

Competitor Collaborations – Necessity, Enforcement and Defenses During Pandemic

One way to break through bottlenecks and potentially save time and lives is for industry participants to collaborate with each other to take fast, decisive measures to increase output and distribute products to those most in need as quickly as possible.

By Carl W. Hittinger and Brady Cummins

Across the country, customers are finding bare shelves that were filled just over a month ago with toilet paper, hand sanitizer, disinfectant wipes and cold medicine. Perhaps even more severe than the shortages of consumer products are the shortages of medical supplies –especially personal protective equipment such as face masks and gloves. Under normal circumstances, we rely on market forces – countless unilateral decisions by independent actors pursuing their own interests and strategies – to govern the supply and purchases of the products now in short supply. The purpose of the antitrust laws is to ensure these competitive mechanisms are not subverted or circumvented.

Every competitive interaction – each negotiation, agreement and transaction – along the path from raw material to finished product takes time. As the world has witnessed, the COVID-19 virus does not give affected populations time. Cases, hospitalizations, and tragically, deaths, grow exponentially in a matter of days while the government and private industry try to catch up. One way to break through bottlenecks and potentially save time and lives is for industry participants to collaborate with each other to take fast, decisive measures to increase output and distribute products to those most in need as quickly as possible.

Public policy recognizes that industry collaborations may be more necessary during emergencies than under normal circumstances. This recognition is reflected in both government statements and antitrust exemptions included in two major emergency-related statutes. Understanding just how antitrust enforcers' perspective regarding competitor collaborations will shift (if at all) during this crisis as well as the contours of the antitrust exemptions available in legislation is crucial for businesses looking to use collaborations. These arrangements are needed to get supplies to those in need while at the same time protecting collaborating companies from serious antitrust risk when the smoke finally clears and inquiries into responsibility commence.

Review of Collaborations

The U.S. antitrust enforcement agencies have recognized the reality that business collaborations, including among competitors, may be especially necessary in the fight against COVID-19. In a March 24 Department of Justice (DOJ) and Federal Trade Commission (FTC) joint statement, the agencies stated: “Addressing the spread of COVID-19 will require unprecedented cooperation ... among private businesses to protect Americans’ health and safety” and “that there are many ways firms, including competitors, can engage in procompetitive collaboration that does not violate the antitrust laws,” see Department of Justice and Federal Trade Commission, “Joint Antitrust Statement Regarding COVID-19” (March 24, 2020).

The joint statement identified types of collaborations that rarely pose antitrust concerns, and the agencies indicated that they would work to expedite the DOJ’s normal business review and the FTC’s advisory opinion processes by providing guidance within seven calendar days of receiving all necessary information from parties, a process that can take much longer under ordinary conditions.

Thus far, the DOJ has issued two business review letters under the expedited process, both of which involved substantially similar proposed conduct by medical supply distributors “to collaborate with and at the direction of the U.S. government” to help FEMA and HHS address bottlenecks, identify and qualify new sources of supply, monitor areas of increased demand, expedite distribution, understand and negotiate prices, see Department of Justice, [“AmerisourceBergen Corporation Business Review Request Pursuant to COVID-19 Expedited Procedure”](#) (April 20, 2020); Department of Justice, [“McKesson Corporation, Owens & Minor, Inc., Cardinal Health, Inc., Medline Industries, Inc., and Henry Schein, Inc. Business Review Request Pursuant to COVID-19 Expedited Procedure”](#) (April 4, 2020).

The DOJ ultimately concluded in both letters that it “presently does not intend to challenge” the proposed conduct. Four factors seem to weigh heavily DOJ’s assessments:

- Government (including Division) supervision. The DOJ letters reiterate that government personnel, either from FEMA, HHS, or the Division itself, will direct, be involved with, or supervise most of the collaborative conduct proposed.
- Limited Time. The letters emphasize that the time scope of the collaboration is limited, and activities “will end promptly when the exigent circumstances it is intended to address have passed.”
- Limits on competitively sensitive information. Both letters include explicit commitments by the companies to share competitively sensitive information only with government agencies and not with any competitors.
- Limited Scope. The letters emphasize that the companies’ collaborations will be “focused on, and limited to, facilitating the U.S. government’s efforts to respond to the unprecedented COVID-19 pandemic.” Safeguards include commitments by the companies not to “use any collaboration to increase prices, reduce output, reduce quality, or otherwise engage in COVID-19 profiteering” and to “continue to pursue their respective business strategies as before” outside the collaboration.

The first two factors – government supervision and limited time scope – are specific to the current emergency circumstances. These are two safeguards that limit the risk of anticompetitive effects and are likely the key to antitrust enforcers willingness to allow conduct that they would otherwise not under normal circumstances.

A DOJ business review letter only describes the Division’s enforcement intentions under the antitrust laws as of the date of the letter, not under any other Federal or state statute or regulation, meaning it does not confer blanket immunity and the DOJ can later bring whatever action it believes is in the public interest. See Department of Justice, [“Introduction to Antitrust Division Business Reviews”](#) (last accessed on April 22, 2020); *United States v. Grinnell Corporation*, 30 F.R.D 358, 363 (D.R.I. 1962) (“present intention not to take action” is not the same as future immunity). Likewise, the FTC warns, “While they may have persuasive value, Commission and FTC staff advisory opinions are not binding on courts, other governmental entities, or private parties. Consequently, [FTC] advisory opinions should not be considered to provide immunity from legal challenge by others to the conduct at issue, or from contrary or adverse legal determinations by courts or other decisional bodies.” See Federal Trade Commission, [“Guidance From the Bureau of Competition on Requesting and Obtaining an Advisory Opinion”](#) (last accessed on April 22, 2020).

Defense Production Act and Its Limited Antitrust Defense

In addition to the DOJ’s and FTC’s business review processes, companies considering taking collaborative action might consider seeking antitrust protection under one of two emergency-related laws that offer antitrust protection. The first of such laws is the Defense Production Act (DPA), which was passed in 1950 during the Korean War and historically consisted of wide-ranging authorities, including price and wage stabilization. Congress has allowed DPA provisions to expire, leaving on three of the original seven titles in effect. The primary authorities under Title I are for the president to prioritize and accept contracts for materials and services as necessary to address the emergency situation and to prohibit hoarding of designated products. Title III allows the President to incentivize domestic industry to expand capacity and production of critical products through loans, loan guarantees, purchases and purchase commitments, and procuring and installing equipment in private facilities. Title VII includes the authority for the President to block mergers and acquisitions by foreign entities and to consult with industry representatives and oversee “voluntary agreements and plans of action to help provide for the national defense.”

Along with this last authority under Title VII is a provision for antitrust immunity for actions taken under “voluntary agreements” and “plans of action.” However, certain administrative requirements must be met, and defendants have the burden to prove they met the elements of the defense including that any agreement or plan must be in writing, must contain rules governing the plan, and must be submitted to Congress. The president’s delegate must certify that any agreement or plan is necessary to respond to the emergency threat. The U.S. Attorney General, upon consultation with the FTC chair, must also certify that the agreement or plan is narrowly tailored, meaning its purpose cannot be achieved via less-competitive means. The DPA also has detailed notice-and-comment-like administrative procedures, though it remains to be seen how flexible these may be during a time-sensitive response to a national emergency.

Once approved, actions pursuant to the agreement or plan must be monitored by the U.S. Attorney General and the chair of the FTC. Meetings of parties to any agreement or plan must be transcribed, and documents, records, and data related to the agreement or plan must be made available for inspection by the DOJ and the FTC. The DOJ and the FTC have the right to be present at “meetings to carry out any voluntary agreement or plan of action.”

Assuming all prerequisites are met, the DPA does provide a good defense to civil or criminal antitrust liability under both federal and state antitrust laws whether brought by the government or private parties. The defendant, however, has the burden of establishing that the conduct in question must have been “specified in, or ... within the scope of, an approved voluntary agreement ... or a plan of action” and the president or a designee “authorized and actively supervised the voluntary agreement or plan of action.”

In a March 27 executive order, the Trump administration authorized the Secretary of HHS and the Secretary of Homeland Security to submit voluntary agreements or plans of action for the president’s approval in accordance with the DPA. Despite this authorization, no voluntary agreements or plans of action have been publicly announced to date. The collaborations analyzed under the DOJ’s business review process described above seem to be good candidates for the DPA mechanism, but those involved appear to have chosen the limited protection from the business review route rather than utilizing the DPA for now. See Donald J. Trump, “[EO on Delegating Additional Authority Under the DPA with Respect to Health and Medical Resources to Respond to the Spread of COVID-19](#)” (March 27, 2020).

Pandemic and All-Hazards Preparedness Act

The other emergency-related legislation that provides for antitrust immunity that could become relevant is the federal Pandemic and All-Hazards Preparedness Act (PAHPA), which was enacted in 2006. Under PAHPA, the secretary of Health and Human Services “may conduct meetings and consultations with persons engaged in the development of ... a qualified pandemic or epidemic product for the purpose of the development, manufacture, distribution, purchase, or storage of a countermeasure or product.” PAHPA permits the U.S. Attorney General, in consultation with the FTC Chair, to grant antitrust protection for “conduct in accordance with a written agreement” initiated by the HHS under the DPA. As with immunity under the DPA, antitrust exemptions under PAHPA must be narrowly tailored to avoid “any substantial anticompetitive effect that is not reasonably necessary for ensuring the availability” of the products involved.

PAHPA’s most significant administrative requirement is that any written agreements made pursuant to meetings – along with explanations of the purpose, substance, and necessity of such agreements – must be submitted to the attorney general and the chairman of the FTC for consideration. And PAHPA’s antitrust exemptions are affirmatively granted for specified party conduct by the attorney general. Thus a party with an antitrust exemption would have a strong case that the government determined that its conduct would “not have any substantial anticompetitive effect that is not reasonably necessary for ensuring the availability of the countermeasure or product involved.”

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Though the administrative hurdles in PAHPA are lower than those outlined in the DPA, and the antitrust immunity has advantages, the Trump administration has not yet invoked PAHPA. Based on these advantages, however, companies that seek antitrust protection beyond the limited protection of review letters or advisory opinions would be wise to consider seeking it through PAHPA if possible to further minimize antitrust risk.

The benefits of competition among competitors may in extraordinary times need to be foregone in favor of concerted, coordinated activity in order get essential products to those who need it the most in the quickest manner possible. Antitrust enforcers in the United States recognize this, as has Congress in emergency-related legislation. All rules do not go out the window, however. Enforcers will look to make sure collaborations are narrowly targeted and have safeguards in place. Statutory antitrust exemptions have significant administrative requirements and their use is limited and untested in courts. Businesses contemplating collaborative activity to address COVID-19 related challenges therefore need to plan and execute collaborations deliberately and take good care to best preserve their defenses against government or private antitrust actions when the COVID-19 pandemic finally subsides and judgement day arrives when people want to know what really happened and who is responsible. Stay tuned.

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