

COVID-19 NEWS OF INTEREST

Antitrust and Condition-Mitigating COVID-19 Collaborations

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We previously reported that the Antitrust Division of the Department of Justice (the “DOJ”) and the Bureau of Competition of the Federal Trade Commission (the “FTC,” and with the DOJ, the “Agencies”) are offering expedited review of collaborations related to COVID-19 conditions.¹ Although the Agencies provided, based on prior guidance, examples of collaborations that they would likely approve, most of those collaborations relate to the provision of health care to those afflicted with the coronavirus or are otherwise uncontroversial.

The Agencies were largely silent with respect to collaborations that are designed to *mitigate the severe economic hardships* that have been wrought by the near-total shutdown of the economy. This memorandum explores just those types of collaboration.

The Agencies cited the following types of collaboration as likely acceptable:

- 1) collaboration on research and development;
- 2) “sharing technical know-how” that may be necessary for otherwise legitimate collaborations;

¹ William H. Rooney and Michelle A. Polizzano, “*Competition Authorities Expedite Consideration of Competitor Collaborations Due to the COVID-19 Pandemic*,” WILLKIE.COM (Mar. 25, 2020), [here](#); Joint Statement, Dep’t of Justice and Fed. Trade Comm’n, Joint Antitrust Statement Regarding COVID-19 (Mar. 24, 2020), ([here](#)).

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- 3) “providers’ development of suggested practice parameters – standards for patient management developed to assist providers in clinical decision-making – that also may provide useful information to patients, providers, and purchasers”;
- 4) “most joint purchasing arrangements among healthcare providers, such as those designed to increase the efficiency of procurement and reduce transaction costs,” and
- 5) “private lobbying addressed to the use of federal emergency authority, including private industry meetings with the federal government to discuss strategies on responding to COVID-19.”²

Countless businesses, however, are not involved in the healthcare sector and are facing extreme commercial and personal distress. They will have legitimate incentives to collaborate to mitigate the unprecedented economic conditions.

Firms can ask the DOJ or the FTC to review the proposed collaboration on an expedited basis, assuming that a collaboration designed to mitigate economic harm from the shutdown is sufficiently “COVID-19 related” to qualify for expedited review. But even a prompt response that the reviewing Agency has “no present intent to challenge” the collaboration does not insulate the parties from private actions or second-guessing by the reviewing Agency or the other Agency, especially if the collaboration evolves beyond the initial, usually stylized facts presented for review. Some collaborations will also have “long tails” and endure well after the workforce has returned to the office.

A likely permissible collaboration is one in which two competitors contribute complementary resources to provide a product or achieve an efficiency that neither could have produced or obtained on its own.³ A likely unlawful collaboration is one that eliminates competition between the parties without consumer benefit. For example, forming a joint marketing arrangement without substantive integration that coordinates and regulates the sale of the competitors’ products or services may be challenged by regulators.⁴ Most collaborations, however, lie between those poles, especially those that are not designed to produce a new and innovative product but to mitigate unexpected economic hardship.

² *Id.*

³ FED. TRADE COMM’N AND U.S. DEP’T OF J., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS at 6, 31 (Apr. 2000) (In hypothetical situation where software firms with “complementary areas of design expertise” formed a joint venture to develop and market a new word processing program, the Agencies “likely would conclude that the . . . project is an efficiency-enhancing integration of economic activity that promotes procompetitive benefits.”).

⁴ *Id.* at 13-14, 30 (Where two firms create a joint venture to sell each of their products, and agree on the prices the joint venture would charge, the agreement “may be challenged as per se illegal, unless it is reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity.”).

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Though specific legal guidance should always be obtained, following are some objectives that competitors could pursue through a collaboration to mitigate the severe economic conditions of the pandemic crisis and that, with sound structuring and substantive justification, could be permissible under the antitrust laws:⁵

1. Reduce the cost of inputs by increasing the scale and scope of purchases or by designing a hedging system to protect against volatility in the value of the input.
2. Reduce participating firms' excess capacity by forming an independent or commonly owned spin-off business that is designed to serve a specialized demand at scale.
3. Reduce the cost of "mothballing" currently unneeded assets by using common means and storage facilities.
4. Reduce distribution and delivery costs and increase customer coverage by sharing distribution resources in a manner similar to airline code-sharing arrangements.
5. Reduce employment costs while limiting layoffs by way of labor-sharing arrangements that maximize both employee hours and labor efficiency.

Industry participants may also seek to reduce excess capacity through mergers and acquisitions, which would be subject to regulatory merger review. Given the extreme conditions of the pandemic crisis, however, those mergers and acquisitions may be assessed more favorably than in ordinary circumstances.

Each of the above collaborations and many others that creative businesses will consider will involve legal risks along with significant commercial benefits, the latter of which may be necessary to businesses' survival. Considering antitrust issues at the initial stages of those collaborations can facilitate their lawful structuring as well as the early presentation of the collaboration, if the parties so choose, for review by the DOJ and the FTC.

The upshot: creative and substantive collaborations in times of economic distress can mitigate hardship and, if well-structured, can do so within the bounds of the antitrust laws.

⁵ We consider such collaborations only from the perspective of U.S. antitrust law. The specific factual setting and structure would affect their antitrust assessment and legality. Other legal issues may also attend such collaborations.

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The Antitrust Practice Group is pleased to assist with your competition questions, both specific to the pandemic and in the ordinary course of business. Please contact the authors or other members of the Antitrust Practice Group, listed below:

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