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Antitrust implications from U.S. government COVID-19 response

26 March 2020

On 24 March 2020 the Antitrust Division of the Department of Justice (DOJ) and the Bureau of Competition of the Federal Trade Commission (FTC) (collectively the agencies) released a joint statement[1] providing guidance to the business community on how to remain compliant with the antitrust laws while collaborating with other entities in response to the COVID-19 national emergency (the joint statement). This announcement follows an executive order signed by U.S. President Donald Trump on 18 March 2020 invoking the Defense Production Act (DPA) which, if utilized, also has implications for how the antitrust laws will be applied to cooperative efforts by businesses in response to the COVID-19 emergency.

Agencies' joint antitrust statement regarding COVID-19

Expedited FTC advisory opinions and DOJ business review letters

The joint statement announces an expedited review process for FTC advisory opinions and DOJ's business review letters. The FTC and DOJ will accept requests for staff advisory opinions[2] and business review letters[3], respectively, and respond on an expedited basis if the requests are related to proposed business conduct "address[ing] the urgent public health and economic needs associated with COVID-19." The agencies will attempt to respond to these expedited requests within seven calendar days of receiving the necessary information.

Companies seeking expedited requests for guidance from the agencies are required to provide the following information:

a) How the proposed business conduct is related to COVID-19, including a description of the nature of, and rationale for the proposal (e.g., the names of the participants, the products or services related to the proposal, and the geographic scope of the arrangement).

b) Any proposed contractual or other arrangements among the parties, including any documentation of the contracts or other arrangements.

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1 U.S. Department of Justice and Federal Trade Commission, Joint Antitrust Statement Regarding COVID-19 (March 2020) available here.

2 An FTC staff advisory opinion provides guidance with respect to the application of the antitrust laws on proposed business conduct.

3 A DOJ business review letter provides guidance to businesses with respect to how the DOJ may assess the potential competitive impact of joint ventures or other business conduct.

c) The names of expected customers and information regarding the competitive significance of other providers of the products or services offered.

Requests for an FTC staff advisory opinion should be submitted to the FTC's Bureau of Competition via email at FTCCOVID19@ftc.gov. Requests for DOJ business review letters should be submitted to the Antitrust Division at ATR.COVID19@usdoj.gov.

Expedited processing of National Cooperative Research and Production Act filings

The joint statement also committed to expediting the processing of filings made under the National Cooperative Research and Production Act (NCRPA).[4] The NCRPA is intended to clarify the "rule of reason" standard as applied to the antitrust analysis of certain research and development and production joint ventures[5], and standards development organizations (SDOs)[6] that are engaged in research and production related to standards development activity.

Guidance pertaining to COVID-19 related activities that will not violate the antitrust laws

In recognition of the need for individuals and businesses to immediately address the COVID-19 pandemic, the joint statement refers to past guidance documents outlining various types of collaborative activities that the agencies will likely find to be compliant with the antitrust laws. These include:

1. Collaborations on research and development classified as "efficiency-enhancing integration of economic activity."[7]

2. Health care providers' development of suggested practice parameters, including standards for patient management developed to assist providers in clinical decision-making, that is deemed to provide useful information to patients, providers, and purchasers.[8]

3. Joint purchasing arrangements among health care providers designed to increase the efficiency of procurement and reduce transaction costs.[9]

4. Private lobbying for governmental action with respect to the passage and enforcement of laws related to federal emergency authority, including private industry meetings with the federal government to discuss strategies responding to COVID-19.[10]

5. Sharing of technical know-how, rather than company-specific data about prices, wages, outputs or costs, that may be deemed "necessary to achieve the procompetitive benefits of certain collaborations."[11]

The joint statement also notes that the agencies will consider exigent circumstances when evaluating cooperative efforts to address COVID-19 and its aftermath. These efforts may include health care facilities working together to provide personal protective equipment, medical supplies or health care to affected communities, as well as businesses temporarily combining production,

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4 The National Cooperative Research and Production Act of 1993 ("NCRPA" or "Act"), 15 U.S.C. §§ 4301-06.
5 A description of the types of joint ventures covered by the NCRPA is available here.
6 Department of Justice, Filing a Notification Under the NCRPA (6 September 2018) available here (For purposes of the Act, a SDO is a domestic or international organization that plans, develops, establishes or coordinates voluntary consensus standards using procedures that incorporate the attributes of openness, balance of interests, due process, an appeals process, and consensus in a manner consistent with the office of management and budget circular number A-119, as revised February 10, 1998. A standards development organization does not include the parties participating in the standards development organization.)
7 Federal Trade Commission and U.S. Department of Justice, Antitrust Guidelines for Collaborations among competitors (April 2000) available here.
8 U.S. Department of Justice and the Federal Trade Commission, Statement of Antitrust Enforcement Policy in Health Care (August 1996) available here.
9 Id.
10 Federal Trade Commission, Enforcement Perspectives on the Noerr-Pennington Doctrine: An FTC Staff Report (October 2006) available here.
11 Federal Trade Commission, Information Exchange: Be Reasonable (11 December 2014) available here.

distribution, or service networks to facilitate production and distribute supplies to address the COVID-19 outbreak.

Agencies commit to continued enforcement of the antitrust laws against bad actors found to be exploiting the COVID-19 emergency

The joint statement affirms the agencies' commitment to holding accountable individuals and businesses found to be taking advantage of the COVID-19 emergency to engage in anticompetitive activity. The FTC and the DOJ will continue to investigate and pursue civil violations of the antitrust laws related to fraudulent and deceptive activity involving COVID-19 (including agreements to restrain competition through increased prices, lower wages, decreased output, or reduced quality, or using market power to engage in exclusionary conduct). DOJ will prosecute any criminal violations of the antitrust laws, specifically with respect to conspiracies to fix prices or wages, rig bids, or allocate markets.

President Trump invokes Defense Production Act

On 18 March President Trump issued an executive order[12] invoking the Defense Production Act (DPA) in response to the need to increase production of medical equipment and supplies in the face of the COVID-19 pandemic. The executive order designates that "health and medical resources needed to respond to the spread of COVID-19, including personal protective equipment and ventilators, meet the criteria specified in section 101(b) of the [DPA] (50 U.S.C. 4511(b))."[13] The executive order delegates to the secretary of health and human services broad authority under the DPA with respect to "all health and medical resources needed to respond to the spread of COVID-19 within the U.S." and provides that the secretary "may identify additional specific health and medical resources that meet the criteria of section 101(b)."[14]

While the Trump administration has yet to use the DPA to respond to the COVID-19 emergency, if deployed, the DPA would grant the president (and his delegate, the HHS secretary) the authority to require companies to prioritize certain contractual obligations and direct the allocation of personal protective equipment (PPE) to areas deemed to be in most need of these resources. The DPA also gives the president the authority to approve "voluntary agreements" among private competitors.[15] The president may delegate this authority to cabinet members or other appointed officials on the condition that the delegates seek approval of the voluntary agreements from the attorney general, in consultation with the chairman of the FTC. The attorney general and chairman of the FTC are also charged with monitoring the carrying out of voluntary agreements to assure compliance with the relevant provisions of the DPA.[16]

The DPA provides specific protections with respect to antitrust concerns that may arise from these voluntary agreements. While the DPA does not convey immunity from civil or criminal liability under the antitrust laws, in the case of COVID-19 responses, it would provide limited antitrust exemptions for cooperating business competitors who enter into voluntary agreements or plans of action to coordinate production of PPE such as masks, eye protection, and isolation gowns. If a civil or criminal antitrust case is brought against any person with respect to any action taken to develop or carry out an approved voluntary agreement, the following defenses are available under the DPA: that the action was taken in the course of developing or carrying out the voluntary agreement initiated by the president or a plan of action adopted under the agreement, and the action was specified or within the scope of the approved voluntary agreement or plan of

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12 Executive Order on Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19 (18 March 2020) available here.
13 Id.
14 Id.
15 DPA at §4558(c).
16 Id. at §4558(g).

action adopted under the agreement.[17] This exception does not apply if it is shown that the person asserting the defense took the action for the purpose of violating the antitrust laws.[18]

Looking ahead

The agencies are adapting their antitrust enforcement processes in response to the COVID-19 pandemic in real time and on a regular basis. Parties considering collaborations in response to the COVID-19 crisis should consult with experienced antitrust counsel to evaluate the potential antitrust scrutiny that such transactions may face in order to make informed decisions during this unprecedented time.

For additional information, guidance and updates related to the diverse legal implications the COVID-19 crisis is having on global and domestic businesses and industry sectors, please see the Hogan Lovells COVID-19 information site.

17 Id. at §4558(j)(1) and (2).
18 Id. at §4558(j)(4).

Contacts

Edith Ramirez
Partner, Washington, D.C., Los Angeles
T +1 202 637 5509 (Washington, D.C.)
T +1 310 785 4601 (Los Angeles)
edith.ramirez@hoganlovells.com

Logan Breed
Partner, Washington, D.C.
T +1 202 637 6407
logan.breed@hoganlovells.com

Chuck Loughlin
Partner, Washington, D.C.
T +1 202 637 5661
chuck.loughlin@hoganlovells.com