Antitrust Rules Still Apply During COVID-19

By **Lauren Weinstein and Jennifer Fischell** (March 27, 2020)

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Communities and competitors across the globe have come together to confront the COVID-19 crisis. Ensuring public access to essential, now-scarce supplies has become a top priority.

Hospitals in Ohio that normally compete with one another, for example, have teamed up to provide drive-through COVID-19 testing facilities.[1] Supermarkets in the U.K. are attempting to work together to deliver food to areas that have faced shortages.[2]

Other creative solutions abound: Apparently one bar in New York has started bundling a free roll of toilet paper with each delivery order of its $25 margarita pitchers.[3] In these uncertain times, it sometimes seems like the rules no longer apply.

But they do. The antitrust laws still prohibit anti-competitive coordination, even if undertaken under the guise of cooperation. But whether cooperation crosses the line into anti-competitive conduct turns on whether a restraint of trade is unreasonable. And reasonableness depends on context. How are the antitrust laws supposed to gauge reasonableness in these unprecedented times?

That is a question litigants and courts will be attempting to answer in the months and years to come. The path to an answer will be further complicated by the fact that certain agreements — including competitor-to-competitor (also called horizontal) agreements to fix prices, reduce output and/or allocate markets — are so reliably anti-competitive that they are ordinarily treated as per se unreasonable, anti-competitive and illegal as a matter of law. As the legal world grapples with the implications of COVID-19, it will also have to assess the pandemic's effect, if any, on those per se presumptions.

The U.S. Department of Justice has already recognized that sellers of scarce and in-demand products — finding themselves in a new position of power — might try to leverage the crisis to their advantage.[4] It has thus cautioned the business community against violating antitrust laws in the manufacturing, distribution and sale of such products.

According to the DOJ, its announcement "is part of a broader administration effort to ensure that federal, state, and local health authorities, the private healthcare sector, and the public at large are in the strongest possible position to respond" to the COVID-19 outbreak. To that end, the DOJ and the Federal Trade Commission have announced that they will provide expeditious guidance to businesses "about how to ensure their efforts comply with the federal antitrust laws."[5]

Under enforcers' and potential plaintiffs' scrutiny, any attempt to raise prices on essentials would of course be suspect. But horizontal agreements to discount, stabilize or cap prices are equally illegal price-fixing arrangements. So, too, is any attempt to engage in anti-competitive tying.

Imagine, for example, that a medical supply manufacturer begins requiring all customers who want to purchase face masks to also purchase surgical scalpels. Normally, the

manufacturer would have to compete with other sellers. And there is nothing obvious about COVID-19 that will make scalpels harder to come by. But, because the seller is one of few with masks available, it can exert that its market power to also make customers purchase scalpels from it. The exercise of power in one market to coerce customers to purchase products in another — i.e., tying — is illegal.

Although the medical industry may be the focal point for antitrust scrutiny in the coming months, it is not the only sector particularly susceptible to antitrust violations right now. COVID-19 is changing the way people work, live and socialize. That upheaval may invite anti-competitive behavior across industries — and such behavior will not always be as obvious as a price-fixing conspiracy or an illegal tying arrangement. In the current unprecedented emergency, antitrust violations might even masquerade as altruistic.

Consider, for example, that every employer has been facing decisions about if and when to close its doors to try to prevent the spread of the virus. For manufacturers, that means shutting down factories. But if competitors agree about when, where and how to shut down, that could be interpreted as a per se illegal agreement to reduce output. Closures may seem necessary now, but a concerted reduction in manufacturing could have an anti-competitive effect on price later.

Grocers struggling to keep up with shortages of goods from toilet paper to bread may also face pressure to collaborate with competitors to come up with system-wide solutions. In the short run, such behaviors might well benefit consumers.

The U.K. certainly thinks so: It has already granted supermarkets permission to engage in conduct that would normally be deemed anti-competitive "to help feed the UK during the coronavirus outbreak."[6] Supermarkets may now "cooperate to keep shops open," including by coordinating contingency plans and sharing distribution depots, delivery vans, data on stock levels and even staff.

It is easy to imagine food wholesalers in the U.S. dividing up the country's markets or customers in the name of increased efficiency, but here that would probably constitute a per se illegal market-allocation agreement. And it is far from clear whether the U.K.'s government-exemption strategy would work in the U.S. To avoid the application of civil antitrust claims, at least, an exemption would almost certainly require legislative action.

Any such legislation seems unlikely and probably ill-advised. While there may be some short-term benefits to permitting anti-competitive behavior, the long-term costs to competition may be greater. And the questions about how to implement any exemption are endless. Who will decide when the emergency ends? How might competitors exploit such a regulatory loophole to hurt consumers? Which industries require exemptions? What happens when the next emergency strikes?

Assuming no unprecedented legislative intervention, however, it seems to be a near certainty that industry responses to COVID-19 will inspire years of antitrust litigation. Courts across the country will then face a question of first impression: Is crying "COVID-19!" a defense to antitrust violations?

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[1] University Hospitals and Cleveland Clinic Partner to Provide Drive-Through COVID-19 Testing, Cleveland Clinic Newsroom (Mar. 13, 2020), https://newsroom.clevelandclinic.org/2020/03/13/university-hospitals-and-cleveland-clinic-partner-to-provide-drive-through-covid-19-testing/.

[2] Mark Kleinman, Coronavirus: Supermarkets float competition waiver if crisis deepens, Sky News (Mar. 9, 2020), https://news.sky.com/story/coronavirus-supermarkets-float-competition-waiver-if-crisis-deepens-11953710.

[3] Ryan Brooks (@ryanbrooks), Twitter (Mar. 18, 2020), https://twitter.com/ryanbrooks/status/1240416090611646466.

[4] Justice Department Cautions Business Community Against Violating Antitrust Laws in the Manufacturing, Distribution, and Sale of Public Health Products, Department of Justice News (Mar. 9, 2020), https://www.justice.gov/opa/pr/justice-department-cautions-business-community-against-violating-antitrust-laws-manufacturing.

[5] Bryan Koenig, DOJ, FTC Speeding Up Antitrust Prechecks For Coronavirus, Law360 (Mar. 24, 2020), https://www.law360.com/competition/articles/1256520?cn_pk=bb83dd0b-0fb3-4079-a6fa-66e197e81abd&utm_source=newsletter&utm_medium=email&utm_campaign=custom.

[6] Sarah Butler, UK relaxes trading rules so food stores can work together, The Guardian (Mar. 19, 2020), https://www.theguardian.com/business/2020/mar/19/food-retailers-urge-government-to-relax-regulations-coronavirus.