Proskauer

Antitrust Enforcers Target Coronavirus-related Violations

Minding Your Business Blog on **March 23, 2020**

As businesses across the globe grapple with the changing realities presented by the COVID-19 pandemic, U.S. and international antitrust enforcers have warned that business should continue to mind the antitrust laws. Global enforcers are also focusing on the role competition laws play as industries – both essential and hard-hit – grapple with the new environment.

On March 9, 2020, the U.S. Department of Justice ("DOJ") announced its intention to continue to hold businesses accountable for *per se* criminal violations of antitrust laws during the Coronavirus outbreak. On the supply chain and consumer-facing side, for example, DOJ vowed to prosecute "[i]ndividuals or companies that fix prices or rig bids for personal health protection equipment such as sterile gloves and face masks." DOJ also warned that "competitors who agree to allocate among themselves consumers of public health products could also be prosecuted." In a departure from typical practice, DOJ's announcement also included a call to action — inviting potential whistleblowers and would-be informants to come forward with information concerning price-fixing, bid-rigging, or market allocation schemes during the Coronavirus outbreak. DOJ's public warning is the latest directive in furtherance of its recent formation of the Procurement Collusion Strike Force—an interagency partnership of the Antitrust Division, federal attorneys general, the FBI, OIG, Department of Defense, and the U.S. Postal Service Office of the Inspector General – focused on deterring, investigating, and detecting bid rigging and other schemes in the context of government procurement.

Whereas DOJ's recent pronouncements reflect a focus on investigating traditional violations of Section 1 of the Sherman Act, the Federal Trade Commission ("FTC") took swift action in furtherance of its consumer protection mission. In February 2020, the FTC issued guidance to consumers for detecting and avoiding Coronavirus-related scams. On March 9, 2020, the FTC announced that, in a joint effort with the FDA, it had issued warning letters to seven sellers of sham products that falsely claimed they could treat or prevent Coronavirus. In addition to outlining the various violations of the Federal Food, Drug, and Cosmetic Act (FD&C Act), 21 U.S.C. § 355(a), the letters warned that such false claims were unlawful under the FTC Act absent appropriate substantiation and scientific testing. Offending products included lozenges that supposedly "killed" the Coronavirus, frankincense that "decreased" risk of infection, and essential oils that "protected" against Coronavirus. In addition to sending the specific warning letters, the FTC more broadly warned businesses that any claims relating to Coronavirus will be subject to "exacting scrutiny" and the FTC will take a close look at myriad methods that companies can suggest or imply claims to consumers, including through URLs, hashtags, and suggestively named products.

Outside of the U.S., various international governments and authorities have temporarily relaxed certain competition law provisions to facilitate the provision of essential services. By way of example, large grocery chains in the United Kingdom will be allowed to exchange data on stock levels, share warehouse space and delivery vans, and team up to serve consumers in this time of crisis, after the UK government temporarily relaxed elements of UK competition law. The European Commission has also relaxed state aid rules to allow for exceptional support from member state governments to relevant sectors and businesses impacted by the virus or otherwise providing essential services to combat its spread. Despite the exceptional circumstances, international competition authorities have made clear, however, that the current situation does not provide immunity to businesses from competition/antitrust law infringements, including unlawful collusion, information exchange and/or excessive pricing, even if the relevant government encourages competitors to cooperate for COVID-related purposes.

The recent announcements and activity from the DOJ, FTC, and other global competition enforcers serve as a reminder to businesses that antitrust regulators will apply increased scrutiny to conduct during times of crisis. Companies, particularly those in the health care space, should keep antitrust policies current and closely monitor bidding, pricing, and any issues bearing on market allocation. These concerns are particularly heightened where competitors may be engaging in joint ventures, information sharing arrangements, collective government petitioning, or other collective action designed at responding to the Coronavirus crisis. In addition, consumer-facing companies must continue to ensure that products marketed, particularly those on social media, are not interpreted as implying false or misleading claims to customers.

View Original

Related Professionals

- **Stephen R. Chuk**
  Partner
- **Christopher E. Ondeck**
  Partner
- **Colin Kass**
  Partner