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Unlike Fine Wine: The JV Guidelines A Decade Later

Law360, New York (January 05, 2012, 2:44 PM ET) -- In 2000, the federal antitrust agencies — the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice — jointly issued guidelines for assessing competitor collaborations, commonly called the JV guidelines.[1]

They are a landmark effort by the agencies to delineate the general antitrust framework for assessing all collaborations short of merger, such as joint ventures and strategic alliances.

The JV guidelines clarify often confusing antitrust principles, but should not be confused with the actual laws. The guidelines are not binding on courts or state attorneys general — or even the agencies themselves. Instead, they emphasize that the Antitrust Division and the FTC "evaluate each case in light of its own facts."[2]

The JV guidelines accurately reflect the practices of the agencies at the time they were released. But those practices have evolved since 2000 and, consequently, the reality of enforcement today differs from the guidelines in important respects.

This divergence grows each year and threatens the ability of the guidelines to achieve their fundamental goal of providing valuable guidance to the business and legal community by "explain[ing] how the Agencies analyze certain antitrust issues."[3]

The JV guidelines have shown their age since 2009, as seen in the three developments discussed below.

2009 Amicus Brief

"Mergers are designed to be permanent, while competitor collaborations are more typically of limited duration."[4] Accordingly, under the JV guidelines, the Antitrust Divison and the FTC treat a collaboration as a merger, and thus apply the separate merger guidelines if "the collaboration does not terminate within a sufficiently limited period by its own specific and express terms."[5]

In a footnote, the JV guidelines further explain that, "[i]n general, the Agencies use 10 years as a term indicating sufficient permanence to justify treatment of a competitor collaboration as analogous to a merger."[6] A decade later, however, this 10-year guidance is itself questionable.

In 2009, the Antitrust Divison and the FTC jointly filed an amicus brief with the U.S. Supreme Court in the case eventually decided as American Needle Inc. v. National Football League, 130 S. Ct. 2201 (2010).

In their submission, the agencies advanced a two-part test for single-entity treatment. Notably, the two prongs address issues relating to operational sphere and competitive effects but are silent as to the duration of the collaboration.

While the Supreme Court did not take up this proposal, this test is nonetheless significant because it suggests that current agency thinking is inconsistent with the duration criterion in the JV guidelines.

This, in turn, raises questions about what, if any, duration test the antitrust agencies now favor and whether the agencies believe merger-like treatment is warranted for collaborations less than a decade old.[7]

2010 Merger Guidelines

A key feature of the JV guidelines is their general safety zone, which holds that, "[a]bsent extraordinary circumstances," the Antitrust Divison and the FTC will not "challenge a competitor collaboration where the market shares of the collaboration and its participants collectively account for no more than 20 percent of each relevant market in which competition may be affected."[8]

This safety zone was crafted to be consistent with their merger guidelines, in effect when the JV guidelines were released in 2000. Almost exactly 10 years later, however, the agencies replaced their 1992 merger guidelines in 2010 with the new and strikingly different 2010 merger guidelines.

The 2010 merger guidelines de-emphasize the methodologies of their predecessor that are reflected in the safety zone of JV guidelines. For instance, under the 2010 merger guidelines, market definition — and the measuring of market shares and market definition — "is not an end in itself" and, indeed, "[t]he Agencies' analysis need not start with market definition."[9]

The Antitrust Division and the FTC said the 2010 merger guidelines were released to "reflect the[ir] ongoing accumulation of experience."[10] Yet this accumulation of experience is not reflected in the static JV guidelines, which have not been revised since their adoption over a decade ago.

2011 Policy Statement

Most recently, in October 2011, the Antitrust Division and the FTC issued the final version of their joint policy statement detailing how the agencies will enforce the antitrust laws with respect to accountable care organizations (ACOs).[11]

This policy statement describes "conduct that ACOs with high Primary Service Area (PSA) shares or other possible indicia of market power may wish to avoid."[12]

Eligibility for the new ACO safety zone, which is distinct from the one in the JV Guidelines, is based on calculations of the combined PSA shares of ACO participants that provide common services to patients. The PSA for each participant is the lowest number of postal ZIP codes from which the participant draws at least 75 percent of its patients.

While premature to assess the actual implications of this methodology, this much can be said: the ZIP code approach of the PSA model departs from traditional market definition analysis. In essence, the term "PSA shares" has displaced the "market shares" language of the JV guidelines.

The agencies note this difference by observing that "a PSA does not necessarily constitute a relevant antitrust geographic market."[13]

This recent downplaying of market definition reflects the influence of the 2010 merger guidelines. It also demonstrates how far the Antitrust Division and the FTC have moved away from the 1992 merger guidelines — and, hence, the JV guidelines.

Conclusion

Since 2000, the JV guidelines have provided valuable guidance on a complex area of the law. To ensure that their light continues to shine bright, the agencies should consider the release of an updated version.

Until then, the 2010 merger guidelines and other recent developments should be taken into account when forming and operating joint ventures.

--By Gaspare J. Bono and Stephen M. Chippendale, McKenna Long & Aldridge LLP

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[1] Fed. Trade Comm'n & Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors (2000), available at www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

[2] Id. at 2.

[3] Id. at 1-2.

[4] Id. at 5.

[5] Id. (footnote omitted).

[6] Id. at 5 n.10.

[7] For a thoughtful analysis of the agencies' amicus arguments, see Robert A. Skitol, Are the Collaboration Guidelines Ripe for Revision?, 25 Antitrust 55 (2010).

[8] Id. at 26.

[9] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines 7 (2010), available at www.justice.gov/atr/public/guidelines/hmg-2010.html.

[10] Id. at 1 n.1.

[11] Fed. Trade Comm'n & Dep't of Justice, Final Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medical Shared Savings Program (2011), available at www.justice.gov/atr/public/health_care/276458.pdf.

[12] Id. at 6.

[13] Id. at 7.