

NEWS | 26 October 2021

DG Competition workshop on joint purchasing

Closed workshop on joint purchasing

On 25 October 2021 DG Competition organized a closed workshop on joint purchasing. With the exception of consumers, all stakeholders were adequately represented. The workshop is part of the public consultation process that will lead to the release of new draft Horizontal Guidelines that is expected in February 2022.

The issue of joint purchasing is of obvious interest to the Distribution Law Center as it concerns the vertical competitive process.

Apart from brief presentations by Prof R. Whish and Prof R. Inderst, the workshop consisted essentially of two break-out sessions. The themes addressed in these sessions can be divided between the overall treatment of joint purchasing and sustainability-related agreements. The latter topic will be picked up in a separate Distribution Law Center news update.

Object or effects restriction?

The session chaired by Prof R. Inderst focused on the effects of retail alliances and, according to the conclusions summarized at the end of the session, has done not much more than to highlight the differences of opinion between the various stakeholders. One may wonder whether DG Competition was able to secure much relevant guidance from that discussion as the positions are known.

The session chaired by Prof R. Whish was of a legal nature and focused heavily on the dividing line between joint purchasing as an object or an effects restriction. The importance of that distinction is obvious. The former qualification (object box) implies that a competition authority does not need to show anti-competitive effects, the materiality of the restrictive conduct is presumed (Expedia judgment) and the chances of securing an exemption are slim.

The session showed that, with exception of naked buyer cartels, it is difficult to define with legal precision any other joint purchasing scenarios that should fall into the object box. There seemed to be consensus that a bright line between object and effects restrictions is needed to avoid legal uncertainty. There also seemed to be consensus that the hidden or secret nature of the joint purchasing arrangement cannot be a decisive factor to place the arrangement in the object box. One of the constant features that is found in joint purchasing set-ups that deserve to be handled in the effects category is some form of pooling of volumes or pooling of resources. The session underscored that joint purchasing comes in many shapes and forms and that retail buying alliances in particular can be very different. The session touched briefly on the effects of joint purchasing and did not bring

much to the table on that score as the delegates essentially repeated the known positions.

Summary by Mrs S. Moonen

In her overall summary, Mrs S. Moonen (Head of Unit, DG Competition) recorded that, while secrecy may be a factor of some relevance, it seems not to be the decisive factor to delineate object from effects-based restrictions. She noted that pooling of resources seems to be found always in joint purchasing set-ups and that the assessment of the effects of joint purchasing may require that a multitude of elements are considered. She emphasized that the future Horizontal Guidelines will need to deal with joint purchasing in general and not just with retail buying alliances.