

CPI's Cartel Column Presents:

Avoiding Price Gouging, Price Fixing and Other Antitrust Risks During the COVID-19 Pandemic

*By Carl Hittinger & Ann O'Brien¹
(BakerHostetler)*

Edited by Rosa M. Abrantes-Metz & Donald Klawiter



Copyright © 2020

Competition Policy International, Inc. For more information visit CompetitionPolicyInternational.com

April 2020

The COVID-19 global pandemic has upended typical supply and demand in unprecedented ways. As the world struggles to contain the pandemic and faces tragic human suffering, the resulting states of emergency, need for medical supplies, and panic buying have caused overnight changes in supply and demand on an unparalleled global scale. Businesses face increased antitrust risk as they struggle to continue operations and meet historic demand. The Department of Justice (“DOJ”) has actively enforced the antitrust laws in response to previous natural disasters² and financial crises,³ and federal and state antitrust authorities are again paying close attention as this global pandemic unfolds.

On March 9, 2020, the DOJ announced that it would ensure resources were available to enforce antitrust laws against “bad actors” that might take advantage of the current emergency situation.⁴ And as the pandemic has worsened, the DOJ announced recent changes that ramp up enforcement against hoarding of essential supplies, price gouging, price fixing, bid rigging and fraud, while working with the Federal Trade Commission (“FTC”) to increase flexibility in certain areas, such as competitor collaborations. Meanwhile, as demand and prices spike, so has state and local price-gouging enforcement.

This article discusses some of the evolving areas of antitrust risk during the COVID-19 crisis and contains information and best practices on how to avoid them.

Price Gouging, Price Fixing and COVID-19

Generally, under the antitrust laws, companies are free to price their goods and services as they see fit, so long as those decisions are made independently. Agreements to set prices or services at a certain level, made among two or more horizontal competitors, are considered price fixing, and companies and individuals can be prosecuted criminally as well as civilly under federal and some state antitrust laws for such conduct. Price gouging is a term generally used to describe the charging of exorbitant prices in times of emergency.

State Price-Gouging Laws

Approximately 36 states have price-gouging laws, and there is additional legislation pending in several other states in reaction to COVID-19. Once triggered, typically by a state of emergency declaration, state laws prohibit price increases for certain essential products. That category of products may change given the nature of the emergency. For example, water, fuel and food are often essential products after hurricanes, but we now see personal protective equipment (“PPE”), ventilators and hand sanitizers becoming essential to the fight against COVID-19.⁵ State price-gouging laws vary dramatically in terms of their threshold for what constitutes gouging. Some states have a specific price increase cap, such as New Jersey’s⁶ 10 percent cap, while many other states prohibit excessive or unjustified increases more generally, and still other states contain specific excessive pricing formulas. State price-gouging laws are often opaque and subject to selective enforcement. Unfortunately, given their wide-ranging differences, there is no “safe harbor” acceptable price increase for avoiding all state pricing-gouging laws, particularly where products are sold nationally or are shipped across state lines.

Individual states and cities with laws against price gouging, such as Pennsylvania, New Jersey and New York, have already acted in the wake of the pandemic. The Pennsylvania attorney

general set up a dedicated hotline for price gouging and has reported receiving more than 1,200 tips from the public since the hotline's creation. After reviewing the complaints, the attorney general's office has already sent more than 30 cease-and-desist letters and subpoenas regarding price-gouging behavior.⁷

Some state attorneys general have also called on Amazon, Facebook and other online retailers to crack down on price gouging during the COVID-19 outbreak. "Ripping off consumers by jacking up prices in the middle of a public emergency is against the law and online resellers like Amazon must join in this fight," the Pennsylvania Attorney General said in a letter.⁸ "These companies form the backbone of online retail and have an obligation to stop illegal price gouging now and put strong practices into place to stop it from happening in the future."⁹

In New Jersey, the governor declared a formal state of emergency, triggering additional consumer safeguards that are embedded in state law, including an explicit ban on increasing prices by more than 10 percent.¹⁰ The only exception to the strict price control is if an increase is caused by "additional costs imposed by the seller's supplier or other costs of providing the good or service during the state of emergency." Violators are subject to fines of \$10,000 for an initial offense and \$20,000 for each subsequent offense.¹¹

New York City recently declared face masks in short supply in order to ensure there would be no price gouging.¹² Under the Rules of the City of New York, the commissioner of the Department of Consumer and Worker Protection can declare certain items temporarily in short supply during "extraordinary circumstances," which ensures that stores are prohibited from increasing prices in excess of normal market fluctuations.¹³ In Nassau County, New York, the Office of Consumer Affairs has already fined two businesses \$5,000 each for price gouging on protective masks.¹⁴ The New York attorney general sent cease-and-desist letters to a hardware store in Manhattan and a grocery store in Queens for excessive prices on hand sanitizer and disinfectant. One hardware store was charging customers \$79.99 for 1,200 milliliters of hand sanitizer (a 300 percent increase from the normal price of about \$20), while the grocery store was charging customers \$14.99 for a 19-ounce bottle of disinfectant spray (a 150 percent increase from the normal price of about \$6).¹⁵

Federal Price-Gouging Laws

There is no general federal price-gouging law. However, in the wake of COVID-19, the federal government has expressed concerns about hoarding and price gouging and is invoking sparingly used federal defense powers to combat them. On March 23, the President signed an executive order aimed at preventing price gouging and hoarding of crucial medical supplies needed to fight COVID-19.¹⁶ Attorney General William Barr said the DOJ would prioritize fraudulent activity and price gouging involving vital supplies needed to fight COVID-19. The executive order invokes, in a limited way, the Defense Production Act to prevent hoarding of certain critical items as designated by the U.S. Department of Health and Human Services ("HHS"). For certain items designated by HHS,¹⁷ such as PPE and ventilators, individuals and companies are prohibited from accumulating these items either (1) in excess of reasonable needs or (2) for the purpose of selling them in excess of prevailing market prices.¹⁸ As a result of this executive order, it is a misdemeanor to engage in this prohibited activity, punishable by up to one year in prison and a fine of up to \$10,000.¹⁹ It remains to be seen how "prevailing

market prices” will be determined and how much further the administration will go in invoking the Defense Production Act.

On March 24, Barr announced the creation of the DOJ’s COVID-19 Hoarding and Price Gouging Task Force.²⁰ According to the release, “The task force will develop effective enforcement measures, best practices, work closely with HHS as they designate particular items and equipment, and coordinate nationwide investigation and prosecution of these illicit activities.”²¹ Speaking at the daily COVID-19 briefing on March 23, Barr said that the government’s crackdown was aimed at “people hoarding these goods and materials on an industrial scale for the purpose of manipulating the market and ultimately driving windfall profits. If you have a big supply of toilet paper in your house, this is not something you have to worry about. But if you are sitting on a warehouse with masks, surgical masks, you will be hearing a knock on your door.”²²

Anti-hoarding and price-gouging concerns have already led the FBI to the door of one person and resulted in his arrest. On March 30, a Brooklyn man was arrested by FBI special agents and charged by complaint with assaulting a federal officer and making false statements.²³ The man was under federal investigation for hoarding certain scarce health and medical resources including N95 face masks and attempting to sell them at a markup of 700 percent.²⁴ The charges against the man also included assault for coughing on agents while claiming to have COVID-19. He is set to appear in federal court in Newark. The complaint does not contain federal criminal charges for hoarding or selling in excess of prevailing market prices under the Defense Production Act. The false statement charges are felonies and carry a higher sentence than the misdemeanor hoarding or excessive pricing prohibitions. It will be interesting to see how the charges develop in a subsequent indictment in this case or other cases.

Price Fixing

Price fixing occurs when two or more horizontal competitors agree to collude on a future price. Fixing of emergency fees or components of a price is also considered price fixing. As companies struggle to set pricing under these difficult circumstances, it may be enticing to discuss pricing with competitors, but such “benchmarking” or “information exchanges” can violate civil and criminal antitrust laws.

Avoiding Price-Fixing or Price-Gouging Laws

When it comes to both price gouging and price fixing, businesses facing high or low demand can avoid running afoul of state and federal prosecution if they:

- Make independent pricing determinations.
- Tie pricing decisions to market factors or costs, limit duration of increased prices to an as-needed basis with periodic reevaluation, and document rationale for reasonable pricing decisions is a best practice.
- Avoid discussing future pricing (maximum or minimum) with competitors.
- Refrain from discussing with competitors any intention to charge emergency or other surcharges or eliminate discounts.

Bid Rigging and COVID-19

As companies try to respond to urgent demands for products while the world fights COVID-19, there may be too much or too little business to allow bidding on every available contract. Bid rigging occurs when competitors agree in advance as to who will win a public or private contract. Companies and individuals can be prosecuted criminally for bid rigging under federal antitrust laws and under certain state laws. Bid rigging can take many forms, including agreements to rotate winners (you take this one, we take the next one), and may also involve providing a “complementary” bid with the intent of not winning the contract. Businesses can avoid running afoul of bid-rigging laws if they:

- Decide independently which contracts to bid on.
- Avoid discussions with competitors about territories, areas or specific customers.
- Bid to win and determine bid prices independently and avoid providing high or low numbers not intended to win a bid.

Market Allocation and COVID-19

If demand for food or public health and safety products or services is high, businesses may be approached by other competitors to limit supply or split up the market by geographic area or customers to drive up prices or control supply. Competitors may also agree to boycott certain customers, or they may agree to sell into certain territories and not others, including for sales involving import or export between countries. On the flip side, when demand is low, competitors might agree to stay in their own territories or serve only their existing customers in order to split up the dwindling market share rather than face costly competition. Market allocation schemes are agreements among competitors to divide markets among themselves. Inflated prices of critical products and suspicious failures to increase supply to match increased demand, or failure to sell products into the United States, are likely to attract close scrutiny during and after the crisis from both U.S. lawmakers and private litigants. Price spikes can lead to inquiries into or allegations of output restriction agreements. Companies and individuals can be prosecuted criminally as well as civilly for market allocation and supply agreements under federal antitrust laws and some state laws. Businesses can avoid running afoul of violating such prohibitions if they:

- Decide independently which customers and markets to serve.
- Avoid discussions with competitors of territories, areas or specific customers.
- Do not agree with competitors to limit areas of service or customers served, or agree on amount of supply or output, even in response to emergency situations.

Coordination Among Competitors and COVID-19

On March 24, the FTC and DOJ issued a [joint](#) antitrust statement regarding cooperation among firms during the COVID-19 crisis.²⁵ In that statement, the FTC and DOJ recognized that public health efforts in response to COVID-19 require cooperation between agencies; they therefore decided to expedite review of COVID-19-related requests to within seven days of

receipt of all information. In more normal times, the FTC's existing advisory opinion process and the DOJ's existing business review letter process could take many months after submission of all initial and follow-up requests for information.

While many forms of pro-competitive collaboration do not violate the antitrust laws, the FTC and DOJ state that they are prepared to pursue civil violations of the antitrust laws for agreements “between individuals and business to restrain competition through increased prices, lower wages, decreased output, or reduced quality as well as efforts by monopolists to use their market power to engage in exclusionary conduct.”²⁶

The DOJ and FTC also provided guidance for collaborations by businesses working to protect the health and safety of Americans during the COVID-19 pandemic. The agencies' guidance noted that:

- When firms collaborate on research and development, this “efficiency-enhancing integration of economic activity” is typically procompetitive.
- They typically will not challenge providers' sharing of technical know-how or development of suggested practice parameters – standards for patient management developed to assist providers in clinical decision-making – that may provide useful information to patients, providers and purchasers.
- Joint purchasing arrangements among healthcare providers, such as those designed to increase the efficiency of procurement and reduce transaction costs, usually do not raise antitrust concerns.
- The antitrust laws generally permit private lobbying addressing the use of federal emergency authority, including industry meetings with the federal government to discuss strategies on responding to COVID-19.

What Businesses Should Do to Reduce Antitrust Risk During the COVID-19 Crisis

During a public health crisis, there may be increased pressure to get vital products, materials or services to market, and cooperation with competitors might seem like a quick way to address supply chain issues and accomplish these important goals. Conversely, dwindling demand might also make it enticing to work with competitors to coordinate bids, allocate markets or agree with competitors to reduce service or output. In the U.S., however, there is no specific antitrust exemption for public health emergencies.

The federal antitrust laws attempt to protect consumers from illegal activity while remaining flexible and resilient enough to encourage beneficial collaborations. In these trying times, beneficial collaborations and joint ventures can benefit consumers by enabling businesses to bring goods or services to market faster or at lower cost and potentially make products or services available that would otherwise be unavailable to consumers. While the agencies have provided some helpful guidance in this area, the line between procompetitive collaborations and illegal coordination can be tricky to navigate. Businesses looking to avoid antitrust risk during the COVID-19 crisis should:

- Make independent business decisions tailored to market factors.
- Avoid sharing competitively sensitive information like future pricing or bid intentions with competitors.
- Enhance antitrust compliance – desperate times often call for desperate measures, and antitrust collusion is often born of business desperation, so it is more important than ever for companies to ensure they have thoughtful antitrust compliance programs and reporting and audit functions in place.
- Consider seeking an expedited business review of potential competitor collaborations under the new expedited review procedures offered by the FTC and DOJ.

These unprecedented times create previously unthinkable personal and business challenges. When making difficult business decisions, it is more important than ever to be mindful of antitrust risk to avoid violations.

-
- ¹ Carl W. Hittinger is a partner and Antitrust and Competition Practice National Team Leader at BakerHostetler. Ann M. O'Brien recently joined BakerHostetler as a partner after almost twenty years at the Antitrust Division of the U.S. Department of Justice. The views expressed in this article are those of the authors and not necessarily those of BakerHostetler or its clients.
- ² The Department of Justice "Disaster Recovery" (March 18, 2020) available at <https://www.justice.gov/atr/disaster-recovery#conduct>.
- ³ The Department of Justice "Economic Recovery" (March 18, 2020) available at <https://www.justice.gov/atr/economic-recovery>.
- ⁴ U.S. DEP'T OF JUSTICE, "Justice Department Cautions Business Community Against Violating Antitrust Laws in the Manufacturing, Distribution, and Sale of Public Health Products" (March 9, 2020) available at <https://www.justice.gov/opa/pr/justice-department-cautions-business-community-against-violating-antitrust-laws-manufacturing>.
- ⁵ The White House, "President Donald J. Trump Will Not Tolerate the Price Gouging and Hoarding of Critical Supplies Needed to Combat the Coronavirus" (March 23, 2020) available at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-will-not-tolerate-price-gouging-hoarding-critical-supplies-needed-combat-coronavirus/>.
- ⁶ Edwin Torres, "New Jersey Declares State of Emergency to Curb Price Gouging," *NewsRoom* (March 11, 2020) NJ Spotlight (Page unavailable online), available at: Westlaw.com 2020 WLNR 7173389.
- ⁷ OFFICE OF THE ATTORNEY GENERAL, "UPDATE: AG Price Gouging Complaints Surpasses 1,000 Tips," Office of the Pennsylvania Attorney General, (March 17, 2020) available at <https://www.attorneygeneral.gov/taking-action/updates/update-ag-price-gouging-complaints-surpasses-1000-tips/>.
- ⁸ Office of the Attorney General Commonwealth of Pennsylvania "AG Shapiro: Amazon, Facebook, Ebay, Walmart, Craigslist Must Stop Site Price Gouging by Online Sellers" (Press Release), (March 25, 2020) available at <https://www.attorneygeneral.gov/taking-action/press-releases/ag-shapiro-amazon-facebook-ebay-walmart-craigslist-must-stop-site-price-gouging-by-online-sellers/>.
- ⁹ *Id.*
- ¹⁰ Edwin Torres, "New Jersey Declares State of Emergency to Curb Price Gouging," *NewsRoom* (March 11, 2020) NJ Spotlight, available at [Westlaw.com 2020 WLNR 7173389](https://www.westlaw.com/2020/WLNR/7173389).
- ¹¹ *Id.*
- ¹² Jeff Greenbaum, "NYC Department of Consumer Affairs Issues Price Gouging Declaration," *NewsRoom* (March 11, 2020 Mondaq) available at [Westlaw.com](https://www.westlaw.com/2020/WLNR/7232712), 2020 WLNR 7232712.
- ¹³ *Id.*
- ¹⁴ Candice Ferrette, "Nassau Fines Businesses for Price Gouging on Masks," (March 10, 2020) available at <https://www.newsday.com/long-island/politics/coronavirus-price-gouging-nassau-manhattan-1.42739060>.
- ¹⁵ *Id.*
- ¹⁶ The White House, "Executive Order on Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID-19" (March 23, 2020) available at <https://www.whitehouse.gov/presidential-actions/executive-order-preventing-hoarding-health-medical-resources-respond-spread-covid-19/>.
- ¹⁷ *Id.*
- ¹⁸ See 50 U.S.C. § 4512.
- ¹⁹ See 50 U.S.C. § 4513.
- ²⁰ Office of the Attorney General, "Memorandum For All Heads Of Department Components And Law Enforcement Agencies...Department of Justice COVID-19 Hoarding and Price Gouging Task Force" (March 24, 2020) available at <https://www.justice.gov/file/1262776/download>.
- ²¹ *Id.*
- ²² Law.com, "'You Will Be Hearing a Knock on Your Door': William Barr Warns Coronavirus Profiteers" (March 23, 2020) available at <https://www.law.com/nationallawjournal/2020/03/23/you-will-be-hearing-a-knock-on-your-door-william-barr-warns-coronavirus-profiteers/>.
- ²³ United States Attorneys' Office, District of New Jersey, "Brooklyn Man Arrested for Assaulting FBI Agents and Making False Statements About His Possession and Sale of Scarce Medical Equipment" (March 30, 2010) available at <https://www.justice.gov/usao-nj/pr/brooklyn-man-arrested-assaulting-fbi-agents-and-making-false-statements-about-his>.
- ²⁴ *Id.*

²⁵ U.S. Department Of Justice and Federal Trade Commission, “Joint Antitrust Statement Regarding COVID-19,” (March 24, 2020) available at <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19>.

²⁶ *Id.*