

**Baker
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Annual Corporate Compliance Conference 2020

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Competitor Collaborations: Keeping the Right Side of the Line

Thursday 17 September, 2.00 - 3.00 pm BST



Speakers



James Robinson
Partner (Chair), London



Irena Apostopoulos
Senior Associate, London



Grant Murray
Lead Knowledge Lawyer,
Global Antitrust &
Competition Group,
London

Agenda

- 1 OVERVIEW
- 2 COMPETITOR COLLABORATIONS DURING THE COVID-19 PANDEMIC
- 3 PURCHASING COLLABORATION
- 4 COMPETITOR COLLABORATIONS AND SUSTAINABILITY

1

**Competitor
Collaborations:
Overview**

Reminder of the fundamentals



Article 101(1) / Chapter I prohibits agreements or concerted practices which have as their object or effect the prevention, restriction or distortion of competition



Typical examples of "by object" infringements:

- Price fixing agreements
- Agreements to limit production
- Joint boycotts
- Market division agreements (geographic markets or customers)
- Bid rigging (collusive tendering)



Exchanging competitively sensitive information



Some collaborations require closer analysis: see if the benefits justify the restrictions / collaboration

Some key risk areas



Crisis cartels – economic downturns are ripe for poor conduct



Typical risk scenarios:

- Trade associations
- Social / informal contacts
- Benchmarking
- Signalling
- Information from trade channels
- Phone / WhatsApp / IM

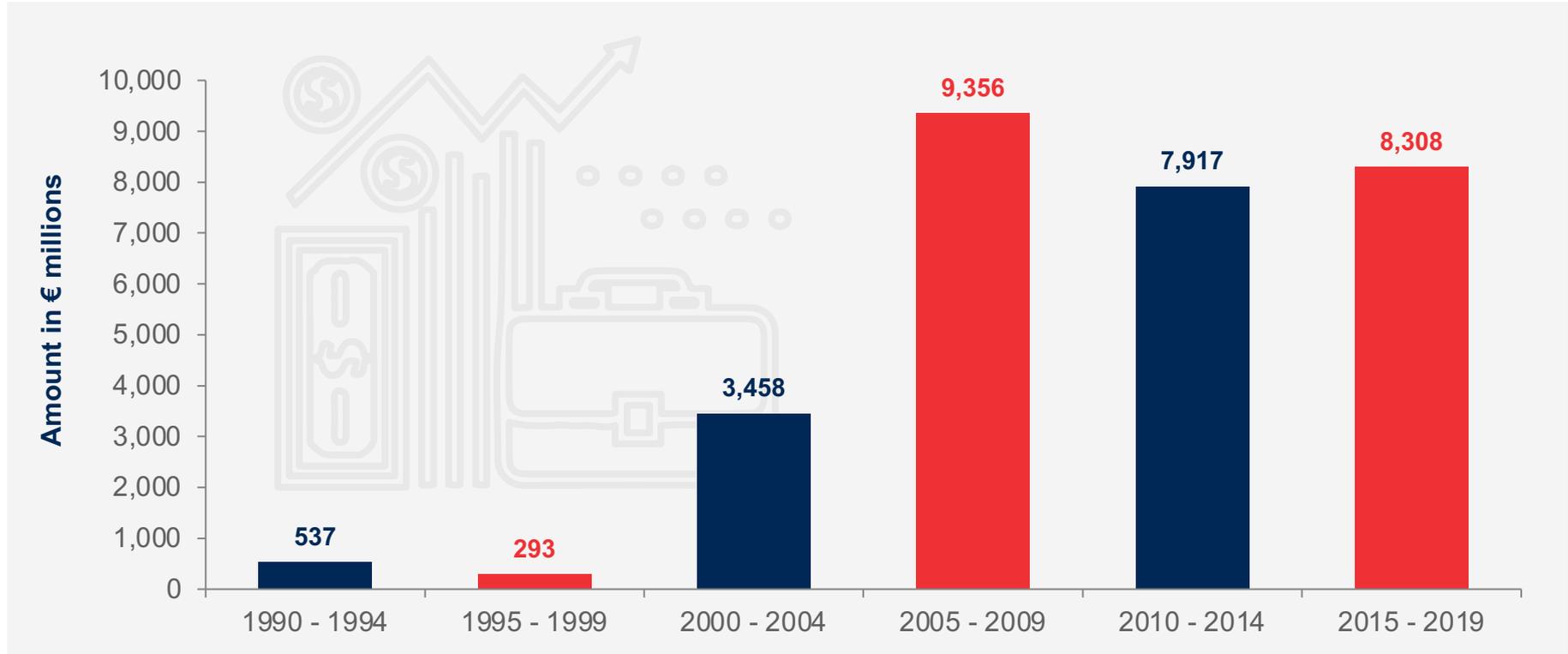


Be careful when gathering "market intelligence"



The risks are not always obvious: e.g. HR, purchasing, dual distribution, developing industry standards

EU cartel fines* (1990 - 2019)



*Not adjusted for Court judgments

Recent themes



Purchasing cartels – see later

Restricting competition in innovation – Emissions Technology



Main infringement decisions 2019:

- Canned vegetables: EUR 31.6 million
- Car safety systems: EUR 368 million
- Foreign exchange spot trading: EUR 1.07 billion



Continued importance of immunity / leniency: Bonduelle avoided EUR 250 million; Takata avoided EUR 195 million; UBS avoided EUR 285 million



Settlement / hybrid settlement cases

2

**Competitor
Collaborations during the
COVID-19 pandemic**

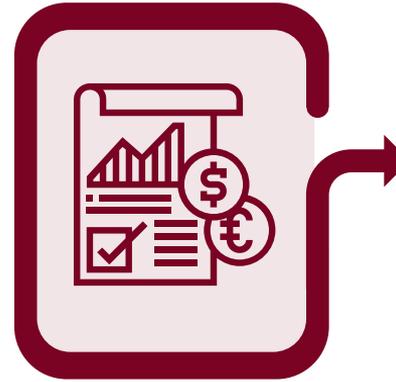
COVID-19 | Competitor collaborations in a crisis



Authorities are taking emergency competition law measures



Measures are designed to allow businesses to cooperate and collaborate in order to ensure the supply of essential goods and services



Limited, temporary exclusions from competition law for certain types of competitor collaborations. Guidance on enforcement priorities



Heightened level of risk of unlawful collaborations during a crisis due to increased pressures on businesses

COVID-19 | EC Temporary Framework

European Commission Temporary Framework

- Sets out main criteria for assessing possible cooperation to address shortages of essential products and services
- Process for issuing ad hoc comfort letters

What types of competitor collaborations are permitted under the Temporary Framework?

- Certain conduct not an enforcement priority if:
 1. Objectively necessary
 2. Temporary
 3. Not excessive
- Still require sufficient safeguards (e.g. no flow of individualized company information back to competitors unless strictly necessary)
- Need to document all exchanges and agreements

COVID-19 | (Temporary) changes to UK law and CMA guidance

Temporary amendments to the Competition Act

- Targeted at specific activities in specific industries
- Typically allow for increased coordination, sharing of information, labour and facilities – depending on industry.

CMA guidance note issued in March 2020 on cooperation

- CMA guidance states it will not intervene when collaborations are:
 1. Temporary and last no longer than necessary to deal with critical COVID-19 related issues
 2. Appropriate and necessary in order to avoid a shortage, or ensure security of supply
 3. In the public interest
 4. Contribute to the benefit or wellbeing of consumers
- **However:** "The CMA will not tolerate conduct which opportunistically seeks to exploit the crisis"

COVID-19 | Pressure points to watch out for



COVID-19 has created greater commercial pressure and interest in collaborations and speaking with competitors (e.g. trade association meetings)



This creates additional compliance risks which need to be carefully monitored (particularly with many of us working remotely). Areas to watch out for include:

1. Trade Associations – risk of discussions about COVID-19 responses straying into sharing competitively sensitive information on prices, customers etc.
2. Human Resources – sharing plans for furlough, salaries, redundancies, bonuses
3. Sales – COVID-19-related "truces" between competitors, dividing up sales markets
4. Joint tendering
5. Recovery phase and return to the "new normal"



Businesses must continue to assess the competition law risks and ensure appropriate safeguards are in place

COVID-19 | Key takeaways and practical tips



If possible, involve competition authority (and public bodies) at early stage



Keep record of ongoing collaboration (communications, agreements)



Cartel enforcement remains high and competition law still applies in a crisis

- Only specific collaborations with clear public interest permitted under temporary measures
- Think about how the business is responding to COVID-19 and some of the additional pressure points that may have arisen out of the crisis
- Heightened compliance risk with people working remotely
- Do not neglect competition law compliance during the crisis. As lockdown measures begin to ease, consider a compliance audit of the business

3

**Purchasing
collaboration**

Purchasing collaboration | Overview



Collaborative agreement between competitors (actual or potential) to purchase together. Improves negotiating position of collaborators



Can create substantial economic benefits: share risk, save costs, enhance quality and variety. Especially attractive in current economic climate



But can also create potential competition problems: disguised cartels, limitation of competition, foreclosure

Purchasing collaboration | An easy line to cross

Competitor collaborations to combine purchasing power may breach competition law

01

Fine line between buyer cartel (prohibited) and legitimate joint purchasing (permitted)

02

Competition law assessment not straightforward. In the EU, "safe harbour" for true joint purchasing if below market share thresholds

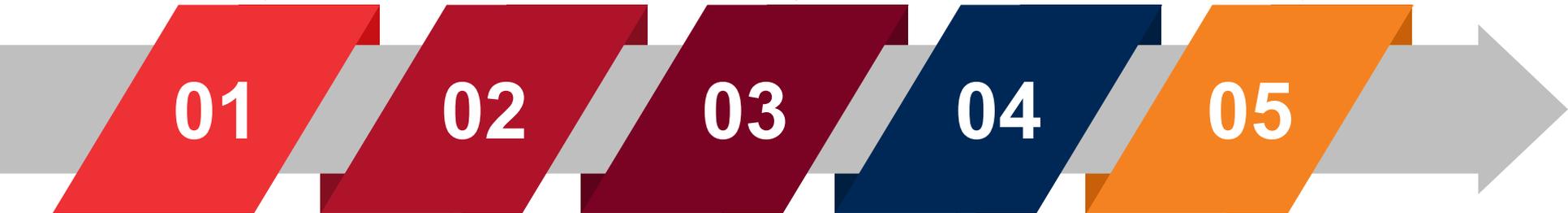
03

No set requirement for how "structural" or integrated joint purchasing arrangement needs to be. But secret discussions regarding individual purchasing plans a clear risk

04

Enforcement against buyer cartels an increasing priority for authorities; underlines the importance of correctly assessing joint purchasing arrangements

05



Purchasing collaboration | Buyer cartels in the antitrust spotlight



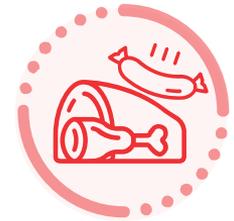
French Supermarkets (EC: Ongoing)

Collaboration between two French supermarkets that may have gone beyond legitimate joint purchasing - developing shop networks; consumer pricing policies



Ethylene (EC: 2020) € 260 million

Collaborators exchanged price-related information to artificially lower the industry-wide purchase price of ethylene



French Pork Producers (France: 2020) € 93 million

Collaborators used market power to drive down purchase prices of pork; regulator emphasised the strong bargaining power of the collaborators and detrimental effect on suppliers

Purchasing collaboration | Market position



EU "safe harbour" for joint purchasing when the combined market share in each of the buying and selling markets is less than 15%



Above the thresholds

- Need to assess the effects on each of the selling and buying markets
- Joint purchasing between companies with limited market power (especially on the selling market) unlikely to raise competition concerns. Greater risk if significant combined market share
- Will the parties achieve a high commonality of costs?
- Does the joint purchasing cover a large proportion of the total volume of the purchasing market? May rival purchasers be foreclosed?

Staying on the right side of the line

Identify efficiencies

- Conduct an upfront assessment, consider the expected benefits of the joint purchasing (lower costs, qualitative efficiencies)
- Joint activities such as ordering, distribution, warehousing may increase economic efficiency and make the market more competitive

Manage information exchange

- The scope of the joint purchasing activity needs to be properly structured to avoid problematic information exchange. Consider safeguards – e.g. an independent joint purchasing organization
- Only information that is absolutely necessary for the implementation of the joint purchasing should be provided

Key takeaways and practical tips

Recent cases are a reminder that agreeing purchase prices with competitors can lead to enforcement and high fines, just like fixing sale prices. Be wary of secrecy



Joint purchasing can be legitimate and permissible depending on market strength of the participants, which requires a careful upfront analysis



Compliance training should include procurement staff / purchasing managers who must be aware of risks



Provide compliance guidance so that employees are clear on the limits of the collaboration and how to avoid pitfalls

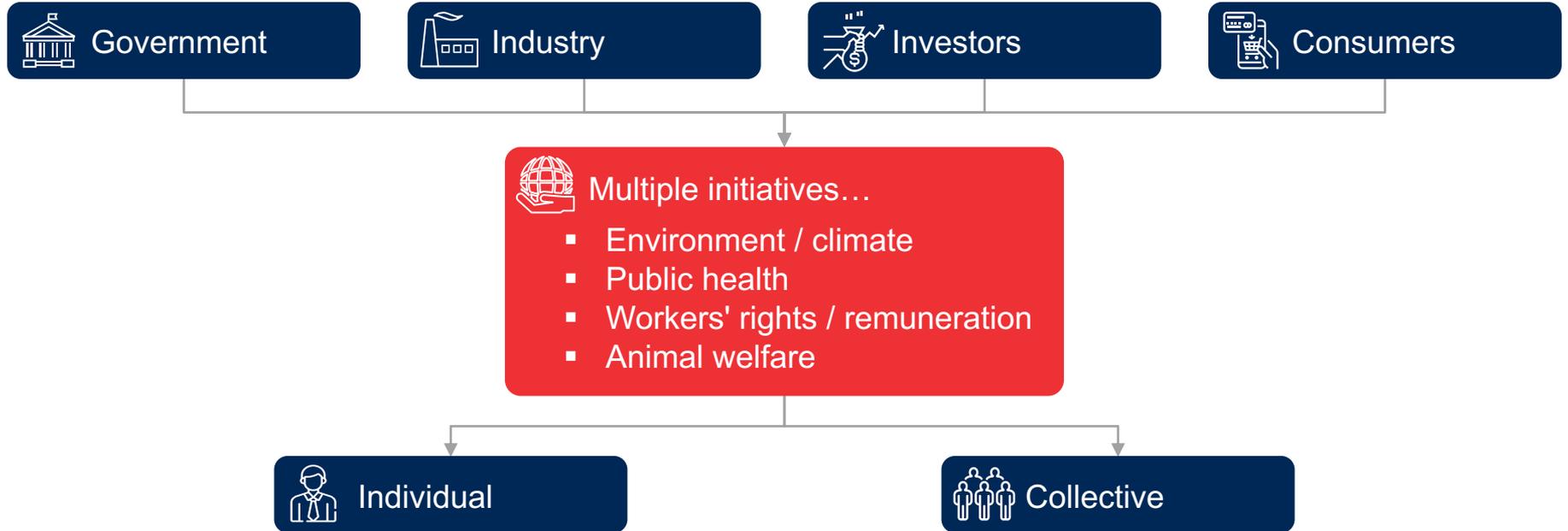


Look-out for "mission creep". Only share information that is strictly necessary to the joint purchasing arrangement and consider information exchange safeguards

4

**Competitor
collaborations and
sustainability**

Sustainability



Standards and benchmarking / info exchange



An industry standard can cover any part of the supply chain

- How workers are paid, which inputs can be used, manufacturing methods; can play a role in making recycling more efficient



There are clear benefits to standards and many will not raise antitrust issues



Must not be developed in a way which disadvantages or excludes others (i.e. boycotts)

Standards and benchmarking / info exchange

EU
'safe harbour'

- Unrestricted participation in the standard-setting process
- Transparent procedure for adopting standard
- Voluntary and effective access to the standard

Information
sharing /
benchmarking,
e.g. to show
progress

- Aligning KPIs
- Apply usual information exchange safeguards (firewalls, third party aggregator etc.)

Scope-creep and straying into illegal territory

Scope creep / frequent competitor contacts



Implement clear compliance safeguards even when a project is initially uncontroversial



Establish clear plans about objectives - and revisit



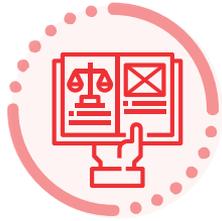
Make sure that info exchange remains necessary for the legitimate aims pursued



No discussions on how to pass on the costs of new standards etc.



In-between cases



Make sure that those responsible for corporate sustainability initiatives are connected to Legal



Focus on why an arrangement has to be carried out by competitors working together:

- What is it about the project (in terms of risk and cost) which means that it could not be achieved in some less restrictive manner?
- Why not go it alone?
- Have other options been considered and rejected?



Retain as much room for competition as possible – e.g. latitude to decide independently how to meet standard / target

In-between cases



Identify / quantify the benefits of the initiative as well as who will benefit and when



Ensure that each initiative has a compliance programme which will cover information exchange safeguards



Consider the pros and cons of approaching a Government body and / or antitrust agency about a contemplated project

The image features a white speech bubble on the left side, containing the word "Questions" in a bold, dark blue font. The background is a dark blue gradient with a glowing teal particle trail that curves across the bottom right. The overall aesthetic is clean and modern, with a focus on the central text.

Questions

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