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Antitrust Does Not Shelter in Place During a Pandemic

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Our realities have been upended by COVID-19, creating a new world that is likely to continue for a long time. This "new normal" is already stress testing businesses of all types. When we face this kind of external threat, our natural instinct is that since we are all in this together, we should all work together to figure out what to do.

For any business, the group with which it is "in it together" is often made up of the business's competitors: No one knows the issues a business like yours will face better than your competitors. So you may think that if you have to make hard decisions—and you will—it would be better if you and your competitors made those decisions together, because that way you all can be sure that you really are "in it together" and all taking the same actions.

Natural as it is, that "all in it together" instinct is the polar opposite of antitrust law's core principle that competing businesses must make their own decisions on issues that affect competition with each other. Deciding competitive issues together reduces the risk to each business by ensuring they all act in the same way. It is handy to think of antitrust law as prohibiting that kind of risk reduction: Antitrust laws work by increasing the risk that each company faces from the independent actions of its competitors.

It is OK to jointly discuss, and even agree on, measures that address the health of your employees and customers, but it can create antitrust problems if those discussions and agreements spill over into agreements that limit competition. For example:

- It is OK for a local group or a larger trade group of retail stores to discuss and even agree on "best practice" ideas for protecting the health of customers and employees, such as "wiping down all surfaces with bleach every night."
- But it may not be OK for that same group to discuss whether they should all close for some period of time and how long that should be, or whether to reduce hours or take turns being open at different times or on different days.

Antitrust law draws a similar distinction between a single business acting to limit its market presence and a collective decision by competing businesses to do the same. For example:

- It is OK for a grocery chain to announce that it will limit hours to allow for more frequent cleaning or restocking, or to designate "senior citizen hours" to help protect older customers.
- It may not be OK for the competing grocery stores in a city to agree on what their hours will be during the crisis, even if their stated purpose is to allow for more frequent cleaning or to protect their older customers.

It is important to remember that antitrust risk can result in lawsuits by federal or state authorities to prohibit the conduct as well as in treble damage actions by competitors or customers injured by the practice. And for conduct regarded as "per se" illegal under the federal antitrust laws, the consequences can be particularly severe:

- Individuals can be sent to jail for up to 10 years, and can be fined up to $1 million in *addition* to any jail sentence.
- Corporations can face fines in an amount calculated as the *highest* of the following:
  - Up to $100 million
  - Twice the loss inflicted on customers
  - Twice the unlawful gain to the offending corporation

At the same time, antitrust does allow some kinds of collective activity. For example, U.S. antitrust law has long recognized that the First Amendment to the U.S. Constitution protects joint activity

directed at seeking or influencing government action under the "petitioning clause" of the amendment, even if the outcome sought would otherwise violate the antitrust laws were the petitioners to engage in that activity directly and without government sanction. Most commonly, this permits companies to jointly lobby Congress on issues that affect their industry or to get agency regulations passed, modified, or killed. Government petitioning may be an effective way for companies to address and solve industry-wide challenges posed by COVID-19.

But petitioning activity is not entirely free of antitrust risk. For example, assume companies are jointly seeking regulations that would allow them to jointly determine the prices they would charge. If the government entity being petitioned decides against the request, the companies are at risk of criminal prosecution under the antitrust laws if they implement the joint pricing scheme they had proposed to the government.

Antitrust also allows companies to form joint ventures where working together can provide pro-competitive efficiency benefits resulting in offering products or services that each company could not offer on its own, or that each company alone could offer only less efficiently. Joint ventures may require the same kind of approval process as mergers or acquisitions, and are more likely to succeed where there is real economic integration among the joint venture participants, such as the formation of a separate joint venture entity to which the participants contribute assets.

The evaluation of proposed joint ventures, like all "rule of reason" antitrust analysis, takes account of all relevant information about the companies involved, the markets in which they operate, and their roles in those markets. There will undoubtedly be new realities about markets that will have to be taken into account in an age of COVID-19, so businesses should think creatively about whether a joint venture approach would help them solve their problems.

Some joint actions with competitors can help you address the business problems you face in the new world brought about by COVID-19. Other joint actions can subject you to jail sentences, and your company to crippling fines. Knowing the difference is the key to avoiding antitrust problems, and getting antitrust help, in our new normal.

To see our prior alerts and other material related to the pandemic, please visit the Coronavirus/ COVID-19: Facts, Insights & Resources page of our website by clicking here.

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