Proskauer

The Antitrust Dos and Don’ts on Petitioning the Government for COVID-19 Relief

March 25, 2020

In the wake of the coronavirus pandemic's ravage on industries, markets, and entire economies, businesses are seeking help from the government, whether in the form of a bailout or some regulatory accommodation. Industries from nearly every sector of the economy – from travel to communications, and from health insurance to fishing – are lobbying the government. They want relief in the form of, to name a few, changes to immigration laws, relief from credit card transaction fees, tax incentives, and inclusion in the federal stimulus package.

While some companies might try to go it alone and seek relief from the government, many have concluded that government officials are more likely to listen to an industry-wide request. This can be seen as not biased toward any one company, and may be more reflective of the needs of an entire sector of the marketplace. The antitrust laws do not stand as an obstacle to industry-wide government petitioning, but they do impose certain guardrails to make sure legitimate petitioning activity does not spill over into unlawful competitor coordination.

Authorities across the globe are mindful that competition rules must be applied flexibly in the face of Covid-19. In the United Kingdom, for example, after a meeting with supermarket and food industry executives and "listen[ing] to the[ir] powerful arguments," the Environment Secretary confirmed competition laws would be temporarily relaxed to allow supermarkets to share data with each other on stock levels and supply, and to share resources. But competition authorities remain vigilant, and are warning businesses not to use the pandemic as an excuse for unlawful coordination. The DOJ in particular has said it will be on the lookout for "hard-core" antitrust violations – "price fixing, bid rigging, and market allocation" – to "make sure that bad actors do not take advantage of emergency response efforts, healthcare providers, or the American people during this crucial time."

In the United States, there has been no official relaxation of the application of the antitrust laws to certain industries. However, the existing ability of members of an industry to approach the government on a collective basis is extremely powerful and should meet the needs of industries to communicate their requests. The First Amendment to the United States Constitution contains the right of all persons to "petition the government for redress of grievances." This is the right of individuals and groups to lobby and petition any branch of the government. The Supreme Court has ruled that this right trumps the prohibition in antitrust law against competitors working together in ways that might impact competition, in cases called *Noerr* and *Pennington*, establishing the Noerr-Pennington doctrine.

Under the Noerr-Pennington doctrine, a group of executives from otherwise competing industries getting together to ask the government for help is fine, and even good. For example, in *Noerr*, the Supreme Court held railroad companies did not violate the antitrust laws in lobbying for laws that would be destructive to trucking businesses. The railroad companies' motive was irrelevant: "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so."

But, like most immunities from the antitrust laws, the Noerr-Pennington doctrine is narrowly construed and has its limits. In theory, there is a simple test for determining what is permissible and what isn't: Identify all potential economic harms from the collaborative activities, and if all those harms flow from government action, then the efforts to petition the government are immune. But if any of the harms occur regardless of whether the government acts, then the immunity might be lost. In other words, there may be no protection if petitioning activity has spill-over effects independent of any government action.

Guarding against spill-over effects takes care and thoughtfulness, as it is all too easy to cross the line into antitrust risk. Take, for example, recent activities by the State of California and certain auto makers to address global climate change. Certainly, curbing auto emissions is a laudable goal. And it is not one that can be realistically achieved by any one firm acting on its own. It is also a heavily regulated area, with both the federal government and the certain states, like California, establishing standards. Under the Noerr-Pennington doctrine, automakers are free to petition the government for standards they desire. What they cannot do, however, is reach agreement among themselves independent of regulation concerning the types of vehicles, or their emission profiles, that they will produce. This was made abundantly clear last year, when the DOJ opened an investigation into automakers that agreed with California's regulatory agency on emissions standards. Makan Delrahim, the Assistant Attorney General for the DOJ's Antitrust Division, publicly explained the probe was to determine whether the agreement between the automakers was collusive. "I don't have a problem with them agreeing with California to do this," he said, but it was "not clear" if that's what happened. "The Supreme Court repeatedly has said that it is illegal if competitors get together, no matter what the laudable goal is."

The general rule that competitors should not agree to restrictive or coordinate activities not compelled by law is not always as easy to apply as it seems. For example, in some cases, the law itself may be ambiguous. This is especially true now, as government responses to the coronavirus change day to day. Some may interpret the law conservatively, concluding that it prohibits certain actions; others may interpret it more liberally. Firms that just want to do the right thing, but are constrained by their more conservative interpretation, may be put at a competitive disadvantage. Couldn't all firms in the industry convene, share information, and perhaps reach an understanding about how to comply with new regulations? Firms certainly can collectively approach government regulators and seek clarification of their rules. They may even be able to share certain information and best practices, if they follow traditional guidelines concerning the sharing of information (such as ensuring that the information is aggregated, anonymous, and not particularly competitively sensitive). But they should not reach agreements about how the law should be interpreted. In that case, they may be exposing themselves to antitrust risk (including potentially treble damages).

Concerns about spill-over effects also apply to direct requests for government intervention. Whether the requested intervention is pro-competitive (such as bailouts to keep industries afloat) or anticompetitive (rules restricting operations), getting the government to act in the first place often requires businesses, or their lobbyists, to provide information supporting their request to the government. Sharing information about pricing, output, business strategies, and likely responses to government action can all be fraught with peril unless the parties carefully establish procedures to prevent its improper use.

So what are firms to do when developing industry-wide responses to this new world with COVID-19? Before gathering or talking with competitors, take a moment to consider a few key antitrust guidelines:

DOs

- Set the ground rules for any competitor meeting, and clearly define the purpose of the meeting. There are many legitimate and laudable purposes for competitors to work together. Identify them and limit discussion accordingly.
- Involve antitrust counsel at the outset to identify potential competition concerns, and develop procedures to mitigate risk. Have in-house or outside counsel for at least one party attend industry meetings to ensure that meetings stay appropriately focused, and to document what transpires.
- Ensure that all petitioning efforts are focused on obtaining government relief, and not on how individual firms will behave in the market, either independent of such government actions or in response to them. Prospective government petitioning is generally protected activity, but agreeing on how to react to existing laws and regulations is not.
- Where feasible, limit participation in the petitioning activity to necessary individuals, preferably, those without day-to-day responsibility for making competitive decisions. For example, this could include limiting participation to each firm's legal teams and lobbyists.
- Document the reasons for sharing information, petitioning the government, creating industry standards, or other activity with competitors. Legitimate goals can include promoting better offerings, better business planning, and better responses to the corona virus crisis.

DON'Ts

- Avoid exchanging competitively sensitive information. Information exchanges can be pro-competitive and lawful if done correctly. Among other things, data should generally be anonymized, collected by a third party, and aggregated.
- Establish clean teams – individuals who do not have day-to-day responsibility for making the relevant decisions – involved in exchange of potentially sensitive information, particularly for current or future information about price or output.
- Do not have discussions among the competitors in an industry about how they will price or compete among each other AFTER they achieve the requested relief from the government.
- Do not use the process of working together as an industry to seek relief from the government as an opportunity to have discussions or enter into agreements that could harm competition that are unrelated, or merely tangentially related, to the requested relief.

Aside from the limited categories of *per se* illegal conduct such as price fixing or market allocation, the antitrust laws in the United States are purposefully flexible. They should not prevent firms from doing what they need to do to survive the current crisis and emerge as strong as possible. That being said, any strategy for engaging government officials should be assessed against antitrust guidelines to make sure firms work together in the *right* way and stay on the *Noerr-Pennington* side of the antitrust line.

* * *

Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. Visit our **Coronavirus Resource Center** for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

Related Professionals

- **Colin Kass**
  Partner
- **Christopher E. Ondeck**
  Partner
- **David A. Munkittrick**
  Partner