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DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
COMMITTEE ON COMPETITION LAW AND POLICY

ROUNDTABLE ON JOINT VENTURES

-- Note submitted by the US Federal Trade Commission --

This note is submitted by the US Federal Trade Commission to the Committee on Competition Law and Policy FOR DISCUSSION at its forthcoming meeting on 24-25 October 2000.

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JOINT VENTURE GUIDELINES: VIEWS FROM ONE OF THE DRAFTERS

Remarks by
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Workshop: Joint Ventures and Strategic Alliances:
The New Federal Antitrust Competitor Collaboration Guidelines

Washington, D.C.
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A major theme that I hope many of you subscribe to is the following: better late than never.

It is now an oft told tale that Federal Trade Commission staff, at the conclusion of our 1996 hearings on Global and High-Tech Competition[2] inquired of participants what area of antitrust law was most uncertain - especially where the uncertainty led to the business community avoiding transactions that might be legal and efficient. Overwhelmingly, the responses pointed to antitrust law with respect to joint ventures or, more broadly, with respect to horizontal collaboration. As a result, the Federal Trade

outcomes in similar cases. They advise practitioners about the standards that agency staff will employ in investigation and enforcement actions, and that in turn enables staff and private counsel to have a more constructive exchange during investigations. Finally, Guidelines

the same analytical approach whether one is talking about R&D in basic metals, marketing arrangements for airlines, or production joint ventures designed to facilitate retailing on the Internet. Some may inquire whether that marks the death knell of other Guidelines that take up joint venture issues in the process of addressing specific issues in specific sectors of the economy. For example, how do these Guidelines relate to Guidelines with respect to the health care providers or intellectual property? The answer is that sector-specific Guidelines remain in effect. We see no reason why we cannot specify relevant efficiencies or describe safe harbors in the health care area in somewhat greater detail than in generic joint venture Guidelines. That happens where the enforcement agencies have a great deal of experience with a particular sector of the economy and therefore can be more specific in the rules of the road. In short, when the agencies know more, they will say more in terms of providing guidance.

B. The Line Between Per Se and Less Rigorous Antitrust Treatment.

1. Distinguishing Types of Analysis.

An immense amount of time in our hearings and in the drafting process was devoted to trying to draw a sensible and understandable line between *per se* and rule of reason.

The tension between the two types of analysis is first touched upon at page 3 of the Guidelines (Section 1.2) where *per se* is described, in accord with precedent, as types of agreements "so likely to harm competition and to have no significant pro-competitive benefit that they do not warrant the time and expense required for particularized inquiry into their effects."[6]

The Guidelines (Section 3.2) note that "typically these are agreements not to compete on price or output." Agreements of a type that might be considered illegal *per se* are nevertheless accorded rule of

cover a particular geographic area which they could not have done separately, or to accomplish marketing in a substantially more efficient way that is likely to benefit consumers - could be integrative. If so, a pricing agreement covering the jointly marketed products will escape *per se* treatment if the agreement is reasonably related to the integration and reasonably necessary to achieve its pro-competitive effects. That doesn't mean it is legal - only that more extended analysis is required. Note also that an "efficiency-enhancing integration of economic activity" is not limited to circumstances in which the collaboration "creates a new product." If the agreement improves quality or service, reduces price or increases incentives for innovation, all of those qualify as well. In that sense, these Guidelines fully embrace the principles and perhaps go beyond the narrow facts of *BMI*.[7]

2. Short and Long Versions of the Rule of Reason.

Rule of reason analysis is a flexible inquiry calling for an examination of a variety of factors in sufficient detail to under13.2(ao10.9(e)2.2(i)83ri.4(13.2(ao1s4(13i.6(r)-2.3(aceer)9)6c2(ao10.9(e0011 Tw [(perha)7(h)9)

A focus on reasonable necessity is usual agency practice, as already reflected in Health Care Statements 8 and 9, and it flows from Supreme Court case law. For example, in *Maricopa*,[9] the Court concluded that even if a maximum fee schedule were desirable, it could be set by insurers rather than an agreement among the doctors, so there was a practical less restrictive alternative. In *BMI*, the Court asked the same question but reached a different answer, finding "a bulk license of some type a necessary consequence of the integration necessary to achieve these efficiencies," and then determining that a necessary consequence of an aggregate license was that a price must be established.

I believe, also, that a fair reading of the Supreme Court's decision in *Topco*[10] is consistent with this approach. In *Topco*, an association of small and medium size regional super market chains joined forces to purchase, store and distribute grocery products to its members. As a condition of membership, the grocery chains agreed not to sell Topco brands outside an assigned marketing territory, and members were also given the right effectively to veto new members who might offer actual or potential competition. I would describe *Topco* as an efficiency-enhancing integration, but would also conclude that provisions dividing markets and protecting incumbents from challenge were not reasonably necessary to achieve those efficiencies. Indeed, it seems reasonable to expect that additional members of the Topco collaboration would have made the joint venture more efficient, not less efficient, by aggregating additional purchasers.

Conclusion

I have only scratched the surface in discussion of relevant aspects of these Guidelines. I did

NOTES

1. Chairman of the United States Federal Trade Commission. The views expressed are my own and do not necessarily reflect the views of the Commission or other Commissioners.

2. FTC Staff Report, Competition Policy in the New High-Tech, Global Marketplace (1996).

3. U.S. Dep't of Justice, Vertical Restraints Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,105 (1985).

4. Phillip Areeda, T*he "Rule of Reason" in Antitrust Analysis: General Issues* 37-38 (Federal Judicial Center, June 1981).

5. Broadcast Music Inc. v. Columbia Broadcasting System, Inc. 441 U.S. 1 (1979).

6. See, *e.g.*, Northern Pac. Ry v. United States 356 U.S. 1, 5 (1958); NCAA v. Bd. of Regents 468 U.S. 85, 103-04 (1984); Catalano Inc. v. Target Sales Inc. 446 U.S. 643, 647 (1980).

7. In *BMI*, the Court concluded that a blanket license fee was not *per se* illegal price-fixing, in part because the product would not have existed in the absence of the joint pricing. But the Court did not conclude that the restraint would have been *per se* illegal if cooperation had not been "essential" to the creation of a new product. Under the Guidelines, an efficiency-enhancing integration does not result solely from the creation of a new product, nor must the restraint be essential to achieve such integration.

8. FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986).

9. Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982).

10. *United States v. Topco Associates, Inc*. 405 U.S. 596 (1972).