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Memorandum

COVID-19 Response Planning: Minding the Antitrust Gap

March 24, 2020

Businesses around the globe continue to react to coronavirus disease 2019 ("COVID-19") as the global pandemic creates unprecedented challenges for companies including supply chain issues, employment-related matters, and forced closings or other national or local operating restrictions. In confronting these issues, companies may desire to coordinate with other industry participants during the business downturn and an uncertain future. The U.S. antitrust agencies acknowledge that benefits can accrue from some types of competitor collaborations, in the ordinary course as well as in response to natural disasters having severe economic consequences. However, coordination is not risk-free even in extraordinary circumstances such as the current pandemic. In addition, unilateral actions may face antitrust scrutiny, including under price gouging laws. In navigating their COVID-19 response, businesses must remain mindful of these risks. Below we highlight certain common issues facing businesses and the potential corresponding U.S. antitrust risk.

Antitrust Enforcement Remains Active

A global pandemic does not absolve companies from antitrust scrutiny. Underscoring this, on March 9, 2020, the U.S. Department of Justice ("DOJ") declared its "intention to hold accountable anyone who violates the antitrust laws of the United States in connection with the manufacturing, distribution, or sale of public health products such as face masks, respirators, and diagnostics."

Antitrust risk for COVID-19 responses extend beyond just public health products. All businesses must be aware that enforcement investigations often occur after the conduct itself. Even genuine efforts to respond beneficially to the great economic uncertainty of the current moment will be analyzed by antitrust enforcers later in time, presumably when normal economic order has been restored.

This does not mean that antitrust regulators will be unduly harsh or formulaic in their enforcement. The DOJ and Federal Trade Commission ("FTC") acknowledge in their joint Antitrust Guidelines for Collaborations Among Competitors that certain competitor collaborations "are not only benign but procompetitive." This recognition extends even further in response to calamities. In the wake of Hurricanes Katrina and Rita, the DOJ and FTC jointly announced that "[t]he federal antitrust laws are sufficiently flexible and resilient to accommodate beneficial collaborations, including collaborations among competitors, of appropriate scope and limited duration" in response to those events. We anticipate that the antitrust authorities' response to COVID-19 will be similar: the antitrust laws remain in effect, but certain coordination among industry participants will be viewed as beneficial

and other coordination may be exempt from antitrust enforcement. Naked price fixing and market allocation will not be permissible in any event.

PERMITTED COORDINATION

Competitor Collaborations

The U.S. antitrust enforcement agencies recognize that competitor collaborations may be procompetitive. These arrangements often involve production, marketing, buying, or research and development collaborations. Some benefits potentially obtained by collaboration include bringing products to market faster, enabling a more efficient use or combination of assets or expertise, and encouraging output enhancing investments. Absent per-se illegal agreements such as price fixing, bid rigging, and market allocation, the agencies assess competitor collaborations by examining the potential competitive benefits and harm from the collaboration. The agencies will also consider whether the collaboration was reasonably necessary to achieve the benefit or if a less restrictive means could yield a similar benefit. The DOJ and FTC have also prescribed certain criteria upon which joint purchasing arrangements among healthcare providers may be subject to an antitrust "safe harbor," for which antitrust enforcement action will not be taken absent extraordinary circumstances. Companies contemplating competitor collaborations should consult with experienced antitrust counsel in order to assess antitrust risk associated with these activities.

The DOJ and FTC also may take steps to shorten advance review periods for cooperative efforts taken by companies to provide supplies or services needed to combat COVID-19. Expedited antitrust reviews for companies seeking approval to work together in those efforts possibly could be shortened to no more than a week.

Petitioning the Government

In the U.S., the Noerr-Pennington doctrine generally exempts from the antitrust laws coordination among industry participants to influence government processes, including lobbying and submissions to regulatory agencies and courts. With national and state governments increasingly engaging in legislative and regulatory acts to combat the health and economic effects of COVID-19, increased coordination among industry participants to influence such efforts is reasonably expected. In general, this behavior is lawful in the U.S. However, there is a "sham" exception for coordination that is not genuinely aimed at legitimate lobbying purposes.

Pandemic Response

The Pandemic and All-Hazards Preparedness and Advancing Innovation Act ("PAHPAI") provides a limited antitrust exemption for meetings held to address pandemic countermeasures. PAHPAI permits the Secretary of Health and Human Services ("HHS") to meet and consult with persons engaged in the development, manufacture, distribution, purchase, or storage of certain countermeasures or products during pandemic events. Such meetings shall be convened by the Secretary of HHS in consultation with DOJ and FTC. The meetings are exempt from the antitrust laws. If the meeting results in an agreement that involves a competitor collaboration aimed at achieving

a particular objective authorized by the Secretary of HHS in consultation with DOJ and FTC, then actions taken to execute that agreement are also exempt from antitrust enforcement.

National Defense Response

On March 18, 2020, President Trump issued an executive order invoking the Defense Production Act ("DPA") which authorizes the President to expedite and expand the critical supplies and services from the private sector needed to protect the national defense. One provision of the DPA authorizes the President to enter voluntary agreements with two or more industry participants to support national defense or emergency preparedness and response activities. Participants in a voluntary agreement receive relief from federal and state antitrust laws. This exemption requires coordination among the President and both DOJ and FTC as they participate in developing, implementing, monitoring, and reporting on voluntary agreements among industry members under the DPA. So long as voluntary agreement participants operate within the parameters of the agreement, they will be exempt from antitrust liability.

HSR WAITING PERIOD AND REVIEW DELAYS

The Hart-Scott-Rodino ("HSR") filing obligations for mergers and acquisitions remain in effect. However, both the FTC and DOJ have noted changes in their premerger clearance processes that will result in review and clearance delays for some transactions. For one, until further notice, HSR "early terminations" will not be granted as the agencies have also adopted an e-filing HSR system in response to COVID-19. Further, the FTC announced it will consider case-by-case timing modifications for its ongoing investigations and litigations, whereas DOJ announced it is requesting an additional 30 days, across the board, to complete its review of transactions after the parties have complied with document requests. Additionally, there is pending legislation in the U.S. that could result in further extensions or delays in the HSR waiting period and merger reviews. Foreign jurisdictions are considering similar measures.

Protecting Against Risks

SUPPLY AGREEMENTS

Many businesses are experiencing uncertainty in their supply chains caused by international restrictions, local operations shuttering due to illness or forced shelter orders, or shortages or redirection of material inputs. To protect against these business risks, industry participants may consider pursuing backup supply arrangements with their direct competitors. In such arrangements, if one competitor loses access to critical inputs due to economic effects of COVID-19, another competitor agrees to provide a certain level of supply to that competitor. Where contingency agreements may be beneficial, businesses should seek antitrust advice on the appropriate structure and safeguards for facilitating any necessary discussions and exchanges of information between competitors, to avoid risks associated with sharing competitively sensitive information.

LABOR ISSUES

COVID-19 has caused dramatic declines to many industries including travel, hospitality, and entertainment while others, such as healthcare, approach or exceed capacity. In deciding how to handle the health and safety of employees, as well as workforce and labor obligations, businesses may wish to confer with other industry participants on how to approach these issues. Discussion on many such topics may be timely and facilitate efficient operations in these uncertain times, but should nonetheless be approached with caution. Consistent with DOJ and FTC pronouncements in their Antitrust Guidance for HR Professionals, antitrust enforcers will closely scrutinize any discussions or information sharing that may bear on employee hiring, wages and benefits. The agency guidance does, however, recognize that not all employment information sharing is illegal, and they have outlined methods for businesses to conduct such information sharing in compliance with the antitrust laws.

INDUSTRY MEETINGS AND STANDARD SETTING

Antitrust enforcers generally recognize that there are legitimate, pro-competitive reasons for competitors to share certain information, including in response to major calamities. Further, benchmarking against industry participants is often helpful in establishing best practices. However, such benchmarking efforts require exchanges of information presenting antitrust risk even where identifiable pro-competitive objectives exist. Many companies have established internal antitrust compliance policies for trade association and industry meeting participation. This same guidance should be applied for industry discussions with competitors surrounding COVID-19 responses, and attendees at these meetings should receive appropriate reminders and/or supplemental training.

PRICE GOUGING

Businesses are generally free to make unilateral decisions under the antitrust laws including deciding at what price to sell their goods and services. However, during the period of a declared national or statewide emergency such as this, critical industry participants will be held to account through price gouging laws for any material changes in the pricing of their products. Many states have enacted price gouging laws, all of which share similar principles (ensuring that companies do not take advantage of emergency needs by artificially inflating prices) but differ with regards to applicable standards (e.g., some laws set specific percentages above which a company may not increase its price during the period of emergency). While there is no federal law prohibiting price gouging, President Trump signed an executive order on March 23, 2020 prohibiting price gouging and hoarding of supplies designated as critical by the Secretary of HHS under the DPA. This follows prior commitments from DOJ and FTC to pursue any perceived "emergency need" profiteering. State attorneys general have also declared their intent to investigate COVID-19 price gouging. Thus, during this emergency period, companies should ensure that their pricing decisions are made independently and take into consideration applicable price-gouging restrictions.

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As the business realities of the COVID-19 pandemic continue to evolve, companies will invariably look for ways to improve their ability to provide needed products and services to the marketplace. The antitrust laws need not

inhibit legitimate collaboration, but businesses should continue to be mindful of how to approach and structure necessary dealings with competitors to mitigate antitrust and other legal risks.

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