COLLABORATIONS WITH COMPETITORS AND ANTITRUST COMPLIANCE

By

Donald P. Gallo, Esq.
Reinhart Boerner Van Deuren s.c.

November 26, 2012

When considering a joint venture or other collaboration with a competitor, it is a good idea to first review the ABCs of antitrust law. Just remember that in general, independent competitors may not get together and agree to:

1. Set the price they charge for goods or services;

2. Set the terms of sales;

3. Set the levels of production;

4. Allocate customers, territories or markets;

5. Not compete, or to engage in bid-rigging;

6. Cease doing business with suppliers or customers for anti-competitive ends (boycotts).

These actions are considered "*per se* illegal" under state and federal antitrust laws. That means that such conduct will be deemed illegal, even if the actual anticompetitive effects are minimal.

But when competitors form a true joint venture or other collaboration for pro-competitive reasons, the joint venture may be permitted to do things that the participants could not do independently. In fact, the U.S. Supreme Court recently held that a true joint venture may even price its joint venture products and services as the joint venture sees fit without worry of *per* se antitrust liability. But the venture must be integrated enough to be seen as a single entity for antitrust purposes; in other words, the participants must do things that independent competitors would not do, such as pool assets and share risks and rewards. There is no particular legal form that will be deemed an acceptable collaboration or joint venture – courts look at whether collaboration is a true integration between competitors, and whether the collaboration was formed for legitimate purposes.

A joint venture or other collaboration between competitors formed for legitimate purposes usually will be judged under the "rule of reason" rather than the "*per se* illegal" standard. To determine whether a joint venture is legitimate for antitrust purposes, courts examine the reason for the venture – will it enable the participants to better serve customers or increase their output? Will it in effect increase competition in the market? Or was it created solely to restrain trade or to help ease competition between competitors?

Courts also examine any competitive restraints that the venture includes, and whether the restraints are really necessary for the goals of the venture. For example, competitors cannot begin to set prices together or establish exclusive territories or customers just because they say they have formed a 'joint venture.'

If the venture has pro-competitive purposes, and is formed and run in a way that avoids unnecessary restraints on trade, it likely will pass antitrust muster. If the venture is formed for the purpose of limiting competition, or if it includes unnecessary restraints on competition, it may be deemed illegal. Courts will also look at the effect of the joint venture – did it increase products and services, or simply restrain trade?

Below are some guidelines that may help you avoid problems in this area.

To determine whether a joint venture is pro-competitive versus a threat to competition, the FTC and courts look at a large range of market factors, including:

- the purpose of the venture;
- whether the purpose of the venture is to provide for greater production and output;
- whether the venture allows the participants to more quickly or more efficiently research or develop new or improved goods, services or production processes;
- the industry structure and relative competitive positions of the venture participants (if the participants individually or jointly have market power,[1] the venture will receive a higher level of scrutiny);
- the scope and duration of the venture;
- efficiencies and other justifications for the venture;
- the impact of the venture on outside competitors;
- the impact of the venture on customers;
- the nature, impact and purported justifications for any restraints ancillary to the venture (such as territorial or price restrictions, or restraints on output);
- whether any restraints could have been achieved through less restrictive means.

[1] A party is deemed to have "market power," if it has the power to reduce market output or raise prices above a competitive level or impose other limitations on consumer choice in that market.

In general, joint ventures that involve marketing and distribution functions are deemed to be pro-competitive when they lower transactional, logistical and administrative costs and enable the partners to provide additional or enhanced services to customers. But courts will examine the factors listed above to determine whether any ancillary restraints are unnecessary or are outweighed by the benefits provided by the collaboration. As a general rule, ancillary restraints will be considered acceptable as long as they are reasonably related to the efficiency sought to be achieved by the venture, and no more restrictive than necessary to achieve the efficiency sought.

The FTC's Competitor Collaboration Guidelines describe some well-accepted "rules" for evaluating collaborations between competitors. The FTC's "rule of reason" analysis may be summed up as follows:

1. The starting point is an examination of the nature of the agreement.

   (a) What is the purpose of the agreement?
   (b) Has the agreement caused anticompetitive harm?
   (c) If the nature of the agreement and absence of market power[2] demonstrate lack of competitive harm, the agency will not challenge the agreement.

2. If the initial examination yields competitive concerns, then the Agency takes a closer look by:

   (a) defining the relevant markets, calculating market share and concentration;
   (b) examining the ability and incentive of the participants to compete independently; and
   (c) evaluating other market factors that may affect harm (such as whether it is difficult for others to enter that market).

Note that even if the FTC does not challenge your venture, one of your customers or competitors may do so by bringing an action in court. So all of the factors described above are important.

Here are some tips for discussing a joint venture in a way that avoids triggering antitrust concerns:

[2] If a party or venture has 20% or less market share, the FTC usually will not challenge a collaboration between competitors.

- keep the communications on the right track – concentrate discussions on the legitimate purposes for the collaboration and avoid discussions that focus on the prohibited conduct discussed on page 1.

- if you discuss how the participants will limit current competition in some areas, make sure the limitations are for reasons that support the pro-competitive purposes of the venture itself, and always note that any restraints (like setting of prices, exchange of information, allocation of territory) must be limited to foster the legitimate reasons for the venture.

- be cautious in how confidential information is exchanged during this time, and use a proper confidentiality agreement that limits the use of any such information in case you decide not to go forward with the collaboration or joint venture.

Here are some tips for carrying out a joint venture or other collaboration and avoiding antitrust problems:

- ensure that personnel working in the joint venture are separate from, and do not communicate with, the personnel running the lines of business that still compete;

- there should be clear lines of authority separating the function of joint venture personnel from personnel of the still-competing businesses;

- do not engage in communications that are on the "per se illegal" list described above;

- continue to compete fairly in the other lines of business;

- cooperate only where cooperation will enhance competition;

- share information carefully and only that which is necessary to carry out the legitimate purposes of the joint venture.

For a more thorough discussion of these topics, see the FTC's *Antitrust Guidelines for Collaborations Among Competitors* (2000), available on the FTC webpage (www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.)

If you have any questions before, during or after any communications regarding a joint venture, please do not hesitate to contact me at 262-951-4555 or dgallo@reinhartlaw.com.

MW2755662