Insights: Alerts

Antitrust Compliance During the Pandemic

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Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main COVID-19 Task Force page and/or your email for updates.

Volatile markets are breeding grounds for both antitrust violations and antitrust litigation. And there is little doubt that before the pandemic dust settles, crisis-driven decisions, collaborations, and agreements will be scrutinized, investigated, second guessed, and challenged by antitrust enforcement agencies and plaintiffs' counsel.

Compliance with the antitrust laws should not, however, be an impediment to businesses engaging in legitimate actions to restart or weather the pandemic. Economically rational laws – which the U.S. antitrust laws are for the most part – accommodate changes in market conditions, including national emergencies and crises.

While there is no specific crisis exception or immunity in the antitrust laws themselves, changes in the marketplace caused by a crisis may render certain actions or agreements more defensible than they might have been absent the crisis.[1] Information exchanges, collaborations, and agreements between competitors that might have posed unacceptable antitrust risk in the pre-pandemic world may well be production enhancing and pro-competitive in the current marketplace. Likewise, actions that were defensible in the pre-pandemic marketplace may now carry increased risk due to changes in a particular market.

How then should a company proceed to mitigate antitrust risk in these uncharted waters? First, it is important to recognize the most likely potential antitrust claims. In their recent Joint Statement, the DOJ and FTC provide a list of their top candidates. The DOJ and FTC will be on the watch for information exchanges or agreements that facilitate:

- Increases in or the maintenance of prices.
- Decreases or reductions in quality of output.
- Allocation of geographic or product markets or customers.
- Lower wages or anti-poaching practices.

We would add an additional potential claim to this list – vertical agreements that have the effect of substantially foreclosing a competitor from access to needed inputs, distribution, or sales channels.

With the potential claims in mind, the compliance areas on which to focus become more apparent. Underscoring compliance in the below areas not only will help prevent missteps, but also guard against almost equally-costly appearances of impropriety.

1. Communications with Competitors

While a common topic in any antitrust guidelines – the current environment has made competitor communications both more likely and more potentially problematic. Communications are more likely as businesses look for and

employ innovative solutions to assist them in reopening and weathering the current crisis. As a result, discussions between competitors *will* occur – ranging from best practices and information sharing to potential collaboration or cooperation.

Such communications also will be more problematic because there will be more conduct in the marketplace that looks on its face like it flows from some meeting of the minds among competitors – as similarly situated companies react in similar manner to the same crisis market stimuli. Such parallel conduct by competitors is a core element in asserting an illegal conspiracy in restraint of trade claim. Fortunately, parallel conduct alone typically is insufficient to support an inference of an illegal conspiracy. Plaintiffs also are required to plead "plus" factors that tend to make the likelihood of conspiracy, as opposed to unilateral self-interested conduct, more plausible. One of the most regularly pled plus factors in parallel conduct cases is communications between the alleged competitor conspirators.

In light of this, companies would be well served to revisit and reinforce with executives and employees their antitrust guidelines relating to communications with competitors. In particular:

- Clients should be advised that the guidelines relating to communications with competitors have not changed as a result of the pandemic and that failure to follow these guidelines now carries elevated risk. The usual suspects in terms of off-limit topics (without prior legal approval) remain:
    - Pricing and price-related terms,
    - Costs,
    - Production,
    - Customers,
    - Suppliers,
    - Business strategies, and
    - HR-related information including wages, benefits, and hiring practices.
- Clients also should be reminded that press-releases or other public statements may be viewed as communications to competitors – particularly when there is no legitimate business rational for the statement or release. Companies should take care to identify a valid business rationale for any public statements – particularly those relating to pricing, production, capacity, business plans, and hiring.

This is not to say cooperation and collaboration should be avoided. There will be numerous situations when such actions are both necessary and procompetitive. The important point to underscore is that any proposals for pandemic-driven collaboration, agreement, or information sharing should be vetted with antitrust counsel prior to communicating with competitors. Likewise, such proposals, communications, and information from competitors should be brought to the law department's attention immediately and prior to responding.

2. Business Rationales are a Must

Another way to rebut an allegation of conspiracy based upon parallel conduct is to demonstrate that the conduct was in the unilateral self-interest of the company – *i.e.*, that it was rational in the absence of a conspiracy. Such rationales also can mitigate risk relating to vertical agreements. Business rationales should be required and maintained for any crisis-driven or otherwise out-of-the-ordinary actions by a company. In particular:

- Cooperation, collaborations, ventures, or information exchanges with competitors.

- Price changes (or decisions to maintain current prices in the face of uncertain demand or market over-capacity).
- Decisions relating to production or amount of capacity to restart.
- Changes in positions or agreements with suppliers and channels.

Needless to say, if a company cannot identify a legitimate business rationale for a proposed action, it may be time to consult with your antitrust counsel.

3. Relationships, Agreements, and Communications with Suppliers and Channels

Changes in the marketplace also may increase antitrust risk associated with previously defensible vertical agreements. Be on the lookout for pre-pandemic supply or distribution agreements that now, due to changes in the marketplace, result in a greater degree of foreclosure of competitors or that cause significant increases in their costs.
Similar issues surround new agreements or relationships as suppliers and distributors seek commitments or incentives from your company so that they in turn can manage their own restarts. Such commitments or incentives, while rational and understandable in the current business climate, could have the unintended effect of substantially foreclosing your competitors or raising their costs.

A second caution in this area relates to information flows between your company and its suppliers, distributors, and sales channels. Now more than ever suppliers will request business projections and anticipated demand and production data to aide their own restart decisions. Likewise, distributors and channels will want data including anticipated production, timing, and pricing. While companies may be inclined to share such information with their suppliers and channels, keep in mind that you are operating in an environment in which you and your rivals are more likely to be following similar (*i.e.*, parallel) business strategies – and in which a plaintiff may need only a plausible plus factor to survive a motion to dismiss on a conspiracy claim.

Without the proper proscriptions, sharing this competitively sensitive information with a supplier or distributor potentially could support an allegation of what is sometimes referred to as a hub-and-spoke conspiracy. A hub-and-spoke conspiracy exists where a conspiracy at one level in an industry is facilitated via communications through an entity at a different level with whom all conspirators deal or communicate. Don't allow a distributor or supplier to inadvertently become a *de facto* information sharing “hub” between your company and your rivals. Information shared with suppliers, distributors, or channels, should be tightly controlled and clearly restricted to specific uses by the supplier, distributor, or channel, and should not be shared with your rivals. Nor should your employees accept such data from suppliers or channels relating to your competitors.

Finally, as in the case of business rationales, companies should assess the legitimacy of any data request from a supplier or channel, and decline those requests that appear unnecessary to performance. In this environment, extra care should be taken to avoid even the appearance of impropriety.

4. The Accidental Monopolist

Per the DOJ/FTC Joint Statement, “the Division and the Bureau stand ready to pursue civil violations of the antitrust laws, which include…efforts by monopolists to use their market power to engage in exclusionary conduct.” While it is likely much of the post-pandemic litigation will focus on claims sounding in conspiracy, companies also should be attentive to any recent acquisitions of market power resulting from changes in the marketplace. The antitrust laws

impose slightly different rules on companies with market power and conduct permissible for a company without market power may subject a company that now has such power to greater scrutiny and risk. While unilateral predatory conduct is typically a more difficult case to make, companies should remain vigilant, particularly given the propensity for the politicization of the antitrust laws in times of crisis.

5. Hiring and Compensation Decisions

With significant lay-offs, furloughs, salary reductions, and unemployment, this is an area ripe for litigation. As most HR professionals are aware, the DOJ and FTC remain quite focused on agreements among competing employers with regard to wages, salaries, benefits, terms of employment, etc. There is a fine line between permissible sharing of information and best practices between competing employers and information sharing that can be used to infer a conspiracy. Any information sharing in this area should be pre-approved by counsel.

6. Document Creation Guidelines

In the new work-from-home environment there are going to be a lot more things put in writing in the form of emails, texts, etc. Also, a new twist in our now more virtual world is the recordation of web-based calls and meeting – both internal and external. Add in heightened levels of anxiety and stress accompanying the pandemic and you have a recipe for the creation of plaintiffs' exhibits. Clients should be reminded that anything they commit to writing – or anything they say during an audio or video conference – should be something they wouldn't mind the DOJ reading (or watching) two years from now.

Conclusion

No doubt, businesses will consider and engage in a variety of new and innovative actions and agreements in the coming months. While the antitrust laws should not be a barrier to any necessary procompetitive activities, companies are well advised to increase antitrust vigilance during these times. Even an appearance of impropriety can result in significant and needless costs.

Recommended Actions

- Recirculate those antitrust guidelines. And reinforce those guidelines to all employees engaged in communications with competitors including participants in trade associations and other industry groups.
- Identify and document the independent business rationales for any crisis-driven conduct – including the business reason for public statements regarding pricing, production, and business plans.
- Follow the lead of the DOJ and FTC and set up a rapid response process or team. Clients are more likely to seek legal guidance – especially for time sensitive activities – when they know doing so will not result in significant delays.
- If in doubt check with your antitrust attorney.

Footnotes

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[1] The *Defense Production Act of 1950* does provide limited exemptions from civil and criminal liability under the U.S. antitrust laws for collaborations in response to the national emergency resulting from

Covid-19, subject to very specific requirements. Note also that the Department of Justice and Federal Trade Commission have committed to expedited review of all “Covid-19-related-requests” as well as to expediting the processing of filings under the *National Cooperative Research and Productions Act*. *DOJ FTC Joint Antitrust Statement Regarding Covid-19* (March 2020) (“Joint Statement”). While these vehicles will be of limited practical value for most companies and restart activities, we encourage you to discuss them with your antitrust counsel.