

ANTITRUST

Expert Analysis

Competitor Collaborations During Covid-19 Crisis

In addition to tragic loss of life and grave social costs, the Covid-19 pandemic has disrupted many markets and distribution channels, causing companies and governmental entities to consider the benefits of short-term cooperation in their efforts to respond to the crisis. At the same time, antitrust laws remain in effect, requiring careful review of competitor collaborations. In some cases, special exceptions or procedures have been instituted to enable critical collaborations, while in others, traditional antitrust jurisprudence has been applied. The analysis, as with most antitrust matters, involves fact-specific inquiries and understanding the nature of the markets at issue. During these unprecedented times, assessing likely competitive effects on those markets requires examination and consideration of exceptional momentary conditions. Conduct that may harm competi-

tion under normal circumstances may not have the same effect during extraordinary times.

The Antitrust Division of the U.S. Department of Justice (“DOJ”) provided expedited review of a plan by drug and medical equipment distributors to speed up the supply of protective gear and medications. The Australian competition authority authorized banks to cooperate to provide relief packages for borrowers affected by Covid-19. The European Commission will temporarily permit joint market stabilization measures in some agricultural sectors. And the British government announced a temporary “relaxation” of some competition rules to permit supermarkets to exchange data on stock levels,

share distribution assets, and pool staff.

While the likelihood that a given collaboration will pass muster depends on its specific facts and the distinct laws and regulations of each jurisdiction, several key considerations stand out:

- The collaboration among rivals is directly related to solving a critical problem caused by the pandemic.
- The goals of the collaboration could not be accomplished reasonably and efficiently without cooperation among competitors.
- The collaboration is short-lived, lasting no longer than necessary.
- The collaboration is not expected to reduce output or raise prices to consumers.

Like private companies, state governments may contemplate addressing unusual and unexpected events by cooperating instead of outbidding one another for scarce yet essential supplies. To avoid the risk of running afoul

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of antitrust law, states may explore the requirements for immunity from antitrust scrutiny under the state-action doctrine.

Medical Supplies

In the U.S., DOJ announced in a business review letter that it will not challenge the joint efforts of medical supplies distributors to expedite and increase manufacturing, sourcing, and distribution of personal-protective equipment (PPE) and coronavirus-treatment-related medications as part of an emergency response developed by U.S. government agencies.

The distributors' request for a business review letter explained that the collaboration would enable them to address scarcity and bring products to market faster than they could absent joint conduct. The request added that the distributors could make better use of existing assets by collaborating. The distributors emphasized that the collaboration would be limited to Covid-19-related efforts and would not last longer than necessary. DOJ business review letters typically require months of review and analysis, but under the temporary, expedited review procedure, the work was completed within days.

In this case, while the process was expedited, the analysis relied on traditional factors used to evaluate legitimate collaborations, including creating efficiencies and

enabling the supply of products that would otherwise not be available to the market, as set out in the U.S. agencies' guidelines for collaborations among competitors issued in April 2000.

Supermarkets

The U.K. government announced a "relaxation" of competition law rules, allowing grocery retailers to "feed the nation" by sharing data on stock levels, cooperating to keep stores open, and sharing distribution centers and delivery vehicles. The temporary waiver would also allow supermarkets to "pool staff with one another to help meet demand." The U.K. Competition & Markets Authority ("CMA") welcomed the governmental action and assured businesses that for collaborations "not covered by that legal relaxation . . . the CMA has no intention of taking competition law enforcement action against cooperation between businesses or rationing of products to the extent that this is necessary to protect consumers."

Banking

In another swift, pandemic-related action, the Australia Competition and Consumer Commission ("ACCC") provided conditional authorization for the Australian Banking Association and banks to coordinate to provide relief packages to customers affected

by Covid-19. Under the arrangement, among other things, banks will defer the principal and interest payments for small business loans of up to A\$3 million. Loans of up to A\$10 million by commercial property landlords also qualify for deferrals, as long as they do not terminate leases or evict tenants. The ACCC emphasized that, under the authorized arrangements, individual banks remain free to offer better, more tailored terms to their customers.

Agriculture

The European Commission stated that it will authorize the milk, flower, and potato industries to jointly take measures to stabilize the market. For example, the milk sector will be allowed to collectively plan milk production and the flower and potato sectors will be allowed to withdraw products from the market. However, these arrangements will be valid for only six months and consumer prices will be monitored closely to avoid adverse effects.

Failing Firms

The pandemic's dramatic impact on some businesses has altered the analysis of the likely effect of mergers as well. For example, in the U.K., the CMA had extended its investigation of Amazon's proposed investment in Deliveroo, a British restaurant and grocery delivery platform

that attained a significant share of the market, to study whether the transaction would substantially lessen competition. Deliveroo's financial condition deteriorated as a result of the pandemic and the CMA found that Deliveroo would likely exit the market without Amazon's investment. The authority provisionally determined that Deliveroo's exit would cause greater harm to competition than the possible diminution of Amazon's incentive to compete. It is not that the rules changed because of the pandemic, but that new facts – created by harsh and extreme economic conditions – must be considered when forecasting future market dynamics.

Taking Advantage

Many authorities around the world warned that companies should not exploit the crisis as a cover for unlawful conspiracies. In addition, collaboration that is not reasonably necessary to address critical pandemic-related concerns may not benefit from any special procedures or rules. For example, British authorities stated that exchanging data that go beyond what is needed to address current needs, such as longer-term pricing or business strategies, will not qualify for the “relaxation” of competition rules. In the U.S., the Federal Trade Commission and DOJ released a joint statement acknowledging

that the health crisis may require collaboration under some circumstances, but admonished that they will protect those on the front lines by enforcing antitrust laws against attempts to exploit the pandemic to disadvantage essential workers or engage in other anticompetitive conduct in labor markets.

State-Action Immunity

According to press reports, some states seeking to procure medical equipment and protective gear, including ventilators and masks, have encountered limited supplies and intensified demand, with states bidding against one another for scarce but essential products. Does antitrust law prohibit states from joint bidding under these circumstances? Unlike private businesses, whose collaborations must endure careful antitrust analysis or obtain a special waiver, states are immune from antitrust scrutiny, in many cases, under the state-action doctrine. The Supreme Court declared nearly eighty years ago that antitrust law does not apply to “state action or official action directed by a state.” *Parker v. Brown*, 317 U.S. 341, 351 (1943).

But not all state-sanctioned conduct is immune. Subordinate state agencies and private parties must act under a clearly articulated state policy that is actively supervised by the state. Among

other limitations on the doctrine, the courts have distinguished between state purchases “for use in traditional government functions” and “state purchases for the purpose of competing against private enterprise.” *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150, 154 (1983). The latter, “market participant” purchases, may not enjoy immunity from federal antitrust law. However, acquisition of medical equipment during a severe public health emergency may constitute a traditional government function, even if similar purchases by state hospitals in normal times may not.

Flexible Principles

The essential objective of antitrust law is preventing harm to competition and its key method is the evaluation of impact on markets. When markets fail to function normally due to an unexpected event, evaluation of competitive effects in the near term must adjust to new facts and, accordingly, temporary coordination among rivals may not unreasonably harm competition. When appropriately applied, traditional antitrust principles are flexible enough to reach common-sense results even during a pandemic.