

Antitrust and Competition Law

Update: DOJ Approves First Competitor Collaboration in Response to COVID-19 Pandemic



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Two weeks ago, on March 24, [as discussed in our prior client alert](#), the US Department of Justice (DOJ) and Federal Trade Commission (FTC) [issued guidance](#) to businesses contemplating collaborating with competitors when responding to the COVID-19 pandemic. As part of that guidance, DOJ and FTC announced that they would expedite the evaluation of such competitor collaborations under the DOJ's Business Review Process and the FTC's Advisory Opinion Process and aim to have those evaluations, which can take months, finished within seven days.

This past weekend DOJ [completed its first COVID-19 related business review](#), announcing that it did not view as anticompetitive an ongoing collaboration between medical supply distributors McKesson Corporation; Owens & Minor, Inc.; Cardinal Health, Inc.; Medline Industries, Inc.; and Henry Schein, Inc., to expedite and increase manufacturing, sourcing and distribution of personal protective equipment (PPE), such as masks, gloves and gowns designed to protect health care workers and first responders against COVID-19 infection. In a [press release](#), Makan Delrahim, the assistant attorney general of the Antitrust Division, praised the companies, saying they "should be applauded" for both "responding to the COVID-19 pandemic" as well as "stay[ing] within the bounds of antitrust law."

DOJ's Business Review letter contains its full rationale for approving the collaboration and contains further indications about how DOJ will evaluate collaborations undertaken in response to COVID-19. A few key points are summarized below:

- **Competitor collaborations taken at behest of, and directed by, the federal government are generally immune from antitrust scrutiny.** The medical supply distributors' collaborative efforts to bring critical PPE to the places it is most needed are, the DOJ explains, a response to a direct request for their expertise and assistance from the Federal Emergency Management Agency and the US Department of Health and Human Services and occurs at those agencies' "explicit direction."^[1] Thus the collaboration is "focused on, and limited to, facilitating the US Government's efforts to respond to the unprecedented COVID-19 pandemic."^[2] As DOJ stated, collaborative efforts "compelled" by a "clearly defined federal policy" and "supervise[d]" by a federal agency are typically immune from the antitrust laws and DOJ "will not challenge conduct that satisfies this standard in responding to the COVID-19 pandemic and its aftermath."^[3]
- **Antitrust Division attorneys were themselves directly observing the collaboration.** The letter notes that Antitrust Division attorneys "participate in regular communications with the federal agencies organizing" one of the collaborative projects "and in many cases directly observe the associated collaborative activity."^[4]
- **The collaboration is limited in duration and scope to addressing the COVID-19 pandemic.** The companies agreed to dissolve the competitor collaboration "[u]pon resolution of the COVID-19-related disruptions and the disbanding of the related US Government response initiatives" and to immediately notify DOJ in writing of the dissolution.^[5]
- **The companies agreed to measures to prevent anticompetitive behavior, now or in the future.** Most notably, the distributors agreed that, to the extent possible, competitively sensitive

information would be shared only with the government and not with the other distributors.^[6] The distributors also committed to working with the government to “determine appropriate sequestration of competitively sensitive material that was produced during the collaboration period.”

- **The collaboration is procompetitive because it is bringing critical PPE to market when it would not otherwise be available.** DOJ recognized the “unusually strong” procompetitive benefits of the collaboration here, which brings “life-saving goods faster to market than would be possible absent the collaboration.”^[7] Moreover, DOJ recognized that the participation and collaboration of the medical supply distributors was “essential” to this effort.^[8] DOJ was blunt: “These benefits have the potential to save lives and limit the tremendous damage physically and economically the pandemic is causing.”^[9]

As the above indicates, DOJ is committed to allowing competitors to collaborate when such collaboration is pursuant to a federal government policy and is supervised by the government. This letter also underscores that DOJ recognizes that, in the current environment, it may be essential for competitors to collaborate to bring certain goods, particularly medical supplies, to market. At the same time, the presence of Antitrust Division attorneys “observing” the collaboration and DOJ’s insistence on written guidelines around the sharing of competitively sensitive information should make clear that it is not relaxing in its mission of policing the antitrust laws in the face of the COVID-19 pandemic.

Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.

For additional information and materials, please visit our COVID-19 / Coronavirus Resource Center.

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^[1] Letter from Makan Delrahim, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice to Lori A. Schechter, Exec. Vice Pres., McKesson Corp., et al. at 2, 6 (Apr. 4, 2020), *available at* <https://www.justice.gov/opa/press-release/file/1266541/download>.

^[2] *Id.* at 6.

^[3] *Id.* at 7.

^[4] *Id.* at 5.

^[5] *Id.* at 6.

^[6] *Id.*

^[7] *Id.* at 9.

^[8] *Id.*

^[9] *Id.*

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