

Reducing antitrust risk of collaborations during the COVID-19 pandemic

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The COVID-19 pandemic has affected U.S. health care in an unprecedented way, requiring hospitals, providers, and suppliers to collaborate to respond to the urgency of the crisis. The situation has also put pressure on companies in other industries that may need to coordinate with one another in order to fulfill their essential roles in responding to the pandemic, including telecommunications, financial services, information technology, defense, food and agriculture, transportation and logistics, energy, water and sewage, law enforcement, and public works.

While much of this coordination is procompetitive, any collaboration between competitors carries some antitrust risk. For example, competitors working together in a procompetitive manner to accelerate production of much-needed medical equipment must be careful not to coordinate production activities outside of the collaboration. Any company working with competitors in response to COVID-19 should also be mindful that restrictions on competition and information sharing beyond the legitimate scope of the collaboration carry potentially significant risk.

More generally, companies across industries should understand that merely citing COVID-19 will not carry the day if an agency or private party challenges cooperative conduct. Although the Federal Trade Commission (FTC) and U.S. Department of Justice Antitrust Division (DOJ) (the "agencies") have issued a joint statement allowing certain types of collaboration within specific industries in response to COVID-19¹ and the president has authorized limited antitrust exemptions under the Defense Production Act, the agencies have recently **signaled** that they will not relax antitrust enforcement as a result of the pandemic. In addition, unlike some other countries, there is no general antitrust immunity in the United States for responding to the public health crisis.²

¹ See U.S. Department of Justice and Federal Trade Commission, Joint Antitrust Statement Regarding COVID-19 (March 2020) available at https://www.ftc.gov/system/files/documents/public_statements/1569593/statement_on_coronavirus_ftc-doj-3-24-20.pdf.

² For information about antitrust immunity and collaboration outside of the United States, see Hogan Lovells, Opportunities for competitors to work together in times of COVID-19 in Germany (14 April 2020) available at <http://hoganlovells-blog.de/2020/04/14/moeglichkeiten-der-zusammenarbeit-von-wettbewerbern-in-zeiten-von-covid-19/>; and Hogan Lovells, Better together – How far can competitors go under UK competition law in cooperating to deal with the challenges of the COVID-19 crisis? (3 April 2020) available at https://www.hoganlovells.com/~/_media/hogan-lovells/pdf/2020-pdfs/2020_04_03_better-together-how-far-can-competitors-go-under-uk-law.pdf?la=en.

Below is a nonexhaustive list of antitrust Do's and Don'ts for competitors collaborating to address COVID-19 built on general antitrust principles and agency guidance issued in response to the pandemic.³

Do's

- **Review the FTC and DOJ joint statement on antitrust compliance during the COVID-19 pandemic:** Companies that are collaborating to deliver or distribute medical supplies or other essential goods, provide care, reduce the risk of spread of the virus, develop best practices for patient management, and purchase inputs for any of the related tasks are likely to be viewed as engaging in procompetitive activity.
- **Consider seeking review from the FTC or DOJ if you plan to collaborate on COVID-19-related public health projects:** The DOJ and FTC have adopted an expedited review process for business review letters and advisory opinions⁴ related to collaborations involving COVID-19.
- **File under the National Cooperative Research and Production Act (NCRPA) if you are pursuing certain research and production joint ventures related to standards development activity:** The agencies' 24 March 2020 joint statement also committed to expediting the processing of NCRPA filings. The NCRPA ensures that cooperative research, development, and production joint ventures and standards-development are analyzed under the "rule of reason."
- **Seek approval for collaborations related to the production and distribution of health and medical resources necessary to respond to COVID-19:** Under the Defense Production Act, the president may approve "voluntary agreements" among competitors, which confer limited antitrust immunity⁵ for collaborations related to the production and distribution of health and medical resources needed to respond to the spread of COVID-19.
- **Determine whether any information shared with competitors falls in the DOJ Safety Zone⁶:** This includes information that is historical (at least three months old), collected by a third party, aggregated, and comes from at least five participants with no single provider's data contributing more than 25 percent of the "weight" of any statistic shared. If the information is not within the safe harbor, consult with antitrust counsel who may be able to structure arrangements that will allow for the sharing of critical information without undue risk.
- **Collaborate only for procompetitive reasons such as:** designing, producing, and distributing new equipment; developing and licensing new platforms; or jointly operating warehouse and distribution facilities to handle inventory.

³ For information on the implications of the COVID-19 crisis on merger control see Hogan Lovells, Global Merger Control Overview, EU Merger Control, US merger control process update (20 March 2020) available at <https://ehoganlovells.com/cv/60cf27853c30001e0464d9c4c299fb509de7259b>.

⁴ Since announcing the expedited review process, DOJ has issued two business review letters related to proposed cooperation in response to the COVID-19 crisis. See Department of Justice, press release, Justice Department issues business review letter to AmerisourceBergen supporting distribution of critical medicines under expedited procedure for COVID-19 pandemic response (20 April 2020), available at <https://www.justice.gov/opa/pr/justice-department-issues-business-review-letter-amerisourcebergen-supporting-distribution>; see also Department of Justice, press release, Department of Justice issues business review letter to medical supplies distributors supporting Project Airbridge under expedited procedure for COVID-19 pandemic response (4 April 2020), available at <https://www.justice.gov/opa/pr/department-justice-issues-business-review-letter-medical-supplies-distributors-supporting>.

⁵ See 15 U.S.C. § 4558.

⁶ See Department of Justice and Federal Trade Commission, Statements of Antitrust Enforcement Policy in Health Care (August 1996), available at https://www.justice.gov/atr/page/file/1197731/download#CONTNUM_49.

Don'ts

- **Don't raise prices on goods that are in high demand without checking applicable state statutes on price gouging:** Many states have statutes regulating "price gouging" – charging "excessive" prices above a benchmark price for products in high demand, in short supply, or designated as essential by state statute or executive action following a declared state of emergency, natural disaster, abnormal economic disruption, or combination of them. A declaration of a state of emergency in response to COVID-19 will trigger a majority of these statutes. Again, consult with counsel. Don't assume that a change in cost or demand will necessarily justify a price increase.⁷
- **Don't coordinate on hiring, furloughs, or wages, wage reductions, benefits, or other forms of compensation; don't enter into employee no-poach or nonsolicitation agreements, or share information on labor costs:** The FTC and DOJ have issued a Joint Statement announcing they are watching for collusion in the U.S. labor markets in order to protect workers on the front lines.⁸ Be mindful that these principles apply to coordination with your traditional "competitors" as well as with companies in other industries which you compete for employees.
- **Don't discuss the following competitively sensitive topics with competitors:**
 - Current or future prices, rebates, discounts, warranties, or financing terms.
 - Current or future margins on any product or service.
 - Current sensitive or forward-looking product or service information.
 - Terms under which the company does business with any supplier or customer.
 - Current or estimated future cost information for any product or service.
 - Current or future strategic or development plans.
 - Internal projections or forecasts relating to or concerning product deployment, consumer demand, market conditions, or other matters bearing upon the competitive landscape.
 - Current or future marketing, sales, or business plans.
 - Production levels, including production quotas and production costs.

Key takeaways

The antitrust laws still apply during these challenging times. Consulting experienced antitrust counsel can help reduce the antitrust risk of collaborations with other companies.

⁷ See Hogan Lovells, U.S. and European authorities actively pursue COVID-19 price gouging violations (20 April 2020) available at https://www.hoganlovells.com/~media/hogan-lovells/pdf/2020-pdfs/2020_04_20_acer_alert_us_and_european_authorities_actively_pursue_covid19.pdf?la=en.

⁸ Department of Justice and Federal Trade Commission, Joint antitrust statement regarding COVID-19 and competition in labor markets: Antitrust enforcers closely monitoring coordination to disadvantage workers (April 2020), available at https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-bureau-competition-federal-trade-commission-antitrust-division-department-justice/statement_on_coronavirus_and_labor_competition_04132020_final.pdf.

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