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COVID-19: Antitrust Implications of Dynamic Pricing, Online Third-Party Seller Platforms and Price Gouging

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COVID-19 has disrupted supply and demand for public health products and other essential goods and services. In response to surging demand, prices for many of these items have increased sharply. These increases have drawn sharp criticism from lawmakers and enforcers across the globe, as well as from the public.

While some of these price increases by sellers appear opportunistic, others may be inadvertent, driven by automated or algorithmic responses to changes in demand and competitive pricing. In today's online marketplaces (also known as third-party seller platforms), it is common for sellers to set pricing using such technology-assisted pricing tools, replacing the traditional model of individual business executives making pricing decisions.

If not carefully configured or monitored, these pricing tools may automatically increase pricing during a time of supply and demand disruption, like the COVID-19 pandemic. The result may be price spikes that sellers may not be aware of if they are not closely following their products on the marketplaces on which they sell.

Some third-party seller platforms, which can offer millions of products sold by third-party sellers, have strict policies banning price gouging in times of emergency. In response to recent price hikes, these platforms have removed hundreds of thousands of products from their sites, suspended third-party sellers that violated price gouging policies and restricted the types of sellers that are permitted to sell certain COVID-19 related products.

The public outcry, however, has targeted not only sellers of essential products, but also the online marketplaces themselves. In a recent letter, dozens of state attorneys general (AGs) argue that third-party seller platforms should take a more active role policing sales on their platforms. These AGs suggest that these platforms should take steps to prevent price gouging by implementing protections that are automatically triggered as soon as the system detects price spikes.

The US Department of Justice (DOJ) and Federal Trade Commission (FTC) are also paying close attention to the competitive implications of technology-aided pricing tools on online marketplaces and, in particular, the potential for these tools to be used as a vehicle for collusion. While the independent use of technology-aided pricing standing alone should not ordinarily raise antitrust issues, the use of such technology to reach agreement on pricing between competitors may run afoul of antitrust law. It is critical that firms utilizing these tools appropriately observe the antitrust guardrails to minimize the risks of an antitrust investigation or litigation.

In the current environment, the intersection between third-party marketplaces, technology-assisted pricing and price gouging is in the crosshairs. All participants in the supply chain for essential goods affected by the pandemic – from manufacturers and distributors to the platforms on which these products are increasingly sold – should anticipate close scrutiny of their pricing practices.

Price gouging in times of emergency – rules of the road

In the US, pricing in times of public health and other emergencies is primarily regulated by state law. The majority of states have price gouging laws that are triggered once a city, county executive or governor declares a public health emergency. Other states may challenge price gouging through state consumer protection and unfair competition laws.

The price gouging laws in the states vary widely, from the products covered to the level of price increased proscribed to the available defenses and potential penalties.

For example, California Penal Code Section 396 makes price gouging criminal during a declared state of emergency. In the case of COVID-19, this law – which automatically came into force after the governor declared a state of emergency on March 4 – prohibits raising prices by more than 10% for covered goods and services, such as medical supplies, food and gas, subject to exceptions such as if the price of labor, goods or materials has increased. The California law provides for civil as well as criminal penalties.

Given the increased likelihood for price gouging during the COVID-19 pandemic, state AGs around the country are encouraging consumers to bring price gouging to their attention and dedicating resources to address these issues. Several have already announced investigations and have taken enforcement action.

In addition to state law, a recent executive order authorizes Health and Human Services (HHS) to designate certain health and medical resources needed to respond to the spread of COVID-19 as "scarce," which may allow the DOJ to use the Defense Procurement Act to prosecute price gouging of these resources. The act makes it a crime to stockpile designated items in excess of reasonable needs for the purpose of selling them above prevailing market prices. The US Attorney's Office in New York has begun to file cases under this authority.

US federal antitrust law, by contrast, does not specifically outlaw price gouging. So long as companies price independently, under federal antitrust law companies are generally free to price their goods and services as they see fit, even in times of public health emergencies. The FTC will challenge deceptive statements regarding pricing as a “deceptive act or practice,” but has not historically challenged standalone price increases as an “unfair practice” or “unfair method of competition.”

Pricing in coordination with competitors, however, clearly falls within the ambit of antitrust law and can raise significant antitrust risk, even if aimed at addressing the impact of COVID-19. Naked agreements on price among competitors – for example, to collectively raise price in response to increased demand or fix a price floor in response to falling demand as a result of COVID-19 – continue to be *per se* illegal and potentially subject to criminal as well as civil liability. Even an agreement among competitors to hold prices steady in the face of increased demand, believed to be for the public good, could raise antitrust concern.

Indeed, in response to COVID-19, the DOJ issued a **statement** indicating it will “hold accountable anyone who violates the antitrust laws of the United States in connection with the manufacturing, distribution or sale of public health products such as face masks, respirators and diagnostics.” The DOJ is particularly focused on price fixing, bid rigging, customer allocation and collusion in government procurement, for public health products.

Antitrust considerations at the intersection of price gouging, technology-assisted pricing and online third-party seller marketplaces

The attention currently being paid to the pricing of COVID-19 related goods on online marketplaces will likely lead to heightened scrutiny of policing practices on these platforms, as well as the behavior of the sellers that operate on the platform, including the widespread use of technological tools to set pricing.

Unilateral decisions to use a particular pricing algorithm – absent concerted action between competitors – should be defensible under US antitrust law. This is the case even if multiple sellers use similar but independently developed and adopted algorithms,

which may increase the likelihood of interdependent pricing of the type observed in the wake of COVID-19, since interdependent (but non-collusive) pricing has been generally viewed as beyond the scope of price-fixing laws.

On the other hand, the use of algorithms to fix price – for example, competing sellers agreeing to program their algorithms to match prices for public health products – is subject to challenge as price-fixing. This is analytically no different from competitors reaching an agreement on price in smoke-filled rooms of yesteryear. Indeed, a few years ago, sellers of posters online were charged with just such a practice.

US antitrust enforcers are also paying close attention to more subtle uses of technology-aided pricing to increase prices and, in particular, competitors colluding on price through an intermediary, such as online marketplaces or other marketing or pricing tools in the ecosystem.

Examples of such conduct cited by enforcers include a seller agreeing with a platform to use a particular pricing algorithm on the understanding that its competitors would also use the same algorithm and thereby increase prices. Another example enforcers have cited is competing sellers sharing pricing information with a central firm, which then develops an algorithm for use by each firm that maximizes prices. Even absent direct agreement between sellers, enforcers have noted that this conduct may be subject to challenge as a hub-and-spoke conspiracy.

What this means for your business

It is a good time for entities involved in the sale of public health products and other essential goods and services impacted by COVID-19, whether as an operator of an online marketplace or as a third-party seller, to confirm their systems align with antitrust law and prevent anticompetitive conduct.

Companies involved in this ecosystem should pay close attention to price changes being implemented and the rationale for such price increases. Companies leveraging technology to price their products should specifically assess how COVID-19 has impacted operation of these tools. More generally, going forward these companies should consider procedures for monitoring price changes in response to market shocks and safeguards to avoid inadvertently drawing scrutiny.

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