GIBSON DUNN

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# ANTITRUST IMPLICATIONS OF COVID-19 RESPONSE

To Our Clients and Friends:

As companies around the world respond to COVID-19, questions arise about whether coordinated or even unilateral efforts to deal with the virus could prompt antitrust scrutiny. Antitrust laws generally prohibit agreements that unreasonably restrain trade. Certain particularly harmful agreements, such as agreements among competitors to fix prices, rig bids, or allocate markets, are unlawful *per se*. Others are evaluated based on their effects on competition. Antitrust laws also prohibit the abuse of monopoly power or near-monopoly power.

There is no general exemption from competition laws for public health emergencies. Just this week, the U.S. Department of Justice announced its intent to "*hold accountable anyone who violates the antitrust laws of the United States in connection with the manufacturing, distribution, or sale of public health products*."[1]

At the same time, certain collaborations among competitors can be lawful, provided they are justified by legitimate business concerns, and companies retain wide latitude to take unilateral steps to protect their business, workers, and the public.

Below we address some of the most common questions regarding COVID-19 responses and the antitrust laws in the United States, Europe, and China, but seeking advice about any specific business practice in advance is the best way to minimize risk. Attorneys in Gibson Dunn's Antitrust and Competition Practice Group are available to help companies design COVID-19 responses that comply with the antitrust laws.

***Information Sharing and Standard Setting***

The U.S. antitrust agencies have recognized that there are legitimate, pro-competitive reasons why competitors may want to share information, particularly in response to a crisis.[2] For example, it may be useful for companies to benchmark their response to COVID-19 against their competitors in order to improve their own response to the virus and to minimize disruptions in supply chains or labor markets.

Information exchanges among competitors should always be designed and reviewed by antitrust counsel, but certain general rules apply. Companies should identify legitimate goals for the information exchange that are pro-competitive or competitively neutral and ensure that all communications with competitors are limited to what is reasonably necessary to achieve those goals. Conversations among competitors should follow an agenda prepared in advance and reviewed by counsel. And care should be taken to avoid discussing competitively-sensitive information like current or future prices, costs, or output.

While companies may, with proper guidance and oversight, exchange appropriate information about best practices with respect to COVID-19, adherence to those best practices should be entirely voluntary for each company to adopt at its own discretion. For example, competitors may discuss best practices for remote working, extended leave, and travel restrictions. But mandatory standards should not be adopted nor agreements otherwise reached.

Likewise, the European Commission has recognized that benchmarking against the best practices in an industry can improve efficiency. Information sharing and benchmarking are generally assessed on a case-by-case basis, taking into account any pro-competitive justifications. For example, information sharing that allows suppliers to better forecast areas of oversupply and undersupply may be acceptable, provided it "*does not go beyond what is necessary to correct the market failure*."[3] In any event, the sharing of particularly sensitive or strategic information – such as future pricing – may be deemed unlawful *by object* under Article 101 of the Treaty on the Functioning of the European Union ("TFEU"). Before discussing any aspect of pricing or output in such forums, advice should be obtained from European qualified outside counsel.

In China, the exchange of competitively sensitive information can constitute a violation of the Anti-Monopoly Law if it has anti-competitive effects. But the Anti-Monopoly Law also exempts certain agreements with "beneficial purposes," many of which are not recognized as efficiencies in other jurisdictions. For instance, Article 15(4) exempts anti-competitive agreements entered into for the purpose of "*maintaining the public welfare*," such as environmental protection, energy conservation, and disaster relief. Article 15(5) provides a possible exemption for anti-competitive agreements undertaken to "*mitigate the severe decrease of sales volume or overstock during economic recessions*" (often referred to as "crisis cartels"). Like Article 101(3) of the TFEU, however, the Anti-Monopoly Law requires companies to self-assess and if investigated, demonstrate that the agreement or coordination does not seriously restrict competition and that consumers share the resulting benefits.

Absent guidance from the State Administration for Market Regulation ("SAMR") on these exemptions, it is unclear how they will be applied to coordinated responses to COVID-19. Thus, it is prudent to follow the best practices explained above – namely, to identify legitimate, pro-competitive goals and to limit the coordination to what is reasonably necessary to achieve those goals.

If collaborating or sharing information with a competitor will enable a more effective response to COVID-19, Gibson Dunn attorneys are available to help design a collaboration consistent with the antitrust laws.

***Unilateral Refusals to Deal***

Companies have wide latitude to decide for themselves with whom to deal. And ordinarily, even firms with market power can unilaterally refuse to deal with certain suppliers, customers, or competitors for a valid business reason.

Thus, a company can generally refuse to deal with firms that fail to adopt adequate measures to protect workers and customers, or promote misinformation that may exacerbate the public health risks. Such

steps should only be taken unilaterally and not in coordination with other companies. And again, antitrust guidance in advance of terminating a business relationship can help to minimize risk.

***Price Gouging***

Companies are generally free to price their goods and services as they see fit, as long as those decisions are made unilaterally. However, antitrust regulators around the world have recently issued warnings against price gouging and other unfair trade practices in response to COVID-19.

In the U.S., there is no federal law prohibiting price gouging.[4] Thus, during the recent COVID-19 outbreak, the Federal Trade Commission has focused on deceptive advertising and consumer fraud.

In contrast, states such as New York and California have laws that restrict price gouging. On March 4, 2020, for example, California declared a state of emergency, which triggers a prohibition against price gouging of food, emergency supplies, medical supplies, gasoline, emergency cleanup services, hotel accommodations, and transportation.[6] Other State Attorneys General have announced similar investigations.

In China, the SAMR has wide powers under the Price Law to supervise and inspect the prices of goods and services and to investigate unfair pricing behaviors, including using misleading or false pricing practices, covertly manipulating prices by raising or reducing grade levels of goods and services, and illegally seeking exorbitant profits (even absent any market power).

In the wake of the COVID-19 outbreak, the SAMR implemented strict pricing supervision at national and local levels. The SAMR's Price Supervision, Inspection and Anti-Monopoly Bureau reported that a number of mask manufacturers complained about the increase in their production costs, which led some manufacturers to suspend production.[7] In order to tackle this issue, the SAMR extended its price supervision to cover not just masks, but the entire supply chain, including manufacturing equipment and raw materials.[8] Several e-commerce platforms are now voluntarily monitoring the prices of masks and protective gear on their platforms to ensure that they comply with China's pricing regulations.

As of February 24, 2020, the SAMR has investigated around 4,500 entities for the price gouging of masks and commenced investigations into around 11,000 companies for pricing violations concerning medical protective gear and other essential products.[9] In addition, local authorities in Beijing, Tianjin, Jiangxi, Shanghai and Hubei similarly imposed heavy penalties on those who drove up the prices of such products, including fines of RMB 2 to 3 million (approx. $286,000 to $430,000).[10]

In Europe, a number of national regulators have taken action against price gouging. The UK's Competition and Markets Authority announced that it would take action against violations of consumer protection and competition laws, such as excessive pricing and misleading advertising.[11] Italy's competition authority is seeking information on how online platforms are preventing unjustified price spikes and false claims regarding the efficacy of products.[12] And the Polish competition authority has opened investigations into wholesalers who allegedly terminated contracts with hospitals to sell protective equipment on the market for disproportionately high prices.[13]

In light of these warnings against price gouging and unfair trade practices, companies should ensure that their pricing activity is not only independent from its competitors, but also reasonable and justified. Claims about the efficacy of products, such as protective gear, should be verified and substantiated by credible evidence.

***Industry Bailouts***

Some countries have already announced the intention to adopt aid measures that will help commercial sectors that are particularly vulnerable to the financial consequences of COVID-19. In Europe, companies that are to receive such aid need to ensure that the measures comply with the EU State Aid rules and have been cleared by the European Commission. Conversely, competitors of recipients of aid may see opportunities to intervene to secure a fair market outcome.

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

[2] In 2014, the agencies recognized a legitimate need for competitors to share information about cybersecurity threats to improve the safety of our nation's networks. Thus, they concluded that a properly designed sharing of cybersecurity threat information was not likely to raise antitrust concerns. For more information, see DoJ and FTC: Antitrust Policy Statement on Sharing of Cybersecurity Information (April 10, 2014), available at: https://www.justice.gov/sites/default/files/atr/legacy/2014/04/10/305027.pdf.

[3] European Commission, Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements, para 110.

[4] During Hurricane Katrina, the Chair of the Federal Trade Commission explained to Congress that a seller with lawfully acquired market power can charge any price that the market will bear. For more information, see FTC, Prepared Statement of the Federal Trade Commission – FTC Initiatives to Protect Consumers and Competitive Markets in the Wake of Hurricane Katrina (September 22, 2005), available at: https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-subcommittee-commerce-trade-and-consumer-protection/050922katrinatest.pdf

[6] State of California, Proclamation of a State of Emergency (March 4, 2020), available at: https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf

[7] Central People's Government, "Press conference held by the Joint Prevent and Control Mechanism of the State Council introduces measures for maintaining market order in accordance with the law: A focus on the efficient investigation and punishment of behavior involving fake masks and

price gouging on masks" (February 9, 2020), available at http://www.gov.cn/xinwen/2020-02/09/content_5476343.htm.

[8] Central People's Government, "SAMR's Urgent Notice Concerning the SAMR's Crackdown on Pricing Violations in the Production of Masks and Other Products Relating to Epidemic Prevention and Control During the Period of Epidemic Prevention and Control" (February 5, 2020), available at http://www.gov.cn/zhengce/zhengceku/2020-02/06/content_5475223.htm.

[9] SAMR: More than 4,500 companies have been investigated for driving up mask prices" (February 25, 2020), available at http://www.xinhuanet.com/fortune/2020-02/25/c_1125623897.htm

[10] See footnote 7, above.

[11] CMA, "CMA statement on sales and pricing practices during Coronavirus outbreak" (March 5, 2020), available at: https://www.gov.uk/government/news/cma-statement-on-sales-and-pricing-practices-during-coronavirus-outbreak

[12] ACGM, "ICA: Coronavirus, the Authority intervenes in the sale of sanitizing products and masks" (February 27, 2020), available at: https://en.agcm.it/en/media/press-releases/2020/3/ICA-Coronavirus-the-Authority-intervenes-in-the-sale-of-sanitizing-products-and-masks

[13] UOKiK, "UOKiK's proceedings on wholesalers' unfair conduct towards hospitals" (March 4, 2020), available at: https://www.uokik.gov.pl/news.php?news_id=16277

*Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact any member of the firm's* ***Coronavirus (COVID-19) Response Team****.*

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