

Arising Antitrust Issues Amid COVID-19

5.8.20

As the pandemic continues to upend the global marketplace, easily overlooked antitrust conditions that may be arising should be considered carefully by businesses.

With the current state of the COVID-19 economy, a number of corporations and businesses are receiving requests from their customers to provide more favorable payment terms for both existing receivables and future sales – increased time to pay, the ability to pay in installments, etc. The U.S. antitrust laws generally consider such “payment terms” to be a part of the “price” of goods and services. If a business has a major share of their market for a particular product and sell to customers that are themselves competitors, the granting of more favorable payment terms to one such customer and not to all similarly situated customers could be considered price discrimination under the U.S. Robinson-Patman Act (and/or under similar state antitrust laws). Under the antitrust laws, a “market” can be defined in many ways – and a “market” can be national, regional or in some cases even local. So, a business does not have to be national in order to have a major share of “their” market.

The Robinson-Patman Act prohibits sellers from charging different prices to competing buyers for the same or similar products. This is the most litigated provision of the Robinson-Patman Act. Price discrimination refers to a difference in price, however, the Act does not define price. Under the Act, price generally includes the actual invoice price paid by the buyer, less any discounts, offsets, or allowances that are not reflected in that invoice price – but also includes shipping and credit terms (as well as less obvious items such as advertising allowances, promotional materials, etc.). The Act applies only to tangible products and not to services. However, some states’ price discrimination statutes apply to services. To establish a price discrimination claim, a plaintiff must be able to establish a potential and substantial injury to competition. Typically, this is the most complex element of a price discrimination case. The Act specifically provides three statutory defenses against claims of price discrimination: (i) cost justification; (ii) meeting competition and (iii) changed conditions. These defenses can be much more difficult to establish than might be expected.

The good news is that while the FTC and DoJ have jurisdiction to enforce the Robinson-Patman Act, neither agency has sought to enforce the Act for some time. The bad news, however, is that the Robinson-Patman Act continues to be enforced through private actions. In today’s economy, businesses should beware of potential price discrimination issues when attempting to work out payment terms with customers facing financial struggles stemming from COVID-19. These antitrust issues have posed another interesting COVID-19 question with no simple answer.

Please reach out to [R. Alan Higbee](#) for more information on potential COVID-19 antitrust issues.

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