

US and European Antitrust Authorities Provide Updated Guidance on Joint Activity During COVID-19

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On March 24, the U.S. Department of Justice Antitrust Division (the Antitrust Division) and the Federal Trade Commission (FTC) (collectively, the Agencies) issued a joint statement detailing a new expedited process for review of proposed collaborations aimed at protecting the health and safety of Americans during the COVID-19 pandemic, to ensure that such collaborations comply with federal antitrust law. The statement recognized the need for “unprecedented cooperation between federal, state and local governments and among private businesses to protect Americans’ health and safety.”

The Antitrust Division has long offered a “business review letter” process and the FTC an “advisory opinion” process for providing its views on any proposed business activity, but those processes traditionally takes six months to a year, or longer. The new process will aim to resolve proposals addressing COVID-19 or public health and safety within seven calendar days after the Agencies have received all necessary information. That qualifier recognizes that the Agencies may need more information than the parties provide with their submissions, and also recognizes that the “seven calendar days” does not begin until after the Agencies are satisfied that they have all the information they need.

The Agencies will also work to quickly process filings under the National Cooperative Research and Production Act for joint ventures seeking to bring goods to communities in need, to expand existing capacity, or to develop new products or services.

Additionally, the Agencies highlighted some types of collaborative activities designed to improve the health and safety response to COVID-19 that they would see as being consistent with the antitrust laws. For example:

- Generally, when firms collaborate on research and development, this “efficiency-enhancing integration of economic activity” is procompetitive.
- Sharing technical know-how (rather than company-specific data about prices, wages, outputs, or costs) may be “necessary to achieve the procompetitive benefits of certain collaborations.”
- The Agencies will not challenge (absent extraordinary circumstances) providers’ development of suggested practice parameters—standards for patient management developed to assist providers in clinical decision-making—that also may provide useful information to patients, providers, and purchasers.
- Most joint purchasing agreements among healthcare providers, such as those designed to increase the efficiency of procurement and reduce transaction costs, do not raise antitrust concerns.
- Private lobbying activities addressing the use of federal emergency authority, including private industry meetings with the federal government to discuss strategies on responding to COVID-19, are generally permitted, to the extent these activities are “mere solicitation of governmental action with respect to the passage and enforcement of laws.”

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 to provide 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 types of joint efforts, when limited in duration and necessary to assist patients, consumers, and communities affected by COVID-19, may be a necessary response to exigent circumstances to provide products or services that might not be available otherwise.

The European Competition Network (ECN) has taken a more proactive approach in its March 23 Joint Statement on the application of competition law during the coronavirus crisis. The ECN—which provides a mechanism by which the European Commission (the Commission) and the national competition authorities in the EU Member States cooperate with each other—noted that the extraordinary situation of the COVID-19 epidemic may trigger the need for companies to cooperate to ensure the supply and fair distribution of scarce products to consumers. To provide assurance to companies planning cooperation, the ECN stated that the various competition authorities will not actively intervene against “necessary and temporary measures put in place to avoid a shortage of supply.” The ECN also explained that such measures are not likely to amount to a restriction of competition under Article 101 of the Treaty for the Functioning of the European Union, and may generate efficiencies that would most

likely outweigh any such restriction. Companies can also contact the Commission or a domestic competition authority for informal guidance.

The Agencies’ complete statement and additional guidance are available here: <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19>.

The ECN’s Joint Statement is available here: https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf.

To see our prior alerts and other material related to the pandemic, please visit the Coronavirus/ COVID-19: Facts, Insights & Resources page of our website by clicking [here](#).

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