Buying alliances and the analysis of market power

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Overview

- Buying alliances
  - EU views
  - Recent practice of national competition authorities (focus on France)

- Concept of market power
  - Critical element in assessment

- Focus on Article 101 TFEU/corresponding provisions national competition law
Buying alliances

- Distinction between two types of buying alliances or joint purchasing agreements (German Competition Authority, Food retail sector inquiry)

- Traditional pooling of purchasing volumes

- "New generation" joint purchasing cooperation
  - Go beyond pooling of purchasing volumes: assimilation of product ranges, including private label, sometimes territorial protection, etc.
  - Long term view/often structural links (concentrative elements)
    - Certain degree of influence over smaller partners
    - Less evident for smaller partner to withdraw
  - Can be pre-stage of a merger

- Enforcement focus on new generation type of agreements
EU: Horizontal Guidelines

- Starting point in Article 101 TFEU analysis: EU Horizontal Cooperation Guidelines, Chapter 5 (2011)

- Effects analysis (unless disguised cartel)

- Critical concept: market power
  - Market power on *selling market* (sales to consumers)
    - Risk that better purchase conditions are not passed on to consumers
  - Market power on *procurement market* (buying power of retailers)
    - Risk of reduced output, quality, innovation
    - Risk of foreclosure effect on competing purchasers
EU: Horizontal Guidelines

- Market power concept defined in Horizontal Guidelines, §39

- Essentially the same concept in context of Articles 101/102 TFEU but question of degree
  - Substantial degree required in context of Article 102 TFEU

- Market shares are first point of reference

- Other factors: stability of market shares, entry barriers, countervailing power

“Market power is the ability to profitably maintain prices above competitive levels” or “to profitably maintain output […] below competitive levels”
EU: Horizontal Guidelines

- Preliminary step: market definition
  - Commission Notice on market definition and Horizontal Guidelines
  - Private label vs. branded products
  - Geographic dimension

- Horizontal Guidelines contain negative threshold: unlikely competition concern if market shares ≤15% on purchasing and selling markets (safe harbour)

- Above 15% market share threshold: no presumptions but detailed assessment of the effects
  - Market concentration (suppliers and retailers)
  - Procurement market: countervailing power of suppliers (must-have brands)
    - German sector inquiry: only 6% must-have
EU: Horizontal Guidelines

- Commission also points to risk of collusion between buying alliance partners

- Conditions
  - Market power
  - Market characteristics conducive to coordination

- Commonality of variable costs is important factor

- Level and intensity of exchange of information
  - Commercially sensitive data

- Comments on Article 101(3) TFEU assessment
  - Efficiency gains and pass-on to consumers
National competition authorities

- German Competition Authority
  - Food retail sector inquiry (2014)

- Italian Competition Authority
  - Centrale Italiana (September 2014)
  - Buying alliance between Coop Italia, Despar, Gartico, Discoverde and Sigma (Centrale Italiana)
  - Commitment decision
    - Termination Centrale Italiana buying alliance
    - Limited purchasing cooperation between Coop Italia, Discoverde and Sigma (combined market shares on procurement markets <20%)

- French Competition Authority
France

- Agreements concluded between September and December 2014
- Three alliance agreements between 6 of the main retail groups
- Combined market share >70%
  - Together with E. Leclerc combined market share >90% in France
France

- Government and Senate seek opinion from French Competition Authority (FCA)
  - Concerns on impact of buying alliances on competition


- Opinion and not a decision
  - FCA sets out its views on how it will assess buying alliances

- Opinion in part already overtaken by subsequent events
  - Buying alliance partners Système U and Auchan have announced further integration
  - Will be important test case
France

- Background to formation of buying alliances: price war between retail distributors
  - Drop in margins
  - Retailers claim that buying alliances are necessary to re-establish competitiveness

- High degree of concentration on both sides (suppliers and retail distributors)

- Form and scope of three buying alliances different
  - Range of products covered, but private label products always excluded
  - Purely contractual cooperation or separate legal structure
France

- FCA follows approach Horizontal Guidelines
- First step: presence of market power?
- Market definition (procurement markets)
  - Groups of products ("families")
  - Status of private label products to be assessed on a case by case basis
  - National markets
- Market shares >15% on selling markets and on certain procurement markets
- Countervailing power of suppliers/entry barriers to be further examined
- Likelihood that retail distributors have market power
France

Next step: assessment of competition risks

– Selling and procurement markets

Selling market: risk of collusion (exchange of information/commonality of costs)

– Significant risk (most important one for FCA)
– Difficulty to distinguish pure price negotiations from discussion on counterparts from distributors (promotions, business plan, etc.)
– Risk even when distinct legal entity is set up (e.g., hub&spoke via supplier)
– FCA notes that market characteristics are conducive to coordination
– Closer look at degree of competition at local level required

Selling market: risk of foreclosure of other distributors

– “Spiraling effect”: FCA sceptical – effect uncertain and probably limited
France

- Purchasing market: risk of negative impact on output, innovation, quality, etc.
  - FCA not convinced at first sight, unless specific tailor-made investments made by suppliers

- Purchasing market: risk of foreclosure of other suppliers
  - Impact possible but to be further examined
  - FCA notes need to select suppliers on objective grounds

- Efficiency gains and pass-on to consumers
  - FCA takes no position but case appears to be difficult
France

- Towards a notification obligation for buying alliances?
  - Recommendation of FCA

- Draft amendment to French Competition Act
  - Notification of joint purchasing agreements to FCA at least two months before their implementation
  - Minimum turnover thresholds to be defined

- Information obligation
  - Option for FCA to intervene
Conclusion

- Case by case assessment
- Fast moving world – area to watch out for
  - National competition authorities likely to take the lead
  - France: Système U/Auchan will be important test case

“Thus, as many economists suggest, sometimes joint purchasing can be problematic; sometimes it can bring benefits.” (Bellamy & Child, 7th ed., §6.067)
Thank you!

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