



Antitrust Group

Client Alert

Antitrust in the Time of COVID-19: Update on Antitrust Agencies' Response to the Pandemic

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The COVID-19 crisis has impacted many industries and driven new collaborations in the healthcare industry and beyond to ensure continuity of supply and business operations. Though COVID-19 is still very much alive as a public health crisis, antitrust enforcement has largely resumed business as usual, albeit in a virtual capacity. Since our [March 27, 2020 alert](#), government authorities in both the US and the EU have largely resumed their normal merger review procedures under the antitrust laws.

Firms must remain conscious that even though the COVID-19 crisis is still affecting many parts of the world, antitrust authorities are reviewing proposed transactions under their normal vigorous scrutiny. While some opportunities for competitor collaborations in response to the pandemic may still exist, firms should be cognizant that antitrust authorities are reviewing proposed transactions with skepticism of failing firm defenses and focusing on potential long-term anticompetitive effects.

I. United States

Further Developments from the FTC and the DOJ Since Their March 24, 2020 Joint Statement

As explained in our March 27th alert, the FTC and the DOJ (the "US Antitrust Agencies") issued a [joint statement](#) on collaborative efforts to respond to COVID-19, which included guidance on coordination among competitors in order to respond to the pandemic. The joint statement announced expedited review processes for such collaborations.

The FTC and the DOJ issued [another joint statement](#) on April 13, 2020. In that statement, the US Antitrust Agencies emphasized that they would be closely monitoring coordination among employers in the labor markets. They indicated that they would be on alert for conduct ranging from naked agreements among competitors to reduce wages to unilateral anticompetitive conduct by employers that harm competition for labor. The US Antitrust Agencies made clear that they will not tolerate anticompetitive behavior that seeks to take advantage of the COVID-19 crisis.

The FTC, in an [April 6, 2020 statement](#), also made clear that, despite the pandemic, it will continue to rigorously review of proposed transactions. They emphasized that a less stringent premerger review assessment could have negative long-term consequences such as “fewer competitors, reduced innovation, and higher prices.” The FTC emphasized that it will also rigorously review proposed divestiture transactions, stating, “FTC staff will continue to evaluate whether the buyer has the current financial capability to acquire and operate the divestiture assets, as well as the buyer’s ability to compete in the relevant markets with those assets.”

On July 8, 2020, the FTC issued a [statement](#) indicating that despite COVID-19, “the Commission is on pace for one of its busiest years for merger enforcement in twenty years[.]” The FTC announced that in the past six months it:

- Challenged the acquisition of Pacific Biosciences of California, Inc by Illumina Inc. in the healthcare space in late 2019 and a few months later challenged Össur Hf’s acquisition of College Park Industries, Inc. Along with seven state Attorneys General, the FTC further sued Vyera Pharmaceuticals, LLC in federal court alleging an “anticompetitive scheme to preserve a monopoly for a life-saving drug[.]”
- Challenged the acquisition of a direct-to-consumer razor company, Harry’s, Inc., who had begun brick-and-mortar operations, by Edgewell Personal Care Company which would have created a competitive threat to a long-standing duopoly;
- Challenged a minority investment by an aggressive competitor, Altria Group, Inc., in a dominant market player, JUUL Labs, Inc., and an “attendant joint venture[.]”
- Entered into a settlement with rent-to own operators, Aaron’s Inc., Buddy’s Newco, LLC, and Rent-A-Center, Inc., who allegedly entered into illegal reciprocal purchase agreements, with the settlement “eliminat[ing] harmful agreements among competitors and reopen[ing] markets to competition in the rent-to-own industry[.]” and
- “Collected \$3.5 million in civil penalties from [Alimentation Couche-Tard Inc. and CrossAmerica Partners LP, who] failed to divest retail fuel stations as required by a Commission order.”

The FTC also noted that based on an investigation into the potential anticompetitive effects of a merger between two home healthcare companies, Aveanna Healthcare and Maxim Healthcare Services, the companies abandoned their deal. Indeed, on August 5, 2020, the FTC [testified](#) before the Senate Committee on Commerce, Science, and Transportation, emphasizing that it is on pace to break its record for the most merger enforcement actions in a year since 2001. In remarks on November 12, 2020 at the American Bar Association’s Fall Forum FTC Commissioners [Simons](#) and [Slaughter](#) echoed that this year has had a record number of enforcement actions. Slaughter, speaking on her own behalf rather than the FTC’s, suggested that due to staffing constraints amid the pandemic, a pause in processing merger reviews may be helpful for the FTC to keep pace.

In sum, despite the challenges posed by the COVID-19 crisis, the US Antitrust Agencies have continued to vigorously review proposed transactions.

II. European Union

The European Commission

During the last several months, competition law in Europe proved to be sufficiently flexible to respond to rapidly changing economic circumstances. Both cartel prohibition and merger control were applied unchanged during the pandemic. The European Commission (“Commission”) issued a single [comfort letter](#) – the first comfort letter in approximately 20 years – providing guidance for coordination in the pharmaceutical industry.

The National Competition Authorities

The National Competition Authorities (“NCAs”) of the EU member states stressed that the substantive antitrust laws are fully applicable during the COVID-19 crisis. Temporary changes relating to procedural regulations have now expired.

The NCAs’ focus is shifting away from safeguarding short-term security of supply and the avoidance of shortages back to long-running consumer protection efforts.

For example, some NCAs have ramped up investigations and even continued conducting unannounced inspections on site. There is a noticeable trend that competition authorities are again fully prepared to intervene where deemed necessary.

Companies must carefully consider their justifications for crisis collaborations

The Commission in its “[Temporary Framework](#)” for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak” stated that coordination can be permissible only as long as it is “temporary in nature”. Where general economic conditions ease up and justification for the cooperation is no longer applicable, collaborations must be terminated immediately.

III. Key Takeaways

- Both US and European Antitrust Authorities emphasize that they will not tolerate anticompetitive behavior that seeks to take advantage of the COVID-19 pandemic.
- Proposed mergers will be vigorously reviewed, mostly within the regular time frame. There are no changes to substantive law and temporary suspensions or changes to procedural law now have expired.
- Companies must conduct regular and diligent self-assessments to determine whether collaboration with competitors can still be justified by COVID-19 and its effects.

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