

Gouging, Fixing, Rigging, Allocating: Avoiding Antitrust Risk in Wake of COVID-19

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By Carl W. Hittinger and Ann O'Brien

As COVID-19 has become a global pandemic, nervous Americans are running to stores to stock up on food, cleaning supplies and safety products, leaving stores struggling to keep up with the demand. Medical facilities are worried about shortages of medical supplies and equipment. At the same time as Americans are stocking up, they are hunkering down and canceling travel and discretionary purchases and services, driving down demand and leaving an oversupply in other industries. The COVID-19 crisis has quickly upended typical supply and demand. Businesses can face increased antitrust risk as they struggle to continue operations, and they can expect federal and state authorities to be paying close attention.

In response to the COVID-19 crisis, the U.S. Department of Justice recently announced its intention to hold accountable anyone who violates the antitrust laws in connection with the manufacturing, distribution or sale of public health products. Attorney General William Barr said, "The Department of Justice stands ready to make sure that bad actors do not take advantage of emergency response efforts, health care providers or the American people during this crucial time." The department said the Antitrust Division's recently launched procurement collusion strike force (PCSF) will be on high alert for collusive practices in the sale of such products to federal, state and local agencies. The PCSF is described as leading a coordinated national response to combat antitrust crimes and related schemes in government procurement, grant and program funding at all levels of government – federal, state and local. The department has actively enforced the antitrust laws in response to previous natural disasters and financial crises, and we can expect similar scrutiny now.

As businesses face unprecedented challenges to continue operations during the COVID-19 crisis, here are some key areas of antitrust risk and suggestions on how to avoid them.

Price Gouging, Price Fixing and COVID-19

Generally, under the antitrust laws companies are free to price their goods and services as they see fit if those decisions are made independently. Agreements among two or more horizontal

competitors about price are considered price fixing, and companies and individuals can be prosecuted criminally under federal and some state antitrust laws for such conduct. Price gouging is a term generally used to describe the charging of exorbitant prices in times of emergency and is prohibited by certain state laws. There is no specific federal price-gouging law.

On March 23, President Donald Trump signed an executive order aimed at preventing price gouging and hoarding of crucial medical supplies needed to fight COVID-19. Barr said the department would prioritize fraudulent activity and price gouging involving vital supplies needed to fight the coronavirus. The executive order contemplates invoking the Defense Production Act to prevent hoarding of critical items as designated by the U.S. Department of Health and Human Services.

Individual states have laws against price gouging. Pennsylvania, New Jersey and officials in New York have already taken action against price gouging in the wake of the pandemic. Pennsylvania Attorney General Josh Shapiro set up a dedicated hotline for price gouging and has reported receiving more than 1,200 tips from the public since the hotline's creation. After reviewing the complaints, the attorney general's office has already sent more than 30 cease-and-desist letters and subpoenas regarding price-gouging behavior. Just yesterday, Shapiro was also part of a group of state attorneys general who called on Amazon, Facebook and other online retailers to crack down on price gouging during the coronavirus outbreak. "Ripping off consumers by jacking up prices in the middle of a public emergency is against the law and online resellers like Amazon must join in this fight," Shapiro said in the letter. "These companies form the backbone of online retail and have an obligation to stop illegal price gouging now and put strong practices into place to stop it from happening in the future."

In New Jersey, Gov. Phil Murphy declared a formal state of emergency, which triggers additional consumer safeguards that are embedded in state law, including an explicit ban against the increasing of prices by more than 10%. The only exception to the strict price control is if an increase is caused by "additional costs imposed by the seller's supplier or other costs of providing the good or service during the state of emergency." Violators are subject to fines of \$10,000 for an initial offense and \$20,000 for each subsequent offense.

New York City recently declared face masks in short supply in order to ensure there would be no price gouging. Under the rules of the city of New York, the commissioner of the Department of Consumer and Worker Protection can declare certain items temporarily in short supply during “extraordinary circumstances,” which ensures that stores are prohibited from increasing prices in excess of normal market fluctuations. The declaration remains in effect for 30 days, unless it is terminated or extended. In Nassau County, New York, the Office of Consumer Affairs has already fined two businesses \$5,000 each for price gouging on protective masks. The New York attorney general sent cease-and-desist letters to a hardware store in Manhattan and a grocery store in Queens for excessive prices on hand sanitizer and disinfectant. One hardware store was charging customers \$79.99 for 1,200 milliliters of hand sanitizer, while the grocery store was charging customers \$14.99 for a 19-ounce bottle of disinfectant spray.

While price gouging can be the act of a single seller, when two or more horizontal competitors get together and agree on a future price it is considered price fixing. As companies struggle to set pricing under these difficult circumstances, it may be enticing to discuss pricing with competitors, but such “benchmarking” or “information exchanges” about future pricing may walk too close a line to price fixing. Businesses facing high or low demand can avoid running afoul of price-fixing laws if they:

- Make independent pricing determinations.
- Avoid discussing future pricing (maximum or minimum) with competitors.
- Do not discuss with competitors any intention to charge emergency or other surcharges or eliminate discounts.

Bid Rigging and COVID-19

As companies try to respond to urgent demands for products while the country fights COVID-19, there may be too much or too little business to allow bidding on every available contract. Bid rigging occurs when competitors agree in advance who will win a public or private contract. Companies and individuals can be prosecuted criminally for bid rigging under federal antitrust laws and some state laws. Bid rigging can take many forms, including agreements to rotate winners (you take this one, we will take the next one), and may involve providing a “complementary” bid not intended to win the contract. Businesses can avoid running afoul of bid-rigging laws if they:

- Decide independently which contracts to bid on.
- Avoid discussions with competitors about territories, areas, or specific customers.
- Bid to win and determine bid prices independently and avoid providing high or low numbers not intended to win a bid.

Market Allocation and COVID-19

If demand for food or public health and safety products or services is high, businesses may be approached by competitors to split up the market by geographic area or customers to ensure adequate supply. Competitors may tell others to stay in their territory or “footprint” or “backyard.” On the flip side, when demand is low, competitors might agree to stay in their own territories or only serve their existing customers to split up the dwindling market share rather than face costly competition. Market allocation schemes are agreements among competitors to divide markets among themselves. Agreements to allocate or suppress supply of products or reduce output can also be viewed as illegal market allocation agreements. Companies and individuals can be prosecuted criminally for market allocation agreements under federal antitrust laws and some state laws. Businesses can avoid running afoul of violating market allocation prohibitions if they:

- Decide independently which customers and markets to serve.
- Avoid discussions with competitors of territories, areas or specific customers.
- Do not agree with competitors to limit areas of service or customers served, or agree on amount of supply or output, even in response to emergency situations.

What Businesses Should Do To Reduce Antitrust Risk

As discussed above, during a public health crisis, there may be increased pressure to get vital products, materials or services to market, and cooperation with competitors might seem like a quick way to address supply chain issues and accomplish these important goals. Conversely, dwindling demand might also make it enticing to work with competitors to coordinate bids, allocate markets or agree with competitors to reduce service or output. In the United States, however, there is no specific antitrust exemption for public health emergencies.

The federal antitrust laws attempt to protect consumers from illegal activity while remaining flexible and resilient enough to encourage beneficial collaborations. In these trying times, competitor collaborations and joint ventures can benefit consumers by enabling businesses to bring goods or services to market faster or at lower cost. On March 24, the Antitrust Division and the Federal Trade Commission announced expedited review procedures and provided guidance for collaborations by businesses working to protect the health and safety of Americans during the COVID-19 pandemic. The agencies provided guidance noting that:

- When firms collaborate on research and development, this “efficiency-enhancing integration of economic activity” is typically procompetitive.
- They typically will not challenge providers’ sharing of technical know-how or development of suggested practice parameters – standards for patient management developed to assist providers in clinical decision-making – that may provide useful information to patients, providers and purchasers.
- Most joint purchasing arrangements among health care providers, such as those designed to increase the efficiency of procurement and reduce transaction costs, do not raise antitrust concerns.
- The antitrust laws generally permit private lobbying addressing the use of federal emergency authority, including industry meetings with the federal government to discuss strategies on responding to COVID-19.

The line between procompetitive and illegal collaborations can be tricky to walk. Businesses looking to avoid antitrust risk during the COVID-19 crisis should:

- Make independent business decisions tailored to market demands.
- Avoid sharing competitively sensitive information like future pricing or bid intentions with competitors.
- Enhance antitrust compliance – Desperate times often call for desperate measures, and antitrust collusion is often born of business desperation, so it is more important than ever for companies to ensure they have thoughtful antitrust compliance programs and reporting and audit functioning in place.
- Consider seeking a business review of potential competitor collaborations under the new expedited business review procedures by the FTC and DOJ.

While it may seem difficult to imagine what the next move should be in these troubled times, the navigation of dangerous antitrust waters must remain calm and steady as we all work to ensure the health and safety of those in need.

Stay tuned.

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