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Antitrust and COVID-19: Antitrust Immunity and Emergency Federal Powers



There are many ways that companies can cooperate with each other to combat COVID-19 without running afoul of antitrust laws.

But companies considering cooperating with competitors should be aware of and assess potential antitrust risks before they do so. As [we previously explained](#), the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) are offering expedited guidance processing in limited situations and may consider leniency for antitrust violations in undefined "exigent circumstances." In certain circumstances involving federal emergency powers, civil and criminal antitrust immunity may be available to companies acting within the scope of those emergency activities. Those circumstances are explored below.

Defense Production Act—Voluntary Agreements. The Defense Production Act permits the president of the United States, when certain circumstances are met, to consult with industry leaders to develop "voluntary agreements and plans of action to help provide for the defense of the United States through the development of preparedness programs and the expansion of productive capacity and supply beyond levels needed to meet essential civilian demand in the United States." On March 27, President Trump invoked the Defense Production Act for the first time to require the production of ventilators. Previously, [President Trump had tweeted](#), "The Defense Production Act is in full force, but I haven't had to use it because no one has said NO!" In other words, companies have acted voluntarily.

Regardless, the protections of the Defense Production Act also apply to companies and individuals that participate in developing or carrying out a voluntary agreement initiated by the president. 50 U.S.C. § 4558(j)(1). Civil and criminal immunity is not automatic. The specific voluntary agreement or plan of action must be approved by the president and occur within the scope of the approved voluntary agreement. The plan must then be reviewed, implemented, and monitored in accordance to the various provisions of the statute. If triggered, immunity can then be asserted as an affirmative defense to a claimed violation of the antitrust laws.

Pandemic Countermeasures. The Pandemic and All-Hazards Preparedness Act permits the secretary of the U.S. Department of Health and Human Services (HHS) to "conduct meetings and consultations with persons engaged in the development" of certain countermeasures or pandemic products "for the purpose of the development, manufacture, distribution, purchase, or storage of a countermeasure or product."

Companies and individuals participating in meetings and consultations with HHS may be eligible for antitrust immunity for those actions. 42 U.S.C. § 247d-7f(a)(3). The scope of the immunity is developed by HHS and must first be approved by the U.S. attorney general. The statute specifies the broad range of potentially anticompetitive conduct that may be covered by the immunity.

Critical Infrastructure. Many sectors are eligible to receive a critical infrastructure [designation from the U.S. Department of Homeland Security](#), including communications, manufacturing, power generation, defense, financial, emergency services food and agriculture, information technology, transportation, public health, water, energy, and nuclear. Designated companies have a special responsibility to maintain their normal work schedule.

While this designation does not automatically trigger antitrust immunity for designated companies, it could potentially offer a path to receiving antitrust immunity for responses to COVID-19. Critical infrastructure companies that need to cooperate with competitors to maintain a normal work schedule should first consult with experienced antitrust counsel.

Implications

Since the DOJ and FTC have committed to offering antitrust leniency in undefined "exigent circumstances," companies considering cooperating with competitors to combat COVID-19 must be mindful of and assess potential antitrust risks. In certain circumstances involving federal emergency powers, civil and criminal antitrust immunity may be available to companies acting within the scope of those emergency activities. Companies considering relying on these immunities should first consult with experienced antitrust counsel. We will continue to monitor federal government announcements for further developments.

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