

Competitor Collaborations: Competition Agencies Respond to a Global Pandemic

March 2020

Authors: [J. Mark Gidley](#), [George L. Paul](#), [Rebecca Farrington](#), [Douglas M. Jasinski](#), [Trisha Grant](#), [Trina Shek Rizzo](#)

The COVID-19 outbreak has led to changes in how the US and other competition agencies around the world look at competitor collaborations. Despite these policy announcements, antitrust compliance is still a priority, and companies should continue to follow antitrust guidelines and sensitivities when collaborating with competitors.

Competitor Collaborations

The COVID-19 pandemic is leading firms around the world in industries such as healthcare, food retail, and distribution, to look at collaborations with competitors, customers, and suppliers as a reaction to increased demand in a more challenging business environment. In doing so, it is important for firms at all levels of the supply chain to continue to comply with antitrust laws.

Many jurisdictions, including the US, Canada, United Kingdom, and European Union, already have a permissible view toward procompetitive competitor collaborations. In reaction to the COVID-19 outbreak, several competition agencies have announced new policies to provide for expedited review of proposed collaborations or a relaxing of regulations to permit collaborations that will help maintain supply chains, distribute supplies equitably, reduce transaction costs, foster open lines of communication, and provide standard quality of care. Competition agencies, however, also will be on alert for anticompetitive behavior during this crisis, such as naked agreements on price fixing, bid rigging, restrictions on output, customer and territorial allocations, monopolization, or abuse of a dominant position.

Competitor Collaborations under the US Antitrust Laws

Many collaborations among competitors, and with suppliers and customers, can be procompetitive under the US Antitrust Laws.¹ In general, the Federal Trade Commission (“FTC”) and Department of Justice (“DOJ”) consider potential procompetitive benefits, potential anticompetitive harms, and overall competitive effects when analyzing agreements among horizontal competitors.²

Generally, the US antitrust agencies will not challenge, absent extraordinary circumstances, any joint purchasing arrangement where two conditions are present: (1) the purchases account for less than 35% of the total sales of the purchased product or service in the relevant market; and (2) the cost of the products and

¹ *US Dep’t of Justice & Fed. Trade Comm’n, Antitrust Guidelines for Collaboration Among Competitors* § 2.1 (2000) [hereinafter “Collaboration Guidelines”]; *US Dep’t of Justice & Fed. Trade Comm’n, Statement of Antitrust Enforcement Policy in Healthcare*, Statement No. 7 (1996) [hereinafter “Healthcare Guidelines”].

² *Collaboration Guidelines* § 2.

services purchased jointly accounts for less than 20% of the total revenues from all products or services sold by each competing participant in the joint purchasing arrangement.³

Joint purchasing arrangements and other collaborations can raise concerns where a collaboration possesses market power or exclusive access to an element essential to effective competition. Collaborations can also facilitate anticompetitive collusion by providing an avenue to discuss or exchange sensitive business information including pricing, cost, or customer data.

Global Competition Agency Responses to COVID-19 Pandemic

In light of the global COVID-19 pandemic, governments and antitrust enforcers are looking for ways to support the affected communities and economies while still encouraging robust competition. Given this unprecedented situation, many countries are willing to accept some joint collaboration between competitors to support such goals as maintaining supply chains, fairly distributing limited supplies, decreasing transaction costs, increasing communications, and standardizing quality of care.

The DOJ and FTC issued a joint statement providing for expedited review of proposed competitor collaborations within seven calendar days of receiving all necessary information because “there are many ways firms, including competitors, can engage in procompetitive collaboration that does not violate the antitrust laws.”⁴ Collaborative arrangements likely to be consistent with antitrust laws include:

- Research and development collaboration;
- Sharing of technical know-how (excluding company specific data on prices, wages, outputs, or costs);
- Development of provider practice parameters (e.g., standards for patient management);
- Joint purchasing agreements among healthcare providers; and
- Lobbying, including industry meetings with the federal government on responding to COVID-19.

More generally, joint efforts that are “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.”⁵ This suggests that truly limited duration collaborations tailored to the exigent circumstances will be treated deferentially.

Historically, the one downside of the DOJ business review and FTC advisory opinion processes has been that the parties must provide all necessary information to the DOJ or FTC and wait for a response prior to initiation of the collaboration. What remains to be seen under the new seven-day guidance is whether the DOJ and FTC move even faster than a seven-day review for a truly exigent emergency collaboration, particularly one with significant public health implications. We suspect that the agencies will make efforts to do so, but the proof will come with experience under the new guidance.

While a DOJ business review letter or FTC advisory opinion can assist the collaborating parties in defending against private civil antitrust challenges to a collaboration, the decision to seek a DOJ business review letter or FTC advisory opinion should be assessed on a case-by-case basis depending on the purpose and scale of the collaboration and the exigent circumstances involved.

The European Competition Network (“ECN”) issued a similar statement and noted, “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.”⁶ Due to the current COVID-19 pandemic, the ECN “will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply as such

³ Healthcare Guidelines, Statement 7(a). See also Collaboration Guidelines § 4.2. Note that this is not necessarily a maximum, but a safe harbor.

⁴ *Joint Antitrust Statement Regarding COVID-19*, US Dep’t of Justice & Fed. Trade Comm’n (March 24, 2020).

⁵ *Id.*

⁶ *Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis*, (March 23, 2020).

measures are unlikely to be problematic, since they would either not amount to a restriction of competition under Article 101 TFEU/53 EEA or generate efficiencies that would most likely outweigh any such restriction.”⁷

Other countries have followed suit in allowing some increased collaborative activity to address the unique circumstances of COVID-19, including Canada and South Africa.⁸ Others, such as the UK and Australia, are permitting immediate collaboration between supermarkets and grocery stores only.⁹

Antitrust Compliance as a Priority

The DOJ and FTC, as well as other competition agencies, continue to stress that firms must comply with antitrust laws even when collaborating in response to COVID-19. This is particularly true because the risk of private plaintiffs bringing an antitrust claim will continue to exist, even in light of recent statements by competition agencies. In general, competitors should avoid any agreements that could be deemed a *per se* violation of the antitrust laws, such as an agreement among competitors concerning prices, bids, output, wages and benefits, supply, or the allocation of markets or customers. During discussions and collaborations, competitors should limit the exchange of competitively sensitive information that might change the way they would price, bid, or perform outside of the collaboration. In all competitor collaborations, we strongly recommend documenting the pro-competitive, pro-consumer rationale and being able to substantiate it.

White & Case LLP
701 Thirteenth Street NW
Washington, District of Columbia 20005-3807
United States

T +1 202 626 3600

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⁷ *Id.* ECN members, including Austria, the Czech Republic, France, Germany, Greece, and Sweden issued statements incorporating the ECN guidance. See *Corona (Covid-19) and the Effects on Competition Law in Austria – Joint Action of the “European Competition Network (ECN),”* Federal Competition Authority (March 23, 2020) (“In the present situation, cooperation between competitors may be necessary to ensure the supply chain and to avoid impending supply shortages of scarce products.”); *Joint statement by the EU competition authorities associated in the European Competition Network (ECN) on the application of the competition rules during the COVID-19 pandemic*, Office for the Protection of Competition (March 23, 2020); *Message from the European Competition Network to companies regarding the coronavirus epidemic*, French Competition Authority (March 23, 2020); *Joint statement by the European competition authorities on the coronavirus crisis*, Bundeskartellamt (March 23, 2020); *Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis*, Hellenic Competition Commission (March 23, 2020); *Questions related to the corona virus*, Konkursverket Swedish Competition Authority (March 20, 2020).

⁸ *Statement from the Commissioner of Competition Regarding Enforcement During the COVID-19 Coronavirus Situation*, Competition Bureau Canada (March 20, 2020) (“Canada’s competition laws accommodate pro-competitive collaborations between companies to support the delivery of affordable goods and services to meet the needs of Canadians”); *Government Gazette* No. 11056, Vol. 657 (March 19, 2020) (implementing regulations with the purpose of “promoting concerted conduct to prevent an escalation of the national disaster and to alleviate, contain and minimi[z]e the effects,” particularly with respect to agreements between hospitals or healthcare facilities, medical suppliers or specialists, pathologists or radiologists, pharmacies, and healthcare funders.)

⁹ *Supermarkets to join forces to feed the nation*, gov.uk (March 19, 2020); *Supermarkets to work together to ensure grocery supply*, Australian Competition & Consumer Commission (March 24, 2020).