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Antitrust Considerations For Collaboration During COVID-19

By **Jon Roellke** (March 20, 2020, 4:10 PM EDT)

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In responding to the coronavirus (COVID-19) pandemic, the mantra of working together is heard often.

But as businesses confront sudden and extensive demand and supply disruptions — and a range of sometimes conflicting information and guidance from the public sector about the health crisis — questions inevitably arise about the extent to which the private sector can coordinate its responses consistent with the antitrust laws.

Such issues arise even in the context of well-intentioned, collaborative activity aimed at reducing health risks to employees and the communities they serve or ensuring the continued viability of their businesses.

While the following general antitrust principles are applicable to potential competitor collaborations in response to this pandemic, effective mitigation of antitrust risk requires specific competition law guidance on any particular collaborative activity under consideration.[1]

The Basics

The antitrust laws recognize that competitor collaborations can be, and frequently are, pro-competitive and efficiency-enhancing activities that serve important public policy objectives, such as protecting public health, developing innovative technologies, enhancing cybersecurity safeguards or strengthening the fairness and integrity of important markets, all to the benefit every market participant.

Competitor collaborations, however, also can violate the antitrust laws if they unduly restrain the independent decision making of competitors. The antitrust laws prohibit, for example, agreements among competitors that could restrict the competitive capabilities or opportunities of other competitors, suppliers, or customers, or unduly restrain the independent activities of competing businesses, particularly with respect to price, quality, or the output or distribution of products or services.

Such agreements among actual or potential competitors may be illegal regardless of whether the competitors are buyers or sellers of the good or service at issue. And, importantly, under the antitrust laws, such agreements need not be written or formal or even enforceable to be illegal; they, instead, can be oral or written, formal or informal, expressed or implied.[2]

Certain types of conduct are considered to be per se illegal under the antitrust laws. This means that the conduct is strictly illegal without regard to intent, reasonableness, actual competitive effects or other justification. These per se illegal practices include price-fixing, bid-rigging and group boycotts (i.e., agreements among competitors to refuse to deal with another market participant or to deal only on certain terms and conditions agreed upon by the boycotting firms).

In the European Union, these practices are called by object restrictions or hardcore restrictions and similarly are presumed illegal. In the case of agreements between competitors (horizontal agreements), restrictions of competition by object include, in particular, price-fixing, output limitation and sharing of markets and customers. With respect to agreements between noncompetitors (vertical agreements), the category of restrictions by object includes, in particular, fixing (minimum) resale prices and restrictions that limit sales into particular territories or to particular customer groups.

Other types of competitor collaborations are subject to an antitrust analysis known as the rule of reason. In the EU, such collaborations are viewed as an exemption for efficiencies benefiting consumers, without eliminating competition. This means that the conduct may or may not be permissible, depending on the circumstances, because the collaboration could be efficiency-enhancing or promote a public policy goal.

Frequently, this rule of reason analysis does not lend itself to specific guidelines or bright-line rules, and legal counsel may need to be consulted to determine whether a particular activity is permissible. Examples of rule of reason collaborations include the setting of product standards, the development of industry best practices and certain types of information exchanges intended to inform competitive and well-functioning markets.

Navigating the difference between good and bad collaborations is always important but is particularly critical in times like this, when good industry collaboration is needed most to address a common crisis. These unique circumstances require practical antitrust advice, with clear guidance, lest uninformed antitrust concerns discourage or inhibit the urgent imperative to work together in response to the pandemic.[3]

Information Exchanges

While some types of information exchange between competitors are clearly pro-competitive, other types of information sharing could raise concerns if it leads to, or could facilitate, an agreement to restrain trade. Sharing certain types of information in response to a crisis, for example, has been recognized as both beneficial and, in some circumstances, necessary.[4]

In the context of COVID-19, businesses may need to exchange information to better inform their independent assessment of the efficacy of their COVID-19 policies and practices or to better assess potential impacts from supply chain and work force disruptions.

For example, properly managed information exchanges that inform efforts to forecast industry-wide supply needs in the face of supply shocks, limited to that which is necessary to address unforeseen market failures, may be legitimate, important and even necessary to address the impact of COVID-19 on distribution chains in an affected industry.

Particular attention should be given to information exchanges intended to help inform businesses how best to accommodate work force disruptions. In response to COVID-19, for example, competitors may want to discuss the options they have considered to address travel restrictions, working remotely, staggered work schedules, or other options for promoting social distancing and mitigating its economic impact, or protocols for business

continuity or environmental cleaning.

While such information exchanges can promote orderly and well-considered policies and practices, they should be managed to avoid discussions not tethered to that objective and to ensure that they are consistent with the guidelines and principles the U.S. Department of Justice's Antitrust Division and the Federal Trade Commission have emphasized in recent years for human resource professionals.[5]

More generally, the factors important to consider in connection with any information exchange include: identifying clearly its objective (i.e., does it have a strong public policy or efficiency-enhancing goal); limiting it to that which is reasonably necessary to achieve that goal; and, if it involves any nonpublic information, can it be collected or facilitated by a third-party and aggregated and anonymized to mitigate against the risk that it could be used to facilitate unlawful collusion.

In all events, without clear and thoughtful antitrust guidance, competitors must be especially careful in avoiding exchanges about their prices, costs, expected output or other economic terms and conditions under which they will sell (or buy) goods or services.

Best Practices

It is not unusual for competitors, typically through trade associations, to discuss or promulgate standards of conduct or best practices that are intended to protect the public from clearly unethical, fraudulent, unfair, or deceptive practices, or to promote business practices that serve other public policy objectives.

The analysis of such discussions about best practices or standards under the antitrust laws starts by asking whether joint activity is necessary to create, promulgate or implement a standard or promote a policy objective. Care also must be taken to ensure that standards of conduct, or any proposed best practices suggestions, do not have the purpose or effect of disadvantaging competitors or favoring one group of competitors over another.

And any best practices that are discussed or developed must be recognized as purely voluntary in nature, with each market participant deciding for itself whether or to what extent to adopt or implement any such practices in light of its individual circumstances and independent economic interests.

Avoiding Group Boycotts and Market Allocations

Collaborative activity in response to the pandemic that involves joint action among competitors that could competitively disadvantage another market participant should be avoided.

For example, information exchanges to inform potential policies and practices in response to supply constraints should not include discussions that could be interpreted as an agreement not to deal with a particular supplier or service provider or to deal with suppliers or service providers only on certain terms. Rather, each market participant must decide for itself, based on its independent business judgment, with whom it will deal and on what terms.

To be clear, businesses have broad discretion under the antitrust laws to decide for themselves whether or under what terms and with whom they will deal; even firms with market power can generally decide for themselves whether to refuse to deal with a supplier, customer or competitor, so long as they make that decision unilaterally based on a valid business justification and not in concert with another competitor.

In the context of COVID-19, for example, a firm may unilaterally decide that it will not deal

with other market participants that have failed to take sufficient steps to protect their workers, or otherwise failed to adopt policies and practices that the public sector has encouraged to combat the crisis. Such decisions, however, must be made independently and not based on any agreement or understanding that competitors will likewise refuse to deal.

This is not to say that market participants should not discuss with other firms available options for policies and practices that promote sound and effective pandemic mitigation that may have an adverse economic impact; rather, the antitrust laws mandate — as explained earlier — that competitors decide for themselves whether and to what extent any such options are adopted or implemented.

And care should be taken to avoid discussions with competitors that could be construed as an agreement intended to seek economic advantage and limit the market.

Similar caution is warranted against discussions that could have the appearance of allocating among competitors market opportunities. For example, agreements among competitors about who will — or will not — buy or sell particular products or services in a particular geographic market, or with a particular supplier or customer could be construed as a per se illegal market allocation.

Government Lobbying and Economic Relief

The threat of COVID-19 requires extensive public and private sector collaboration. Competitors can, and should, facilitate such collaboration by convening or participating in forums that address common concerns, discuss industry issues, and promote fair, transparent, and efficient responses to the pandemic, including efforts to advocate on regulatory and legislative issues important to the industry.

In the U.S., such collaborative efforts to persuade legislators or government officials to take (or not take) legislative, administrative or regulatory action are generally protected against challenge under the antitrust laws as an exercise of free speech rights under the First Amendment.

This immunity also extends to participation in judicial and administrative proceedings, so long as there is a sound legal basis for the positions asserted by industry advocates in such proceedings. However, activities that are not genuinely intended to influence government action may be considered a sham and vulnerable to antitrust allegations.

The severe financial stress of pandemic mitigation has already led industry advocates and public officials to call for aid measures to serve those sectors that have been most affected by the economic consequences of COVID-19. Building on the experience of the 2008 financial crisis, the European Commission has recently approved a draft framework for state aid measures in response to COVID-19.[6]

The proposed framework will enable four types of aid: (1) direct grants and selective tax advantages up to EUR 500K per company, (2) State guarantees for loans taken by companies from banks, (3) subsidized public loans to companies and (4) safeguards for banks that channel support to the real economy. Also, restructuring aid rules would be relaxed with a view to facilitating expected larger bail outs of companies.

Advocates must be mindful that businesses that receive any such aid comply with the European Union's state aid rules and secure necessary clearance from the European Commission. And all market participants will want to make sure that such aid is fair and consistent with desired market impacts, particularly competitors who may not qualify for or be provided similar economic relief.

Impacts on Financial Markets

Financial market participants should also exercise care in their responses to the economic challenges posed by the pandemic. Such markets are somewhat unique, in that they typically require a substantial degree of competitor collaboration to function efficiently, fairly and with sufficient liquidity.

But in addition to the general guidelines above, which apply equally to competitors in financial markets, financial services firms should be particularly mindful of antitrust considerations applicable to initiatives intended to stabilize volatile markets or preserve or strengthen liquidity.

Such initiatives are best pursued with the guidance and involvement of financial markets regulators, with clearly identified objectives, the participation of a broad range of market stakeholders and a high degree of transparency.[7]

Price Gouging and Consumer Protection Concerns

As with any health emergency or environmental disaster, COVID-19 has led to concerns about price gouging, with firms taking advantage of the crisis to charge excessively high prices for necessary goods or services in short supply and high demand.

While the antitrust laws generally allow businesses to decide how to price their goods and services (so long as they do so unilaterally), regulators around the globe have invoked numerous other laws, including those that are triggered by declarations of a state of emergency to police and prohibit price gouging activities.[8]

Businesses, therefore, must be careful to ensure that any increases in the prices they charge are justified, reasonable, and well supported by a fair assessment of their costs as well as to price those goods and services unilaterally (and without coordination or discussion with their competitors).

Regulators also have been active in warning against deceptive and unfair trade practices, such as misleading advertising or the dissemination of false information about the crisis. Accordingly, businesses that are working hard to meet consumer demand for goods and services in response to the crisis should make sure that any claims they make about the suitability and effectiveness of those goods and services are verifiable and substantiated by evidence.

Collaboration Guardrails

The antitrust laws do not, and should not, discourage lawful, well-meaning and important competitor collaborations intended to combat through collective effort the threat of COVID-19. While specific antitrust guidance should be obtained to effectively assess and mitigate risks associated with particular collaborative initiatives intended to respond to the pandemic, the following general guardrails should be kept in mind.

1. Discussions with a competitor about prices should be avoided. While this may seem self-evident, the unprecedented and substantial disruptions to supply and demand can lead to risky discussions about stabilizing the severe price volatility being observed in markets. Accordingly, without the benefit of legal advice, competitors should avoid discussions about the fees or prices they charge, sales incentives, rebates or discounts, profit margins, revenue sharing or other payment terms. This includes discussions about employee compensation, benefits or other economic terms of employment.

2. Competitors should not, without clear antitrust guidance, exchange competitively sensitive information about their respective terms and conditions and conditions of trade;

the status of their negotiations with suppliers with customers or suppliers; quantities, production capacities, or inventories; or the requirements of customers or suppliers.

3. Competitor discussions about best practices to mitigate the severity and duration of the pandemic should be conducted with a clearly identified public policy objective, should strive to develop recommendations that do not unfairly advantage some market participants while disadvantaging others and should be premised on the clear understanding that each market participant must decide for itself whether and to what extent it adopts or implements any recommended practices.

4. Without clear antitrust guidance, competitors should avoid discussions about the terms and conditions under which they will conduct business with other market participants throughout the crisis or discussions about allocating customers, markets or geographic areas.

5. To reduce the risk that competitor discussions could be viewed as inconsistent with any of the guidelines set forth above, the following procedures should be observed, not all of which may be applicable to a particular activity or meeting and some of which may not be practical or necessary in connection with such activities: (a) a written agenda should be prepared and followed to guide industry discussions; (b) accurate minutes should be prepared when feasible, sent to the participants, and maintained in company files; and (c) if there is any doubt about the propriety of a topic of discussion, antitrust counsel should be consulted.

6. Companies should be mindful of the prohibitions against excessive or unreasonable pricing of emergency goods and services and should monitor all bidding, pricing and sales of public health products and services, whether to government entities or private citizens.

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[1] As the US Department of Justice (DOJ) recently warned, it will hold accountable anyone who violates the antitrust laws by taking advantage of “emergency response efforts, healthcare providers, or the American people” in the context of this current crisis. Department of Justice Antitrust Division, Justice Department Cautions Business Community Against Violating Antitrust Laws in the Manufacturing, Distribution, and Sale of Public Health Products (March 9, 2020). Recall also that the DOJ’s Antitrust Division conducted a multi-year investigation into, among other things, certain post-September 11th security surcharges, and accused multiple companies and individuals of fixing prices. See, Extradited Former Air Cargo Executive Pleads Guilty for Participating in a Worldwide Price-Fixing Conspiracy. This led to a highly complicated multidistrict civil litigation matter involving multiple defendants. See, e.g., In re Air Cargo Shipping Services Antitrust Litigation, Case 1:06-md-01775-BMC (EDNY), First Consolidated Amended Complaint, ECF No. 271 at ¶ 97 (“Following the September 11 attacks, Defendants met and communicated and jointly agreed to impose the Security Surcharge upon their Airfreight Customers, which remained in effect thereafter. Secret meetings and communications included discussions at the highest levels of the respective companies and occurred in various venues, including Europe, the United States, and Africa.”).

[2] In certain circumstances, the existence of an unlawful agreement can be inferred from circumstantial evidence that the participants have agreed to act in some manner that

restrains trade. For example, an illegal agreement to restrain trade may be inferred from the fact that competing firms all acted in a similar manner following a meeting where a particular topic was discussed or certain information was exchanged (e.g., if two competitors discuss prices, and later adopt prices that are similar, a conspiracy to fix prices might be inferred, even though there was never an explicit “agreement” on price).

[3] While confirming that an emergency does not exempt anticompetitive conduct from the antitrust laws, some regulators have recognized that rigid application of antitrust doctrine may not be warranted “in these present extraordinary social and economic conditions.” The Greek competition authority, for example, recently confirmed that it will "not take action" against certain maximum resale prices or recommended prices on vertical supply contracts and distribution agreements, citing examples involving personal hygiene products and food distribution networks, while it reinforced that other prohibitions under its competition laws will be actively enforced. See Press Release - Application of competition rules. Other European agencies’ responses currently range from increased vigilance with regard to possible exploitation of the crisis and the relaxing of certain antitrust rules to promote necessary and beneficial cooperation justified by COVID-19.

[4] Antitrust enforcement agencies in the United States, for example, recognized that competitors needed to share information in their efforts to combat cybersecurity threats to the nation’s networks’ infrastructure. See DoJ and FTC: Antitrust Policy Statement on Sharing of Cybersecurity Information (April 10, 2014); see also, Dep’t of Justice and Fed. Trade Comm’n, Antitrust Guidelines for Collaborations Among Competitors (2000), at 15 (concerns about information sharing are mitigated where it is “reasonably necessary to achieve the procompetitive benefits of certain collaborations.”).

[5] See Antitrust Guidance for Human Resources Professionals, and Antitrust Redflags for Employment Practices.

[6] See Statement by Executive Vice-President Margrethe Vestager on a draft proposal for a State aid Temporary Framework to support the economy in the context of the COVID-19 outbreak.

[7] In the midst of the financial crisis in 2008, there were numerous competitor collaborations, many of which were conducted with the involvement of financial regulators but some of which were managed by private sector market participants. One such private sector collaboration was the setting of financial benchmarks, including, for example, LIBOR, which was set through a daily polling process that asked major liquidity providers (i.e., banks) to identify the rates at which they believed they could borrow from another bank. That well-accepted polling practice has since been the subject of substantial antitrust government investigations and private litigation based, in part, on the allegation that the practice was manipulated by reference banks concerned about how their rate submissions might impact market perceptions about their solvency and creditworthiness. The extensive financial benchmark reform that followed, spearheaded by financial regulators in coordination with the private sector, provides a useful model for how markets can best respond to liquidity and other financial market events that threaten market stability, integrity, and fairness.

[8] In the United States, for example, numerous states have declared a state of emergency that triggers prohibitions against gouging of needed goods and services, such as food, gasoline, hotel accommodations, transportation, and medical and other emergency supplies. The US Department of Justice has likewise warned against price gouging by companies involved in the manufacture, distribution, and sale of public health products such as face masks, respirators, and diagnostics, as did regulators in the United Kingdom, Italy, and Poland. In China, regulators implemented strict pricing supervision that extended to the entire supply chain associated with the manufacture and sale of protective masks and other medical protective equipment.