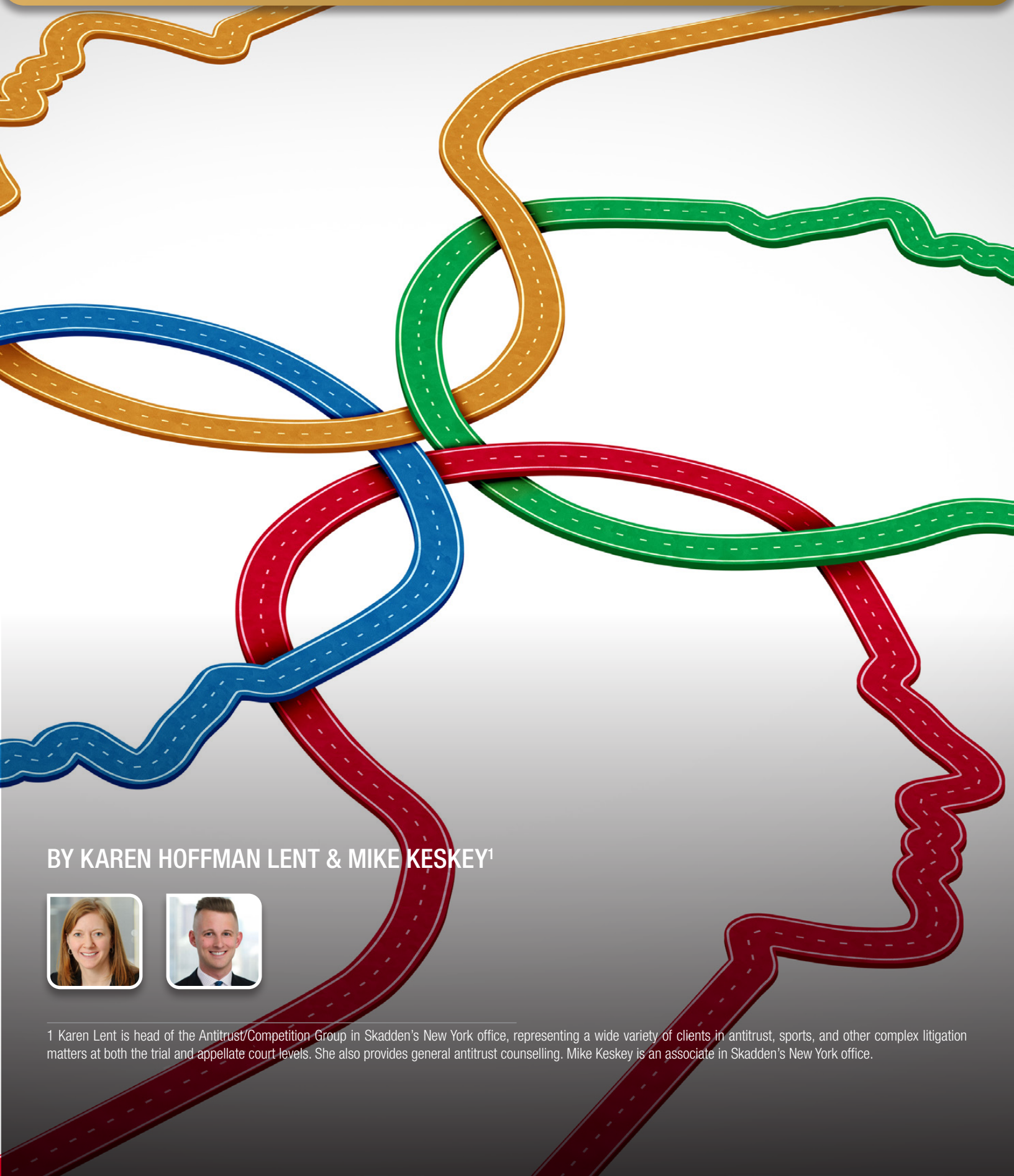
COMPETITOR COLLABORATIONS DURING COVID-19



BY KAREN HOFFMAN LENT & MIKE KESKEY[1]

1 Karen Lent is head of the Antitrust/Competition Group in Skadden's New York office, representing a wide variety of clients in antitrust, sports, and other complex litigation matters at both the trial and appellate court levels. She also provides general antitrust counselling. Mike Keskey is an associate in Skadden's New York office.

Antitrust regulators worldwide have had to adopt novel strategies to address the emergency need for collaboration within certain industries to help combat the COVID-19 pandemic. As issues arose involving, for example, the timely distribution of medicine, or further downstream, business closures delayed critical supply chains, COVID-19 changed the way most industries must do business. As a result, many businesses have found that they can work together to more effectively respond to the pandemic. Antitrust enforcers recognized this need for collaboration and have issued public statements discussing increased antitrust tolerance for collaborations between competitors if these combined efforts can help provide necessary products and services that may otherwise be unavailable. This arguably more lenient view of collaboration extends beyond the immediately relevant medical and pharmaceutical companies, as regulators have indicated an understanding that the pandemic has produced downstream effects on many industries that may benefit from increased collaboration.

In the U.S., the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") issued a joint statement in March 2020 to address the ways firms can engage in "procompetitive collaboration" to help respond to COVID-19.[2] In this statement, the agencies discuss acceptable joint activities that companies could undertake to address the pandemic conditions while not running afoul of the antitrust laws. Some of these lawful activities include sharing "technical know-how" and collaborating on research and development. The agencies explained that they will "account for exigent circumstances in evaluating the efforts to address the spread of COVID-19 and its aftermath" where those efforts are "necessary to assist patients, consumers, and communities" and "provide Americans with products or services that might not be available otherwise." This guideline signals an understanding that the COVID-19 pandemic may have widespread consequences that extend beyond the medical industry and may require collaborations that would typically attract a higher level of antitrust scrutiny. As a part of their guidance, the antitrust agencies pledged to expedite their individual programs: the FTC's advisory opinion program and the DOJ's business review program.

2 Joint Antitrust Statement Regarding COVID-19, DOJ (Mar. 24, 2020).

I. THE BUSINESS REVIEW PROGRAM

The DOJ's business review program provides businesses with insight into how the enforcer may respond to proposed business conduct. The process begins with a written request from a business (or group of businesses) to the Assistant Attorney General. Each request must be accompanied by additional relevant information, including background details, copies of all operative documents and detailed statements of all collateral oral understandings (if any).[3] The DOJ can also request additional information or conduct an independent investigation. If the DOJ chooses to write a business review letter in response to a request, it can take one of three positions: (i) it does not presently intend to bring an enforcement action against the proposed conduct; (ii) it declines to state its enforcement intentions; or (iii) it will file suit against the companies if they engage in the proposed conduct. Even if the DOJ issues a business review letter stating that it does not intend to bring an enforcement action against certain conduct, it reserves the right to do so in the future, as each business review letter states only the DOJ's intentions as of the date of the letter. Significantly, however, when the DOJ has stated an intention not to bring suit, it has never subsequently brought a criminal action if full disclosure was presented at the time the request.[4]

The DOJ touts the business review program as beneficial to both the DOJ and the business community because the DOJ can analyze and comment on the possible competitive impact of proposed business conduct, potentially avoiding later lawsuits or other actions. The review process typically takes several months to complete from the time a business submits a request; from 2010–2019, the average number of days between submission of a request and the date of the DOJ response letter was 127 days. Under the new guidance, the DOJ announced it will aim to respond expeditiously to all COVID-19-related requests, and to resolve those addressing "public health and safety" within seven calendar days of receipt of all necessary information.

II. INCREASE IN BUSINESS REVIEW LETTERS DURING PANDEMIC

Unsurprisingly, requests for business review letters have increased in the months since the DOJ released its guidance. Over the 15-year period of 2004–2019, the DOJ released an average of approximately two business review letters per calendar year. In the eight months ending in August 2020, the DOJ released seven business review letters, including four using the expedited process.

The first expedited business review letters of 2020 were directly related to the pandemic and involved the distribution of medicine and medical equipment. First, on April 4, 2020, the DOJ issued a business review letter to a group of distributors of personal protective equipment ("PPE"), including McKesson and Cardinal Health, announcing that it would not challenge the collaboration between the companies to address COVID-19-related supply chain problems affecting distribution of their products.[5] The requesting parties had proposed that they would work with the Federal Emergency Management Agency ("FEMA") to accelerate manufacturing and distribution of PPE and medication. The DOJ pointed to many of the participants' proposed competitive safeguards, including their promises not to use the collaboration to raise prices, reduce output or reduce quality, and noted that the collaboration is unlikely to harm competition because it is "limited in scope and duration ... and will not extend beyond what is required to facilitate the availability of needed supplies."[6] With these proposed safeguards, the DOJ stated it did not believe the conduct would be anticompetitive.

Shortly after issuing the first expedited letter, the DOJ issued another on April 20, 2020, to AmerisourceBergen Corporation announcing that it would allow the company to coordinate with FEMA, the U.S. Department of Health & Human Services and other federal agencies to distribute medicine nationally.[7] Amerisource proposed limiting its collaborations to efforts related to COVID-19 and continuing such arrangements as long as was necessary to help combat the pandemic. Much of the framework proposed by Amerisource was substantially similar to the framework presented by the DOJ in the McKesson letter,[8] with the DOJ noting the importance that Amerisource's proposed collaboration would

3 28 C.F.R. §50.6.

4 See Introduction to Antitrust Business Reviews, DOJ (Nov. 3, 2011).

5 See McKesson Corporation Business Review Letter, DOJ (Apr. 4, 2020).

6 *Id.* at 9.

7 See AmerisourceBergen Corporation Business Review Letter, DOJ (Apr. 20, 2020).

8 See *id.* at 10 ("The Department recently applied this same framework in evaluating the proposed collaborations by the PPE Distributors responding to the COVID-19 pandemic under the direction of FEMA.").

be "specifically intended to further U.S. government policy and efforts."[9] In both letters, the DOJ credited the requesting parties' proposed competitive safeguards, including "limiting what information is exchanged and how long it will be exchanged or kept, to minimize the risk that [the parties'] conduct might harm competition." For these reasons, the DOJ stated it did not intend to challenge the collaboration.

The DOJ's next expedited business review letter, released in May 2020, illustrated that the authority understood that the pandemic has effects in many industries outside of the medical and pharmaceutical space. On May 15, 2020, the DOJ announced that it would allow the National Pork Producers Council ("NPPC"), a trade association of U.S. pork producers, to share information regarding the recommended best practices for euthanizing unmarketable hogs.[10] The NPPC explained in its request that pork producers use standardized equipment that can only process hogs of a certain size, and many producers had been forced to decrease production at their facilities due to the pandemic. This decrease in production resulted in an oversupply of live hogs in the U.S. — with nowhere for farmers to sell their hogs, eventually the animals became too large to process. In response to this problem, the U.S. Department of Agriculture ("USDA") created a program to euthanize these unmarketable hogs, and NPPC members offered to assist farmers in following best practices for doing so. The DOJ's business review letter to NPPC emphasized the importance of the fact that the conduct would be occurring at the direction of a government agency (the USDA). Further, like it did in the Amerisource and McKesson letters, the DOJ highlighted that the collaboration was narrowly targeted to solve the specific problem of pandemic-related capacity reductions resulting in an overpopulation of unmarketable hogs.[11] For these reasons, the DOJ saw no risk for competitive harm and stated it would not challenge the proposed conduct.

The fourth (and final, so far) expedited business review letter issued by the DOJ involved the pharmaceutical industry. On July 23, 2020, the DOJ issued a business review letter to a group of pharmaceutical manufacturers, including Eli Lilly and Amgen, regarding the manufacturers' proposed information exchange relating to manufacturing and production of certain COVID-19 treatments.[12] Citing the need for expedited production of any approved COVID-19 treatment, the requesting parties, some of which compete with each other in the production of biologics, asked to share information regarding "manufacturing facilities, raw materials, and supplies" that could be used to produce COVID-19 treatments and "reduce the lead time necessary to prepare their facilities for the production of these treatments." In its business review letter, the DOJ explained that because the proposed information exchange was limited to production capacity specifically related to COVID-19 treatments, it was "unlikely to result in collusion or harm competition."[13] As the DOJ did in the other expedited review letters, the authority emphasized the fact that the requesting parties agreed only to "exchange and use information for the strictly limited purpose of facilitating the production of COVID-19 treatments."[14]

The DOJ has also released three business review letters in 2020 through the nonexpedited process.[15] First, in January 2020, the DOJ issued a business review letter to the American Optometric Association ("AOA"), a trade association of optometrists,[16] which operates a group purchasing organization ("GPO") through which its members can purchase non-optometric products like insurance, credit card processing and general medical supplies. The AOA uses a third-party health care GPO as its agent to negotiate discounts on products and services. The AOA requested a business review from the DOJ regarding potentially expanding its GPO to include the purchase of optometric products, contending that allowing the GPO to negotiate prices on optometric equipment would better position its members to compete with large retail stores and vertically integrated manufacturers. The AOA proposed a number of competitive safeguards to ensure the expansion was not anticompetitive, including that GPO members would be allowed, but not required, to make their purchases through the GPO; that an independent third party would be conducting the negotiations; and that any discussions between the GPO and individual members regarding pricing/costs would be kept confidential from the other GPO members.

9 See *id.* at 11.

10 See National Pork Producers Council Business Review Letter, DOJ (May 15, 2020).

11 See *id.* at 4 ("The Department further understands that the conduct will not be used as a mechanism to depopulate more hogs than necessary, i.e. the conduct is limited to the depopulation of hogs that become unmarketable due to a reduction in processing plant capacity.").

12 See Eli Lilly Business Review Letter, DOJ (July 23, 2020).

13 *Id.* at 6.

14 *Id.* at 9.

15 In September 2020, DOJ updated a business review letter it originally issued to The Institute of Electrical and Electronics Engineers in 2015. This update addressed concerns "raised publicly by industry, lawmakers, and former department and other federal government officials that the 2015 letter has been misinterpreted, and cited frequently and incorrectly."

16 See American Optometric Association Business Review Letter, DOJ (Jan. 15, 2020).

Next, in April 2020, the DOJ issued a business review letter to the Association of Independent Commercial Producers ("AICP"), a trade association representing companies that produce commercials on various media platforms for advertisers and advertising agencies, regarding a proposed bidding platform that AICP was developing[17] through its wholly owned subsidiary AICP Services, Inc. ("ASI") to allow subscribers (primarily advertisers and advertising agencies) to solicit and receive bids from production and post-production companies for commercial advertisements. AICP represented that it would not share information regarding bids, pricing or other competitively sensitive information outside of the specific members invited to participate in the bids, and that the platform would not be used to facilitate communication between subscribers or bidders.[18] Additionally, participation in these services would be nonexclusive for all AICP members.

Finally, the most recent business review letter was issued on July 28, 2020, to Avanci, LLC regarding its proposed joint patent-licensing pool for use with 5G technologies used in automobiles.[19] Avanci offers a licensing platform that aggregates patents declared essential to 2G, 3G and 4G standards, which are then licensed to manufacture connected vehicles and smart meters. Avanci proposed to implement a similar program for 5G cellular technologies. In its request, the company proposed a number of competitive safeguards to ensure the patent-licensing pool did not have anticompetitive effects, such as excluding substitute patents from the pool, permitting independent licensing outside of the pool, making the license agreements available to all interested licensees and limiting access to competitively sensitive information.[20]

III. GOING FORWARD — "NO RELAXATION" OF ANTITRUST ENFORCEMENT

While the FTC and the DOJ may be allowing for quicker reviews of proposed conduct related to COVID-19, the antitrust agencies are not relaxing their enforcement or allowing companies to coordinate in violation of the antitrust laws. In an April 2020 panel at the annual spring meeting of the American Bar Association's Antitrust Law Section, Ian Conner, the Director of the FTC's Bureau of Competition, reiterated the agency's commitment to vigorous antitrust enforcement. "We're not changing our enforcement priorities or our enforcement standards. So if you want to take advantage of the crisis to try and price fix or fix wage prices, those are the things we will still prosecute. So there's no relaxation of antitrust rules here." In a separate statement, Mr. Conner explained that the expedited antitrust review process "is just going to be expedited for things that likely would have been cleared anyway." In contrast, both the DOJ and the FTC have also made clear that certain practices will be particularly scrutinized during the pandemic, including "anticompetitive conduct in labor markets, such as agreements to lower wages or to reduce salaries or hours worked," especially in industries involved in the public health response to COVID-19.[21]

Thus, businesses should not view the new guidance as changing antitrust enforcement policies, but might consider taking advantage of enforcers' increased use of the business review programs, considering that the DOJ released more business review letters so far in 2020 than it did in any single year since 2002, and more than in the last five years combined. Even excluding this year's expedited letters, the three regular business review letters released by the DOJ in 2020 tally more than in any single year since 2013. As the review process gets more exposure during the pandemic, companies may become more comfortable using either the expedited or the regular program to gain insight into proposed conduct before implementing it.

Further, considering the agencies' explanation that the expedited business review process has only been approving conduct that would have been approved under the normal review process, businesses may be able to use these letters as data points generally indicating the types of conduct that antitrust agencies are unlikely to challenge. If a business is looking to collaborate with other businesses in a manner that is similar to approved conduct from a previous business review letter, it can have some comfort that the antitrust agencies would view that conduct similarly from an enforcement perspective.

17 See Association of Independent Commercial Products Business Review Letter, DOJ (April 16, 2020).

18 See *id.* at 3.

19 See Avanci Business Review Letter, DOJ (July 28, 2020).

20 See *id.* at 12–21.

21 Joint Statement Regarding COVID-19 and Competition In Labor Markets, DOJ (Apr. 13 2020).

IV. CONCLUSION

The COVID-19 pandemic will have long-lasting effects on nearly every field of law, and competition law is no different. As we have already seen, the pandemic has forced lawmakers and regulators to consider designs outside traditional antitrust arrangements, resulting in a more dynamic and unpredictable regulatory space. This makes undertaking collaborations with a certainty of avoiding antitrust concerns more difficult than ever for businesses. Through the business review process, antitrust agencies have shown a willingness to accept creative collaborations between competitors as long as those collaborations are sufficiently targeted and as brief as necessary. The agencies have and will continue to release guidance discussing acceptable collaborations, and businesses will be able to use this guidance to help make their own decisions regarding collaborations with competitors. As always, it remains important for businesses to affirmatively demonstrate how their collaborations will benefit consumers (or, in the case of the COVID-19 response, public health). If businesses are able to demonstrate these advantages in advance, they may be able to use the antitrust agencies' review programs to help mitigate risk and ensure their conduct will not violate antitrust laws.

CPI COMPETITION POLICY INTERNATIONAL

CPI Subscriptions

CPI reaches more than 35,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.