



ACC NCR In-House Primer Competitor Collaborations: Joint Ventures and Strategic Alliances

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■ Contextual Awareness: Antitrust Fever Pitch

Antitrust is being rolled out to address concentration and help consumers from all sides:

- Federal investigations, enforcement
- Congressional investigations and legislative proposals
- White House focus via NEC and Executive Orders
- State enforcement and legislation
- International collaborations
- Media and Interest Group Focus
- Even strike forces to galvanize state, federal and citizen enforcers

■ Example: Procurement Collusion



- The Procurement Collusion Strike Force (PCSF) leads a coordinated national response to combat antitrust crimes and related schemes in government procurement, grant, and program funding at all levels of government—Federal, state, and local.
- The PCSF is comprised of the Antitrust Division of the U.S. Department of Justice, multiple U.S. Attorneys' Offices around the country, the Federal Bureau of Investigation (FBI), and the Inspectors General for multiple Federal agencies.

■ Example: Procurement Collusion

- Since November 2019, the initiative has grown to include 22 U.S. Attorney's Offices and more than a half-dozen federal investigative agencies like the FBI.
- Their combined efforts—which include training and working with state and local agencies and hundreds of procurement personnel in the U.S. and overseas—have resulted in the recovery of millions of dollars in losses and criminal charges against individual conspirators.
- Two core objectives:
 - Deter and prevent antitrust and related crimes on the front end of the procurement process through outreach and training.
 - Investigate and prosecute!

■ Joint Ventures and Strategic Alliances



■ Joint Venture - Defined

- Definition of “joint venture” with competitor
 - Any collaborative activity, short of a full merger, by which independent firms pool resources and share risk to design, produce or market a product or service, to obtain needed inputs, or to pursue some other common objective that neither could do as well on its own
- Different from a merger
 - Mergers completely end competition between the merging parties and are designed to be permanent
 - Collaborations preserve some form of competition between the participants and are typically of limited duration

■ Types of Joint Ventures

- Fully-Integrated
- Network
- Production
- Marketing and Distribution
- Purchasing
- Research & Development
- Closed/Open/Limited Membership Models

■ **Applicable Law**

- Section 7 of the Clayton Act
- Hart-Scott-Rodino (“HSR”) Act
- Sections 1 and 2 of the Sherman Act
- Section 5 of the FTC Act
- Specific Joint Venture Antitrust Statutes
- FTC/DOJ Antitrust Guidelines for Collaborations Among Competitors

■ Antitrust Analysis of Joint Ventures

- Agreements between/among horizontal competitors generally prohibited by antitrust laws
 - *Per se* treatment if coordination on price or output
- Rule of Reason Analysis
 - Does the agreement impose an “unreasonable restraint of trade”?
 - General analysis
 - In what “market”?
 - What are the parties’ shares of that market?
 - Does either party, or do the parties collectively, have market power?
 - What is the effect of the agreement on price and output?
 - Is there a legitimate (procompetitive) justification?

■ Antitrust Analysis of Joint Ventures

- *Per Se* or Rule of Reason Treatment?
 - If the venture is a sham (no true integration, just an excuse to stop competing), it may be *per se* illegal
 - If rule of reason applies, test is whether collaboration will harm competition (e.g., raise prices, reduce output, limit choice)
 - Consider market definition, market shares and concentration, likelihood of anticompetitive effects and demonstrable procompetitive benefits (increased profitability alone may not be a benefit for antitrust purposes)
 - Rule of reason can be truncated if evidence of anticompetitive effects
- Same rules apply whether called joint venture or strategic alliance

■ Antitrust Analysis of Joint Ventures

- What sets a lawful joint venture apart from potentially unlawful competitor collaboration?
 - “Integrative efficiencies”
 - Sharing capital costs beyond resources of individual company
 - R&D investment in new product or process
 - Realizing demonstrable economies of scale/scope through facilities integration
 - Combining complementary skills, assets, or IP

■ Joint Venture Analysis

- What potential anticompetitive effects can flow from a joint venture?
 - Reducing competition in a market as a whole
 - “Spill over” effects onto corporate parents
 - Cooperation goes too far – beyond the scope of the joint venture.
 - Not reasonably necessary for joint venture to achieve its legitimate purpose

■ Joint Venture Analysis

- “Ancillary restraints”
 - If reasonably necessary, analyzed under rule of reason, even if restraint is a type that may otherwise be considered per se illegal (e.g., market allocation or price fixing)
 - If not reasonably necessary, risk of per se treatment
 - **RED FLAG:** Restriction on remaining competition between parents

■ Joint Venture Agreements

- Joint venture agreements often include restraints on competition
 - Can the agreement limit the participants' ability to compete with the venture?
 - Can the agreement limit the ability of the participants to compete outside of the venture?
 - Can the agreement limit the territories and customers that the participants sell to?
- Joint venture agreements should include safeguards to preserve competition among the venture and its participants
 - Can the venture be used to exchange competitively sensitive information?
 - Can the venture be used to collectively set price and output?

■ Joint Venture Guidelines

- If the co-venturers compete with each other outside of their joint ventures, care must be taken to avoid creating the wrong impression that the venture is being used as cover to reduce, or eliminate that competition.
 - Do not exchange, or share (directly or indirectly), competitively sensitive information that is unrelated to the joint ventures.
 - The only information that should be flowing from the joint venture back to the co-venturers is that which is reasonably related to a legitimate purpose, like exercising voting rights and protecting ones investment.
 - No individual at either co-venturer that has day-to-day responsibility for products outside the joint venture that are competitive should be involved in the joint venture.
 - No discussions between the co-venturers regarding products outside the joint venture that are competitive should take place without legal guidance.

■ Joint Venture Formation – Minimizing Risk

- What are the first steps to take when forming a joint venture to prevent running afoul of the antitrust laws?
 - Understand the legal standards for the exchange of information
 - Enter into a NDA
 - Explore whether the transaction will have to be reported
- Why is this important?
 - Exchanging competitively sensitive information is permitted if it is reasonably related to an evaluation of the merits of a transaction (due diligence) and integration planning, and if the exchange is accompanied by protections preventing the recipient from using the information for commercial purposes

■ Joint Venture Formation – Minimizing Risk

- What information is safe to exchange between competitors?
 - Publicly available information
 - General information
- What information raises concern if exchanged between competitors?
 - Competitively sensitive information

■ Joint Venture Formation – Minimizing Risk

- What safeguards can be used to prevent the information from being used for commercial purposes?
 - A NDA limiting the use of the information (e.g., evaluating the proposed transaction) and prohibiting the use of the information for any commercial purposes (e.g., revenue data shared with accounting, not marketing)
 - Physically segregate and limited access to the information exchanged
 - Use third-party consultants or former employees to collect, evaluate, and aggregate sensitive data (e.g., a clean team)
 - Consider removing employees temporarily from decision-making authority if given access to sensitive information

■ Joint Venture Formation – Minimizing Risk

- What provisions should a NDA contain?
 - Key provisions might include
 - Identify the legitimate purposes for using the competitively sensitive information
 - Limit who may receive the information
 - Describe what may be done with the information
 - More recent consent decrees have prohibited the disclosure of competitively sensitive information to employees directly involved in or responsible for the marketing, pricing, or sales of any competing product or service
 - The key goal is to prevent the commercial use of competitively sensitive information

■ Joint Venture Formation – Minimizing Risk

- Provide the business team with guidance for joint venture discussions, for example:
 - Do
 - Discuss how the companies could do things better by combining complementary resources
 - Discuss specific resources of each company that might offer synergies if brought together (e.g., product improvement, new product development, production process improvement, improved distribution)
 - Discuss potential benefits of joint venture for customers
 - Don't
 - Discuss how the companies could increase prices if they worked together
 - Discuss limiting competition on particular aspects of products or services
 - Discuss potential impact of joint venture on competitors

■ Hypotheticals



■ Joint Purchasing Venture

■ Facts:

- Five manufacturers of Product X contemplate forming a sourcing venture. Collectively, the five manufacturers account for approximately 15% of sales.
- Each of the five manufacturers operate at a single plant and sell Product X within a 100-200 mile radius of its plant.
- The five manufacturers compete against a number of larger multi-plant manufacturers, including one with approximately 20% of sales and two others with 15% of sales each.
- Relative to their larger multi-plant competitors, each of the five manufacturers operate at a cost disadvantage. To overcome that cost disadvantage, the five manufacturers propose to form a joint purchasing venture to purchase sufficient quantities of various inputs to qualify for quantity discounts.

■ Joint Purchasing Venture

- **Question:** What are the justifications for the venture?

- **Answer:** The proposed venture will allow the members to obtain cost savings and enable the members to offer lower prices to customers. The lower prices will enable the members to eliminate the competitive advantage that multi-plant manufacturers enjoy as a result of receiving volume discounts from suppliers.

■ Joint Purchasing Venture

- **Question:** How would you document the justifications for the venture?
- **Answer:** In the planning and formation documents, identify the problem to be overcome by formation of the venture and explain how formation of the venture will enable lower prices.

■ Joint Selling Venture

■ Facts:

- Assume the facts above in “Scenario 1: Joint Purchasing Venture.”
- While each of the five manufacturers operate at a single plant and sells Product X within a 100-200 mile radius of its plant, none of those plants are within 300 miles of each other.
- The larger multi-plant manufacturers are selling Product X to national and multi-regional customers who want a single source solution.
- Each of the five manufacturers has lost, or is faced with the prospect of losing, customers to multi-plant manufacturers that can offer a single source solution to national and multi-regional customers.
- To overcome their individual competitive disadvantages, the five manufactures propose to form a joint selling venture to compete for national and multi-regional customers that want a single source solution.

■ Joint Selling Venture

- **Question:** What are the justifications for the venture?

- **Answer:** The proposed venture will allow the members to compete for contracts with national and multi-regional customers that none could do so individually on its own. The proposed venture creates a new competitor vis-à-vis multi-plant manufacturers thereby increasing competition benefitting national and multi-regional customers looking for a single source solution

■ Joint Selling Venture

Question: How would you document the justifications for the venture?

- **Answer:** In the planning and formation documents, identify the problem to be overcome by formation of the venture and explain how formation of the venture will introduce a new competitor and result in a new option for national and multi-regional customers looking for a single source solution.

■ Generator Production JV

- PowerCo (“PC”) and ElectricMax (“EM”) produce generators and other products
- PC and EM each have a dedicated generator production facility in the US; both facilities are operating at 25-30% of capacity
- Each company has a 15-20% share of US generator sales

■ Generator Production JV

- To lower overhead costs, can PC and EM enter into a production joint venture?
 - Parties to form Generator Production LLC
 - PC to contribute its US generator production facility and related equipment to the LLC
 - EM to close its US generator production facility and contributes its equipment and tooling to the LLC
 - Both parties contribute their intellectual property rights, product drawings and designs and trade secrets related to generators to the LLC
 - PC and EM will independently resell venture generators

■ Generator Production JV

- Step 1: Is the Venture *Per Se* Illegal or Will It Be Analyzed Under the Rule of Reason?
 - Both parties contributed productive assets, intellectual property and trade secrets to the venture
 - Is it an efficiency-enhancing integration?
- Step 2: Analysis of Venture Under Rule of Reason
 - Venture will be upheld if anticompetitive effects are unlikely (e.g., combined production does not result in higher prices or decreased output)

■ Generator Production JV

- Other competitive considerations:
 - Ad hoc coordination between PC and EM in marketing generators?
 - Other spillover effects?
 - What if market picks up? Who decides whether to increase capacity?

Downstream Restrictions

- What if PC and EM agreed to market and sell their respective portions of the generators produced by the venture at common prices?
- What if PC and EM agreed to divide up customers for generators?

Downstream Restrictions

- But for the joint venture, an agreement between PC and EM to fix prices or divide markets would be per se illegal
- Is restriction ancillary to legitimate joint venture?
 - Reasonably necessary to achieve the procompetitive purposes of the joint venture?
 - Not likely to cause anticompetitive effects?

■ Remanufacturing Venture

- Reman has recently begun to remanufacture generators (one of your core businesses). You want Reman to stop that activity.
- Can you propose that it shift its customers to you, and enter into a services agreement with you to cover that business?
- What if cost efficiencies exist that would flow through in form of lower prices?
- What if there are differences in customer segments served by each?

■ Telematics Alliance

- Wire-Buzz manufactures telematics for its own equipment
- TeleMat manufactures telematics for use with the Wire-Buzz's and other equipment
- Some end users perceive TeleMat's product as superior to Wire-Buzz's
- But TeleMat's distribution network is not as extensive or "user-friendly" as Wire-Buzz's
- Wire-Buzz proposes a "strategic alliance"

■ Telematics Alliance

- The terms of the alliance are:
 - Wire-Buzz and Tele-Mat to jointly determine which products each will continue to manufacture
 - Wire-Buzz and Tele-Mat to agree on a plan to terminate Tele-Mat's dealers, and to shift distribution to Wire-Buzz
 - Wire-Buzz immediately to begin buying telematics from Tele-Mat for resale through its dealers (Wire-Buzz dealers will also sell Wire-Buzz-manufactured telematics unless Wire-Buzz phases-out production)
 - Wire-Buzz and Tele-Mat to share profits on all telematics sales
- *Per Se* or Rule of Reason?

■ Next-Generation Software

- You want to develop a next-generation tool to manage the operation of certain equipment, but have limited resources and IP.
- Can you joint venture with HotIP to develop that product faster?
- Can you also keep HotIP from competing with the venture with respect to other tools it produces which end users may view as alternatives?
- Can you require HotIP to sell its other tools at or above the price of comparable venture products?

■ Dealer Collaboration

- Manufacturer distributes its products through independent dealers with nonexclusive sales territories
- Products are used in ships
- Shipyard is in Dealer A's territory, End Customer is in Dealer B's territory
- Product will be installed in Dealer A's territory (requiring services from Dealer A) and used in Dealer B's territory
- Bid will be by Dealer(s) to supply manufacturer's product for ship manufacturer

■ Dealer Collaboration

- Would it be appropriate for Manufacturer to encourage Dealers A and B to “collaborate” on bidding the product to the shipyard?
 - If the Shipyard is putting the project out to bid, and Dealer A and Dealer B both have sufficient expertise to supply, would it be appropriate for Dealer A and B to agree that Dealer B will not bid and Dealer A will pay Dealer B a portion of its profits?
 - What if End User selects Dealer B and insists that the Shipyard purchase the product from Dealer B, can they collaborate?
 - If Dealer A has significant expertise in providing solutions to shipyards (both technical and business expertise), that Dealer B lacks, and Dealer A cannot effectively provide customer support in Dealer B’s territory, can they work together?

■ Dealer Collaboration

- What if there are many large international customers, and although Dealers A and B are strong in their territories, Manufacturer is losing sales because it cannot efficiently provide consistent sales and services to the customers throughout the world?
- Assume Dealers A and B account for most sales of purpose built products for use in ships.
- Is it appropriate for Manufacturer to encourage Dealers A and B to form a JV to sell the product to these types of customers?

Trade Association Data Gathering

- Your client is a member of a trade association
- Trade association asks each member to provide data on sales over the last five years – both volume and prices
- Trade association also asks for forecast data
- Trade association plans to discuss future price trends and best practices for curtailing competitive imports at its next meeting
- Problem?

■ Subcontract/Consortium Bidding

- Manufacturer of Product X is approached by a customer looking for a single source solution that includes Product X and Product Y, where Products X and Y are complementary products. Product X Manufacturer does not manufacture Product Y.
- Product X Manufacturer approaches Product Y Manufacturer to obtain pricing information to submit a bid to supply customer with Products X and Y.
- What (if any) justifications are there for subcontracting?

■ Questions?



■ Speaker Biographies



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As Associate General Counsel, Gabrielle counsels Verizon's businesses on all aspects of competition law issues, and represents the company before US and international competition agencies. She also leads Verizon's FTC and competition policy strategy. Gabrielle is a frequent speaker and writer on competition, technology, compliance, business, and diversity issues. An active part of the ABA, she is Chair of the ABA Antitrust Section Privacy Legislation Task Force and Co-Chair of Women. Connected. Next to competition and emerging technologies, her passion lies in promoting diversity and inclusion. She sits on Verizon's Public Policy Law and Security DE&I Council, and on the board of two organizations promoting women and diversity in STEM and law.



Education

- The George Washington University Law School (J.D. 2008), *summa cum laude*
- The George Washington University (M.A. 2008), International Affairs, International Economics
- University of North Carolina at Greensboro (B.A. 2003)

Bar Admissions

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Zarema's practice focuses on complex antitrust matters including government investigations, M&A transactions, and complex litigation, including high-stakes class action defense. Zarema regularly advises clients on enforcement matters before state and federal agencies, and regularly counsels on competition issues, including refusals to deal, distribution and franchising restraints, tying arrangements, group purchasing, price discrimination, exclusive dealing, leveraging, joint ventures, and trade association activities. She also counsels clients contemplating complex transactions that may be affected by antitrust statutes including Hart-Scott-Rodino. In addition, Zarema advises clients on compliance with U.S. and foreign anti-bribery and anti-corruption regulations, U.S. sanctions and export controls, and foreign investment reporting requirements.

She represents clients in many sectors including financial services, technology, energy, and life sciences. She also counsels and defends clients with respect to regulatory compliance with international laws, including the Foreign Corrupt Practices Act, Export Administration Regulations, and Office of Foreign Assets Control economic sanctions. Her work with financial institutions and their executives centers on securities class actions and investigations by the U.S. Securities and Exchange Commission, the U.S. Department of Justice, the Federal Energy Regulatory Commission, and the Treasury Department.

Zarema's clients benefit from her extensive experience in and understanding of the U.S. government. She served as a trade specialist for the U.S. Department of Commerce's International Trade Administration in the Office of China and as the Acting Director of the U.S. Department of Commerce's Corporate Governance Program in the Office of Russia. During her tenure in these roles, she provided guidance to U.S. companies regarding bilateral and unilateral treaties and trade agreements and compliance with international standards. Throughout her career in the Government and the private sector, Zarema has designed and implemented training programs for business people and legal practitioners in the United States, Russia, and Central Asia to address antitrust, anti-bribery, and other corporate governance issues.



Education

- American University, Washington College of Law (J.D. 2005)
- Baldwin-Wallace University (B.A. 2000)

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- New York
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Jonathan is a seasoned antitrust and competition lawyer serving clients in diverse sectors, including manufacturing, chemicals, pharmaceuticals, health care, and technology. He advises clients regarding the management of their day-to-day business risks, counsels on corporate transactions, and provides litigation defense.

Known for providing substantive antitrust analysis of proposed transactions, Jonathan advises on a wide range of issues, including merger review and pre-merger integration planning, distribution and franchising, and other business practices. He also represents clients before federal and state antitrust enforcement authorities in the course of investigations concerning distribution practices and pre- and post-merger review.

Jonathan has extensive experience litigating all types of antitrust claims, such as price fixing, exclusive dealing, tying, predatory pricing, monopolization, and attempted monopolization. In both antitrust and consumer fraud class actions, he has been successful in defeating motions for class certification.



Education

- University of Michigan Law School (J.D. 1999), *cum laude*
- University of Maryland (M.P.M. 1993)
- University of Maryland (B.A. 1992); Honors in Economics

Bar Admissions

- District of Columbia
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