

# Necessity as the Mother of Invention? Streamlining the Evaluation of Competitor Collaborations

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**W**E WRITE AS THE CORONAVIRUS continues its grip on the United States and as the Department of Justice and Federal Trade Commission (the Agencies), in response, have committed to expedite their review of competitive collaborations when firms are responding to the COVID-19 crisis. This crisis gives rise to an opportunity to reassess the traditional paradigm for assessing collaborations among competitors outlined in the April 2000 Antitrust Guidelines for Collaborations Among Competitors (Collaboration Guidelines), especially in the context of exigent circumstances.

Traditionally, two criteria govern the assessment of collaborations of the “type that always or almost always tend to raise price or reduce output”:<sup>1</sup> First, whether the collaboration is ancillary to a legitimate efficiency-enhancing *integration* of the competitors’ assets or operations—such as a bona fide joint venture. Second, whether the scope of the collaboration resides in a *cordon sanitaire* so that any information sharing pursuant to the collaboration does not “spill over” into the competitors’ competing businesses and facilitate coordination or collusion.<sup>2</sup>

Below, we suggest that during exigent circumstances, these two criteria ought to be assessed in a practical, dynamic, and inverse light; proponents of a competitor collaboration should bear the burden of persuasion of explaining why, “but for” the collaboration, prices would be higher, output would be less, or quality worse. Going to these “bottom lines” may suggest that less analytical time should be spent on the integration of assets.

The alternative framework we propose recognizes that the integration requirement is not invariably or necessarily

directly related to the Collaboration Guidelines’ goal of “encouraging procompetitive collaborations, [while] deterring collaborations likely to harm competition and consumers . . . .”<sup>3</sup> That is, while the Agencies *may* use or view the integration requirement as a tool to weed out anticompetitive integrations, the Collaboration Guidelines do not provide evidence (either based on economic theory or empirical evidence) that integration is a necessary condition for a collaboration of this type to be procompetitive. Nor do the Collaboration Guidelines provide evidence that the integration requirement is a good proxy for or provides meaningful information about the likely competitive effects.

The framework proposed here recognizes the lack of an invariable and direct link between the integration requirement and the ultimate question of whether the collaboration is procompetitive. The examples we present demonstrate that during times of exigent circumstances firms may “collaborate to perform . . . one or more business functions, such as production, distribution, marketing . . . and thereby benefit, or potentially benefit, consumers by expanding output”<sup>4</sup> in the absence of integration. These examples affirmatively show the lack of a direct link between integration and procompetitive outcomes during times of exigent circumstances. It is an open question whether the integration requirement precludes procompetitive collaborations during normal times. Importantly, the framework put forth in this article, which is based on a standard “but-for world” analysis, could potentially be used to identify procompetitive collaborations, regardless of whether or not there is a direct link between integration and procompetitive outcomes during normal times.

To take a COVID-19 paradigm: Assume two drug manufacturers. Manufacturer A currently produces at full capacity a generic for the treatment of multiple sclerosis but also has the skills to use its production lines to make a new antiviral drug to treat COVID-19. Manufacturer B produces the same generic for treating multiple sclerosis at half capacity. In this situation, if the two manufacturers were to (temporarily) coordinate production decisions for the multiple sclerosis drug, shifting the production of that drug to

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manufacturer B so that A can produce the antiviral drug, they could increase output of the antiviral drug without limiting output for the multiple sclerosis drug. Although this agreement would be an integration of the firms' production lines, it would likely not be treated as an "integration" under the Collaboration Guidelines. In particular, it fails to include the types of contracts or capital investments that the Collaboration Guidelines suggest are needed to demonstrate "integration."<sup>5</sup> Consequently, it would likely be challenged as per se unlawful as an agreement to fix output.

We suggest an analysis focusing on how "but for" the joint production agreement, output would be less, prices will not increase, and quality will not suffer. We also suggest that an important part of this discussion will be the traditional demonstration that the parties put sufficient restraints in place to protect from any kind of spillover. There should be a sliding scale relationship between the integration and spillover criteria: the weaker the indicia of integration, the stronger the restraints need to be to ensure spillover protections, but the former should not be viewed as the *sine qua non* for collaboration, particularly during exigent circumstances. As described below, especially in the case of exigent circumstances, strong restraints that govern short-term collaborations may be sufficient to ensure procompetitive outcomes. For longer collaborations that are entered outside of exigent circumstances, it may be more administratively difficult to identify and police strong workable restraints.

Lest we be misconstrued, we certainly do not argue that the Agencies should abandon the use of the per se rule when analyzing competitor collaborations. Agreements or understandings by competitors as to the terms or conditions of sale should face per se condemnation, as should bid rigging and market allocations. Rather, we suggest that integration is a limited proxy for assessing whether a collaboration is efficiency enhancing or procompetitive. In times of crisis, these limitations become particularly troublesome as competitors seek to find atypical solutions to address unprecedented shocks to demand and supply. But this crisis may have yielded an insight for ordinary times: we should evaluate whether the integration requirement always comports with the fundamental aim of antitrust law—driving superior consumer results on output, price, and quality.

We understand that departure from bright-line rules, such as the integration requirement, may raise concerns about judicial costs and lack of clarity for potential litigants. We believe that our proposed framework addresses both of these concerns by placing the burden on the parties to demonstrate to the agencies that, but for the collaboration, consumers would be worse off. First, it should alleviate the burden on courts because it takes the analysis directly to "bottom lines" on outcomes, rather than focusing unduly on the extent and bona fide nature of integration and whether the collaboration is ancillary to it, both of which are complex assessments. Second, although de-emphasizing the integration requirement would indeed increase uncertainty for potential col-

laborators, we believe that both the parties and, ultimately, consumers would gladly trade the certainty that integration-less collaborations will be rejected for the possibility of beneficial integration-less collaborations being blessed by anti-trust authorities.

### **Recent Antitrust Enforcement Agency Statements Regarding COVID-19**

Firms may seek guidance on how a potential competitor collaboration will be viewed by the Agencies through the existing DOJ's Business Review Letter and the FTC's Advisory Opinion processes. In a March 24, 2020 joint statement regarding COVID-19, the DOJ and FTC introduced expedited antitrust procedures for reviewing competitor collaborations formed to respond to the COVID-19 crisis, noting the existing processes "generally take several months after the Agencies receive all necessary information."<sup>6</sup> In the statement, the Agencies referred interested businesses to the "Agencies' previous statements on how they analyze cooperation and collaborations between competitors" (referring to the Collaboration Guidelines and Health Care Statements)<sup>7</sup> while also stating that the Agencies "will account for exigent circumstances in evaluating efforts to address the spread of COVID-19."<sup>8</sup>

While committing to expedited review of collaborations, the Agencies have also reiterated their commitment to maintaining their usual standards in antitrust enforcement. For example, in an April 6, 2020 blog post the FTC's Bureau of Competition Director Ian Conner stated that the FTC "will not suspend our usual rigorous approach to ferreting out anticompetitive harm and seeking appropriate relief, even in the face of uncertainty."<sup>9</sup> In addition, on April 13, 2020, the Agencies issued a joint statement on COVID-19 and competition in labor markets stating they "wish to make clear to the public that although there are many permissible ways that firms can engage in procompetitive collaboration, COVID-19 does not provide a reason to tolerate anticompetitive conduct that harms workers, including doctors, nurses, first responders, and those who work in grocery stores, pharmacies, and warehouses, among other essential service providers on the front lines of addressing the crisis."<sup>10</sup>

On April 4, 2020, the DOJ issued its first Business Review Letter under the expedited procedures. This letter responded to a business review request by McKesson Corporation, Owens & Minor, Inc., Cardinal Health, Inc., Medline Industries, Inc., and Henry Schein, Inc. to "collaborate with and at the direction of FEMA, HHS, and other government entities, to expedite and increase manufacturing, sourcing, and distribution of PPE and COVID-19-treatment-related medication essential to protect Americans' health and safety."<sup>11</sup> The DOJ's analysis of McKesson et al.'s proposal relied on the Collaboration Guidelines, which "are intended to explain how the Agencies analyze certain antitrust issues raised by collaborations among competitors."<sup>12</sup> They "describe an analytical framework to assist businesses in assessing the likeli-

hood of an antitrust challenge to a collaboration with one or more competitors.”<sup>13</sup>

The collaboration aims “to ensure the fast, fair and pro-competitive distribution of necessary medical supplies to the most-needed places during the current health crisis” as part of a broader effort of the federal government to address personal medical supply shortages.<sup>14</sup> The involved firms will collaborate “to manufacture, source, and distribute medications and healthcare products as directed by FEMA, HHS, or additional government agencies.”<sup>15</sup> A few weeks later, the DOJ reviewed the plan of AmerisourceBergen, another medical distributor, to participate in these governmental efforts.<sup>16</sup>

The DOJ, in its business review letters, accepted these collaborations largely because they were pursuant to an agreement with governmental agencies.<sup>17</sup>

On May 15, 2020, the DOJ issued its third Business Review Letter under the expedited procedures. This letter responded to a business review request by the National Pork Producers Council (NPPC) related to the NPPC’s efforts to facilitate the euthanization of hogs for which there is no market. Like the previous two letters, the DOJ accepted the NPPC’s collaboration largely because it would occur under the direction of government agencies.<sup>18</sup>

If the collaborating suppliers acted independently of governmental authorization, the procompetitive effect of these collaborations may not have been recognized, as coordination on the “distribution of necessary medical supplies to the most-needed places during the current health crisis” could be interpreted as a coordination on customers. If this were the case, the Collaboration Guidelines would have required an efficiency-enhancing integration to avoid a challenge by the agencies.<sup>19</sup>

### Framework as Outlined in the Competitor Collaboration Guidelines

The Collaboration Guidelines state that “[a] competitor collaboration comprises a set of one or more agreements, other than merger agreements, between or among competitors to engage in economic activity, and the economic activity resulting therefrom.”<sup>20</sup> According to the Collaboration Guidelines, the Agencies will “assess the competitive effects of the overall collaboration and any individual agreement or set of agreements within the collaboration . . . .”<sup>21</sup> In this analysis, “[T]wo or more agreements are assessed together if their procompetitive benefits or anticompetitive harms are so intertwined that they cannot meaningfully be isolated . . . .”<sup>22</sup>

The Agencies will either challenge an agreement as per se illegal or analyze the agreement under the rule of reason.<sup>23</sup> As described in the Collaboration Guidelines, “Rule of reason analysis focuses on the state of competition with, as compared to without, the relevant agreement. Under the rule of reason, the central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service or innovation below what likely would prevail in the absence

of the relevant agreement.”<sup>24</sup> When an agreement is challenged as per se illegal, the Agencies do not analyze the likely competitive effects of the agreement.<sup>25</sup>

The Collaboration Guidelines identify the types of agreements that the Agencies will normally challenge as per se illegal, and instances in which the Agencies will analyze these agreements instead under the rule of reason.<sup>26</sup> The Collaboration Guidelines state the Agencies will challenge agreements “of a type that always or almost always tend to raise price or reduce quantity” as per se illegal.<sup>27</sup> These “include agreements among competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories or lines of commerce.”<sup>28</sup> As an exception to this general rule, when

participants in an *efficiency-enhancing integration* of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits, the Agencies analyze the agreement under the rule of reason, even if it is a type that might otherwise be considered *per se* illegal.<sup>29</sup>

The Collaboration Guidelines warn that “[t]he mere coordination of decisions on price, output, customers, territories, and the like is *not* integration, and cost savings without integration are *not* a basis for avoiding *per se* condemnation.”<sup>30</sup> We suggest that this requirement may be too stringent in times of crisis or when exigent circumstances require firms to act quickly and for a limited period of time to bring necessary products to the market or to remain profitable in the short run, allowing the collaborators to be long run competitors.

The Collaboration Guidelines also describe how the Agencies will analyze collaborations under the rule of reason. This analysis “begins with an examination of the nature of the relevant agreement,” which focuses on “the business purpose of the agreement” and “whether the agreement . . . cause[s] anticompetitive harm.”<sup>31</sup> According to the Collaboration Guidelines, the Agencies do not challenge agreements “[i]f the nature of the agreement and the absence of market power together demonstrate the absence of anticompetitive harm.”<sup>32</sup> On the other hand, the Agencies challenge agreements without further market analysis if “the likelihood of anticompetitive harm is evident from the nature of the agreement, or anticompetitive harm has resulted from an agreement already in operation . . . .” and there are no “overriding benefits that could offset the anticompetitive harm.”<sup>33</sup>

The Collaboration Guidelines then clarify that agreements that fall in neither category—i.e., agreements where “the initial examination of the nature of the agreement indicates possible competitive concerns, but the agreement is not one that would be challenged without a detailed market analysis”—will be analyzed in greater depth.<sup>34</sup> In this detailed analysis, “[t]he Agencies typically define relevant markets and calculate market shares and concentration as an initial step in assessing whether the agreement may create or increase market power or facilitate its exercise . . . .”<sup>35</sup> According to the

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Collaboration Guidelines, the Agencies also

- “examine factors relevant to the extent to which the participants and the collaboration have the ability and incentive to compete independently . . . .”<sup>36</sup>
- “evaluate whether entry would be timely, likely, and sufficient to deter or counteract any anticompetitive harms”;<sup>37</sup> and
- “assess any other market circumstances that may foster or impede anticompetitive harms.”<sup>38</sup>

The Collaboration Guidelines state that “[i]f the examination of these factors indicates no potential for anticompetitive harm, the Agencies end the investigation without considering procompetitive benefits.”<sup>39</sup> If the Agencies do identify a potential for competitive harm, they “examine whether the relevant agreement is reasonably necessary to achieve procompetitive benefits that likely would offset anticompetitive harms.”<sup>40</sup>

### **Requiring Integration to Avoid per se Condemnation May Be Overly Restrictive in Times of Crisis**

Despite the importance of integration to parties considering collaborations, the Collaboration Guidelines do not directly address the purpose of requiring integration. The FTC and DOJ’s joint Statements of Antitrust Enforcement Policy in Health Care, which the Collaboration Guidelines reference, suggests the integration requirement provides evidence that the efficiencies are significant.<sup>41</sup> While it is true that significant integration and investment may provide additional evidence of procompetitive benefit, significant integration or large joint investments are not necessary for a collaboration to be procompetitive. Using integration as a proxy for procompetitive benefits is particularly problematic in times of crisis, with myriad exigent needs, unexpected shocks to demand and supply, and a potentially undefined time frame, as shown by our examples below.

In addition to referencing the Health Care Statements, the Collaboration Guidelines provide some potential insight into the rationale behind requiring integration to avoid per se condemnation. The Collaboration Guidelines’ statement that “[m]ere coordination of decisions on price, output, customers, territories, and the like is not integration”<sup>42</sup> is further reinforced by Example 7 of the Collaboration Guidelines, which describes a scenario where potential competitors collaborate on which components will be included in their batteries.<sup>43</sup> The Collaboration Guidelines explain that, because coordination on components occurs without any integration, the coordination likely will be challenged as per se illegal.<sup>44</sup> In this sense, the Collaboration Guidelines’ integration requirement is consistent with the Health Care Statements’ reasoning in that it appears to be using meaningful integration of resources as a signal that the parties intend to collaborate in order to provide some procompetitive benefit to the market, and not merely to coordinate on how to capture additional profits.

If the Collaboration Guidelines require integration not to clearly prohibit collaboration on the aforementioned factors (“price, output, customers, territories, and the like”), the requirement does not provide much marginal value in instances where collaboration is necessary to address exigent circumstances. Indeed, under exigent circumstances, it may not be feasible to establish the type of integration (e.g., a joint venture) that may achieve similar procompetitive benefits as a simple, non-iterative coordination of output. The Agencies will heavily scrutinize collaboration on any of those factors, regardless of the level of integration or the presence of exigent circumstances. As the Collaboration Guidelines note, “Typically [agreements challenged as per se illegal] are agreements not to compete on price or output.”<sup>45</sup> And when the Agencies do not condemn a collaboration as per se illegal, they typically perform a rule of reason analysis before blessing the agreement.<sup>46</sup> The central question of this rule of reason analysis is whether the agreement “likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.”<sup>47</sup>

Mere coordination on price, output, customers, and territories will certainly cause a detrimental shift in ability or incentive to compete on these factors, and would thus be prohibited under the rule of reason analysis. Yet some agreements focused on responding to exigent circumstances that lack significant integration might still survive the rule of reason analysis; these surviving agreements would have to demonstrate that the relevant competitive conditions are better under the agreement than they would be in its absence. These agreements are by definition procompetitive, regardless of the presence of integration. Accordingly, the current integration requirement may be identifying some false positives (i.e., procompetitive collaborations that lacked sufficient integration and were thus condemned as per se illegal) without adding any additional protections over those provided by rule of reason analysis.

These false positives may not be particularly concerning during normal times, but times of crises carry jarring shocks to consumer demand, the prices and available supply of inputs, and supply and distribution chains. These exigent circumstances often turn seemingly anticompetitive collaborations into cooperation necessary to ensure adequate supply and distribution. For example, sudden spikes in demand or extreme supply shortages might necessitate collaboration between competitors to ensure that the market collectively is able to produce the desired quantity of vital goods. In fact, the business review request from McKesson et al. addressed exactly this: coordinating across competitors and with government agencies to ensure that the companies can provide the PPE desperately needed across the country.<sup>48</sup>

Accordingly, we suggest a modified, two-part framework for assessing short-term collaborations in times of crises. As an initial step, proponents of the collaboration must demon-

strate why, but for the collaboration, prices would be higher, output would be less, or quality worse. This involves the same “central question” as the Collaboration Guidelines’ rule of reason analysis: whether the collaboration drives superior outcomes on price, quantity, and quality than would exist in the but-for world without the agreement.<sup>49</sup> If the proposed collaboration fails to meet this standard, the Agencies should reject the coordination. If the proposed collaboration leads to better price, quantity, or quality, then the parties would move on to the second stage of the framework: determining how to limit spillover.

As a practical matter, the parties could propose their safeguards against spillover at the first stage, in order to provide additional context to their proposed collaboration and begin discussions on limiting spillover. If the Agencies are satisfied with the spillover safeguards initially proposed, the Agencies could bless the proposed collaboration after the first step without any additional review or discussion; if not, the parties and Agencies can conduct additional conversations to determine adequate safeguards.<sup>50</sup>

### **Economic Arguments to Support Collaboration in a Rule of Reason Analysis**

Here, we review the economic incentives and possible outcomes of agreements that likely would be challenged as per se illegal by the Agencies but could have procompetitive outcomes with appropriate restraints. These examples provide insights into the types of evidence that can be brought to bear when analyzing collaborations among competitors without efficiency-enhancing integrations and the types of restraints that could limit potential anticompetitive effects. Additionally, these examples demonstrate how our proposed rule of reason analysis would function for short-term agreements that are meant to address exigent circumstances but lack integration. The potential collaborators would present evidence that the collaboration: (1) is likely to increase output, decrease price, or increase quality during the crisis and (2) includes sufficient restraints to prevent negative spillover effects into market outcomes not explicitly governed by the agreement during the crisis, and future market outcomes after the crisis.

***Drops in Ferry Demand and Coordination on Schedules.*** The COVID-19 crisis caused demand for ferry service between the English Isle of Wight and mainland Britain to decrease significantly.<sup>51</sup> The UK government subsequently suspended competition law to allow three ferry operators “to discuss and agree [on] routes and coordinate staff” in order to “continue to run essential services despite reduced usage during the virus.”<sup>52</sup> Based on the official press release, the collaboration does not involve any integration besides the coordination on routes.<sup>53</sup> This suggests that the operators’ agreement on routes is likely the type of coordination “on price, output, customers, [and] territories” that the U.S. agencies would challenge as per se illegal, despite the fact that it could lead to an increase in output during the crisis.<sup>54</sup>

### **[E]xigent circumstances often turn seemingly anticompetitive collaborations into cooperation necessary to ensure adequate supply and distribution.**

The collaboration will have an output-enhancing effect if, absent the agreement, ferry service would be more limited (e.g., the ferry schedules would be more limited). For example, if under the agreement the ferry operators coordinate schedules to guarantee a single ferry is operating at each scheduled time (as opposed to only in peak times), the joint scheduling could result in a fuller schedule than if each ferry were to independently select its schedule, which may result in ferries not operating during the lowest demand periods. The ferry operators would also need to include adequate safeguards to ensure that the coordination during the exigent circumstances does not lead to continued coordination once normal market conditions return.

The ferry operators could offer the following types of evidence to demonstrate that the collaboration is likely to be procompetitive.

#### **1. Evidence that the collaboration is likely to increase output, decrease price, or increase quality during the crisis:**

- Evidence that, in the absence of coordination, the ferry operators would have no incentive to schedule ferries during low demand or off peak times (i.e., evidence that the demand for ferry service during certain times of day is too limited to be profitable when expecting the other ferry operator to operate as well); and
- A commitment from the ferry operators to coordinate to provide at least limited service during all periods.

**2. Evidence that the collaboration includes sufficient restraints to prevent negative spillover effects:** Negative potential effects of the collaboration are (1) after agreeing not to compete, the operators may charge supracompetitive prices during the crisis, and/or (2) the operators may continue to coordinate on schedules (either explicitly or tacitly) *after the crisis* ends, which would result in supra-competitive prices. The following measures could limit any harmful or anti-competitive effects:

- Committing to maintain existing prices during the period of the modified schedule;
- Defining the conditions under which the collaboration will end;
- Appointing a third party to monitor the crisis and determining the earliest end date possible for the collaboration;<sup>55</sup>
- Committing to revert back to the pre-crisis schedule after the end date of their collaboration;
- Limiting the communication necessary to develop the updated schedule, in particular by avoiding direct com-

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munication about their operating costs; and

- Delegating the development of the crisis schedule to a third party that treats each operators' data confidentially.

**Spikes in Drug Demand and Coordination on Production Decisions.** While the above example concerns sudden drops in demand, crises can also cause sudden spikes in demand that may require coordination to serve this demand better. For example, the COVID-19 crisis caused a sudden increase in the demand for certain medications used in intensive care units.<sup>56</sup> A group of drug manufacturers in Europe, through their industry association "Medicines for Europe," subsequently received the approval of the European Commission for a collaboration that "targets the risk of shortage of critical hospital medicines for the treatment of coronavirus patients."<sup>57</sup> Subsequent news coverage implied that the collaboration aims to "ensure [the drug manufacturers] aren't over-producing some medicines while neglecting others," and entails communication "to decide whether they should switch production of a medicine to a different site, to increase capacity and avoid under-production."<sup>58</sup>

While the details of this particular collaboration have not been made public, we assume *arguendo* that the collaboration involves the communication between participating drug manufactures about current demand for various drugs and an agreement to coordinate the production of drugs. The production coordination allows capacity to be jointly managed in order to increase production of drugs needed to respond to the current crisis while maintaining sufficient production to meet the demand for other essential drugs. Under these assumptions, the collaboration would not entail an efficiency-enhancing integration, thus triggering per se condemnation by the U.S. agencies.

Using the analysis framework introduced above, we now delineate a rule of reason analysis of this collaboration and discuss the types of evidence that could be used to prove its procompetitive effect.

**1. Evidence that the collaboration is likely to increase output, decrease price, or increase quality during the crisis:**

- Evidence that the information exchange will allow the drug companies to obtain better demand estimates for crisis related drugs and other essential drugs; and
- Evidence that supports a need to coordinate to increase production of crisis-related drugs while guaranteeing adequate production of other essential drugs. This could include evidence that many of the manufacturers are capacity constrained and evidence that concentrating production of specific drugs leads to higher overall output.

**2. Evidence that the collaboration includes sufficient restraints to prevent negative spillover effects.** In the short run, the allocation of production of different drugs across different manufacturers may decrease competition for each type of drug, which could result in supracompetitive pricing. There is also risk that the communication around the ex-

change of information on drug demand and production allocations could have long run impacts on competition (i.e., the firms may elect to continue to allocate production of different drugs or use the information they gained about the relative efficiency of their competitors). The following restraints could prevent anticompetitive harm:<sup>59</sup>

- Committing that, in the absence of a cost increase, manufacturers will not increase the price of any drug that is covered by the allocation agreement;
- Limiting the communication necessary to exchange information on demand to the least possible, potentially by appointing a third party that collects each manufacturer's information on demand and aggregates it to a prediction of the overall demand;
- Defining the conditions under which the collaboration will end, potentially by appointing a third party to monitor the development of the crisis and determine the earliest end date.

**Coordination on the Distribution of Crisis-Related Supplies.**

As noted above, in the United States, the DOJ recently reviewed a collaboration by medical suppliers McKesson Corporation and others. A collaboration to distribute medical supplies in times of high demand may have procompetitive effects independently of the involvement of the federal government. For example, there could be a risk that some purchasers of medical supplies would fill stockpiles, while other hospitals or service providers would obtain fewer or no supplies. In that case, a collaboration between distributors could increase the total quantity of supplies brought to effective use (as opposed to being stockpiled), without reducing the total quantity sold. The suppliers could better predict individual purchasers' needs by combining knowledge on each purchaser's characteristics and historic purchasing patterns. By collaborating, the suppliers could also centrally allocate supply to different purchasers, making sure that all purchasers receive only the supplies they need.

Taking again the analysis framework introduced above as a guidance, we now delineate a rule of reason analysis and describe the evidence that could be used to prove the procompetitive effect of the collaboration.

**1. Evidence that the collaboration is likely to increase output, decrease price, or increase quality during the crisis:**

In order to show that the collaboration would increase the quantity of supplies being brought to effective use, the distributors could show that, based on their combined knowledge of purchasers' increased needs from the crisis, the total quantity shipped to individual purchasers recently mismatched their predicted needs, and argue that a redistribution of supply would have led to a better match.

**2. Evidence that the collaboration includes sufficient restraints to prevent negative spillover effects.** Again, there are short- and long-run risks. In the short run, the allocation of purchasers to distributors eliminates price competition and may lead to supra-competitive prices. In the long run, the distributors could either explicitly or tacitly continue with the

customer allocation, posing the risk of supra-competitive prices. The suppliers could propose the following measures to limit anticompetitive harm:

- Committing to not increase prices absent cost increases for the affected supplies;<sup>60</sup>
- Appointing a third party to allocate medical supplies, avoiding any direct communication between suppliers, and shielding the suppliers from any information about the allocation of purchasers between themselves. We note that this is essentially the role of the government in the McKesson et al. collaboration<sup>61</sup>; and
- Defining the conditions under which the collaboration will end, potentially by appointing a third party to monitor the development of the crisis and determine the earliest end date.<sup>62</sup> ■

<sup>1</sup> U.S. Dep't of Justice & Fed. Trade Comm'n Antitrust Guidelines for Collaborations Among Competitors 3 (2000) [hereinafter Collaboration Guidelines], [https://www.ftc.gov/sites/default/files/documents/public\\_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf](https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf).

<sup>2</sup> Richard Hoskins, *Antitrust Analysis of Joint Ventures and Competitor Collaborations: A Primer for the Corporate Lawyer*, 10 U. MIAMI BUS. L. REV. 119, 122–23 (2002).

<sup>3</sup> Collaboration Guidelines, *supra* note 1, at 2.

<sup>4</sup> *Id.* at 8.

<sup>5</sup> The Collaboration Guidelines contrast mergers, which are a permanent integration of all of the parties' assets, with collaborations of a limited duration, where "participants in a collaboration remain potential competitors, even if they are not competitors for certain purposes." *Id.* at 5. The shorter the duration of the collaboration, the greater the need to ensure that competition among the participants is not inappropriately reduced as a result of the collaboration. *Id.* at 21.

<sup>6</sup> U.S. Dep't of Justice & Fed. Trade Comm'n, Joint Antitrust Statement Regarding COVID-19 (Mar. 24, 2020) [hereinafter Joint Antitrust COVID-19 Statement], <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19>.

<sup>7</sup> Collaboration Guidelines, *supra* note 1; U.S. Dep't of Justice & Fed. Trade Comm'n, Statements of Antitrust Enforcement Policy in Health Care (1996) [hereinafter Health Care Statements], <https://www.justice.gov/atr/page/file/1197731/download>.

<sup>8</sup> Joint Antitrust COVID-19 Statement, *supra* note 6.

<sup>9</sup> *Antitrust Review at the FTC: Staying the Course During Uncertain Times*, FEDERAL TRADE COMMISSION NEWS AND EVENTS BLOG (Apr. 6, 2020), <https://www.ftc.gov/news-events/blogs/competition-matters/2020/04/antitrust-review-ftc-staying-course-during-uncertain>.

<sup>10</sup> FTC-DOJ Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets (Apr. 2020) <https://www.justice.gov/opa/press-release/file/1268506/download>.

<sup>11</sup> U.S. Dep't of Justice Bus. Rev. Letter Re: McKesson Corporation, Owens & Minor, Inc., Cardinal Health, Inc., Medline Industries, Inc., and Henry Schein, Inc. Business Review Request Pursuant to COVID-19 Expedited Procedure, 5 (Apr. 4, 2020) [hereinafter DOJ McKesson letter], <https://www.justice.gov/opa/press-release/file/1266541/download>. The DOJ issued a second letter responding to a business review request by AmerisourceBergen about conduct that "significantly overlaps with the conduct" described in the McKesson letter. See U.S. Dep't of Justice Bus. Rev. Letter Re: AmerisourceBergen Corporation Business Review Request Pursuant to COVID-19 Expedited Procedure (Apr. 20, 2020) [hereinafter DOJ AmerisourceBergen letter], <https://www.justice.gov/atr/page/file/1269911/download>.

<sup>12</sup> Collaboration Guidelines, *supra* note 1, at 1.

<sup>13</sup> *Id.* at 2.

<sup>14</sup> Letter by McKesson Corporation et al. to The Honorable Makan Delrahim 1–2 (Mar. 30, 2020) [hereinafter McKesson letter], <https://www.justice.gov/opa/press-release/file/1266546/download>.

<sup>15</sup> *Id.* at 3.

<sup>16</sup> DOJ AmerisourceBergen letter, *supra* note 11, at 2 n.4. ("The Department also understands that the Proposed Conduct significantly overlaps with the conduct described in the request letter from McKesson Corp. . . . and the Department's subsequent Business Review Letter to the PPE Distributors dated April 4, 2020.")

<sup>17</sup> DOJ McKesson letter, *supra* note 11, at 7–8 ("Courts have extended this immunity to conduct by private parties acting individually or together when (i) the collaboration is compelled by an agreement with a federal agency or a clearly defined federal government policy and (ii) a federal agency supervises the conduct. . . . Based on the Requesting Parties' representations, it is the Department's conclusion that this conduct fits within the two-part framework described above."); See also DOJ AmerisourceBergen letter, *supra* note 11, at 8 ("AmerisourceBergen intends to distribute certain medications from the Stockpile 'a[t] the direction of FEMA, HHS, and other government agencies . . . to FEMA-designated COVID-19 hotspots.' This conduct fits within the two-part framework described above.")

<sup>18</sup> U.S. Dep't of Justice Bus. Rev. Letter Re: National Pork Producers Council Business Review Request Pursuant to COVID-19 Expedited Procedure 2 (May 15, 2020), <https://www.justice.gov/opa/press-release/file/1276971/download>. ("Following an expedited review, the Department can conclude that it does not presently intend to challenge the Proposed Conduct by the NPPC. Based on your representations, most of this conduct will occur at the direction and under the supervision and coordination of the USDA—a government agency—and therefore should not raise concerns under the antitrust laws. Moreover, NPPC's communication of non-competitively sensitive information to its members, e.g., best practices for depopulating unmarketable hogs, even if not occurring at the direction of and under the supervision and coordination of the USDA, similarly is unlikely to raise concerns. In accordance with the Department's usual practice, however, it reserves the right to challenge the conduct in the future if it is later revealed to be anticompetitive in purpose or effect").

<sup>19</sup> Collaboration Guidelines, *supra* note 1, at 8.

<sup>20</sup> *Id.* at 6.

<sup>21</sup> *Id.* at 6–7.

<sup>22</sup> *Id.* at 7.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 3. ("The courts conclusively presume such agreements, once identified, to be illegal, without inquiring into their claimed business purposes, anticompetitive harms, procompetitive benefits, or overall competitive effects.")

<sup>26</sup> *Id.* at 8–12.

<sup>27</sup> *Id.* at 3.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 8 (emphasis added). The Collaboration Guidelines define efficiency-enhancing integrations as having the following attributes: (1) "[P]articipants collaborate to perform or cause to be performed . . . one or more business functions, such as production, distribution, marketing, purchasing or R&D, and thereby benefit, or potentially benefit consumers by expanding output, reducing price or enhancing quality of or innovation;" and (2) Participants "typically combine, by contract, or otherwise, significant capital technology, or other complementary assets to achieve procompetitive benefits that the participants could not achieve separately." *Id.*

<sup>30</sup> *Id.* The Collaboration Guidelines also warn that "[s]ome asserted efficiencies, such as those premised on the notion that competition itself is unreasonable, are insufficient as a matter of law." *Id.* at 9. We do not intend to argue that firms should be able to claim that "competition itself is unre-

sonable.” Rather, we provide specific examples in which during exigent circumstances a competitor collaboration can have procompetitive benefits by alleviating short run disruptions in supply and/or demand. These examples are not suggesting that “competition is unreasonable” but, rather, the market disruption is leading to a short run break down in normal terms of competition that can be ameliorated through efficiency enhancing competitor collaborations.

<sup>31</sup> *Id.* at 10.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 10–11.

<sup>34</sup> *Id.* at 11.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 11–12.

<sup>41</sup> See, e.g., Health Care Statements, *supra* note 7, 8A.4 at 67–68. (“The safety zones are limited to networks involving substantial financial risk sharing not because such risk sharing is a desired end in itself, but because it normally is a clear and reliable indicator that a physician network involves sufficient integration by its physician participants to achieve significant efficiencies”).

<sup>42</sup> Collaboration Guidelines, *supra* note 1, at 8.

<sup>43</sup> *Id.* at 31–32.

<sup>44</sup> *Id.* at 32.

<sup>45</sup> *Id.* at 8.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> DOJ McKesson letter, *supra* note 11, at 5.

<sup>49</sup> Collaboration Guidelines, *supra* note 1, at 8–12.

<sup>50</sup> We note that our suggestion to relax the integration requirement is consistent with recent guidance issued by the European Commission on competitor collaboration in the crisis, which does not require that collaborations on, for example, production decisions must be part of an efficiency-enhancing integration. European Commission, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak,” C(2020) 3200 final, 4 (Apr. 8, 2020), [https://ec.europa.eu/info/sites/info/files/framework\\_communication\\_antitrust\\_issues\\_related\\_to\\_cooperation\\_between\\_competitors\\_in\\_covid-19.pdf](https://ec.europa.eu/info/sites/info/files/framework_communication_antitrust_issues_related_to_cooperation_between_competitors_in_covid-19.pdf). (“Measures to adapt production . . . may require exchanges of commercially sensitive information and a certain coordination of which site produces which medicines, so that not all undertakings focus on one or a few medicines, while others remain in under-production. Such exchanges and coordination between undertakings are in normal circumstances problematic under EU competition rules. Nevertheless, in the current exceptional circumstances, such measures would not be problematic under EU competition law or—in view of the emergency situation and temporary nature—they would not give rise to an enforcement

priority for the Commission, to the extent that such measures would be: (i) designed and objectively necessary to actually increase output in the most efficient way to address or avoid a shortage of supply of essential products or services, such as those that are used to treat COVID-19 patients; (ii) temporary in nature (i.e. to be applied only as long there is a risk of shortage or in any event during the COVID-19 outbreak); and (iii) not exceeding what is strictly necessary to achieve the objective of addressing or avoiding the shortage of supply.”).

<sup>51</sup> Press Release, UK Government, Government to Suspend Competition Law to Support Isle of Wight Ferry Routes (Mar. 27, 2020), <https://www.gov.uk/government/news/government-to-suspend-competition-law-to-support-isle-of-wight-ferry-routes>. (“The COVID-19 outbreak has significantly reduced demand for the day-to-day services provided by the 3 operators, Hovertravel, Wightlink and Red Funnel.”).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Collaboration Guidelines, *supra* note 1, at 8.

<sup>55</sup> This could be operationalized by comparing current passenger numbers to a predetermined threshold above which the competitive provision of ferry services will be viable again.

<sup>56</sup> Press Release, Medicines for Europe, Medicines for Europe Welcomes European Commission Decision to Enable Secure Supply of Hospital Medicines (Apr. 8, 2020), <https://www.medicinesforeurope.com/wp-content/uploads/2020/04/Medicines-for-Europe-Press-release-European-antitrust-guidance-08042020.pdf>.

<sup>57</sup> Press Release, European Comm’n, Antitrust: Commission Provides Guidance on Allowing Limited Cooperation Among Businesses, Especially for Critical Hospital Medicines During the Coronavirus Outbreak (Apr. 8, 2020), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_618](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_618).

<sup>58</sup> *Comment: Medicines ‘Comfort Letter’ Shows EU’s Speed, Pragmatism in Granting Exemptions*, MLEX (Apr. 9, 2020).

<sup>59</sup> Some of these measures have in fact been implemented in the “Medicaments Europe” collaboration. *Id.*

<sup>60</sup> This commitment is part of the McKesson et al. collaboration. DOJ McKesson letter, *supra* note 11, at 6. (“The Requesting Parties are not using any collaboration to increase prices, reduce output, reduce quality, or otherwise engage in COVID-19 profiteering.”).

<sup>61</sup> *Id.* at 5. (“The Requesting Parties propose to collaborate with and at the direction of FEMA, HHS, and other government entities, to expedite and increase manufacturing, sourcing, and distribution of PPE and COVID-19-treatment-related medication essential to protect Americans’ health and safety.”).

<sup>62</sup> This commitment is part of the McKesson et al. collaboration. *Id.* at 6. (“The Requesting Parties’ collaborations are limited to the “time period necessary to assist FEMA and other government agencies in responding to COVID-19 shortages; . . . Upon resolution of the COVID-19-related disruptions and the disbanding of the related U.S. Government response initiatives, the Requesting Parties will formally dissolve this competitor collaboration and immediately notify the Department, in writing . . .”).