Antitrust Group

Milbank

Client Alert

Antitrust in the Time of COVID-19:
Antitrust Agencies Receptive to "Unprecedented Collaboration" but Will Continue to Prosecute Anticompetitive Conduct

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Businesses and industry associations are navigating critical production, procurement, logistics, and workplace challenges in responding to COVID-19. Coordinated industry responses and business collaborations may be necessary to address these challenges, but it is important that these efforts comply with the antitrust laws. In the last several days, antitrust authorities in the US and Europe have issued important guidance on interfirm collaborations that are intended to address the effects of the crisis, such as product scarcity, medical needs, research and development activities, joint purchasing, distribution, and logistics, and standards-setting activities. The US and EU antitrust authorities have made clear that they will continue to vigorously enforce the antitrust laws in the current environment, but they also will take account of the challenges caused by COVID-19 when assessing the potential competitive effects of collaborations. They are also ready to provide expedited guidance on the legality of proposed joint activities in response to COVID-19.

While some businesses may find it helpful to consult with the authorities on their proposed collaborations, in most cases experienced antitrust counsel can vet proposals and help to develop compliant arrangements without the need to involve the antitrust authorities. US and EU antitrust law provides considerable flexibility to engage in a range of collaborative activities to address industry challenges in the current environment. This alert provides a briefing on antitrust developments in response to COVID-19 and provides practical guidance for businesses and associations that are considering industry responses and collaborations at this time.

I. UNITED STATES

JOINT FTC AND DOJ STATEMENT ON COLLABORATION IN RESPONSE TO COVID-19

On March 24, 2020, the Department of Justice Antitrust Division ("DOJ") and Federal Trade Commission ("FTC") (together, the "US Antitrust Agencies") issued a joint statement on collaborative efforts to respond to COVID-19 (the "FTC/DOJ Joint Statement"). The FTC/DOJ Joint Statement provides important guidance and expedited processes for reviewing competitor collaborations including the following:

- "Unprecedented collaboration" between firms and government agencies will be necessary to ensure the US population's health and safety.
- Competitors may engage in collaborative activities to respond to COVID-19, such as joint ventures and joint purchasing, distribution, logistics, and standard-setting without violating the antitrust laws so long as, on balance, they are procompetitive.
- US Antitrust Agencies will provide expedited responses to:
    - Requests for vetting of proposed collaborations related to COVID-19 health and safety issues. Responses will be provided within seven (7) calendar days, instead of the typical months long process under the normal DOJ Business Review and FTC Advisory Opinion processes.
    - National Cooperative Research and Production Act notifications on proposed research and development and production joint ventures as well as standards development activities.
- Exigent circumstances of COVID-19 will be considered when evaluating proposed joint business plans especially if they are limited in duration and necessary to assist patients, consumers, and communities affected by COVID-19.
- Warning: US Antitrust Agencies will continue to vigorously enforce the US antitrust laws and prosecute cartels and other anticompetitive or fraudulent conduct using the full range of civil and criminal enforcement tools.

The complete Joint Statement is available here.

Even if not a direct response to COVID-19, companies may be considering a range of collaborative efforts to address the current challenging industry conditions. Companies considering collaborative efforts with competitors can take comfort in the fact that the US Antitrust Agencies traditionally have viewed many different types of competitor collaborations as permissible provided that the collaboration does not have market power and on balance, has procompetitive effects. *See* United States Department of Justice and Federal Trade Commission, Antitrust Guidelines For Collaborations Among Competitors, 64 Fed Reg 54483 (1999). Relevant types of collaboration in the current context may include:

- **Joint Research and Development**: when firms collaborate on research and development this "efficiency-enhancing integration of economic activity" is often viewed as procompetitive.
- **Voluntary Standards-Setting and Development of Technical Best Practices**: sharing technical know-how is generally permissible and may be necessary to achieve the procompetitive effects of certain collaborations. Voluntary standards-setting activities, including in the areas of workplace health and safety and patient medical care standards, generally are permissible.
- **Joint Purchasing, Distribution, and Logistics**: activities that reduce costs and increase efficiencies in procurement, distribution, and logistics are typically permissible.

Joint Lobbying Activities: In addition, pursuant to the *Noerr-Pennington* doctrine, coordinated efforts by industry participants to lobby government bodies typically are immune from antitrust challenge. However, participants should ensure that the collaboration does not extend beyond the lobbying effort and should avoid engaging in industry "self-help" as a complement to or substitute for government action (*e.g.*, avoid

actions or statements such as "if we don't qualify for emergency government aid, the industry may need to coordinate to reduce price volatility or limit production").

II. EUROPE

JOINT STATEMENT BY ECN ON THE APPLICATION OF COMPETITION LAW DURING THE CORONA CRISIS

On March 23, 2020, the European Competition Network ("ECN"), a cooperation forum that includes the European Commission ("Commission") and the national competition authorities of the EU Member States (including the UK during the post-Brexit transition period following January 31, 2020), issued a joint statement on the application of EU competition law during the corona crisis ("ECN Joint Statement")." Highlights include:

- The COVID-19 outbreak has resulted in an extraordinary situation that may trigger the need for companies to cooperate in order to ensure the supply and fair distribution of scarce products to all consumers.
- The ECN will, therefore, not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply.
- Such measures are, in any event, unlikely to be problematic under EU competition law because they either would not amount to a restriction of competition under Article 101 TFEU or likely would generate efficiencies that would outweigh any such restriction.
- The Commission or the national competition authorities of the EU Member States are willing to provide informal guidance to companies considering collaborative activities to ensure that they are permissible under EU competition law.
- However, the ECN will take action against companies taking advantage of the crisis situation by cartelizing or abusing their dominant position and will focus, in particular on products that are essential to protect the health of consumers (*e.g.*, face masks and sanitizing gel).

The complete ECN Joint Statement is available here.

Other competition authorities in Europe are pursuing similar initiatives aimed at maintaining the supply and fair distribution of scarce products and the protection of consumers:

- The United Kingdom announced on March 19, 2020 its approval of a competitor collaboration in response to COVID-19. The UK is permitting supermarkets to share competitively sensitive information, distribution centers and delivery vehicles, and pool employees temporarily to ensure that sufficient numbers of retail stores remain open with adequate stock. Additionally, on March 25, 2020, the UK Competition & Markets Authority ("CMA") published a guidance paper on business cooperation in response to COVID-19. The guidance paper exempts from enforcement certain collaborative activity during the crisis provided the activities are intended to benefit the public interest and consumers by ensuring the supply of scarce products during the pandemic and of are limited duration.
- In Germany, the Minister of Economic Affairs and Energy and the President of the German Federal Cartel Office have announced that, in the context of the current crisis, enforcement of competition law may be relaxed, particularly with respect to the food industry. Already, McDonalds Germany and the supermarket chain ALDI have started to cooperate by allowing McDonalds employees, who are unable to work at McDonalds while it remains closed, to take temporary employment at ALDI with an option to return to McDonalds after the crisis.

EU competition law also is sufficiently flexible to permit various types of cooperation between competitors in the ordinary course of business as well as in times of economic crisis. Under EU competition law, cooperative measures are permitted if (i) they result in certain efficiencies, (ii) they allow consumers a fair share of the resulting benefits, (iii) they are necessary for the attainment of the efficiencies, and (iv) they do not eliminate competition entirely. While any proposed collaboration requires a case-by-case

assessment, the recent announcements alongside existing soft law such as the Commission's Horizontal Guidelines offer helpful guidance in applying EU competition law to collaborative efforts during COVID-19.

"CRISIS CARTELS" ARE NOT PERMITTED

The economic and public health exigencies stemming from COVID-19 have raised the question of whether antitrust agencies in the US, the EU or elsewhere will permit the operation of so-called "crisis cartels." Agreements between competitors to limit production, fix prices, or allocate customers or geographic markets are unlawful *per se* under antitrust/competition laws around the globe. However, in times of severe economic dislocation, some jurisdictions have relaxed cartel enforcement or sanctioned cartel activity (*i.e.*, so called "crisis cartels") among competing firms to alleviate shortages and/or maintain the production of goods and services.

The FTC/DOJ Joint Statement recognizes that during this crisis some individuals and businesses may seek to exploit the vulnerable and undermine competition through abuse of market power or agreements between competitors to increase prices, lower wages or benefits, decrease production, or reduce quality. The US Antitrust Agencies have warned that cartels are not permitted even in a crisis and they remain vigilant and stand ready to prosecute all civil and criminal antitrust violations, as well as other fraudulent schemes.

The US response is consistent with the ECN Joint Statement and a growing number of statements and enforcement actions by national competition authorities against "crisis cartels." However, in response to COVID-19, some European governments have granted temporary exemptions from the application of the competition laws to collaborations between competitors:

- Norway has granted Scandinavian Airlines (SAS) and Norwegian Air a temporary exemption from the competition laws to ensure that transportation services for goods continues unimpeded.
- On March 27, 2020, the United Kingdom announced a temporary suspension of the competition laws allowing three ferry operators to collaborate in order to maintain vital ferry services for essential food, freight, and medical supplies between the Isle of Wight and the mainland. In particular, the operators are allowed to discuss and agree on routes and coordinate staff resourcing to ensure that ferries will still run regularly.

Antitrust authorities and governments around the world are considering a range of responses to the challenges faced by different industries in responding to COVID-19 and Milbank is monitoring these developments closely.

EMPLOYEES AND EMPLOYMENT PRACTICES

Employers responding to COVID-19 are dealing with novel questions in addressing employee and workplace disruption. While industry collaboration and information sharing among employers may be appropriate, it is important that employers continue to comply with the US antitrust laws. Notably, the US Antitrust Agencies' 2016 joint guidance on the application of the US antitrust laws to human resource functions (the "Guidance") highlights specific agreements and practices that typically violate Section 1 of the Sherman Act. These include employers reaching agreements on:

- Compensation or other terms of employment.
- Level and scope of employee benefits, including healthcare benefits.
- Hiring freezes, layoffs, and other labor force reductions.

Employers should be aware that directly exchanging information on these topics could lead to an inference of an unlawful agreement. A complete copy of the Guidance is available here. The DOJ and FTC also released a quick reference card which provides a list of "antitrust red flags" for companies and their HR departments to watch out for. The Milbank Antitrust Group Client Alert "Ensuring Antitrust Compliance in Employee Recruitment and Compensation" provides additional analysis of the Guidance and is available here.

Employers may collaborate and share information on a range of workplace related issues, including health and safety best practices, without raising antitrust concerns. Examples include:

- Technologies and best practices to facilitate "work from home" arrangements.
- Protocols for screening and testing employees.
- Best practices for provision and use of personal protective equipment.
- Technologies and best practices for cleaning and maintaining safe work environments.
- Industry lobbying efforts to obtain government assistance or to advocate for specific statutory interpretations or legislative outcomes, including in relation to employees.

Before undertaking any collaboration with a competitor, including other employers, it is prudent to assess the proposal with antitrust counsel to avoid creating unnecessary antitrust risks. The following checklist is a good place to start.

A Checklist for Collaborations

- What is the issue your business or organization is trying to solve?
- Does the solution involve collaboration or sharing information with competitors? Remember that your competitors include other firms competing for the same type of employees, as well as firms that compete for the same customers.
- Is a proposed collaboration with competitors necessary or likely to result in a better solution for customers (*e.g.*, increase the availability, quality, or security of products and services, or reduce transaction costs) or employees (*e.g.*, safer, more efficient working conditions)?
- Are solutions limited to what is necessary to address the issue defined?
- Do possible solutions involve lobbying the government for grants, changes in regulation, legislation, or litigation? If so, how are these lobbying efforts being organized? What safeguards are in place to ensure lobbying efforts do not spill over into private industry actions?
- Will solutions have any adverse impact on customers, employees, or competition? What will happen to price or output? Will customers have fewer or more choices?
- Do participants need guidance on appropriate/inappropriate topics for discussion? Would it be helpful for counsel to participate in initial meetings or provide ongoing supervision?
- Would targeted antitrust training be helpful for participants to identify potential issues and strategies to address these?

Milbank's antitrust group has extensive expertise in helping clients to quickly develop antitrust-compliant, practical solutions to exigent commercial circumstances and to provide guidance for competitor collaborations and industry efforts to respond to dynamic and distressed market circumstances. Please feel free to reach out to our key contacts below if you have any questions about actual or potential collaborations or coordination in your industry.

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