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CLIENT ALERT

Collaborative Crisis Response: Antitrust Compliance & the Coronavirus Outbreak

Mar.10.2020

Economic actors across the U.S. have had their hands full contending with the outbreak of novel coronavirus strain COVID-19. As companies face significant effects on demand (largely but not exclusively negative) and significant disruptions in their supply chains, many are considering whether there is scope for industry- or association-focused responses.

These "collaborative" strategies may have real pro-competitive value, as companies benchmark against one another and look for the most effective and efficient responses. In many cases, relying on common expertise may help keep customers, employees, and other stakeholders safer, improve product availability and lower costs, and avoid unnecessary public relations missteps. And given the pervasive involvement of government in the coronavirus outbreak, many companies are rightfully focused on mounting lobbying and influence campaigns that ensure their industries' perspectives are heard in a clear and unified way.

All of that upside comes with the potential for antitrust risk. Whenever competitors collaborate, their communications and joint actions may draw scrutiny from antitrust enforcers and third parties. In a time of price volatility, significant changes in price may draw particular attention and even allegations of price fixing or customer allocation. And while competitors are certainly entitled to advocate for appropriate legislation or regulation in response to the coronavirus crisis, they are also vulnerable to allegations that joint lobbying efforts can lead to private agreements not to compete.

The mere mention of antitrust risk can scramble an industry's response to coronavirus, slowing or blocking even procompetitive efforts. An effective, efficient response requires that counsel to businesses – and counsel to their trade associations and other industry bodies – offer common-sense advice and risk reduction strategies to facilitate appropriate, necessary collaboration in response to this unique threat.

Collaborative Industry Action: Key Antitrust Reminders

1. Beware Initiatives Intended to Influence Industry Pricing or Output

- Disruptions in supply and demand can lead to price volatility and the sense that something is "out of whack," and that both suppliers and customers could benefit from efforts to "restore sanity."
- It goes without saying that overt agreements to fix prices, stabilize output or capacity, allocate customers, or to rig bids are *per se* antitrust violations. On Monday, March 9th, the DOJ expressly cautioned against agreements not to compete affecting the supply of public health products like face masks and diagnostic products, and asked citizens to report suspected price fixing. Competitors should be careful about even the appearance of discussing these topics, regardless of industry or product, without legal advice.
- The appearance of anticompetitive agreements may also arise under circumstances that seem innocuous. This can include industry discussions of topics like "addressing customer uncertainty" and "ensuring sufficient supply." While

industry participants may collaborate to address novel issues arising from the outbreak, consider how to ensure the concepts or solutions being discussed do not look to an outsider like agreements not to compete.

2. Competitors May Cooperate to Lobby the Government

- Under the *Noerr-Pennington* doctrine, companies can work together to advance their shared policy goals at every level and in every branch of the government. This is true even if policy success would itself limit competition (*i.e.* government-imposed price-setting).
- However, companies may incur risk if collaborative meetings and communications do not clearly reflect that the purpose of bringing competitors together is to effect policy change. For instance, a general discussion of an "industry price floor" or "ideal price levels" poses a risk, if not clearly undertaken for the strictly limited purpose of government advocacy.
- Companies may also run unnecessary risk if collaborations extend **beyond** what is necessary for lobbying purposes (*i.e.* "if the bill does not pass, the industry will do what is necessary to address price volatility").

3. Competitors May Also Share Information, and Collaborate on Voluntary Standards and Best Practices

- As the Department of Justice has acknowledged in its Antitrust Policy Statement on Sharing of Cybersecurity Information, it is well-recognized that companies may effectively and efficiently address security and similar threats by sharing technical information that is not competitively sensitive. Such exchanges will be assessed under the "rule of reason," meaning they are permissible if their overall effect is procompetitive.
- With respect to the coronavirus threat, businesses may anticipate benefits from sharing technical or other information that has the potential to reveal competitively sensitive details about their businesses; where information to be exchanged may include both sensitive and non-sensitive information, counsel can help assess antitrust risk and advise on mitigation strategies.
- Under certain circumstances, industry groups may discuss, work toward, or implement industry-wide standards or practices to address issues arising from the coronavirus outbreak.
- This approach is less likely to raise antitrust risk if the standard or strategy in question will allow the industry to address a serious issue more quickly/efficiently/better than individual competitors could do on their own; in addition, voluntary rather than binding standards pose lower risks than mandatory standards imposed by an industry group.
- A key example would be for operators of consumer-facing businesses to pool their collective knowledge of sanitization to propose a voluntary cleaning protocol for spaces used by customers or employees.
- However, collaboration on practices and standards may raise higher levels of antitrust risk if it results in adverse customer outcomes (*i.e.* lower service standards, less favorable terms of trade, or – of course – higher prices or lower output).

4. Competitors May Collaborate on Supply Chain Issues to Prevent Industry Disruption

- Some companies facing disruption in their supply chains may find it helpful to work with competitors to smooth access to necessary inputs and ensure they can continue to produce output – for example, by engaging in swaps or group purchasing arrangements to ensure continuous input supply.

- Such arrangements raise lower antitrust risk where they are narrowly tailored to address the specific supply problem at hand (i.e. addressing the effects of a short-term supplier shutdown), and where they are intended to maintain output for the customers of the participants.
- Such arrangements may raise antitrust risk where they go beyond what is necessary to address short term supply issues, where they involve a large proportion of the total purchasers of the input in question, or where they would allow the competitors involved to share input cost information extensive enough to facilitate an anticompetitive agreement on downstream pricing.

Advising Your Client: A Checklist

- Understand what your association or business is trying to accomplish. What is the issue that must be addressed, and will industry collaboration likely result in a better solution?
- Do possible solutions involve changes in government policy via regulation, legislation or litigation? How does the group intend to effect and advocate for these changes?
- Could these solutions appear to customers to result in less competition between participants? What will happen to price or output? Will customers have fewer choices (of products, suppliers, etc.)? Are solutions limited to what is necessary to address the issue defined?
- Who will take part in discussions of the issue and potential strategies to respond? How will participants know what to discuss and not to discuss? Should counsel participate in early sessions to assess the topics that arise, and the need for ongoing antitrust risk management?
- Should counsel deliver targeted antitrust training to help participants identify potential issues, and strategies to address these?

Legal counsel to companies and associations alike can play an important role in unlocking the power of appropriate collaboration to address incipient, disruptive issues caused by the coronavirus outbreak. A small investment in assessment and risk management at the outset will pay dividends throughout the collaborative process.

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