



The Legal 500 Country Comparative Guides Hot Topic

The State of Competition Investigations and Litigation in the United States

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The State of Competition Investigations and Litigation in the United States

The COVID-19 pandemic has slowed down drastically the pace of investigations and trials in the United States. Most federal courts have adjourned their trial schedules since March 2020, and with the recent spike in COVID-19 cases, it appears likely that the courts will not generally open for trial work until mid-fall or early winter.¹ For example, the court in the *In re Capacitors* case in the Northern District of California commenced a jury trial in the direct purchaser class action in February but had to adjourn in March due to the COVID-19 shelter-in-place orders. It then declared a mistrial in June. Because of court closures for COVID-19, the earliest schedule for a new trial for criminal cases, which have priority for trial, is going to be in December 2020. The reaction to COVID-19 has also arrested the pace of investigations initiated by the Antitrust Division of the Department of Justice (DOJ). Grand juries already empaneled before the pandemic in the United States can be used to continue already open investigations. But when the courts ceased empaneling petit juries for trials, new grand juries could not be empaneled. Among the states that have been hardest hit in recent months, Arizona suspended grand jury proceedings indefinitely in June;² Florida allowed its grand juries to continue to meet, but in July, it postponed the empanelment of additional grand juries;³ and Texas resumed the activity of existing grand juries as of May 26, 2020, but postponed empanelment of new grand juries prior to September in certain regions, subject to court order.⁴

Lawyers at the DOJ Antitrust Division have been working remotely since March 2020. It is extremely difficult for government lawyers to further an investigation by remotely interviewing witnesses while showing them documents tendered in the investigation. New challenges are also presented by the increased difficulty of remote e-discovery as more employees working remotely are confined to the use of home devices. Moreover, witnesses located outside the United States may not be interviewed via telephone or teleconference by U.S. government lawyers or agents in furtherance of a criminal investigation. It is doubtful that the slowdown in the initiation of new cartel investigations is entirely due to the pandemic. Many practitioners are convinced the number of leniency applications has been substantially reduced for practical reasons. The Antitrust Division has justifiably touted the great success of the leniency program in generating numerous leads resulting in serious investigation and follow-on criminal cases. The division maintains that the level of leniency applications is consistent with that of past years. Little public evidence exists to support this rosy picture.

There is a general feeling in the legal community that business has become aware of the knock-on costs that flow from the filing of a leniency application in the United States. The burden of leniency applications across various jurisdictions has increased as more countries criminalize certain kinds of anti-competitive conduct and develop procedures to allow for private damage actions predicated on infringement of competition laws. For example, a company that files a leniency application in the United States must decide whether it also should file similar applications for leniency in other jurisdictions in which it does business.

Many firms that do business in the United States also do business in the European Union (EU), other countries in North and South America, and various countries in Asia, including India and Australia - and so it goes. In one recent case, a leniency applicant in the United States also decided to file in nine other jurisdictions. In addition, the filing of leniency applications in the United States and EU often induces the filing of private civil damage actions in both jurisdictions as well as in the U.K., Canada, Australia and Chile. Some members of the EU, Canada and the U.K. have enacted procedures that allow for class actions in antitrust cases. In the case referred to *supra*, the governmental investigations were commenced in 2012, and in several jurisdictions, the antitrust enforcement agencies have not completed their investigations; in at least three of the jurisdictions - the EU, Canada and Chile - private damage actions are also in progress or threatened. It must be kept in mind that in the United States, the four-year statute of limitations applicable to private antitrust damage actions may be tolled for various reasons, including the pendency of class action allegations in one or more filed cases or the pendency of an Antitrust Division grand jury investigation, or for fraudulent concealment of the infringing conduct. These tolling doctrines result in long delays in the commencement of litigation or in demand by large customers that opt out of class actions and wait to determine whether and how to seek redress. There are also delays in the EU with respect to the filing of private antitrust damage actions. As a result, companies likely are reluctant to start the leniency process when the process may not be completed within a decade from when it commences, which oftentimes translates into business uncertainties, burden on key employees, and substantial legal fees and costs.

The U.S. Congress has tried to incentivize the filing of leniency applications by enacting the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) Pub. L. No. 108-237, tit. II, 118 Stat. 661(2004). It is a statutory provision that, among other things, aims to reduce the cost to leniency applicants of follow-on treble damage actions by relieving an amnesty applicant of triple damages and joint and several liability if the applicant timely assists the plaintiffs in the follow-on private damage actions. ACPERA is not as effective at the trial stage as it was intended to be because it requires court certification of the amnesty applicant's application to obtain its benefits; the application is often opposed by plaintiffs' lawyers. In any event, ACPERA normally aids the majority of amnesty applicants in reaching settlements.

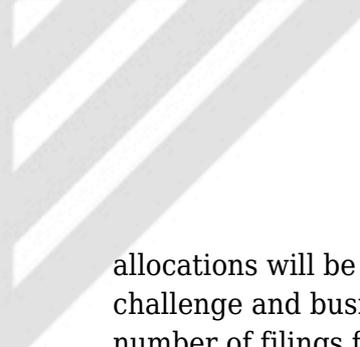
The pandemic has likewise substantially reduced economic activity in the United States since March 2020. Many companies have felt the slowdown; however, others in the healthcare and pharmaceutical industries have been pressed to capacity. The economic conditions have precipitated the decision of the Antitrust Division and the Federal Trade Commission (FTC) to jointly address the situation.⁵ In a joint statement, the U.S. enforcement agencies encouraged cooperation among firms and industries, which is important to address the healthcare industry's constraints on supply caused by the pandemic. Both agencies encouraged companies and industries material to the supply of essential products and services in the health crisis to cooperate in pro-competitive ways to meet the supply problems caused by the pandemic. The agencies also offered to provide quick responses within seven days on business review letters and advisory opinions, which can be submitted to the agencies to get opinions on whether planned cooperation with competitors would infringe the antitrust laws. This expedited procedure is designed for COVID-19-related issues. Since the joint announcement, at least three companies requested the Antitrust Division's expedited business review in the personal



protective equipment, pharmaceutical and food supplies industries in April and May.⁶ The Antitrust Division clarified that the conduct aiming at addressing COVID-19 is immune from antitrust prosecution if it is “compelled by an agreement with a federal agency or a clearly defined federal government policy and supervised by a federal agency.”⁷ Even if some collaboration may be independent of a federal agency’s involvement, such as a trade association sharing information on equipment, supply reduction protocols or vendors, the division believes, based on the information presented by the trade association, such activities may not raise antitrust concerns.⁸ In order to obtain a favorable business review or advisory opinion, the request should demonstrate that the proposed collaboration is closely connected to a COVID-19 problem, is for a limited time, and involves participation, direction or supervision of a governmental agency. When they are unsure, it is advisable for trade associations or their members to obtain legal advice in preparing and submitting a request for a business review or an advisory opinion regarding joint efforts as a response to the pandemic. Trade associations and their members face mounting challenges with increased costs and sluggish demand during the pandemic. At least two recent cartel prosecutions involved the exchange of sensitive information during and surrounding trade association meetings, which naturally provide convenient, legal opportunities to discuss and work on common problems.

The Antitrust Division and the FTC have made it clear that any criminal activities such as price fixing, coordinated capacity reductions, and customer or geographical divisions that were undertaken to alleviate the impact of the pandemic would be prosecuted without hesitation.⁹ Shortly after the joint statement in March, the Antitrust Division and the FTC issued another joint statement in April highlighting the agencies’ commitment to protecting the U.S. labor markets and to prosecuting anti-competitive or collusive conduct such as agreements to lower wages or to reduce salaries or hours worked or to enter no-poach agreements.¹⁰ This statement highlights the importance of protecting essential workers and is applicable to all payroll and nonpayroll workers during the pandemic.

Experience indicates that natural disasters such as Hurricanes Katrina (2005) and Sandy (2012) and the infamous tsunami of March 2011 in East Japan are followed by an increased rate of antitrust investigations by the Antitrust Division. From 2010 through 2019, the Antitrust Division’s criminal prosecutions have resulted in more than \$9 billion in criminal fines and penalties and jail terms for more than 250 individuals.¹¹ The Antitrust Division hopes to continue utilizing its Leniency Program to incentivize amnesty and leniency applicants to come forward. The Antitrust Division may be further aided by its global partners, as it led the International Competition Network (ICN) initiative on cross-border leniency cooperation to fight international price-fixing cartels among enforcers from Australia, Canada, Chile, Brazil, the EU, Hong Kong, New Zealand, Turkey and Hungary.¹² Under the initiative, the international antitrust enforcers agreed on a protocol to exchange intelligence and alert agencies in other jurisdictions to investigate certain market sectors or industries.¹³ In its press release of March 2020, the Antitrust Division gave notice to the public that any anti-competitive coordination among competitors to alleviate the strain of the pandemic will be scrutinized and acted upon.¹⁴ It is expected that as the global pandemic recedes and the United States returns to normal, there will be an increased number of antitrust investigations. Any coordination among competitors to obtain capacity reductions, price stabilization or increases or to fix the material terms of employment agreements or customer and geographical



allocations will be closely scrutinized, and action will be taken against the participants. The challenge and business uncertainties brought by the pandemic significantly affected the number of filings for premerger notification and review under the Hart-Scott-Rodino (HSR) Act. In 2019, 2,089 transactions were filed for HSR review, and more than half of these transactions were granted early termination. The FTC and the DOJ opened 61 investigations in which second requests were issued.¹⁵ The commission challenged 21 mergers. It eventually initiated administrative or federal court litigation on two of these, and the others were either withdrawn or settled. The DOJ challenged 17 merger transactions and sought to enjoin three of them through litigation.

From January to June 2020, only 703 transactions were filed, representing an annualized 33 percent reduction from the 2019 level.¹⁶ To limit the impact of COVID-19, the two agencies rolled out a new program to suspend all hard copy and DVD submissions and have allowed only online filing since March 17, 2020.¹⁷ It is expected that the pandemic will push some companies into financial distress, which will result in opportunities for acquisitions. With the court backlog, any challenges the two agencies may have likely will not be resolved in 2020.