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Managing Association Joint Purchasing Programs without Violating the Antitrust Laws: Lessons from a DOJ Business Review Letter

Related Topic Area(s): Antitrust and Trade Regulation

Trade and professional associations (“associations”) frequently sponsor joint purchasing arrangements on behalf of their members. These programs offer numerous potential benefits, including centralized ordering, volume discounts, efficient warehouse or distribution, and access to products or services at short notice, among other benefits. Although popular with members, joint purchasing programs also can expose the association (and individual members) to potential antitrust risk.

This article provides an overview of joint purchasing along with best practices for associations looking to help members obtain the potential cost savings and other benefits of joint purchasing while minimizing antitrust risk.

What Is Joint Purchasing?

Defined broadly, joint purchasing involves collaboration among competitors to purchase product inputs and services. Association joint purchasing programs come in many different shapes and sizes; in some, the association simply handles administration of the program, while in others, the association acts as purchasing agent for its members. Some joint purchasing involves product inputs, while others involve the purchase of services. No matter the structure of the purchasing program, associations must take care to avoid running afoul of antitrust laws.

What Are the Antitrust Implications?

The principal federal antitrust statutes, the Sherman Act (15 U.S.C. § 1 et seq.) and the Federal Trade Commission Act (15 U.S.C. § 41 et seq.), prohibit contracts, agreements, and conduct that unreasonably restrain trade (as well as monopolization and attempted monopolization). In this respect, the FTC and the DOJ (the “enforcement agencies”) review joint purchasing under the “rule of reason,” which examines the totality of the circumstances and balances the procompetitive benefits of the conduct against the potential anticompetitive harm to determine the likely overall effect on competition.

The concern with joint purchasing is that it may give members monopsony power over vendors and suppliers or facilitate collusion among members by standardizing costs or encouraging the sharing of competitively sensitive information. (“Monopsony power” is a buyer’s power to eliminate suppliers by artificially depressing prices.)

On the other hand, the enforcement agencies recognize the potential procompetitive benefits of joint purchasing. For this reason, the enforcement agencies are unlikely to challenge, absent extraordinary circumstances, joint purchasing arrangements where: (1) the purchases 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 participants in the joint purchasing arrangement. See [DOJ and FTC Statements of Antitrust Enforcement Policy in Health Care](#) and [DOJ and FTC Antitrust Guidelines for Collaborations Among Competitors](#) (setting forth antitrust safety zones).

For example, in a recent DOJ [Business Review Letter to STARS Alliance LLC](#) (“STARS”), the DOJ reviewed a joint purchasing arrangement proposed by an association of several nuclear utility operators. As a starting point, the DOJ noted that the proposal likely qualified for the safety zone for collaborations that account for less than 20 percent of the relevant market. Nevertheless, the DOJ went on to conduct a rule of reason analysis.

Starting with potential anticompetitive effects, the DOJ found that it was unlikely the arrangement would “restrict competition in either the upstream markets for goods and services or the downstream markets

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for electricity” because the STARS members were generally located in different geographic areas and did not compete against each other. At the same time, DOJ found that the arrangement had the potential for procompetitive benefits through increased efficiencies and lower costs.

Finally, DOJ noted that STARS had implemented numerous safeguards to limit the potential for anticompetitive coordination among its members, including that the joint purchasing activities would be voluntary for members, that members would not discuss prices for procuring goods and services, and that STARS would require antitrust compliance training for its members.

Suggested Best Practices

Absent extraordinary circumstances, the enforcement agencies are unlikely to challenge an association joint purchasing program where members are not required to purchase a particular product or service, each member makes its own independent decision to participate, and there is significant competition in the relevant market.

Associations looking to implement a joint purchasing program should implement safeguards, as appropriate, to prevent members from sharing competitively sensitive information, such as downstream sale prices, the timing of price increases or purchase orders, and margins. Suggested precautionary measures include:

- Check your association's governing documents and evaluate its tax-exempt status to confirm that a joint purchasing program is a permissible association activity.
- Consult with antitrust counsel prior to establishing a joint purchasing program and periodically throughout the process to ensure compliance with antitrust laws.
- Monitor the buying group's market share in the input and output markets to stay within the safeguards set forth in the enforcement agencies' Antitrust Guidelines for Collaborations Among Competitors (*e.g.*, 35 percent share for total purchases in the relevant input market and 20 percent share in the relevant output market).
- The association or an independent agent should handle joint buying activity and negotiate with suppliers on behalf of the purchasing group, or require each member to contract individually with the supplier offering a group discount.
- The program should not impose minimum purchasing requirements on members.
- Participation in the joint purchasing arrangement should be available to all association members and should not be limited by the size, type or location of a member.
- Joint purchasing should not be used to raise, lower or stabilize prices, or to boycott suppliers.
- Members should not share competitively sensitive information or enter into any agreement or understanding on prices or other competitive conduct in the downstream output market.
- Any meetings of a joint purchasing group should have an agenda and minutes. All discussions should be limited to the purposes of the joint purchasing group.
- Antitrust counsel should be present at all meetings where competitively sensitive information is discussed.

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