Every oil and gas exploration and production (E&P) company acquires oil and gas properties either directly from landowners or from other lessees. These transactions come in many forms and sizes but occur daily in good times and bad times.

At the same time, E&P companies typically do not act alone in developing their oil and gas properties and often enter into agreements of various kinds with other companies to jointly explore, develop and produce oil and gas properties. Many such relationships do not raise any legal issues concerning anti-competitive conduct, but some recent high-profile cases have emphasized the need to observe some basic concepts.

The late Aubrey K. McClendon, the former CEO of an active E&P company, was recently indicted for alleged violations of antitrust laws in bidding to acquire oil and gas leases during a period from 2007 to 2012. While this particular case involved criminal charges, improper conduct also raises the possibility of civil charges by the government and private actions by injured parties.

According to the Indictment, McClendon “and his coconspirators knowingly entered into and engaged in a combination and conspiracy to suppress and eliminate competition by rigging bids for certain leasehold interests and producing properties. The combination and conspiracy engaged in by the defendant, Aubrey K. McClendon, and his co-conspirators was in unreasonable restraint of interstate commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).” According to the press release issued by the US Department of Justice:

> [t]he indictment alleges that McClendon orchestrated a conspiracy between two large oil and gas companies to not bid against each other for the purchase of certain oil and natural gas leases in northwest Oklahoma. During this conspiracy, which ran from December 2007 to March 2012, the conspirators would decide ahead of time who would win the leases. The winning bidder would then allocate an interest in the leases to the other company. McClendon instructed his subordinates to execute the conspiratorial agreement, which included, among other things, withdrawing bids for certain leases and agreeing on the allocation of interests in the leases between the conspiring companies.

The indictment contains few details, but, apparently, executives from two companies agreed that only one of them would bid to acquire leases and producing properties, and, if successful in that bid, would share the properties with the other company at cost. The arrangements were kept secret and the selling party was not informed of the arrangement.

While the criminal indictment against a well-known CEO is certainly newsworthy, another civil case from a few years ago holds more practical lessons for E&P companies. In a 2012 Colorado federal court case called United States vs. SG Interests I, Ltd., et al., the government considered antitrust issues in arrangements for the joint bidding to acquire federal oil and gas leases. This was the first time that the United States challenged under antitrust laws a joint bidding arrangement for mineral rights leases administered by the US Bureau of Land Management (BLM).
that case, one set of bids made pursuant to a memorandum of understanding among several companies were found to violate antitrust laws, but another set of bids that were “ancillary to a broader joint development and production collaboration” were found to be permissible and not contrary to the antitrust laws.

Bid-rigging agreements generally are among the types of restraints on competition that courts have condemned as *per se* unlawful. The government has the discretion to decide whether to bring criminal or civil charges when dealing with *per se* antitrust offenses. In the *SG Interests* case, the government stated that it chose to pursue a civil action because the joint bidding agreement was performed under a written memorandum of understanding (MOU) drafted by attorneys.

The government entered into a settlement agreement with the *SG Interests* defendants that called for a monetary payment (the government alleged that it suffered damages given that BLM allegedly received less money for the lease interests because of the unlawful agreement). In its “Response of Plaintiff United States to Public Comments on the Proposed Final Judgment,” 4 explaining its recommendation for the proposed final judgment and remedy in the case, the government articulated the application of an exception to the *per se* rule:

Applying this analysis to an auction setting, a naked agreement between competitors not to bid against each other is properly treated as *per se* unlawful. On the other hand, a joint bidding agreement that is ancillary to a procompetitive or efficiency-enhancing collaboration may be lawful under the rule of reason. Significantly, lawful joint bidding “contemplates subsequent joint productive activity, which entails a measure of risk sharing or joint provision of some good or service.” 12 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *Antitrust Law* ¶ 2005d, at 75 (2d ed. 2005). For example, if a firm, which cannot or might not otherwise compete on a particular bid, joins with another firm to pool resources or share risk, their joint bidding might increase competition by increasing the number of bidders.

The unlawful bidding arrangement took place against the backdrop of discussions among the parties under an MOU about a broader agreement, but any such broader collaboration remained just a “vague possibility.” However, the second, lawful arrangement took place later, pursuant to a more concrete collaborative arrangement. The factors relevant to that characterization were these:

[The lawful collaboration was formed] … after significant negotiations between the parties, was reflected in an agreement that provided for joint exploration and development of lands located within the defined area. It was specifically designed to facilitate the efficient production of gas and included provisions for the joint acquisition and ownership of leases in the area, for conducting joint operations, and for building and operating a pipeline system to transport gas to end-users which required substantial capital investment. Defendants’ agreement to share ownership of future leases acquired by either party aligned their incentives to cooperate in achieving the goals of the collaboration and discouraged any one Defendant from appropriating an undue share of the collaboration’s benefits. Defendants’ collaboration, thus, allowed them to pool their resources and share the risks of exploration for, and development of, the natural resources, which provided an opportunity to realize significant production efficiencies.

Joint bidding arrangements and “area of mutual interest” provisions are quite common in the upstream business. Indeed, the bidding arrangement that the government deemed lawful in *SG Interests* was memorialized in an Area of Mutual Interest Agreement and an Option and Participation Agreement to jointly acquire and develop leases and pipelines in the relevant area.

As the *SG Interests* case suggests, when used properly in the context of collaborative efforts, these arrangements would be deemed to be in compliance with the antitrust laws. The US antitrust agencies, in their “Antitrust
Guidelines for Collaborations Among Competitors," recognize that "competitive forces are driving firms toward complex collaborations to achieve goals such as expanding into [new] markets, funding expensive innovation efforts, and lowering production and other costs." The antitrust laws encourage procompetitive collaborations that help achieve these goals, as is often the case with joint bidding and development arrangements among E&P companies.

Parties must be careful to utilize these arrangements only in the context of a larger collaboration that will withstand antitrust scrutiny from the government or private parties. The government will examine the facts, such as those quoted above, to see if the collaboration is one in which, to use the government’s language from SG Interests, “procompetitive efficiencies arise.”

1 See Indictment in re United States of America vs. Aubrey K. McClendon, filed with The United States District Court for the Western District of Oklahoma.


3 One of the co-authors of this legal update, William Stallings, joined Mayer Brown in its Washington office after service as Chief of the Transportation, Energy and Agriculture Section of the Antitrust Division of the United States Department of Justice. While at the Antitrust Division, he had responsibility for the SG Interests case.