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DOJ Increases Enforcement Related to COVID‑19

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The DOJ's Antitrust Division has signaled it will step up enforcement in response to COVID-19. While pandemics and Sherman Act investigations may not seem like the most intuitive pairing, it actually fits a historic pattern in which the DOJ ramps up antitrust enforcement during crises. There are two main reasons for this:

1. Antitrust violations have potentially greater impact to consumers and businesses during emergencies. A price-fixing conspiracy in the current market for protective equipment or respirators could have life or death consequences. Moreover, given the potential for widespread economic disruption and hardship from the pandemic's secondary effects, higher prices or limited availability of "non-essential" products will cause great harm to ordinary consumers and businesses. The DOJ has indicated it will likely take a hardline position on possible antitrust violations during the pandemic and will be far less likely to assume that any violation was not worth prosecuting or the impact of a violation was de minimis.

2. The economic pressure caused by a crisis tends to lead to more cartel activity. Companies trying to stay afloat often view vigorous competition as little more than a recipe for mutually assured destruction and therefore may seek temporary truces with their competitors. In other words, during times of crisis it may be more enticing to work with competitors. The fact that this cooperation may be well intentioned or made in response to a crisis, however, neither excuses nor makes such conduct any less of an antitrust violation. COVID-19 has already caused unprecedented disruptions, including the near-shutdown of entire industries. We expect this will incentivize conduct that may violate the antitrust laws due to desperation or poor decisions made under intense pressure.

In the face of increased risk for cartel activity and more aggressive DOJ enforcement, companies should revisit their antitrust guidelines and employee antitrust training materials to ensure that they stay on the right side of the law. It does not take a board-approved decision to attract the DOJ; rather, it takes only one badly informed choice made by a handful of employees or even just one.

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