

# Ventur and competition



This report is an overview of the competition law considerations which arise from the company's proposal to enter into a joint partnership or joint venture agreement with other health care organisations in the community to increase market position and profit.

There has been a sharp rise in antitrust investigations in the healthcare industry resulting from joint ventures (Elhauge & Geradin, 2007) and I shall provide an overview of the legal issues impacting the current proposals.

### 1) Antitrust Legislation

The primary legislative provisions governing antitrust law in the United States is the Federal Sherman Act 1890, with each state having reciprocal antitrust provisions effectively mirroring the Sherman Act (Hovenkamp, 2005). The essence of the Sherman Act is the prohibition of agreements that unreasonably restrain trade, monopolies, attempted monopolies and conspiracies to monopolize (Sherman Act 1890, section 1).

The relevant enforcement body is the Federal Trade Commission, the U. S. Department of Justice, state attorneys and general or private parties affected by any proposed anti-competitive measure (Posner, 2001). If a joint venture or partnership agreement is found to fall within any of the Sherman Act 1890 prohibitions, the penalties for violation include the following:

- 1) Mandatory “ treble damages” (which is three times the amount of financial damage caused by the anticompetitive behaviour);
- 2) The claimant's attorney's fees;
- 3) Injunctive relief intended to prevent continuation of anti-competitive behavior;
- 4) Divestiture;
- 5) Criminal penalties including prison terms of up to three years and

substantial money fines.

The main reason that healthcare joint ventures can fall foul of the antitrust provisions under the Sherman Act is that often the partners will be competitors within the same market with the overriding purpose being to pool resources to maximise economic benefits (Elhauge & Geradin, 2007). However, if additional to this, the venture partners continue to compete outside of the joint venture agreement, the antitrust legislation imposes restrictions on conduct between the partners (Hovenkamp, 2005).

Secondly, one of the partners in the venture may have market power or the result of the venture will be to increase market power, which can be anti-competitive if the partners to the venture are then enabled to set prices above a competitive level. Furthermore, in considering the proposed joint venture the company should consider the following four issues in particular:

- 1) Knowing the competitors and market presence;
- 2) Providing justification for the venture;
- 3) Understand who controls the venture; and
- 4) Recognise limits on information sharing and implement safeguards (Elhauge & Geradin, 2007).

## 2. Competitors and Market Presence

In considering compliance with Sherman Act provisions, it is vital for the company to consider the relevant market (Posner, 20010. The relevant market comprises the relevant service market and relevant geographic market (Elhauge & Geradin, 2007). The service market is where the market of services is “reasonably interchangeable” and the relevant geographic market is “the area of effective competition where buyers can turn for alternate sources of supply” of the relevant service (Elhauge & Geradin,

2007).

Antitrust enforcement bodies are primarily concerned with a provider's market share and resultant impact on market power (Hovenkamp, 2005).

Therefore in considering any proposed joint venture, the company must consider the structure and proposed impact on market power.

### 3. Justification for the venture

The central focus of antitrust law and the FTC regulators is the effect of the commercial activity on price and in particular, whether the proposed joint-venture will impact the pricing in the market (Posner, 2001).

In context of the healthcare industry, the most common type of plaintiff will be other service providers in the relevant market that have been excluded from a joint venture and commercial payers who are concerned that the venture will result in higher prices (Elhauge & Geradin, 2007). Higher prices might be justified by the creation of a new service, and higher unit prices may result in an overall reduction in costs to consumers because of improved care and reduced utilisation of services, however the onus will be on the company to prove this (Hovenkamp, 2005).

For example, in a complaint investigated by the FTC against the activities of the Greater Rochester Independent Practice Association, notwithstanding the pricing implications; the FTC believed that the significant clinical integration activities would improve quality of service and overall lower costs in the marketplace (Elhauge & Geradin, 2007). Therefore, it is vital for the company to provide justification from the outset to avoid claims. In particular, the company should in its proposal consider the following from the outset:

1) Will the venture achieve quality objectives that cannot be achieved independently?

2) Will the venture create a new service or deliver services in a different and more efficient manner?

4) Will the venture provide increased access to a particular service for the community or part of the community? (Posner, 2001)

#### 4. Control

From the outset, failure to properly structure an agreement can result in a determination of being anticompetitive per se due to the court's interpretation of the section 1 prohibition as categorising conduct that will lead to a presumption of "illegal conduct per se" and that which is unlikely to be harmful in applying the rule of reason (Elhauge & Geradin, 2007). Indeed, courts have held that an agreement between a joint venture and one of its members can be illegal if the member is also a competitor of the joint venture within the relevant market (Elhauge & Geradin, 2007).

Therefore, if the company proceeds with the proposed joint venture or partnership agreement, the terms of the agreement itself must be structured to avoid the illegality per se presumptions (Posner, 2001). In order to achieve this successfully, it will ultimately depend on the degree of economic integration and unity of purpose between the parties to the joint venture agreement (Hovenkamp, 2005).

Courts have been inconsistent in determining whether there is unilateral action between a venture partner and the venture, and therefore no antitrust liability, and when there is concerted action, in which case liability is imposed (Elhauge & Geradin, 2007). To avoid this, parties should structure an agreement so that control is vested in one party that would treat the venture as it would treat its subsidiary for contracting or other purposes (Posner, 2001).

In summary, the proposed agreement will undoubtedly raise antitrust issues and the company should initially undertake a detailed exercise to ensure justification requirements are met. Additionally, if the company proceeds with the plans, it is imperative to ensure that the terms of the venture or partnership agreement include appropriate control provisions to avoid falling foul of the antitrust provisions.

#### BIBLIOGRAPHY

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