



Antitrust ADVISORY ■

MARCH 24, 2020

Avoiding Antitrust Risk as Industries Respond to the Coronavirus: Businesses Look to Collaborate & Federal Government Offers Expedited Avenues

The coronavirus (COVID-19) pandemic has upended U.S. businesses. Companies that provide essential products and services – including health care providers and manufacturers of critical supplies – are being asked to transform their operations to meet unprecedented patient and industry demands. And business leaders across the economy are adapting to rapidly changing federal, state, and local mandates as they are simultaneously attempting to meet the current and future needs of their customers and employees without complete information on the duration or depth of the current crisis.

In this time of unprecedented uncertainty, many executives are looking to their peers and industry organizations for support, for answers, or to work together to confront common challenges. And as they adapt to the current environment, the federal antitrust enforcement agencies today announced [expedited antitrust review](#) procedures to encourage procompetitive collaborations. With all these developments, how can companies avoid criminal and civil antitrust liability under U.S. law as they work together?

Do Antitrust Laws Apply During Times of Crisis?

Yes. The antitrust laws, which aim to preserve competition for the benefit of consumers, still apply during times of crisis. The federal enforcement agencies – the U.S. Department of Justice Antitrust Division (DOJ) and Federal Trade Commission (FTC) – regularly challenge agreements between competitors to fix prices, allocate markets, or rig bids. And there can be heightened antitrust scrutiny during times of crisis.

Earlier this month, Attorney General Bill Barr publicly [warned](#) companies that manufacture, distribute, or sell facemasks, respirators, diagnostics, or other public health products vital to the response to COVID-19 that they will face criminal prosecution if they engage in these activities. In doing so, Barr echoed prior antitrust enforcers, who have consistently [maintained](#) that they will “hold accountable those who seek to illegally subvert competition” in the wake of hurricanes and other natural disasters. This was reiterated in the March 24, 2020, joint statement by the DOJ and FTC.

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In particular, antitrust enforcers are likely to challenge agreements between competitors to restrict or fix:

- Capacity or output levels
- Price terms
- Customer relationships
- Sales territories
- Employment or furlough decisions
- Specific supply-chain disruptions
- Retail store closures
- Other significant business decisions that ordinarily are made independently

Even the exchange of competitively sensitive information (e.g., information on pricing, costs, employment decisions) between competitors can constitute an antitrust violation if it is likely to facilitate an anticompetitive agreement.

And it's not just the government antitrust enforcers who are watching – companies should remember that competitors or customers also may have standing to bring private lawsuits challenging anticompetitive agreements or other illegal conduct. Competitors that might otherwise avoid litigation may be incentivized to pursue antitrust claims, either now or later, if their businesses are hit hard by the ongoing pandemic.

How Can Rivals and Industries Work Together?

At the same time, many types of joint conduct involving competitors can pass antitrust muster. As a starting point, the antitrust laws generally immunize certain joint petitioning activities, including coordinated efforts to seek government legislation, orders, or action. For example, joint efforts to convince a state or local government to recognize an industry as “essential” for purposes of a shelter-in-place or shelter-at-home order, or to request federal legislation mandating industry-wide price or production levels, would be immune from antitrust challenge.

More generally, certain collaborations between industry peers can benefit American consumers without posing a significant risk to competition. As the DOJ and FTC [explained](#) in the wake of Hurricanes Harvey and Irma:

Joint ventures and other collaborative arrangements can benefit consumers by enabling businesses to bring goods or services to market faster or at lower cost, or for participants to make products or services available they could not otherwise provide on their own... For example, hospitals or other health care facilities temporarily may need to combine certain resources or services to meet the health care needs of affected communities. Similarly, two or more firms might combine their distribution networks to better or more quickly bring needed products or services to their customers.

This flexibility is consistent with modern antitrust law and the DOJ/FTC [Antitrust Guidelines for Collaborations Among Competitors](#). For example, with appropriate safeguards in place, it may be appropriate for rivals and even industries to engage in:

- Sharing of information on noncompetitively sensitive or technical topics (such as cleaning protocols, taking employees' temperature, approaches to shift staggering, or how to comply with evolving regulatory orders).
- Joint research and development (including for new therapeutic drugs and vaccines).
- Integrated production efforts or logistics partnerships (such as collaborative manufacturing or distribution, or collaborations to provide vital services).
- Expanded involvement in group purchasing.
- Development of voluntary industry guidelines or best practices (but not agreements) to help address common challenges or improve public services (such as guidelines for providing special shopping periods for at-risk population groups).
- Creation of new technical standards (such as to allow expanded interoperability of products).
- Joint marketing to promote an industry and disseminate general information about its response to the crisis.
- Aggregated and anonymized surveys (such as to assess industry capabilities or understand best practices, especially if done at the request of the government).
- Collaborating at the specific direction of governmental entities (and not anything in other areas beyond that).

These types of efforts often pass antitrust muster, particularly when the collaborators lack significant market share in any product or geographic area. Moreover, even industry-leading companies may be able to achieve these goals through the use of appropriate safeguards, including, for example, the use of a trade association to administer blind surveys or to develop and disseminate voluntary best practices. Some collaborations may also qualify for protection from full antitrust damages if procedures are followed under the National Cooperative Research and Production Act.

And as conditions evolve, the scale and scope of what activities are reasonably necessary may grow, particularly in the health care industry. On March 24, 2020, the DOJ and FTC announced an expedited process for them to issue business review letters and informal opinions about their views on the competitive impact of collaborations relevant to public health projects in response to the coronavirus pandemic, such as the provision of health care or production of needed supplies. Although the relevant legal standards are unchanged, the agencies will provide their views about whether they would challenge proposed activities under the antitrust laws within one week after the submission of information, rather than the usual multimonth process. Before moving forward under the new procedures or any collaboration, you should consult with antitrust counsel.

Are There Any Special Rules Applicable in a Time of National Crisis?

Yes. Congress has recognized that in extraordinary circumstances, the need to take certain joint actions in response to a crisis may override antitrust concerns.

Two rarely invoked statutory exemptions include:

- **Pandemic and All-Hazards Preparedness Act.** This law, which was reauthorized last year, immunizes otherwise impermissible meetings and agreements by companies involved in the manufacture and sale of pandemic countermeasures (generally drugs, biological products, or devices) when done at the request of and in coordination with the U.S. Department of Health and Human Services, U.S. Department of Homeland Security, the Attorney General, and the chair of the FTC.
- **Defense Production Act.** This law, under which President Trump declared a national emergency on March 18, 2020, also provides antitrust immunity under certain circumstances for agreements developed to meet national defense requirements and protect critical infrastructure, which includes national economic security and national public health or safety.

Whether your business is seeking to help address the public health crisis posed by COVID-19 or simply to survive the unprecedented challenges facing all American companies, it is critical that you consult with antitrust counsel before collaborating with your competitors. With appropriate safeguards, U.S. businesses can find ways to work together to solve problems while avoiding missteps that could open your company or executives to legal liability.

Alston & Bird has formed a multidisciplinary [task force](#) to advise clients on the business and legal implications of the coronavirus (COVID-19). You can [view all our work](#) on the coronavirus across industries and [subscribe](#) to our future webinars and advisories.

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