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Preface

Global Competition Review’s *Americas Antitrust Review 2020* is one of a series of regional reviews that have been conceived to deliver specialist intelligence and research to our readers – in-house counsel, government agencies and private practice lawyers – who must navigate the world’s increasingly complex competition regimes.

Like its sister reports covering the Asia-Pacific, Europe, the Middle East and Africa, this book provides an unparalleled annual update from competition enforcers and leading practitioners on key developments in the field.

In preparing this report, Global Competition Review has worked with leading competition lawyers and government officials. Their knowledge and experience – and above all their ability to put law and policy into context – give the report special value. We are grateful to all of the contributors and their firms for their time and commitment to the publication.

Changes from the previous edition include adding a chapter on US class action defence, focusing on the perspective of plaintiffs. Along with the new topics, contributors’ roles highlight trends in competition law. For example, the Federal Trade Commission chapter was penned by Daniel Francis, associate director for digital markets – an area of particular interest globally.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws over the coming year.

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United States: Energy

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The energy sector uses a variety of agreements among competitors to further key business needs. These agreements are typically pro-competitive, but even pro-competitive agreements can carry antitrust risk. A joint venture (JV) can take a variety of forms, with some JVs being based on a few contractual arrangements such as a joint bidding agreement or area of mutual interest agreement, and others can involve the creation of an entirely new entity dedicated to fulfilling the collaborative purpose. Indeed, major JVs such as Chevron Phillips Chemical (Chevron/Phillips 66) and its proposed US$15 billion acquisition of Nova Chemicals, Shell’s New Energies’ joint bid with EDP Renewables to develop offshore wind projects in the north-eastern United States and the formation of Heolios EnTTG (Engie/Tokyo Gas Co, Ltd) to provide renewable energy for 1.3 million households in Mexico, are just a handful of recent examples of companies combining resources to extend their capabilities for the benefit of consumers. This article advises how to best structure a JV to ensure its legitimacy under the antitrust laws and avoid mistakes that could lead to liability.

Structuring a JV to avoid antitrust scrutiny

Antitrust law makes illegal ‘every contract, combination . . . or conspiracy in restraint of trade or commerce’. Collaborations among competitors inherently require some level of agreement, and that level of agreement often requires imposing some basic restraints on participants. Nevertheless, antitrust law acknowledges that such collaborations are often pro-competitive and help firms to achieve goals together that they could not achieve individually. For that reason, JVs are generally analysed under the ‘rule of reason’ test, to determine their overall competitive effect, rather than the per se rule. Conduct that is per se illegal, which almost always involves agreements

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to raise price or limit output, is illegal regardless of the intended purpose of the conduct. Under the rule of reason test, courts weigh the purported anticompetitive effects of defendants’ conduct against their intended pro-competitive purposes. Recognising the potential procompetitive benefits, courts have found that parties to fully integrated JVs can sometimes engage in conduct that would otherwise be per se illegal. Because of the rule of reason’s balancing test, collaborations that do more to restrict competition must have greater, related, procompetitive benefits than collaborations that are less restrictive. Industry participants contemplating entering into a JV should be conscious of this trade-off when they determine how to structure their JV.

Is the JV legitimate?

First, JVs must be structured as actual collaborative efforts. Legitimate collaborations between competitors are analysed under the rule of reason, but if a JV is merely a pretextual way of coordinating clearly anticompetitive behaviour, it can be challenged as being per se illegal. Legitimate JVs require integration between the participants’ assets in a manner that will enable the JV to compete more effectively. Courts have struck down collaborations as being per se illegal where they lacked such integration. Parties to agreements that may restrain trade should be conscious of whether their agreement constitutes a fully integrated JV, particularly where those restraints involve restrictions on pricing or output.

Is the JV pro-competitive?

Even a fully integrated JV can engage in illegal, anticompetitive conduct if it goes beyond the legitimate business purpose of the JV and has anticompetitive effects that outweigh the procompetitive benefits. These restraints (collateral or ancillary) may be legal if they are necessary for achieving a legitimate business objective of the JV.

In judging a restraint, courts will determine whether the restraint is ancillary, meaning that it is reasonably related to the JV’s purpose, and that it is not significantly broader than necessary to achieve that purpose.

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3 eg, Newman v Universal Pictures, 813 F.2d 1519, 1522-23 (9th Cir. 1987).


6 See, eg, Engine Specialties v Bombardier Ltd, 605 F.2d 1, 11 (1st Cir. 1979) (labelling an agreement as a ‘joint venture cannot save an agreement otherwise inherently illegal’) (internal quotation marks omitted).


8 See, eg, In re Insurance Brokerage Antitrust Litig., 618 F.3d 300, 345 (3d Cir. 2010).
Typical pro-competitive purposes

Though JVs can include a wide variety of structures and purposes, they tend to take one of the following forms:

- **Research and development (R&D) JVs** share risk involved in R&D and encourage increased R&D by lowering costs, combining resources, and removing the incentive to free ride.9
- **Production JVs** involve the integration of production facilities or resource pooling to create new production facilities. They have the potential to increase capacity and output by combined operations to make products more efficiently than they would individually. The National Cooperative Research and Production Act of 1993 provides extra protection to production JVs falling within its scope by ensuring that they are analysed under the rule of reason and limiting the extent of potential damages a suing party can recover under antitrust laws.10
- **Joint marketing JVs** integrate members’ marketing activities for a particular set of products or services. Courts have determined that these arrangements can facilitate products or services reaching the marketplace more efficiently.11
- **Joint purchasing JVs** can ensure access to goods that would otherwise be unavailable and leads to efficiencies through economies of scale. Although these arrangements are generally reviewed under the rule of reason, some courts have indicated that it may be appropriate to use the per se rule for joint purchasing arrangements in which the parties have monopsony power or exclusive access to an input that is essential for competition.12
- **Network JVs** involve the creation or management of a ‘network’: a system of products that is more useful with the more consumers who are part of the network. Agencies are more likely to challenge a network JV with a significant market share that imposes restrictions on their members because that type of JV could discourage competition by preventing non-members from accessing the market.

Typical restrictions

Any restrictions on the JV or its participants’ activities must be ancillary, or reasonably related to the JV’s purpose. To determine whether a restraint is ancillary, a court will consider whether there are less restrictive alternatives that the participants could use to achieve that purpose. However, the agencies distinguish between ‘reasonably necessary’ restrictions and ‘essential’ restrictions.13 The agencies consider whether ‘practical, significantly less restrictive means’ exist, not whether the restriction is the theoretically least restrictive method possible.

JVs selling their own products must be able to dictate some ‘restrictions’ that are necessary for doing basic business. In *Texaco Inc v Dagher*, the Supreme Court explained that ‘where the business practice being challenged involves the core activity of the joint venture itself’ courts do not need

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9 *Addamax Corp. v Open Software Found*, 152 F.3d 48, 42 (1st Cir. 1998).
13 *Collaboration Guidelines §3.36(b).*
to determine whether the restriction is ancillary.\(^{14}\) In that case, the restrictions involved pricing the goods that the JV produced and sold. However, that does not mean that participants in a JV can use the JV to set prices on other products. JVs may impose restrictions that are designed to prevent the JV or its participants from competing against one another because those restrictions can enhance competition by eliminating free riding. But, agreements between the JV participants not to compete with one another in any market outside the activities of the JV may be per se illegal.\(^{15}\)

JVs can also inhibit competition by restricting the ability of rival firms to benefit from the venture. US antitrust law generally acknowledges the right of private companies to refuse to deal with their competitors. But, courts may require a JV to deal with a competitor if the JV has power in a relevant market or perform an important, non-duplicable service.\(^{16}\)

Agreements with restrictions are more likely to be found anticompetitive if they create or increase market power. In assessing whether an agreement will increase market power, antitrust enforcers calculate the change in market concentration as a result of the agreement and supplement that calculation by looking at factors outlined in the 2010 Horizontal Merger Guidelines. Inversely, JVs that neither have nor create market power are unlikely to be found to violate the US antitrust laws.

Recent examples of scrutinised JVs

The energy industry frequently engages in collaborative efforts such as joint-bidding arrangements, area of mutual interest (AMI) agreements and teaming. These efforts are typically procompetitive, but can lead to anticompetitive results. For example, joint-bidding arrangements can increase competition by allowing parties that could not independently perform a contract on their own to combine their assets to be able to meet the needs of the contract. This is healthy for competition because it effectively adds another firm that is capable of competing for the contract. But, joint-bidding can easily lead to bid-rigging, which is per se illegal as a form of price-fixing. Similarly, AMI agreements can be procompetitive because they allow companies to pool resources and share the risks associated with the exploration and development of natural resources. But, AMI agreements can violate antitrust laws where they serve as a mechanism for dividing the area of interest and parsing out land so that competitors can ensure that they are not competing to lease the same areas of land.

In United States v SG Interests I, Ltd, the DOJ Antitrust Division alleged that two companies, SG Interests (SGI) and Gunnison Energy Corporation (GEC), had agreed to not compete with one another at a series of Bureau of Land Management auctions where the parties executed a memorandum of understanding that only SGI would bid at the upcoming auctions and would split 50 per cent of any acquired interests to GEC.\(^{17}\) The parties also agreed to an AMI agreement later that

\(^{14}\) 547 U.S. 1, 7-8 (2006).
\(^{15}\) See, eg, Polygram Holding v FTC, 416 F.3d 29 (D.C. Cir. 2005).
\(^{16}\) See, eg, Associated Press v United States, 326 U.S. 1 (1945).
year.\textsuperscript{18} The DOJ found that the bids predating the AMI agreement were unlawful, but it did not challenge the bids occurring after the AMI agreement was signed.\textsuperscript{19} The AMI agreement articulated, in the government’s view, a legitimate joint development and production collaboration.\textsuperscript{20}

Other antitrust considerations related to JVs

Legitimate, procompetitive JVs can also create antitrust risk by facilitating information exchanges or lead to liability if parties fail to report a qualifying JV formation to the government under the Hart-Scott-Rodino Act (the HSR Act) rules.

Information exchanges

Sometimes, collaborations will facilitate collusion indirectly. One way this can happen is by facilitating information exchanges. Information exchanges may be necessary for coordination in many different types of collaborations. For example, R&D collaborations may require sharing participants’ pre-existing research findings, and product collaborations, based on products that incorporate components of multiple participants, may require information sharing about the pricing of component parts for the JV to assign a fair price to the product.

Information exchanges are almost always examined under the rule of reason. The agencies’ primary concern in this context is that competitors will share competitively sensitive information such as prices, costs, margins, future products or strategic plans, that would make it easy for those competitors to make a separate, illegal scheme with one another going forward. The more competitively sensitive the shared information is, the more likely it is to lead to a lessening of competition. For example, price information is more competitively sensitive than cost information, and the exchange of price information is more likely to lead to antitrust scrutiny than the exchange of cost information. Participants in an information exchange can mitigate the risk of the exchange facilitating collusion by enacting safeguards that minimise the extent of their disclosures. For example, participants can limit which people have access to competitively sensitive information, and maintain firewalls and data rooms that inhibit the spread of information beyond those few necessary people.

Gun-jumping

Unless an exemption applies, the formation of a JV may be subject to the pre-merger notification requirements of the HSR Act if it involves the formation of a new legal entity or the acquisition by any of the JV participants of any assets. HSR filings are required for mergers, acquisitions and

\textsuperscript{18} id. (the AMI was dated 3 June 2005).
\textsuperscript{19} Complaint at 6, United States v SG Interests I, Ltd., No. 12-cv-00395-RPM-MEH (D. Colo. Feb. 15, 2012) (only alleging anticompetitive bids up to 12 May 2015, a month before the AMI was signed).
\textsuperscript{20} Response of Plaintiff United States to Public Comments on the Proposed Final Judgment at 3, United States v SG Interests I, Ltd., No. 12-cv-00395-RPM-MEH (D. Colo. Feb. 15, 2012) (“[T]he United States concluded that Defendants’ subsequent noncompete agreement was ancillary to a broader joint development and production collaboration established by Defendants in the summer of 2005. On this basis, the United States determined not to challenge Defendants’ joint acquisition of eighteen leases in the latter half of 2005 and 2006”).
JV formations if they meet certain size thresholds. There are also some exceptions that apply based on the types of assets or securities being acquired, or the types of entities involved in the transaction. The DOJ and the FTC will not challenge JVs ‘absent extraordinary circumstances’ if they fall within one of two ‘safety zones’. The first safety zone is for JVs where the combined market share of the JV and its participants combined is less than 20 per cent of each relevant market in which the JV could affect competition. The second safety zone covers JVs in ‘innovation markets,’ where there are three or more independently controlled research efforts that are ‘close substitute[s]’ for the JV’s R&D activity. These safety zones do not apply to agreements that are per se illegal, competitor collaborations in which a merger analysis is applied or agreements that would be challenged without a detailed market analysis.

Failing to submit an HSR filing for a transaction when it is required can result in significant penalties.

JVs must also be conscious of gun-jumping, which entails one company exercising control of the other company prior to the close of the transaction. Joint venturers are at risk of violating antitrust laws if they begin integrating business activities or enacting ancillary agreements before actually closing on the transaction. This risk is heightened in the period between submitting an HSR filing and completing the agencies’ review, but the potential for a gun-jumping violation exists until the deal has closed. Gun-jumping conduct can include the following:

- sharing competitively sensitive information such as current and future pricing or cost information;
- transferring beneficial ownership or closing the transaction prior to clearance;
- prematurely integrating or consolidating business operations prior to clearance;
- exercising control over the other party’s management or operational decisions; and
- engaging in cartel conduct (such as fixing price, rigging bids, or agreeing on other terms and conditions).

In 2017, the DOJ filed a complaint against Duke Energy Corporation (Duke), which alleged that Duke engaged in gun-jumping by obtaining beneficial ownership of Osprey Energy Center (Osprey) before notifying the government of the transaction. Duke and Osprey had entered into a ‘tolling agreement,’ which gave Duke control over Osprey’s fuel purchasing, scheduling decisions and energy generation. The DOJ explained that ‘from the moment the tolling agreement went into effect, Osprey ceased to be an independent competitive presence in the market.’ Duke settled the DOJ’s claims by paying a US$600,000 penalty, out of a possible penalty of US$6 million.

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21 Collaboration Guidelines §§ 4.2-4.3.
22 id. at § 4.2.
23 id. at § 4.3.
25 id. at 2-3.
**Best practices for structuring JVs**

Collaborations should integrate resources to achieve some benefit that would not be achieved by the participants individually. Collaborating entities should clearly set out what that benefit is from the outset.

Although some collaborations may necessitate imposing restraints on members, restraints should only be imposed if they are related to achieving the collaboration's legitimate business purpose and are reasonably necessary to achieve that purpose.

Participants in a collaboration should not stop competing with one another outside of the collaboration.

Collaborations that encompass significant portions of a relevant market should not prevent other market participants from joining unless there is a legitimate business reason why the JV would not want that participant to join. In that case, the collaboration should be able to clearly articulate what the reason is. If the collaboration has the ability to deprive excluded market participants of essential competitive resources, it should be prepared to offer its benefits to non-members.

**Best practices for avoiding other liability**

Participants of a JV should:

- determine whether their JV requires an HSR filing to avoid penalties for failure to file;
- limit sharing competitively sensitive information such as information about prices, costs, margins, future products and strategic plans;
- limit sharing competitively sensitive information to persons who do not make competitive decisions for the individual parties and only share competitively sensitive information that is reasonably related to the scope of the collaboration;
- use clean rooms and other methods of limiting data access to ensure that competitively sensitive information is only accessed by those who absolutely must have to access it;
- be conscious of any change in the market or industry that would affect the type of information that can reasonably be shared between JVs;
- maintain compliance training to the extent firewalls or data rooms are used;
- remain conscious of antitrust considerations and not engage in discussions about prices, competitors or competitively sensitive information; and
- avoid premature integration of the firms’ business operations. This includes transferring employees, assets or capital to the JV firm prior to obtaining regulatory clearance, or using the JV as an operational entity.
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Global Competition Review has worked exclusively with the region’s leading competition practitioners, and it is their wealth of experience and knowledge – enabling them not only to explain law and policy, but also put it into context – that makes the report particularly valuable to anyone doing business in the Americas today.