

The background is a dark blue gradient with a complex pattern of glowing, multi-colored lines and dots in shades of orange, yellow, green, and purple. These elements create a sense of depth and movement, resembling a digital or data landscape.

Morgan Lewis

NAVIGATING THE ANTITRUST RISKS OF COMPETITOR COLLABORATIONS

Brian C. Rocca (San Francisco)

Christina Renner (Brussels)

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NAVIGATING THE ANTITRUST RISKS OF COMPETITOR COLLABORATIONS



CHRISTINA RENNER

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ANTITRUST PRACTICE



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ANTITRUST PRACTICE**

Program Overview

- The Basic Antitrust Framework
- Collaborating During the COVID-19 Crisis
- Examples of Competitor Collaboration
- The U.S. Approach
- The E.U. Approach
- Reminders and Best Practices

SECTION 01

THE BASIC ANTITRUST FRAMEWORK



Antitrust Elements: 2 Key Questions



Is there an agreement?



If so, does it unreasonably restrain or harm competition?

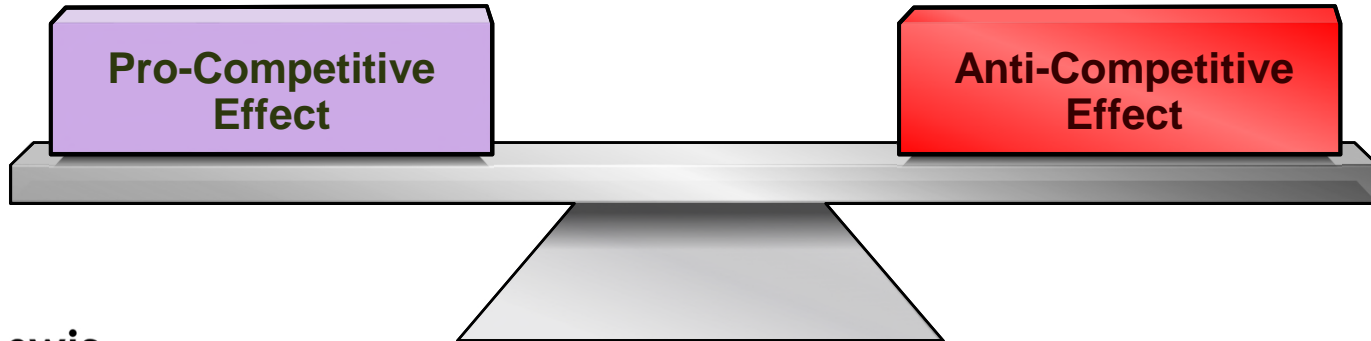
Antitrust Elements: Is there an agreement?

- The “agreement” element
 - Can be express or implied, written or oral
 - Always monitor bilateral communications, industry events, info exchanges, or other forms of collaboration involving competitors
 - Be aware: The mere receipt of info you should not receive can be enough



Antitrust Elements: Does the agreement unreasonably restrain or harm competition?

- **Per se or by object:** Conduct so bad the only question is whether it happened
- **Rule of Reason or Exemption:** Weighs an agreement's pro- and anti-competitive effects



When Does Collaboration Become Collusion?



SECTION 02

COLLABORATING DURING THE COVID-19 CRISIS



COVID-related Collaborations

- **US:** Various medical distributors engaged in joint efforts to identify global supply opportunities, ensure product quality, and facilitate manufacturing, sourcing, and product distribution (PPE, medicines) to communities and healthcare providers
- **EU:** Medicines for Europe (MfE), an association of generic pharmaceutical manufacturers, engaged in joint efforts as to ingredients, production, supply and distribution of essential medicines
- **UK:** Retailers collaborating by sharing data on stock levels, cooperating to keep shops open, sharing distribution depots and delivery vans, and pooling staff to help meet demand.

Competition Agencies Relaxing Their Standards...



- DOJ committed to issuing swift guidance for competitor collaborations limited in scope and duration to address the COVID-19 pandemic
 - Conduct at the direction of, or in conjunction with, the gov't is likely to be viewed positively, especially if steps taken to prevent coordination on prices
- EC will not intervene to stop (and may approve) necessary, temporary measures to help avoid shortage of essential goods/ services



...But Also Issuing Warnings!



JOINT ANTITRUST STATEMENT REGARDING COVID-19 AND COMPETITION IN LABOR MARKETS

Antitrust Enforcers Closely Monitoring Employer Coordination to Disadvantage Workers



"The ECN will not hesitate to take action against companies that take advantage of the current crisis."

SECTION 03

EXAMPLES OF COMPETITOR COLLABORATION



Joint Ventures

- Flexible definition
 - Something less than a full-blown merger
 - Includes formal collaborations to jointly produce/buy goods/services (e.g., an alliance to jointly procure specialized equipment)
 - May refer to other forms of collaboration, e.g., a network of service providers (like transporters of goods) to pool operating territories; or joint marketing strategies
- Procompetitive: Innovation, efficiencies, economies of scale, networking
- Anticompetitive: Concentration of power? Cartel masquerading as a JV?
- Bottom line: When businesses who otherwise compete pool their capital, and share the risk of loss and the opportunity for profit, such JVs are typically regarded as a single firm competing with other sellers in the market

Joint Ventures: Special Note re Ancillary Restraints

- An ancillary restraint promotes the procompetitive attributes of a legitimate collaboration, such as a JV
 - Restraint must be reasonably-related to the efficiency enhancing operation of the JV
 - Restraint must be narrowly tailored (are there less restrictive alternatives?)
- E.g., HR restraints ancillary to a legitimate competitor collaboration

Joint Ventures : A Complicated EU Animal

- A less than straight-forward distinction from a merger transaction
 - “Full function” entity
 - “Joint control”
- EU antitrust rules continue to apply to all or some relationships

Standard Setting

- Industry standards can be an economic engine
 - Facilitate interoperability of products and networks
 - Increase innovation and efficiency
 - Reduce costs and encourage market entry
- Typically occurs in the context of Standard Setting Organizations (SSOs)
- Main concern is standard-essential patents (SEPs)
 - Disclosure of IP during standard setting process
 - FRAND Commitment?
 - “Hold up”: The ability of an IP holder to extract more favorable licensing terms after a standard is set

Information Exchange

- Direct exchange of competitive information may be perceived as facilitating an implied agreement not to compete
- Rarely a stand-alone abuse – BUT: receipt can be enough!
- However, not all information exchanges are illegal
- Safe Harbor Guidelines:
 - a neutral third party manages the exchange
 - the exchange involves info that is historic (backward-looking)
 - the info is aggregated to protect the identity of underlying sources
 - enough sources aggregated to prevent competitors from linking data to specific sources

Joint Petitioning / Lobbying

- Collaborating for the purpose of petitioning a government department (e.g., agency, legislature, court) is immune from antitrust liability
 - Immunity applies whether or not the alleged competition injuries are caused by the act of petitioning or are caused by government action which results from the petitioning
- Document the purpose and scope
- Apply safeguards on exchange of information
- Note: The immunity is not a bar to discovery

SECTION 04

THE U.S. APPROACH



U.S. Rule of Reason Applied to Collaborations

- Rule of reason is flexible and depends on nature of agreement in the market context
- Looks at the business purpose and whether it causes obvious anticompetitive harm
- Almost always involves of balancing of pro- vs. anti-competitive effects
- Define relevant market(s) and calculate market shares
 - Market shares of individual participants and also of the collaboration itself
 - Agencies develop a low-to-high market share range; low part of range is solely the collaboration itself; and the high range is the sum of the collaboration plus its participants
- Safety Zone: Agencies rarely challenge collaborations where market shares collectively account for 20% or less of each relevant market
- If shares raise red flags, the Agencies also evaluate whether market entry or expansion would likely counteract any anticompetitive harms

U.S. Rule of Reason Applied to Collaborations

- Where the Agencies conclude there is a potential issue, they consider:
 - Is the agreement non-exclusive such that participants are likely to continue to compete independently outside the collaboration?
 - Do participants retain independent control of assets necessary to compete?
 - What is the extent of participants' financial interests in the collaboration or each other?
 - Who has control of the collaboration's competitively significant decision making?
 - Is there a likelihood of anticompetitive information sharing?
 - What is the duration of the collaboration?

Business Review Letter – DOJ Process

- Business review process begins when a firm submits a formal request
- DOJ opens an investigation and may research market conditions, conduct interviews
- DOJ relies mostly on the factual representations of the firm requesting the review
 - conducting a full investigation requires a lot of resources; and
 - any guidance issued will be valid only for the facts explained in the letter, so there is little incentive to withhold information
- The process concludes when the DOJ issues a letter stating one of three things:
 - it has no intention to challenge the proposed conduct
 - it does have an intention to challenge
 - it cannot make a decision based on the facts in the request or the conditions of the market

Recent Business Review Letter (COVID-19)

- DOJ: Collaboration efforts “limited in duration and necessary to assist patients, consumers, and communities affected by COVID-19 and its aftermath,” may be “a necessary response to exigent circumstances that provide Americans with products or services that might not be available otherwise”
- Mitigating Factors
 - Government officials involved in the efforts (FEMA, DOJ Antitrust Division, etc.)
 - Collaboration is limited in scope and duration to address the pandemic
 - Activities do not involve sharing competitively sensitive information such as price
 - Products are being brought to consumers faster than they otherwise would be
 - In all other respects, the parties continue to pursue their independent business interests

SECTION 05

THE EU APPROACH



EU ANTITRUST RULES – A QUICK OVERVIEW

An area of self-assessment



It is up to you!

System of prohibition, safe harbours and exemptions

- Article 101 (1) TFEU prohibits practices restrictive of competition between unrelated entities; also covers vertical agreements
- Article 101 (3) TFEU allows for exemptions of the prohibition
 - General exemptions for agreements outside Article 101 (1) TFEU ("*safe harbours*"): so-called block exemptions
 - Individual exemptions if efficiencies outweigh restrictions
- Hard core restrictions carry a rebuttable presumption of illegality
 - General exemptions (block exemptions) are inapplicable
 - Individual exemptions remain possible but are an uphill battle

Safe harbours of cooperation: general exemption

- *De minimis*: 10% combined/15% individually
- Market share thresholds specific to the type of agreement
 - R&D: 25% combined
 - Specialisation (production/sub-contracting): 20% combined
 - Purchasing: 15% combined
 - Commercialisation: 15% combined
 - Technology transfers (licensing): 20% combined/30% individually – but: excluded restrictions!
- Standardisation: specific assessment

Standardisation: a specific safe harbour

- Participation in the standard is unrestricted
- The procedure establishing the standard is transparent
- There is not obligation to comply with the standard
- Effective access to the standard on fair, reasonable and non-discriminatory terms

Hard core restrictions: the red flag

Competitors

- price fixing
- output limitation
- market sharing



Non-competitors

- sales restrictions on buyers/licensees/sellers
- resale price maintenance

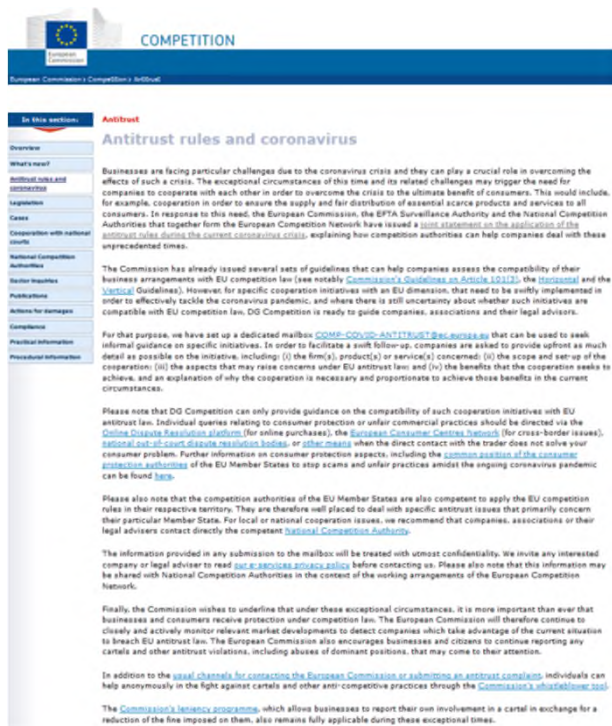
Other hard core restrictions are agreement specific.

Individual Exemption: Efficiency defence

- Efficiency gains
- Fair share for consumers
- Indispensability
- No elimination of competition

EU ANTITRUST RULES DURING THE COVID 19- PANDEMIC

The EU's dedicated website and mailbox



1. Dedicated guidance website:
<https://ec.europa.eu/competition/antitrust/coronavirus.html>

2. Dedicated mailbox:
COMP-COVID-ANTITRUST@ec.europa.eu

3. Information

- firm(s), product(s) or service(s) concerned
- scope and set-up of the cooperation
- aspects that may raise concerns
- objectives sought and why the cooperation is necessary and proportionate

EU's Temporary Antitrust Framework (April 8, 2020)

Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak

Scope	Purpose
<ul style="list-style-type: none">• Cooperation projects aimed at addressing a shortage of supply of essential products and services, and triggered by the current coronavirus crisis.• Applicable to all sectors, but focuses on health sector.• Applicable until withdrawn by the Commission.	<ol style="list-style-type: none">1. Guidance and criteria for assessing these cooperation projects; and setting enforcement priorities.<ol style="list-style-type: none">a) Designed and objectively necessary to increase outputb) Temporary in naturec) Not exceeding what is strictly necessaryd) Need to document all exchanges2. Procedure to provide ad hoc guidance (including comfort letters, issued at the Commission's discretion)

The return of the comfort letter: the *MfE* case

- First comfort letter in almost 20 years, issued on April 8, published on 29 April, to Medicines for Europe (MfE), an association of generic pharmaceutical manufacturers
- in order to respond to the shortage in essential medicines required for COVID-19 patients, members are authorized to jointly:
 - model demand of relevant medicines;
 - identify production capacity and stocks of relevant medicines;
 - adapt or reallocate production and stocks as between them of relevant medicines, so that not all manufacturers focus on one or a few medicines;
 - switch production to a certain medicine and/or increase capacity as between them;
 - rebalance and adapt capacity utilization, production, and supply on an ongoing basis;
 - cross-supply active pharmaceutical ingredients (possibly including intermediates); and
 - coordinate the distribution of relevant medicines.

Lessons for future requests for EC comfort letters

- Cooperation cannot go beyond what is objectively necessary to fight the shortage of supply
- Cooperation must be temporary.
- Engaging with the EC at an early stage ensures a quick turn.
- Helpful safeguards :
 - data made available to participating entities is aggregated by an external third party;
 - cooperation is open to any market participant willing to participate;
 - minutes of all meetings and exchanges of information will be recorded, and may be provided to the EC upon request, and
 - any agreements will be disclosed to the EC.

SECTION 06

REMINDERS AND BEST PRACTICES



Recommendations

- Implement an antitrust compliance policy that requires advance Legal approval of any proposed competitor or industry collaboration
- Conduct training of your Legal department, HR staff and executives about the risks of unlawful collaboration
- Create contemporaneous documentation of the business justifications for proposed collaborations
- Set up and document competition guardrails to guide any collaborations, including the exchange of information
- Consider whether agency pre-approval is advisable or required
- Know your enemy: know your market position and possible opponents to your collaboration
- Consider whether collaboration is cross-border and make sure to take account of different approaches across international jurisdictions
- Consult with outside legal counsel to ensure risk is managed and the privilege is protected

Morgan Lewis Coronavirus/COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

To help keep you on top of developments as they unfold, we also have launched a resource page on our website at

www.morganlewis.com/topics/coronavirus-covid-19

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple “Stay Up to Date” button.

Biography



Brian C. Rocca
San Francisco

T +1.415.442.1432

F +1.415.442.1001

Brian C. Rocca focuses on antitrust and complex litigation matters. He is managing partner of the firm's 135-lawyer San Francisco office and leader of the firm's Chambers-ranked California antitrust practice. Brian has worked on litigation, investigation, and counseling matters in many industries, with particular emphasis on technology and internet-based services.

Biography



Christina Renner
Brussels

T +32.2.507.7524

F +32.2.507.7555

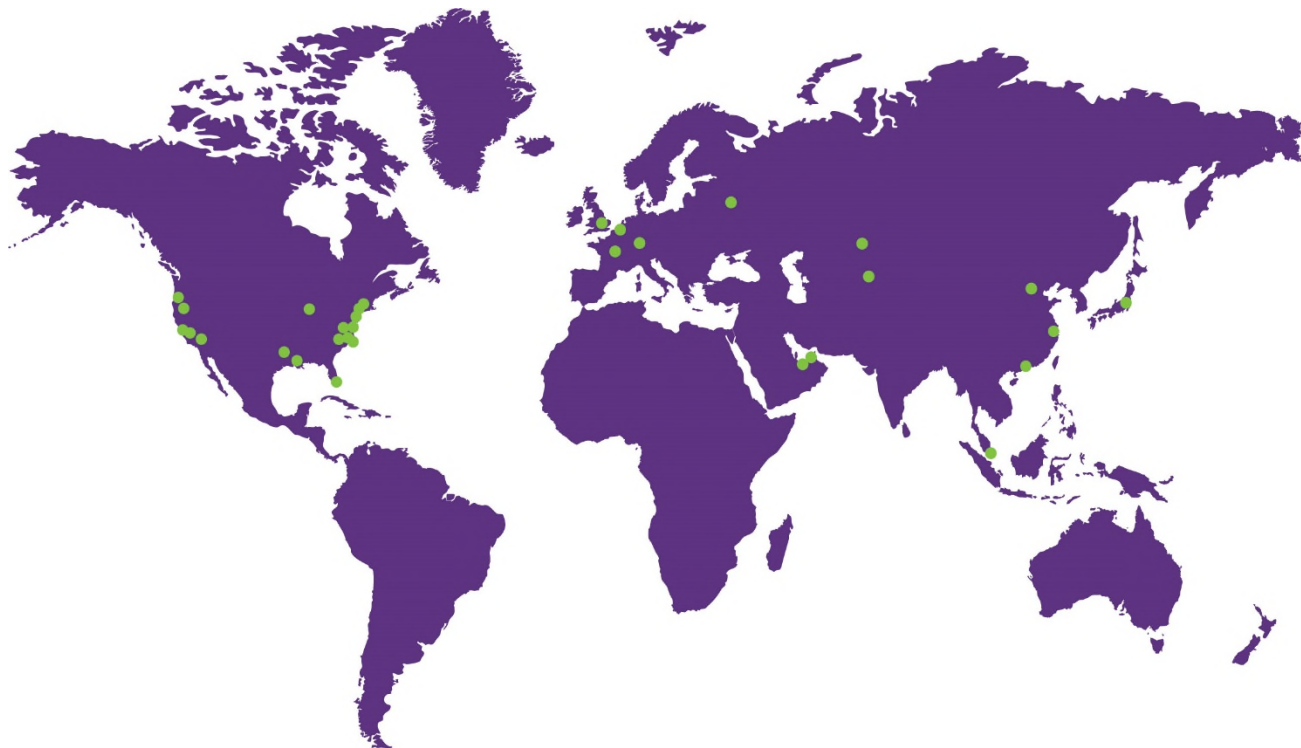
Christina Renner concentrates her practice on European Union and German merger control, competition, and antitrust law, with experience in cartels and general behavioral matters, abuse of dominance, and EU state aid laws. Christina regularly advises clients concerning mergers reviewed by the European Commission and the German Federal Cartel Office, as well as the French, Austrian, and Belgian competition authorities. Her work spans a variety of industries, including transportation, energy, life sciences, telecoms as well as retail. Christina is admitted in Brussels and Germany.

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