CARTELS AS CRISIS MANAGEMENT: WHY COLLUSION MAY BE INEVITABLE DURING ECONOMIC DOWNTURNS

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All around the globe, the impact of the ongoing COVID-19 pandemic has been relentless, both from direct affliction with the virus itself and from the economic downturn devastating numerous industries. Given the increased demand for items such as personal protective equipment (PPE), medical devices and supplies, and basic household items, the U.S. government announced an expedited antitrust procedure for the creation of joint ventures for new goods or services made in response to the pandemic. Still, authorities have made it clear that they continue to remain vigilant, warning companies and individuals who may try to take advantage of the current health crisis and circumvent anti-competition laws that they will be prosecuted. Though the novel coronavirus has ushered in a wave of economic fallout, it is not the first time industries have felt a shock wave. The current health pandemic recalls past crises and the emergence of so-called crisis cartels. These cartels are made up of cohorts of competitors trying to withstand the storm of a torrential economic downswing. In the past couple of decades, as a result of a tighter, globalized economic community and substantial growth of various industries, such cooperation between individuals and companies became inevitable in order for them to survive; even the line between permitted collaboration and unlawful activities has become blurred. This article examines the periods following September 11, 2001, the 2008 financial crisis and the current COVID-19 pandemic as times of economic distress, which is when such crisis cartels emerge.

Following the 9/11 terrorist attacks, U.S. airlines witnessed a slump in the demand for air travel. Several airline companies filed for bankruptcy as the losses worsened. Even with a $15 billion[2] bailout from the government, the airline industry's downturn created permanent changes to the market. In response to the sharp decline in demand for air travel, the industry banded together, leading to the extraordinary consolidation of multiple carriers. In fact, several decades prior to the attacks, following deregulation of the airline industry in 1978, competition in the airline industry already seemed superficial.[3] The mammoth mergers and consolidations that took place in the 2000s produced a cartel of airline carriers in response to the dip in demand for U.S. carriers and new competition from airlines based in the Middle East and Asia.[4] As a result, the U.S. government granted immunity from U.S. antitrust laws to several airlines that were participants in international alliance agreements.[5] The rationale was that immunity would allow the carriers to provide benefits to passengers by allowing them to travel to more destinations at lower cost. Of course, this also meant less

2 Paul A. Cleveland and Michael D. Tucker, "The Futility of the Government Airline Bailout," The Freeman, Foundation for Economic Education (Dec. 1, 2005), available at https://fee.org/articles/the-futility-of-the-government-airline-bailout/.

3 Paul A. Cleveland and Michael D. Tucker, "The Futility of the Government Airline Bailout," The Freeman, Foundation for Economic Education (Dec. 1, 2005), available at https://fee.org/articles/the-futility-of-the-government-airline-bailout/.

4 Hubert Horan, "How Alliance Carriers Established a Permanent Cartel," Promarket (University of Chicago Booth School of Business) (May 5, 2020), available at https://promarket.org/2020/05/05/how-alliances-carriers-established-a-permanent-cartel/.

5 William Gillespie and Oliver M. Richard, "Antitrust Immunity and International Airline Alliances," discussion paper, U.S. Department of Justice, Antitrust Division (Feb. 1, 2011), available at https://www.justice.gov/atr/antitrust-immunity-and-international-airline-alliances.

competition among the carriers. Regardless, the government advocated for consolidation, hoping for an increase in profitability and fewer airlines filing for bankruptcy.[6] Despite the immunity protection, several airlines still unlawfully colluded to fix prices on passenger and cargo fuel surcharges, and following investigation by the Department of Justice (DOJ), they faced severe fines and ongoing cooperation with government authorities, including continued inquiry into the conduct of individual executives.[7]

Similarly, following the 2008 recession, the financial market became another industry that felt collusion would be necessary to cope with the economic chaos, and the transatlantic London Interbank Offered Rate ("LIBOR") scandal emerged. LIBOR had been used as a benchmark to assess bank health. As a global market interest rate reference, LIBOR was based on the rates submitted by banks showing at what rate they were willing to lend money in multiple currencies through a self-policing committee, and it was used to determine short-term interest rates.[8] In 2012, a large-scale investigation revealed that bankers were reporting false interest rates in an attempt to profit from or hide financial weaknesses. Several major financial institutions were investigated for colluding to fix LIBOR, going back to 2003.[9] Indeed, the bankers conspired to manipulate LIBOR by intentionally submitting false borrowing costs in order to prove that their institutions were not exposed to risk despite the unpredictable environment. And for many bankers, rigging the rates was one way they could exert control as market health plunged.[10] Consequently, the institutions involved suffered massive financial penalties and were obligated to pay substantial settlements for their participation in the rate fixing. Individuals also were held accountable, as both U.S. and European authorities prosecuted more than 20 bankers.[11] In addition to the LIBOR scandal, several traders were also found to have participated in a foreign exchange conspiracy. Just this September, a foreign exchange trader was sentenced to eight months in prison and ordered to pay a fine of $150,000 for his role in the conspiracy, fixing prices on trades for Central and Eastern European, Middle Eastern, and African currencies, while his co-conspirators pled guilty to their involvement.[12] In connection with the foreign exchange rigging scandal, six banks were ordered to pay $5.6 billion to U.S. authorities for their roles in the conspiracy, which evidently took place from the end of 2007 to the beginning of 2013.[13] On top of that penalty, the European Union also fined five of those banks the equivalent of approximately $1.2 billion.[14] The U.K.'s Financial Conduct Authority, which was established to investigate and regulate the financial industry within the U.K., began the transition away from using LIBOR as a benchmark reference following the LIBOR and currency fixing revelations, eventually requiring firms to use alternative benchmark rates prior to the end of 2021.[15]

Now, during the current COVID-19 pandemic, while the global economy by and large has contracted at a record rate,[16] demand for certain household items, PPE and medical equipment has soared. With the onslaught of the novel coronavirus, consumers rushed to purchase protective face masks, hand sanitizer and gloves to prevent the spread of the virus. Unsurprisingly, this led to hoarding and price gouging. On March 23, President Trump signed an executive order seeking to prevent price gouging and the hoarding of certain supplies in the fight against the novel coronavirus. The executive order invoked the Defense Production Act (DPA) and made it a misdemeanor for individuals and companies to acquire these items either (1) in excess of reasonable needs or (2) for the purpose of selling them in excess of prevailing market prices. Attorney General William Barr has reiterated that antitrust laws will continue to be enforced during this time and that any agreements concerning supply chain

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6 Holman W. Jenkins Jr., "The Airline Cartel That Isn't," Wall Street Journal (July 10, 2015), available at https://www.wsj.com/articles/the-airline-cartel-that-isnt-1436569728.

7 Kevin Done, Michael Peel and Stephanie Kirschgaessner, "Fallout begins over airline price-fixing," Financial Times (Aug. 1, 2007), available at https://www.ft.com/content/e58fccd6-4069-11dc-9d0c-0000779fd2ac.

8 Liam Vaughan and Gavin Finch, "Libor scandal: the bankers who fixed the world's most important number," The Guardian (Jan. 18, 2017), available at https://www.theguardian.com/business/2017/jan/18/libor-scandal-the-bankers-who-fixed-the-worlds-most-important-number.

9 James McBride, "Understanding the Libor Scandal," Council on Foreign Relations (Oct. 12, 2016), available at https://www.cfr.org/backgrounder/understanding-libor-scandal.

10 *Supra* note 7.

11 *Id.*

12 Stewart Bishop, "Ex-JPMorgan Trader Gets 8 Months For Forex-Rigging," Law360 (Sept. 17, 2020), available at https://www.law360.com/newyork/articles/1311381/ex-jpmorgan-trader-gets-8-months-for-forex-rigging-; Kadhim Shubber, "Former JPMorgan trader charged with conspiring to fix currency prices," Financial Times, (May 10, 2018), available at https://www.ft.com/content/6451fd0c-5489-11e8-b3ee-41e0209208ec.

13 Gina Chon, Caroline Binham and Laura Noonan, "Six banks fined $5.6bn over rigging of foreign exchange markets," Financial Times (May 20, 2015), available at http://ig-legacy.ft.com/content/23fa681c-fe73-11e4-be9f-00144feabdc0#slide0.

14 Foo Yun Chee and Kirstin Ridley, "EU fines Barclays, Citi, JP Morgan, MUFG and RBS $1.2 billion for FX Rigging," Reuters (May 16, 2019), available at https://www.reuters.com/article/us-eu-antitrust-banks/eu-fines-barclays-citi-jp-morgan-mufg-and-rbs-1-2-billion-for-fx-rigging-idUSKCN1SM0XS.

15 Financial Conduct Authority, "Transition from LIBOR," (Jan. 7, 2020), available at https://www.fca.org.uk/markets/libor.

16 Press release, "COVID-19 to Plunge Global Economy into Worst Recession since World War II," World Bank (June 8, 2020), available at https://www.worldbank.org/en/news/press-release/2020/06/08/covid-19-to-plunge-global-economy-into-worst-recession-since-world-war-ii.

or prices could be considered per se violations of the Sherman Act, potentially resulting in criminal prosecution. The day after Trump signed the executive order, the DOJ and the Federal Trade Commission (FTC) issued a joint statement to announce that the agencies would expedite requests for business review letters and advisory opinions, and that cooperation between federal, state and local governments and among private businesses would be necessary to fight the virus, emphasizing that procompetitive collaboration that does not violate antitrust rules is possible. In addition, nearly all states have implemented special measures to address the surging prices of high-demand products during the ongoing health crisis. As emergency declarations were announced on both the federal and state levels, price-gouging laws went into effect in at least 38 states and the District of Columbia, while other states without such regulations confronted the rising prices through executive orders and other state consumer protection laws.[17] In order to avoid running afoul of the price-gouging rules, companies have to be careful not to mark up prices of certain products, but at the same time, they must avoid sharing any pricing information with competitors, as that could possibly lead to violating federal or state antitrust laws. Suppliers of essential and high-demand products must therefore tread carefully or risk facing federal or state penalties.

Additionally, the DPA was reactivated, granting the Department of Health & Human Services authority to ramp up production of ventilators.[18] Trump also issued another executive order, setting up an administrative process that could result in the granting of narrow antitrust immunity to companies engaged in "voluntary agreements" to respond to COVID-19. For immunity to be granted, either the president or an appointee would have to find that "conditions exist which may pose a threat to the national defense or its preparedness programs" and, with industry participants, devise a written plan of action or voluntary agreement to be submitted to Congress and to certify that the plan is necessary to respond to such threat. The DOJ, upon consultation with the FTC, also would have to certify that the plan is narrowly tailored. If approved, the collaboration as envisaged by the plan is to be monitored by the attorney general and the FTC chairperson.

The DOJ's Antitrust Division also has issued several responses to requests for business review letters from companies seeking to collaborate in order to work swiftly to boost the manufacture and distribution of certain supplies needed to contain the spread of the novel coronavirus. For example, PPE and medical distributors McKeeson Corp., Owens & Minor Inc., Cardinal Health Inc., Medline Industries Inc. and Henry Schein Inc. jointly requested that the DOJ issue a business review letter, where other government agencies had asked the companies to use their collective expertise in the supply chain industry to address shortages and other supply chain issues necessary to address in the fight against COVID-19.[19] Recognizing that the "pandemic will require unprecedented cooperation between federal, state, and local governments and among private businesses to protect Americans' health and safety," the DOJ conducted an expedited review and announced that it did "not intend to challenge the Requesting Parties' efforts to expedite and increase manufacturing, sourcing, and distribution of PPE and medications."[20] Similarly, the DOJ also confirmed it would not challenge AmerisourceBergen's proposal to respond to the current health pandemic by "identify[ing] global supply opportunities, ensur[ing] product quality, and facilitate[ing] product distribution of medications and other healthcare supplies."[21] And in a truly expedited fashion, merely eight days after the request was submitted, the DOJ also issued a business review letter to pharmaceutical manufacturers Eli Lilly, AbCellera Biologics, Amgen, AstraZeneca, Genentech and GlaxoSmithKline allowing them to proceed with sharing information about manufacturing facilities to speed up production of certain antibody treatments for the purposes of treating COVID-19.[22] Still, since the DOJ and FTC's joint statement pledging expedited review was announced in March, only four public review letters have been issued through this process.[23] Notably, the requests were submitted by large corporations in the medical and supply industries. Other companies and industries may not have such similar resources to vet carefully their policies and procedures to avoid antitrust violations. Indeed, some businesses desperate to survive in the current pandemic may see no other option than to band together despite the consequences from enforcement authorities.

17 Ann O'Brien and Brady Cummins, "The Price of Price-Gouging Laws," The Antitrust Source (June 2020), available at https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/2020/june-2020/jun20_obrien_6_17f.pdf.

18 Press release, "HHS Announces New Ventilator Contracts, Orders Now Totaling Over 130,000 Ventilators," U.S. Department of Health & Human Services (Apr. 13, 2020), available at https://www.hhs.gov/about/news/2020/04/13/hhs-announces-new-ventilator-contracts-orders-now-totaling-over-130000-ventilators.html.

19 See letter from Makan Delrahim, Assistant Attorney General for Antitrust Div., DOJ, to Lori A. Schecter, exec. vice pres., chief legal officer and general counsel, McKesson Corp.; Michael S. Ettinger, sr. vice pres., corp. and legal affairs, and chief of staff, Henry Schein Inc.; Alex Liberman, general counsel, Medline Industries Inc.; Jessica L. Mayer, exec. vice pres. and chief legal and compliance officer, Cardinal Health Inc.; and Nicholas J. Pace, exec. vice pres., general counsel and corp. secretary, Owens & Minor Inc. (Apr. 4, 2020), available at https://www.justice.gov/atr/page/file/1266511/download.

20 *Id*.

21 See letter from Makan Delrahim, Assistant Attorney General for Antitrust Div., DOJ, to John G. Chou, exec. vice pres., chief legal officer and secretary, AmerisourceBergen Corp. (Apr. 20, 2020), available at https://www.justice.gov/atr/page/file/1269911/download.

22 See letter from Makan Delrahim, Assistant Attorney General for Antitrust Div., DOJ, to Thomas O. Barnett. (July 23, 2020), available at https://www.justice.gov/atr/page/file/1297161/download.

23 See DOJ, business review letters and request letters, available at https://www.justice.gov/atr/business-review-letters-and-request-letters.

It is unclear when the reach of the virus will finally wane. What is more apparent, however, is the detrimental impact on the economy, which has already begun. Based on past events, cartels are likely to arise in times of crisis and panic. These crisis cartels seem to occur as a knee-jerk reaction in order to provide stability in an uncertain time. Such cooperation within industries occurs in an effort to assuage public fears and to demonstrate financial vigor. But these efforts often can shroud unlawful antitrust agreements and price fixing, which inevitably lead to more instability. The government, particularly the DOJ's Antitrust Division, seems to have acknowledged this pattern of crisis cartels sprouting up during times of crisis and recognizes that collaboration is sometimes necessary, efficient and critical during such uncertainty, particularly during a health pandemic as the one we are grappling with now. By permitting certain collaborations – which of course are narrowly tailored and subject to the scrutiny of authorities – businesses are given some bandwidth to discuss matters with other members in their industry in hopes that they will not feel compelled to turn to collusion and anti-competitive conduct to survive the economic onslaught. If they do so, companies should be aware of the DOJ's guidance on its business review process and must understand that it should not be used carte blanche to skirt anti-competitive laws in times of emergency. Indeed, businesses and industries should recall that the spirit of antitrust laws is to protect competition, not the competitors themselves.

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