COVID-19: Antitrust Considerations for Competitor Collaborations

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Overview of Competitor Collaborations

- **As COVID-19 has spread throughout the country and the world, competitors may want, need or be asked to cooperate in various endeavors**
  - Competitors may want to benchmark best practices for safely distributing products
  - Competitors may seek to jointly produce or sell high-demand medical equipment and supplies
  - Competitors may wish to undertake joint research and development initiatives for a vaccine or antivirals
- **In typical circumstances, collaboration among competitors could raise antitrust concerns**
  - Certain collaborations, such as price-fixing, bid-rigging and market-allocation agreements, are per se unlawful
  - Most other competitor collaborations are analyzed under the rule of reason
    - The U.S. Department of Justice ("DOJ") and the U.S. Federal Trade Commission ("FTC") considers whether the agreements have caused or could cause anticompetitive harm
    - If there is evidence of actual or potential anticompetitive harm, the Agencies will assess whether the collaboration is "reasonably necessary" to achieve procompetitive benefits that will likely outweigh any anticompetitive harms
- **This presentation addresses special antitrust considerations that may arise as competitors seek to collaborate in response to COVID-19**

Antitrust Reprieves During Times of War and Emergency

- **Historically, in times of war or national emergencies, the government has addressed antitrust collaboration concerns through legislation or agency action**
  - The Lever Act, passed during World War I, authorized the President to regulate the "supply, distribution, and movement" of food. The Wilson Administration relied on cooperation among private industry in furtherance of these wartime efforts
  - Shortly before the United States entered World War II, the Attorney General immunized from antitrust scrutiny actions taken in compliance with specific requests by public authorities, provided the "general character" of the actions were cleared first with DOJ
  - Following Hurricanes Katrina and Rita, DOJ and FTC committed to respond to requests from businesses for expedited antitrust guidance within five business days on specific proposed conduct relating to hurricane relief

- **DOJ and FTC recently took similar steps in response to COVID-19. In particular, the Agencies released a Statement detailing an expedited antitrust procedure and providing guidance for business collaborations that aim to "protect the health and safety of Americans"**

DOJ & FTC Guidance for COVID-19

On March 24, 2020, DOJ and FTC issued a joint Statement to address the ways in which "firms, including competitors, can engage in procompetitive collaboration that does not violate the antitrust laws." In particular, the Agencies:

- **Committed to Providing Expedited Guidance**
  - DOJ/FTC will aim to respond expeditiously to all COVID-19-related requests, and to resolve requests addressing public health and safety within seven days of receiving all necessary information
- **Committed to Expediting the Review Process for Joint Ventures and Standard Development Orgs.**
  - DOJ/FTC will work to process expeditiously filings for joint ventures and standard development organizations under the National Cooperative Research and Production Act (as amended by the Standards Development Organization Advancement Act)
- **Reiterated the Procompetitive Benefits of Certain Collaborations**
  - The Agencies reiterated that certain collaborations, such as R&D ventures and sharing technical know-how, are likely procompetitive
  - Absent extraordinary circumstances, DOJ/FTC will not challenge healthcare providers' development of suggested practice parameters
  - Most joint purchasing arrangements among healthcare providers similarly do not raise antitrust concerns
- **Reiterated the Value of Private Lobbying**
  - DOJ/FTC explained that the federal antitrust laws generally permit private lobbying for the use of federal emergency authority, including private industry meetings with the federal government to discuss strategies for responding to COVID-19

DOJ & FTC Guidance for COVID-19

- **Committed to Account for Exigent Circumstances**
  - DOJ/FTC recognized that competitors may need to temporarily combine production, distribution or service networks to facilitate care and the production/distribution of COVID-19-related supplies
- **Recognized Private Industry May Be Enlisted to Help**
  - Committed to assisting when the government enlists help from private businesses, including by working with the Department of Health and Human Services to effectuate the Defense Production Act and the Pandemic and All Hazards Preparedness Act
- **Cautioned Against Unlawful Schemes**
  - The Agencies emphasized that they will not hesitate to hold accountable individuals and businesses who view COVID-19 as an opportunity to subvert competition or prey on vulnerable Americans
  - DOJ/FTC will aggressively pursue civil and criminal enforcement actions as necessary

Relevant Considerations for Collaborations Today

In light of DOJ and FTC's recent COVID-19 Statement, companies may wish to consider the following points as they assess opportunities to cooperate and collaborate in response to COVID-19

- **Is the proposed collaboration immune from antitrust scrutiny?**
  - Certain statutory and doctrinal antitrust immunities and defenses are likely to be particularly relevant to collaborations undertaken in response to COVID-19
  - For instance, the President may authorize organizations to make "voluntary agreements and plans of action to help provide for the national defense" pursuant to the Defense Production Act of 1950. A person acting to develop and implement such agreements and plans may have a statutory defense to criminal or civil antitrust liability
- **If the proposed collaboration is not immune, is it generally perceived favorably by antitrust enforcement authorities?**
  - Even if not immune from federal antitrust scrutiny, some collaborative conduct is generally presumed to be procompetitive
  - Joint research and development, for example, is ordinarily quite easy to justify under the antitrust laws
- **Is the proposed collaboration presumptively unlawful?**
  - Certain presumptively anticompetitive behavior may be met with particularly sharp scrutiny during the COVID-19 outbreak
  - DOJ has already made clear, for instance, that it will not tolerate price-fixing, bid-rigging or other illegal profiteering in response to COVID-19

Antitrust Immunities and Defenses

The below list of defenses/immunities may be particularly relevant for collaborations undertaken in response to COVID-19

- **Defense Production Act of 1950 ("DPA")**
  - "Upon finding that conditions exist which may pose a direct threat to the national defense or its preparedness programs, the President may consult with representatives of industry, business, financing, agriculture, labor, and other interests in order to provide for the making by such persons, with the approval of the President, of voluntary agreements and plans of action to help provide for the national defense." 50 U.S.C. § 4558(c)(1)
  - Actions taken to develop or carry out such agreements or plans are exempt from civil and criminal antitrust scrutiny, provided a number of statutory requirements are satisfied. *Id.* § 4558(j)
  - The person asserting the defense bears the burden of proof, and the defense is not available if the person against whom the defense is asserted shows that the challenged "action was taken for the purpose of violating the antitrust laws." *Id.* § 4558(j)(3),(4)
  - In their COVID-19 Statement, DOJ/FTC committed to assisting in situations where the government has enlisted help from private businesses pursuant to the DPA
- **State-Action Doctrine**
  - Business activity subject to state government regulation or direction may be exempt from federal antitrust scrutiny
  - The challenged activity must be "clearly articulated and affirmatively expressed as state policy," and the state must "supervise actively any private anticompetitive conduct." *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 57 (1985)
  - This may encompass activity that is permitted by, but not compelled by, a particular state policy. *Id.* at 61

Antitrust Immunities and Defenses

- ***Noerr-Pennington* Immunity**
  - Concerted activity to lobby or influence government is exempt from federal antitrust immunity, provided such efforts are not "objectively baseless and intended only to burden a rival with the governmental decision-making process." *See, e.g.*, *Davric Maine Corp. v. Rancourt*, 216 F.3d 143, 147 (1st Cir. 2000)
  - In their recent Statement, DOJ/FTC reiterated the value of such lobbying and made clear private industry may meet with the federal government to discuss COVID-19 strategies, provided such activities "comprise[] mere solicitation of governmental action with respect to the passage and enforcement of laws." *E. R. Conf. v. Noerr Motors*, 365 U.S. 127, 138 (1961)
  - Such immunity may also apply to state antitrust laws, depending on whether the doctrine is grounded in the First Amendment. *Davric*, 216 F.3d at 148 n.7

- **National Cooperative Research and Production Act of 1993 ("NCRPA")**
  - This Act establishes certain protections for joint research, development or production venture, provided the participants provide written notification to the Attorney General and FTC, do not exchange unnecessary competitively sensitive information and do not enter into certain restrictive agreements or engage in certain restrictive conduct. 15 U.S.C. §§ 4301-4306
  - The rule of reason applies to federal antitrust suit relating to covered ventures, and recovery is limited to actual damages, interest and reasonable attorneys' fees. *Id.*
  - The rule of reason also applies if suit is brought under "any State law similar to the [federal] antitrust laws." *Id.* § 4302
  - DOJ and FTC committed to "expeditiously process" COVID-19-related filings under the NCRPA

- **Pandemic and All Hazards Preparedness and Advancing Innovation Act 2019 ("PAHPAIA")**
  - This Act provides a limited antitrust exemption for "meetings and consultations with persons engaged in the development of a security countermeasure . . ., a qualified countermeasure . . ., or a qualified pandemic or epidemic product . . . for the purpose of the development, manufacturer, distribution, purchase, or storage of a countermeasure or product." 42 U.S.C. § 247d-7f
  - In their COVID-19 Statement, DOJ/FTC committed to assisting in situations where the government has enlisted help from private businesses pursuant to the PAHPAIA

Potentially Desirable Cooperative Activities

Even absent immunity or a statutory defense, certain cooperative conduct may be particularly desirable in light of the COVID-19 outbreak

- **Benchmarking**
  - Such as sharing best practices for workplace safety during the outbreak
    - Benchmarking is analyzed under the rule of reason
    - When considering anticompetitive potential, relevant considerations include the timeframe and specificity of the information being shared, whether it is publicly available and the context for the exchange
    - These practices are generally procompetitive and thus not frequently investigated. FTC/DOJ recently reiterated in the COVID-19 Statement the value of certain information sharing, particularly as to “technical know-how”

- **Practice Parameters**
  - Such as developing standards for patient management to help providers in clinical decision-making
    - Providing such information poses little risk of restraining competition and may help in the development of protocols that increase quality and efficiency
    - DOJ/FTC explained in the COVID-19 Statement that they will not challenge such activity, absent extraordinary circumstances

Potentially Desirable Cooperative Activities

- **Joint Purchasing, Marketing/Selling or Production**
  - Such as jointly purchasing raw materials for a vaccine; jointly selling products to the government or public when doing so would widen distribution channels and shorten distribution time; or combining complementary technologies or know-how to more efficiently manufacture medical equipment or protective gear
    - DOJ and FTC generally do not challenge competitor collaboration when the market shares of the collaboration and its participants account for no more than 20% of each relevant market in which competition may be affected
    - This safety zone is not intended to discourage competitor collaborations that lead to market share above 20%. There is good reason to believe that the exigencies of COVID-19 would justify joint ventures with higher market share, provided there are clear procompetitive benefits
    - Indeed, in their COVID-19 Statement, FTC/DOJ noted that most joint purchasing agreements among healthcare providers would not raise antitrust concerns
    - Still, production and marketing/selling collaborations that involve agreements on level of output, price or other competitively sensitive variables, or joint purchasing agreements that create or significantly increase the buyers' ability to drive the price of the purchased product or collude on costs, may continue to raise antitrust concerns

- **Joint Research and Development**
  - Such as combining complementary assets, technology or know-how to develop much-needed goods, services and production processes
    - This is generally the easiest type of collaboration to justify because the procompetitive benefits of joint R&D so often outweigh any anticompetitive harm. DOJ/FTC emphasized the procompetitive value of joint R&D initiatives in their COVID-19 Statement
    - DOJ and FTC have created a special safe harbor for R&D collaborations: "Absent extraordinary circumstances, the Agencies do not challenge a competitor collaboration on the basis of effects on competition in an innovation market where three or more independently controlled research efforts in addition to those of the collaboration possess the required specialized assets or characteristics and the incentive to engage in R&D that is a close substitute for the R&D activity of the collaboration"

Prohibited Activities

- **Attorney General William P. Barr has warned businesses against "tak[ing] advantage of emergency response efforts, healthcare providers, or the American people during this crucial time"**
- **DOJ is particularly focused on price-fixing, bid-rigging and market-allocation agreements**
- **DOJ also recently announced a Procurement Collusion Strike Force, which will be "on high alert for collusive practices in the sale of [public health] products to federal, state, and local agencies"**
- **Companies should make sure to steer clear of per se unlawful schemes, which will face heightened law enforcement and public affairs scrutiny during the COVID-19 outbreak**

The Dos And Don'ts of Collaboration

In general, companies can take steps to minimize antitrust risk when collaborating with competitors

- **Do not share competitively sensitive information (*e.g.*, recent, current or future prices, cost data, output levels or strategic planning)**
- **Any information that is shared should be in furtherance of procompetitive benefits or the public good**
- **Where possible, aggregate and anonymize non-public data and use third parties to facilitate the transfer of such information, all of which may lessen DOJ and FTC concerns about potential anticompetitive harms**
- **All discussions about benchmarks or best practices should be framed as voluntary, and it should be clear that each participant must decide for itself whether to implement the recommendations**
- **Do not engage in discussions that could be interpreted as agreements to boycott non-conforming firms or efforts to allocate customers, suppliers, territories or lines of commerce**
- **Retain antitrust counsel to monitor inter-firm communications**

Summary

- **The COVID-19 pandemic may require innovative collaborations among competitors within and across many industries**

- **The U.S. DOJ and FTC have released a Statement to assist firms seeking to collaborate in response to COVID-19 without running afoul of the federal antitrust laws**

- **In light of that Statement, companies interested in collaborating with competitors should:**
  - Consider whether any existing statutory or doctrinal immunities or defenses apply to the proposed collaboration
  - Absent immunity, consider whether potential procompetitive benefits outweigh any anticompetitive harms, while recognizing that there may be more significant procompetitive value to a COVID-19-related collaboration now than in typical times
  - In all events, avoid price-fixing, bid-rigging, group boycotts or market allocation schemes

CRAVATH

Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
+1-212-474-1000 Phone
+1-212-474-3700 Fax

CityPoint
One Ropemaker Street
London EC2Y 9HR England
+44-20-7453-1000 Phone
+44-20-7860-1150 Fax