The COVID-19 Economic Shock: Antitrust Considerations and Concerns

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The COVID-19 global pandemic triggered an economic tsunami. Healthcare systems across the world are overwhelmed. The United States and many other countries adopted social distancing as the principal measure to slow down the spread of the pandemic. To enforce social distancing policies, governments and localities have been requiring closures of non-essential brick-and-mortar business operations. In a growing number of countries, states, and localities lockdowns are ordered. Partial shutdowns of economies became a global norm. In the United States and other countries, relaxations of antitrust enforcement standards are considered and implemented.

On March 24, 2020, the Justice Department's Antitrust Division (DOJ) and Federal Trade Commission (FTC) issued a joint statement recognizing that the national emergency requires collaborations among competitors and announcing an expedited review process for such collaborations.[1] The agencies also declared that they would vigorously prosecute companies and individuals that violate the antitrust laws. Two weeks earlier, the DOJ announced "its intention to hold accountable anyone who violates the antitrust laws . . . in connection with the manufacturing, distribution, or sale of public health products."[2]

There is nothing surprising about the relaxation of competition policy in periods of national emergency.[3] There is also nothing surprising about concerns that formal and informal relaxation measures are or would be excessively permissive.

In this comment, I discuss why the relaxation of antitrust enforcement standards is inevitable at the present time, specific concerns about present and coming relaxation measures, and likely long-term effects on competition policy.

1. Economic and Uncertainty Shocks

Economic shocks are meaningful changes in the economy caused by unexpected events. Negative economic shocks contract the scope of economic activities, while positive shocks expand the scope of economic activities. Important to the design and evaluation of public policies, the distinction between positive and negative shocks refers to their total welfare effects. Most economic shocks, however, produce both negative and positive welfare effects. In the United States, the social costs of skewed distributions of gains and losses associated with economic shocks have been chronically neglected, in part, for beliefs that wealth trickles down smoothly and quickly.

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[1] U.S. Department of Justice & Federal Trade Commission, *Joint Antitrust Statement Regarding COVID-19* (March 24, 2020).

[2] U.S. Department of Justice, *Justice Department Cautions Business Community Against Violating Antitrust Laws in the Manufacturing, Distribution, and Sale of Public Health Products* (Press Release, March 9, 2020).

[3] *See*, *e.g.*, Thomas K. Fisher, *Antitrust during National Emergencies: I & II*, 40 MICH L. REV. 969, 1161 (1942).

For their disruptive essence, economic shocks tend to generate uncertainty shocks—abrupt and significant increases in uncertainty. When an economic shock is negative, the accompanying uncertainty shock further depresses the scope of economic activities and dries up liquidity. The COVID-19 pandemic is a seismic negative shock that caused a challenging uncertainty shock.

Accounts of the market crashes of 1929 and 2008 often describe the resulting uncertainty shocks.[4] For example, a month after the Great Crash of 1929, *The Magazine of Wall Street*'s Editorial Board wrote:

> Uncertainty is worse than knowing the truth, no matter how bad. The decline in the stock market has greatly exaggerated the beliefs about the business situation. . . . [T]he country has a sound base from which to rise if we . . . get to work and plan for the future.[5]

As we witness these days, negative shocks sometimes require government action to mitigate their costs and sometimes also to enable and expedite the recovery. The design and implementation of such government actions are particularly challenging when the uncertainty is high. For the uncertainty the adopted measures are very imperfect compromises that draw criticism and controversy. Studies of the Great Depression and Great Recession illustrate why in crisis no good deed goes unpunished. It is evident that, in every crisis, some people discount or ignore the costs of controversy.

Historically, massive negative shocks led to formal and informal relaxations of antitrust enforcement standards. The principal reasons for such relaxations are concerns that government intervention in markets would contribute to further decline in economic activities, undermine efforts to expand production, and cause a loss of jobs. One aspect of this set of reasons is the costs of compliance systems for businesses. Another reason for the relaxation of antitrust enforcement standards is that, in periods of emergency, governments must reallocate their resources to address pressing priorities. Antitrust enforcement is prioritized below national tasks that are directly related to crisis management. The important point, however, is that the choice is not between a complete suspension of antitrust law and pre-crisis standards. Rather, the relaxation is a policy whose cost varies with design. A meaningful and practical commitment to antitrust enforcement should focus on the features of the relaxation policy. Objections to any relaxation are unlikely to accomplish much.

The National Industrial Recovery Act of 1933 (NIRA) is probably the most known formal relaxation of antitrust law. Congress passed NIRA to address a "national emergency . . . of widespread unemployment and disorganization of industry, which burden[ed] interstate commerce . . ., affect[ed] the public welfare, and undermine[d] the standards of living of the American people." NIRA required industries to negotiate "codes of fair competition," exempted the codes from antitrust law, and provided that violations of codes would be deemed unfair methods of competition within the meaning of Section 5 of the FTC Act. This regulatory framework was nothing short of a federal investment in the formation and enforcement of cartels across the economy.

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[4] *See*, *e.g.*, James B. Stewart, *Eight Days*, NEW YORKER, Sept 21, 2009, at 58.

[5] *1930 Will Be What We Make It*, MAG. WALL ST., Nov. 30, 1929, at 177.

Today, the concerns about the relaxation of enforcement standards are heightened because market concentration and economic power are pervasive features of the American economy and are conducive to anticompetitive conduct. Another source of concern is that the ideological composition of the federal judiciary accounts for a significant narrowing in the scope of antitrust in recent decades. Specifically, under the present Supreme Court's antitrust jurisprudence, uncertainty is a reason to avoid enforcement actions. The false positives principle embodies this approach.

But the most significant source of concern is the diminished confidence in the three branches of government. Present economic and social conditions in the United States have normalized impulsive policymaking, disdain for science and intellect, divisive rhetoric, conspiracy theories, and cynical disregard of factual realities. Our system of checks and balances is not as strong as it should be. Notably, President Trump's impulsive style and disinterest in facts compromise the Nation's and the global community's ability to address problems.

The Upshot

For the economic characteristics of the COVID-19 crisis, the relaxation of antitrust enforcement standards is inevitable. Efforts to preserve the competitive process should focus on the scope and characteristics of the relaxation policy. The present state of antitrust jurisprudence, as well as political and social norms, create serious concerns that the relaxation of antitrust enforcement standards would be poorly conceived.

2. Technological Leap

Historically, antitrust jurisprudence and enforcement policies have tracked with delay fluctuations in public attitudes toward big business, which, in turn, have followed the progression of technological change. The delay has been caused by the slow pace of common law.

The explanation for this pattern is that technology shocks (*i.e.*, economic shocks caused by technological change) generate positive and negative welfare effects whose distribution is heavily skewed. In the years that follow a massive technology shock, successful entrepreneurs and their backers capture a disproportionate portion of the gains, while large segments of the population experience losses arising from automation and displacement of old technologies. As the new technologies diffuse and new jobs are created, gains trickle down. This process may be very slow. In the intervening period, the hardship and frustrations incite a growing animosity toward the new business titans. Actual and perceived misconduct of these companies further fuel the public anger. In the United States, such sentiments have been the source of the antitrust impulse.

The historical pattern can be summarized as follows. The emergence of large companies in America in the second half of the nineteenth century created public animosity towards industrialists and large retailers. Responding to these sentiments, in 1890, Congress passed the Sherman Act and, in 1914, passed the Clayton and FTC Acts. Until the mid-1930s, however, antitrust enforcement meant big political promises, symbolic trustbusting campaigns, and a little enforcement stick. Aggressive trustbusting enforcement began only in the mid-1930s. By the early 1940s, however, antitrust became "one of the faded passions of American reform," although enforcement policies continued to be aggressive.[6] Then, since the late 1970s, objections to government oversight of markets have been dominating antitrust jurisprudence and enforcement policies.

Renewed public anger toward large corporations formed in the last quarter of the twentieth century, as information and communication technologies began evolving. The hardship and anxieties caused by the Great Recession dramatically expanded public animosity toward big business. In the second decade of the twenty-first century, America's public discourse became dominated by perceptions that corporate greed unleashed by corrupt politicians and radical judges resulted in a new Gilded Age in which a small class of business titans governs the economy to the detriment of the small businesses and hard-working Americans. The prevalence of these attitudes created a new antitrust impulse. The COVID-19 economic shock is likely to impact these trends.

Until the outbreak, the transition to the digital economy was gradual. Since the outbreak, social distancing policies have been forcing society to abandon physical venues and handle most economic and social activities in the digital space. This abrupt change in economic and social patterns constitutes a "technological leap."

The social distancing mandates will be lifted sooner or later. Society will return to physical venues. But the return would not fully compensate for their present abandonment. We are likely to witness only a partial revival of economic and social patterns that governed the world until a few weeks ago. The forced technological leap creates avenues for economic and social activities whose replacement would be costly. To the extent that this analysis is somewhat correct, the trustbusting impulse that gained steam in recent years would lose influence.

The Upshot

The COVID-19 pandemic has been forcing a radically increased reliance on virtually managed supply chains and virtual social interactions. These aspects of the COVID-19 economic shock will influence the recovery path. It is quite possible that the forced shift of economic and social activities to the digital space would incite a new wave of "techlash" (a widespread public animosity toward large technology companies). But it is also possible that, to facilitate a rapid recovery, society would use regulation to try to diffuse concerns about the economic power of digital platforms.

3. Temporary Relaxation of Antitrust Law

The expected relaxation of antitrust enforcement standards evokes concerns that it would repeat the mistakes of NIRA. These concerns are misplaced.

NIRA's approach to collaborations among competitors was not a change in the direction of antitrust policy. Rather, it was the last episode of the Nation's experimentation with the "associative state" vision. Under that vision, collaborations among competitors were a prescribed

[6] Richard Hofstadter, *What Happened to the Antitrust Movement?*, *in* THE BUSINESS ESTABLISHMENT 113 (Earl F. Cheit ed. 1964).

remedy for the perceived illnesses of industrialization.[7] This vision shaped national economic policies throughout the 1920s, led to NIRA, and collapsed with NIRA. Justice Brandeis' dissent in *American Column & Lumber* (1921) illustrates the spirit of the associative state vision's influence on antitrust policies.[8]

Today, the principal vulnerability of policymaking in America is corrosive political and social norms that replace reliance on facts and expertise with impulsive policies, delusions, and conspiracy theories. In the antitrust context, impulsive ideas to relax enforcement standards would find support in the ideological arms of antitrust law. One arm conflates the competitive process with the protection of small businesses and other social goals. The other ideological arm conflates economics with objections to government oversight of markets.

On the positive side, public statements of the DOJ and FTC in the wake of the COVID-19 outbreak presented a promising practicality. The agencies recognized that a relaxation of enforcement standards might be necessary but emphasized their commitments to enforce antitrust law.

<u>The Upshot</u>

The relaxation of antitrust law in periods of national emergency constitutes a price that society is willing to pay to address urgent needs. Criticism of the willingness to sacrifice antitrust enforcement in the time of COVID-19 could be counterproductive. Instead, criticism and constructive efforts should focus on the design and implementation of relaxation policies. Specifically, the relaxation should be treated as a set of temporary and narrow exemptions, not as a new norm. Moving forward, antitrust thinkers should be more cautious with political agendas disguised as sound jurisprudence and solid economics.

[7] *See* LAURA PHILLIPS SAWYER, AMERICAN FAIR TRADE (2018).

[8] American Column & Lumber Co. v. United States, 257 U.S. 377, 413-19 (1921).