycling*).

25 Commission decision of July 14, 2020 (AT.40410 – *ETHYLENE*).

26 *Ibid*. para. 42.

5. Steel (Germany)

On November 21, 2019, the FCO imposed fines totaling around EUR 100 million on car manufacturers for taking part in a price-fixing cartel for the purchase of steel products.[27]

These German car manufacturers, which met twice a year with steel manufacturers, forging companies and large systems suppliers under the umbrella of the "German association for steel and metal processing," exchanged information on uniform surcharges for the purchase of long steel products. Such exchange could lead to price collusion.

B. Enforcement Action Involving Purchasing Alliances

1. P&H/Makro (UK)

On April 27, 2010, the UK Office of Fair Trading ("OFT") issued an opinion in relation to a proposed joint purchasing agreement between Makro and Palmer & Harvey.

The OFT concluded in general that, in the absence of parallel networks of similar agreements in the relevant market, joint purchasing agreements were unlikely to cause harm where the parties had no downstream market power. It thus considered that the arrangement between Makro and P&H was unlikely to reduce competition as the companies would not have the power to raise prices/reduce output in the downstream markets.

In its analysis, the OFT identified a concern that certain exchanges of information between the companies could potentially lead to a reduction in competition. However, the parties subsequently agreed to ensure the data they supplied to each other was general and aggregated, preventing either company from extrapolating specific or sensitive information. The OFT opinion did not consider the upstream market in any detail.

2. Centrale Italiana (Italy)

On September 17, 2014, the Italian Competition Authority ("ICA") closed an investigation against a joint purchasing organization (Centrale Italiana), and five retailers.[28]

The parties involved in the alliance had a market share of 23 percent on Italy's upstream procurement market and around 40 percent on the downstream retail markets in some local areas.

The ICA considered that upstream, the alliance could reduce the possibility of suppliers to compete or decrease the variety and quality of products. At downstream level, the ICA considered that the arrangement could reduce the incentive of the parties to compete – as alliance members were aware of the turnover achieved by their competitors within the alliance, which could lead to the coordination of their sales policies.

The ICA closed its investigation given that the parties agreed and committed to put an end to their alliance or any form of commercial cooperation.

3. Retail Trade Group (Germany)

On April 4, 2017, the FCO indicated that it had no objection to the creation of a joint purchasing joint venture (Retail Trade Group) between four (small) food retailers.[29]

27 Bundeskartellamt 2019 Annual Report, p. 21.

28 Italian NCA, I768, Centrale d'acquisto per la Grande Distribuzione Organizzata.

29 Press release, "Bundeskartellamt currently has no objection to food retail joint venture 'Retail Trade Group.'"

While noting that the cooperation could have effects on the market, the considered effects on downstream retail markets would be limited given that the four major retailers dominated more than 85 percent of the market. As a result, the cooperation ensured the competitiveness, and ultimately the independence of the smaller retailers. The latter was necessary in order to provide alternatives and variety to consumers. Moreover, upstream, the effects were also limited given that the combined shares of the RTG members amounted to less than 15 percent – despite downstream market shares above in some territories – in all product categories and were thus under the safe harbor.

The FCO therefore decided not to investigate but indicated that a probe under competition law might be carried out later if the cooperation was extended.

4. Casino/Intermarché (EC)

On November 4, 2019, the EC opened a formal antitrust investigation into a joint purchasing joint venture between Casino and Intermarché.[30]

This investigation differs from other EC precedents, which concerned full-on buyer cartels, whereas here, a joint purchasing arrangement (more particularly, a joint purchasing joint venture) is at the root of the investigation. While a separate entity usually adds some layer of protection, the EC is investigating whether this separate entity exceeded its initial framework and served as a vehicle to coordinate their behavior downstream in relation to the development of shop networks or pricing policy. The investigation is still ongoing.

5. Casino/Auchan/Metro/Schiever (France)

On October 22, 2020, the FCA rendered binding the commitments submitted by retailers for their purchasing alliance to alleviate the competition concerns raised by such alliance.[31]

The alliance at issue was organized through a separate legal entity that organized tenders for a range of products. The FCA considered that there was a risk of foreclosure of suppliers, especially SMEs and very small businesses. Moreover, if a cut in margins to suppliers were to occur, it could reduce their ability to invest and innovate, and finally their incentive to stay in the market. The FCA took into account: (i) the suppliers' limited market power (e.g. short-term contracts); (ii) the market's low profitability and decreasing volumes over the years; and (iii) the fact that a significant share of the supply of retailers' own-brand labels was produced by SMEs, which were more susceptible to sudden changes in marketing conditions.

To alleviate these concerns, the parties agreed to exclude certain categories of products from struggling sectors and limit the scope for other products to 15 percent of all purchases.

6. Carrefour/Tesco (France)

On December 17, 2020, the FCA rendered binding the commitments submitted by retailers for their purchasing alliance to alleviate the competition concerns.[32]

The FCA identified a range of possible competition effects similar to those identified for the Casino/Auchan/Metro/Schiever alliance. The commitments are therefore very similar to the abovementioned case. The parties agreed to (i) exclude certain agricultural products; (ii) limit their cooperation for other product families to 15 percent of all purchases; and (iii) ensure SMEs the possibility of bidding for tenders launched by retailers.

7. Carrefour/Provera (Belgium)

On April 28, 2021, the Belgian Competition Authority ("BCA") rendered binding the commitments submitted by retailers for their purchasing alliance.[33]

30 AT. 40466, *Alliance Casino & Intermarché.*

31 Decision of the French NCA, October 22, 2020, No 20-D-13.

32 Decision of the French NCA, December 17, 2020, No 20-D-22.

33 Decision of the Belgian NCA, April 28, 2021, Case CONC-I/O-19/0013.

As part of this alliance, Carrefour agreed to negotiate the purchase of product on behalf of both retailers.

The BCA considered that the safeguards put in place were not sufficient to prevent the exchange of sensitive information:

- Commercial negotiations within the alliance were conducted by the same employees as were also in charge of the negotiations of Carrefour's separate purchases. The BCA took the view that a non-disclosure agreement, a separate e-mail address or committing not to use the information was not sufficient to prevent the exchange of information;

- Provera shared future purchases information with Carrefour;

- In order to negotiate the discounts to be granted by the suppliers in exchange of promotional services to be provided by Carrefour and Provera in their respective stores, the parties used a so-called "scorecard" system. While the parties negotiated the details for the compensation separately, the BCA considered that through the scorecard system, they obtained information that they would not have obtained otherwise, and which could contribute to the coordination of their commercial policies; and

- At management level, there was a risk of information exchange given that they were informed of the negotiations. Even though the cooperation provided that only the necessary information was to be shared, there was also a risk of coordination.

In order to address competition concerns, the parties agreed to create a separate legal entity for the conducting of their purchasing operations and to implement stricter control over the persons with access to information. Parties also committed to ensure that negotiations would henceforward be restricted to the bare financial aspect, allowing each party to define its business strategy in complete independence.

C. Conclusions

The decisional practice of the EC and NCAs shows a distinction between buyer cartels and legitimate joint purchasing agreements. On the one hand, buyer cartels are viewed as restriction of competition by object and are *per se* prohibited. As a result, hefty fines[34] are usually imposed, even where the parties cooperate with the investigation. On the other hand, legitimate purchasing alliances, which are subject to an effects-based analysis, are rarely subject to fines. Either the cooperation is terminated (*Centrale Italiana*), or the parties to the cooperation make some changes to it in order to alleviate the competition concerns (e.g. *Carrefour/Provera*). The only exceptions where fines are imposed is where purchasing alliances are used as a vehicle for covert cartels (*Billa/Julius Meinl*).

V. KEY TAKEAWAYS WHEN SETTING UP PURCHASING ALLIANCES

It is important to ensure when setting up a purchasing alliance that there is no restriction of competition by object and that the effects on competition are limited to what is strictly necessary to achieve the efficiencies resulting from such cooperation. Great care must indeed be taken to ensure that a cooperation does not become a vehicle for the exchange of sensitive information or coordination of behavior.

In order to reduce the risks, parties to a purchasing alliance may consider the following:

- The parties should make sure that the arrangement falls within the 15 percent safe harbor. In this regard, it should be ensured that the 15 percent market share threshold is not exceeded even under a narrow definition of the market.

- The parties should be able to purchase products outside the arrangement. In addition, the purchasing arrangement should not prevent the parties from competing with each other in the downstream market.

- The parties should consider: (i) limiting the exchange of commercially sensitive information to what is necessary to the joint purchasing activities; (ii) implementing "clean teams" to handle the joint purchasing and information; (iii) carefully managing documents, in particular those describing the purposes of the transaction. However, the safest way might be to organize the joint purchasing arrangement through a separate legal entity, with information barriers in place.

It remains to be seen what changes will be made to the Horizontal Guidelines as these will ultimately determine the framework of assessment.

34 See *Raw tobacco*; *Car battery recycling*; *Ethylene*; *Steel*.

BUYER CARTEL DOCTRINE: LESSONS FROM LABOR ANTITRUST

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I. INTRODUCTION

Courts and commentators agree that just as seller cartels are illegal, buyer collusion to fix price or divide markets likewise violates the law.[2] But while there is plentiful caselaw on seller cartels and the doctrine is fairly well settled, the caselaw on buyer cartels is relatively sparse. Courts offer general guidance that the same principles apply in cases involving seller power and buyer power,[3] but the general guidance leaves many specific questions unanswered.

However, while buyer cartel cases are generally rare, one type of buyer has come under particular scrutiny from antitrust enforcers in recent years. Employers (who "buy" their employees' labor) have increasingly been in the antitrust spotlight. Over the past 20 years, a wave of wage-fixing suits have hit a wide spectrum of different industries, including nursing,[4] energy,[5] animation,[6] au pair services,[7] shepherding,[8] professional sports,[9] and agriculture,[10] and a case alleging that many high-tech companies agreed not to solicit each other's workers shook up Silicon Valley in the early 2010s.[11] Attention to labor antitrust spiked even further in October 2016, when the antitrust agencies published Antitrust Guidance for Human Resource Professionals ("HR Guidelines"),[12] which clarified that not only were naked wage-fixing and no-poach agreements *per se* illegal, but the Department of Justice ("DOJ") intended to proceed criminally against such agreements.[13] Since 2016, DOJ provided additional clarification on employer agreements by filing statements of interest in private cases involving fast food franchises,[14] railway equipment companies,[15] and medical schools,[16] and then followed through on its HR Guidelines by filing the first criminal wage-fixing case in December 2020[17] (with a superseding indictment involving an additional defendant following in April 2021),[18] and the first criminal no-poach case in January 2021.[19] In a recent interview with the American Bar Association, Acting Assistant Attorney General for the Antitrust Division Richard Powers indicated that DOJ intends to increase criminal enforcement against employer agreements further,[20] so all signs point to this area of law continuing to garner attention.

2 See, e.g. *Vogel v. Am. Soc'y of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984) ("[B]uyer cartels, the object of which is to force the prices that suppliers charge the members of the cartel below the competitive level, are illegal per se. Just as a sellers' cartel enables the charging of monopoly prices, a buyers' cartel enables the charging of monopsony prices; and monopoly and monopsony are symmetrical distortions of competition from an economic standpoint.").

3 See, e.g. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 317–18, 322–23 (2007) (stating that test that applied to predatory pricing on the sell-side also applied to predatory bidding on the buy-side and that "similar legal standards should apply to claims of monopolization and to claims of monopsonization"); *Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.*, 846 F.3d 1297, 1315 (10th Cir. 2017) ("The same general framework for assessing market power applies to monopsony and monopoly situations alike."); *Presque Isle Colon & Rectal Surgery v. Highmark Health*, 391 F. Supp. 3d 485, 502 n.12 (W.D. Pa. 2019) ("The Court applies the same standard as a claim of monopoly to this situation of an allege monopsony based on the close "kinship between monopoly and monopsony," which suggests that "similar legal standards should apply to claims of monopolization and to claims of monopsonization.").

4 See, e.g. *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130 (N.D.N.Y. 2010); *Maderazo v. Vanguard Health Sys.*, 241 F.R.D. 597 (W.D. Tex. 2007); *Doe v. Arizona Hosp. & Healthcare Ass'n*, No. CV07-1292-PHX-SRB, 2009 WL 1423378 (D. Ariz. Mar. 19, 2009); *Reed v. Advoc. Health Care*, No. 06 C 3337, 2007 WL 967932 (N.D. Ill. Mar. 28, 2007).

5 See *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001).

6 See *In re Animation Workers Antitrust Litig.*, 123 F. Supp. 3d 1175 (N.D. Cal. 2015).

7 See *Beltran v. InterExchange, Inc.*, 176 F. Supp. 3d 1066, 1073 (D. Colo. 2016).

8 See *Llacua v. W. Range Ass'n*, 930 F.3d 1161, 1179 (10th Cir. 2019).

9 See *Kelsey K. v. NFL Enterprises LLC*, No. C 17-00496 WHA, 2017 WL 3115169 (N.D. Cal. July 21, 2017), *aff'd*, 757 F. App'x 524 (9th Cir. 2018).

10 See *Jien v. Perdue Farms, Inc.*, No. 1:19-CV-2521-SAG, 2020 WL 5544183, at *2 (D. Md. Sept. 16, 2020).

11 See *United States v. eBay, Inc.*, 968 F.Supp.2d 1030 (N.D. Cal. 2013).

12 Department of Justice, Antitrust Guide for Human Resources Professionals (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

13 *Id.* at 3-4.

14 See *Stigar v. Dough Dough, Inc.*, Case No. 2:18-cv-002440-SAB, Dep't of Justice Statement of Interest (Mar. 8, 2019), ECF No. 34 ("DOJ *Stigar* Statement of Interest").

15 See *In Re Railway Industry Employee No-Poach Antitrust Litigation*, Case No. 2:18-MC-00798-JFC Dep't of Justice Statement of Interest (Feb. 8, 2019), ECF No. 158.

16 *Seaman v. Duke University*, No. 1:15-CV-462, Dep't of Justice Statement of Interest (Mar. 7, 2019), ECF No. 325 ("DOJ *Duke* Statement of Interest").

17 See *United States v. Jindal*, Case No. 4:20-cr-00358-ALM-KPJ (Dec. 9, 2020), ECF No. 1.

18 See *United States v. Jindal*, Case No. 4:20-cr-00358-ALM-KPJ (April 15, 2021), ECF No. 21.

19 See *United States v. Surgical Care Affiliates, LLC*, Case No. 3:21-cr-00011-L (Jan. 5, 2021), ECF No. 1.

20 Richard Powers, Acting Assistant Attorney General, U.S. Department of Justice Antitrust Division, American Bar Association Antitrust in Healthcare Virtual Conference (Feb. 12, 2021).

The result is that while the caselaw on buyer cartels is fairly sparse, the doctrine on employer agreements is increasingly coming into clearer view.[21] That is not to say that all important questions have been answered, but courts and enforcers have already weighed in on many important aspects of employer collusion, and with both private and government enforcement continuing at a high level, the body of applicable common law will continue to grow and refine the doctrine. What can this rapidly developing doctrine pertaining to one specialized type of buyer (the employer) tell us about buyer cartel doctrine more generally? This article proceeds by considering three important aspects of buyer cartel law where our rapidly accumulating experience with labor antitrust cases may be particularly illuminating: the dividing line between rule of reason and *per se*, the type of harm plaintiffs must show, and market definition.

II. RULE OF REASON v. *PER SE*

As any practitioner knows, one of the most consequential questions in antitrust litigation is whether the claim proceeds under the *per se* or rule of reason rubric. The article presumes the reader's familiarity with these concepts, but suffice it to say that the plaintiff's path to victory is far less direct in a rule of reason case, with market power, competitive effects, and procompetitive justifications all at issue. Perhaps even more importantly, as DOJ's recent actions show,[22] *per se* price-fixing and market-allocation agreements may subject defendants to criminal as well as civil liability.

What do labor antitrust cases have to teach us about the dividing line between rule of reason and *per se* violations? One key question is whether the challenged agreement is *naked* or *ancillary* to a broader procompetitive collaboration. As the DOJ explained in a Statement of Interest filed in a no-poach case involving medical faculty, "[i]f a no-poach agreement is reasonably necessary to a separate, legitimate business transaction or collaboration among the employers, it is not *per se* unlawful as a naked restraint, but instead judged under the rule of reason."[23] The DOJ synthesized the existing caselaw and explained its application in the labor antitrust context: "To be ancillary, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction, and reasonably necessary to make the main transaction more effective in accomplishing its purpose."[24]

Of course, where the rubber really hits the road is figuring out what makes a restraint ancillary. Is an agreement among competing purchasers (of labor, or a different input) always going to be subject to rule of reason if it is part of some broader collaboration? How searching is the inquiry into whether the challenged agreement is "reasonably necessary" to the broader collaboration? A case involving temporary nurses in Arizona offers an instructive illustration. A class of per diem and travel nurses sued the Arizona Hospital and Healthcare Association ("AzHHA"), alleging that the organization's "nursing Registry Program, which contracts with various agencies representing temporary nurses, operated as an illegal and anticompetitive buyers' cartel" that "jointly set—and wrongfully suppressed—the wages and compensation" of temporary nursing staff."[25] The hospitals accused the plaintiffs of "attempting to 'cherry pick' one aspect of AzHHA's role, without considering the other, pro-competitive activities of the organization," and even the plaintiffs conceded that the organization "serve[d] some legitimate ends, such as quality assurance."[26] This was not enough to take the case out of *per se* territory.[27] Rather, the court agreed with the nurses that "[t]here was no need for Defendants to begin price-fixing to permit AzHHA to continue providing other benefits to the hospitals."[28] The case suggests that invocation of ancillarity is no free pass, and courts are likely to question whether the challenged conduct is really a necessary part of the broader procompetitive collaboration or agreement.

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21 This is particularly the case for wage-fixing agreements (which have been analogized to price-fixing) and no-poach agreements (which have been analogized to market allocation).

22 See *Jindal*, Case No. 4:20-cr-00358-ALM-KPJ (Dec. 9, 2020), ECF No. 1; *Surgical Care Affiliates, LLC*, Case No. 3:21-cr-00011-L (Jan. 5, 2021), ECF No. 1.

23 DOJ *Duke* Statement of Interest at 24.

24 *Id.* Courts apply a similar framework in no-poach cases. See, e.g. *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464, 480–81 (W.D. Pa. 2019) ("[T]he court first asks whether the challenged conduct truly involves a 'horizontal' restraint between actual or potential competitors allocating markets or customers, reducing output, or otherwise restricting competition between them, and, if so, whether the restraint is devoid of plausible procompetitive justification (i.e., is 'naked') or is instead plausibly ancillary and necessary to some larger, procompetitive integrative activity.").

25 *Arizona Hosp. & Healthcare Ass'n*, 2009 WL 1423378 at *1, 3.

26 *Id.* at *3.

27 It also bears noting that the fact that the hospitals joined together as part of an industry organization did not prevent the court from treating the alleged wage-fixing as a horizontal agreement among competing hospitals, rather than a hub-and-spoke conspiracy with a series of vertical agreements between the industry organization and the participating hospitals.

28 *Id.* at *3. (internal square brackets omitted).

The contours of the inquiry into whether the supposedly ancillary restraint is really "reasonably necessary" is likely to come into sharper view in the coming years. The vehicle for this doctrinal clarification just may be a case featuring your favorite burger spot. Non-solicitation clauses in franchise agreements (such as the ones commonly used in the fast food industry) have been the subject of much scrutiny recently. The Trump-era DOJ took the position that most franchisor-franchisee restraints are subject to the rule of reason, at least in part because such restraints are likely to be reasonably necessary to the broader franchise agreement.[29] But other enforcers are skeptical that ancillary restraint doctrine applies to these agreements. Speaking on an American Bar Association podcast in April 2020, Washington Assistant Attorney General Rahul Rao described DOJ's position as "somewhat misguided," arguing that 35-40% of franchise systems do not use no-poach restraints and "the lack of a no-poach provision with those systems has not hindered their growth or success" and that "it's not clear how a single labor market allocation agreement is organically or plausibly connected to the main transaction."[30] With enforcement and litigation in this sector continuing apace, it will be fascinating to track whether the Biden DOJ will maintain the prior administration's position or take a more skeptical view of ancillary restraints in line with Washington's position, and how courts resolve the inevitable controversies over whether challenged employer restraints were "reasonably necessary" to a broader agreement. The answers to these questions will provide a lot of clarity not only for labor antitrust, but for buyer cartel doctrine more generally.

III. DOES HARM TO SELLERS/EMPLOYEES SUFFICE?

While many within the antitrust world question the consumer welfare standard, it remains the touchstone for antitrust analysis, at least for the time being. The conventional thinking, applicable in cases involving *seller power*, is that the challenged antitrust conduct must harm consumers in order to be illegal. But how do we think about *buyer power* cases, where the immediate victim is the seller (or the employee — the seller of labor), not the consumer? What kind of competitive harm must the plaintiff show?

Again, the labor antitrust cases, and academic discussion over such cases, are the vanguard that may provide cases for buyer cartel cases more generally. In the *AzHHA* case, the court treated the claim as *per se* and thus had no occasion to analyze competitive effects, but did weigh in on whether "the nature of the plaintiff's alleged injury…was the type the antitrust laws were intended to forestall" in the course of determining whether the nurses had standing to bring suit. The court's view was that being paid wages below the competitive level was "an example of the type of injury the antitrust laws are meant to protect against."[31] In other words, showing harm to the sellers (employees) was enough.

There are two distinct ways to reach the conclusion that harm to sellers / employees suffices. One is to interpret the consumer welfare standard as applying not literally only to consumers, but to trading partners more generally, be they buyers, sellers, employees, or other economic actors. Interestingly, the clearest legal support for this proposition comes from an old Supreme Court case from the 1940s that predates the rise of the consumer welfare standard. In holding that farmers could state a cause of action against sugar refiners who allegedly "agree[d] among themselves to pay a uniform price for sugar beets grown in California," the Supreme Court proclaimed that the Sherman Act "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers," and "is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."[32] One may wonder whether the rise of the consumer welfare standard creates tension with the *Mandeville Island Farms* holding. Many labor antitrust scholars would say it does not. In their view, depressing wages below the competitive level ends up hurting consumers and not just employees, and so protecting employees is not at all inconsistent with the antitrust law's focus on the consumer. As Suresh Naidu, Eric A. Posner, and Glen Weyl explain, if a firm depresses wages it will hire fewer workers, and "if firms employ fewer workers, they will produce less output, resulting in higher prices."[33] Therefore, "monopoly and monopsony are two sides of the same coin, and both harm labor and product markets."[34]

As labor antitrust litigation continues to work its way through the courts, it will become clearer whether courts converge on the expansive *Mandeville Island Farms* position that the Sherman Act protects all victims and not just consumers, the scholars' view that restraints that hurt employees hurt consumers as well, or some other position. Whatever consensus emerges will have a profound impact on buyer power cases more generally, not just labor antitrust.

29 See DOJ *Stigar* Statement of Interest at 11, 16.

30 Am. Bar Ass'n, *Our Curious Amalgam* (Apr. 27, 2020), https://podcast.ourcuriousamalgam.com/episode/43-no-poach-assessing-risk-in-uncertain-seas/.

31 *Arizona Hosp. & Healthcare Ass'n*, 2009 WL 1423378 at *4.

32 *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 221, 236 (1948).

33 *Antitrust Remedies for Labor Market Power*, 132 Harv. L. Rev. 536, 559 (2018).

34 *Id.* See also Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 Ind. L.J. 1031, 1062 (2019) (explaining that when a "firm has market power on both sides of the market… exercising market power on the labor side will entail the purchase of less labor… [and] less labor will lead to less output on the product side").

IV. MARKET DEFINITION

Market definition is vital in most antitrust cases, and buyer power cases are no exception. Particularly in purchaser cases that fall under the rule of reason, market share of the purchasing group will be a key question in the assessment of competitive effects,[35] and to calculate market share one must first identify the correct market.

Here, again, labor antitrust cases provide useful guidance. In particular, then-Judge Sotamayor provided a detailed tutorial on market definition in labor antitrust cases (applicable to buyer cartel cases more generally) in the 2001 Second Circuit opinion *Todd v. Exxon*.[36] Plaintiffs, complaining "that defendants violated § 1 of the Sherman Act by regularly sharing detailed information regarding compensation… and using this information in setting the salaries," alleged the relevant market to be "the services of experienced, salaried, non-union, managerial, professional and technical (MPT) employees in the oil and petrochemical industry."[37] The district court applied traditional "seller power" market definition framework, and asked whether "the 'products' at issue here—MPT employees—are reasonably interchangeable or [whether] there is a cross-elasticity of demand for potential substitutes."[38]

Judge Sotamayor explained that "the district court looked through the wrong end of the telescope": in a buyer-power case, "market is comprised of buyers who are seen by sellers as being reasonably good substitutes."[39] Therefore, "[t]he question [was] not the interchangeability of, for example, lawyers with engineers… [but rather] the interchangeability, from the perspective of an MPT employee, of a job opportunity in the oil industry with, for example, one in the pharmaceutical industry."[40]

The lesson certainly carries over into the buyer cartel context. Under Sotomayor's logic, for example, if there is an alleged cartel of gold purchasers, it us plausible for makers of gold watches to be in the same market as makers of gold earrings. It does not matter whether gold watches are substitutes for gold earrings; the question is whether the watch maker and the earring maker are reasonable substitutes for gold sellers looking to sell their raw material. Geographic market is another issue where labor cases will likely provide useful lessons. In employer collusion cases, the relevant market can be either local or national, depending on whether the employee views jobs in a particular city, state, or the entire nation as plausible substitutes. While geographic market definition is disputed less frequently than product market definition in antitrust litigation, this is an area where we may see more action in the near future in labor antitrust, as the proliferation of video-conferencing technology and growing acceptance of remote work expands the geographic area where one may look for employment. Any elaboration on the law of geographic markets in employer cases would likely have a significant impact on buyer cartel doctrine, and is an area to watch going forward.

V. CONCLUSION

While labor antitrust cases have already provided much useful guidance for buyer cartel doctrine, there are certainly remaining questions that will be worth monitoring. With all signs pointing to wage-fixing and no-poach litigation continuing to keep the courts busy for the foreseeable future, the contours of buyer cartel doctrine will continue to be filled in by this particular subtype of "buyer power" case.

35 E.g. Agency guidance for the healthcare industry states that "[t]he Agencies will not challenge, absent extraordinary circumstances, any joint purchasing arrangement among health care providers where… the purchases account for less than 35 percent of the total sales of the purchased product or service in the relevant market." United States Dep't of Justice and Fed. Trade Comm'n, Statement of Antitrust Enforcement Policy in Health Care 54-55 (August 1996).

36 275 F.3d 191 (2d Cir. 2001).

37 *Id.* at 195, 199.

38 *Id.* at 201.

39 *Id.* at 201, 202.

40 *Id.* at 202.

BUYER CARTELS: A THEORETICAL AND POLICY FRAMEWORK

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I. INTRODUCTION

Typically, the analysis of collusion considers the formation of sellers' cartels. For example, in oligopolistic markets, the formation of cartels of producers is analyzed under the assumption that demand is atomistic, so that buyers react in a competitive fashion to the choices of sellers and cartel formation among sellers is studied in detail.

While such a model is well-suited to analyze collusion in markets for consumer goods, their conclusions cannot hardly be extended to other markets, such as markets for primary commodities, where a small number of buyers and sellers interact repeatedly. Moreover, the best-known examples of cartels are actually found on thin markets with a small number of traders on both sides. Examples include the commodity cartels grouping producer countries (OPEC, the Uranium, Coffee, Copper and Bauxite cartels) facing a very small number of buyers of primary commodities, the famous shipping conferences, legal cartels grouping all shipping companies operating on the same route, interact repeatedly with the same shippers.

In markets with a small number of strategic buyers and sellers, the study of collusion on one side of the market must take into account the reaction of traders on the other side. The formation of a cartel by traders on one side of the market may induce collusion on the other side. In fact, it is often argued that commodity cartels were formed in the 1970's as a response to the increasing concentration of buyers on the market (see the case studies by Sampson (1975)[2] on the oil market, by Holloway (1988)[3] on the aluminum market and by Taylor & Yokell (1979) on the uranium market).[4] In ocean liner shipping, the monopoly power of shipping companies has led to the emergence of cartels of buyers, the shippers' councils which negotiate directly with the shipping conferences (Sletmo & Williams 1980).[5]

In this short paper, the focus is on the formation of buyers' cartels on markets with a small number of strategic buyers and sellers.

The analysis reported here builds on Bloch & Ghosal (2000)[6] where a formal theoretical model to study bilateral collusion is developed. In that paper, a sequential model of interaction between an equal number of buyers and sellers of an indivisible good is studied. In the first stage, buyers decide to form a cartel and restrict the number of traders they put on the market. In the second stage, sellers form a cartel and restrict trade in the same way. In the third stage, once the number of buyers and sellers excluded from the market is determined, the remaining traders trade on the market. The model of trade for an indivisible commodity used is inspired by Rubinstein & Wolinsky (1990)'s model of repeated matching and bargaining among a small number of traders.[7] Buyers and sellers bargain over the surplus generated by the indivisible good, which is normalized to one. At each point in time, buyers and sellers are randomly matched and make decentralized offers. To guarantee the existence of a unique price at which trade occurs, it is assumed that trade only occurs when all offers are accepted in the same round.

The model of trade has the desirable feature that, as the discount factor converges to 1, the market outcome converges to the competitive outcome with the implication that all of the economic surplus is appropriated by traders on the short side of the market. On the other hand, when the discount factor converges to 0, the trading mechanism approaches a simple bargaining model with take-it-or-leave-it offers.

In this paper, in the next, section, the payoffs in the limiting case when the discount factor goes to one is used to examine the incentives of buyers to form cartels for a fixed number of sellers. As the price of the good traded depends on the numbers of buyers and sellers on the markets, traders have an incentive to restrict the quantities of the good they buy or sell on the market. However, given the indivisibility of the good traded, the only way to restrict offer or demand on the market is to exclude some agents from trade. Hence, the assumption is that cartels are formed in order to exclude some buyers from the market and to compensate them for withdrawal.

The next section contains analysis of a simple theoretical framework followed by a section containing a discussion of the implications of the analysis reported here as well as some policy implications.

2 Sampson, A. (1975) *The Seven Sisters: The Great Oil Companies and the World they Made*. Viking Press, New York.

3 Holloway, S.K. (1988) *The Aluminium Multinationals and the Bauxite Cartel*. Saint Martin's Press, New York.

4 Taylor, J.H. & Yokell, M.D. (1979) *Yellowcake: The International Uranium Cartel*. Pergamon Press, New York.

5 Sletmo, G.K., Williams, E.W. (1980), *Liner Conferences in the Container Age: U.S. Policy at Sea* Mac Millan, New York.

6 Bloch, F. & S. Ghosal (2000), "Buyers' and sellers' cartels on markets with indivisible goods," *Review of Economic Design* 5, pp.129–147.

7 Rubinstein, A. & Wolinsky, A. (1990), "Decentralized trading, strategic behavior and the Walrasian outcome," *Review of Economic Studies* 57: 63–78.

II. A THEORETICAL FRAMEWORK

We consider a market for an indivisible good with a finite set B of identical buyers and a finite set S of identical sellers and let b and s denote the number of buyers and sellers, the cardinality of the sets B and S respectively. Each buyer i in B wants to purchase one unit of the indivisible good traxded on the market, and each seller j in S owns one unit of the good. Without loss of generality, we normalize the gains from trade (the economic surplus) from each bilateral trade to 1.

We model the formation of the cartel as a simple, noncooperative game, where buyers simultaneously decide on their participation to the cartel. This participation game implies that a cartel is stable when (i) no trader has an incentive to join the cartel and (ii) no trader has an incentive to leave the cartel.

It has long been noted that traders have an incentive to collude on these competitive markets for indivisible commodities (see Shapley & Shubik (1969), fn. 10 p. 344).[8]

We consider two scenarios, one which a buyer's cartel once formed, can create barriers to entry and exclude non-cartel members from trading in the market and the another in which such a cartel cannot exclude non-cartel members from trading in the market.

In each scenario, the interaction between participants on the market is modelled as a three-stage process:

- Stage 1: a buyer's cartel is formed;
- Stage 2: members of the buyer's cartel choose the number of active traders they put on the market;
- Stage 3: buyers and sellers trade on the market.

Since the model is solved by backward induction, we start by describing the payoffs obtained in the final stage of the game and proceed backwards to the first stage.

As already noted, in this paper, the focus is on markets where all of the economic surplus is appropriated by traders on the short side of the market.

In both scenarios, the key result is that faced with a fixed number of sellers, there at most one stable cartel size on the buyer's side of the market.

Suppose there is small cost to cartel formation $\varepsilon > 0$. This cost could be the communication costs incurred by the cartel to coordinate its actions.

In the first scenario, if buyers and sellers are initially in equal number on the market, buyers form a cartel and exclude one trader from the market and capture all the economic surplus $1 - \varepsilon$. If there are more buyers than sellers to begin with, buyers form a cartel in order so that the number of buyers is exactly one less than the number of active sellers and again the buyers capture all the economic surplus $1 - \varepsilon$. If there are more sellers than buyer to begin with, there does not exist any stable cartel of buyers.

What is key here is that the buyer's cartel, once formed can create barriers to entry than can exclude non-cartel members from trading. In such a case, the cartel formation is entirely limited by how costly such barriers to entry are. If the cost is small, then essentially there will be few or no limits to formation of buyers' cartels resulting in a distribution of the economic surplus away from sellers to buyers and as well as the economic inefficiencies by limiting the opportunities to trade.

In the second scenario, where a buyer's cartel cannot prevent non-carted members from trading, the size of the cartel will be limited by the incentives to free ride. In this case, the unique cartel size is the one for which, upon departure of a member, the cartel collapses entirely i.e. every member of a buyers' cartel must be pivotal to the existence of the cartel.

8 Shapley, L.S. & Shubik, M. (1969), "Pure competition, coalitional power and fair division," *International Economic Review* 10: 337–362.

In order to gain some insight into this result, consider the case, where initially there is one less seller than the number of buyers. What will the buyers' response be? Clearly, by forming a cartel which excludes two sellers from the market they could capture a surplus of $1-\varepsilon$ per unit traded, whereas by excluding one trader they obtain a surplus of $\frac{1}{2}$.

Hence, at first glance, it seems that buyers should form a cartel which excludes two traders. However, we argue that this cartel cannot be stable, and that the only stable cartel is a cartel excludes exactly one buyer from the market. To see this, note that the minimal cartel size for which two buyers are excluded is four. Each cartel member then receives a payoff of $\frac{2-2\varepsilon}{4}=\frac{1}{2}-\frac{\varepsilon}{2}$. By leaving the cartel, a member would obtain a higher payoff of $\frac{1}{2}$. So the cartel is unstable.

It is worth remarking what happens when one side of the market responds to collusion on the other side – when buyers form a cartel, they anticipate that sellers will respond by colluding themselves.

When buyers and sellers are originally in equal number on the market, it is easily checked that, using the earlier characterization of stable cartels on one side of the market, in a sequential game of bilateral cartel formation, there exists a unique stable cartel configuration, where both buyers and sellers form cartels, the cartels are of equal size, and both cartels exclude one trader from the market.

It thus appears that the formation of cartels on the two sides of the market leads to the same restriction in trade as in the case of unilateral collusion. Furthermore, the size of the cartels formed under bilateral collusion is smaller than the size of the cartel formed under unilateral collusion. The interpretation of these results is that there exist limits to bilateral collusion. The threat of collusion on one side of the market does not lead to a higher level of collusion among traders on the other side.

III. DISCUSSION AND POLICY IMPLICATIONS

The analysis shows that limiting the impact of buyer cartels depends critically on whether such a cartel can create barriers to entry to exclude non-cartel members from the trading process. In addition, for a buyer's cartel to exist, cartel members need to be able to make side payments to each other which do not go through markets but are made directly each other.

Allowing for bilateral cartels, the analysis shows that the formation of a cartel of sellers induces the formation of a cartel of sellers yielding a "balance" in market power on the two sides of the market. Clearly, the analysis too schematic to account for the emergence of cartels of producers of primary commodities. However, the analysis, however preliminary, gives credence to the view that these cartels were formed partly as a response to increasing concentration on the part of sellers. Furthermore, the analysis indicates that the cartels formed would only group a fraction of the active traders on the market, in accordance with the actual evidence at the time of the formation of OPEC, the Copper and Uranium cartels.

The roots of the analysis reported here can be traced back to the debate surrounding Galbraith's (1952) book on "countervailing power."[9] In this famous book, Galbraith (1952) argues that the concentration of market power on the side of buyers is the only check to the exercise of market power on the part of sellers. (see Scherer & Ross (1990), Ch. 14, for a survey of recent contributions to the theory of "countervailing power").[10] As was already noted by Stigler (1954)[11] in his discussion of the book, Galbraith's (1952) assertions are not easily supported by formal economic arguments. In fact, as shown here, existence of countervailing power may balance the market power of buyers and sellers, but does not help to reduce the inefficiencies linked to the existence of market power.

The analysis reported here relies strongly on the study of stable cartels on oligopolistic markets initiated by d'Aspremont et al. (1983),[12] Donsimoni (1985)[13] and Donsimoni et al. (1986).[14] The stability concept we use is due to d'Aspremont et al. (1983).[15] In spite of differences in the models of trade, our results bear some resemblance to the characterization of stable cartels in Donsimoni et al. (1986). As in their analysis, we find that free-riding greatly limits the size of stable cartels, thereby reducing collusion on the market.

9 Galbraith, J.K. (1952) *American Capitalism: The Concept of Countervailing Power*. Houghton Mifflin, Boston.

10 Scherer, F. & Ross, D. (1990) *Industrial Market Structure and Economic Performance*, 3rd ed. Houghton Mifflin, Boston, MA.

11 Stigler, G.J. (1954) "The economist plays with blocs," *American Economic Review* 44: 7–14.

12 d'Aspremont, C., Jacquemin, A., Gabszewicz, J.J. & Weymark, J. (1983), "The stability of collusive price leadership," *Canadian Journal of Economics* 16: 17–25.

13 Donsimoni, M.P. (1985), "*Stable heterogeneous cartels*," *International Journal of Industrial Organization* 3: 451–467.

14 Donsimoni, M.P., Economides, N.S., & Polemarchakis, H.M. (1986), "Stable cartels," *International Economic Review* 27: 317–336.

15 d'Aspremont, C., Jacquemin, A., Gabszewicz, J.J. & Weymark, J. (1983), "The stability of collusive price leadership," *Canadian Journal of Economics* 16: 17–25.

It is worth remarking that in reality, a buyers' cartel can choose to enforce different collusive mechanisms. It could for example specify a common strategy to be played by its members at the trading stage or delegate one of the cartel members to trade on behalf of the other members. The analysis and detection of these forms of collusion are difficult areas of investigation both theoretically and empirically, a matter that competition policy-makers need to be aware in their work.

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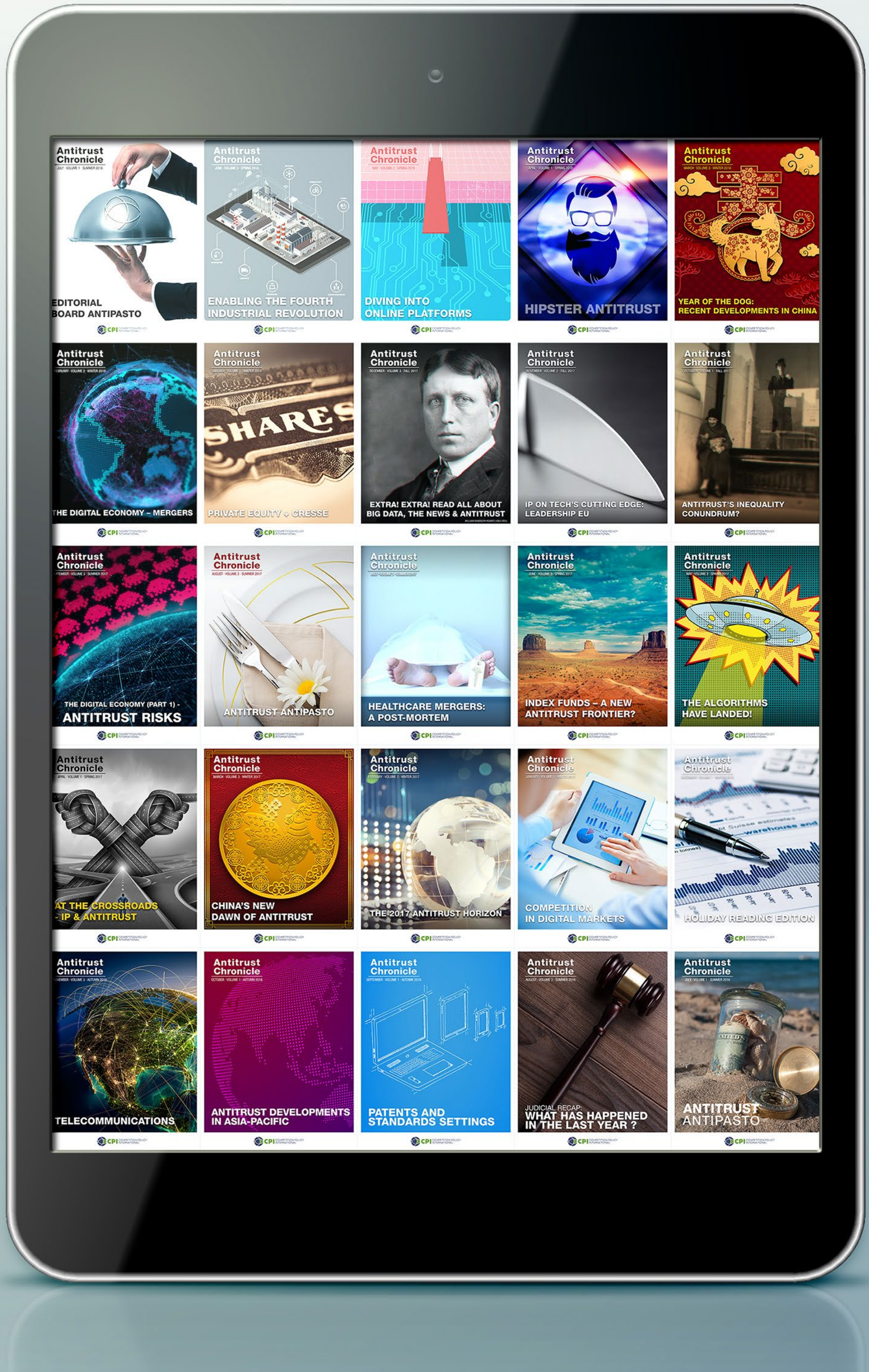

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