Joint purchasing agreements

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Joint purchasing agreements are agreements under which two or more companies (and indeed, often a significant number of companies) agree to jointly purchase all or part of their product requirements. Joint purchasing agreements can give rise to significant benefits for consumers and markets. For example, they may create cost savings (such as lower purchase prices or reduced transaction, transportation and storage costs) because of the parties’ increased buying power and economies of scale, which can in turn be passed on to customers. They can also give rise to qualitative benefits, such as by leading suppliers to innovate and introduce new or improved products on the markets.

However, joint purchasing agreements can in certain circumstances give rise to serious competition law concerns, in particular where the parties have a significant degree of market power. Accordingly, it is crucial that any joint purchasing arrangement be carefully assessed to ensure that the desired benefits are achieved whilst avoiding EU competition law exposure.

What is a joint purchasing agreement?

A joint purchasing agreement involves any arrangement under which two or more parties agree to jointly source products, whether these are components to be used by each party in the manufacture of other products or products for resale in their existing form.

Joint purchasing can be 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.

Competition concerns

Joint purchasing agreements which may affect trade between EU Member States are subject to the rule contained in Article 101(1) TFEU, which prohibits agreements; the object or effect of which is to restrict competition.

References:
Art 101 TFEU

First, the market or markets with which the joint purchasing agreement is directly concerned – the ‘purchasing market(s)’. If the parties have a significant degree of market power on the purchasing market(s) (‘buying power’), and thus the joint purchasing arrangement accounts for a large proportion of the total volume of the purchasing market(s), there is a risk that the parties may force suppliers to reduce the range or quality of products they produce. This may bring about restrictive effects on competition such as quality or variety reductions, lessening of innovation efforts, or ultimately sub-optimal supply.

In such circumstances there is also a risk of competing purchasers being foreclosed (ie excluded from the purchasing market) because their access to efficient suppliers is limited. This is most likely if there are a limited number of suppliers and there are barriers to entry which prevent new suppliers from entering the purchasing market.

Second, if in addition to purchasing goods jointly the parties are also competing sellers on one or more downstream market or markets, then those ‘selling market(s)’ will also need to be assessed under Article 101(1) TFEU. If downstream competitors purchase a significant part of their products together, their incentives for price competition on the selling market(s) may be considerably reduced. In some circumstances, this can...
Joint purchasing agreements lead to a collusive outcome (ie facilitate the coordination of the parties’ behaviour). In addition, if the parties have a significant degree of market power on the selling market(s) (which does not necessarily need to amount to dominance), the lower purchase prices achieved by the joint purchasing arrangement are likely not to be passed on to consumers.

In general, however, joint purchasing agreements are less likely to give rise to competition law concerns when the parties do not have market power on the selling market or markets.

In addition, joint purchasing agreements between competing purchasers who are not active on the same relevant selling market (for example, retailers which are active in different geographic markets and cannot be regarded as potential competitors), are considered under EU law as unlikely to have restrictive effects on competition unless the parties occupy a position in the purchasing markets that is likely to be used to harm the competitive position of other players in their respective selling markets.

See further, Applying EU competition law to cooperation between competitors-worked examples

Framework for assessing joint purchasing agreements

In order to determine whether a joint purchasing agreement might have the objective or effect of giving rise to one or more of the above anti-competitive outcomes, the following steps need to be applied:

• first, all horizontal agreements between the companies engaging in joint purchasing need to be assessed according to the European Commission’s guidelines on assessing the compatibility of an individual horizontal agreement with Article 101(1) TFEU. This involves

References:
EU horizontal cooperation guidelines

• the general assessment criteria described in the Horizontal Guidelines, which should be consulted in all cases; see further, Competition issues impacting horizontal commercial agreements, and

• the specific assessment criteria described in the Horizontal Guidelines applicable to joint purchasing agreements (which illustrate how the general assessment criteria need to be applied to these types of agreements). See further below.

• second, even if the above assessment leads to the conclusion that the joint purchasing arrangement does not give rise to competition concerns, a further assessment will be necessary to examine all relevant vertical agreements between the parties (if any). The latter assessment will follow the rules of the European Commission’s Block Exemption Regulation on Vertical Restraints (Vertical Block Exemption) and accompanying guidelines (Guidelines on Vertical Restraints) (see further Competition issues impacting vertical commercial agreements).

References:
EU horizontal cooperation guidelines, para 206

Whether checking for a restriction of competition by object or effect, the agreement on purchase prices needs to be assessed in the light of the overall effects of the purchasing agreement on the market.

For more detail on object restrictions, see What is the object test?

Restrictions of competition by effect

The Horizontal Guidelines provide that joint purchasing agreements which do not have as their object the restriction of competition must be analysed in their legal and economic context, having regard to their actual and likely effects on competition in the purchasing and selling markets.

References:
EU horizontal cooperation guidelines, para 207

The key consideration in this analysis is the parties’ joint market power.

References:
EU vertical restraints guidelines

Application of specific assessment criteria under Horizontal Guidelines

Assessment under Article 101(1) TFEU

Article 101(1) TFEU prohibits restrictions of competition by object or effect.

Restrictions of competition by object.

The Horizontal Guidelines provide that joint purchasing arrangements restrict competition by object if they do not truly concern joint purchasing, but rather ‘serve as a tool to engage in a disguised cartel’ . In other words, an agreement will have a prohibited object if it is actually designed as a means of implementing one or more ‘hardcore restrictions’, namely prohibited price-fixing, output limitation or market allocation.

References:
EU horizontal cooperation guidelines, para 205

Agreements which involve the fixing of purchase prices can have the object of restricting competition within the meaning of Article 101(1) TFEU. However, the Horizontal Guidelines clarify that this does not apply where the parties to a joint purchasing agreement agree on the prices the joint purchasing arrangement (eg the jointly-owned company) may pay to its suppliers for the jointly purchased products. Nonetheless, in these circumstances, an assessment is required as to whether the agreement as to prices is likely to give rise to anti-competitive effects within the meaning of Article 101(1) TFEU (see Restrictions of competition by effect below).

References:
EU horizontal cooperation guidelines, para 206

Whether checking for a restriction of competition by object or effect, the agreement on purchase prices needs to be assessed in the light of the overall effects of the purchasing agreement on the market.

For more detail on object restrictions, see What is the object test?
There is no absolute threshold under the Horizontal Guidelines above where it can be presumed that the parties have sufficient market power for it to be likely that the joint purchasing agreement will give rise to anti-competitive effects within the meaning of Article 101(1) TFEU.

However, the Horizontal Guidelines recognise that in most cases it is unlikely that market power will exist if the parties have a combined market share not exceeding 15% on the purchasing market or markets as well as a combined market share not exceeding 15% on the selling market or markets.

References:
EU horizontal cooperation guidelines, para 208

A market share above these thresholds does not automatically indicate that the agreement is likely to give rise to anti-competitive effects. However, in these circumstances, the effects of the agreement on the relevant markets need to be carefully assessed taking into account factors such as:

• how concentrated the relevant market is (ie in a purchasing market, whether there are few suppliers; and in a selling market, whether there are few sellers)
• the strength of countervailing bargaining power, if any (ie in a purchasing market, whether suppliers have sufficient bargaining strength to resist the pressures of the jointly purchasing parties; and in a selling market, whether the parties’ customers have sufficient buying power to resist eg higher prices)
• how much competition the parties faces on the purchasing market (eg market shares of competing purchasers outside the joint purchasing arrangement)
• the number and intensity of links (for example, other purchasing agreements) between the competitors in the market, and
• any barriers to entry (ie in a purchasing market, whether new suppliers can enter the market and/or whether smaller competing purchasers can form their own purchasing groups; and in a selling market, whether new sellers can enter the market, thus affording customers an alternative source of supply and exerting a constraint on the parties’ prices)

See further, Assessing the anti-competitive effect of an agreement

Risk of a collusive outcome

Where the parties are competitors on one or more selling markets, it is also important to look out for the possibility of collusion between them. A joint purchasing agreement can lead to a collusive outcome if it facilitates the coordination of the parties’ behaviour on the selling markets in which they compete.

The Horizontal Guidelines indicate that the risk of a collusive outcome is likely to be higher where-provided that they have the market power and the market characteristics are conducive to coordination—the parties have a significant proportion of their variable costs in the relevant downstream market in common. This will be the case, for example, where the parties are retailers active on the same retail market(s) who jointly purchase a significant amount of the products they offer for resale under the joint purchasing agreement (thus those jointly purchased products account for a high degree of their respective variable costs). The incentive for the parties to coordinate their behaviour would be reinforced if their cost structures were already similar prior to concluding the joint purchasing agreement; whilst similar margins further increase the risk of a collusive outcome.

References:
EU horizontal cooperation guidelines, para 214

In addition, a high degree of exchange between the parties of commercially sensitive information (such as purchase prices and volumes) may facilitate coordination with respect to their sales prices and output on the selling markets. The implementation of a joint purchasing agreement often requires the exchange of this sort of sensitive information. However the risk of collusion can be reduced by ensuring the information exchanged does not go beyond that which is strictly necessary for the implementation of the agreement, and by putting in place safety measures that reduce the level of direct information exchange between the parties (eg by entrusting an independent joint purchasing organisation with the purchase of the product, and ensuring that all sensitive data necessary for the purchases—for example quality specifications, quantities, delivery dates, maximum purchase prices—is collated by the joint purchasing organisation, and not passed on to the parties to the agreement). Any negative effects arising from the information exchange will not be assessed separately but in the light of the overall effects of the agreement. Whether information exchange is likely to lead to anti-competitive effects needs to be assessed according to the specific guidance given in the Horizontal Guidelines with respect to information exchanges.

References:
EU horizontal cooperation guidelines, para 216

Assessment under Article 101(3)TFEU

If an agreement is found to be restrictive of competition within the meaning of Article 101(1) TFEU, it is necessary to determine whether it produces any pro-competitive benefits and to assess whether those pro-competitive benefits outweigh the restrictive effects on competition.

The balancing of restrictive and pro-competitive effects is conducted exclusively within the framework laid down by Article 101(3) TFEU. If the pro-competitive effects do not outweigh a restriction of competition, the agreement shall be automatically void under Article 101(2) TFEU.

For the general principles as to how to assess an agreement under Article 101(3) TFEU see further, Competition issues impacting horizontal commercial agreements. With respect to the specific principles applicable to joint purchasing agreements, the Horizontal Guidelines provide the following:

• joint purchasing agreements can give rise to significant efficiency gains, such as cost savings which lead to lower prices, or qualitative efficiency gains such as innovation or new products by suppliers
References:
EU horizontal cooperation guidelines, para 217
- however, restrictions that go beyond what is necessary to
achieve the efficiency gains will not meet the conditions of
Article 101(3). It may be necessary in certain cases for the
parties to purchase exclusively through the joint co-operation
(i.e., this may be indispensable to achieving the necessary
economies of scale or buying power); however, any such
obligation must be assessed in the context of the individual
case.

References:
EU horizontal cooperation guidelines, para 218
- efficiency gains (e.g., lower costs or qualitative efficiencies)
must be passed on to consumers to an extent that outweighs
the restrictive effects on competition caused by the joint
purchasing agreement. In other words, efficiencies that only
benefit the parties will not meet the conditions of Article 101(3)
TFEU, and

References:
EU horizontal cooperation guidelines, para 219
- the conditions of Article 101(3) will not be fulfilled if the
agreement affords the parties the possibility of eliminating
competition with respect of a substantial part of the products
in question (having regard to both the purchasing and selling
markets).

References:
EU horizontal cooperation guidelines, para 220
Joint purchasing agreements can be hugely beneficial for
consumers and markets, as well as the parties concerned.
However, a joint purchasing agreement (or important parts of
it) found to be restrictive of competition within the meaning of
Article 101(1) TFEU which is or are not saved by Article 101(3)
TFEU, will be automatically void and unenforceable.