

Arnold & Porter

***Managing Antitrust Risk in
Joint Ventures***

**SCCE Utilities & Energy Conference
February 12, 2019**

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Key Antitrust Issues

- Formation
 - Is a Hart-Scott-Rodino (HSR) Act filing required?
 - Is there a substantive competition concern?
- Information Sharing
 - Will competitively sensitive information be shared between competitors?
 - Can firewalls be used to mitigate the risks?
- Ongoing Compliance
 - Has the scope remained the same?
 - Are firewall protocols being followed?
 - Should refresh training be provided?

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The Antitrust Enforcers

US Department of Justice,
Antitrust Division



Federal Trade Commission



State Attorneys General



Private Litigation



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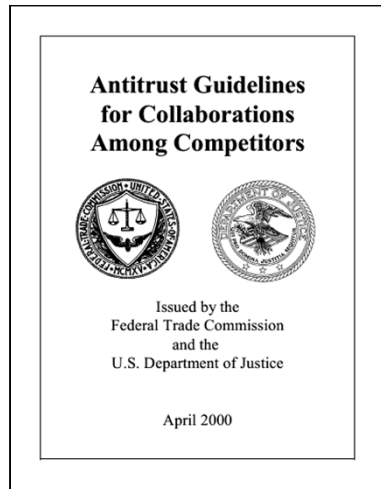
HSR Act Filings

- Starts 30-day waiting period before closing; however, not required for all collaborations
 - E.g., activities done by contract like joint purchasing
- Typically start with valuation threshold
 - \$84.4M as of January 2019—adjusted annually for inflation
- Many reasons why a filing still may not be required
 - Numerous exemptions
 - Size-of-person test
- HSR rules are complex
 - Civil penalties accrue daily—currently over \$40k/day

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DOJ/FTC Collaboration Guidelines



- Outlines analytical framework for enforcement
- Goal to provide guidance and avoid deterrence of procompetitive collaborations

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Substantive Analytical Framework

- Analyzing joint ventures that are in effect mergers
 - Joint ventures that completely eliminate competition between the parties
 - Analyzed under Section 7 of the Clayton Act, which governs mergers
- Market share safety zone
 - Agencies generally do not challenge a competitor collaboration where the collaboration and the participants combine for less than 20% of each relevant market

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Substantive Issues for M&A Type Analysis

Theories of Horizontal Anticompetitive Harm

Unilateral Effects

- Elimination of close competitors allows price increase without significant losses to competitors

Coordinated Effects

- Limited number of remaining competitors will engage in coordination (tacit or explicit)

- Elimination of potential competition may be a concern
 - High share, few companies with ability to enter, difficult entry conditions
 - Acquired entity is significant
- Also potential for foreclosure concerns if the JV will be vertically integrated

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Collaborations Short of a Merger

- Production Joint Venture
 - Typically output enhancing
- R&D Collaborations
 - Promotes innovation
- Joint Purchasing
 - DOJ guidance on “antitrust safety zone”
 - Purchases are <35% of total sales of the product/service
 - Cost is <20% of total revenue from JV member sales
 - Other mitigation: voluntary participation, negotiations conducted by non-member, firewalls
- Marketing JVs
 - More risky

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Analysis Where Parties Still Compete

- Agreements “unreasonably” restraining trade are unlawful under Section 1 of the Sherman Act
- “Naked” agreements limiting competition are per se unlawful
 - E.g., market allocation with no integration
- Economic integration shifts to balancing test: rule of reason
 - Is it just integration solely on competitive decisions, such as pricing, production volumes or customer sales?
 - Or a combination of capital, technology or other complementary assets?
- Procompetitive benefits will weigh against potential harms
 - Increased output, economies of scale, better R&D, etc.

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Compliance in Joint Venture Formation

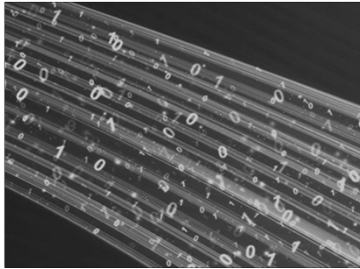
- Check for HSR filings
- Define the business purpose
 - Increased efficiency vs output/price harms
- Consider the market impact
 - Does this effectively eliminate a competitor from the market?
- If procompetitive justification and integration exists, is a restraint:
 - Reasonably related to the purpose?
 - Reasonably necessary to achieve the objectives?



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Compliance for Information Exchanges



- Focus is competitively sensitive information both in diligence and over the life of the collaboration
 - E.g., prices, costs, margins, future products or strategic plans
- Sharing only aggregated data can mitigate the risks
- Limit any sharing of competitively sensitive information
 - Only to persons who do not make competitive decisions for the individual parties
 - Only competitively sensitive information that is reasonably related to scope of the collaboration
- Use of “clean room” or other limited access mechanism

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Ongoing Compliance Monitoring

- Consider changes to the substance of the collaboration:
 - Are market shares and competitive dynamics different?
 - Do procompetitive benefits still exist?
 - Is JV offering new products or services not analyzed initially?
- Firewall protocols should be part of regular training and compliance reviews
 - Employee turnover both at the JV and members can give rise to confusion over the antitrust the rules of the road



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DOJ Guidance on Specific Utility Collaborations

STARS Alliance (2012)

- Share resources and best practices; coordinated joint planning and operational activities
- Limited geographic overlap in member sale of electric power
- Joint procurement, but parties <20% and can decline
- Firewalls used to avoid threats to competition

Utility Pooling (1998)

- Utility owners jointly developed generation units and sold output through regional dispatch in which they participated
- Association pivoted to sell at any price rather than at cost and in competition with generation owners
- Pooled supply was <10% and planned use of firewalls

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DOJ Guidance on Specific Utility Collaborations

Electronic Trading System for Power Pool (1996)

- Prices offered subject to FERC tariff
- Members also free to trade outside of the system
- DOJ saw factors as lessening any likelihood of an anticompetitive effect, though noted that any collusion among private rivals would violate the antitrust laws notwithstanding maximum rate tariffs

Utilities Service Alliance (1996)

- Nuclear generators formed membership to reduce costs
- Shared resources—personnel, parts, equipment, and tools
- Also joint procurement to give economies of scale
- Members would be just 7% of U.S. nuclear power generation so no monopsony power

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Intersection of Antitrust & Industry Regs

- FERC must consider federal antitrust policies when carrying out its public interest mission
 - *See, e.g., Ala. Power Co. V. Federal Power Comm'n*, 511 F.2d 383 (D.C. Cir. 1974)
- Unlike the federal antitrust authorities, FERC has the authority to directly regulate business operations
 - E.g., for pipelines: rates, services, and access rights
- However, certain conduct remains subject to antitrust laws
 - *City of Moundridge v. Exxon Mobil*, 250 F.R.D. 1 (DDC 2007) (natural gas price-fixing via Nat'l Petroleum Council)
 - *Gainesville Utils. Dep't v. Florida Power & Light Co.*, 573 F.2d 292 (5th Cir. 1978) (horizontal territorial allocation by utilities)

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Antitrust Preemption & Immunity

- Agency regs do not automatically create blanket immunity
 - *"When relationships are governed in the first instance by business judgment, not regulatory coercion, courts must be hesitant to conclude that Congress had intended to override the fundamental national policy embodied in the antitrust laws."* *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973)
- While preemption may exist at some points in the supply chain, antitrust claims may be viable at others
 - *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015) (state laws governing retail sales of natural gas not preempted by the Natural Gas Act pricing authority given to FERC)
- State Action Doctrine provides immunity in narrow cases
 - Requires clear state policy and active supervision by the state
 - E.g., potentially where the state defines territories for utility

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A Word On “No-Poach” Agreements

- DOJ/FTC Guidance (Oct. 2016) states naked no-poaching or wage-fixing agreements will be prosecuted criminally
- DOJ officials have described employers as horizontal competitors for employees
 - Regardless of whether the companies compete in a downstream market
- DOJ has acknowledged some criminal investigations
- States actively pursuing franchises currently
- Private plaintiffs have brought successful no-poach cases
 - *In re High-Tech Employee Antitrust Litigation* (2011) – tech companies agreed not to cold call the others’ employees, to notify prior to making offers to others’ employees and not to outbid each other for employees



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Quick Reference Antitrust Checklist

Joint Ventures/Collaborations

- Does an antitrust exemption or immunity apply?
- Is it an acquisition with a potential HSR filing?
- Is the venture as a whole procompetitive with sufficient economic integration?

Information Sharing

- What information do the parties plan to share?
- Can firewalls and clean teams be used to mitigate risks?

Monitoring Existing Collaborations

- Has there been scope creep (products, geographies, etc.) requiring new legal analysis?
- Are information sharing protocols still effective?



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