



Antitrust risks and considerations

Cooperation, collaboration, and information sharing during the COVID-19 crisis

The Issue

COVID-19 is causing unprecedented disruptions to businesses and supply chains. The growing crisis has increased the global demand for products compelling many businesses and competitors to temporarily combine required operations to facilitate production and distribution of COVID-19-related products and services.

Increased Collaboration

The Antitrust Division of the Department of Justice (DOJ) and the Bureau of Competition of the Federal Trade Commission (FTC) have issued a joint statement (the Joint Statement)¹ detailing allowed collaborative

activities between businesses including: research and development; sharing of technical information; joint purchasing agreements designed to increase the efficiency of procurement and reduce transaction costs; and coordination to combine production, distribution or service networks.

Despite the allowable collaboration, the Joint Statement warns companies against crossing the line to share competitively sensitive information. The Joint Statement cautions that the FTC will not hesitate to hold accountable those who use the COVID-19 crisis as an opportunity to

subvert competition or prey on vulnerable Americans. Additionally, the DOJ will continue to prosecute any criminal violations of the antitrust laws, such as agreements or conspiracies between individuals or businesses to fix prices or wages, rig bids, or allocate markets. US state legislatures, attorney generals, and governors are also focused on implementing new price gouging laws or enhancing existing laws to prevent predatory market practices during the COVID-19 pandemic. These institutions are rigorously scrutinizing business activities and are encouraging residents in their respective jurisdictions to raise price gouging issues with government officials.

Like the US, the UK² and European Union³ are aggressively pursuing similar actions and will cooperate with US regulators.

Market Challenges

Companies are currently navigating many market challenges related to the cooperation guidelines referenced in the Joint Statement, including:

- Allocation and distribution of products and services to customers
- Sharp increases in production combined with shortages in raw materials are forcing some manufacturers to go to vertically-integrated competitors
- Supply chain constraints are pressuring businesses to increase prices to maintain margins while avoiding appearances of price gouging
- Managing data requests from state and federal governments to facilitate coordination among competitors

Antitrust Risks and Regulatory Considerations

Certain risks of antitrust exposure have increased due to the market factors as well as the increased contact with competitors and suppliers, including:

- Price gouging and collusion
- Procurement fraud
- Materials fixing
- Market/customer allocation
- Increased touchpoints between competitors increases appearances of and opportunities for discussing prohibited items under antitrust regulations
- Heightened scrutiny of manufacturing, distribution, and sale of products and consumer goods
- Collusive practices in the sale of products and services to federal, state, and local agencies⁴

Regulatory Impact

As the COVID-19 crisis continues to evolve, regulators in the US, Europe, UK, and elsewhere are expected to continue to focus on antitrust enforcement to address potential anticompetitive behavior across global geographical borders. Whether initiated by federal government and regulatory agencies, state attorney generals, or private plaintiffs, antitrust

actions can lead to major damage awards and settlements and potentially significant criminal penalties.

Additionally, governments around the globe are providing stimulus packages to businesses, such as the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)⁵ in the US, to prop up local economies. Regulators are going to be keeping a very close watch on safeguarding resources and investigating potential misconduct to determine that their governments do not overpay due to price fixing, bid rigging, or collusion.

Why Deloitte

As the increased global demand is compelling businesses and competitors to temporarily combine required operations, the regulators are meticulously examining business activities and may initiate regulatory inquiries and investigations. Deloitte has deep experience and capabilities in helping clients navigate through global antitrust regulatory inquiries and investigations. Our experience includes assisting clients and counsel across the life cycle of an investigation, from identification of relevant data, responding to grand jury subpoenas, calculation of damages and financial analyses, assessment of capacity to pay, and providing experienced testimony.

Technology-enabled Antitrust Investigations

Using technology-enabled and analytics-driven methodologies, we assist clients and counsel in retrieving relevant data and understanding important facts surrounding alleged anticompetitive activity. In assessing facts, our approach embeds digital tools and models in performing analysis of financial data, documents, emails, and other relevant evidence residing in a number of different languages. We provide the applicable experience and scalable capacity to assemble the factual development of an antitrust investigation. We also bring the required level of precision, consistency, and insight throughout an investigation. In particular, our approach to antitrust investigations relies on both the human investigators as well our tech capabilities within e-Discovery and advanced analytics, among others.

Technology-enhanced e-Discovery

We develop customized e-Discovery operating models based on our clients' industry, regulatory, and regional requirements in supporting antitrust investigations. Due to our vast experience, we understand the drivers and challenges for each stage of discovery throughout the lifecycle of an antitrust matter. Our scalable, repeatable, and defensible discovery and document review processes drive results and support clients and counsel by rapidly deploying remote resources to help assess the facts in data and documents. Through implementation of technological accelerators, we can help enhance the management and coordination among investigation teams, client, and counsel for effective execution of multiple workflows in antitrust investigations.

Advanced Analytics

Our professionals utilize sophisticated artificial intelligence (AI)-enabled advanced analytics tools, methodologies, and models in analyzing financial, operational, and business data to enhance efficiency and quality of results. Our analytics modeling approach can enrich the data by incorporating external information, which serves to increase the model's defensibility. Our profiling techniques can identify and catalog data limitations, which helps to determine specific assumptions to include in the model. By applying the appropriate model of the relevant market and the dynamics of market participant behavior, we can potentially narrow the exposure period and the attendant value of transactions that may be subject to fines and damages. Using our insight and experience, we can assist clients and counsel with developing alternative damage theories and models appropriate to the issues of an antitrust matter, and critique and explore the limitations of the opposing point of view.

Our broad approach to antitrust investigations relies on an experienced investigator to identify and utilize the right technology at the right time to advance the investigation results in a more efficient and effective manner.

Let's talk

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Endnotes

1. www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19
2. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874240/COVID_19_Open_letter_to_pharmaceutical_and_food_and_drink_industries2.pdf
3. https://ec.europa.eu/competition/ecnr/202003_joint-statement_ecn_corona-crisis.pdf
4. <https://www.justice.gov/opa/pr/justice-department-cautions-business-community-against-violating-antitrust-laws-manufacturing>
5. <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf>

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