Can a Fully Integrated Joint Venture Be Per Se Unlawful? The Ninth Circuit's Decision in *Dagher*

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JOINT VENTURE ANALYSIS REMAINS one of the greatest sources of dissonance in antitrust jurisprudence today. Because joint ventures comprise such a wide range of business combinations, and often involve both contractual agreements between independent parties and the creation of new entities through consolidation, courts reviewing these arrangements are more prone to elevate corporate form over economic substance, misapply principles of modern joint venture analysis, and, in the end, simply lose sight of the goals of antitrust.

The most recent contribution to the confusion in this area is the Ninth Circuit's decision in *Dagher v. Saudi Refining, Inc.*, 369 F.3d 1108 (9th Cir. 2004). Read broadly, *Dagher* holds that companies that consolidate competing operations (including sales and marketing) into a single integrated joint venture, and decide to charge the same prices for formerly competing brands, are engaged in a per se violation of Section 1 of the Sherman Act.

The *Dagher* decision is a disturbing departure from modern joint venture analysis with serious potential implications for future antitrust enforcement. In short:

***Dagher* diverges sharply from recent trends in joint venture analysis.** The decision employs an analytical approach that, like decisions of decades ago, elevates form over economic substance and is inconsistent with the goals of antitrust. It concludes that bona fide, procompetitive joint ventures can still be subject to per se liability.

***Dagher* is a potentially dangerous precedent.** The decision introduces conflict and uncertainty into modern joint venture analysis. It threatens procompetitive joint ventures—including those that have been reviewed and approved by federal and state antitrust authorities—with potential treble damages exposure under theories of per se liability. It will discourage the formation of some joint ventures and force others to be structured in less efficient ways.

Petitions for certiorari in *Dagher* were filed in December 2004 and are currently pending before the Supreme Court.[1]

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The Ninth Circuit's *Dagher* Decision

The Texaco/Shell Joint Ventures. *Dagher* involves a private class action challenge to two joint ventures created in 1998 by Texaco, Inc., Shell Oil Co., and Saudi Refining Inc (SRI), which consolidated all of Texaco, SRI, and Shell's petroleum refining, marketing, and sales (i.e., "downstream") operations. Because Texaco and SRI had an existing joint venture that sold gas in the eastern United States, the parties accomplished this consolidation through two separately incorporated joint venture entities: Motiva, which combined the Shell's downstream operations in the eastern United States with the existing Texaco/SRI joint venture, and Equilon, which combined Shell and Texaco's downstream operations in the western United States. The Ninth Circuit found there was "a voluminous record documenting the economic justifications for creating the joint ventures"—i.e., the achievement of "numerous synergies and cost efficiencies," including "up to $800 million in cost savings annually." *Id.* at 1111.

While the joint ventures consolidated all of Texaco/SRI and Shell's downstream petroleum operations, the companies continued to operate the other portions of their businesses independently (e.g., "upstream" petroleum exploration and production; "downstream" operations outside the United States), and consequently retained ownership of their trademarks and brands. Each company, however, granted the joint ventures exclusive rights to market gasoline in the United States under their respective brand names. They also entered into non-competition agreements which prohibited them from competing against the joint ventures.

Under the joint venture agreements, "a single individual at each joint venture was responsible for setting a coordinated price for the two brands," *id.* at 1112, and each joint venture charged the same price for both brands in any given geographic area. The parties claimed that "[a]fter the formation of the ventures, Equilon and Motiva each independently decided that, to prevent issues of price discrimination from arising under the Robinson-Patman Act, it would charge the same prices for Shell branded gasoline as it would charge for Texaco branded gasoline (sold to the same class of trade in the same geographic area)."[2] The court, on the other hand, concluded that this policy was implemented by each joint venture "either immediately before the formation of the joint ventures or sometime shortly thereafter," and that "there is at least a triable issue of fact as to whether Texaco and Shell agreed in advance to charge the same price for their two distinct gasoline brands as an initial operating requirement of the alliance." 369 F.3d at 1112 & 1120 n.11.

Federal and State Review of the Joint Ventures. The creation of the joint ventures was subject to a lengthy review by the Federal Trade Commission under the Hart-Scott-Rodino Act, and by the Attorneys General of California, Hawaii, Oregon, and Washington. The FTC "evaluated the formation of the [joint ventures] as if [they] were a complete merger of the downstream operations of Texaco and Shell."[3] None of the governmental agencies viewed the joint ventures' price-setting policies as separate restraints of trade or expressed concerns about the lawfulness of these policies. This analytical approach is consistent with the federal agencies' subsequently promulgated Antitrust Guidelines for Collaboration Among Competitors, which state that fully integrated joint ventures of sufficient duration should be evaluated as mergers under the standards of Section 7 of the Clayton Act—i.e., under a rule of reason style of analysis.[4]

The federal and state review culminated in consent orders, pursuant to which the joint venture parties divested a package of assets, including refinery, terminal, and service station operations. The Director of the FTC's Bureau of Competition declared the settlement "a victory for motorists" that "preserves competition and assures that consumers will not pay more for gasoline and other petroleum products, especially on the West Coast."[5]

The Ninth Circuit Decision. *Dagher* is a class action brought on behalf of 23,000 Texaco and Shell service station owners, who allege that "the defendants conspired to fix the nationwide prices for the Shell and Texaco brands of gasoline through the creation of a national alliance consisting of two joint ventures." 369 F.3d at 1110. The plaintiffs "disclaimed any reliance on the traditional 'rule of reason' test, instead resting their entire claim on either the per se rule or a 'quick look' theory of liability." *Id.* at 1113. The district court denied the defendants' motion to dismiss, but granted their motion for summary judgment on the ground that the lawfulness of the joint ventures is properly analyzed under the rule of reason.

A panel of the Ninth Circuit reversed, over a dissent by Judge Fernandez, concluding that there was a triable issue of fact as to whether the joint venture's pricing practices should be evaluated under the per se rule. Writing for the majority, Judge Reinhardt held:

> The proper inquiry for a per se analysis of price fixing is not simply whether the joint venture itself is anticompetitive. Nor is the relevant question simply whether the defendants intended to destroy competition. . . . Rather, if the answer to those questions is in the negative, we must then decide whether the defendants' conduct—setting one, unified price for both the Texaco and Shell brands of gasoline instead of setting each brand's price independently on the basis of normal market factors—is reasonably necessary to further the legitimate aims of the joint venture.

Id. at 1121 (citations omitted). Put simply, the majority regarded the joint ventures' price formation rules as collateral restraints—i.e., conduct that could be subject to per se condemnation under the ancillary restraints doctrine. *Id.* at 1124.[6]

Applying this doctrine, the majority found that the defendants "failed to offer any explanation of how their unified pricing of the distinct Texaco and Shell brands of gasoline served to further the ventures' legitimate efforts to produce better products or capitalize on efficiencies." *Id.* at 1122. It rejected the defendants' argument that integrated joint ventures inherently have the right to set the prices of the ventures' products on the grounds that (1) there is at least a triable issue of fact as to whether the decision to charge a common price for the two brands in this case was made by the joint venture entities or, instead, by Texaco and Shell when they formed the joint ventures, and (2) such an argument, if accepted, would enable "any number of companies [to] create joint ventures as fronts for price fixing." *Id.* at 1124.

Dagher's Departure from Modern Joint Venture Analysis

Joint ventures have always been a source of confusion in antitrust analysis. This confusion reached its apex in the middle of the 20th century, when the courts applied the per se rule to declare unlawful a variety of ventures, some of which were plainly procompetitive and others of which had sufficient efficiency-enhancing characteristics to warrant rule of reason review.[7]

Beginning with the Supreme Court's decision in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* (*BMI*),[8] however, judicial analysis of joint ventures began to evolve. Decisions such as *BMI*, *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*,[9] *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*,[10] and *Polk Bros., Inc. v. Forest City Enterprises, Inc.*[11] provide a coherent series of guideposts for modern joint venture analysis. *Dagher* represents a potentially dangerous detour from this path.

Modern Joint Venture Analysis. As the Justice Department and FTC Competitor Collaboration Guidelines explain, modern joint venture analysis seeks to "assess the competitive effects of the overall collaboration and any individual agreement or set of agreements within the collaboration that may harm competition." (§ 2.3) Put simply, the agencies and court ask two basic questions: (1) is the venture itself anticompetitive; and (2) are the venture's "ancillary restraints," if any, anticompetitive?

1. Is the Venture Itself Anticompetitive? The first issue in analyzing a joint venture among horizontal competitors is whether the collaboration is simply a disguise for

a naked agreement to fix prices or restrict output or, instead, is a legitimate combination that involves some economic integration or risk sharing designed to increase the joint venture partners' efficiency or competitiveness. In the mid-20th century, the courts often focused on the form, as opposed to the economic substance, of the venture, which resulted in the condemnation of legitimate joint ventures as naked agreements to fix prices or restrict output. The Supreme Court recognized the infirmities in this analytical approach in *United States v. Penn-Olin Chemical Co.*,[12] where it rejected the suggestion (urged by the dissent) that the formation of a new joint venture by two potential competitors was per se unlawful. Acknowledging the growing importance of joint ventures to competition in the post-war economy, the Supreme Court instructed the lower courts to undertake a detailed analysis of the markets at issue, and the likely competitive effects of joint ventures, using the legal standards applicable to mergers. The Supreme Court recognized that because legitimate economic integration among joint venture partners could enhance competition, it should not be subject to per se condemnation.

Even in the wake of *Penn-Olin*, however, joint venture jurisprudence was marked by inconsistency. This began to change in the late 1970s and 1980s, with the Supreme Court's decisions in *BMI* and *Pacific Stationery*. *BMI* involved a group of sellers who formed a joint venture to sell a combined product at a unified price; likewise, *Pacific Stationery* involved a group of buyers who formed a joint venture to purchase products collectively at unified prices. The lower courts held both joint ventures to be per se unlawful—the *BMI* venture was deemed a horizontal price-fixing agreement, while the *Pacific Stationery* venture was deemed a horizontal group boycott.

The Supreme Court rejected the application of the per se rule in both cases. In *BMI*, the Court acknowledged that the joint venture "involves 'price fixing' in the literal sense," but cautioned that "[l]iteralness is overly simplistic and often overbroad."[13] In both cases, the Court examined the effect of the joint ventures and concluded that they were not properly subject to per se condemnation because each was designed to 'increase economic efficiency and render markets more, rather than less, competitive.'[14] Consistent with this analytical approach, the Supreme Court also held that collaborations in which there is no promise of increased efficiency—i.e., where competitors do not "pool their capital and share the risks of loss as well as the opportunities for profit"—may be properly subject to per se condemnation.[15]

In short, *Penn-Olin*, *BMI*, and their progeny stand for the proposition that legitimate joint ventures between competitors should not be evaluated under the per se rule simply because they diminish rivalry between the joint venture partners in the production of the joint venture product. Rather, because joint ventures "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively . . . such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect."[16]

2. Are the Venture's Collateral Restraints, if Any, Anticompetitive? The second issue in analyzing a joint venture among horizontal competitors is whether the joint venture partners have entered into any restraints on competition beyond those inherent in the venture itself and, if so, whether those restraints are unreasonable on their face or because of their likely effect. These types of restraints are analyzed under what is commonly called the "ancillary restraints doctrine." An ancillary restraint is one that is "subordinate and collateral to a separate, legitimate transaction . . . in the sense that it serves to make the main transaction more effective in accomplishing its purpose."[17]

In his seminal opinion in *Addyston Pipe*, then-Judge Taft explained that if ancillary restraints were subject to per se condemnation, a partner in a joint venture could easily be deprived of "the full enjoyment of the legitimate fruits" of the venture, or become the victim of the "unjust use of those fruits by the other party."[18] For these reasons, he concluded, an agreement that restrains competition between two parties to a joint venture is lawful under the antitrust laws so long as it "is merely ancillary to the main purpose of a lawful contract" between them and advances the purpose of the venture.

Although antitrust analysis of ancillary restraints varied in the years following *Addyston Pipe*, a line of decisions beginning with the Supreme Court's opinion in *BMI*, and continuing through the lower court decisions in *Rothery* and *Polk Bros.*, clarified the boundaries of the ancillary restraints doctrine. The courts have held that when a venture imposes ancillary restraints that are reasonably related to the venture's purpose, those restraints are presumptively lawful and must be evaluated under the rule of reason. On the other hand, an agreement among joint venture partners that "always or almost always tends to raise price or reduce output . . . may be challenged as per se illegal, unless it is reasonably related to, and reasonably necessary to achieve [the] procompetitive benefits" of the venture.[19] Thus, in evaluating the lawfulness of truly collateral restraints, the first step in the analysis is to determine whether the restraint is one that is reasonably necessary to achieving the joint venture's procompetitive purpose. If so, it is subject to rule of reason analysis. If not, it may be subject to per se condemnation.

Dagher's Misapplication of Modern Joint Venture Analysis. The *Dagher* court considered, but misapplied, the Supreme Court's modern joint venture jurisprudence.

1. Are the Texaco/Shell Joint Ventures Themselves Anticompetitive? In *Dagher*, there is no dispute that Equilon and Motiva are legitimate joint ventures. The Ninth Circuit found that the joint ventures fully integrated the refining, marketing, and sales operations of Shell, Texaco, and SRI, and that the record supported the venturers' claim that they would realize significant synergies and efficiencies in their operations. Nor is there any dispute that the lawfulness of the joint ventures themselves must be analyzed under the rule of reason, not the per se rule. The court expressly acknowledged the Supreme Court's teaching that "'when two partners set the price of their goods or services they are literally "price fixing," but they are not per se in violation of the Sherman Act.'" 369 F.3d at 1118 (quoting *BMI*, 441 U.S. at 9).

While the Ninth Circuit accepted the district court's holding that "a reasonable trier of fact could not find that the Defendants formed Equilon and Motiva merely to achieve an ulterior anticompetitive purpose or that the ventures are patently anticompetitive," *id.* at 1120, it found these holdings insufficient to support the application of the rule of reason. This is because, in the majority's view, "the defendants' conduct—setting one, unified price for both the Texaco and Shell brands of gasoline instead of each brand's price independently on the basis of normal market factors" is a separate restraint, the lawfulness of which should be judged independently of the lawfulness of the ventures themselves. *Id.* at 1121.

This reasoning diverges sharply from modern joint venture analysis. Courts now recognize that a fully integrated joint venture is, in substance, a merger of the parties' competing business lines, the very purpose of which is to end competition between the parties so as to enable them to compete more vigorously against other rivals.[20] Once a court determines that a joint venture is not a pretext for price fixing, then (assuming no Section 7 issue) the elimination of competition inherent in the venture should be per se lawful.

The facts of *Dagher* illustrate why modern joint venture analysis employs this approach. In creating the Equilon and Motiva joint ventures, the parties merged all of their gasoline refining, marketing, and sales operations; the price-setting function is an inherent part of those activities. Judge Fernandez makes this point in dissent: "What could be more integral to the running of a business than setting a price for its goods and services?" 369 F.3d at 1127. When a court evaluates the lawfulness of a legitimate horizontal joint venture under the rule of reason, it is necessarily evaluating whether the consolidation of the price-setting functions of former rivals lessens competition. There is no reason for the courts to then evaluate this question a second time, viewing the consolidation of the price-setting functions as a separate restraint of trade subject to the ancillary restraints doctrine. For this reason, modern joint venture analysis holds that "[o]nce a venture is judged to have been lawful at its inception and currently, decisions that do not affect the behavior of the participants in their nonventure business should generally be regarded as those of a single entity rather than the parents' daily conspiracy."[21] A decision by Equilon and Motiva to charge the same price for Shell and Texaco gasoline is no different than a decision by Hewlett-Packard to charge the same price for HP and Compaq brand computers.

The *Dagher* court offers three reasons for analyzing the joint ventures' price-setting function as a separate restraint. First, the court says its analytical approach is compelled by the Supreme Court's decision in *Citizen Publishing Co. v. United States*,[22] a case in which the Court held that a joint venture that combined all of the operations, except news and editorial, of the only two newspapers in Tucson, Arizona, was per se unlawful. The majority, however, recognized that the Supreme Court's subsequent opinions, including *BMI*, "suggest that the Court, if confronted with a similar joint venture today, might not find the enterprise as a whole unlawful." 369 F.3d at 1119. Whatever the Supreme Court might conclude today about the lawfulness of the Tucson newspapers' joint ventures, it plainly would not apply the per se rule in reaching that judgment. As Judge Bork observed with respect to similar joint venture decisions from the same era as *Citizen Publishing*, "to the extent [these decisions] stand for the proposition that all horizontal restraints are illegal per se, they must be regarded as effectively overruled" by *BMI* and subsequent authority.[23]

In modern joint venture analysis, the lawfulness of fully integrated ventures among competitors—i.e., ventures such as Equilon and Motiva that combine all of the competitors' operations in a line of business—are typically judged under the legal standards applied to mergers. This is the lesson of *Penn-Olin* and its progeny, and it is now embodied in the Competitor Collaboration Guidelines. In addressing a hypothetical example in which "[t]wo oil companies agree to integrate all of their refining and refined product marketing operations," the Guidelines conclude that because "[t]he formation of the collaboration involves an efficiency-enhancing integration of operations in the refining and refined product markets, and the integration eliminates all competition between the participants," the joint venture should be analyzed under the legal standards applied to mergers. (Example 1).

Second, the *Dagher* court finds that its analytical approach is consistent with decisions holding that *collateral* restraints on competition between joint venture partners should be evaluated independently of the lawfulness of the venture itself, and may be subject to per se condemnation. The majority observes that "the mere existence of a bona fide joint venture" does not mean that "participating companies may use the enterprises to do anything they please with full immunity from *per se* analysis." 369 F.3d at 1118. This unremarkable proposition finds support in the FTC's recent decision in *Three Tenors*, in which the Commission strongly suggested that it was per se unlawful for joint venture partners to agree, as part of a venture to create a new product, to restrict competition between existing products that were not produced by the venture.[24] While there is legitimate debate about the FTC's mode of analysis in *Three Tenors*, there is no debate that restraints on products produced outside of the joint venture are collateral—not integral—to the joint venture and therefore are subject to review under the ancillary restraints doctrine.

Dagher, however, did not involve "ancillary" restraints. Indeed, the Ninth Circuit's fundamental error was in confusing the standards used to judge the lawfulness of a venture itself with those used to judge the lawfulness of a venture's collateral restraints. The fact that some collateral restraints may be properly subject to the per se rule does not mean that a joint venture itself, including an agreement between the joint venture partners as to the price of the joint venture product, is properly subject to that standard of review. On the contrary, as Professor Herbert Hovenkamp concludes in discussing the example of an automobile joint venture: "Once the [joint venture] automobiles are manufactured, they are jointly owned and cannot be sold without an agreement between the owners as to the price that will be charged for them. . . . [the owners] 'are literally "price fixing," but they are not per se in violation of the Sherman Act.'"[25]

Of course, if a joint venture comprises only development and manufacturing, and not marketing and sales, an agreement to fix the price at which each company separately sells the joint venture product may be collateral to the venture itself, and thus may be subject to the per se rule. But this was not the case in *Dagher*, where the joint ventures combined all of the companies' U.S. downstream operations, including marketing. The Ninth Circuit's characterization of the joint ventures' price-setting function—basic joint venture conduct—as a collateral restraint led it to apply the wrong legal standard.

Third, the *Dagher* court expressed concern that treating the joint ventures' price-setting function as an integral part of the joint venture would enable "any number of companies [to] create joint ventures as fronts for price fixing." 369 F.3d at 1124. Modern joint venture law, however, would not permit this result. *BMI* and its progeny established that a legitimate joint venture must involve some form of economic integration or risk sharing among the joint venture partners. A cartel that creates a joint venture entity simply as a "front [] for price fixing" would have no such characteristics, and would be properly subject to the per se rule. *Id.* Moreover, even if a cartel created a legitimate joint venture, that would not immunize it from antitrust scrutiny; it would remain subject to review under the rule of reason. If the venture's anticompetitive effects outweighed its procompetitive effects, it would be found unlawful.

The FTC and State Attorneys General analyzed the formation of the Equilon and Motiva joint ventures as "a complete merger of the downstream operations of Texaco and Shell,"[26] and concluded that the transaction (at least as modified) would not lessen competition in the sale of gasoline. The *Dagher* decision is really a collateral attack on that conclusion and thus on the lawfulness of the joint ventures themselves. The Ninth Circuit's characterization of the joint ventures' price-setting function as a collateral restraint, and its finding that a legitimate, fully integrated joint venture may be per se unlawful, are inconsistent with modern joint venture jurisprudence.

2. Are the Texaco/Shell Joint Ventures' Collateral Restraints, if Any, Anticompetitive? Even if the Ninth Circuit were correct in characterizing the Texaco/Shell joint ventures' price-setting practices as collateral restraints, the court's analysis of these practices under the ancillary restraints doctrine diverges sharply from modern joint venture law.

The *Dagher* court assumed that the price-setting function was a collateral restraint and concluded that, because the establishment of a unified price for the Shell and Texaco brands was not "sufficiently important to attaining the lawful objectives of the joint venture," it was properly subject to the per se rule. 369 F.3d at 1121. In reaching this conclusion, the court placed significant weight on the fact that there was at least a dispute "as to whether Texaco and Shell agreed in advance to charge the same price for their two distinct gasoline brands as an initial operating requirement of the alliance." *Id.* at 1120 n.11. The court's conclusion rested heavily on its belief that Texaco and Shell reached this agreement when the joint ventures were formed and then required the ventures to abide by it.

As the court acknowledged, if the decision to charge the same price for the two brands was made independently by each joint venture, there would be no cause of action. *See id.* at 1117–18, 1124. But even if the decision to charge the same price for the two brands was made by the parent companies when the ventures were created, and even if that decision could be properly characterized as a collateral restraint, such an agreement would not merit per se condemnation. Modern joint venture analysis looks to economic substance, not form, in determining whether a collateral restraint has the characteristics of a naked restraint on price. A decision to employ a uniform pricing scheme for the Shell and Texaco brands, whether made by the parents or the joint venture entities, does not have these characteristics.

The thrust of the *Dagher* court's concern, and the reason it believes the parent companies' agreement may be a naked restraint of trade, is that the joint ventures may have priced the brands differently in the absence of this agreement. The majority concluded that because the "gasolines marketed under the Texaco and Shell labels have different reputations and consumer bases, [i]t thus seems likely that independent price analyses would result, at least in some circumstances, in the rational decision to sell the different brands at different prices." *Id.* at 1122. Putting aside whether courts should be in the business of making such judgments,[27] the *Dagher* court does not explain why the joint ventures' economic incentives would be different from those of the parent companies. The ventures, like their parents, will seek to maximize the profits associated with selling Texaco and Shell gasoline. And the ventures, like their parents, will choose a strategy that maximizes profits when the brands are under common ownership. If a strategy of setting a unified price for both brands achieves this end, then that is precisely what the joint ventures will do. As a matter of economic substance, this strategy does not exhibit the characteristics of a naked restraint on price.

The *Dagher* court concluded that use of a uniform pricing scheme exhibited not only the characteristics, but also the effects, of a naked restraint on price. Specifically, it found no evidence to suggest that "unified pricing [is] relevant to product improvement or efficiency gains," and that this fact, "when viewed along with the plaintiffs' evidence showing anticompetitive effects, convinces us that the plaintiffs have made a sufficient showing as to the applicability of the *per se* rule." 369 F.3d at 1122. The court's conclusions, however, are not supported by its own account of the record.

With respect to procompetitive effects, the court acknowledged that the pricing function is necessarily related to the achievement of integrative efficiencies in mergers and joint ventures: "when two competing companies agree to merge and to combine their product lines . . . they generally agree to adopt a *uniform* pricing scheme." *Id.* at 1117–18 (emphasis added). If uniform pricing were unrelated to the benefits of integrated joint ventures, parties to such ventures would not generally employ such schemes. Indeed, in the specific case of Equilon and Motiva, the court found that "the very purpose of the alliance was to eliminate competition [between the Shell and Texaco brands] *in order to realize efficiency gains and gain market share.*" *Id.* at 1120 (emphasis added).

While the court rejected the parties' Robinson-Patman Act justification, finding that the Act "would unquestionably be inapplicable" to a practice of selling the commonly-owned Texaco and Shell brands at different prices, the issue for the parties when they made the decision was whether they might have to incur the uncertainty and expense of litigating this question, potentially in multiple jurisdictions. A unified pricing scheme eliminated this uncertainty. In short, a decision by joint venture parties to combine their two brands and price them uniformly is often an integral part of achieving efficiencies and making both brands more competitive.

With respect to anticompetitive effects, the only evidence the court cites to support its conclusion is that Equilon raised its gasoline prices at a time when crude oil prices reached near historic lows. But this is far from the sort of evidence antitrust courts generally require to support a finding—or even an inference—of market power. In evaluating anticompetitive effects, courts and agencies look first at market structure. When the FTC and the State Attorneys General reviewed the formation of Equilon, they found it would increase the HHI in a market for "CARB gasoline" in California by 154 points—to 1635—well below the levels at which the agencies generally conclude that a merger or joint venture is likely to reduce competition.[28] Nevertheless, antitrust enforcement agencies obtained divestiture relief; as a result, the joint ventures control only 15 percent of gasoline sales nationally and 25 percent of sales on the West Coast, 369 F.3d at 1111, again far below the levels that would enable the ventures to affect market price.

While courts will consider direct evidence of market power, the evidence cited by the *Dagher* court does not show that Equilon (much less Motiva) had the power to restrict output and thereby increase the market price of gasoline for a sustained period. The price of crude oil, though an important element of the cost of gasoline, is not the only factor. The court does not discuss whether Equilon's price increase was related to other factors affecting its costs. Likewise, the court does not discuss the demand for gasoline. Equilon sold gas only in the western United States; the fact that its prices rose could also have been the product of an increase in demand in that region. And the court apparently gave no weight to the fact that the plaintiffs' expert—who also worked for the FTC and State Attorneys General on the pre-formation review of the joint ventures—"disclaimed any opinion that the ventures were anti-competitive."[29]

In the end, the *Dagher* court's analysis does not support the conclusion that the nature, intent, or effect of the Equilon and Motiva joint ventures, or the uniform pricing of the Texaco and Shell brands, warrant per se condemnation. The problems with the court's analytical approach are underscored by its statement that it would have reached a different conclusion if Texaco and Shell had "agreed to merge their current product lines into one collective brand." *Id.* at 1124. In the court's view, discontinuing one brand in favor of the other is perfectly lawful, but continuing to sell both brands at the same price is per se unlawful. The court's approach elevates form over substance and loses sight of the goals of antitrust; it threatens to punish conduct that enhances, not lessens, competition.

The Lessons of *Dagher*

Unless reversed by the Supreme Court, *Dagher* is a potentially dangerous precedent. It introduces conflict and uncertainty into modern joint venture analysis.[30] It threatens procompetitive joint ventures—even those that have been reviewed, modified and approved by federal and state antitrust authorities—with the prospect of treble damages exposure. It is likely to discourage the formation of some joint ventures, and almost certainly will force others to structure themselves in less efficient ways.

Parties to existing and future horizontal joint ventures, particularly those that operate in the Ninth Circuit, now have to account for the risk of a *Dagher*-like attack by class action counsel. To reduce the risk of a finding of per se liability under *Dagher*, parties to such ventures should consider the following structural alternatives:

- Retain only one of the joint venture parties' competing product lines.
- If both product lines are retained, formally assign full pricing discretion with respect to both lines to the joint venture entity.
- If the both product lines are retained, and a decision is made to unify the pricing structure, document the reasons for adopting unified pricing and why this structure enhances the venture's competitiveness.

Of course, none of these structural features will enhance the competitiveness of a joint venture. On the contrary, these and other structural alternatives parties might consider are likely to render joint ventures less efficient and hence less competitive. But until the courts bring joint venture analysis fully into the modern era, this will be the legacy of *Dagher*. ■

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[1] 73 U.S.L.W. 3363 (U.S. Dec. 14, 2004) (Nos. 04-085, 04-814). On February 22, 2005, the Supreme Court invited the Solicitor General to file a brief expressing the views of the United States.

[2] Appellees' Brief at 16, *Dagher v. Saudi Refining, Inc.,*369 F.3d 1108 (9th Cir. 2004) (No. 02-56509).

[3] Chevron Corporation/Texaco Inc., File No. 011-0011, FTC Docket No. C-4023, Statement of FTC Commissioners Sheila F. Anthony and Mozelle W. Thompson (Sept. 7, 2001), *available at* http://www.ftc.gov/os/2001/12/atstat.htm.

[4] U.S. Dep't of Justice & Federal Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors § 1.3 (2000), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161, *available at* http://www.ftc.gov/os/1999/10/jointventureguidelines.htm [Competitor Collaboration Guidelines].

[5] Press Release, Federal Trade Comm'n, Shell, Texaco to Divest Assets to Settle FTC Charges (Dec. 19, 1997), *available at* http://www.ftc.gov/opa/1997/12/shell.htm.

[6] The court wrote: "[T]he defendants have failed to produce sufficient evidence demonstrating that their price fixing scheme was ancillary rather than naked." *See, e.g.*, Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986); General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588 (7th Cir. 1984).

[7] *See, e.g.*, United States v. Topco Assocs., 405 U.S. 596 (1972); United States v. Sealy Inc., 388 U.S. 350 (1967).

[8] 441 U.S. 1 (1979).

[9] 472 U.S. 284 (1985).

[10] 792 F.2d 210 (D.C. Cir. 1986).

[11] 776 F.2d 185 (7th Cir. 1985).

[12] 378 U.S. 158 (1964).

[13] 441 U.S. at 9.

[14] *Id*. at 20 (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16); *Pacific Stationery*, 472 U.S. at 295 (quoting *BMI*).

[15] Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 356 (1982).

[16] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984).

[17] *Rothery*, 792 F.2d at 224.

[18] United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

[19] Competitor Collaboration Guidelines, *supra* note 4, Ex. 4.

[20] *See also id.* § 1.3.

[21] 7 Phillip Areeda & Herbert Hovenkamp, Antitrust Law, ¶ 1478c, at 325.

[22] 394 U.S. 131 (1969).

[23] *Rothery*, 792 F.2d at 226.

[24] Polygram Holding, Inc., 5 Trade Reg. Rep. (CCH) ¶ 15,453 at 22,447 (FTC 2003), *available at* http://www.ftc.gov/os/2003/07/polygramopinion.pdf. The Commission said its conclusion "[a]rguably . . . could be characterized as a finding of 'per se illegality' in that we conclude that the restraints at issue are 'naked' restraints on competition because they lack a cognizable justification," *id.*, but ultimately declined to apply a particular "label" to its mode of analysis. *See also* Yamaha Motor Co. v. FTC, 657 F.2d 971 (8th Cir. 1981).

[25] 11 Herbert Hovenkamp, Antitrust Law ¶ 1908e, at 264 (2005) (quoting *BMI*, 441 U.S. at 9).

[26] Chevron Corporation/Texaco Inc., *supra* note 3.

[27] *See Rothery*, 792 F.2d at 227–28.

[28] Shell Oil Co., FTC File No. 971-0026, Analysis of Proposed Consent Order to Aid Public Comment at 5 (Dec. 19, 1997), *available at* http://www.ftc.gov/os/1997/12/shelltex.pdf.

[29] Appellees' Brief, *supra* note 2, at 3.

[30] *Compare* Dagher *with* Augusta News Co. v. Hudson News Co., 269 F.3d 41 (1st Cir. 2001) (joint venture among newspaper and magazine distributors establishing a single up-front payment to buyers did not constitute per se illegal price fixing); National Bancard Corp v. Visa U.S.A., Inc. 779 F.2d 592 (11th Cir. 1986) (joint venture among banks establishing interchange rates did not constitute per se unlawful price fixing). *See also* Fraser v. Major League Soccer, L.L.C., 284 F.3d 47 (1st Cir. 2002) (rule of reason applies to horizontal joint venture's collateral restraint); *Rothery*, 792 F.2d at 224 (same); Polk Bros., Inc., v. Forest City Enters., Inc., 776 F.2d 185, 190–91 (7th Cir. 1985) (same).