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Raising the Stakes: Global Criminal Enforcement of the Antitrust Laws in the Supply Chain

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The Department of Justice's Antitrust Division and the international competition authorities from the other "Five Eyes" nations recently announced measures to combat collusive schemes in the supply chain that may cross borders. The announcement raises the stakes of the existing antitrust scrutiny related to supply and demand imbalances during the pandemic, which includes an FTC investigation into possible anticompetitive behavior in the supply chain (chronicled [here](#)). Companies should take stock of any risk from their operations or conduct in their industry—DOJ is presaging criminal enforcement of the antitrust laws.

Background: Pandemic Antitrust Enforcement

Since the beginning of the pandemic, the Antitrust Division and the Federal Trade Commission have focused on enforcing the antitrust laws in a manner that polices anti-competitive conduct while supporting pro-competitive collaborations. In early 2020, the agencies [jointly announced](#) an expedited process for resolving inquiries regarding procompetitive collaborations.¹ At the same time, they also [separately announced](#) that they were "closely monitoring employer coordination to disadvantage workers" that might take place if some use the pandemic "as an opportunity to prey on American workers by subverting competition in labor markets."

A few months ago, the FTC [announced](#) a wide-ranging investigation into supply chain disruptions and consumer price increases. It issued the equivalent of civil subpoenas to numerous large retailers and consumer goods companies, with further activity likely to follow.

Current Announcement

On February 17th, the Antitrust Division, Federal Bureau of Investigation, and the competition authorities from the other "Five Eyes" nations (the UK Competition and Markets Authority (CMA), the Australian Competition and Consumer Commission, the Canadian Competition Bureau, and the New Zealand Commerce Commission) [announced](#) new criminal enforcement regarding the supply chain. In the Antitrust Division's words, the "initiative puts [the] business community on notice that the Antitrust Division is looking out for companies that would exploit supply chain disruptions to engage in anticompetitive conduct."

The Division and the FBI linked the announcement to "persistent price increases initially stemming from supply chain disruptions caused by the COVID-19 global pandemic" and warned that these phenomena

“create an opportunity for criminals to fix prices and overcharge customers.” This linkage indicates that this enforcement initiative is a criminal analogue to the FTC’s supply chain investigations.

Two aspects of this initiative presage increased enforcement. First, the Division “is undertaking measures to proactively investigate collusion in industries particularly affected by supply disruptions.” Second, DOJ “formed a working group focusing on global supply chain collusion with its global partners” in the Five Eyes nations that is dedicated to “developing and sharing intelligence, utilizing existing international cooperation tools, to detect and combat collusive schemes.”

Implications and Preparation

If the past is the prologue, then this announcement foreshadows significant antitrust enforcement regarding the supply chain. The current announcement resembles, in both scope and tone, the Antitrust Division and FBI’s 2019 [announcement](#) of the creation of the Procurement Collusion Strike Force (PCSF). The PCSF is a partnership between the Antitrust Division, U.S. Attorney’s Offices, the FBI, federal Inspectors General, and state and local officials designed to police the government procurement process for anticompetitive practices. It has [grown](#) to encompass over fifty federal, state, and local government agencies, numerous investigations, and multiple indictments over a short period of time. The same enforcement trend likely awaits the Antitrust Division’s new initiative.

In light of this new focus, companies should take three steps. First, they should evaluate their pandemic operations and, specifically, whether those operations deviated in significant respects from their pre-pandemic operations such that they give rise to unique competition law risks. New lines of business, new vertical arrangements, new hiring methods, and new modes of doing business present positive opportunities but can raise new antitrust risks that may be overlooked during times of rapid and unexpected change.

In particular, companies should evaluate their pandemic interactions with competitors or potential competitors, including those with whom they also have a vertical relationship. As the Antitrust Division and the FTC pointed out, collaboration among competitors may have had pro-competitive justifications during the pandemic, but it also raises the risk of inappropriate coordination both during the pandemic and as the pandemic changes. Many companies compete with other companies that they also supply or from which they obtain supplies and these interactions raise antitrust law risks, especially as they change over time.

Second, companies should evaluate their hiring and recruiting practices, especially as they relate to potential disruptions in product supply. The intersection of the pandemic, which changed the interactions between employers and employees, the agencies’ laser focus on labor, and the potential effect of personnel practices on output creates a potential perfect storm for antitrust risks.

Third, companies should assess the risk posed by their business partners. The recent labor indictments in the [aerospace industry](#) teach that a company enjoys risks not only from its own operations and the operations of its subsidiaries, but also from its business partners, whose activities may draw government scrutiny and ensnare the company in a government investigation either as a target or a third-party witness or victim. This is particularly true if those partners also contract with the government which is an overlapping focus of the Division’s PCSF.

The recent Antitrust Division announcement raises the stakes of current antitrust focus on anticompetitive conduct regarding supply chain disruptions. But companies can control and mitigate the risks they face in the new antitrust environment.



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