

DOJ, FTC Vow to Evaluate Competitor Collaborations Within Seven Days, in Light of COVID-19 Challenge

Information about an expedited procedure for obtaining guidance about the permissibility of certain collaborations between competitors, which have the effect of protecting Americans' health and safety, was set forth in a joint statement issued March 24, 2020, by the US Department of Justice (DOJ) and the US Federal Trade Commission (FTC) (the Statement). The Statement makes clear that such procompetitive collaborations are permissible.

Both US antitrust enforcement agencies have extant procedures that provide individuals and businesses with a method of seeking advice to evaluate certain conduct that could raise concerns under US antitrust laws. The Antitrust Division's Business Review Process and the Federal Trade Commission's Advisory Opinion Process currently provide individuals and businesses with a structure and process for such evaluations, though these processes can sometimes take many months. In an effort to speed up evaluations in light of the COVID-19 challenge, the Statement indicates that the antitrust enforcement agencies will "aim to respond expeditiously to all COVID-19 requests, and to resolve those addressing public health and safety within seven (7) calendar days of receiving all necessary information."

Because of the need for immediate action in certain cases, the Statement lays out a number of collaborative activities that would be consistent with antitrust laws. The following five points are taken from the Statement:

- As a general matter, the Agencies have stated that when firms collaborate on research and development, this "efficiency-enhancing integration of economic activity" is typically procompetitive. See Federal Trade Comm'n & U.S. Dep't of Justice, [Antitrust Guidelines for Collaborations Among Competitors](#) at 31 (2000).
- The Agencies have expressed that sharing technical know-how, rather than company-specific data about prices, wages, outputs, or costs, may be "necessary to achieve the procompetitive benefits of certain collaborations." *Id.* at 15; see also Federal Trade Commission, [Information Exchange: Be Reasonable](#) (discussing the "safety zones" around information sharing).
- The Agencies have explained that they will not challenge, absent extraordinary circumstances, providers' development of suggested practice parameters – standards for patient management developed to assist providers in clinical decision making – that also may provide useful information to patients, providers, and purchasers. See Federal Trade Comm'n & U.S. Dep't of Justice, [Statement of Antitrust Enforcement Policy in Health Care](#) at 41 (1996).
- The Agencies have also explained that most joint purchasing arrangements among healthcare providers, such as those designed to increase the efficiency of procurement and reduce transaction costs, do not raise antitrust concerns. See *id.* at 53 (also explaining circumstances in which joint purchasing arrangements may raise concerns).
- The antitrust laws would generally permit private lobbying addressed to the use of federal emergency authority, including private industry meetings with the federal government to discuss strategies on responding to COVID-19, "insofar as those activities comprise[] mere solicitation of governmental action with respect to the passage and enforcement of laws." *Eastern R. Conf. v Noerr Motors*, 365 U.S. 127, 138 (1961); see also FTC, [Enforcement Perspectives on the Noerr-Pennington Doctrine: An FTC Staff Report](#) (2006) (discussing applicability and limitations).

The Statement goes on to say that certain "joint efforts, limited in duration and necessary to assist patients, consumers and communities affected by COVID-19 and its aftermath, may be a necessary response to exigent circumstances that provide Americans with products or services that might not be available otherwise." That said, the antitrust enforcement agencies have made clear in the Statement that they remain vigilant to pursue antitrust violations that include "agreements between individuals and business to restrain competition through increased prices, lower wages, decreased output, or reduced quality as well as efforts by monopolists to use their market power to engage in exclusionary conduct." The Antitrust Division has also said that it will prosecute any criminal antitrust violations, including price-fixing or market division.

The Statement lays out a process for requesting expedited review of certain collaborative activities that involve COVID-19. For example, requests should be sent via email to: ATR.COVID19@USDOJ.GOV. The request must also detail not only the COVID-19 connection to the collaboration, but also the nature and rationale of the collaboration. This would include not only affected customers, but also products and services involved, as well as the geographic scope of the collaboration and any relevant documents created.

Given the likely detail of the submission, it is advisable to consult counsel.

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