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Expert Analysis

Regulators Adopt a Strategic Posture in Response to COVID-19

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The COVID-19 global pandemic has led antitrust regulators to adopt novel strategies to balance enforcement duties with the unprecedented, emergency need for industry collaboration. Recently, authorities worldwide have altered longstanding practices in a desire to spur innovation and alleviate supply issues resulting from the pandemic. Regulators have issued public statements indicating increased tolerance for collaborations between competitors where such partnerships can help ensure the provision of necessary products and services that would not otherwise be available. This flexible posture extends past medical and pharmaceutical sectors, as authorities have also acknowledged the challenges the pandemic poses for the supply of goods and services generally. The global crisis has also led to speedier clearance of collaborative activities, with the Department of Justice (DOJ), Federal Trade Commission (FTC), and foreign regulators all committing to provide fast guidance on transactions that have the potential to mitigate COVID-19 related issues. Finally, the pandemic has required enforcement agencies to slow down—and in some cases halt—investigations into broader anticompetitive conduct.

At the same time, the COVID-19 pandemic has led to greater public scrutiny as the world collectively works to mitigate the damage inflicted by the virus. Regulators, politicians, and media outlets have increasingly focused on the activities of companies that bear directly on public health and supply chains. Specifically, health care and pharmaceutical labor, pricing, and output decisions are more likely to engender scrutiny due to the heightened importance of those industries at this time.

Because of the shift in regulator priorities, streamlined clearance programs, and the urgent need for supply to combat COVID-19, actors in all markets should think creatively about innovative methods to ensure robust output and delivery that can meet the needs of consumers during this unprecedented period. By devising methods of collaboratively solving market challenges and working productively with regulators, industry can help resolve the global health crisis.

Regulators Have Signaled Higher Tolerance for Certain Collaborations Between Competitors. Worldwide, competition law authorities have signaled an increased tolerance for cooperation between competitors as a result of the unprecedented challenges of the COVID-19 pandemic. This encouragement is aimed primarily at fostering short-term arrangements to ensure the provision of essential services and supplies in industries such as health care and pharmaceuticals, as well as the supply of more general needs such as household items, transportation, and food products. While numerous regulatory bodies have now released statements explicitly calling for innovative partnerships and expedited reviews, they have also warned that clear competitive abuses will not be allowed.

The DOJ and FTC have addressed the extent of their acceptance of innovative or unconventional arrangements

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in a series of joint statements aimed at illustrating the "many ways firms, including competitors, can engage in procompetitive collaboration" to help combat COVID-19. *Joint Antitrust Statement Regarding COVID-19*, DOJ (March 24, 2020). In their guidance, the agencies specify lawful joint activities designed to improve the response to the pandemic that would be consistent with the antitrust laws such as "collaborating on research and development," sharing "technical know-how," developing "suggested practice parameters," and crafting "joint purchasing arrangements." Id. Further—and most notably—the guidance also announced a shift in the posture of the agencies when addressing business conduct that simply touches the COVID-19 crisis. Going forward, the agencies will "account for exigent circumstances in evaluating efforts to address the spread of COVID-19 and its aftermath" where collaboration is "necessary to assist patients, consumers, and communities … [and] provide Americans with products or services that might not be available otherwise." Id. Put simply, the DOJ and FTC have signaled that they understand these are uncommon times that may require arrangements that would normally engender much greater scrutiny, leading to novel guidance and a pledge for quicker reviews of proposed arrangements.

Foreign regulators have moved in step with the DOJ and FTC by encouraging collaborations between competitors abroad. Simultaneous with the American agencies, the European Competition Network (ECN) issued a statement that the European Commission and member state authorities "will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply." *Joint Statement by the European Competition Network (ECN) on Application of Competition Law During the Corona Crisis*, ECN (March 23, 2020). The Canadian Competition Bureau went a step further, stating that it would "refrain from exercising scrutiny" where companies collaborate "in good faith" during the pandemic. *Statement on Competitor Collaborations During the COVID-19 Pandemic*, Competition Bureau Canada (April 8, 2020). This style of relaxed scrutiny for collaborations has largely been adopted by every competition regulator, worldwide. On April 8, the International Competition Network (ICN)—a loosely organized collection of competition regulators—agreed that the "extraordinary situation may trigger the need for competitors to cooperate temporarily in order to ensure the supply and distribution of scarce products and services." *ICN Steering Group Statement: Competition During and After the COVID-19 Pandemic*, ICN (April 8, 2020).

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All regulator statements include the caveat that this new emphasis on collaboration and related relaxation of scrutiny does not extend beyond activities that touch shortages and pressures caused by the COVID-19 crisis. For example, the DOJ and FTC specifically stated in their initial guidance that they will continue to aggressively investigate actions deemed to "subvert competition or prey on vulnerable Americans." Similarly, the ECN noted in its March 23 statement that it would "not hesitate to take action against companies taking advantage of the current situation by cartelizing or abusing their dominant position." Likewise, the ICN stated that its relaxed view only applies where competitor collaborations are "limited in scope and duration [and] necessary to assist those affected by COVID-19."

Expedited and Expanded Clearance Programs. Many competition authorities have committed to providing fast individual reviews of proposed business arrangements related to COVID-19 to ensure that innovative collaborations can quickly move forward without regulatory intervention. Since the pandemic has created both an urgent need for collaborations as well as rapidly changing circumstances, this expedited process is essential to encourage participation in arrangements between competitors.

The DOJ and FTC have stepped up their individual guidance programs. Guidance from the DOJ's business review letters and the FTC's advisory opinions ensure the issuing agency will hold that position for at least a year after the guidance is issued. While these requests usually take several months to process, "the agencies recognize that many individuals and businesses are trying to address a rapidly evolving crisis as quickly as possible." Therefore, both agencies have committed to providing guidance on the legality of business arrangements within seven days for public health and safety issues, and "expeditiously" for all other requests touching the pandemic. See *Joint Antitrust Statement Regarding COVID-19*, DOJ (March 24, 2020).

In the month since the joint DOJ/FTC statement, the agencies have made good on their pledge to move quickly to clear potential arrangements. On April 6, the DOJ announced that it would not challenge the collaboration between McKesson, Cardinal Heath, OMI, Medline, and Harry Schein designed to speed up the distribution of health care products. The DOJ's business review letter was finalized seven days after the request, and adopted many of the participants' proposed competitive safeguards. The collaboration was explicitly aimed at mitigating COVID-19 related supply chain problems, and the DOJ highlighted the limited nature of the collaboration in the letter clearing it. See *McKesson Corporation Business Review Letter*, DOJ (April 4, 2020). Similarly, on April 20, the DOJ announced that it would allow AmerisourceBergen to coordinate with other health care suppliers to distribute medicine nationally. The DOJ's stated reasoning was similar to the McKesson review, and was also provided within seven days of receiving the request. See *AmerisourceBergen Corporation Business Review Letter*, DOJ (April 20, 2020).

European regulators have also sought to encourage collaborations by offering speedy guidance on potential arrangements. The European Commission has specifically committed to provide "guidance and comfort … where there may still be uncertainty about whether such initiatives are compatible with EU competition law." To achieve this, the Commission has set up a dedicated process to evaluate requests from "undertakings and trade associations asking for guidance about their envisaged cooperation, notably in the health sector." *Temporary Framework for Assessing Antitrust Issues Related to Business Cooperation In Response to Situations of Urgency Stemming From the Current COVID-19 Outbreak*, European Commission (April 4, 2020). The Commission has started releasing "comfort letters" clearing proposed conduct for the first time in twenty years, with the first addressing the provision of generic drugs to regions experiencing supply shortages through partnerships among pharmaceutical producers. See *Antitrust: Commission Provides Guidance on Allowing Limited Cooperation among Businesses, Especially for Critical Hospital Medicines During the Coronavirus Outbreak*, European Commission (April 8, 2020).

> The shift in regulator posture should not be misunderstood as an abandonment traditional competition law principles, but rather a necessary and strategic change to prevent additional problems arising from the pandemic.

COVID-19 Has Altered the Pace of Regulatory Action. While regulators have pledged to operate during the pandemic as close as possible to business as usual, competition authorities worldwide have encountered work disruptions due to challenges associated with COVID-19. Over the past month, numerous enforcement actions have slowed or halted, with regulators citing either COVID-19 related limitations or reallocation of resources as reasons for the decline in pace.

In the United States, both the FTC and DOJ have experienced slowdowns due to difficulties conducting discovery as well as a general decline in the pace of transactions. The FTC has actively sought temporary pauses on discovery proceedings over the past month, specifically citing disruptions to evidentiary hearings caused by COVID-19. For example, the FTC requested 45-day stays of proceedings in several litigations, including its challenges to Axon's acquisition of Vievu and Arch Coal's proposed joint venture with Peabody Energy. At the same time, the FTC has noted that the number of corporate transactions has declined during the pandemic, thereby reducing its merger review burden and providing it time to adapt to the current circumstances.

Foreign authorities have also reacted to the pandemic by altering regulatory priorities. In the United Kingdom, the Competition and Markets Authority (CMA) has suspended several probes in order to free up resources to investigate COVID-19 consumer protection issues such as price gouging and false advertising. In particular, the CMA halted investigations into the alleged anticompetitive acts of pharmaceutical manufacturers, including arrangements to allocate markets by Advanz and Morningside, and price collusion by Alliance, Focus, Lexon, and Medreich. Similarly, the German Federal Cartel Office discontinued investigations where the pandemic made near-term market developments difficult to predict, such as in the probe of Sky's acquisition of premier league soccer broadcasting rights. And the European Commission has been vocal in asking companies to slow down the reporting of merger notifications to allow the Commission to focus on the clearance of economic stimulus measures.

Areas of Heightened Scrutiny. The COVID-19 pandemic has led to greater enforcement interest in certain areas of competition law. Specifically,

regulators, members of Congress, and media outlets have focused on price gouging, exclusivity of essential products, and past regulatory decisions that have impacted the response to the pandemic.

Joint statements from the DOJ and FTC signaling tolerance for cooperation between competitors have made clear that certain practices will be particularly scrutinized during the pandemic. For example, in a recent guidance, the agencies noted that they would aggressively target "anticompetitive conduct in labor markets, such as agreements to lower wages or to reduce salaries or hours worked" especially in fields that relate to the public health response to COVID-19. *Joint Statement Regarding COVID-19 and Competition In Labor Markets*, DOJ (April 13 2020). Additionally, the DOJ and FTC have set up a "COVID-19 Fraud Hotline" and a "Hoarding and Price Gouging Hotline" to combat issues specific to the pandemic.

Others have also scrutinized competitive practices that relate to public health. For example, Congress and state governments have increasingly addressed pricing practices for items experiencing supply shortages due to reduced output or increased need. Multiple well-publicized media accounts of price gouging and hoarding have led to greater scrutiny of decisions that may contribute to the strain consumers and industries are feeling during the pandemic. See Michael Levenson, *Price Gouging Complaints Surge Amid Coronavirus Pandemic*, N.Y. Times (March 27, 2020). The Texas state attorney general recently filed a lawsuit alleging Cal-Maine Foods engaged in price gouging, profiting off increased demand. *Texas v. Cal-Maine Foods*, No. 20205427 (215th Dist. Ct. Harris Cty. Tex. April 23, 2020). Actions like *Cal-Maine Foods* may be a harbinger of more active state and federal regulators.

Finally, past mergers and regulatory decisions that directly impact public health have received more attention. One high profile example is the recent Congressional criticism of the FTC's decision to clear the merger of Covidien and Newport Medical Instruments, which opponents claim contributed to a shortage in ventilators during the initial stages of the crisis. Similarly, members of Congress have also raised concerns over exclusivity and pricing regulations associated with pharmaceuticals, and have signaled a desire to legislate pricing rules for any future COVID-19 related treatments.

Navigating the Shifting Terrain. Due to the rapidly changing circumstances caused by the global pandemic, it is more difficult than ever to navigate business decisions that touch on competition law. The fallout from the COVID-19 crisis will likely continue to create a dynamic regulatory, enforcement, and legal environment for businesses pursuing joint activities or arrangements with competitors. But the present situation also has the potential to enhance the ability of the private sector to make a meaningful impact on the global effort to combat COVID-19 through creative actions in partnership with public officials.

One key for businesses considering innovative arrangements is to focus on targeted collaborations rather than broad, long-term deals that may be portrayed as anticompetitive. The DOJ and FTC have backed up their promises to provide resources for businesses pursuing arrangements that can mitigate the impact of the pandemic. The agencies have continued to issue guidance on acceptable collaborations, and are processing specific guidance requests with unprecedented speed. Further, the agencies have been candid about diverting resources from traditional activities towards COVID-19 mitigation programs.

The shift in regulator posture should not be misunderstood as an abandonment traditional competition law principles, but rather a necessary and strategic change to prevent additional problems arising from the pandemic. An analysis of the deals cleared by regulators since the crisis began demonstrates the importance of demonstrating how the proposed business conduct will benefit consumers or public health. Added scrutiny on business decisions that impact the pricing and supply of essential goods and services counsels for caution when making short term plans. Therefore, businesses considering innovative collaborations should attempt to avoid competitive missteps by actively utilizing regulator programs to ensure competition law compliance.