

ANTITRUST AND TRADE REGULATION

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DOJ and FTC Allow Collaborative Action Between Competitors In the Age of COVID-19

By Carl J. Schaerf

Due to the current COVID-19 pandemic, the U.S. Department of Justice (“DOJ”) and Federal Trade Commission (“FTC”) have announced an expedited 7-day review process for proposed collaborations allowing competitors to work together on solutions to the coronavirus crisis. The first business review letter, addressed to collaboration in the production of medical supplies and personal protective equipment (“PPE”), was issued on April 4, 2020, and is instructive as to how our national antitrust enforcers intend to assess proposed collaborative action designed to meet the current public health and economic emergency.

The DOJ and FTC have long-standing antitrust guidelines for when it is permissible for competitors to work together collaboratively. Under the long-standing guidelines, businesses can pursue a formal clarification process with DOJ, but that process often takes several months, if not longer. The new expedited review process is intended to eliminate many of these customary hurdles.

See the following:

- Joint DOJ-FTC Antitrust Statement Regarding COVID-19 (March 24, 2020) – <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19>.
- DOJ Business Review Letter of April 4, 2020 – <https://www.justice.gov/atr/page/file/1266511/download>.
- DOJ-FTC Antitrust Guidelines for Collaborations Among Competitors (2000) –

<https://www.justice.gov/atr/page/file/1098461/download>.

Details About the Expedited Review Process

The DOJ and FTC announced the expedited review process as our nation faces unprecedented challenges, including a myriad of difficulties for businesses trying to meet basic needs and make essential plans and projections given the uncertainties of the crisis. The new DOJ-FTC program provides:

“The Agencies will also account for exigent circumstances in evaluating efforts to address the spread of COVID-19 and its aftermath. For example, health care facilities may need to work together in providing resources and services to communities without immediate access to personal protective equipment, medical supplies, or health care. Other businesses may need to temporarily combine production, distribution, or service networks to facilitate production and distribution of COVID-19-related supplies they may not have traditionally manufactured or distributed. These sorts of 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.”

The use of the terms “consumers, and communities” is suggestive that a temporary need to collaborate on issues beyond the furnishing of medical supplies and

health care is contemplated. Indeed, the announcement also has this reference:

“Since joint ventures may be necessary for businesses to bring goods to communities in need, to expand existing capacity, or to develop new products or services...”

The one business review letter currently available does squarely relate to medical supplies and PPE, but that does not mean that other issues with a less obvious nexus to COVID-19 might not warrant and receive the same treatment. Some of the comments made by DOJ are instructive as to the types of collaborations and justifications that might pass muster during the current pandemic.

The DOJ’s recital of the unusual circumstances leading to expedited review will serve as no surprise to any reader, but is worth reviewing, and repeating, in any request made to DOJ. We live in unprecedented times, and U.S. business faces unprecedented challenges in meeting the current demands imposed by the COVID-19 crisis:

“The circumstances that led to this request are exceptionally pressing and unlikely to recur frequently. In December 2019, a new, highly infectious coronavirus reportedly emerged in Wuhan, China and began to spread rapidly around the world. On January 31, 2020, the Secretary of Health and Human Services declared a public health emergency under section 319 of the Public Health Service Act. A few weeks later, the World Health Organization announced that the COVID-19 outbreak had become a global pandemic. On March 13, 2020, President Donald J. Trump declared a national emergency under sections 201 and 301 of the National Emergencies Act, and announced that the crisis is of sufficient severity and magnitude to warrant a nationwide emergency determination under section 501(b) of the Robert T. Stafford Disaster Relief and Emergencies Assistance Act. The President also encouraged all governors and tribal leaders to consider submitting requests for declaration of a “major disaster” under Section 401(b) of the Stafford Act. As of April

1, major disasters have been declared in more than 25 states and territories. By April 1, more than 200,000 Americans had been infected with the virus and more than 4,500 had died. The White House has projected that, even with unprecedented measures to contain the virus, it could eventually take between 100,000 and 240,000 American lives.”

The review letter by DOJ reminds us that:

“Conduct by federal agencies is not subject to scrutiny under the antitrust laws. Courts have extended this immunity to conduct by private parties acting individually or together when (i) the collaboration is compelled by an agreement with a federal agency or a clearly defined federal government policy and (ii) a federal agency supervises the conduct. The Department will not challenge conduct that satisfies this standard in responding to the COVID-19 pandemic and its aftermath.”

Therefore, one thing to consider as part of any contemplated coordinated response by the business community to COVID-19 is whether to involve Federal Regulators and try to satisfy the above standard.

However, even if the above standard cannot be satisfied, the DOJ is prepared to consider collective action that “might allow a federal agency to ‘respon[d] to exigent circumstances [and] provide Americans with products or services that might not be available otherwise’ more immediately, efficiently, and effectively than if firms worked on their own or even bilaterally with the agency.”

Certainly, it is the goal of all U.S. businesses responding to the crisis to make things available that otherwise might not be available, and where joint action is necessary toward that goal, the DOJ and FTC are open to the possibility. The “do not go” areas are what they always were for joint action:

“If, however, the parties were engaging in prohibited conduct, such as unlawful price fixing or directly exchanging sensitive forward-looking competitive information, the Division would be concerned.”

Agreements between competitors amounting to bid rigging, price-fixing, territorial division, or restrictions in quality or output are always going to be subject to question, even with relaxed and expedited analysis.

Practical Takeaways

It seems clear that the DOJ and FTC are looking to remove impediments to U.S. business being able to alleviate the shared pains of the COVID-19 crisis, and that impediments to arrangements that are broader than public health concerns are up for consideration. Examples of joint arrangements that might be contemplated may include:

- Coordination of import of goods;
- Coordination of interstate shipment of goods;
- Protocols for cleaning and safe COVID-19 packing and transport of goods;
- Programs for temporary suspension of mortgages and mortgage interest; and
- Programs for temporary suspension or alleviation of rent (residential and commercial).

The Federal Government is suggesting that different states may be able to open for business at different times, and there may well be areas that reopen as soon as early May. Even if this happens, creative solutions to the crisis will be needed for months thereafter.

The first step is to identify a need better serviced through collaborative action than unilateral action. As most U.S. (and international) businesses recognize, there are massive future uncertainties, and spreading of risk alone might incentivize collaborative action.

Thus, businesses may consider seeking expedited review after jointly identifying crucial needs and determining effective means of servicing them. Trade groups may also have a role to play, and in manufacturing, perhaps even the standard setting organizations like ANSI and NEMA might play a part.

“Together we will get through this” is a maxim that often runs afoul of antitrust doctrine. But the approach is now invited. The Government is asking the

best minds to work together to solve the crisis, perhaps in ways that the Antitrust Laws would otherwise forbid. These are extraordinary times, and the Federal Government is offering an extraordinary remedy. ♦

This Alert is based on information available at the time of publishing. It is subject to change. Business leaders should consult with counsel and refer to government websites and publications for the most up-to-date information.

For more detailed analysis on a wide range of legal issues, please see Schnader’s COVID-19 Resource Center at www.schnader.com/blog/covid-19-coronavirus-resource-center.

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