

DOJ and FTC Issue Statement to Expedite Antitrust Review For Coronavirus Competitor Collaborations

March 25, 2020

The US Department of Justice Antitrust Division and Federal Trade Commission issued a [joint statement](#) on Tuesday, March 24, making clear to the public that “firms, including competitors, can engage in procompetitive collaboration that does not violate the antitrust laws,” to address the public health and safety risks associated with the COVID-19 pandemic. The agencies also committed to expedite antitrust review of certain such coronavirus collaborations.

As the statement explains, the agencies recognize the response to COVID-19 “will require unprecedented cooperation... to protect Americans’ health and safety,” and their reviews will “account for exigent circumstances in evaluating efforts to address the spread of COVID-19 and its aftermath.”

The statement outlined expedited procedures for companies to seek guidance from the antitrust authorities on the legality of COVID-19 related collaborations, and in particular, to all requests “addressing public health and safety.” Both the agencies have processes that allow companies to seek the agencies’ evaluation of the antitrust impact of proposed conduct. While these processes typically take months, the agencies committed to respond “expeditiously to all COVID-19 related requests, and to resolve those addressing public health and safety within seven calendar days of receiving all necessary information.”

The agencies also committed to expedite filings under the National Cooperative Research and Production Act, which provides for “flexible treatment under the antitrust laws for certain standard development organizations and joint ventures.”

Finally, the agencies highlighted past guidance on how to assess competitor collaborations, recognizing “that some individuals and businesses may need to act immediately in addressing this ongoing pandemic.” For example, the agencies reiterated that efficiency-enhancing integration of economic activity is typically procompetitive, sharing technical know-how may be necessary to achieve procompetitive benefits of collaborations, and joint purchasing arrangements can provide procurement efficiencies and reduce transaction costs.

They also noted specific joint conduct that, if limited in duration and necessary to assist patients, consumers and communities affected, may be a necessary response:

- Healthcare facilities may need to work together in providing resources and services to communities without immediate access to personal protective equipment, medical supplies or healthcare.
- Businesses may need to temporarily combine production distribution or service networks to facilitate production and distribution of COVID-19 related supplies that they may not have traditionally manufactured or distributed.

Their statements suggest the agencies may find conduct focused on addressing the pandemic acceptable that might get more scrutiny if proposed and occurring in another context or time.

At the same time, the statement did note the agencies will not hesitate to hold accountable those who attempt to use the COVID-19 pandemic “to subvert competition or prey on vulnerable Americans,” including bringing criminal charges against those who engage

in price or wage fixing, bid rigging or market allocation, as well as civil charges for monopolization for exclusionary conduct.

In sum, while the agencies are not issuing a free pass to businesses to pursue any collaboration to address the COVID-19 pandemic, antitrust concerns should not stand in the way of collaborations, networks, joint ventures or other relationships that may save lives or otherwise help address the spread and ramifications of COVID-19.

Companies planning to collaborate with competitors will want to seek advice from antitrust counsel and consider taking advantage of the agencies' offer to provide expedited business review letters or advisory opinions. Such advice will insulate disclosed conduct from federal antitrust challenges, and while they would not foreclose state enforcement or private litigation, they should diminish the likelihood of such challenges.

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