

Competition Compliance in Times of Crisis

Managing Antitrust Risk During the COVID-19 Pandemic



Agenda

Competitor Collaborations and Communications

Antitrust Compliance Challenges of Working Remotely

Pricing Risks and Best Practices

Merger Clearance Considerations and Challenges

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Competitor Collaborations and Communications

Boundaries and Risks of Joint Conduct During a Crisis



The Department of Justice stands ready to make sure that bad actors do not take advantage of emergency response efforts, healthcare providers, or the American people during this crucial time. . . . I am committed to ensuring that the department's resources are available to combat any wrongdoing and protect the public.



- AG William Barr



COVID-19 does not provide a reason to tolerate anticompetitive conduct that harms workers, including doctors, nurses, first responders, and those who work in grocery stores, pharmacies, and warehouses, among other essential service providers on the front lines of addressing the crisis.

- FTC and DOJ, Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets



“Crisis Cartels” Are Still *Per Se* Illegal

- **Price Fixing**: Agreement among competitors to raise, fix or maintain price at which products or services are sold, or lower price they pay for a product
- **Bid Rigging**: Agreement among competitors about which competitor will submit a winning bid on a public or private contract in a formal or informal competitive bidding process
- **Market Allocation**: Agreement among competitors to divide the market geographically or by customer
- **No Poach**: Agreement between competing employers not to compete for each other’s employees such as by not soliciting, interviewing or hiring them

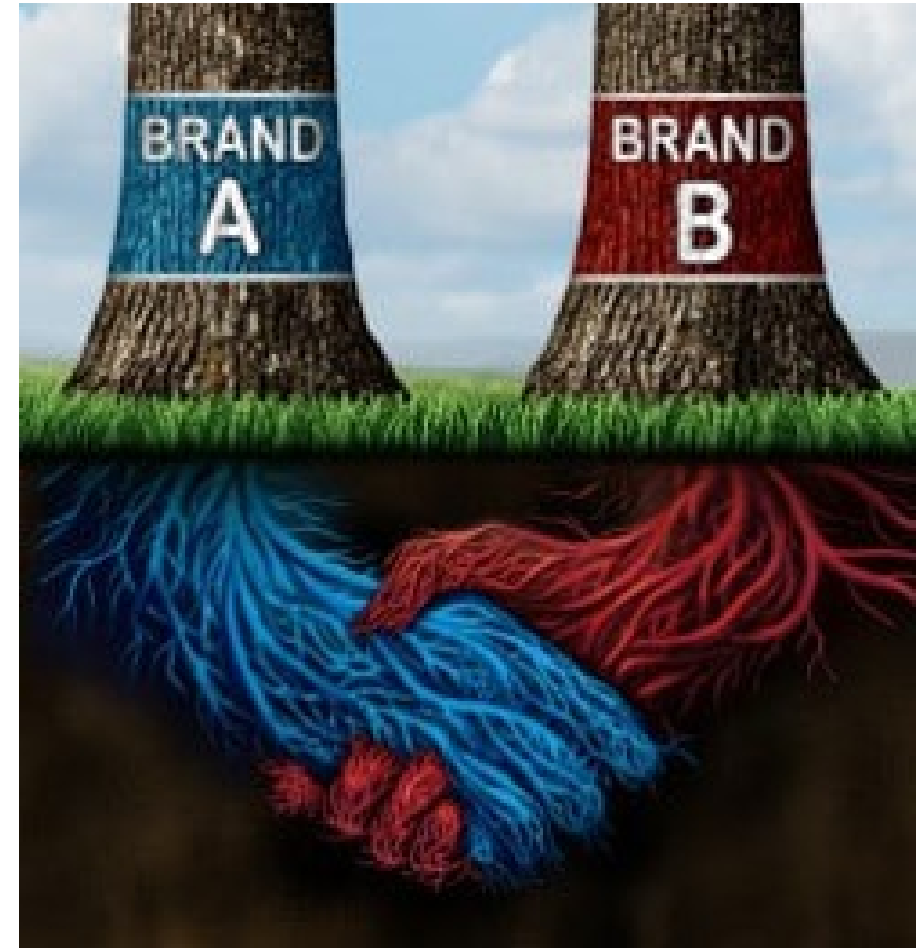
Exchanging information with competitors is not by itself illegal, but it may be **evidence** of an illegal agreement.



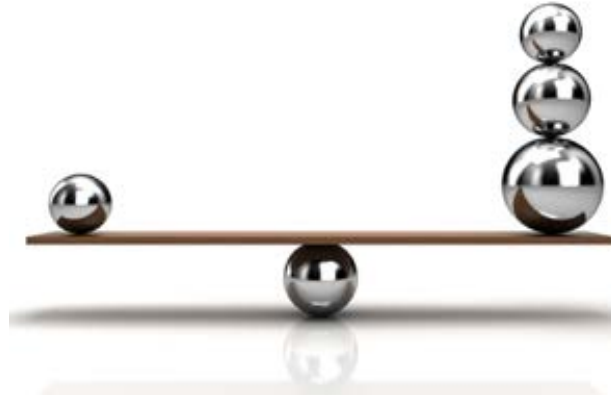
- Fight against COVID-19 “will require unprecedented cooperation between federal, state, and local governments and among private businesses”
- Expedited process for agencies to evaluate proposed conduct within 7 days
 - FTC Advisory Opinions
 - DOJ Antitrust Division Business Review Letters
 - Provides clarity that agency has no intention to take enforcement action
- Agencies will consider exigent circumstances

Examples of Pro-Competitive Collaborations

- Joint Venture
- COVID-19 Industry Task Force
- Private Lobbying
- Joint R&D / Standard Setting
- Technical information Exchange
- Joint Purchasing Agreement



Analysis of Competitor Collaborations



The rule of reason **balances** anticompetitive harms against procompetitive justifications. To withstand the analysis, the agreement:

1. Must be part of a larger legitimate procompetitive employer **collaboration**
2. Must be “**reasonably necessary**” to the collaboration
3. May **not be broader** than reasonably necessary to achieve the **efficiencies** from a business collaboration

Best Practices to Minimize Risk



- Consider seeking **agency guidance** on collaboration.
- Understand and **document business reasons** for wanting to collaborate or exchange information.
- Ensure **communications are limited** to discussions **reasonably necessary** to achieve those **legitimate business purposes**.
- Prepare an **agenda**, reviewed by antitrust counsel, then stick to it.
- Consider having **antitrust counsel** attend every competitor meeting.
- Avoid discussing **competitively sensitive information**.
- Ensure that decisions about pricing, markets, and customers are **independent**.
- Educate personnel that even a public health crisis such as COVID-19 does **not excuse** conduct that is otherwise illegal.

Limited Immunity under DPA

Defense Production Act

- Immunity from federal or state antitrust laws for companies asked to participate in “voluntary agreements” or “plans of action” 50 U.S.C. § 4558(j)
- Can facilitate cooperation not necessarily permissible in normal circumstances.
- Invoked to mobilize production of PPE; Trump specified in executive order intent to immunize certain voluntary coordination from antitrust scrutiny.
- Strict statutory and regulatory requirements to invoke defense.
- Limited in scope to actions taken to develop or carry out agreements or plans of action initiated by President or designated individuals.

Examples of International Approaches

- **European Competition Network (ECN) and European Commission**
 - Will “not actively intervene against **necessary and temporary** measures put in place to avoid a shortage of supply”
 - Temporary Framework from DG Comp for assessing on legality of specific cooperation initiatives to tackle pandemic
- **UK’s Competition and Markets Authority (CMA)**
 - Exemptions for measures to ensure supply of scarce products that are “appropriate and **necessary**, clearly in the **public interest**, contribute to the **benefit and wellbeing of consumers**, deal with **critical** issues that arise as a result of the pandemic and last **no longer than necessary**”
- **Australia’s Competition & Consumer Commission (ACCC)**
 - Expedited **interim authorization** process granting statutory protection for covered conduct (applied already to supermarkets, medical technology, banks, airlines, pharma wholesalers)
- **Canadian Competition Bureau (CCB)**
 - Will refrain from scrutinizing “**short-term**” collaborations to respond to crisis “**in good faith**”

Antitrust Compliance Challenges of Working Remotely

Antitrust Compliance Challenges of Remote Working

- Increased use of alternative methods of communication outside of the company's network means more difficulty in monitoring and detecting risky communications
 - WhatsApp, WeChat
 - Text messages
 - Personal email accounts
- Harder to preserve / collect data from these alternative sources



Pricing Risks and Best Practices

Price Gouging



- Some **state and local laws** restrict excessive price increases on **necessities**
 - In U.S., most states have restrictions on price gouging
 - Most are statutes; some governors have recently issued executive orders
 - Enforced by state AGs; some private rights of action allowed
 - Mostly injunctive relief and civil penalties; some criminal penalties (e.g., California)
- **No federal statute** (yet)
 - Executive Order under Defense Production Act
 - Legislation introduced in House and Senate
- Triggered by **disaster** or declaration of **state of emergency**
- Other countries (e.g., UK, France, Italy) investigating excessive pricing claims on high-demand health products like masks and hand sanitizer

Price Gouging – Variations in State Laws

- Which **products** qualify?
 - Food, gasoline, medical supplies, emergency supplies
 - Most statutes give AG discretion to define “essential commodity” in these circumstances
 - PPE? Disinfectant wipes? Hand sanitizer? Toilet paper?
- **Only retailers** or **any party** in distribution chain?
 - Manufacturers, wholesalers, distributors
- What is the **threshold** for price increases?
 - Percent increase cap above pre-event price (e.g., 10% higher than before emergency)
 - “Unconscionable” or “gross disparity” pre- vs. post-event
 - Outright ban on price increases



Pricing Algorithms and Online Marketplaces

- Online marketplaces have seen price gouging, particularly by third-party sellers. Companies are partnering with law enforcement, but must remain vigilant.
- May be effect of pricing algorithms programmed to raise prices as demand increases.
- Heightened scrutiny now could trigger broader post-pandemic look into industry, pricing algorithms and other technology tools for pricing in online marketplaces.



Best Practices to Minimize Risk

- **Document reasons / justifications for price increases**
 - Statutes generally contain exceptions where seller is justified in raising prices to account for increased costs or where profit margins remain consistent pre- and post-event
- Considerations for online marketplaces
 - Proactively remove posts:
 - Automated systems that compare, identify, and remove unfairly priced items
 - Increase number of employees conducting sweeps and take-downs
 - Ban potentially problematic products like face masks
 - Add price gouging reporting tool for users

Merger Review Challenges and Considerations

Merger Clearance – Procedural Changes

- FTC and DOJ Antitrust Division have implemented a temporary electronic filing system for the submission of Hart-Scott-Rodino (HSR) filings and will not accept hard copy or DVD HSR filings until further notice.
- Remote working – meetings and interviews that would be in-person are now by phone or video. Depositions cancelled and rescheduled by video.
- European Commission is accepting and encouraging digital submissions



Merger Clearance – Delays and Extensions

Many jurisdictions are delaying or extending merger review timeframes.

United States – DOJ and FTC

- DOJ asked for additional 30 days after parties submit documents
- After 2-week suspension in March, requests for early terminations are being processed again
- Remote working causing additional delay

European Commission

- Requesting companies where possible to delay merger notification
- Difficulties in collecting information from third parties
- Remote working causing additional delay

Backlogs will likely impact timing for future transactions where parties haven't yet filed for clearance.



Beware of Gun Jumping

- Antitrust laws still apply in full even if the parties have agreed to merge, e.g., the parties cannot agree on prices, output, market allocations, etc.
- Buyer cannot effectively obtain control of the target before the transaction closes

Legal Standards Remain Unchanged



We will not suspend our usual rigorous approach to ferreting out anticompetitive harm and seeking appropriate relief, even in the face of uncertainty. . . . We will continue to follow the facts, adjust to changing market conditions, and master the many details that comprise a thorough antitrust review.

- Ian Conner, Director of FTC's Bureau of Competition



Questions?

Speakers



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Eva Cole helps clients navigate the complex area of antitrust law, identifying and mitigating risks before they turn into problems and effectively managing and resolving problems that have unavoidably turned into disputes. As co-chair of the firm's Antitrust/Competition Practice Group, she focuses her practice on civil antitrust litigation, class actions, and international cartel investigations led by enforcement agencies around the world. She has particularly distinguished experience representing clients in the electronics, financial, and sports industries.

As a member of the firm's Diversity Committee, Eva leverages nearly two decades of experience to help foster and promote a culture of inclusion.

Speakers



Susannah Torpey

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Susannah has more than fifteen years of experience representing Fortune 500 companies in multimillion and billion dollar antitrust class actions, high-tech competitor disputes, international investigations, and counseling partnerships, including monopolization, price fixing, wage fixing, no-poach agreements, group boycotts, exclusive dealing, tying, price discrimination, unfair competition, anticompetitive product redesign, and mixed issues of antitrust and intellectual property law relating to Fair, Reasonable, and Non-Discriminatory (FRAND) obligations, standard-setting, patent licensing, patent misuse, and fraud on the PTO. Susannah also counsels international and U.S. businesses regarding the minimization of antitrust risk and evaluates board and other corporate activities for antitrust compliance.

She has been repeatedly recognized as a “SuperLawyer,” “Top Woman Attorney,” and as a “Star” in Antitrust and Litigation for obtaining critical wins for her clients, whether at trial on behalf of plaintiffs or by winning complete dismissals on behalf of defendants.

Speakers



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Neely guides leading companies in the United States and around the world through merger review and clearance processes, and develops creative strategies for clients contemplating M&A transactions to reduce their antitrust risk. She has steered hundreds of transactions through the U.S. and global merger control review process and regularly represents clients in merger and other antitrust investigations by the U.S. Department of Justice (DOJ), Federal Trade Commission (FTC), and state attorneys general, as well as in Hart-Scott-Rodino (HSR) matters. Neely uses her deep experience to counsel clients on a variety of antitrust issues, including distribution restrictions, the formation and operation of joint ventures, trade association activities, information exchanges, and pricing practices.