GPOs – Not Just for the Healthcare Industry

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It is widely acknowledged that joint purchasing arrangements or commonly used Group Purchasing Organizations ("GPOs") can result in significant benefits for consumers and markets. For example, they may enable participants to secure volume discounts, reduce transaction costs associated with negotiations, or combine transportation and storage functions to operate more efficiently. However, because joint purchasing arrangements typically involve multiple competitors, they can also raise antitrust concerns—particularly when the participants account for a large share of the relevant markets. In recent years, discussion about joint purchasing arrangements has largely been focused on the healthcare industry, where collaborative buying agreements for the purchase of products and services used in hospitals or other medical facilities are fairly common. However, the benefits of joint purchasing arrangements are not limited to the healthcare space and—when structured properly—companies across industries can achieve efficiencies from these types of arrangements.

A joint purchasing arrangement is generally defined as an agreement between or among companies to buy a joint supplier's product or service. Jointly purchased products are often used as components of other products sold by the parties to the joint purchasing agreement (*e.g.*, a button purchased as part of a joint purchasing arrangement may be added to a pair of pants sold by one of the participants). However, the jointly purchased product or service may also be resold or used in its existing form. Joint purchasing arrangements may (and often do) include companies that compete in a downstream market. For example, a group of competing small restaurants may enter into a joint purchasing agreement to buy vegetables so that they are able to secure volume discounts offered to their larger competitors. These types of volume-based discounts are typically procompetitive. Large, consistent orders allow manufacturers to plan more efficiently and exploit economies of scale, which reduces cost. The reduced costs can in turn be passed on to the participants in a joint purchasing arrangement and ultimately to consumers of the downstream product.

Potential Anticompetitive Risks of Joint Purchasing Arrangements

Despite their numerous benefits, joint purchasing activities also include a degree of antitrust risk—particularly when they involve two or more competitors in a downstream market. The primary federal statutes governing joint purchasing activities are the Sherman Act[1] and the Federal Trade Commission Act[2], which prohibit contracts, agreements, and conduct that unreasonably restrain trade. As an initial matter, joint purchasing agreements must have some legitimate, efficiency-enhancing element, or they will be deemed an unlawful buyers' cartel. A buyers' cartel is an agreement among competing buyers to pay a supplier a certain amount for a product or service. Price fixing agreements among competitors—whether sellers or buyers—are *per se* illegal under the antitrust laws.[3] However, if a joint purchasing agreement has some potential efficiency-enhancing

[1] 15 U.S.C. § 1 et seq.
[2] 15 U.S.C. § 41 et seq.
[3] *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) ("Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a

elements, it will likely be evaluated by the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") (collectively the "Antitrust Agencies" or "Agencies") under the rule of reason.[4]

Utilizing the rule of reason framework, the Antirust Agencies weigh the likely procompetitive benefits of an agreement against the potential anticompetitive harm to determine its overall effect on competition. One potential anticompetitive harm that the Antitrust Agencies evaluate with respect to joint purchasing agreements is whether the agreement will give the participants monopsony power over suppliers (*i.e.*, buyer market power to drive down the price of the purchased product, thereby depressing prices below what would exist in a competitive market).[5] When participants in a joint purchasing arrangement are competitors in a downstream market, the Antitrust Agencies will also evaluate whether the joint purchasing arrangement will impact downstream competition among the participants by, for example, standardizing costs or encouraging the sharing of competitively sensitive information.[6]

Guidance from the Antitrust Agencies

Recognizing both the potential procompetitive benefits and anticompetitive harms joint purchasing arrangements can cause, the Antitrust Agencies have issued guidance to companies engaged in, or considering entering into, these types of arrangements. The Agencies' two main policy papers addressing joint purchasing conduct are Statement 7 of the *Statements of Antitrust Enforcement Policy in Health Care*[7] (the "Health Care Statements") and the *Antitrust Guidelines for Collaborations Among Competitors*,[8] (the "Competitor Collaboration Guidelines") jointly issued by the Antitrust Agencies in August 1996 and April 2000 respectively. The DOJ also has issued numerous business review letters indicating their intention to challenge (or not challenge) proposed joint purchasing arrangements among participants in both the healthcare space and in other industries. Similarly, the FTC staff has issued advisory opinions relating to GPOs in the healthcare

commodity in interstate or foreign commerce is illegal per se."); *see also Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

[4] In *Northwest Wholesale Stationers*, the Supreme Court utilized the rule of reason to analyze the legality of a purchasing cooperative among competing stationary retailers. The Court upheld the legality of the cooperative, because it was "designed to increase economic efficiency and render markets more, rather than less, competitive" and that it "permits the participating retailers to achieve economies of scale in both purchasing and warehousing…and also ensures ready access to a stock of goods that might otherwise be unavailable on short notice." *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 295 (1985).

[5] U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS §3.31(a) (April 2000).

[6] *Id*.

[7] U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, STATEMENTS OF ANTITRUST POLICY IN HEALTH CARE (August 1996) (hereinafter, "HEALTH CARE STATEMENTS").

[8] U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (April 2000) (hereinafter "COMPETITOR COLLABORATION GUIDELINES").

industry, "to help clarify FTC rules and decisions, often in response to requests from businesses or industry groups."[9]

THE COMPETITOR COLLABORATION GUIDELINES

In the Competitor Collaboration Guidelines, the Antitrust Agencies lay out the analytical framework that they use to evaluate the competitive effects of collaborations among competitors, such as joint purchasing arrangements. The Agencies acknowledge that competitor collaborations "often are not only benign but procompetitive."[10] To encourage procompetitive collaborations, the Agencies identify a general "safety zone," in which they will not challenge a competitor collaboration absent extraordinary circumstances. Joint purchasing arrangements fall within the safety zone if the market shares of all participants collectively account for no more than 20% of each relevant market.[11] This includes the market for the purchased products and services, as well as downstream markets, if the participants are competitors. In the Competitor Collaboration Guidelines, the Agencies also discuss concerns that buying collaborations may facilitate the sharing of competitively sensitive information among competitors. To avoid anticompetitive conduct, the Agencies suggest implementing safeguards, such as using "an independent third party to handle negotiations in which its participants' input requirements or other competitively sensitive information could be revealed."[12]

HEALTH CARE STATEMENTS

The Health Care Statements similarly acknowledge the efficiency-enhancing benefits of most joint purchasing arrangements.[13] While the Health Care Statements officially only apply to joint activities in the healthcare area, they offer a guidepost for how the Agencies will likely analyze joint purchasing conduct in other industries as well. In fact the DOJ has cited the safety zones established in Health Care Statements as one of the reasons it did not intend to challenge proposed joint activity in multiple business review letters dealing with non-healthcare-related industries, including one issued after the publication of the Competitor Collaboration Guidelines.[14] In the Health Care Statements, the Antitrust Agencies acknowledge that joint purchasing arrangements typically only raise antitrust concerns in the following situations:

[9] FED. TRADE COMM'N, Advisory Opinions (https://www.ftc.gov/policy/advisory-opinions?title=&term_node_tid_depth=3516&date_filter%5Bmin%5D%5Bdate%5D=&date_filter%5Bmax%5D%5Bdate%5D=).

[10] COMPETITOR COLLABORATION GUIDELINES, Preamble; *see also id*. at § 3.31(a) (discussing buying collaborations, the Agencies state "[m]any such agreements do not raise antitrust concerns and indeed may be procompetitive.").

[11] *Id*. at § 4.2.

[12] *Id*. at § 3.34(e)

[13] HEALTH CARE STATEMENTS, Statement 7, Introduction.

[14] U.S. Dep't of Justice Business Review Letter to National Cable Television Cooperative, Inc. (Oct. 17, 2003).

1. the arrangement allows the purchaser to effectively exercise market power in the purchase of the product or service; or

2. the products or services being purchased jointly account for so large a proportion of the total cost of the services being sold by the participants that the joint purchasing arrangement may facilitate price fixing or otherwise reduce competition.[15]

Because many joint purchasing agreements are procompetitive, the Agencies established "an antitrust safety zone" for joint purchasing arrangements among healthcare providers: "absent extraordinary circumstances," joint purchasing arrangements falling within the safety zones are not challenged by the Antitrust Agencies. To fall within the antitrust safety zone established in the Health Care Statement, the joint purchasing agreement must satisfy two conditions:

1. the purchases must account for less than 35 percent of the total sales of the purchased product or service in the relevant market; and

2. the cost of the products and services purchased jointly accounts for less than 20 percent of the total revenues from all products or services sold by each competing participant in the joint purchasing arrangement.[16]

The purpose of the first condition is to determine whether the joint purchasing arrangement may result in monopsony power, while the second condition—which only applies to direct competitors—is intended to guarantee the arrangement doesn't facilitate price fixing.[17]

The Agencies further recognized that joint purchasing arrangements that fall outside the established safety zone do not necessarily raise antitrust concerns, particularly if participants take steps to mitigate potential harm. For example, the Agencies suggest participants may lessen antitrust concern by implementing three safeguards, including:

1. not requiring each participant to make all purchases through the joint arrangement;

2. utilizing an independent agent to conduct negotiations on behalf of the participants; and

3. restricting communications between participants and implementing restrictions to keep competitively sensitive information confidential.[18]

[15] HEALTH CARE STATEMENTS, Statement 7, Introduction.
[16] *Id*. at Statement 7, § A. It's worth noting that the general safety zone established by the Agencies in the Competitor Collaboration Guidelines is not the same as the safety zone established 4 years earlier in the Health Care Statements. While the Agencies never issued a statement explaining the divergence, competitors that wish to enter into joint purchasing agreements would be prudent to keep both in mind.
[17] *Id*.
[18] *Id*.

Implementing the safeguards discussed above serves as a signal to the Antitrust Agencies that the purpose of the joint purchasing arrangement is to "achieve economic efficiencies rather than to serve an anticompetitive purpose," and therefore increases the likelihood that the Agencies will not challenge the agreement.[19]

THE DOJ BUSINESS REVIEW LETTERS

While the Competitor Collaboration Guidelines and Health Care Statements give businesses a general framework for how the Agencies will evaluate joint purchasing arrangements, more specific agency analysis, such as the DOJ's business review letters ("BRLs"), offer further guidance regarding the proper bounds of these arrangements. Over the years, the DOJ has weighed in on the legality of several proposed joint purchasing arrangements outside the healthcare industry. For example, the DOJ has issued BRLs relating to proposed joint purchasing arrangements to companies as diverse as nuclear power plant operators[20] and chemical manufacturers[21] to armored transport service providers.[22] Although each proposed joint purchasing arrangement that the DOJ evaluated was unique—and the evaluation of each arrangement was extremely fact-specific— patterns emerge from the guidance that may be useful to businesses considering entering into a joint purchasing arrangement.

PRE-COMPETITOR COLLABORATION GUIDELINES

Between 1995 and 2000 (before the Agencies published the Competitor Collaboration Guidelines), the DOJ issued BRLs to nine companies outside of the healthcare industry that considered entering into a joint purchasing arrangement.[23] In each of the 9 cases, the DOJ concluded that no anticompetitive effects were likely and stated that it had no intention to challenge the joint conduct.

A key factor in reaching this conclusion was that each proposed arrangement accounted for a small percentage of the relevant markets. For example, with regards to its 1996 review of a proposed joint purchasing agreement among Baker Hughes INTEQ, Dresser Industries, Inc., and M-1 Drilling Fluids for the procurement and transport of barite from China, the DOJ noted that "the joint venture would not possess market power as a purchaser of shipping space in the China-U.S. trade" because the parties asserted "the current and anticipated shipments of the three member firms would constitute far less than the 35 percent market share" in the relevant market.[24] Similarly, the DOJ found that the proposed joint purchasing arrangement of the California Large Electric Power Purchasing Association ("CLEPPA") in 1997 was unlikely to cause anticompetitive effects, in part because the members' purchases "would account for less than one percent of all electric power consumed in California and less than four percent of electric power consumed for industrial use in the state."[25] The DOJ was similarly not

[19] *Id*. at Statement 7, § B.
[20] U.S. Dep't of Justice Review Letter to Utilities Services Alliance (July 3, 1996); U.S. Dep't of Justice Review Letter to STARS All. LLC (Dec. 20, 2012).
[21] U.S. Dep't of Justice Review Letter to Baker Hughes INTEQ, Dresser Industries, Inc. and M-1 Drilling Fluids (May 13, 1996).
[22] U.S. Dep't of Justice Review Letter to Armored Transport Alliance (Mar. 12, 1998).
[23] Do you want a citation to all the BRLs?
[24] U.S. Dep't of Justice Review Letter to Baker Hughes INTEQ, Dresser Industries, Inc. and M-1 Drilling Fluids (May 13, 1996).
[25] U.S. Dep't of Justice Review Letter to California Large Elec. Power Purchasing Ass'n (Nov. 20, 1997).

inclined to initiate antitrust enforcement against the Textile Energy Association in 1998, the NSM Purchasing Association in 1999, or Containers America LLC in 2000, in part because the total shares of the participants in each proposed arrangement were less than 2.1%, 35% and 15% of their respective relevant markets.[26]

POST-COMPETITOR COLLABORATION GUIDELINES

Since the publication of the Competitor Collaboration Guidelines in April 2000, the DOJ has only issued two BRLs evaluating proposed joint purchasing arrangements outside of the healthcare industry.

In October 2003, the DOJ indicated that it had no intention to prosecute an arrangement proposed by the National Cable Television Cooperative, Inc. ("NCTC") to jointly purchase cable network programming.[27] The NCTC sought permission to change its current procedures, which it claimed hindered its ability to negotiate volume discounts. Under the newly proposed rules, members who wished to participate in a new master contract would be required to state their reserve price before negotiations and participate in the contract if the reserve price was met. Members remained free to negotiate their own contracts if the price was not met or they choose to participate in the master contract.

The DOJ found that the proposal did not raise concerns about monopsony power because, according to information provided by the participants, the NCTC members collectively served approximately 15.8% of the nation's multichannel video programming distribution subscribers.[28] Additionally, the DOJ said that there was little concern about price collusion among NCTC members because a majority of them do not compete with each other and there are other protections mitigate the concern for collusion among those that did compete. Mainly, each participant would not have access to information about what the other participants were purchasing, competitive information was not shared among members, and the cost structures of each participant varied significantly.[29]

Nine years later, in December 2012, the DOJ approved a proposed joint purchasing arrangement of STARS Alliance LLC and its member utilities (collectively, "STARS").[30] STARS members consisted of seven electric utilities who operated nuclear electric generation plants. The STARS joint purchasing proposal included eight products and services, including services such as turbine maintenance and reactor coolant pump maintenance. STARS claimed that the proposed arrangement would have procompetitive effects, as it would allow members to "replicate the economies of scale of a large nuclear utility with several reactors," thereby "reducing the costs of electricity to some consumers."[31] While there was minimal competition among members in downstream markets, STARS implemented various safeguards to prevent anticompetitive information-sharing among the members. For example, STARS prohibited members from discussing downstream electricity prices and prices for procuring upstream goods or services (other than for purposes of the joint purchasing agreement).

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[26] U.S. Dep't of Justice Review Letter to the Textile Energy Ass'n (Sept. 4, 1998); U.S. Dep't of Justice Review Letter to NSM Purchasing Ass'n (Jan. 13, 1999); U.S. Dep't of Justice Review Letter to Containers Am. LLC (Mar. 8, 2000).
[27] U.S. Dep't of Justice Review Letter to the National Cable Television Cooperative, Inc. (Oct. 17, 2003).
[28] *Id*.
[29] *Id*.
[30] U.S. Dep't of Justice Review Letter to STARS All. LLC (Dec. 20, 2012).
[31] *Id*.

Additionally, all of the joint-purchasing activities were completely voluntary. While STARS suggested that it may ask members to commit to a voluntary minimum purchase requirement to obtain certain volume discounts, each member would be free to reject such a commitment.

The DOJ found that the arrangement was within the safety zone discussed in the Competitor Collaboration Guidelines and there was little likelihood of STARS exercising monopsony power in the markets for the purchase of the eight goods and services that it sought to jointly procure because "its share of the relevant antitrust market is less than 20 percent."[32] With respect to the downstream markets where STARS members competed with one another, the DOJ found that "the members' units are not likely to have an impact on electricity prices given the structure of the organized markets."[33]

PROPOSED JOINT PURCHASING ARRANGEMENTS THAT FALL OUTSIDE THE SAFETY ZONES

Although all of the DOJ BRLs issued to companies outside the healthcare industry in the last 25 years dealt with market shares within the Agencies' established "antitrust safety zones," the DOJ recently approved a proposed joint purchase arrangement in the healthcare space even though it fell outside the "safety zone."[34]

The American Optometric Association ("AOA") requested an opinion from the DOJ regarding an expansion of its group-purchasing organization ("GPO") activities to include joint price negotiations for optometric products, such as contact lenses, frames, and glasses that AOA members sell to consumers. In January of this year, the DOJ issued a letter, finding that the proposed arrangement fell outside of the safety zone established in the Health Care Statements because "the cost of many of the products that the Association members purchase through the GPO appears likely to account for more than 20 percent of the total revenue from the sale of those products by competing participants in the GPO."[35]

However, the DOJ noted that "joint purchasing arrangements that fall outside the antitrust safety zone do not necessarily raise antitrust concerns" and that, as discussed in the Health Care Statements, members may mitigate potential harm by adopting certain safeguards.[36] In this case, AOA's proposed expansion of its GPO activities incorporated all three safeguards discussed in the Health Care Statements:

1. members were not required to purchase all (or any) of their purchases through the GPO;
2. a third party that was not associated with any member would be used to negotiate prices with the GPO's suppliers; and
3. each member's competitively sensitive information would be kept confidential from other members.

In light of the safeguards in place, the DOJ concluded that the "proposed GPO expansion is intended to lower costs and promote competition rather than to serve an anticompetitive purpose."[37] The DOJ also concluded

[32] *Id*.
[33] *Id*.
[34] U.S. Dep't of Justice Review Letter to the American Optometric Ass'n and the AOA Excel GPO, LLC (Jan. 15, 2020).
[35] *Id*.
[36] *Id*.
[37] *Id*.

that competition from large retail stores and other healthcare providers, in addition to the existence of other GPOs for optometric products, would prevent the AOA's GPO from raising consumer prices.[38] The business review letter issued to the AOA demonstrates the impact that appropriate safeguards can have on the DOJ's analysis of a joint purchasing arrangement, even if that arrangement falls outside the antitrust safety zones.

BRLs and the DOJ/FTC Guidelines are not Binding

Despite consistent acknowledgment from the Antitrust Agencies over the years that joint-buying arrangements are likely to be procompetitive, the Agencies remain free to challenge any and all conduct that they believe violates the antitrust laws even if it falls within the safety zone established by the Competitor Collaboration Guidelines or is similar to conduct that the Agencies approved in previous BRLs. As recently as September 9, 2019, the Department of Justice submitted a Statement of Interest in *Global Music Rights, LLC v. Radio Music License Comm. Inc.*, arguing that the court should apply the *per se* rules when evaluating conduct by Radio Music Licensing Committee, Inc. ("RMLC"), an entity that negotiates with performing rights organizations for public-performance licenses on behalf of radio stations.[39] The National Association of Broadcasters ("NAB") submitted an amicus brief in response, pointing out that the DOJ's position in its Statement of Interest included "three substantial divisions from historical Department policy."[40] Those deviations included a "striking shift" from acknowledging the pro-competitive role that entities like RMLC play to suggesting that they were *per se* illegal.[41] NAB argued that the Competitor Collaboration Guidelines—the DOJ's "long-standing enforcement policy about competitor collaborations"[42]—"unequivocally characterizes buying collaborations as arrangements that are subject to the rule of reason, not the per se rule."[43] Additionally, NAB pointed out that the DOJ has previously treated "buying collaborations as entities permissible under the rule-of-reason [in] no fewer than thirty-two Business Review Letters from every Administration since President Ford."[44] While the court has yet to rule on whether RMLC violated the antitrust laws under a *per se* or rule of reason framework, the DOJ's recent submission is a reminder that the Agencies' prior guidance does not carry the force of law.

Key Takeaways

The Antitrust Agencies have historically recognized that joint purchasing arrangements—even among competitors with market shares that fall outside of the established "safety zones" in the relevant markets—often have many efficiency-enhancing elements. Therefore, they are likely to be evaluated using a rule-of-reason analysis that compares the likely procompetitive benefits against the potential anticompetitive effects.

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[38] *Id*.

[39] Statement of Interest by the Dep't of Justice, *Global Music Rights, LLC v. Radio Music License Comm. Inc.*, No. 2:16-cv-09051(C.D. Cal. Dec. 5, 2019).

[40] Brief of Amicus Curiae for National Association of Broadcasters at 3, *Global Music Rights, LLC v. Radio Music License Comm. Inc.*, No. 2:16-cv-09051(C.D. Cal. Jan. 14, 2020).

[41] *Id*.

[42] *Id*.

[43] *Id*. at 2-3.

[44] *Id*. at 4.

Companies that are considering implementing or expanding joint-purchasing activities should keep the following in mind:

- Regardless of the industry or the combined market shares of the participants, the companies engaged in, or looking to implement, a joint purchasing arrangement must be able to articulate how the proposed collaboration will generate procompetitive benefits or efficiencies. Price-fixing and bid-rigging agreements among competitors are *per se* illegal under the antitrust laws and the Agencies have demonstrated a commitment to prosecuting companies that engage in such activity.
- Market shares matter to some extent but joint purchasing agreements among companies with market shares that exceed the Agencies' established safety zones may be OK if proper safeguards are in place. Participants should monitor their collective market shares in both the market for the purchased product/service and the downstream markets and take appropriate actions—such as capping membership at a certain percentage—to avoid the risk of acquiring monopsony power through the joint arrangement.
- Antitrust Agencies are more likely to find that joint-purchasing arrangements are procompetitive if the participants implement appropriate safeguards to ensure that each company's participation is voluntary, competitively sensitive information is not shared among participants, and an independent agent handles the joint-purchasing negotiations on behalf of the purchasing group or each participant contracts individually with the supplier.
- Meetings among members of the joint-purchasing group should be limited to discussions about the joint-purchasing arrangement. If competitively sensitive information will be discussed, such as pricing or supply requirements, antitrust counsel should be present.
- Any antitrust inquiry is fact-specific. Just because an enforcement agency has proscribed safety zones does not mean the particular industry dynamics might cut against previous guideposts. It is always best to consult antitrust counsel when considering joint-purchasing arrangements.

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