

## ESSAY

## Joint Ventures in the Online Economy: New Uses for Old Guidelines

BY KELLY SMITH FAYNE

**T**HE ANTITRUST GUIDELINES FOR COLLABORATION Among Competitors provide a useful baseline for evaluating most modern joint ventures.<sup>1</sup> But much has changed in the 15 years since they were issued. In 2000, the online economy was still in its incipency. People hailed taxis with hand waves and whistles, concertgoers scalped unused tickets standing outside a venue, software came in a box, and Lehman Brothers analysts were casting doubt on the Amazon business model as it expanded beyond selling books and CDs.<sup>2</sup>

As tech innovators look to joint ventures to move new ideas to market faster, antitrust practitioners and their clients need an increasing familiarity with the unique features of technology-driven marketplaces. Consider, for example, a hypothetical JV among several online merchants to develop a new shared payment processing platform, which they intend to use for their own online commerce sites. This collaboration implicates issues related to two-sided markets, network effects, and IP cross-licensing, among others.

The Collaboration Guidelines, however, provide only a “general statement” of the agencies’ approach.<sup>3</sup> For “special circumstances” the Collaboration Guidelines refer back to The Statements of Antitrust Enforcement Policy in Health Care and the Antitrust Guidelines for the Licensing of Intellectual Property. While the IP and Healthcare Guidelines are even older than the Collaboration Guidelines—issued in 1995 and 1996, respectively—they remain important supplements. Indeed, as specialized issues such as network effects and IP cross-licenses become everyday issues, the relevance of the IP and Healthcare Guidelines to the Collaboration Guidelines increases.

Although drafted to address particular issues in the healthcare industry, the Healthcare Guidelines provide detailed analysis on complex issues raised by any network industry. For example, what is the antitrust risk exposure if the hypothetical secure online payment JV requires its members to make exclusive use of the JV’s payment platform?

On the one hand, success of the platform—including acceptance by credit card companies—depends on having a group of committed online retailers. On the other hand, a requirement for exclusive use means that the parties would agree not to use competing payment systems. The Collaboration Guidelines address exclusivity, but only to say that “competitive concern likely is reduced to the extent that participants actually have continued to compete, either through separate, independent business operations or through membership in other collaborations, or are permitted to do so.”<sup>4</sup>

The Healthcare Guidelines offer more relevant insight. For example, they recognize that “in some circumstances exclusivity may help a [physician] network serve its subscribers and increase its physician participants’ incentives to further the interests of the network.”<sup>5</sup> For the online payment JV, analogizing from the Healthcare Guidelines provides more clarity. Those Guidelines suggest that an exclusivity requirement like that contemplated by the JV may be considered a lower risk to the extent it encourages widespread investment in and adoption of an online payment system that would improve the security of online commerce for merchants and consumers. By contrast, if the exclusivity requirement hampers the development or operation of competing technologies, the arrangement may receive more scrutiny.<sup>6</sup>

For the hypothetical secure online payment JV, issues related to the contribution of IP to the JV and issues related to the joint development and commercialization of new IP also require more in-depth treatment. For instance, the Collaboration Guidelines recognize that “sharing certain technology, know-how, or other intellectual property may be essential to achieve the procompetitive benefits of an R&D collaboration.”<sup>7</sup> The Collaboration Guidelines don’t, however, provide much additional insight on how the agencies would view, for example, a plan among members to cross-license input technologies exclusively to each other.

The IP Guidelines step in to provide additional clarity, recognizing several specific procompetitive benefits of cross-licensing, including “integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation.”<sup>8</sup> They also cover specific practices including exclusive cross-licenses. In counseling the secure online payment JV, it would be helpful to refer to the IP Guidelines’ explanation that cross-licenses and patent pools need not be available to everyone, but that such arrangements are more likely to avoid scrutiny if the excluded firms can effectively compete in the relevant market and the JV members do not collectively possess market power in the relevant market.<sup>9</sup>

A complete picture of likely agency perspectives on modern JVs does not stop at any one set of guidelines. As a starting point, the Collaboration Guidelines provide the framework for analysis, but other sources may be needed to provide depth to the analysis of special issues. The Healthcare Guidelines and IP Guidelines are two such sources. Indeed, their significance to the everyday practice of counseling prospective and existing JVs has likely increased from when they were originally drafted to address special circumstances that are now fundamental to antitrust counseling for the online economy. While other sources should not be

*Kelly Smith Fayne is an associate in Latham & Watkins LLP’s Global Antitrust & Competition Practice Group in San Francisco.*

---

overlooked—including the Horizontal Merger Guidelines, case law, business review letters, and international guidance—the Health-care and IP Guidelines (despite their age) add specificity and clarity to the analysis of some of the tricky questions that today’s joint ventures face. ■

---

<sup>1</sup> U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Guidelines for Collaborations Among Competitors (2000) (Collaboration Guidelines), [https://www.ftc.gov/sites/default/files/documents/public\\_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf](https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf).

<sup>2</sup> Robert Hof, Debra Sparks & Ellen Neuborne, *Can Amazon Make It?*, Bus. Wk., July 10, 2000, reprint available at <http://www.bloomberg.com/news/articles/2000-07-09/can-amazon-make-it>.

<sup>3</sup> Collaboration Guidelines, *supra* note 1, at 1.

<sup>4</sup> *Id.* § 3.34(a).

<sup>5</sup> U.S. Dep’t of Justice & Fed. Trade Comm’n, Statements of Antitrust Enforcement Policy in Health Care 79 (1996) (Healthcare Guidelines), [https://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/statements\\_of\\_antitrust\\_enforcement\\_policy\\_in\\_health\\_care\\_august\\_1996.pdf](https://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf).

<sup>6</sup> *Id.* at 77.

<sup>7</sup> Collaboration Guidelines, *supra* note 1, § 3.31(b).

<sup>8</sup> U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Guidelines for the Licensing of Intellectual Property § 5.5 (1995) (IP Guidelines), <https://www.justice.gov/atr/antitrust-guidelines-licensing-intellectual-property>.

<sup>9</sup> *Id.*