Client Alert | Antitrust/Competition

A Novel Antitrust Defense for COVID-19 Agreements:

Section 708 of the Defense Production Act

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This alert describes the surprisingly broad antitrust defense – against federal and state antitrust actions – that Congress created in Section 708 of the Defense Production Act of 1950.[1]

Recent media attention on the implications of the global pandemic on competition law has focused on Section 101 of the Defense Production Act of 1950 ("DPA"), which allows the U.S. President to require private businesses to perform government contracts, and to "allocate materials, services and facilities . . . necessary and appropriate for the national defense."[2] President Trump recently directed the Secretary of Health and Human Services to invoke Section 101 to require General Motors Company to make ventilators.[3]

But in response to the COVID-19 crisis, on March 27, 2020, the White House also issued an Executive Order under a less-discussed provision of the DPA, Section 708. Section 708 allows private companies to assist in responding to the ongoing national emergency by agreeing to cooperate in ways that could ordinarily expose them to antitrust liability. The DPA provides a defense to civil and criminal antitrust liability to companies performing voluntary agreements under Section 708 if the companies follow the procedures in the statute and regulations. This defense is especially critical for collaborations that could otherwise implicate *per se* violations of the Sherman Antitrust Act, which could result in criminal prosecutions, large class action lawsuits claiming treble damage awards, joint and several liability among collaborators, and related state-law penalties.

The procedures under Section 708 are cumbersome, and involve several government agencies, but the Antitrust Division of the Department of Justice and the Federal Trade Commission have committed to responding to requests under the DPA on an expedited basis.[4] The DPA, in some cases, may provide an antitrust defense, allowing private companies to work together to combat COVID-19 across a wide range of industries, from pharmaceutical companies seeking to collaborate on vaccines and treatments, to companies making medical devices and personal protective equipment.

Historical Antitrust Relief Under Section 708[5]

Congress initially enacted the DPA at President Truman's request to aid the United States' involvement in the Korean War.[6] Inspired by the World War II-era First and Second War Powers Acts, the DPA gave the

1 For further insight on the CARES Act response to COVID-19, please see White & Case LLP's *CARES Act Provides No Relief From Antitrust Laws, But Deference On COVID-19-Related Coalitions From DOJ/FTC Will Be Fact-Specific* (Mar. 30, 2020).

2 50 U.S.C. § 4511.

3 Memorandum on Order Under the Defense Production Act Regarding General Motors Company.

4 The Justice Department and the Federal Trade Commission Announce Expedited Antitrust Procedure and Guidance for Coronavirus Public Health Efforts.

5 The Federal Government's response to the COVID-19 health emergency evolves day by day. The information contained in this article is current as of the date of publication.

6 *See, e.g.*, CONGRESSIONAL RESEARCH SERVICE, *The Defense Production Act of 1950: History, Authorities, and Considerations for Congress* 2 (2020).

President greater statutory authority to regulate commerce to aid in the national defense.[7] The original version of Section 708 provided sweeping antitrust immunity for any "act or omission . . . requested by the President pursuant to a voluntary agreement or program . . . ."[8] Within a year of the Defense Production Act's enactment, the Government approved 30 such voluntary agreements, including with manufacturers of tanks, artillery shells, and tactical trucks.[9]

In 1975, Congress replaced that *blanket immunity* with a *litigation defense* to antitrust lawsuits brought against parties to a Section 708 voluntary agreement. The 1975 revision to Section 708 placed the burden on the collaborating contractual parties to justify their actions and added a "good faith" element for the collaborating firms to prove.[10] Congress intended for that remodeling of Section 708 to "balance" the "antitrust interest and the national defense interest" because "immunity from antitrust laws should never be granted except in language that limits and narrows the extraordinary exempting language."[11]

Today, Section 708's antitrust defense is stronger and reduces the burden on the collaborating parties. The Section 708 antitrust defense now reads:

> (j) **Defenses.**
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> (1) In general. Subject to paragraph (4), there shall be available ***as a defense for any person to any civil or criminal action brought under the antitrust laws (or any similar law of any State)*** with respect to ***any action taken to develop or carry out any voluntary agreement or plan of action*** under this section that—
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> (A) such action was taken—
> (i) in the course of developing a voluntary agreement initiated by the President or a plan of action adopted under any such agreement; or
> (ii) to carry out a voluntary agreement initiated by the President and approved in accordance with this section or a plan of action adopted under any such agreement, and
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> (B) such person—
> (i) complied with the requirements of this section and any regulation prescribed under this section; and
> (ii) acted in accordance with the terms of the voluntary agreement or plan of action.
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> * * *
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> (4) Exception for actions taken to violate the antitrust laws. The defense established in paragraph (1) shall not be available if the person against whom the defense is asserted shows ***that the action was taken for the purpose of violating the antitrust laws***.[12]

This language, which has been in effect since 1991, was designed by Congress to "eliminate[] the unique, vague and unreasonably difficult requirement that in order for actions to qualify for the antitrust defense, the person taking them must prove that he has done so 'in good faith' . . . ."[13] Congress replaced the 1975 *"good faith"* evidentiary burden on the defendant with a limited *bad faith* exception to the antitrust defense—that companies cannot receive an exemption from the antitrust laws **if "the action was taken *for the purpose of violating* the antitrust laws**."[14]

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7 *Id.*

8 Defense Production Act of 1950, 81 P.L. 774, 64 Stat. 798, 818 (1950) (current version at 50 U.S.C. § 4558).

9 Shirley J. Norwood, *Function of the Antitrust Division under the Defense Production Act of 1950*, 24 Miss. L.J. 228, 233 (1953) (citing Address by J. Howard McGrath, Attorney General, before Institute on Economics of Defense Mobilization, Dept. of Commerce Auditorium (November 27, 1951)).

10 Defense Production Act of 1950, P.L. 94-152, 29 Stat. 810, 814 (1975).

11 S. REP. NO. 94-353, at 13 (1975).

12 50 U.S.C. § 4558(j) (emphasis added).

13 H.R. REP. NO. 102-7, at 6 (1991).

14 Defense Production Act of 1950, P.L. 102-99, 105 Stat. 487, 489 (1991); 50 U.S.C. § 4558(j)(4).

Current Scope of Antitrust Defense Under the DPA For Collaborative Agreements: Federal and State Antitrust Law

To benefit from the Defense Production Act's antitrust defense, a voluntary agreement:

- Must have a **government sponsor** – that is, be sponsored by and approved by either the Secretary of Health and Human Services ("HHS") or the Department of Homeland Security ("DHS") and approved by the Attorney General[15];
- Must be developed at public **meetings** in collaboration **with the Government**[16]; and
- Is subject to ongoing **oversight.**[17]

If these requirements of a Section 708 voluntary, collaborative agreement are satisfied (discussed more fully below):

- The parties receive **a statutory litigation defense** to any "***civil or criminal*** action brought under the **[Federal] antitrust laws (or *any similar law of any State*)** with respect to any action taken to develop or carry out any voluntary agreement or plan of action."[18]
- The "antitrust laws" include the **Sherman Act**, the **Clayton Act**, **unfair competition** under the FTC Act, **and their state-law counterparts**.[19]
- Defendants have the burden of proof on this defense[20] but the only exception to the defense is for conduct that was "***taken for the purpose of violating the antitrust laws***."[21]

There are several **practical implications** of the Section 708 defense:

- While there is little guidance on the meaning of the exception, the legislative history suggests that Congress added the exception to make it easier for parties to take advantage of the antitrust defense. One could credibly argue that the exception is designed to prohibit actions taken *solely* for the purpose of violating the antitrust laws that are beyond the scope of the government-approved voluntary agreement.
- Class action lawyers often bring state consumer protection actions or unjust enrichment actions as a follow-on claim along with state antitrust law claims. State consumer protection and unjust enrichment claims are arguably not covered by the Section 708 defense ("any similar law of any State" to the federal antitrust laws).
- We think a better reading of the statute, which the DOJ Antitrust Division should adopt and commit to aggressively support through amicus participation in any lawsuit challenging a Section 708 agreement, is that "any" follow-on "antitrust substitute" (such as state consumer protection claims) would be covered by the antitrust defense. Otherwise, the strong emergency purpose of the statute would be gutted.
- This result could be reached by use of the Supreme Court's *Ashcroft v. Iqbal*[22] ruling as U.S. District Judge Stefan Underhill recently did in the *Aggrenox Antitrust Litigation* (a "reverse payment" antitrust case):

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15 44 C.F.R. § 332.2(b)(1)–(2).

16 *Id.* § 332.2(c).

17 *Id.* § 332.3; 50 U.S.C. § 4558(g).

18 50 U.S.C. § 4558(j)(1) (emphasis added).

19 *Id.* § 4558(b)(1) ("The term "antitrust laws" has the meaning given to such term in subsection (a) of the first section of the Clayton Act [15 U.S.C. § 12], except that such term includes section 5 of the Federal Trade Commission Act [15 U.S.C. § 45] to the extent that such section 5 applies to *unfair methods of competition*.") (emphasis added).

20 *Id.* § 4558(j)(3).

21 *Id.* § 4558(j)(4).

22 556 U.S. 662, 678–79 (2009).

- "In an effort to get in on the *Actavis* [a reverse payment decision] game, [plaintiffs] attempt to ***build a Frankensteinian equivalent*** of *Actavis* to reach the very same conduct but without that formidable obstacle, ***by stitching together a hodge-podge of state-law claims*** [such as state unjust enrichment, consumer protection, deceptive practices laws]. ***But the plaintiffs cannot simply enumerate a long list of state-law claims for states where they might otherwise have no available antitrust recovery*** and rely on the defendants and the court to sort out whether or how those laws can act as surrogates for antitrust law."[23]

- Alternatively, and perhaps even more directly, these state laws are pre-empted under the Supremacy Clause of the U.S. Constitution to the extent that they interfere with the DPA.[24] Again, the Antitrust Division should commit to this interpretation to clarify that the protections of Section 708 will have teeth.

Procedural Hurdles to Developing Voluntary Agreements Under the DPA

The President, "[u]pon finding that conditions exist which may pose a direct threat to the national defense or its preparedness programs . . . may consult with representatives of industry . . . and other interests in order to provide for the making by such persons, with the approval of the President, of voluntary agreements and plans of action to help provide for the national defense."[25] In other words, the Defense Production Act authorizes the President, or (more likely) one of his Cabinet Secretaries, to waive the ordinary standards of the antitrust laws and allow ***competitors to work together to aid in an ongoing national emergency.***

On **March 13, 2020,** President Trump declared a national emergency related to the SARS-CoV-2 virus and COVID-19, the disease it causes.[26]

On **March 27, 2020,** the President delegated his authority to consult with private industry to develop voluntary agreements to both HHS and DHS to respond to the COVID-19 crisis.[27] In the March 27, 2020 Order, the President proclaimed that the United States' policy and intention is "to enable greater cooperation among private businesses in expanding production of and distribut[ion]" of medical resources.[28]

DOJ Review and Approval Is Required to Begin Developing an Agreement

To begin the development of a voluntary agreement under the DPA, a governmental "sponsor" from HHS or DHS must submit a proposal for any such agreement to the Attorney General and the Administrator of the Federal Emergency Management Agency ("FEMA") for review. The proposal must include a statement regarding the "purpose of the agreement; the factual basis for making the finding required in subsection 708(c)(1) of the DPA; the proposed participants in the agreement; and any coordination with other Federal agencies accomplished in connection with the proposal."[29] The Attorney General, after consultation with the Chairman of the Federal Trade Commission ("FTC"), must approve or deny the proposal.[30] The Antitrust Division of DOJ would aid the Attorney General in his review of the proposal.[31]

Statements from the Antitrust Division and FTC (collectively, the "Antitrust Agencies") indicate their receptiveness to the use of Section 708. Just last week, the Antitrust Agencies issued a joint statement

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23 *In re Aggrenox Antitrust Litig.*, 94 F. Supp. 3d 224, 255–56 (D. Conn. 2015) (emphasis added).

24 U.S. CONST. art. VI, cl. 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land . . . .").

25 *Id.* § 4558(c)(1).

26 Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak, Proclamation No. 9994, 85 Fed. Reg. 12721, (2020).

27 Delegating Additional Authority Under the Defense Production Act With Respect to Health and Medical Resources To Respond to the Spread of COVID–19, Exec. Order No. 13911 § 3, 85 Fed. Reg. 18403 (2020).

28 *Id.* § 1.

29 *See* 44 C.F.R. § 332.2(b)(1).

30 *Id.* § 332.2(b)(2).

31 *See* 28 C.F.R. § 0.40(e).

outlining their response to the COVID-19 crisis.[32] There, the Antitrust Agencies committed to responding to "all COVID-19-related requests" within seven days[33] and expressed their commitment to "effectuate the Defense Production Act and the Pandemic and All-Hazards Preparedness Act" as appropriate.[34] While there is no formal deadline for the Attorney General to approve or deny a proposal for a voluntary agreement, the President's recent delegation of authority under Section 708 and the Antitrust Agencies' commitment to the speedy review of COVID-19-related issues indicate that the Government agencies are mobilized and ready to respond quickly to proposals to enter voluntary agreements.

The Development of a Voluntary Agreement Is Heavily Monitored and Subject to Input from the Government

After the Attorney General (through the Antitrust Division) approves a proposal, the governmental sponsor may organize meetings between competitors to develop the agreement, which are presumptively open to the public.[35]

There are a number of requirements for the conduct of these meetings, including that ***representatives of the Attorney General and the Chairman of the FTC must be in attendance***.[36] After an agreement has been negotiated and finalized, the Secretary of HHS or DHS must "approve[] it and certif[y], in writing, that the agreement or plan is necessary to carry out the purposes [of the statute] . . . and the Attorney General . . . [must] find[] . . . that such purpose *may not reasonably be achieved through a voluntary agreement or plan of action having less anticompetitive effects* or without any voluntary agreement or plan of action . . . ."[37]

Government Oversight Continues After an Agreement Is Reached

After a Section 708 agreement takes effect, the Antitrust Agencies monitor the parties to ensure they are acting within the scope of the agreement.[38] Meetings of the parties to carry out the agreement are strictly regulated, ***must include an employee of the Government***, and are ***presumptively open to the public***.[39] These meetings, however, may be closed to the public when certain **national security, trade secret**, or other limited concerns are implicated.[40]

Absent an earlier termination or a formal extension, a voluntary agreement entered into under the DPA expires five years after it becomes effective.[41]

Other Options Offer a Path Forward Even if the Burdens of Section 708 Do Not Fit a Proposed Course of Action

Section 708 will not be the right course for every proposed action in response to COVID-19. But entities have two other mechanisms available to seek government approval and safe harbor from the antitrust laws:

- First, entities may submit a proposed course of action to the Antitrust Agencies under the National Cooperative Research and Production Act of 1993, which provides for single damages and deferential rule of reason treatment in a legal challenge to the action[42]; or

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32 For further insight on the Antitrust Agencies' joint statement and the risks of competitor collaborations during the current health crisis, please see White & Case LLP's *Competitor Collaborations: Competition Agencies Respond to a Global Pandemic* (Mar. 27, 2020).

33 Joint Antitrust Statement Regarding COVID-19.

34 *Id*.

35 44 C.F.R. § 332.2(b)(2), (c), (d).

36 *See id.* § 332.2(c)(2).

37 50 U.S.C. § 4558(f)(1) (emphasis added).

38 *Id.* § 4558(g).

39 44 C.F.R. § 332.3(c)(4); §§ 332.3(c)(3), 332.5(b).

40 *Id.* § 332.5(c).

41 50 U.S.C. § 4558 (f)(2).

42 15 U.S.C. § 4301–06; *see also* FEDERAL TRADE COMMISSION, *National Cooperative Research and Production Act of 1993* ("This Act establishes certain protections for any joint research, development, or production venture as to which a voluntary, prior written notification has been filed with the Attorney General and the Federal Trade Commission.

- Second, entities may seek a business review from the Antitrust Division.[43] The DOJ has never brought a criminal indictment against a party to a business review, and federal judges have dismissed civil cases when an approved joint activity is within the business review granted by the Antitrust Division.

While these other mechanisms provide lesser forms of relief than Section 708, they may be appropriate for certain proposed actions, especially for entities seeking quicker comfort in their proposed efforts in response to COVID-19.

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There is a dire need for the assistance of private industry in developing vaccines and treatments for the SARS-CoV-2 virus, and for the manufacture and distribution of medical and other supplies to aid in the United States' response to the COVID-19 health emergency. The Government's recent actions indicate a desire to allow private sector companies to work together to do so quickly.

While many of the needs arising from the ongoing emergency focus specifically on medical supplies, the President's delegation of Section 708 authority to the DHS as well as HHS potentially opens the door to voluntary agreements within broader sectors of the US economy. Under the right circumstances, and if the business combination could garner the governmental sponsor needed for the voluntary agreement, invoking the Defense Production Act's antitrust relief provision through the enactment of voluntary agreements could allow for a more robust response to the COVID-19 pandemic.

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Specifically, in any antitrust suit brought under the Clayton Act relating to the conduct of such a venture, recovery by the plaintiff is limited to actual damages, interest, and reasonable attorney's fees.").

43 White & Case LLP's insight on a business review during the COVID-19 pandemic is available here.