O'Melveny

Alerts & Publications

Competitor Collaborations and Communications in Time of Crisis: Practical Guidance

March 26, 2020

KEY CONTACTS

Ben Bradshaw
Washington, DC
D: +1-202-383-5163

Riccardo Celli
Brussels
D: +32-2-642-41-34

Courtney Dyer
Washington, DC
D: +1-202-383-5215

Andrew Frackman
New York
D: +1-212-326-2017

Philip Monaghan
Hong Kong
D: +852-3512-2368

Anna T. Pletcher
San Francisco
D: +1-415-984-8994

Katrina Robson
Washington, DC
D: +1-202-220-5052

Ian Simmons
Washington, DC
D: +1-202-383-5106

Michael Tubach
San Francisco
D: +1-415-984-8876

Courtney C. Byrd
Washington, DC
D: +1-202-383-5229

Stephen McIntyre
Los Angeles
D: +1-213-430-8382

The COVID-19 pandemic has created unprecedented challenges for all of us. Many businesses are fighting to maintain their operations and mitigate the impact of the crisis on their customers and employees; many are also fighting to help their communities and our nation by providing the supplies needed to combat the virus and ensure life's basic necessities. Under these extreme circumstances, businesses may find it necessary to communicate and collaborate with their rivals. This creates a special challenge: how to mitigate antitrust risk while not getting in the way of procompetitive and urgently needed business action.

It is important to remember that communicating and collaborating with competitors for legitimate business purposes can be procompetitive, both in the ordinary course and in exigent circumstances like those we face today. Courts and antitrust agencies recognize as much. The Supreme Court, for instance, has found that in some circumstances, "a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive,"[1] and "exchange of . . . information among competitors . . . can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive."[2] The antitrust agencies have likewise issued guidance indicating that information exchanges and collaborations are frequently procompetitive and antitrust law need not stand in the way of legitimate procompetitive activity. As the antitrust agencies explained in their 2000 Guidelines for Collaborations Among Competitors: "In order to compete in modern markets, competitors sometimes need to collaborate. . . . Such collaborations often are not only benign but procompetitive."[3]

The agencies further recognize that crises may create a particularly acute need for collaborative action. On March 24, the DOJ and the FTC issued a joint statement in response to COVID-19 "to make clear to the public that there are many ways firms, including competitors, can engage in procompetitive collaboration that does not violate the antitrust laws" and that the agencies "will . . . account for exigent circumstances in evaluating efforts to address the spread of COVID-19 and its aftermath."[4] The message is broadly consistent with agency guidance issued in the aftermath of prior disasters.[5] There are many procompetitive purposes for collaborating or communicating with competitors in a time of crisis, and the agencies provided a non-exhaustive list of illustrative examples in their March 24 Statement:

- partnering on research and development;

Sergei Zaslavsky
Washington, DC
D: +1-202-383-5162

- sharing technical know-how;
- developing practice parameters;
- engaging in joint purchasing arrangements;
- lobbying the government;
- "working together in providing resources and services to communities without immediate access to personal protective equipment, medical supplies, or health care";
- "temporarily combin[ing] production, distribution, or service networks to facilitate production and distribution of COVID-19-related supplies [the collaborating companies] may not have traditionally manufactured or distributed."[6]

That said, competitor communications and collaborations are not without risk. The agencies make clear in their March 24 Statement that they "stand ready to pursue civil violations of the antitrust laws, which include agreements between individuals and business to restrain competition through increased prices, lower wages, decreased output, or reduced quality . . . [and the DOJ] will also prosecute any criminal violations of the antitrust laws, which typically involve agreements or conspiracies between individuals or businesses to fix prices or wages, rig bids, or allocate markets."[7]

The following guidance and best practices will assist businesses and in-house counsel in recognizing high-risk activity and intelligently assessing and mitigating the risk in legitimate competitor interactions.

- ***Competitor Communications***: Businesses are navigating unprecedented circumstances and it is understandable that competitors may want to communicate about how to keep their employees safe or how to contribute to the well-being of the community. But avoid communications that could be mistaken as agreements between competitors to fix pricing, bid results, or the level of output, allocate customers,[8] set employee wages, or not solicit a rival's employees.[9] Such agreements between competitors are considered *per se* anticompetitive and illegal.
- ***Competitor Collaborations***: Competitors can also collaborate on projects or exchange information for procompetitive purposes. However, such collaborations can still be subject to antitrust scrutiny under the rule of reason—a flexible inquiry that takes into account the purpose and nature of the collaboration or information exchange; the structure of the industry; the nature of competition between the participants; the market power of the participants; the effect of the collaboration on the ability and incentive of the participants to raise price or reduce output, service, quality, or innovation; and the relative weighing of the competitive risks and procompetitive benefits stemming from the collaboration.
- In assessing the risk of a potential collaboration or interaction, keep in mind:
  - Risk is lower if the collaboration is of a limited duration.

    - Risk is lower if competitors do not share competitively sensitive information—e.g., information pertaining to current or future price, output, costs, or strategic planning. Where achieving legitimate business goals requires exchanging information on these subjects, risk can be mitigated by using historical rather than current or future information, using aggregated rather than company-specific information, and using a third party that is not an industry participant to aggregate or anonymize any competitively sensitive information.
    - Risk also may be mitigated by setting up firewalls or "clean teams"—mechanisms to ensure that persons who have access to rivals' competitively sensitive information do not share that information with businesspeople responsible for the company's competitive decision-making, such as price setting.
- Be sure to clearly specify and document the procompetitive purpose of the collaboration—i.e., why the collaboration helps the company serve its customers and is good for consumers.
- Identify the information that needs to be shared and the joint activities needed to effectuate the procompetitive purpose. Create processes to ensure that competitor interactions do not go beyond what is necessary to achieve the procompetitive purpose.
- Participate in any conversations with competitors (whether they are in person, telephonic, or electronic). Remind participants at the outset of the subjects to be discussed (and subjects to avoid), keep minutes, and ensure the interactions remain within the permissible scope.
- Be sure to keep monitoring the situation after the COVID-19 outbreak subsides: competitor interactions that are necessary to meet the exigencies of the crisis may potentially be less justifiable (or require additional safeguards) after business returns to normal.
- Some joint ventures that entail an efficient integration of different companies' assets may be procompetitive and legal even if the venture controls competitive decisions, such as output and pricing. "As a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells."[10] But such ventures will be subject to greater scrutiny, particularly where the venture accounts for a significant share of the relevant market.

Companies may also consider taking advantage of FTC's advisory opinion program and DOJ's business review letter process, which allow businesses to solicit agency feedback on proposed joint ventures or collaborations. Ordinarily, the agencies can take several months to generate advisory opinions and review letters. But, pursuant to recent guidance, the agencies "will aim to respond expeditiously to all COVID-19-related requests, and to resolve those addressing public health and safety within seven (7) calendar days of receiving all necessary information."[11] Agency responses on enforcement intentions for these requests will remain effective for one year after they are issued.[12]

Companies contemplating a competitor collaboration in the healthcare sector may also benefit from reviewing O'Melveny's client alert specifically focused on that industry, available here.

O'Melveny's antitrust attorneys have extensive experience in helping businesses assess and mitigate risk in joint ventures, competitor collaborations, and other interactions with rivals, and stand ready to help.

---

[1] *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 103 (1984) (citing *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 13-18 (1979)).

[2] *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441, n.16 (1978); *see also Anderson News, L.L.C. v. American Media, Inc.*, 899 F.3d 87, 105-06 (2d Cir. 2018) (competitor communications "consistent with legitimate, independent, and procompetitive action"); *Interborough News Co. v. Curtis Publ'g Co.*, 225 F.2d 289, 293 (2d Cir. 1955) (public communications among competitors about switching wholesalers led to increased wholesaler competition).

[3] US Dep't of Justice & Fed. Trade Com'n, *Antitrust Guidelines for Collaborations Among Competitors* at 1 (Apr. 2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

[4] US Dep't of Justice & Fed. Trade Com'n, *Joint Antitrust Statement Regarding COVID-19* (Mar. 24, 2020), https://www.justice.gov/atr/joint-antitrust-statement-regarding-COVID-19.

[5] *See, e.g.*, US Dep't of Justice & Fed. Trade Com'n, *Antitrust Guidance — Hurricanes Harvey and Irma* (Sept. 12, 2017), https://www.justice.gov/opa/press-release/file/995986/download ("The recovery from Hurricanes Harvey and Irma may require a range of collaborative efforts among competing firms — including joint ventures, joint licensing, and other similar contractual arrangements."); US Dep't of Justice & Fed. Trade Com'n, *Antitrust Guidance — Hurricanes Katrina and Rita* (June 25, 2015), https://www.justice.gov/atr/antitrust-guidance-hurricanes-katrina-and-rita ("Joint efforts of limited duration by businesses to restore these services [disrupted by the hurricanes] more effectively and to assist the affected communities in recovering from the devastation likely will be necessary and should not generally raise concern under the antitrust laws.").

[6] *Joint Antitrust Statement Regarding COVID-19, supra* n. 4.

[7] *Id.*

[8] *Antitrust Guidelines for Collaborations Among Competitors, supra* n.3 at 8.

[9] US Dep't of Justice & Fed. Trade Com'n, *Antitrust Guidance For Human Resource Professionals* at 3-4 (Oct. 20, 2016), https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf (collecting recent agency enforcement actions alleging wage-fixing and no-poach arrangements among competitors); *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464, 471 (W.D. Pa. 2019) ("no-poach agreements as plead in the consolidated complaint . . . may be considered *per se* violations of § 1"); *In re Animation Workers Antitrust Litig.*, 123 F. Supp. 3d 1175, 1211-14 (N.D. Cal. 2015) (denying motion to dismiss plaintiffs' wage-fixing and no-poach *per se* claim); *see also Todd v. Exxon*, 275 F.3d 191, 198 (2d Cir. 2001) (wage-fixing may be *per se* illegal).

[10] *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006).

[11] *Joint Antitrust Statement Regarding COVID-19, supra* n.4.

[12] *Id*.
