

Antitrust Guidance from the DOJ and FTC for Hurricanes Harvey and Irma

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On September 2, 2017, the Antitrust Division of the Department of Justice and the Federal Trade Commission (the “Agencies”) issued antitrust guidance for those engaged in commercial recovery efforts in the wake of Hurricanes Harvey and Irma.[1]

The guidance concedes that cooperation among federal, state and local agencies will be necessary in the rebuilding of the Gulf Coast and the United States’ Caribbean holdings, and the guidance further acknowledges that recovery is likely to “require a range of collaborative efforts—including joint ventures, joint licensing and other similar arrangements.”[2] But the Agencies nevertheless caution that joint efforts of businesses to restore services and to provide recovery assistance will remain subject to review under the antitrust laws. Thus, the Agencies “will hold accountable those businesses that engage in naked price-fixing, bid rigging or market allocation agreements” and violators will be criminally prosecuted. The Agencies will also bring civil enforcement actions for violations of the antitrust laws and consumer protection laws.

What does this mean as a practical matter? The general rule is that it is illegal for competitors to enter into agreements that unreasonably restrain trade. In other words, it is against the antitrust laws for competitors to agree with each other on how they will each do their separate business. By contrast, a legitimate joint venture, where its purpose is not merely to suppress competition and on balance promotes competition more than it inhibits it, remains permissible. Consequently, the guidance notes that when joint recovery and rebuilding efforts are of limited duration and necessary and beneficial to recovery, they are unlikely to raise antitrust concerns, especially where there are demonstrable consumer benefits.

Practical Considerations

Before engaging in collaborative commercial recovery efforts, consider the following:

First, as in all areas raising antitrust concerns, education and training are critical. The objective is not to teach your employees to be antitrust professionals, but rather to make them sensitive to business practices that would raise antitrust concerns. In areas raising high antitrust risk, it is important to engage knowledgeable antitrust counsel.

Second, the Agencies have issued Antitrust Guidelines for Collaboration Among Competitors.[3] The guidelines explain how the Agencies evaluate the permissibility of cooperation among competitors. They can be very helpful in considering whether and how businesses may engage in joint recovery operations.

Finally, sharing information unrelated to the narrow purpose of the joint venture and unnecessary to its success is potentially very dangerous. The mere fact that employees of competing companies have shared information, which is not relevant to the larger legitimate cooperation required for the venture, could be used as evidence of an implicit illegal agreement. Therefore, while sharing information is not necessarily illegal, it can be if it has an anti-competitive effect or is likely to have such an effect.

[1] Department of Justice Antitrust Division & Federal Trade Commission, Antitrust Guidance – Hurricanes Harvey and Irma (September 2, 2017).

[2] By way of example, the Agencies recognize that hospital or other healthcare facilities may need to combine resources or services to meet the healthcare needs of communities.

[3] Department of Justice Antitrust Division & Federal Trade Commission, Antitrust Guidelines for Collaborations Among Competitors (April 2000).