Global Enforcers Acknowledge Need for Competitor Collaboration During COVID-19 Pandemic

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As the COVID-19 crisis continues to unfold, questions are arising concerning whether and to what extent firms may have greater latitude to collaborate with competitors to address public health and welfare concerns.

Today, the US announced antitrust guidance for the COVID-19 pandemic. To facilitate legitimate competitor collaboration, the Antitrust Division of the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") (collectively, "the Agencies") will respond to guidance requests within seven calendar days of receiving all necessary information. The Agencies also identified several collaborative activities that are traditionally consistent with the antitrust laws.

This follows yesterday's announcement from the EU, where the European Competition Network ("ECN") said that it "will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply."

United States

The DOJ and the FTC enforce the US federal antitrust laws. On March 24, 2020, the Agencies issued a **joint statement** announcing expedited antitrust procedures and competitor collaboration guidance for businesses working to protect Americans' health and safety during the COVID-19 crisis.

Of particular note, the DOJ and the FTC recognize that "health care facilities may need to work together in providing resources and services to communities without immediate access to personal protective equipment, medical supplies, or health care." The Agencies also recognize that, "other businesses may need to temporarily combine production, distribution, or service networks to facilitate production and distribution of COVID-19-related supplies they may not have traditionally manufactured or distributed."

As discussed below, the statement: (1) announces an expedited seven-day process for DOJ business review letters and FTC staff advisory opinions—the announcement does not appear to apply to Commission advisory opinions; (2) summarizes longstanding competitor collaboration guidance; (3) acknowledges that the Agencies "will account for exigent circumstances in evaluating efforts to address the spread of COVID-19 and its aftermath;" (4) reinforces the Agencies' intolerance for anticompetitive behavior; and (5) addresses the Agencies' collaboration with other US government actors.

Streamlined Review: The DOJ **Business Review Process** and the FTC **Advisory Opinion Process** create mechanisms for the Agencies to evaluate proposed conduct. While these processes generally take several months, the Agencies will aim to resolve within seven calendar days all COVID-19-related requests addressing public health and safety.

The FTC clarified that the streamlined process applies to expedited staff advisory opinions, which are issued by the Bureau of Competition. Typically, staff advisory opinions offer guidance on proposed business conduct. The expedited review does not appear to apply to Commission advisory opinions. Commission advisory opinions are "intended to address substantial or novel questions of fact or law, or subjects of significant interest," and are voted on by the Commission.

Long-standing Competitor Collaboration Guidance: For individuals and business who need to act more quickly, the Agencies summarize long-standing guidance on competitor collaboration. For example:

- Collaboration on research and development typically is procompetitive. Federal Trade Comm'n & U.S. Dep't of Justice, **Antitrust Guidelines for Collaborations Among Competitors** at 31 (2000) (noting the "efficiency-enhancing integration of economic activity.").
- Sharing technical know-how, but not company-specific price, wage, output, or cost information "may be necessary to achieve the procompetitive benefits of certain collaborations." *Id.* at 15
- For more than twenty years, the Agencies have identified an "Antitrust Safety Zone" for "[p]roviders' collective provision of underlying medical data that may involve purchasers' resolution of issues relating to the mode, quality, or efficiency of treatment." Federal Trade Comm'n & U.S. Dep't of Justice, **Statement of Antitrust Enforcement Policy in Health Care** at 41 (1996).
- Similarly, "[m]ost joint-purchasing arrangements among healthcare providers, such as those designed to increase the efficiency of procurement and reduce transaction costs," generally have not raised antitrust concerns." *Id.* at 53. Joint purchasing arrangements that create market power, facilitate price-fixing, or reduce competition, will raise concerns. *Id.*
- Finally, the *Noerr-Pennington* Doctrine, traditionally protects meeting with the federal government to respond to COVID-19, ""insofar as those activities comprise[] mere solicitation of governmental action with respect to the passage and enforcement of laws." *Eastern R. Conf. v Noerr Motors*, 365 U.S. 127, 138 (1961); *see also* FTC, Enforcement Perspectives on the *Noerr-Pennington* Doctrine: An FTC Staff Report (2006) (discussing applicability and limitations).

Novel Exigent Circumstances: The Agencies, "will also account for exigent circumstances in evaluating efforts to address the spread of COVID-19 and its aftermath." As discussed above, they recognize that "health care facilities may need to work together in providing resources and services to communities without immediate access to personal protective equipment, medical supplies, or health care." Similarly, "[o]ther businesses may need to temporarily combine production, distribution, or service networks to facilitate production and distribution of COVID-19-related supplies" outside of their traditional manufacturing and distribution channels.

While the Agencies do not specifically refer to these activities in terms of their pro-competitive benefits, they recognize that, "these sorts of joint efforts, limited in duration and necessary to assist patients, consumers, and communities affected by COVID-19 and its aftermath, may be a necessary response to exigent circumstances that provide Americans with products or services that might not be available otherwise."

Continued Antitrust Enforcement: The Agencies will act against individuals and businesses who use the COVID-19 pandemic, "as an opportunity to subvert competition or prey on vulnerable Americans." The Agencies, "stand ready to pursue civil violations of the antitrust laws, which include agreements between individuals and business to restrain competition through increased prices, lower wages, decreased output, or reduced quality as well as efforts by monopolists to use their market power to engage in exclusionary conduct." The DOJ also will "prosecute any criminal violations of the antitrust laws, which typically involve agreements or conspiracies between individuals or businesses to fix prices or wages, rig bids, or allocate markets."

Antitrust Collaboration with Other Agencies: The Trump Administration has invoked the **Defense Production Act**, a US law enacted in response to the start of the Korean War, to secure the manufacture and supply of essential medical equipment. Among other provisions, the Act **requires** the DOJ and the FTC to oversee voluntary agreements among industry members to solve production and distribution problems impairing national defense preparedness. The Act establishes a limited antitrust exemption for these voluntary agreements.

The Agencies will work with the Department of Health and Human Services to effectuate the Defense Production Act, and the **Pandemic and All Hazards Preparedness Act**, which contains a limited

antitrust exemption for certain government meetings to discuss, "security countermeasures, qualified countermeasures, or qualified pandemic or epidemic product development."

Consumer Protection Issues: The Federal Trade Commission enforces the federal antitrust laws and the consumer protection laws. While the DOJ reiterated that it will "address[] actions by individuals and businesses to take advantage of COVID-19 through other fraudulent and illegal schemes," the FTC clarified that the expedited staff advisory opinion process "does not relate to or alter" FTC efforts to "investigate fraudulent and deceptive activity involving COVID-19." More information on the Bureau of Consumer Protection's response to COVID-19 is available **here**.

Intellectual Property Issues: The joint statement does not specifically address the myriad intellectual property licensing issues necessary to facilitate competitor collaboration for high-technology devices, such as testing kits and ventilators. We recommend that companies continue to consult the Agencies' **Antitrust Guidelines for the Licensing of Intellectual Property**, and to use the Agencies' seven-day review process for specific concerns.

European Announcements

The ECN includes the European Commission and the national competition authorities in all EU Member States.[1] On March 23, 2020, the ECN issued a **joint statement** on the application of competition law during the COVID-19 pandemic.

Acknowledging "the social and economic consequences triggered by the COVID-19 outbreak in the EU/EEA," the enforcers announced "this extraordinary situation may trigger the need for companies to cooperate in order to ensure the supply and fair distribution of scarce products to all consumers." As a result, "[i]n the current circumstances, the ECN will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply."

The ECN announcement provides a number of insights into the ways that European competition authorities will take into account the COVID-19 crisis. The authorities announced that, "[c]onsidering the current circumstances," supply coordination efforts are "unlikely to be problematic" because they would either: (1) "not amount to a restriction of competition under Article 101 TTFEU/52 EEA," or (2) "generate efficiencies that would most likely outweigh any such restriction." Companies who are concerned about whether their collaboration initiatives will violate EU/EEA competition law are encouraged to contact the European Commission, the EFTA Surveillance Authority, or the national competition authority for guidance.

Like the US, the ECN stressed the importance of maintaining competitive prices for essential health products, such as face masks and sanitizer gel. It will "not hesitate" to act "against companies taking advantage of the current situation by cartelising or abusing their dominant position."

The ECN also noted that existing rules allow manufacturers to set maximum prices, which "could prove useful to limit unjustified price increase at the distribution level."

This joint announcement follows similar action taken by the UK, Germany, Greece, the Netherlands, and Norway, among others, to address the pandemic:

- Last week, the UK **relaxed its competition laws** to allow supermarkets to work together to "feed the UK." Retailers may share stock-level data, cooperate to keep stores open, share distribution depots and delivery vans, and pool staff to meet demand.
- The UK Competition & Markets Authority (CMA) separately **announced** that it "has no intention of taking competition law enforcement action against cooperation between businesses or rationing of

[1] Although the UK is no longer an EU Member State, it will continue to coordinate its activities with the ECN through to the end of the Brexit withdrawal period.

products to the extent that this is necessary to protect consumers", albeit stressing that "the CMA will not tolerate unscrupulous businesses exploiting the crisis as a 'cover' for non-essential collusion".

- The German Economy Minister Peter Altmaier has **indicated an interest** in facilitating cooperation among German retail outlets to secure supply.
- The Hellenic Competition Commission **announced** that it "will not take action" against "maximum resale prices or recommended prices on supply contracts and distribution agreements," if other conditions are met.
- The Netherlands' Authority for Consumers & Markets "is ready to answer any questions about collaborations that companies wish to launch to combat the crisis," and **warns** against companies who seek to take advantage of product scarcity.
- Finally, Norway has **granted temporary exemptions** in the transportation industry to allow Norwegian and SAS airlines to collaborate on route offers, among other things. (Norway is in the EEA, not the EU.)

Conclusions

Within the current climate, companies operating in the EU, US, and elsewhere may have some greater latitude to adopt necessary and temporary measures to address product scarcity or other public health and welfare concerns. We expect, however, that the authorities will continue to enforce the competition laws vigorously to address "naked" restraints of trade designed to take advantage improperly of the current crisis.

Those firms concerned about collaboration initiatives, such as price-sharing among competitors, should consult with counsel and consider contacting enforcement authorities for guidance. If the collaboration is intended to address supply issues, as opposed to price-gouging, the United States may account for the cooperation as a necessary response to COVID-19. In similar circumstances, the European Commission and the national competition authorities in all EU Member States likely will not intervene. We will update this alert as other global enforcers continue to issue guidance.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your usual Davis Polk contact.

Arthur J. Burke	+1 212 450 4352	arthur.burke@davispolk.com
Ronan P. Harty	+1 212 450 4870	ronan.harty@davispolk.com
Jon Leibowitz	+1 202 962 7050	jon.leibowitz@davispolk.com
Christopher Lynch	+1 212 450 4034	christopher.lynch@davispolk.com
Mary K. Marks	+1 212 450 4016	mary.marks@davispolk.com
Suzanne Munck af Rosenschold*	+1 202 962 7146	suzanne.munck@davispolk.com
Howard Shelanski	+1 202 962 7060	howard.shelanski@davispolk.com
Jesse Solomon	+1 202 962 7138	jesse.solomon@davispolk.com
Nicholas Spearing	+44 20 7418 1096	nicholas.spearing@davispolk.com

*Ms. Munck is admitted to practice in California, and is practicing in DC under the supervision of partners of the firm.