

The new Horizontal Guidelines – What's new for purchasing agreements?

On 1 June 2023, the European Commission (“Commission”) adopted the final version of its new horizontals package, comprising revised Block Exemption Regulations on Research and Development Agreements and Specialisation Agreements and revised Guidelines on horizontal cooperation agreements (“Horizontal Guidelines”). The new Block Exemption Regulations and Horizontal Guidelines, which will replace the existing equivalent instruments dating from 2011, will be applicable as of 1 July 2023.

In a series of VBB Client Alerts, we examine a number of key aspects of the Commission’s new horizontals package. In this Client Alert, we focus on the chapter of the Horizontal Guidelines related to purchasing agreements, which has been expanded to reflect recent case practice and provides useful, though in places challenging, guidance as to when joint purchasing activities may infringe the EU competition rules, which remains most likely where they amount to a buyer cartel or where they are sufficiently likely to lead to a collusive outcome on the downstream selling market(s). The effects of a joint purchasing agreement on the sellers upstream have also been given more consideration in the new Guidelines by including concepts such as retail alliances and negotiation threats. Overall, it remains the case that transparent joint purchasing arrangements are treated rather favourably by the Commission absent significant market power.

Buyer cartels v. joint purchasing arrangements

The new Horizontal Guidelines expand on the distinction between buyer cartels (which, consistent with the European Court’s case-law, are considered as by object restrictions irrespective of market shares) and joint purchasing agreements (which are generally assessed as by effect restrictions). They provide in this respect a list of factors which will make it less likely that a purchasing arrangement will amount to a buyer cartel:

- a. The arrangement makes it clear to suppliers that the negotiations are conducted on behalf of its members who will be bound by the agreed terms, or that the joint arrangement purchases on behalf of its members. While the joint purchase arrangement is not required to disclose the identity of its members, the Guidelines stress that it should not be the responsibility of suppliers to take steps to find out about the existence of the joint purchasing arrangement.

- b. The parties to the joint purchasing arrangement have concluded a written agreement defining the form, scope and functioning of their cooperation, thereby allowing its compliance with Article 101 to be verified ex post and checked against the actual operation of the arrangement.

The Commission however immediately nuances the importance of these two factors by stating that (a) secrecy is not a decisive factor for establishing a buyer cartel and (b) a written agreement will not in itself be sufficient to shield a joint purchasing arrangement from competition law enforcement. While this remains of course a factual case-by-case analysis, the dividing line seems to be that if the parties coordinate or exchange commercially sensitive information in relation to their individual behaviour vis-à-vis their suppliers, they will likely be part of a buyer cartel having as its object the restriction of competition. On the other hand, if the parties genuinely and publicly negotiate collectively with the supplier under the terms of a clear and structured agreement, they would likely be considered as joint purchasers.

Soft safe harbour market share threshold

Being considered as a joint purchasing arrangement (rather than a buyer cartel) does not necessarily mean that such an agreement is not likely to restrict competition. As was the case under the 2011 Guidelines, the new Guidelines state that this is unlikely to be the case provided the parties' combined market share does not exceed 15% on both the relevant purchasing and the selling market(s). Despite stakeholders' requests during the evaluation phase and public consultation, this soft safe harbour threshold of 15% has not been increased in the new Guidelines. Exceeding this threshold does not indicate that a joint purchasing arrangement is likely to restrict competition but its effects on the market must be more closely assessed.

Effects-based assessment above the safe harbour

The guidance on how to assess whether an arrangement has sufficient anti-competitive effects to infringe Article 101(1) is considerably more detailed than in the 2011 Horizontal Guidelines. Although this may be helpful for authorities, a combination of the additional factors to be taken into account and the lack of clarity concerning the relative weight to be given to each of them (individually) may have the unintended consequence of making it more difficult to carry out a reliable self-assessment in practice. Though the primary focus remains on the risk of the purchasing arrangement triggering collusion among the purchasers on the downstream selling market, there is an expanded focus on the potential for harm to suppliers on the upstream market (with the concern that, in certain cases, reduced profits resulting from lower prices could materially reduce investment or innovation by suppliers, in particular where the joint purchasers account for a large share of the purchase market, where the suppliers have made relationship-specific investments to supply them and where they lack countervailing selling power). Collusion on the downstream selling market is most likely where the purchasers have market power on that selling market, the market is structurally prone to collusion (i.e., it is concentrated and transparent) and the purchasers will achieve a high degree of commonality of (in particular variable) costs through the purchasing arrangement.

Where a sufficient likelihood of anti-competitive effects is established, the possibility remains that the purchasing arrangement could trigger sufficient efficiencies to outweigh these effects by meeting the requirements of Article 101(3). However, the Guidelines suggest this may be hard to demonstrate where the participating firms have significant market power as they would not normally have the incentive to pass on cost savings to customers.

Joint negotiations and retail alliances

The new guidance clarifies that it covers not only joint purchasing as such, but also joint negotiation arrangements, which leave the conclusion of actual purchase transactions to each party individually. By doing so, the European Commission seems to target retail alliances, which do not necessarily themselves purchase products from suppliers, but may only negotiate on behalf of their member retailers certain purchase conditions with manufacturers of branded products, such as, for example, extra rebates in exchange of the fulfilment of certain services by the retailers. The evaluation of the 2011 version of the Horizontal Guidelines prompted further consideration of the impact of joint purchasing arrangements, and

more particularly of retail alliances, on suppliers upstream. The revised Horizontal Guidelines therefore address practices such as hard bargaining and negotiation threats in this context, e.g., threats by the joint purchasing/negotiating entity to break off negotiations or to cease purchases if the supplier does not grant better conditions. The Guidelines specify that negotiation threats are not generally considered as amounting to a restriction by object under Article 101(1) TFEU but may nevertheless have the effect of restricting competition in some circumstances. Any such negative effect on competition will be assessed in the light of the overall effects of the agreements on the market, considering the market position of the members implementing the threats. The Guidelines note that such negotiation threats will, in general, not appreciably affect competition in the downstream selling market(s) where, despite temporarily ceasing purchases of the products under negotiation, retailers continue to offer substitute products and to the extent that customers can purchase either the products under negotiation or substitute products from competitors of the members of the retail alliance (i.e., consumers still have sufficient choice despite the temporary cessation of supply).

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