Contemporary Antitrust Analysis of Joint Ventures: Why It Makes Sense to Stay the Course

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In recent years, the argument that uncertainty associated with the application of the antitrust laws to joint ventures has impeded the formation of joint ventures has gained considerable currency. Acceptance of this argument has led to the enactment of the National Cooperative Research and Production Act ("NCRPA"), 15 U.S.C. § 4301 et seq., a statute with the express purpose of encouraging collaborations among competitors in both research and development and production. Yet the NCRPA has not been widely used by businesses since its enactment, most likely because the protection offered by the Act is not as great as the Congress evidently believed when it enacted the statute. Perhaps the NCRPA was a solution in search of a problem.

I am here to argue that the current state of the law on joint ventures is basically sound. Indeed, it would be difficult to improve upon current law by attempting to craft a global set of standards for addressing all competitor collaborations. The richness of variations of forms of competitor collaborations precludes a one-size-fits-all approach, and efforts to draw bright line standards are likely to wind up somewhere along the path of the NCRPA — a set of well-intended, reasonably conservative rules that fail to provide the added comfort that they were designed to give. Moreover, the creation of special rules for joint ventures may induce practitioners to focus their analysis on issues of characterization instead of the economic impact of the collaboration.

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Commentators have described the term as joint venture "a vague and protean concept"[1] or "an expansive notion without definite meaning or antitrust consequence,"[2] and have lamented the "lack of a sharp definition that would distinguish joint ventures from other interfirm contractual agreements."[3] There is good reason for these observations. Competitor collaborations can take many different forms, ranging from relatively modest forms of cooperation to the complete merger of competing businesses into a single entity. The definitional failure is no failure at all. Competitor collaborations come in all shapes and sizes, and it is extraordinarily difficult to draw the line between a joint venture, technical cooperation, a strategic alliance, and other forms of partial economic integration by contract.

Consider a common form of technical cooperation, whereby a manufacturer contracts with another firm for the supply of a component of a new product. The manufacturer may provide its collaborator with working samples or prototypes of the new product, supply it with the technical specifications for the desired performance characteristics, and assign staff to provide technical support and consultation to the collaborating firm. But the extent of collaboration in efforts such as this may range from giving the collaborating supplier a few pages of specifications and a few hours of staff time to full-blown joint development efforts in which the technical expertise and intellectual property of both companies are brought to bear. Both efforts might be called joint ventures, and both possess some attributes of a joint venture, although it is likely that the parties'

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[1] Robert Pitofsky, *Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of* Penn-Olin, 82 Harv. L. Rev. 1007, 1007 (1969).

[2] Phillip Areeda & Louis Kaplow, *Antitrust Analysis* 270 (4th ed. 1988).

[3] Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1521, 1524 (1982). *See generally* Joseph Kattan, *Antitrust Analysis of Technology Joint Ventures: Allocative Efficiency and the Rewards of Innovation*, 61 Antitrust L.J. 937 (1993).

agreements in both cases will expressly disavow the existence of a joint venture, but there are also significant differences between the two collaborations in the extent of the integration of productive efforts.

Current law does not predicate the outcome of the competitive analysis on the label that is assigned to the collaboration. In evaluating restraints on competition that are created by competitor collaborations, the law looks first to the nature of the restrictions. In a narrow category of cases, involving restrictions on price or output or the allocation of markets or territories, the law applies a per se approach,[4] subject to a "quick look" exception in cases in which overwhelming efficiencies are attained by such restrictions.[5] In all other cases, the antitrust analysis begins with an assessment of whether the collaborating parties possess market power.[6] Absent market power, the antitrust inquiry is usually at an end. This is as it should be. Without market power, the collaborating parties lack the ability to harm consumers, and ancillary restrictions on competition between them.

Where market power is found, the law properly balances the reduction in competition that may be brought about by a restraint against the efficiencies that are associated with it. This analysis very often turns on the extent of integration between the parties. The law is more likely to accept

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[4] *See, e.g.*, Federal Trade Commission v. Superior Court Trial Lawyers Association, 493 U.S. 411, 433 (1990) (agreement on price); Palmer v. BRG of Georgia, Inc., 111 S. Ct. 401 (1990) (agreement on markets).

[5] *See, e.g.,* Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc., 441 U.S. 1 (1979) (agreement on price for joint product); National Bancard Corp. v. VISA USA, Inc., 779 F.2d 592 (11th Cir.) (agreement on price for joint product) , *cert. denied*, 479 U.S. 923 (1986); Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030 (9th Cir.) (agreement on markets), *cert. denied*, 464 U.S. 849 (1983).

[6] *See, e.g.*, SCFC ILC, Inc. v. VISA USA Inc., 36 F.3d 958 (10th Cir. 1994), *cert. denied sub nom.* Mountainwest Financial Corp. v. VISA USA Inc., 115 S. Ct. 2600 (1995); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); General Leaseways, Inc. v. National Truck Leasing Ass'n, 744 F.2d 588, 596 (7th Cir. 1984).

significant restrictions on competition where there is a joint sharing of risks and the opportunities for profit.[7] Yet one must look beyond what might strictly be called joint venture law to evaluate collaborative agreements among competitors. For example, to go back to the product development collaborations discussed earlier, the antitrust analysis will turn in large measure on the nature of the technical information exchanged by the parties and extent to which the development requires the sharing of trade secrets. In this regard, as in many other aspect of joint venture law, the 1995 Antitrust Guidelines for the Licensing of Intellectual Property issued jointly by the Justice Department and the Commission offer very useful guidance in the competitive analysis.[8]

It would be difficult for the Commission to improve upon the analysis of the Intellectual Property Guidelines. The Guidelines lay out in detail the potential horizontal and vertical theories of competitive harm resulting from restraints associated with intellectual property licensing activities, as well as the various efficiencies that may be promoted by such restraints. The Guidelines soundly confine per se condemnation to cases in which "there is no efficiency-enhancing integration of economic activity and . . . the type of restraint is one that has been accorded per se treatment . . . ."[9] Although deficiencies in the analytical framework of the Guidelines may become apparent in the fullness of time, the experience to date with the Guidelines has not revealed significant analytical flaws.

The IP Guidelines work well both because they embrace an economically sensible analytical approach and because they do not attempt to do too much. They provide a sound framework for

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[7] *See* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 356 (1982).

[8] 6 Trade Reg. Rep. (CCH) ¶ 13,132 (April 6, 1995).

[9] *Id.*, § 3.4.

analyzing one important form of collaboration — intellectual property licensing — but do not attempt to superimpose a single bright line standard on all forms of collaboration. The one area in which the Guidelines attempt to provide a bright line standard is the one area in which they unambiguously fail. This is the antitrust safety zone for transactions in which the parties collectively account for no more than 20 percent of each relevant market significantly affected by the restraint. The safety zone fails both because a 20 percent rule does not offer any protection that the law currently fails to accord, a manifestation of the NCRPA problem, and because the Guidelines take away the safe harbor if the parties at any time exceed the 20 percent share limit, even if this occurs years after the ink has dried on their agreement. My guess is that this is the fate that will await most bright line standards in enforcement guidelines. The legitimate need to preserve enforcement discretion usually produces standards that are conservative to the point of irrelevance.

But at the end of the day, the virtual uselessness of the safety zone does not matter much, because the IP Guidelines do a superb job of distilling contemporary antitrust law and economics into a sensible analytical framework for analysis. A review of the current state of the law on competitor collaborations also reveals a very hopeful picture. Perhaps Dr. Pangloss was thinking of joint venture law when he said that we live in the best of all possible worlds.

To be sure, erroneous decisions can be rendered in the joint venture sphere, as they can in any other area of the law. Yet these decisions are remarkably few and far between, given the extent to which the asserted need to reform joint venture has been the fodder of luncheon law for the past decade. But just as the law has not been overly restrictive, so it has not been overly permissive. There is no need for an expanded role for the per se rule any more than there is a need for another

safe harbor standard.[10] There is no evidence that significant anticompetitive conduct is going un-punished or undeterred because of an overly narrow application of per se standards. If joint venture guidelines are to emerge from these hearings, the Commission would do well to continue on the path charted by the IP Guidelines.

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[10] The one recent instance in which an enforcement agency has strayed from the IP Guidelines' approach to the per se rule, the *General Electric* licensing case, should make the risks apparent. United States v. General Electric Co., No. CV96-121-M (D. Mont. filed Oct. 28, 1996). In that case, a license restriction that is designed to limit the use of a company's software to companies that do not compete with it is being challenged as a per se antitrust violation.