Joint Venture Analysis under United States Antitrust Law

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Businesses often enter into collaborative arrangements to share costs and risk and to achieve other efficiencies. These arrangements may involve one or more business activities, such as production, distribution, marketing, research and development, sales, purchasing, or information sharing. These collaborations are sometimes structural in that they involve establishing and contributing to legal entities. Other times they are contractual. In either circumstance, when the collaboration involves competing or vertically related firms, parties are well advised to consider the antitrust implications from the perspective of the formation of the collaboration and from its operations.

The formation and operation of joint ventures are subject to review under sections 1 and 2 of the Sherman Antitrust Act, as well as section 5 of the Federal Trade Commission (the FTC) Act. According to the Antitrust Division of the Department of Justice (the DOJ) and the FTC, section 7 of the Clayton Act is also applicable where a collaboration:

- involves competitors in the relevant market;
- would integrate economic activity in the relevant market;
- would eliminate all competition among the joint venture’s participants in the relevant market; and
- collaboration would not terminate within a sufficiently limited period.

For guidance on how the US antitrust authorities treat competitor collaborations, practitioners can look to various guidelines issued by the DOJ and the FTC: the 2000 Antitrust Guidelines for Collaborations Among Competitors (the Competitor Collaboration Guidelines); the 1996 Statements of Antitrust Enforcement Policy in Health Care (the Health Care Guidelines); and the 2010 Horizontal Merger Guidelines.

**Framework for analysing the formation of a joint venture**

Certain joint ventures are evaluated using a merger analysis, which asks whether the collaboration will ‘substantially... lessen competition’ in an antitrust market. In addition to or in lieu of a merger analysis, the lawfulness of a joint venture generally will be reviewed using principles governed by section 1 of the Sherman Act, through the per se unlawful standard or the rule of reason.

Evaluation of a joint venture without a market analysis

Agreements that ‘always or almost always tend to raise prices or to reduce output are per se illegal.’ Such agreements are evaluated without a detailed market analysis due to their inherently anti-competitive nature. Thus, arrangements that are nothing more than agreements between competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories or lines of commerce have been held to be per se illegal.

Agreements that are not patently anti-competitive but that cause obvious anti-competitive harm are deemed presumptively unlawful under what is sometimes referred to as ‘quick look’ review.

Absent overriding pro-competitive benefits that could offset the anti-competitive harm, courts, the DOJ and the FTC will challenge such agreements without a detailed market analysis. For example, an arrangement between competitors to set prices or allocate markets without any other integration, risk sharing or other efficiency enhancement, even if labelled a joint venture, will likely be challenged as per se unlawful or be found to be unlawful after a quick look. In the health-care industry, physician joint ventures without any shared risk or integration have been challenged as little more than price fixing and have been held either per se unlawful or found unlawful after a quick look.

Key to avoiding such per se or quick look analysis is to demonstrate efficiencies reasonably related to and reasonably necessary to the joint arrangement.

**Evaluation of a joint venture with a market analysis**

As indicated above, a market analysis of a joint venture can be undertaken pursuant to section 7 of the Clayton Act to determine if the collaboration will substantially lessen competition, or under section 1 of the Sherman Act to determine if the collaboration has or potentially could reduce competition. In the following sections, we identify the method of analysis and provide an example of a recent DOJ enforcement proceeding using both section 7 of the Clayton Act and section 1 of the Sherman Act.

**Merger analysis under section 7 of the Clayton Act**

Integrative joint ventures that involve an acquisition of assets or voting securities are subject to a merger analysis under section 7 of the Clayton Act. Section 7 prohibits acquisitions, the effect of which ‘may be substantially to lessen competition, or to tend to create a monopoly.’ The central concern of section 7 is that the collaboration ‘should not be permitted to create, enhance, or entrench market power or to facilitate its exercise.’ Thus, the ultimate issue under section 7 is whether the joint venture will be likely to enable the collaborators, acting unilaterally or together with other entities, to increase prices above competitive price levels.

Where section 7 applies, the joint venture may be analysed pursuant to the Horizontal Merger Guidelines. The DOJ and the FTC will evaluate several factors, including the degree to which the venture will reduce head-to-head competition between the parties, the market shares and concentration levels, competitive effects, entry barriers, efficiencies associated with the venture, and the prospect that the arrangement could reduce competition between the parent entities outside of the venture. Before measuring market shares or concentration levels, the agencies will define the relevant markets. Markets have a product and a geographic component. The product market identifies those products that compete with the products contributed to the venture. The geographic market includes those areas where customers can turn for supplies. In both instances, market definition is focused on the alternatives available to customers.

Market shares are calculated using the sales or capacity of existing competitors and those that could quickly enter. The
Herfindahl-Hirschman Index (HHI) is used to measure concentration. If the post-formation HHI is less than 2,000, the DoJ and FTC are not likely to challenge the venture; if it is above 2,500 and the venture increases the HHI by more than 200 points, then the agencies will presume the venture to be anti-competitive. Between these levels, the agencies will examine the overall effect of the joint venture on competition, including whether there are barriers to entry and the efficiencies associated with the venture.

**Section 1 of the Sherman Act**

As indicated above, a joint venture with a reasonable prospect of achieving efficiencies or integrating resources will likely be examined using the rule of reason under section 1 of the Sherman Act. Because the rule of reason analysis focuses ‘on the state of competition with, as compared to without, the relevant agreement’, the core question is ‘whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise prices above or reduce output, quality, service, or innovation below what likely would prevail’.

The rule-of-reason analysis is flexible and varies with the nature of the collaboration and the relevant market conditions. Relevant considerations include:
- actual anti-competitive effects;
- foreclosure of competition;
- increased market power;
- high barriers to entry; and
- the potential for the facilitation of collusion outside the joint venture.

The Competitor Collaboration Guidelines indicate that the agencies generally will not challenge a joint venture agreement when the market shares of the joint venture and its parent companies collectively account for no more than 20 per cent of each relevant market. Courts and agencies will also assess a joint venture’s potentially pro-competitive benefits, which may include:
- combining resources to provide goods or services;
- sharing business risks;
- sharing complementary resources or research and development;
- enhancing production or quality;
- reducing costs; and
- creating new products or services.

In sum, if the nature of the agreement and the absence of market power both demonstrate the absence of anti-competitive harm in a rule of reason analysis, the agencies are unlikely to challenge the formation of the joint venture.

**Case study: United States v ConAgra Foods, Inc et al (DDC 2014)**

Early in 2014, the DoJ challenged the formation of a joint venture under section 1 of the Sherman Act and section 7 of the Clayton Act. This recent development illustrates how the DoJ analyses formation issues.

On 20 May 2014, ConAgra Foods, Inc (ConAgra), Cargill, Inc (Cargill), CHS Inc (CHS), Horizon Milling, LLC (Horizon) and the DoJ reached a settlement, which as of the time of publication is pending court approval, over a proposed joint venture called Ardent Mills. The Ardent Mills joint venture sought to combine the wheat flour milling resources of Horizon, a joint venture between Cargill and CHS, and ConAgra Mills, a subsidiary of ConAgra. Both ConAgra Mills and Horizon made several types of flour, including hard wheat flour and soft wheat flour, while Cargill and CHS marketed wheat to four mills. Under the proposed agreement, Cargill and CHS also proposed to share with Ardent Mills certain information regarding wheat markets.

**Competitive analysis of the joint venture**

First, the DoJ alleged that the markets were hard wheat flour and soft wheat flour, variously, in four regions. With regard to product market, the DoJ alleged that hard wheat and soft wheat flour are rarely substituted for one another in baking applications. The relevant geographic markets were alleged to be Northern California, Southern California, Northern Texas and the Upper Midwest. The DoJ reasoned that wheat flour customers are generally limited to purchasing flour from millers from about 150 to 200 miles because of the cost of truck transportation. Furthermore, flour millers allegedly charge different prices to customers in different locations.

In each of these markets, the DoJ contended that Ardent Mills’ market share was between 40 per cent and 100 per cent of the relevant market. Thus, the DoJ contended that the joint venture was presumptively unlawful in each of the relevant markets.

The DoJ did not, however, rest on a presumption of anti-competitive effect. The DoJ’s complaint identified three anti-competitive effects that the formation of Ardent Mills would allegedly have in the wheat flour industry:
- the elimination of head-to-head competition between ConAgra Mills and Horizon;
- an increase in the likelihood of capacity closures; and
- an increase in the likelihood of anti-competitive coordination among wheat flour millers, including the facilitation of information exchanges between the joint venture and the parents.

The DoJ alleged that the creation of the joint venture ‘would eliminate head-to-head competition between ConAgra Mills and Horizon in the relevant markets because ConAgra Mills and Horizon routinely compete by offering lower prices to their customers and customers have secured lower prices by pitting the two against each other.’ The DoJ then alleged that the creation of the joint venture would have led to an increased likelihood of anti-competitive capacity closures. Here, the DoJ alleged that Ardent Mills would be incentivised to close capacity serving the relevant markets because it would have a larger base of mills to benefit from increased flour prices than the stand-alone parent companies of the joint venture. Because Ardent Mills would have a larger portfolio of flour mills with varying costs, the new joint venture would be more likely to close high-cost mills to raise prices.

The DoJ alleged that the creation of the joint venture would increase the likelihood of anti-competitive coordination among wheat flour millers. The DoJ outlined four key characteristics of the wheat flour markets supporting this contention:
- the transparency of the hard and soft wheat flour markets, which allows millers to gain insight into their competitors’ activities;
- the homogeneity of hard and soft wheat flour;
- the relatively inelastic demand for the products; and
- the fact that larger flour millers compete against one another in multiple geographic markets.

Additionally, the DoJ alleged that the formation of Ardent Mills would allow Ardent Mills and its rivals to ‘more easily identify and account for the competitive strategies of one another, making it easier for them to coordinate on capacity, price, or other competitive strategies in the relevant markets, which already are susceptible to coordination.’
Finally, the DoJ alleged that the formation of Ardent Mills would facilitate information exchanges between CHS, Cargill, and Ardent Mills that would further increase the likelihood of coordination in the relevant markets. Because the agreement would permit CHS and Cargill to provide Ardent Mills with detailed information about its rival mills’ wheat purchases, the joint venture would have insight into its rivals’ strategies. This, in turn, ‘would make coordination more likely and durable’. The DoJ also alleged that entry of others into the wheat flour market would not be likely, timely or sufficient to counteract the anti-competitive effects of the formation of the joint venture. Because the wheat flour market is mature with stable demand and margins, the DoJ asserted that there is little incentive to enter the market with a new mill.

The proposed settlement

The DoJ did not seek to block the Ardent Mills joint venture completely. The proposed final judgment requires the divestitures of four individual wheat flour mills, one in each of the relevant geographic markets. The DoJ concluded that these divestitures ‘will eliminate the anti-competitive effects of the formation of Ardent Mills by establishing a substantial, independent and economically viable competitor in each relevant market’. Notably, the proposed final judgment prohibits Cargill, CHS, and ConAgra from disclosing to Ardent Mills any non-public, customer-specific information relating to wheat sales or usage, and prohibits Ardent Mills from soliciting, receiving, or using such information from Cargill, CHS or ConAgra.

Lessons from the Ardent Mills proposed settlement

The Competitor Collaboration Guidelines indicate that joint ventures that are likely to increase prices or reduce output will be prohibited. The wheat flour joint venture was alleged to do both. The joint venture purportedly would have displaced the once-present competition between its parent companies’ flour mill operations. And, because the combination of ConAgra and Horizon would create a larger portfolio of flour mills under the umbrella of the joint venture – 41 mills in all – the DoJ argued that the joint venture would likely decrease output from those most-costly flour mills in the portfolio.

This enforcement action demonstrates the scrutiny to be given to the potential for information sharing between a parent supplier and a downstream joint venture to reduce competition. While the joint venture and the parent companies at issue in the Ardent Mills joint venture would not have competed directly, the DoJ found that the sharing of information about the joint venture’s competitor mills’ wheat purchases from the supplier parent companies increased the likelihood of anti-competitive coordination.

Finally, while anti-competitive effects may exist as a consequence of the formation of a joint venture, the Ardent Mills settlement suggests that divestitures are a plausible option to gain approval from antitrust authorities.

US antitrust framework for analysing the operation of a joint venture

The preceding discussion relates to how US antitrust authorities will treat a joint venture at its formation. Once formed, the joint venture and its partners must continue to mind the US antitrust laws. A sampling of key decisions related to joint venture operations follows.

The US Supreme Court has held that pricing decisions made by a legitimate, integrated joint venture are not per se unlawful. In *Texaco Inc v Dagher*, Texaco and Shell Oil had formed a joint venture through which they consolidated certain regional operations related to the refining and marketing of gasoline. Pursuant to the joint venture, which was approved by both state and federal antitrust authorities after divestitures, Texaco and Shell sold gasoline under their respective brands at a single, unified price. Plaintiffs challenged this practice as price fixing that was per se illegal under section 1 of the Sherman Act. The Supreme Court disagreed, finding that the practice should be challenged under the rule of reason. The court noted that the joint venture’s parent entities did not compete with each other or the joint venture in the relevant market, and thus there was no price-fixing agreement between competing entities with respect to competing products. Because the joint venture was a single entity, its pricing activities, though price fixing in the literal sense, were ‘not price fixing in the antitrust sense’. The Court also noted that setting the prices at which the joint venture sold its goods was a ‘core activity’, thus making the ancillary restraints doctrine inapplicable. Notably, the Court did not conclude that the pricing was lawful per se, but only that it was not per se unlawful. The Court did not provide guidance as to when pricing by an integrated joint venture would violate the antitrust laws, even though the formation of the joint venture was found lawful.

Although *Dagher* illustrates that certain lawfully-formed joint ventures have some flexibility with regards to operational decisions, it did not grant them a free pass from section 1 scrutiny. In a recent decision, *American Needle, Inc v National Football League*, the Supreme Court held that a joint venture’s concerted actions were ‘not categorically beyond the coverage of section 1’ of the Sherman Act, and were subject to evaluation under the rule of reason. In *American Needle*, various teams from the US National Football League (NFL) had formed a joint venture to license individual teams’ intellectual property. In response to a challenge of their exclusive licensing practices, the teams, the NFL and their licensing entity responded that as a ‘single economic enterprise’ they were incapable of conspiring within the meaning of section 1. The Supreme Court disagreed, and centered its analysis on whether the venture joined ‘separate economic actors pursuing separate economic interests’ that would ‘deprive the marketplace of independent centers of decision-making’. Although it eschewed legalistic distinctions regarding the structure of the joint venture, the Court determined that, as a practical matter, the NFL teams did not possess a unity of interest that would make them incapable of conspiring unlawfully. While recognising that the joint venture may have redeeming justifications, the Court concluded that its operations and business practices were subject to rule of reason analysis.

In one of the leading joint venture cases, a US appellate court concluded that when parents structure a joint venture to allow for competition between the joint venture and each parent, those three entities must continue to compete in compliance with the antitrust laws. In *PolyGram Holding, Inc v FTC*, the DC Circuit found an agreement between two collaborating competitors to be presumptively unlawful under section 5 of the FTC Act. In that case, two distributors agreed to jointly market and distribute a 1998 recording from a classical music trio known as ‘The Three Tenors’. The two distributors would share in the worldwide profits and losses from the recording. Each of the distributors had the right to market a prior, similar recording by ‘The Three Tenors, both of which had enjoyed immense success. Thus, the distributors structured the venture to allow for competition among the two distributors and the venture. Concerned that the jointly marketed 1998 recording would be overshadowed by the prior two recordings, the two distributors...
agreed to cease temporarily promotion of their respective earlier recordings of The Three Tenors in order to support the sales of the 1998 joint venture recording.

The FTC concluded that the agreement was ‘inherently suspect’ and in violation of section 5 of the FTC Act. On appeal, the Court of Appeals for the District of Columbia concurred, and found that PolyGram’s proffered justification of eliminating ‘free riding’ was not a legitimate pro-competitive justification. An agreement between joint venturers to restrain price cutting and advertising with respect to products not part of the joint venture looks suspiciously like a naked price fixing agreement between competitors, which would ordinarily be condemned as per se unlawful.

Thus, the joint venture partners ran afoul of the antitrust laws where they extended their collaboration to competing products outside the joint venture without any associated efficiencies.

Conclusion

While the US courts and federal agencies recognise the pro-competitive potential of joint ventures, there are a number of federal statutes that apply to both the formation and operation of a joint venture. Parties should ensure that they undertake both analyses under all applicable statutes and, once formed, create an antitrust compliance policy to ensure that the joint venture does not run afoul of the US antitrust laws by virtue of its operations.

Notes

1 15 USC sections 1–2.
2 15 USC section 45.
6 15 USC section 18; Collaboration Guidelines section 1.3; Horizontal Merger Guidelines.
7 The lawfulness of a joint venture can also be evaluated under section 2 of the Sherman Act, 15 USC section 2, which prohibits acts of monopolisation, attempts to monopolise, and conspiracies to monopolise. As such challenges are usually made in conjunction with the section 1 challenge, we do not address the section 2 considerations in this article.
8 Collaboration Guidelines section 3.2 (citing Broadcast Music, Inc v Columbia Broadcasting Sys, 441 US 1, 19-20 (1979)).
9 Id (citing cases).
10 See Nat’l Coll. Athletic Ass’n v Bd. of Regents, 468 US 85 (1984); Cal. Dental v FTC, 526 US 756, 770 (1999) (noting that ‘quick look’ analysis is applied where ‘an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anti-competitive effect on customers and markets’).
11 See, eg, N. Tex. Specialty Physicians v FTC, 528 F.3d 346, 362-69 (5th Cir. 2008) (finding quick look analysis appropriate in light of obvious anti-competitive effects and insufficient pro-competitive justifications).
12 See, eg, Health Care Guidelines at 18.
13 Acquisitions of assets and voting securities meeting certain thresholds may require the parties to submit a filing to the DoJ and the FTC under the US merger control statute, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.
14 15 USC section 18.
15 Horizontal Merger Guidelines section 1.
16 The HHI is the sum of the square of each firm’s market share. Thus, if there are 10 firms with 10 per cent share, the HHI will be 1,000.
17 Collaboration Guidelines section 3.3.
18 See generally id. sections 3.31-3.35.
19 Id section 4.2. We note that markets are defined for section 1 purposes largely as they are defined for section 7 purposes.
20 See, generally, id section 2.1.
21 Press release, Dep’t of Justice, Justice Department Requires ConAgra, Cargill, CHS, Horizon Milling to Divest Four Significant Flour Mills to Go Forward with Ardent Mills Joint Venture (20 May 2014), available at www.justice.gov/opa/pr/2014/May/14-at-535.html.
22 Complaint paragraph 15, United States v ConAgra Foods, Inc et al, No. 1:14-cv-00823 (DDC filed 20 May 2014) (Complaint); Competitive Impact Statement at 5, 8–9, United States v ConAgra Foods, Inc et al, No. 1:14-cv-00823 (DDC filed 20 May 2014) (Competitive Impact Statement).
24 Complaint paragraph 21; Competitive Impact Statement at 12.
25 Complaint paragraph 19.
26 Id paragraph 22; Competitive Impact Statement at 13–14.
27 Complaint paragraph 23.
28 Id paragraphs 24–29.
29 Id paragraphs 24–25.
30 Id paragraph 26.
31 Id paragraph 27.
32 Id paragraph 28.
33 Id paragraph 29.
34 Id.
35 Id.
36 Id. paragraph 30.
38 Competitive Impact Statement at 17.
39 Proposed Final Judgment at 15.
41 The joint venture at issue in Dagher was subject to review by the FTC under section 7 of the Clayton Act, as amended. Id at 4; see also In re Shell Oil Co, 125 FTC 769, 1998 WL 34077373 (1998).
42 Dagher, 547 US at 6.
43 Id.
44 Id at 7.
45 560 US 183, 186 (2010).
46 Id at 187–88 (internal quotation marks omitted).
47 Id at 195–96 (quoting Copperweld Corp v Independence Tube Corp, 467 US 752, 769 (1984)).
48 Id at 204.
49 416 F.3d 29 (D.C. Cir. 2005).
50 Id at 37-38.
51 Id at 37.
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