The US FTC's Antitrust Response to the COVID-19 Crisis

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May 15, 2020

We find ourselves in a world where a public health crisis has led to the loss of millions of jobs, the closure of thousands of businesses, and a significant reduction in domestic and global commerce, not to mention human tragedy of epic proportions. The public demands a quick solution to both the economic and public health crises. The demands may lead to questions such as whether normal competition rules, such as those that affect competitor collaboration, be suspended, or what should be the role of the laws of supply and demand in setting prices. The implication is that in times of an emergency, the normal rules don't serve us well. While emergencies require a swift and well-informed response, it is critical not to respond in a way that exacerbates the problem.

While the coronavirus pandemic may be new, calls to turn a blind eye to competition policy and the role of markets are not. As then-Deputy Assistant Attorney General Carl Shapiro said during the 2008 economic crisis, "Keeping markets competitive is no less important during times of economic hardship than during normal times."[29] As with highway speed limits, it's not only important to drive safely on a sunny and dry day, the rules matter even more when it's icy, dark and raining, because that's when accidents are most likely to happen.

In good times and bad, competition authorities such as the Federal Trade Commission and the Department of Justice protect consumers by preventing anticompetitive conduct that prevents markets from responding to consumer needs. The FTC also protects consumer demand from being distorted by deceptive and unfair business practices. These roles are especially important in this uncertain time. Competitive forces are what creates incentives for businesses to provide what consumers want and need. Competition is as important now as ever.

The coronavirus pandemic has led to critical shortages that have resulted in large price increases in certain sectors. Yet in competitive markets, high prices often provide the necessary incentive to attract new entrants, which ultimately helps to bring supply back in line with demand. Well-intentioned proponents of price regulation risk removing this incentive and prolonging the shortage.

The FTC has used its competition and consumer protection authority to address pandemic-related issues, for example by reminding businesses that the pandemic does not abrogate or diminish antitrust or consumer protection rules or enforcement, while providing guidance that would allow legitimate collaborations and joint ventures to address the health crisis created by the pandemic in an effective manner. For example, the FTC, in conjunction with the Department of Justice Antitrust Division, issued a statement detailing an expedited procedure for businesses to obtain antitrust guidance for collaborations of businesses working to protect the health and safety of Americans during the COVID-19 pandemic.[30] Most recently, the FTC and the Department of Justice issued a joint statement that they will seek to protect workers on the front lines of the coronavirus pandemic – including doctors, nurses, first responders, and those who work in grocery stores, pharmacies, and warehouses, among other essential service providers – against those who seek to exploit the current circumstances to engage in anticompetitive conduct in the labor market,[31] such as engaging in collusion to lower wages or to reduce salaries or hours worked.

When anticompetitive conduct results in supply shortages or price increases, competition law enforcement is an appropriate tool. Anticompetitive exclusionary conduct by a dominant firm may prevent new entrants from responding to shortages, thus suppressing price competition and violating Section 2 of the Sherman Act.[32] An example which pre-dated the COVID-19 outbreak, shows how anticompetitive behavior can harm consumers. In 1998, the FTC charged that Mylan Industries and other companies carried out a plan intended to give Mylan the power to raise the price of generic lorazepam tablets and generic clorazepate tablets by depriving its competitors of the active pharmaceutical ingredient (API)

28 The views expressed herein are my own, and do not necessarily represent the views of the Federal Trade Commission or any individual Commissioner.
29 Carl Shapiro, Deputy Assistant Attorney General for Economics, U.S. Department of Justice, Competition Policy in Distressed Industries," Remarks Prepared for Delivery to American Bar Association Antitrust Symposium (May 13, 2009), *available at* http://www.usdoj.gov/atr/public/speeches/245857.htm.
30 See https://www.ftc.gov/news-events/press-releases/2020/03/ftc-doj-announce-expedited-antitrust-procedure?utm.
31 See https://www.ftc.gov/news-events/press-releases/2020/04/federal-trade-commission-justice-department-issue-joint-statement.
32 Section 2 of the Sherman Antitrust Act, 15 U.S.C. §2. Violations of the Sherman Antitrust Act constitute unfair methods of competition in violation of the Federal Trade Commission Act, 15 U.S.C. §45.

necessary to manufacture each product. The firms had entered into exclusive licenses that allegedly deprived Mylan's competitors of the API for lorazepam and clorazepate. Without access to the API for lorazepam or clorazepate tablets, the FTC alleged that Mylan's competitors could not effectively compete for the sale of either product. Therefore, according to the FTC, Mylan could and did raise prices approximately 2000-3000% depending on the bottle size and strength. The FTC ultimately reached a $100 million settlement with Mylan.[33] Thus, anticompetitive conduct that eliminates price competition and thereby results in high prices is within the reach of the U.S. competition agencies.

Tools beyond antitrust and consumer protection law may have a role to play to address market failures that may occur during a national crisis. When such tools are used, the challenge is to use them in way that will protect consumers without undermining incentives that ultimately will bring new supply into the market. Although there is no specific federal price gouging prohibition, the U.S. government can invoke specific provisions of the Defense Production Act to address excessive pricing or hoarding in exceptional cases, which may include natural disasters. The Defense Production Act, which dates back to the Korean War, authorizes the President to mandate contracts necessary for national defense and/or prevent hoarding or charging excessive prices. This statute has been invoked in the current situation with regard to designated health and medical resources. On March 23, the President issued Executive Order 13910, Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID-19, pursuant to Section 102 of the Defense Production Act.[34] The Executive Order also authorizes the Secretary of Health and Human Services to protect scarce healthcare and medical items by designating particular items as protected under the statute. Once an item is so designated, the statute makes it a crime for any person to accumulate that item either (1) in excess of his or her reasonable needs or (2) for the purpose of selling it in excess of prevailing market prices.[35] The statute gives enforcement authority for these provisions to the U.S. Department of Justice. For their part, competition agencies can play a valuable role as advocates within government, helping legislators and other regulators appreciate the value of competition and the longer-term competitive effects of particular proposals.

The international competition community has emphasized the importance of sound competition enforcement practices during the pandemic. The International Competition Network recently issued a statement reaffirming the relevance of competition to economies in crisis and urging member agencies to remain vigilant to prevent anticompetitive conduct during the crisis. The statement recognizes the ability of agencies to evaluate and consider good faith efforts and limited collaborations among competitors to provide needed goods and services in making enforcement decisions, in line with applicable laws. It also encourages transparency with respect to operational and policy changes during the crisis and supports agency advocacy to promote competition as a guiding principle for economic recovery from the pandemic.[36]

History has taught us that ignoring competition principles risks invoking a cure that can prolong the disease. FTC Chairman Joseph Simons recently pointed out that, "[a]s we saw during the 2008 financial downturn and other, earlier challenging times, 'emergency' exceptions to the antitrust laws are unnecessary and can be counterproductive. The National Industrial Recovery Act of 1933, adopted in response to the Great Depression, is an example of a reaction to an economic crisis that likely diminished competition among firms, with little-to-no benefit (and more likely harm) to the economy."[37]

The airline industry presents another good example. In its early days, the industry was dependent on airmail subsidies to survive. By the 1930s, new technology had led the industry to the point where airlines could begin to make a profit carrying passengers. Indeed, some innovative new carriers began to move into the market to compete with the holders of the airmail contracts, such as one that began unsubsidized hourly service between New York and Washington. A crisis resulted from a meeting in which airline officials allegedly met with the Postmaster General to allegedly divide routes. In response, the President cancelled all the airmail contracts and ordered the army to fly the mail. The army, used to flying in good weath-

33 See https://www.ftc.gov/enforcement/cases-proceedings/9810146/mylan-laboratories-inc-cambrex-corporation-profarmaco-sri-gyma.

34 See https://www.federalregister.gov/documents/2020/03/26/2020-06478/preventing-hoarding-of-health-and-medical-resources-to-respond-to-the-spread-of-covid-19.

35 In response to the Executive Order, the U.S. Department of Justice established a COVID-19 Hoarding and Price Gouging Task Force. See https://www.justice.gov/file/1262776/download. See also Executive Order 13909, Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19, https://www.federalregister.gov/documents/2020/03/23/2020-06161/prioritizing-and-allocating-health-and-medical-resources-to-respond-to-the-spread-of-covid-19, in which the Secretary of Health and Human Services (Secretary) is delegated the prioritization and allocation authority under section 101 of the Defense Production Act of 1950, with respect to health and medical resources needed to respond to the spread of COVID-19.

36 ICN Steering Group Statement: Competition during and after the COVID-19 Pandemic, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/04/SG-Covid19Statement-April2020.pdf.

37 Joseph Simons, The Federal Trade Commission's Response to the COVID-19 Pandemic, forthcoming in J. ANTITRUST ENF. (2020), citing C. Shapiro, *supra* note 2 , and A. J. Meese, Competition Policy and The Great Depression: Lessons Learned and a New Way Forward, 23 CORNELL J.L. & PUB. POL'Y 255 (2013). For an excellent discussion of lessons learned from the United States' experience with subordinating competition law to other goals in the 1907 financial panic and the Great Depression, *see* Marc Winerman, Antitrust and the United States Financial Crisis of '07, http://www.abanet.org/antitrust/at-source/08/12/Dec08-FullSource12-22f.pdf.

er, was unprepared and multiple fatal crashes ensued.[38] The resulting furor allowed the airline industry, which claimed to need protection from harmful competition from new entrants, to press Congress to enact a pervasive regulatory scheme in 1938 that regulated entry, price, and routes. For the next 40 years, airlines could compete on the basis of food service and schedules, but very little else, resulting in limited route options and high prices. The regulatory response intended to address a short-term economic crisis took decades to undo.

While regulating airline safety is important for protecting passengers, regulation can go too far when they harm competition, which is typically justified in the interest of promoting "stability," "competitiveness," or other industrial policy goals. The trick, of course, is to find the balance by weighing the cost of regulation against the benefits. The concern for 2020 is that the crisis creates an opportunity for those who would exclude competition to claim that the emergency situation justifies brushing aside sound competition principles with only the slightest glance, as Congress did in the 1930s when it regulated the airline industry.

While some regulatory responses to the COVID-19 crisis response are necessary and well-justified, such responses should not undermine the salutary effects of market-based competition over the long run. An emergency certainly requires a swift and effective response. However, competition agencies should be vigilant in their roles as competition advocates to ensure that regulation does not go beyond its intended purpose and unnecessarily restrict the role of competition and the functioning of a market economy. Otherwise, one crisis can become the root of another.

38 F. Van der Linden, Airlines and Airmail 271-91 (2002).