6 Antitrust Considerations For Companies During Pandemic

By **Jay Levine and Allen Carter** (April 29, 2020)

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Let's face it, antitrust concerns probably do not top your list of legal concerns at this time. So, it is fair to ask whether companies should worry much about antitrust right now.

The short answer is, yes. The rules have not changed, and those who do not heed them now may pay dearly later. At the same time, we realize you probably have better things to do than read another article that recites a long list of antitrust do's and don'ts. So, we will briefly summarize what has happened to date and provide some guidance for these times.

Agency Pronouncements

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On March 24, the U.S. Department of Justice and the Federal Trade Commission issued a "Joint Antitrust Statement Regarding COVID-19."[1] In it, they acknowledged that responding to the crisis may require competitors to collaborate. They reiterated that "procompetitive" collaborations between competitors are permitted and, given the current crisis, there may be good reason to do them.

The agencies reiterated that their previous guidance on collaboration and information-sharing — Antitrust Guidelines for Collaborations Among Competitors(2000)[2] and Statement of Antitrust Enforcement Policy in Health Care(1996)[3] — remain relevant and in full effect.

The agencies also committed to an expedited business review letter and staff advisory opinion process. These processes allow companies who are contemplating conduct that may implicate the antitrust laws to obtain the enforcement agencies view of that conduct ahead of time. Normally, that process can take a few months, but the agencies have promised to expedite their review for COVID-19 related matters and provide a response within seven days of receiving all necessary information.

There is also a rather cumbersome process under the Defense Production Act by which a company can obtain antitrust immunity for certain agreements that are needed to fulfill the goals of the DPA.[4] Under the DPA, a "voluntary agreement" will have antitrust immunity if (1) it has a government sponsor, the U.S. Department of Health and Human Services or the U.S. Department of Homeland Security, (2) it is developed at public meetings in collaboration with the government; and (3) is subject to ongoing oversight.

On April 13, the agencies issued another statement, titled "Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets."[5] In it, the agencies make it clear that while certain information may be shared and certain agreements entered into, they will not "tolerate anticompetitive conduct that harms workers, including doctors, nurses, first responders, and those who work in grocery stores, pharmacies, and warehouses, among other essential service providers on the front lines of addressing the crisis."

The statement noted that examples of such conduct includes "agreements to suppress or eliminate competition with respect to compensation, benefits, hours worked, and other

terms of employment, as well as the hiring, soliciting, recruiting, or retention of workers."[6]

What Does This All Mean?

In many ways, not much has changed substantively, yet the risk of, and the penalty for, crossing the antitrust line has increased substantially.

Substantively, competitor collaborations that, on balance, are pro-competitive remain valid and legal. Similarly, a company may generally do what it pleases if it does so unilaterally, unless it has substantial market power and engages in exclusionary conduct that lacks any legitimate business justification. The agencies confirmed that many collaborations related to COVID-19 will likely be appropriate, as permissible collaborations can include those related to:

- production and logistics;
- research and development efforts;
- sharing of technical know-how;
- standards for patient management in the health care setting, especially those related to clinical decision-making; and
- joint purchasing agreements.

The question is how to ensure that your collaboration is appropriate under the antitrust laws. And while all such issues are highly fact-specific, and there is therefore no way to cover every situation, the following suggestions should help.

First, be very clear, and honest, about your objective. Ask yourself why you are doing this and whether you would be doing this absent COVID-19.

Document what you are trying to accomplish and why conduct or collaboration is really necessary to achieve your stated goals. Contemporaneous documents are always powerful evidence and if your documents reflect well thought-out plans and careful consideration given to achieve pro-competitive benefits while minimizing anti-competitive effects, the better chance you have of prevailing down the line. Vet these objectives with counsel and make sure everyone involved is on board with what you are trying to accomplish and why.

Second, be honest about whether the current collaboration will have effects even after the crisis has passed or in markets that are not affected by the crisis. Care should be

particularly taken if the action you take in conjunction with your competitors will "correct" the market or "stabilize" prices in ways that you could not have achieved previously. If the old adage "do not let a good crisis go to waste" appears to motivate the collaboration, you should seek counsel's advice on whether the collaboration should proceed.

Often, the collaboration will involve sharing of information. The antitrust laws permit such sharing if it leads to pro-competitive and efficient outcomes and is not likely to lead to anti-competitive consequences, such as higher prices, lower output or reduction in quality, or innovation.

In the current environment, sharing information regarding best practices for addressing COVID-19 will typically not raise antitrust concerns. But, the parties must consider: Will that information be relevant after the crisis or the need for the collaboration has passed? Is the information competitively sensitive?

Consider using a third-party to gather the information, instead of the competitors sharing directly. That third-party could then report back to the collaborators in a manner that will facilitate the collaboration but will not allow the parties to use the information competitively. It will also cut down on the number of direct communications, reducing the chances for errant remarks or discussions.

Third, ensure that the collaboration or information-sharing is narrowly tailored to achieve the pro-competitive objectives, both in scope and duration. Similarly, you must ensure that there is no spillover into markets and time periods (i.e., post-COVID-19) that do not require such collaboration.

While certain collaborations may make the transition back to normalcy easier, they may also restrict competition needlessly. For instance, an agreement among competitors not to poach each other's furloughed employees might make it easier to restock a company's labor force, but would also likely be seen as anti-competitive, just as in ordinary times.

The point is that pro-competitive collaboration or information-sharing does not give companies carte blanche to stop competing vigorously. Nor does the current pandemic. Indeed, even if the pandemic is ongoing but the need for collaboration ceases, the fact that the crisis still exists does not justify continuing the collaborative activity.

Dozens, if not hundreds, of lawsuits will be filed second-guessing the scope and need for companies' collaborative activities. Engaging in that second-guessing now will save your company in the end. And that second-guessing should cover all areas of the collaboration, including the number of times the competitors need to meet to discuss the situation, the timeliness of any information shared, the type of information shared, the need to report back on results, and the need for an agreement at all, just to name a few.

Similarly, companies should also be careful about withholding access to certain facilities they normally make available to competitors. While such restrictive access may be justifiable, it could also lead to claims of monopolization and/or conspiracies to rid the market of a competitor. In such situations, the most pressing question will be why access is being denied or limited now or why companies are refusing to do business with that competitor/supplier now. There may be good and justifiable reasons, but it would be wise to discuss them with antitrust counsel first.

Fourth, as with trade association meetings where competitors meet to discuss industrywide issues, use agendas, vetted by counsel, for meeting and discussions with competitors. It

may pay to have counsel on the line as well to ensure that discussions do not go astray, even inadvertently. If warranted, create minutes after the meeting to document that nothing untoward was said or discussed.

Fifth, consider seeking a DOJ business review letter or FTC staff advisory opinion. While they are not binding in the sense that they provide no immunity from the antitrust laws nor even prevent the agencies from changing their minds, they are nevertheless extremely valuable in understanding the risks of the collaborative activity. Additionally, if one is issued in favor of the conduct (i.e., the agencies have no intention to stop it), it will likely deter civil suits from being filed.

And the agencies have been true to their word in expediting such reviews. For instance, the largest distributors of personal-protective gear and medications — McKesson Corporation, Owens & Minor Inc., Cardinal Health Inc., Medline Industries Inc., and Henry Schein Inc. — received a business review letter from DOJ under these expedited procedures on April 4, stating that the DOJ had no intention to challenge their collaborative effort to "expedite and increase manufacturing, sourcing, and distribution of PPE and COVID-19-treatment-related medication essential to protect Americans' health and safety."[7] The request had been made on March 30.

On April 20, the DOJ issued similar guidance to Amerisource Bergen regarding their efforts to "to identify global supply opportunities, ensure product quality, and facilitate product distribution of medications and other healthcare supplies to treat COVID-19 patients."[8] That request was made April 14.

Finally, we cannot stress enough that you must be careful about what you say in your documents. Jokes about correcting the markets or ridding the market of pesky competitors may not be taken lightly by post-COVID-19 juries. Certainly, comments about "taking advantage" of the current situation, even if meant as gallows humor, will not be seen as such when read a few years from now and could cost a company dearly.

Continue to stress the pro-competitive mission to those involved in the collaboration and ensure that the tone and substance of communication related to that (and really all) activity reflect the seriousness of the matter and the desire to adhere to the antitrust laws.

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[1] https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19

[2] https://www.justice.gov/atr/page/file/1098461/download

[3] https://www.justice.gov/atr/page/file/1197731/download

[4] 50 U.S.C. §4558(j).

[5] https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-bureau-competition-federal-trade-commission-antitrust-division-department-justice/statement_on_coronavirus_and_labor_competition_04132020_final.pdf?utm_source=govdelivery

[6] Id.

[7] https://www.justice.gov/atr/page/file/1266511/download

[8] https://www.justice.gov/opa/pr/justice-department-issues-business-review-letter-amerisourcebergen-supporting-distribution