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CARES Act Provides No Relief From Antitrust Laws, But Deference On COVID-19-Related Coalitions From DOJ/FTC Will Be Fact-Specific

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The Coronavirus Aid, Relief, and Economic Security ("CARES") Act provides no modifications to, or relief from, the US antitrust laws (specifically, the Sherman Act, 15 U.S.C. §§ 1-38; Clayton Act, 15 U.S.C. § 12-27; and Robinson-Patman Act, 15 U.S.C. § 13). But some major businesses are forming COVID-19 coalitions, with presumptive DOJ/FTC blessing.

While the COVID-19 crisis is upending markets around the world, firms in many sectors, particularly deeply-affected industries such as healthcare, distribution, airlines, and restaurants/hospitality, are naturally inclined to communicate, collaborate, or coordinate more closely in an effort to put up a joint defence against this aggressive pandemic and its wrath on economies. But there is no general "crisis defense" to the US antitrust laws.

On the other hand, existing US antitrust law is not blind to pro-competitive benefits from collaborations, particularly those which could help in the battle to fight this pandemic.

Unlike other countries like Norway (which recently temporarily exempted the transport sector from antitrust laws[1]) and Australia (whose competition authority publically stated that medical technology companies and supermarkets will be permitted to collaborate to maintain supply chains[2]), the CARES Act does nothing to ease the scrutiny that firms might be subject to if they align too closely.

1 Press release, *The airlines are given a ready signal to cooperate*, Norway Ministry of Trade and Industry (March 18, 2020), https://www.regjeringen.no/no/aktuelt/flyselskapene-gis-klarsignal-til-a-samarbeide/id2693957; *Transportation sector is granted temporary exception from the Competition Act*, NORWEGIAN COMPETITION AUTHORITY (March 19, 2020), https://konkurransetilsynet.no/transportation-sector-is-granted-temporary-exception-from-the-competition-act/?lang=en.

2 Press release, *Cooperation to aid supply of COVID-19 medical equipment*, Australian Competition & Consumer Commission (March 25, 2020), https://www.accc.gov.au/media-release/cooperation-to-aid-supply-of-covid-19-medical-equipment; Press release, *Supermarkets to work together to ensure grocery supply*, Australian Competition & Consumer Commission (March 24, 2020), https://www.accc.gov.au/media-release/supermarkets-to-work-together-to-ensure-grocery-supply.

Firms are already entering COVID-19-related coalitions with presumptive DOJ/FTC blessing and many others are exploring collaborative activity (including supply chain, joint purchasing, and lobbying), but otherwise, it is antitrust enforcement as usual in the US, despite specified relief in other parts of the world.

The US Department of Justice ("DOJ") and Federal Trade Commission ("FTC"), however, recently issued a joint statement providing for expedited review of proposed competitor collaborations within seven calendar days of receiving all necessary information because "there are many ways firms, including competitors, can engage in procompetitive collaboration that does not violate the antitrust laws."[3]

This policy of expedition certainly seems to signal more deferential treatment of competitor collaborations with a purpose to "assist patients, consumers, and communities affected by COVID-19 and its aftermath."[4] Although this potential leniency is very narrowly tailored, some types of collaboration that may be given more deference might include joint purchasing of critical supplies or inputs, or sharing IP to advance vaccines or treatments. (More detail on the DOJ and FTC joint statement can be found here.)

Outside of the specific, narrowly-tailored areas of collaboration suggested by the DOJ/FTC joint statement, antitrust laws apply in this COVID-19 environment in their normal capacity. Firms in the US must assume that the ordinary rules apply to most conduct and should continue to exercise caution when dealing with competitors, particularly on the subjects of price, customers, and supply chain management.

CARES Act does not provide any relief from HSR requirements.

It is also important to note that the CARES Act itself also does not provide any modifications or amendments to the US merger control regime (Hart-Scott-Rodino ("HSR") Antitrust Improvements Act of 1976, 15 U.S.C. § 18a). Unlike, for example, the Italian Competition Authority—which has adjusted its merger control thresholds to account for the COVID-19 crisis[5] — the CARES Act makes no such modifications. The standard HSR guidelines still apply, such as notification thresholds and waiting periods for pre-merger clearance.

However, it should be noted that the FTC is currently seeking assistance from Congress to modify the standard HSR timeline.[6] (More information about COVID-19-related changes to merger clearance requirements in the US can be found here, and in Europe here, and discussion of both here.)

The Act's general silence on competition issues, however, also means that additional lobbying and joint purchasing are not prohibited and likely encouraged under the circumstances.

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3 *Joint Antitrust Statement Regarding COVID-19*, U.S. Dep't of Justice & Fed. Trade Comm'n (March 24, 2020).

4 *Id.*

5 *Turnover thresholds*, AUTORITA GARANTE DELLA CONCORRENZA E DEL MERCATO (March 22, 2020), https://en.agcm.it/en/scope-of-activity/competition/mergers-and-acquisitions/turnover-thresholds.

6 Paul, et al., *Global Merger Clearance: The First Week of the New Normal*, (March 26, 2020), https://www.whitecase.com/publications/alert/global-merger-clearance-first-week-new-normal.