COVID-19: Collaboration Among Competitors

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On March 24, 2020, the Antitrust Division of the U.S. Department of Justice (the "Antitrust Division") and the Bureau of Competition of the Federal Trade Commission (the "Bureau"; collectively the "Agencies") issued a "Joint Antitrust Statement Regarding COVID-19" ("Joint Statement") recognizing that addressing the spread of the novel coronavirus (COVID-19) may require "unprecedented cooperation" between private businesses, including competitors. In their Joint Statement, the Agencies referred to of the Antitrust Division's "Business Review " and the Federal Trade Commission's (FTC) "Advisory Opinion" processes, through which parties can ask the Agencies to evaluate proposed conduct and receive statements advising whether the Agencies would challenge the conduct under the antitrust laws. The Agencies stated they "aim to respond expeditiously to all such COVID-19-related requests" related to proposed collaborations, and to resolve those requests that address public health and safety within seven calendar days, rather than the several months such requests typically take.

In addition, the Agencies referred to the National Cooperative Research and Production Act (NCRPA), which provides protections from possible antitrust damages for R&D or production joint ventures that notify the Antitrust Division and the FTC in advance of their activities.

HOW CAN BRG HELP?

As firms respond during the COVID-19 crisis to help meet demand for health and safety products or to recover from the financial and economic impacts, they may need to consider entering into joint ventures or other types of efficiency-enhancing collaborations with competitors for production, distribution, R&D, sales, or purchasing. BRG professionals provide broad-based economic, industry, and data analytics expertise to assist with Antitrust Division or FTC reviews. They can work to quickly evaluate the overall competitive effects of such agreements among competitors.

- BRG professionals can help determine if a collaborative agreement or sharing of information falls within the antitrust "safety zone" by defining the relevant markets, analyzing data, and calculating the requisite statistics.
- BRG professionals can analyze agreements under the "rule of reason" and assess the overall (net) competitive effect of collaborations by:
    - > Defining the relevant markets
    - > Calculating market shares and concentration indicia and assessing barriers to entry to determine if the agreement may create or increase market power
    - > Assessing the ability and incentives for participants to compete
    - > Analyzing and quantifying prices, output, and/or quality with and without the collaboration to assess anticompetitive effects, if any
    - > Analyzing and quantifying potential procompetitive benefits

KEY TAKEAWAYS FROM EXISTING DOJ AND FTC GUIDANCE

To assess cooperative agreements among competitors when responding to the COVID-19 crisis, the Agencies' Joint Statement referred to the DOJ/FTC 2000 *Antitrust Guidelines for Collaborations Among Competitors ("Antitrust Collaboration Guidelines"),* the DOJ/FTC 1996 *Statements of Antitrust Enforcement Policy in Health Care,* and an FTC statement concerning information exchange.[1]

Below are some key takeaways from this guidance for firms to keep in mind when considering or entering into collaborative agreements and exchanging information with competitors.

WHAT CONSTITUTES ANTITRUST "SAFETY ZONES" FOR COMPETITOR COLLABORATION IN THE U.S.?

- The DOJ and FTC have established antitrust "safety zones" to identify agreements among competitors that, absent extraordinary circumstances, they will not challenge, including:
  - > When the market shares of the collaboration and its participants account for no more than 20 percent of each relevant market where competition may be affected; or
  - > When at least three independently controlled research efforts, in addition to the collaboration, possess specialized assets or characteristics and incentives necessary to engage in R&D that is deemed a "close substitute."[2]
- Most joint purchasing agreements among healthcare providers, particularly those that reduce transaction costs or secure volume discounts, do not raise antitrust concerns.[3]
  - > Purchasing agreements among healthcare providers fall within an antitrust "safety zone" if: (i) purchases account for less than 35 percent of total sales in the relevant market; and (ii) the cost of the products and services purchased jointly accounts for less than 20 percent of total revenue from all products and services sold by each competing participant.[4]
- Information exchanges fall within an antitrust "safety zone" if:
  - > The exchange is managed by a third party;
  - > The information provided is more than three months old; and
  - > At least five participants provide the data underlying each shared statistic, no single provider's data contributes more than 25 percent of the "weight" of any statistic, and the shared statistics are aggregated so that no one participant can discern the data of another participant.[5]

COLLABORATION OUTSIDE OF ANTITRUST "SAFETY ZONES" CAN BE PROCOMPETITIVE OR COMPETITIVELY NEUTRAL.

- The DOJ and FTC recognize a variety of procompetitive benefits from competitor collaboration, including the offering of goods and services at lower prices, higher quality, and faster time to market.
- Agreements not considered *per se* illegal (discussed below)—and agreements that might otherwise be deemed *per se* illegal, but that are "reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity"—are examined under the "rule of reason."[6]
  - > A "rule of reason" analysis assesses the anticompetitive effects of the collaboration, and if any, weighs them against procompetitive benefits to determine the overall net impact of the collaboration on competition.
  - > Under the "rule of reason," the DOJ and FTC start by examining the nature of the agreement, including its business purpose and the participants' intent.

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1 Bloom, Michael, "Information Exchange: Be Reasonable," FTC Bureau of Competition (December 11, 2014), available at: https://www.ftc.gov/news-events/blogs/competition-matters/2014/12/information-exchange-be-reasonable
2 Federal Trade Commission (FTC) and Department of Justice (DOJ), *Antitrust Guidelines for Collaborations Among Competitors* (April 2000), pp. 26–27, available at: https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf
3 DOJ and FTC, *Statements of Antitrust Enforcement Policy in Health Care* (August 1996), p. 53, available at: https://www.justice.gov/atr/page/file/1197731/download
4 *Id.*, pp. 54–55.
5 Bloom (2014).
6 FTC and DOJ (2000), pp. 4, 8.

  - > If the initial examination raises competitive concerns, then they conduct a detailed market analysis that typically defines the relevant markets, calculates market shares and concentration, assesses the nature of competition and any entry barriers, and examines other market factors that affect participating firms' incentives and abilities to compete.
  - > Collaboration on R&D is typically procompetitive.
- The "reasonableness" of information exchanges depends on the nature of the information being shared. All else equal:
  - > Sharing of company-specific data is more likely to raise concerns than sharing of aggregate data.
  - > Sharing of information related to prices, output, customers, costs, or strategic planning is more likely to raise competition concerns than sharing of less-sensitive information.
  - > Sharing of current operating and future business plans is more likely to raise competition concerns than sharing of past information.[7]
- Agreements that the DOJ/FTC have found "always or almost always" raise price or reduce output, such as horizontal agreements among competitors to fix prices or output, rig bids, or share or divide markets, are considered anticompetitive and therefore are more likely to be challenged by the DOJ/FTC as *per se* illegal. This includes potential criminal prosecution by the DOJ.[8]

7 *Id.*, pp. 15–16.
8 *Id.*, p. 3.

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