

STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE

STATEMENT 7: ENFORCEMENT POLICY ON JOINT PURCHASING ARRANGEMENTS AMONG HEALTH CARE PROVIDERS

INTRODUCTION

Most joint purchasing arrangements among hospitals or other health care providers do not raise antitrust concerns. Such collaborative activities typically allow the participants to achieve efficiencies that will benefit consumers. Joint purchasing arrangements usually involve the purchase of a product or service used in providing the ultimate package of health care services or products sold by the participants. Examples include the purchase of laundry or food services by hospitals, the purchase of computer or data processing services by hospitals or other groups of providers, and the purchase of prescription drugs and other pharmaceutical products. Through such joint purchasing arrangements, the participants frequently can obtain volume discounts, reduce transaction costs, and have access to consulting advice that may not be available to each participant on its own.

Joint purchasing arrangements are unlikely to raise antitrust concerns unless (1) the arrangement accounts for so large a portion of the purchases of a product or service that it can effectively exercise market power¹⁶ 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. If neither factor is present, the joint purchasing arrangement will not present competitive concerns.¹⁷

This statement sets forth an antitrust safety zone that describes joint purchasing arrangements among health care providers that will not be challenged, absent extraordinary circumstances, by the Agencies under the antitrust laws. It also describes factors that mitigate any competitive concerns with joint purchasing arrangements that fall outside the antitrust safety zone.¹⁸

A. ANTITRUST SAFETY ZONE: JOINT PURCHASING ARRANGEMENTS AMONG HEALTH CARE PROVIDERS THAT WILL NOT BE CHALLENGED, ABSENT EXTRAORDINARY CIRCUMSTANCES, BY THE AGENCIES

The Agencies will not challenge, absent extraordinary circumstances, any joint purchasing arrangement among health care providers where two conditions are present: (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 each competing participant in the joint purchasing arrangement.

The first condition compares the purchases accounted for by a joint purchasing arrangement to the total purchases of the purchased product or service in the relevant market. Its purpose is to determine whether the joint purchasing arrangement might be able to drive down the price of the product or service being purchased below competitive levels. For example, a joint purchasing arrangement may account for all or most of the purchases of laundry services by hospitals in a particular market, but represent less than 35 percent of the purchases of all commercial laundry services in that market. Unless there are special costs that cannot be easily recovered associated with providing laundry services to hospitals, such a purchasing arrangement is not likely to force prices below competitive levels. The same principle applies to joint purchasing arrangements for food services, data processing, and many other products and services.

The second condition addresses any possibility that a joint purchasing arrangement might result in standardized costs, thus facilitating price fixing or otherwise having anticompetitive effects. This condition applies only where some or all of the participants are direct competitors. For example, if a nationwide purchasing cooperative limits its membership to one hospital in each geographic area, there is not likely to be any concern about reduction of competition among its members. Even where a purchasing arrangement's membership includes hospitals or other health care providers that compete with one another, the arrangement is not likely to facilitate collusion if the goods and services being purchased jointly account for a small fraction of the final price of the services provided by the participants. In the health care field, it may be difficult to determine the specific final service in which the jointly purchased products are used, as well as the price at which that final service is sold.¹⁹ Therefore, the Agencies will examine whether the cost of the products or services being purchased jointly accounts, in the aggregate, for less than 20 percent of the total revenues from all health care services of each competing participant.

B. FACTORS MITIGATING COMPETITIVE CONCERNS WITH JOINT PURCHASING ARRANGEMENTS THAT FALL OUTSIDE THE ANTITRUST SAFETY ZONE

Joint purchasing arrangements among hospitals or other health care providers that fall outside the antitrust safety zone do not necessarily raise antitrust concerns. There are several safeguards that joint purchasing arrangements can adopt to mitigate concerns that might otherwise arise. First, antitrust concern is lessened if members are not required to use the arrangement for all their purchases of a particular product or service. Members can, however, be asked to commit to purchase a voluntarily specified amount through the arrangement so that a volume discount or other favorable contract can be negotiated. Second, where negotiations are conducted on behalf of the joint purchasing arrangement by an independent employee or agent who is not also an employee of a participant, antitrust risk is lowered. Third, the likelihood of anticompetitive communications is lessened where communications between the purchasing group and each individual participant are kept confidential, and not discussed with, or disseminated to, other participants.

These safeguards will reduce substantially, if not completely eliminate, use of the purchasing arrangement as a vehicle for discussing and coordinating the prices of health care services offered by the participants.²⁰ The adoption of these safeguards also will help demonstrate that the joint purchasing arrangement is intended to achieve economic efficiencies rather than to serve an anticompetitive purpose. Where there appear to be significant efficiencies from a joint purchasing arrangement, the Agencies will not challenge the arrangement absent substantial risk of anticompetitive effects.

The existence of a large number and variety of purchasing groups in the health care field suggests that entry barriers to forming new groups currently are not great. Thus, in most circumstances at present, it is not necessary to open a joint purchasing arrangement to all competitors in the market. However, if some competitors excluded from the arrangement are unable to compete effectively without access to the arrangement, and competition is thereby harmed, antitrust concerns will exist.

C. EXAMPLE—JOINT PURCHASING ARRANGEMENT INVOLVING BOTH HOSPITALS IN RURAL COMMUNITY THAT THE AGENCIES WOULD NOT CHALLENGE

Smalltown is the county seat of Rural County. There are two general acute care hospitals, County Hospital ("County") and Smalltown Medical Center ("SMC"), both located in Smalltown. The nearest other hospitals are located in Big City, about 100 miles from Smalltown.

County and SMC propose to join a joint venture being formed by several of the hospitals in Big City through which they will purchase various hospital supplies -- such as bandages, antiseptics, surgical gowns, and masks. The joint venture will likely be the vehicle for the purchase of most such products by the Smalltown hospitals, but under the joint venture agreement, both retain the option to purchase supplies independently.

The joint venture will be an independent corporation, jointly owned by the participating hospitals. It will purchase the supplies needed by the hospitals and then resell them to the hospitals at average variable cost plus a reasonable return on capital. The joint venture will periodically solicit from each participating hospital its expected needs for various hospital supplies, and negotiate the best terms possible for the combined purchases. It will also purchase supplies for its member hospitals on an ad hoc basis.

Competitive Analysis

The first issue is whether the proposed joint purchasing arrangement would fall within the safety zone set forth in this policy statement. In order to make this determination, the Agencies would first inquire whether the joint purchases would account for less than 35 percent of the total sales of the purchased products in the relevant markets for the sales of those products. Here, the relevant hospital supply markets are likely to be national or at least regional in scope. Thus, while County and SMC might well account for more than 35 percent of the total sales of many hospital supplies in Smalltown or Rural County, they and the other hospitals in Big City that will participate in the arrangement together would likely not account for significant percentages of sales in the actual relevant markets. Thus, the first criterion for inclusion in the safety zone is likely to be satisfied.

The Agencies would then inquire whether the supplies to be purchased jointly account for less than 20 percent of the total revenues from all products and services sold by each of the competing hospitals that participate in the arrangement. In this case, County and SMC are competing hospitals, but this second criterion for inclusion in the safety zone is also likely to be satisfied, and the Agencies would not challenge the joint purchasing arrangement.

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Hospitals or other health care providers that are considering joint purchasing arrangements and are unsure of the legality of their conduct under the antitrust laws can take advantage of the Department of Justice's expedited business review procedure for joint ventures and information exchanges announced on December 1, 1992 (58 Fed. Reg. 6132 (1993)) or the Federal Trade Commission's advisory opinion procedure contained at 16 C.F.R. §§ 1.1-1.4 (1993). The Agencies will respond to a business review or advisory opinion request on behalf of health care providers considering a joint purchasing arrangement within 90 days after all necessary information is submitted. The Department's December 1, 1992 announcement contains specific guidance as to the information that should be submitted.

FOOTNOTES:

16. In the case of a purchaser, this is the power to drive the price of goods or services purchased below competitive levels.
17. An agreement among purchasers that simply fixes the price that each purchaser will pay or offer to pay for a product or service is not a legitimate joint purchasing arrangement and is a per se antitrust violation. Legitimate joint purchasing arrangements provide some integration of purchasing functions to achieve efficiencies.
18. This statement applies to purchasing arrangements through which the participants acquire products or services for their own use, not arrangements in which the participants are jointly investing in equipment or providing a service. Joint ventures involving investment in equipment and the provision of services are discussed in separate policy statements.
19. This especially is true because some large purchasers negotiate prices with hospitals and other providers that encompass a group of services, while others pay separately for each service.
20. Obviously, if the members of a legitimate purchasing group engage in price fixing or other collusive anticompetitive conduct as to services sold by the participants, whether through the arrangement or independently, they remain subject to antitrust challenge.