

## Antitrust and Competition Law

# DOJ and FTC Provide Guidance on Collaborating with Competitors in Response to COVID-19



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### Executive Summary

On March 24, 2020, the Department of Justice (DOJ) and Federal Trade Commission (FTC) released guidance on collaborations between competitors when responding to the ongoing COVID-19 pandemic. Though much of the specific discussion is related to collaborations in the healthcare space, the guidance overall does not read so narrowly. Any organization which is in a position to assist in providing “Americans with products or services that might not be available otherwise” is covered by the newly-released guidance. Overall, the guidance is a strong statement that DOJ and FTC understand the unprecedented and unique challenges that private industry is facing in responding to the COVID-19 crisis and will take those into account in evaluating the legality of competitor collaborations undertaken in response.

### Background and Analysis

It is a watchword of antitrust law that collaboration between competitors can be “rife with opportunities for anticompetitive activity”<sup>[1]</sup> and can help facilitate the “supreme evil of antitrust: collusion.”<sup>[2]</sup> Yet, in [new guidance released on Tuesday](#), the Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission made clear they would make special considerations for collaboration between competitors in the fight against COVID-19. The agencies also reiterated and highlighted some past guidance on the topic, which is especially relevant to companies responding to COVID-19. Moreover, the agencies announced a process by which competitors considering collaborating or entering into a joint venture to fight COVID-19 can receive an expedited opinion from DOJ or FTC about the legality of the arrangement.

Recognizing the unprecedented nature of this moment, DOJ and FTC recognized that “some individuals and businesses may need to act immediately in addressing this ongoing pandemic.” In other words, some collaboration and joint arrangements cannot wait on an opinion from DOJ or FTC and must instead rely on past and present guidance. The agencies then provided a list of collaborative actions that could be taken in response to COVID-19 without violating their current interpretation of the antitrust laws:

- Collaborating on research and development.
- Sharing “technical know-how” as opposed to specific data about wages, prices, outputs or costs.
- “[P]roviders’ 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.”
- “[J]oint purchasing arrangements among healthcare providers, such as those designed” to increase efficiency or reduce transaction costs.
- Private lobbying addressed to the use of government’s emergency management authority, such as discussions with the government about strategies to combat COVID-19.

The agencies further referred to their existing guidance on collaborations between competitors as providing further guidance and framework for how to work with competitors to address the COVID-19 pandemic while remaining on the right side of the antitrust laws.<sup>[3]</sup> And, though not made explicit in the COVID-19 guidance, the agencies' intentions can also be gleaned from guidance issued during past crises, for instance, [to companies cooperating to produce and distribute supplies in the aftermath of Hurricane Harvey in Texas](#). In the Hurricane Harvey guidance, the agencies described "two or more firms" combining "their distribution networks to better or more quickly bring needed products or services to their customers" as well as hospital or health care facilities combining facilities or services to reach the "health care needs of affected communities" as likely "beneficial" and not something that would "generally raise antitrust concerns."

Moreover, in the COVID-19 guidance, the agencies stated that they understood that the unprecedented nature of this health crisis will make necessary certain collaborations that may not be adequately covered by prior guidance. For those arrangements, the agencies made clear that joint efforts "limited in duration and necessary to assist patients, consumers, and communities affected by COVID-19 and its aftermath, may be a necessary response to exigent circumstances that provide Americans with products or services that might not be available otherwise." In a statement seemingly aimed directly at companies considering producing healthcare products—such as personal protective equipment—in which there is a dire shortage, the agencies noted that 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." This sort of "joint effort" would likely be considered a "necessary response" to the COVID-19 crisis

For companies that may have the luxury of not needing to make an immediate decision, or for which the legality of their joint arrangement may be a very close question, the agencies committed to a seven-day turnaround to COVID-19 related inquiries under DOJ's Business Review Process or FTC's Advisory Opinion Process.

Lastly, however, the agencies warned that any attempt to use this national crisis as a cover for nakedly collusive or anticompetitive activity, such as price-fixing or market allocation, would be met with swift criminal or civil enforcement. DOJ has already taken quick and concrete action outside of the antitrust context, [filing its first COVID-19 civil enforcement case this past weekend](#) to combat consumer fraud related to supposed COVID-19 "vaccines."

## Conclusion

In sum, DOJ and FTC have signaled strongly that they understand the unprecedented and unique challenges that private industry is facing in responding to the COVID-19 crisis and will take those into account in evaluating the legality of competitor collaborations undertaken in response. Companies contemplating such a collaboration should review this new guidance carefully, as well as the agencies' existing guidance, before undertaking any joint effort. Those companies, however, should know that such guidance may not provide all the answers, a fact recognized by DOJ and FTC in this latest guidance.

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[1] *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982).

[2] *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004).

[3] See FTC & DOJ, [Antitrust Guidelines for Collaborations Among Competitors](#) (2000); FTC & DOJ, [Statements of Antitrust Enforcement Policy in Health Care](#) (1996).

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