

COMPETITOR COORDINATION OF CORONAVIRUS RESPONSES – HOW TO MITIGATE ANTITRUST RISKS

Various forms of cooperation among competitors may be beneficial to improve their ability to provide needed products and services in response to the coronavirus (COVID-19) outbreak. Antitrust laws need not inhibit collaboration that is reasonably necessary to enhance how competitors serve their customers. But businesses must take certain steps to mitigate antitrust and other legal risks.

Coronavirus collaboration

Businesses may consider whether their response to the coronavirus outbreak could be more effective if coordinated with other businesses. However, where those businesses are rivals, or the cooperation could otherwise result in the disclosure or receipt of competitors' competitively sensitive information, any collaboration should comply with applicable antitrust laws.

Some examples of the types of coordination that may be beneficial include:

- Coordination of the supply of products or services that are likely to be in increased demand as a result of the outbreak, in order to maximise the industry's ability to meet that demand. For instance, groceries suppliers might coordinate home deliveries to maximise capacity, in particular in remote areas, or if shops are forced to close down.
- The development of common standards (e.g. for cleaning or sanitation) and exchanging information to the extent necessary for that purpose.
- Coordinating a response to a Government requisition of supplies, to ensure that the Government need is met to the fullest extent possible.
- Coordination to address supply chain issues, e.g. minimising the risk of shortages of key inputs by sharing information on available sources of supply and supplier outages, implementing group purchasing arrangements or swapping purchase volumes.

Even where the benefits of such cooperation seem obvious, businesses should be alert to the risk that a competition authority might decide that the coordination breaches antitrust rules, e.g. because it goes further than is reasonably necessary, the benefits could have been achieved unilaterally or through less restrictive means, or it gives rise to anticompetitive effects that were not justified by the benefits. Such infringements can have various adverse consequences, including financial penalties and antitrust damages claims.

Key issues

- Cooperation with your competitors could play an important role in maximising the effectiveness of your response to the coronavirus outbreak.
- There are various steps that businesses should consider to ensure that antitrust laws do not inhibit such cooperation.
- Competition authorities will be keen to ensure that antitrust laws do not hamper effective responses to the outbreak, so should be receptive to appropriate requests for formal or informal comfort.
- When responding to Government requests for information, consider measures to mitigate the risk that your competitively sensitive information is passed on to a rival.

To guard against those risks, businesses should seek legal advice prior to discussing any potential cooperation agreements and when considering the following options.

Lobbying for legal compulsion or a change in the law

The safest way to pursue a collaborative coronavirus response will usually be to ask the Government of the jurisdiction in question to make it mandatory, or to temporarily disapply the competition rules for the cooperation in question. In the UK, it has been reported that groceries retailers have lobbied the Government to disapply competition law to allow some coordination of home deliveries.

Legal compulsion is a defence to an alleged breach of antitrust rules in the vast majority of jurisdictions. In addition, antitrust laws typically permit rivals to cooperate to lobby public bodies for legislative or regulatory changes, even if those changes might restrict competition between them (in the US, this is known as the *Noerr-Pennington* doctrine). However, businesses should be careful to ensure that discussions do not go beyond what is necessary for lobbying purposes and to avoid sharing competitively sensitive information, except to the extent strictly necessary for those purposes and subject to strict controls (see below).

In the US, pursuant to the Pandemic and All-Hazards Preparedness and Advancing Innovation Act (**PAHPA**), the US Secretary of Health and Human Services may, in consultation with the Department of Justice (**DOJ**) and Federal Trade Commission (**FTC**), convene meetings or consultations with market participants engaged in developing qualified pandemic or epidemic products to discuss developing, manufacturing, distributing, purchasing, or storing pandemic countermeasures or products. Parties may even enter into written agreements pursuant to such meetings if approved by the DOJ and FTC. PAHPA provides exemptions to the US federal and state laws for meeting participants and businesses that enter into agreements approved pursuant to PAHPA's requirements. Businesses in the US that believe competitor collaboration may increase output or otherwise benefit the public in responding to the coronavirus may therefore want to consider approaching the DOJ, FTC, or Health and Human Services to convene meetings or consultations under PAHPA.

Where a Government takes action to compel the relevant cooperation, or to disapply antitrust laws, businesses should be careful not to go beyond the strict limits of what is compelled, or the scope of the provision disapplying the competition rules.

Maintain antitrust compliance

Where legal compulsion or a change in the law is not available, businesses should ensure that their cooperation is compliant with the applicable competition rules. While competition laws vary, cooperation will generally be antitrust compliant if it either does not restrict competition between the parties at all, or if it is objectively necessary to achieve a beneficial aim (such as maintaining supplies of products that are in high demand due to the outbreak), goes no further than is necessary, and any resulting anticompetitive effects are not so serious as to outweigh the benefits. In that respect:

- Explore whether there are other means of achieving the desired results with a lower degree of coordination and document the conclusions. For example, consider whether the initiative needs to be industry wide, or could be implemented

by smaller groups. Where businesses work together to create common standards, consider whether the desired result can be achieved by making them voluntary, rather than binding.

- Avoid coordination that results in fixed prices, reduction of output or capacity, or sharing of customers or markets, as this is unlikely to be acceptable unless strictly necessary to address a severe public health risk.
- Any sharing of competitively sensitive information that is necessary to plan or implement the cooperation should be subject to strict safeguards. In particular, businesses should consider implementing ‘clean team’ arrangements to ensure the information is disclosed on a ‘need to know’ basis to a limited group of individuals who are subject to strict confidentiality obligations and, where possible, restrictions on subsequent work in a role in which they might make use of their rivals’ competitively sensitive information.

Where appropriate, consider approaching competition authorities of the relevant jurisdictions for formal or informal comfort that the cooperation is antitrust compliant. Agencies will be keen to ensure that antitrust laws do not hamper effective responses to the outbreak, so they should be receptive to requests for cooperation that is objectively necessary for businesses to improve their response to the significant demands caused by the coronavirus.

In Australia, it has been reported that two grocery retailers considered seeking clearance from the Australian Competition and Consumer Commission to work together on a co-ordinated approach to limit purchases of goods such as toilet paper, tissues, pasta and rice to ensure sufficient supplies for consumers. However, they ultimately concluded that there was no need for coordination at this stage, in part because of the technical difficulties in implementing limits through their point-of-sale systems.

Given the considerable antitrust risks involved in coordination between competitors, advice from specialist antitrust counsel should be sought before initiating any cooperation. Contact details for Clifford Chance’s global antitrust practice are at the end of this briefing.

Responding to Government requests for information

Government bodies may seek information from suppliers of important goods or services in order to inform their planning and development of policies to contain or mitigate the outbreak. Sharing (any) information with a public body alone should not infringe competition laws. However, antitrust issues could arise if the Government body passes competitively sensitive information about a business’s operations to its rivals. To prevent such issues arising, consider pursuing one of the following options:

- ask the Government body to legally compel you to provide the information. That will allow you to rely on the legal compulsion defence outlined above, whatever the Government body does with the information;
- ask the Government body to enter into a legally binding agreement not to pass your information on to competitors (or to any other businesses if a list of rivals cannot be

easily compiled) or, if the Government body anticipates that it will need to share information with rivals, to ensure that appropriate restrictions are in place, such as a clean team within the rival to handle your competitively sensitive information; or

- if the Government body is not prepared to enter into any agreement, the antitrust risks of sharing information with it will in practice be limited if the Government body does not give you any reason to suspect that your competitively sensitive information will be shared with rivals. To that end, document all discussions and communications with the Government body on the matter.

Competition authorities' enforcement activity

A number of competition authorities have issued statements emphasising that they will consider enforcement action against anticompetitive conduct in respect of goods that are in scarce supply due to the virus outbreak. For example, the US DOJ has urged people who know of price-fixing, bid-rigging or other illegal moves to profit off coronavirus fears to contact government officials, and the UK's Competition and Markets Authority has stated that it will consider any evidence that companies may have broken competition law, for example by charging excessive prices. Government agencies may also take enforcement action under consumer protection laws, which vary widely between jurisdictions.

More generally, however, some types of enforcement action may be subdued as a result of the outbreak. The European Commission, for example, has ordered all non-critical staff to work from home, and critical staff to work in two shifts, which is likely to mean fewer (if any) dawn raids being carried out.

CONTACTS



Nadea Badea
Partner, Bucharest
T +40 216 666 102
E nadea.badea@cliffordchance.com



Marc Besen
Partner, Düsseldorf
T +49 211 4355 5312
E marc.besen@cliffordchance.com



Itir Çiftçi
Partner, Istanbul
T +90 53 0967 2677
E itir.ciftci@cliffordchance.com



Alex Cook
Partner, Prague
T +420 222 55 5212
E alex.cook@cliffordchance.com



Tim Cornell
Partner, Washington D.C.
T +1 202 912 5220
E tim.cornell@cliffordchance.com



Franck Coudert
Partner, Casablanca
T +212 5 2000 8620
E franck.coudert@cliffordchance.com



Luciano Di Via
Partner, Rome
T +39 06 4229 1265
E luciano.divia@cliffordchance.com



Elizabeth Morony
Partner, London
T +44 20 7006 8128
E elizabeth.morony@cliffordchance.com



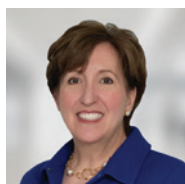
Miguel Odriozola
Partner, Madrid
T +34 91 590 9460
E miguel.odriozola@cliffordchance.com



Greg Olsen
Partner, London
T +44 20 7006 2327
E greg.olsen@cliffordchance.com



Dave Poddar
Partner, Sydney
T +61 2 8922 8033
E dave.poddar@cliffordchance.com



Sharis Pozen
Partner, Washington D.C.
T +1 202 912 5226
E sharis.pozen@cliffordchance.com



Katrin Schallenberg
Partner, Paris
T +33 1 4405 2457
E katrin.schallenberg@cliffordchance.com



Nish Shetty
Partner, Singapore
T +65 6410 2285
E nish.shetty@cliffordchance.com



Torsten Syrbe
Partner, Moscow
T +7 495 725 6400
E torsten.syrbe@cliffordchance.com



Anastasios Tomtsis
Partner, Brussels
T +32 2 533 5933
E anastasios.tomtsis@cliffordchance.com



Thomas Vinje
Partner, Brussels
T +32 2 533 5929
E thomas.vinje@cliffordchance.com



Bai Yong
Partner, Beijing
T +86 10 6535 2286
E yong.bai@cliffordchance.com



Frans Muller
Counsel, Amsterdam
T +31 20 711 9318
E frans.muller@cliffordchance.com



Masafumi Shikakura
Counsel, Tokyo
T +81 3 6632 6323
E masafumi.shikakura@cliffordchance.com



Ivona Terlecka
Counsel, Warsaw
T +48 22 429 9410
E ivona.terlecka@cliffordchance.com

OUR INTERNATIONAL NETWORK 32 OFFICES IN 21 COUNTRIES



Abu Dhabi
Amsterdam
Barcelona
Beijing
Brussels
Bucharest
Casablanca
Dubai
Düsseldorf
Frankfurt
Hong Kong
Istanbul
London

Luxembourg
Madrid
Milan
Moscow
Munich
Newcastle
New York
Paris
Perth
Prague
Rome
São Paulo
Seoul

Shanghai
Singapore
Sydney
Tokyo
Warsaw
Washington, D.C.
Riyadh*

*Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh
Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.

C L I F F O R D

C H A N C E

This publication does not necessarily deal with every important topic nor cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street,
London, E14 5JJ

© Clifford Chance 2020

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571
Registered office: 10 Upper Bank Street,
London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications.

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or contact our database administrator by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ.

Abu Dhabi • Amsterdam • Barcelona
Beijing • Brussels • Bucharest
Casablanca • Dubai • Düsseldorf
Frankfurt • Hong Kong • Istanbul
London • Luxembourg • Madrid
Milan • Moscow • Munich • Newcastle
New York • Paris • Perth • Prague
Rome • São Paulo • Seoul • Shanghai
Singapore • Sydney • Tokyo • Warsaw
Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.