Competition policy during pandemics: how to urgently produce healthcare goods and services while avoiding economic disaster

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**ABSTRACT**

Pandemics present two emergencies: a war against a pathogen and an economic recession. Historically, the US has been forced to relax its antitrust enforcement policies during its largest wartime mobilizations in order to urgently produce goods and services needed in the war effort. Likewise, when the COVID-19 pandemic began, companies should have been allowed to collaborate with each other and with the US government to adequately respond to the increased demand for healthcare goods and services. Guidance from antitrust agencies during the coronavirus pandemic suggested a willingness to allow such collaborations, but the guidance lacked specificity. This article suggests specific policies that the antitrust agencies should implement during pandemics in order to give companies confidence that they can legally engage in collaborations that will hasten the production and distribution of urgently needed healthcare goods and services.

However, relaxing antitrust laws has historically caused and prolonged economic downturns. Thus, during a pandemic, the federal government should relax antitrust laws, but that relaxation could exacerbate the inevitable economic downturn caused by social distancing policies. Accordingly, this article suggests how the US government could use non-antitrust regulations to mitigate the systemic financial risk created by that relaxation in antitrust laws.

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Coronavirus is the most deadly respiratory virus since the 1918 H1N1 influenza pandemic. When the virus started spreading rapidly in the USA in March 2020, epidemiologists estimated that, without social distancing measures, hospitals would have been overwhelmed almost immediately, and critical-care bed demand would have been over 30 times greater than the maximum supply. By the end of the summer of 2020, the virus would have infected 81 per cent of Americans and killed 2.2 million of them.

Needless to say, the US government and state governments had little choice but to implement social distancing measures, including closing schools, non-essential businesses, and other public places. While those measures were necessary, their economic costs were enormous: five weeks after the president declared a national emergency, over 22 million people had lost their jobs.

As many sectors of the economy were shutting down, the healthcare and pharmaceutical sectors were expanding and struggling to respond to the virus. Due to the influx of coronavirus-infected patients, hospitals anticipated a severe shortage of personal protective equipment for their workers. Some hospitals also feared that they would run out of ventilators, which were crucial for treating the most seriously ill patients. Meanwhile, pharmaceutical companies raced to research and develop coronavirus tests, potential treatments, and potential vaccines.

In summary, coronavirus brought two distinct emergencies to the USA: a deep economic slump caused by social distancing measures, and an urgent need to produce medical goods and services to respond to the pandemic. The remainder of this article examines how the US government should alter its antitrust laws in response to such a situation.

Section I examines how the federal government has historically adjusted its antitrust laws and competition policies in times of war. It argues that, during times of

1 Neil Ferguson and others, ‘Report 9: Impact of Non-Pharmaceutical Interventions (NPIs) to Reduce COVID-19 Mortality and Healthcare Demand 1’ (16 March 2020). The Report persuaded President Donald Trump to implement stricter guidelines in response to the coronavirus. See Sheri Fink, ‘White House Takes New Line After Dire Report on Death Toll’ The New York Times (16 March 2020).
2 ibid.
3 ibid.
4 Office of Governor Gretchen Whitmer, Exec Order No 2020-21, ‘Temporary Requirement To Suspend Activities That Are Not Necessary To Sustain Or Protect Life’ (2020).
5 Heather Long, ‘U.S. Now Has 22 Million Unemployed, Wiping Out a Decade of Job Gains’ Washington Post (16 April 2020).
6 ‘FAQs on Shortages of Surgical Masks and Gowns’ <https://www.fda.gov/medical-devices/personal-protective-equipment-infection-control/faqs-shortages-surgical-masks-and-gowns> accessed 20 April 2020.
7 Andrew Jacobs, ‘Fears of Ventilator Shortage Unleash a Wave of Innovations’ New York Times (2020) (17 April 2020).
8 Emma Court, ‘In Coronavirus Testing Ramp-Up, U.S. Called Private Sector in Late’ Bloomberg <https://news.bloomberglaw.com/login?target=https%3A%2F%2Fnews.bloomberglaw.com%2Fhealth-law-and-business%2Ffin-coronavirus-testing-ramp-up-u-s-called-private-sector-in-late> (17 March 2020).
9 John Zarocostas, ‘What Next for the Coronavirus Response?’ The Lancet <https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30292-0/fulltext> (08 February 2020) (‘[the World Health Organization] is working with experts from the public and private sectors . . . to coordinate the response, including providing biomedical and essential supplies for the management of 100 cases for vulnerable countries, accelerating access to therapeutics and vaccines, carrying out clinical trials, and conducting briefings with clinicians treating patients.’).
war, the country has had little choice but to relax antitrust and competition policies in order to allow the private sector to collaborate to produce urgently needed wartime goods and services. That history suggests that, during a pandemic, the country may need to relax antitrust laws to the extent necessary to allow the private sector to produce urgently needed medical goods and services.

Section II then examines the Department of Justice’s (‘DOJ’) and Federal Trade Commission’s (‘FTC’) public statements in response to the coronavirus. The agencies’ guidance suggests openness to relaxing antitrust laws to allow collaboration, but ultimately, the guidance was too vague to give companies enough confidence to urgently collaborate to produce necessary goods.

Section III suggests how the antitrust agencies could provide clearer guidance. The section examines agency-issued antitrust guidance for healthcare and pharmaceutical companies during peaceful times. It also identifies which of those guidelines might deter helpful private-sector collaborations in response to a pandemic. Finally, it suggests that the antitrust agencies should suspend those specific policies for the duration of the pandemic.

Section IV turns to the economic aspect of the pandemic. It examines the history of antitrust law during the Great Depression and the Great Recession, and it concludes that relaxing antitrust enforcement contributed to both of those economic downturns. Accordingly, this article argues that although the US government should relax antitrust laws for healthcare companies during a pandemic, it should also be wary of the dangers associated with relaxing antitrust laws, especially during an economic downturn.

Section V suggests how the US government can mitigate the economic risks associated with relaxing antitrust laws. Specifically, it argues that the US government should liberally use the Defense Production Act as a macroeconomic policy tool to set price levels and output for crucial goods; the US government should not let the free market determine those variables when the US government has suspended laws to mitigate monopoly power and ensure fair competition. Section S also argues that pre-emptive measures like the Dodd–Frank Act help mitigate the risks that cartelization poses during a pandemic.

I. COMPETITION POLICY DURING WARS

World War I

During World War I, Herbert Hoover was the Federal Food Administrator, and he argued that part of a successful wartime effort included using the private sector to hasten the production of goods in short supply. Doing so would take advantage of needed machinery in the private sector and avoid the creation of a centralized bureaucracy. President Woodrow Wilson agreed

10 Ellis W Hawley, ‘Herbert Hoover and the Sherman Act, 1921-1933: An Early Phase of a Continuing Issue’ (1989) 74 Iowa Law Review 1067. Hoover was appointed as Food Administrator—that is, the head of the Food Administration—on 19 May 1917. See James L Guth, ‘Herbert Hoover, the U.S. Food Administration, and the Dairy Industry, 1917-1918’ (1981) 55 The Business History Review 170, 174.
11 ibid (citing ‘Letter from Thomas Gregory to President Woodrow Wilson’ (22 August 1917)).
with Hoover\textsuperscript{12} but also noted that market forces could not be counted on to regulate the private sector in a time of war; the urgency of wartime production would preclude the use of usual free-market tools like bidding and negotiations.\textsuperscript{13} Thus, if the US government used the private sector in its wartime efforts, it could not rely on free markets to set reasonable prices. The government should instead set prices itself through price caps and output regulation.\textsuperscript{14}

President Wilson also argued that if the US government ordered a large production of goods, strictly enforcing antitrust laws could hinder the ability of companies to fulfill the US government’s orders for necessary supplies.\textsuperscript{15} Companies might only have been able to fulfill those large and urgent orders by cooperating with each other.\textsuperscript{16} Thus, it would have been unfair to combine demanding output orders with strict antitrust regulations.\textsuperscript{17} Attorney General Thomas Gregory remarked that he and the President agreed that antitrust enforcement should be relaxed so that companies ‘would have no excuse for not contributing to their full capacities in the prosecution of the war’.\textsuperscript{18}

Accordingly, the US government suspended most major antitrust cases until after the war was over and established the Price Fixing Committee of the War Industries Board to set prices artificially and prevent profiteering.\textsuperscript{19} Thereafter, the US government successfully cooperated with the private sector to rapidly increase the production of wartime goods.\textsuperscript{20} For example, by the end of the war, the US was producing airplane engines at a rate approaching 50,000 per year.\textsuperscript{21}

\textbf{World War II}

Before Pearl Harbor, antitrust enforcement agencies were setting records for proceedings instituted under the Sherman Act.\textsuperscript{22} Perhaps in anticipation of the war, Attorney General Thurman Arnold argued that continuing to enforce antitrust laws was crucial in times of war because war drastically increases the demand for certain products and services, and thereby creates opportunities for suppliers to exploit an emergency situation.\textsuperscript{23} Arnold theorized that anticompetitive agreements could

\begin{itemize}
\item\textsuperscript{12} ibid.
\item\textsuperscript{13} Richard M Steuer and Peter A Barile III, ‘Antitrust in Wartime’ (2002) 16 Antitrust 71, 71.
\item\textsuperscript{14} ibid.
\item\textsuperscript{15} Thomas K Fisher, ‘Antitrust During National Emergencies’ (1942) 40 Michigan Law Review 969, 996.
\item\textsuperscript{16} ibid.
\item\textsuperscript{17} ibid.
\item\textsuperscript{18} ibid.
\item\textsuperscript{19} ibid. In addition, both President Wilson and Attorney General Gregory gave more leeway to administrative agencies—including Hoover’s agency, the Food Administration—to circumvent antitrust laws by cooperating with the private sector in wartime efforts. See Hawley (n 10) 1068 (“In the words of one of Hoover’s assistants, actions by the trades ‘to regulate and police themselves’ became ‘one of the fundamental principles’ of wartime economic control.”).
\item\textsuperscript{20} Hugh Rockoff, ‘America’s Economy Way of War: War and the US Economy from the Spanish-American War to the Persian Gulf War 1’ (2012), Cambridge University Press.
\item\textsuperscript{21} ibid.
\item\textsuperscript{22} Steuer and Barile III (n 13) at 72.
\item\textsuperscript{23} Daniel A Crane, ‘Did We Avoid Historical Failures of Antitrust Enforcement During the 2008-2009 Financial Crisis?’ (2010) 77 Antitrust Law Journal 219, 222.
\end{itemize}
injure the national defence by raising prices and decreasing output levels of goods necessary for war. 24

Despite that theory, Arnold was forced to relax antitrust enforcement in order to increase the production of wartime goods. Standard Oil Co. v United States 25 was a notable example of lenient antitrust enforcement. 26 Standard Oil, a company based in the USA, had agreed with I.G. Farben, a Nazified German company, to divide world markets. 27 Under the agreement, I.G. Farben received exclusive rights to sell rubber, and Standard Oil controlled the world market for petroleum products. 28 Standard Oil’s agreement not to enter the rubber market without I.G. Farben’s consent had profound consequences for the US’s war preparedness. 29 Attorney General Arnold conducted an investigation and was prepared to criminally indict Standard Oil and I.G. Farben, but he was eventually forced to accept a consent decree which freed up some urgently needed patents. 30

Arnold demonstrated that I.G. Farben had similar cartel agreements with other American companies regarding magnesium, titanium, and other products. 31 But because the guilty companies were so vital to the country’s war efforts, Arnold agreed not to bring antitrust enforcement actions if the War and Navy Departments found that the conduct constituting the antitrust violation was necessary for national defence. 32 Those departments vetoed many cases, including cases involving antitrust violations predating the war. 33

The US government also implemented several other mechanisms to permit activity that otherwise might have been challenged under the antitrust laws. 34 First, there was a policy of formal antitrust immunization for actions taken by industry in compliance with specific requests made by a public authority and approved by its general counsel, as long as the agencies found such action to be a proper delegation of a governmental function and justified by the war effort. 35 Secondly, the Justice Department permitted government war agencies to form committees for wartime production. 36 The committees were broadly allowed, as long as they were formed pursuant to a war agency plan to increase production, were representative of the industry, and would not coerce anyone to comply with a war agency order. 37 Thirdly,
the Justice Department allowed smaller firms to pool their resources to compete collectively for war-related projects, as long as the pools were approved by the War Production Board and the Smaller War Plants Corporation.\textsuperscript{38} In summary, antitrust enforcement had to be smothered in order to promote the consolidation and centralized management of the war effort.\textsuperscript{39}

**Antitrust lessons from World War I and World War II**

For purposes of antitrust laws, responding to a pandemic virus is analogous to going to war. When a country goes to war, there is a spike in the demand for certain equipment and services such as weapons and intelligence. While it remains important to maintain competitive conditions in markets that supply those goods, the priority is to keep up with the high demand for critical supplies and services. To that end, during the world wars, companies cooperated to adequately respond to increasing demand for equipment and services, and the DOJ and FTC allowed them to do so by relaxing antitrust enforcement.

As discussed at greater length in Section II, the US government must follow a similar approach during a pandemic. During a pandemic, instead of a spike in demand for wartime goods and services, there is a spike in demand for healthcare goods and services. Companies that supply those goods and services—such as producers of personal protective equipment, vaccine and treatment developers, and hospitals—may need to collaborate to meet that demand. Antitrust laws should be flexible enough to allow them to do so.

**II. THE DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION’S RESPONSE TO CORONAVIRUS**

Section I argued that, to allow the private sector to meet the urgent need for healthcare goods and services, the US government should relax certain antitrust laws. Section II now examines how the antitrust agencies in fact responded to the coronavirus.

Addressing the spread of Coronavirus Disease 2019 (‘COVID-19’), the DOJ and FTC issued a joint statement acknowledging that the emergency situation would require ‘unprecedented cooperation’ between businesses to protect the health and safety of Americans.\textsuperscript{40} Accordingly, the agencies stated that they would ‘aim to respond expeditiously to all COVID-19-related requests and to resolve those addressing public health and safety within seven . . . calendar days of receiving all the necessary information’.\textsuperscript{41} They also emphasized the potential utility of joint ventures in speeding up the necessary expansion of existing capacities of health care companies.\textsuperscript{42}

Nonetheless, the DOJ also announced that it would continue to hold accountable ‘anyone who violate[d] the antitrust laws of the United States in connection with . . . public health products such as face masks, respirators, and diagnostics’.\textsuperscript{43} The DOJ stated

\textsuperscript{38} ibid.

\textsuperscript{39} Waller (n 24) at 607.

\textsuperscript{40} Department of Justice Antitrust Division, Joint Antitrust Statement Regarding COVID-19 (2020).

\textsuperscript{41} ibid.

\textsuperscript{42} ibid.

\textsuperscript{43} ibid.
that the Procurement Collusion Strike Force would lead the national effort to combat antitrust crimes related to government procurement, grant, and programme funding.44

Finally, the DOJ issued a press release stating that it would continue to enforce competition laws in the market for labour. While acknowledging that ‘some cooperation between government, businesses, and individual actors may be necessary’, the DOJ stated that it would vigorously investigate and prosecute those who ‘might engage in collusion or other anticompetitive conduct that harms workers’.45 The press release emphasized the importance of protecting workers who were on the front lines of the response to the pandemic, from nurses and doctors to grocery store workers.46 Specifically, the DOJ committed to investigating and prosecuting any efforts among competitors to fix those workers’ wages or hours.47

The DOJ Antitrust Division further discussed its approach to antitrust enforcement during the pandemic when it released a statement reviewing a collaboration agreement between government agencies and private suppliers of medical equipment. The collaboration was between the Federal Emergency Management Agency (‘FEMA’), the Department of Health and Human Services (‘HHS’), and large private companies capable of supplying medical goods and services. FEMA and HHS asked large private companies to collaborate with each other and with the government to address supply chain shortages in medications and personal protective equipment like gowns, masks, and gloves.48 The private companies agreed to help FEMA and HHS address bottlenecks, identify new sources of supply, identify areas of increased demand, expedite distribution, and understand prices of the equipment.49 The agreement stated that FEMA and HHS would monitor many of the necessary communications between competitors, but it acknowledged that the competitors would sometimes need to communicate without oversight.50

Ultimately, the Antitrust Division found that the agreement likely did not violate antitrust laws, in part because ‘consumers may benefit from collaborations such as this, and they may enable participants to bring life-saving goods to market faster than would be possible absent the collaboration’.51 The DOJ also emphasized that it was important that government agencies oversaw the collaboration between competitors, and that the competing companies agreed to cooperate without sharing competitively sensitive information with each other or negotiating prices or output levels with each other.52

44 ibid; Procurement Collusion Strike Force, <https://www.justice.gov/procurement-collusion-strike-force> accessed 20 April 2020.
45 Department of Justice Antitrust Division (above at n 40).
46 ibid.
47 ibid.
48 Letter from Department of Justice Antitrust Division Regarding McKesson Corporation, Owens & Minor, Inc., Cardinal Health, Inc, and Henry Schein, Inc. Business Review Request Pursuant to COVID-19 Expedited Procedure (04 April 2020), <https://www.justice.gov/atr/page/file/1266511/download>, at 2.
49 ibid, at 5.
50 ibid, at 9.
51 ibid.
52 ibid.
The Antitrust Division wrote a very similar business review letter a few weeks later stating that it would not bring action against AmerisourceBergen for facilitating the government in identifying global supply opportunities and facilitating product distribution of goods necessary to treat coronavirus patients.\(^{53}\)

Finally, the Antitrust Division wrote a business review letter approving a request from large pharmaceutical corporation to exchange information regarding ‘manufacturing facilities, raw materials, and supplies that could be used to produce COVID-19 mAb [antibody] treatments’.\(^{54}\) The pharmaceutical corporations promised not to exchange competitively sensitive information about prices or commercial terms of any arrangements for raw materials or supplies.\(^{55}\) In approving the proposal, the Antitrust Division noted that ‘[a]lthough sharing information about production capacity can raise antitrust concerns because it could lead to collusion that would reduce output, the Proposed Conduct is likely to have the opposite effect’.\(^{56}\) That is, the proposed information sharing would be used to expand output, not contract it.

In summary, the DOJ and FTC’s guidance provide some helpful hints about the agencies’ approach to the crisis. Specifically, the guidance suggested that (i) the agencies would continue to enforce antitrust laws, especially in labour markets, but (ii) the agencies understood the need for a flexible approach to allowing collaboration among competitors to adequately respond to the crisis.

While the existing guidance was welcome, the lack of specificity was dangerous. It is concerning, for example, that healthcare supply distributors felt the need to request business review letters from DOJ Antitrust before having confidence that it would be legal for them to cooperate to respond to the urgent need for medical goods and services.\(^{57}\) In emergencies like pandemics, the antitrust agencies should be committed to giving specific guidance that allows companies to respond rapidly to quickly evolving situations without worrying about infringing antitrust laws.\(^{58}\)

The agencies probably chose to issue vague guidance for at least two reasons. The first reason is that, if the agency issued specific rules granting certain behaviour immunity from antitrust enforcement, corporations may have opportunistically taken advantage of those rules even when their conduct did not aid in the response to the pandemic. Antitrust exemptions, in other words, could be over inclusive. That concern is important, but it needs to be balanced against the distinct advantage of

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\(^{53}\) Letter from Department of Justice Antitrust Division Regarding Amerisource Corporation Business Review Request Pursuant to COVID-19 Expedited Procedure (19 April 2020), <https://www.justice.gov/atr/page/file/1269911/download> (5 August 2020).

\(^{54}\) Letter from Department of Justice Antitrust Division Regarding Business Review Request Eli Lily and Company, AbCellera Biologics, Amgen, Astra Zeneca, Gentech, and GSK Expedited Business Review Pursuant to COVID-19 Expedited Procedure (23 July 2020).

\(^{55}\) ibid.

\(^{56}\) ibid.

\(^{57}\) See above at nn 47–51 and accompanying text.

\(^{58}\) In addition to inhibiting cooperation among US corporations responding to coronavirus, the US refused to allow international cooperation. When world leaders and organizations pledged over $8 billion to the Global Alliance for Vaccines and Immunizations to research, manufacture, and distribute possible vaccines and treatments for COVID-19, the US refused to contribute to the global effort. Robin Emmott, ‘World Leaders Pledge $8 billion to Fight COVID-19 but U.S. Steers Clear’ Reuters <https://www.reuters.com/article/us-health-coronavirus-eu-virus/world-leaders-pledge-8-billion-to-fight-covid-19-but-u-s-steers-clear-idUSKBN22G0RM> (4 May 2020).
specific guidance: that specific rules and safe harbours can allow corporations to gain enough confidence to act cooperate to produce urgently needed goods and services. As described in more detail in the next section, certain limited and carefully crafted safe harbours would have struck that balance better than the vague guidance that the agency actually issued.

The second possible rationale for vague guidance is that the pandemic was a rapidly evolving emergency, and the agencies may not have had enough information to forecast what sorts of cooperation agreements would best aid the response effort. Although that rationale may have justified an initial delay in issuing specific guidance, it did not justify the prolonged absence of such guidance. Even by May, two months after the US economy shut down, the USA was producing less than half of the coronavirus tests necessary to control the spread of the virus.59 There were also severe shortages of beds, ventilators, masks and other personal protective equipment.60 Indeed, even by August, the shortages were so severe that they lead to tragic triage decisions about how to allocate equipment and services.61 Those shortages were severe enough to justify broad allowances of collaborations to urgently produce the necessary life-saving equipment and services.

The next part of this article, Section III, fleshes out the details of antitrust guidance under normal circumstances and discusses how the guidance should be altered during a pandemic.

### III. SUGGESTIONS FOR SPECIFIC ANTITRUST POLICY ADJUSTMENTS DURING THE CORONAVIRUS OUTBREAK

In their statement regarding antitrust enforcement during coronavirus, the DOJ and FTC advised companies to review their pre-pandemic joint statement regarding antitrust enforcement policy in health care (the joint statement).62 The joint statement includes guidance on the legality of sharing costs through joint purchasing agreements and joint ventures, and sharing information with competitors in normal times.63

**Joint ventures for purchasing medical equipment or services**

The joint statement describes a ‘safety zone’ for joint ventures to purchase expensive health care equipment that will not be challenged by the DOJ or FTC as anticompetitive.64 Specifically, the agencies will not challenge a joint venture for hospitals purchasing expensive health care equipment if the joint venture includes only the number of hospitals whose participation is needed to support the equipment, absent extraordinary circumstances.65 A group of hospitals is considered able to support

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59 German Lopez, ‘Why America’s Coronavirus Testing Barely Improved in April’ Vox (1 May 2020).
60 Megan L Ranney, ‘Critical Supply Shortages—The Need for Ventilators and Personal Protective Equipment During the Covid-19 Pandemic’ The New England Journal of Medicine [30 April 2020].
61 See Vivek N Prachand and others, ‘Medically Necessary, Time-Sensitive Procedures: Scoring System to Ethically and Efficiently Manage Resource Scarcity and Provider Risk During the COVID-19 Pandemic’ Journal of the American College of Surgeons [August 2020].
62 Department of Justice Antitrust Division (n 40); Department of Justice & Federal Trade Commission, Statements of Antitrust Enforcement Policy in Health Care (1994).
63 Department of Justice & Federal Trade Commission, ibid, at 1–3, 31.
64 ibid, at 13.
65 ibid, at 13.
expensive healthcare equipment if it could recover the costs of owning, operating, and marketing the equipment over its useful life.  

Ultimately, the term ‘safety zone’ is deceptive because it is difficult for a company to determine how many hospitals are ‘needed’ to support the equipment. There is no simple formula for that determination; it requires consideration of the cost of the equipment, its expected useful life, the expected number of procedures the equipment will be used for given the population served by the joint venture, and the expected price to be charged for the use of the equipment. In addition, the safety zone only applies to joint ventures involving expensive equipment; there is no safety zone for joint ventures involving other expensive health care services.

The joint statement also creates a ‘safety zone’ for joint purchasing arrangements for less expensive equipment and services—such as laundry, food services, or data processing services—where the purchases account for less than 35 per cent of the total sales of the purchased product or service in the relevant market, and the costs of the products and services account for less than 20 per cent of the total revenues from all products or services sold by each competing participant. Once again, it is not always obvious whether a joint venture would fall into that ‘safety zone’ because that determination requires a correct definition of the ‘relevant market’ for the services. Furthermore, there is no safety zone for larger purchasing arrangements.

If a joint venture formed for purchasing healthcare equipment or services falls outside the safety zones, the antitrust agencies apply a notoriously vague and unpredictable ‘rule of reason’ analysis in their antitrust review of such ventures.

It would be prudent to announce a safety zone that broadly covered joint ventures acquiring medical equipment or services used for treating patients infected with a pandemic pathogen. In the midst of a pandemic, joint ventures might be crucial for hospitals to acquire necessary equipment or services. For example, small hospitals often do not have the resources to unilaterally purchase ventilators or other expensive respiratory therapy equipment, which were crucial for responding to the coronavirus pandemic. To the extent those hospitals are able to collaborate to afford lifesaving equipment, they should be allowed to do so urgently, and antitrust laws should not slow the collaboration.

However, when collaborating to purchase equipment and services, the joint ventures’ communications about competitive information—including information about their own prices and outputs—should be strictly regulated. The next section discusses how their communications should be limited.

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66 ibid, at page 13, n 2.
67 ibid, at 14.
68 ibid, at 32–33.
69 ibid, at 54–55.
70 ibid.
71 ibid, at 16, 33.
72 Kirk Siegler, ‘Rural Hospitals Brace for Coronavirus’ National Public Radio <https://www.npr.org/2020/03/15/815638096/rural-hospitals-brace-for-coronavirus> (15 March 2020).
Collectively providing information to customers

The joint statement describes a safety zone for competing health care providers to share information with each other concerning prices for services and wages, or collectively provide fee-related information to purchasers.\(^{73}\) To fall within the safety zone, information must meet certain requirements, including: (i) the information must be managed by a third party; (ii) any information must be based on data that is more than three months old; and (iii) the information must be sufficiently aggregated such that it would not allow recipients to identify the prices charged by any individual provider.\(^{74}\) Those requirements and others serve to mitigate the risk that health care providers will use the information furnishing process to coordinate prices or costs with each other.\(^{75}\) Furthermore, if the information-sharing agreement does not fall within the safety zone, it is subject to the rule of reason analysis.\(^{76}\)

The burdensome requirements for falling within the safety zone for information sharing could slow collaboration among healthcare providers and distributors because when corporations strategize to distribute or purchase medical supplies and services, they might need to discuss price. For example, the health care distributors that requested a business review letter from the Antitrust Division noted that they would need to share information about competitive prices as part of their collaboration efforts.\(^{77}\)

It is also true, however, that even during a pandemic, antitrust agencies should discourage competitors from sharing price and cost information with each other. The dangers of price gouging, price fixing, and other exploitive practices are high in the midst of a pandemic,\(^{78}\) and preventing competitors from communicating about pricing information could mitigate those dangers.

To mitigate that concern, the DOJ announced in a business review letter that the collaborating healthcare distributors would not be allowed to ‘us[e] any collaboration to increase prices, reduce output, reduce quality, or otherwise engage in [coronavirus] profiteering’.\(^{79}\) The DOJ also announced that FEMA would supervise the negotiations, and that any determinations of price would occur only at FEMA’s direction.\(^{80}\)

It would be prudent for the DOJ to announce a safety zone for any collaborations that followed procedures for price-related discussions similar to those described in that business review letter. That is, during a pandemic, companies should be allowed to discuss prices as part of their collaborations so long as they do not use those discussions to increase prices or reduce output, and they receive clearance from a

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\(^{73}\) Department of Justice & Federal Trade Commission (n 62), at 43, 49.

\(^{74}\) ibid, at 44–45, 50.

\(^{75}\) ibid, at 45, 50.

\(^{76}\) ibid.

\(^{77}\) See Department of Justice Antitrust Division (n 40) at 2.

\(^{78}\) See Kendra L Berardi and Ian T Clarke-Fisher, ‘Responding to Government Inquiries Related to Price Gouging During the COVID-19 Pandemic’ (2020) National Law Review; Office of Senator Elisabeth Warren, Pandemic-Anti-Monopoly Act <https://www.warren.senate.gov/imo/media/doc/Merger%20Moratorium%20One%20Pager.pdf> accessed 1 May 2020.

\(^{79}\) Department of Justice Antitrust Division (n 40), at 6.

\(^{80}\) ibid, at 8.
designated government agency before making any joint determinations about prices or output.

**Pooling intellectual property**

So far, this section has discussed antitrust laws for supplying tangible medical goods and services. Equally important, however, is the antitrust guidance for intangible property that is vital to the pandemic response, including patents necessary for developing vaccines and treatments. The remainder of this section discusses how antitrust law treats collaborations among those with intellectual property, and how that approach should shift during a pandemic.

During the Severe Acute Respiratory Syndrome (SARS) outbreak, four separate entities filed patent applications that incorporated either parts, or the whole, of the genomic sequence of SARS.\(^81\) Because all of the entities discovered the sequence at almost exactly the same time, it was not clear who would ultimately receive the rights to use and license the genomic sequence.\(^82\) That uncertainty had the potential to encumber access to the genomic sequence that researchers needed to develop a vaccine because researchers did not know who owned—and, thus, from whom they could license—rights to the vaccine.\(^83\) Fortunately, since the SARS outbreak turned out to be more mild and short-lived than expected, that potential never bore out; no vaccine needed to be developed.\(^84\) Nonetheless, a similar emergency could arise in the future, and it is important that competition law be prepared to respond to it.

The most obvious way to solve the problem would be for developers of the vaccine to obtain a license to each of the patent applications individually.\(^85\) That way, no matter which patent is ultimately approved, the developer will have acquired the right. The problem with that approach, however, is the high transaction costs associated with separately acquiring four nearly identical patent applications. Specifically, there would be high holdout costs because each individual patent application the developer acquired would become a sunk cost, and as a result, he or she would rationally be willing to pay more to acquire the next patent.\(^86\) Accordingly, each entity that filed a patent application would rationally attempt to ‘hold out’ to become the last seller, which would make the transaction difficult.

Another way to resolve the problem would be to allow the four entities that had filed patent applications to pool their applications to sell instead of forcing a developer to acquire each of the patents individually.\(^87\) Doing so would reduce hold-out

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81 See Hillary Greene, ‘Patent Pooling Behind the Veil of Uncertainty: Antitrust, Competition Policy, and the Vaccine Industry’ (2010) 90 Boston University Law Review 1397, 1400 (citing James HM Simon and others, ‘Managing Severe Acute Respiratory Syndrome (SARS) Intellectual Property Rights: The Possible Role of Patent Pooling’ (2005) 83 Bulletin of World Health Organization 707).
82 ibid.
83 ibid.
84 ibid.
85 ibid, at 1414–15.
86 ibid; John Cadigan and others, ‘An Experimental Study of the Holdout Problem in a Multilateral Bargaining Game’ (2009) 76 Southern Economic Law Journal 444, 444.
87 Greene (n 80), at 1415.
costs, and it would allow a developer to acquire certain rights to develop the vaccine with one transaction instead of four transactions.88

Pooling patent applications, however, raises antitrust issues. The DOJ and FTC have jointly written guidelines for the pooling of intellectual property.89 The guidelines note that, most of the time, a patent needs to be combined with other intellectual property or tangible property to produce a final consumer good.90 For example, patented information about how to create a vaccine will not have commercial value unless it can be combined with the manufacturing equipment necessary to produce the vaccine. The property that can be combined with the patent to form the final product is known as ‘complimentary’ to the patent.

The guidelines then note that patent holders may not possess all the intellectual and tangible property needed to make their patent useful, so it might be pro-competitive for patent holders to enter into joint venture arrangements with others who possess the complimentary property.91 For example, a biotechnology firm that invents and patents vaccines might enter into a joint venture with a vaccine manufacturer. These joint ventures are generally permissible under antitrust law.92 Often times, biotechnology firms will enter into joint ventures called ‘patent pools’ that combine and license all of the patents necessary for a particular final product, like a vaccine.93

However, it may not be permissible for a patent holder to create a joint venture with, or otherwise cooperate with, an entity that owns a patent that is a substitute. For example, the owner of a patent covering a method for creating a vaccine could not cooperate with a different entity that had patented an alternate method for creating a vaccine.94 Doing so would eliminate competition and might allow for collusive price fixing.

Based on those guidelines, it is not clear whether it would have been permissible for the patent applicants during the SARS outbreak to pool nearly identical patent applications. On the one hand, the patent applicants are clearly competitors with each other and attempting to create products that are nearly identical, and it is generally not permissible for competitors to cooperate by pooling their intellectual property. On the other hand, in this particular case, the nearly identical patent applications are complements to each other because a vaccine developer will not have the confidence to develop the vaccine unless she has acquired all of the patent applications; no individual patent application would suffice without the others.

One scholar has argued that, in such a situation, competition law should force licensees to purchase each of the competing applications individually instead of allowing licensees to purchase a pool of patents.95 She argues that patents can be

88 ibid at 1416.
89 Department of Justice & Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property (2017).
90 ibid, at 5.
91 ibid.
92 ibid.
93 ibid, at 5.
94 ibid, at 7.
95 Greene (n 80), at 1416.
individually licensed without high transaction costs as long as the licensing agreements are contingency agreements. The licensees should be able to acquire rights to each of the patent applications simply by agreeing to pay the fair value of the patent to each individual patent applicant if and only if that applicant’s patent is the one granted. That approach, however, raises the question of why a patent applicant would agree to be paid the fair value of the patent only if his or her application were granted. Indeed, the patent applicants would have nothing to gain from such a contingent contract because the applicants already know that they will be able to sell their licenses if their patent applications are ultimately granted. Accordingly, the applicants would demand additional compensation for granting rights to the patent applications before they were approved. That additional compensation could come in the form of an upfront payment or a premium on future royalties. The negotiations regarding the amount of that compensation would give rise to transaction costs, including the holdout costs discussed above.

Because of the transaction costs associated with licensing competing patent applications individually, antitrust agencies should issue prospective guidance clarifying that pooling similar patent applications does not violate the antitrust laws during a pandemic. Although it is generally problematic to have competitors cooperate and share information with each other, two factors overcome that concern.

First, as discussed above, the legal uncertainty associated with the patent applications in this situation makes the applications complements, not substitutes, even though they are nearly identical. As discussed, pooling complements can reduce transaction costs without eliminating competition. Secondly, developing a vaccine during a pandemic is more important is a more urgent concern than preventing companies from colluding with each other.

Another situation that could give rise to uncertainty in antitrust rules is when the relationship between patents is unknown or unclear. For example, suppose that entities A and B own separate patents where it is not clear whether developing the vaccine will require access to both patents, or if access to either of the patents will suffice. Put differently, it is not yet clear whether A and B are complements or substitutes. The antitrust guidance, of course, largely depends on a definite relationship between A and B; if they are complements, then the entities will be allowed to pool their patents, but if they are substitutes, the entities may not be allowed to form such a pool.

A similar situation arose during the SARS outbreak. Willard Tom, former counsel to the SARS patent pool, observed that it was not clear whether certain patents related to the genomic sequence of SARS would be complements or substitutes because some vaccine manufacturers might be forced to use both patents, while other vaccine manufacturers might be able to use either patent.

In *Princo Corporation v Int’l. Trade Com’n*, the Federal Circuit held that a patent-misuse claim cannot succeed against a defendant who has pooled patents as long

96 ibid.
97 ibid.
98 ibid, at 1418.
99 See above nn 90–93 and accompanying text.
100 See Greene (n 80), at 1437.
101 616 F.3d 1318 (D.C Cir. 2010) (en banc).
as a reasonable person may have believed that the patent in question could be complimentary to the patent pool. The *Princo* decision takes the right approach, but there is no guarantee that other circuits will follow its decision. Indeed, the Supreme Court arguably casted doubt on the decision when it held in *Kimble v Marvel Entertainment, LLC* that patent-misuse claimants can succeed without showing that the patent-holder’s conduct was anticompetitive. The Antitrust agencies should help alleviate that uncertainty by issuing guidance that follows the *Princo* rationale and clarifies that patent pools can include patents that a reasonable person would believe to be necessary for the development of a vaccine, even if the necessity is uncertain. Congress could also help alleviate the uncertainty by clarifying that patent protections extend to pro-competitive patent pooling agreements.

Patents can also hinder a response to a pandemic when only one entity has the rights to use one or more patents necessary to developing a vaccine. The basic rule of patent misuse is that the patentee may exploit his or her patent but may not use it to acquire a monopoly not embraced in the patent. Therefore, maintaining exclusive rights to a patent that is one of many patents necessary to the development of a vaccine might constitute misuse of the patent because it would effectively give the patent holder exclusive rights to develop the entire vaccine, which is greater than the smaller monopoly embraced in the individual patent.

But in fact, the enforcement agencies’ position is that exclusive licensing is generally permissible as long as the exclusive licensing agreement is not between competitors. Consequently, companies often obtain exclusive access to one or more patents necessary for the development of a vaccine. For example, during the H1N1 pandemic, MedImmune, a for-profit corporation, obtained exclusive licenses to patents that were key to developing a vaccine for H1N1, and the antitrust agencies did not offer resistance.

For rare or mild diseases, exclusive licensing of vaccine-related patents might be pro-competitive because companies will not invest in the research and development of vaccines unless they have exclusive access to the necessary patents. The reason is that vaccine development often requires a high level of initial investment, and if vaccine developers are worried that another developer will develop the vaccine before they do—and thereby reduce the potential for profits—the initial investment will not be worth making. Alternatively, the competing developers might develop substitute vaccines and thereby create competition for selling the vaccines to consumers, which would lower prices. Paradoxically, the fear that other developers

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102 ibid, at 1322.
103 576 US 446 (2015).
104 ibid, at 454–55.
105 ibid.
106 Department of Justice & Federal Trade Commission (n 88), at 20–21 (when a licensor grants an exclusive license to a licensee, the practice generally ‘may raise antitrust concerns only if there is a horizontal relationship among licensors, or among licensees, or between the licensor and its licensees’).
107 Greene (n 80), at 1415.
108 ibid, at 1432–33.
109 ibid, at 1432.
110 ibid.
will also make the investment and engage in an unprofitable race to develop the vaccine could ultimately deter all developers from researching the vaccine.

That rationale for exclusive licensing, however, is weak during a pandemic because the value of developing a vaccine is so large compared to the cost of an initial investment. For example, the value of saving even 10,000 lives—using traditional tools of cost-benefit analysis—could be as much as $100 billion. A vaccine for a deadly pandemic could save far more lives and thus exceed that value. By comparison, the cost of developing a vaccine—from research and discovery to product registration—is estimated to be between $200 million and $500 million. The costs are almost negligible compared to the value of the final product, and as a result, any developer that had a realistic chance at developing and patenting the vaccine would rationally attempt to do so even if competitors were racing to accomplish the same. That is exactly what happened during the coronavirus pandemic.

Senator Elizabeth Warren and Representative Alexandria Ocasio-Cortez were concerned that large corporations might attempt to monopolize patents key to developing vaccines and treatments. To prevent that potential, they proposed the Pandemic Anti-Monopoly Act, which would have imposed a moratorium on mergers and acquisitions involving companies with an exclusive license that impacts the coronavirus crisis for the duration of the pandemic. The bill provided a waiver only if the participating firms demonstrated that the transaction would advance critical national security, economic, or public health interests during the emergency. The bill also established a legal presumption against any transaction that would pose a risk to the government’s ability to respond to COVID-19.

Antitrust agencies should follow the lead of Senator Warren and Representative Ocasio-Cortez by issuing guidance clarifying that it is anticompetitive to exclusively license patents that are necessary to develop a vaccine for a pandemic pathogen; competition for such a valuable vaccine will not deter entities from investing in development. Notably, that guidance is inconsistent with this Note’s general suggestion that antitrust regulations should be relaxed during pandemics. Antitrust laws prohibiting exclusive licensing should be enforced more stringently because that regulation catalyses—rather than restrains—production.

111 Daniel Hemel, ‘Pharmaceutical Profits and Public Health Are Not Incompatible’ New York Times (8 April 2020).
112 Irina Serdobova and Marie-Paule Kieny, Assembling a Global Vaccine Development Pipeline for Infectious Diseases in the Developing World’ (2006) 96 American Journal of Public Health 1554, 1555.
113 World Health Organization, Draft Landscape of COVID-19 Candidate Vaccines—20 April 2020 (2020) (listing the large array of patents that are potentially useful in developing a COVID-19 vaccine), <https://www.who.int/blueprint/priority-diseases/key-action/novel-coronavirus-landscape-ncov.pdf>.
114 Office of Senator Warren (n 78).
115 ibid. The bill was sent to the House Committee on the Judiciary, but it appears that the committee never voted on it. H.R. 6989, 116th Congress, <https://www.congress.gov/bill/116th-congress/house-bill/6989/all-actions-without-amendments>.
116 ibid.
117 ibid.
IV. THE HISTORY OF ANTITRUST LAWS IN ECONOMIC DOWNTURNS

As discussed in Sections 1–3, wars and pandemics both result in a sudden and urgent increase in demand for certain products and services. In the world wars, the US government was forced to relax antitrust enforcement in order to allow the private sector to produce those necessary goods and services, and the US government should also relax antitrust laws during a pandemic. Unfortunately, as this section discusses, relaxing antitrust laws can cause or perpetuate an economic crisis.

The great depression

After Franklin Roosevelt was elected, his administration relaxed antitrust laws and replaced them with price and output controls to help the US recover from the Depression. More specifically, his administration passed the National Industrial Recovery Act (NIRA),\(^\text{118}\) which created the National Recovery Administration (NRA) to help industries create and enforce their own industry codes.\(^\text{119}\) The codes that the industries created functioned as agreements to limit price competition, restrict production, and restrict investment in plant and equipment.\(^\text{120}\) The NIRA provided antitrust immunity for conduct authorized by those codes.\(^\text{121}\)

Less than two years after FDR’s signature, the NRA had approved over 550 industry codes covering businesses employing 80 per cent of the private non-farm workforce.\(^\text{122}\) Many of those codes set minimum prices and limits on output.\(^\text{123}\)

John Maynard Keynes wrote President Roosevelt shortly after the NIRA was passed and predicted that the NIRA’s wage and price fixing would slow recovery from the Depression. Specifically, Keynes theorized that a proper recovery from the Depression would involve a drop in prices, which would stimulate aggregate demand.\(^\text{124}\) Keynes predicted that the NIRA codes would prevent prices from dropping, and thereby slow the economic recovery.\(^\text{125}\)

Empirical evidence vindicated Keynes’ predictions; the NIRA likely prolonged the Depression until the policy was reversed in 1938.\(^\text{126}\) The NIRA decreased investment by 60 per cent and decreased output by 13 per cent, which may have caused about 60 percent of the post-1933 depression in national output.\(^\text{127}\)

\(^\text{118}\) Carl Shapiro, ‘Competition Policy in Distressed Industries’ 25 Corporate Counsel Quarterly ART 4. (2009) (discussing the National Industrial Recovery Act under the heading ‘Lessons from the Great Depression’).
\(^\text{119}\) ibid.
\(^\text{120}\) ibid.
\(^\text{121}\) Alan J Messe, ‘Section 2 Enforcement and the Great Recession: Why Less (Enforcement) Might Mean More GDP’ (2012) 8 Fordham Law Review 1633, 1653. It also provided that the industries that benefited from the antitrust exemptions had to accept collective bargaining agreements with their labour unions. ibid at 1653.
\(^\text{122}\) ibid.
\(^\text{123}\) ibid, at 1653–54.
\(^\text{124}\) ibid, at 1663–64.
\(^\text{125}\) ibid, at 1663.
\(^\text{126}\) Crane (n 23) at 234; Messe (n 121), at 1653.
\(^\text{127}\) Crane (n 23) at 234. Once the policy was reversed in 1938, industrial production rose by an average of 22% per year. See Einer Elhauge, ‘Horizontal Shareholding’ (2016) 109 Harvard Law Review 1267, 1288.
The great recession

The role of lax competition policy in causing the 2008 Recession is described by the now-popular slogan ‘too big to fail’.128 That is, banks became so large that they posed systemic risks to the entire financial system.129 As a result, they knew that if they started to fail, they would receive favourable treatment by the government so that the US avoided economic collapse. The fact that the government would be forced to provide large banks with favourable treatment in the event of a financial crisis might have raised antitrust issues; favourable regulatory treatment can squeeze out competition from smaller entities that could not expect to receive such treatment.130

The Bush Administration, however, did not address those antitrust issues before the Recession. Its official policy was to avoid bringing antitrust actions against companies even if they were engaging in a practice that harmed consumers, so long as the Administration thought the practice in question was, on balance, economically efficient.131 Under that policy, banks were allowed to continue to grow, understanding that the taxpayers might be forced to act as their backstop if they failed.132

After the Recession occurred, presidential candidate Barack Obama rebuked the Bush Administration’s official policy of declining to bring enforcement actions against monopolies that harmed consumers so long as the economic efficiencies generated by the monopoly were greater than the harm to consumers.133 The American Antitrust Institute (“AAI”) echoed Obama’s concerns, arguing that enforcement actions should be brought when a monopolization harmed consumers even if the monopoly generated other economic efficiencies.134

When Obama was elected, the Antitrust Division issued a press release announcing its policy that a monopolist’s conduct that produced significant efficiencies would nonetheless contravene antitrust laws if it imposed harm on consumers in the relevant market that was disproportionate to the efficiency benefits of such conduct.135

Christine Varney, the newly appointed head of the DOJ Antitrust Division, implied that stronger antitrust enforcement—rather than the weak antitrust policy of the Bush administration—would help foster recovery from the Recession.136 She cited the role that NIRA played in prolonging the Great Depression to argue that antitrust enforcement would foster recovery from the Recession by preventing companies from colluding to keep output at suppressed levels and thereby collect monopoly rents.137

The Obama Administration was also critical of the Bush Administration’s Emergency Economic Stabilization Act (‘EESA’), which President Bush signed on 3 October 2008 in response to the Recession.138 Under that programme, the Treasury

128 Eric Dash, ‘If It’s Too Big to Fail, Is It Too Big to Exist?’ New York Times (20 June 2009).
129 ibid.
130 Darren Bush, ‘Too Big to Bail’ (2010) 77 Antitrust Law Journal 277, 279–80.
131 Messe (n 121), at 1639.
132 Bush (n 130), at 279–80.
133 Messe (n 121), at 1639.
134 ibid.
135 ibid, at 1641.
136 ibid, at 1643.
137 ibid.
138 Bush (n 130), at 291.
Secretary could purchase troubled assets from financial institutions in order to stabilize financial markets. The purchasing programme conflicted with antitrust policy because it was not structured to preserve competition in the markets it affected. Section 103 of the EESA lists the considerations the Secretary was required to take into account in exercising his authority to administer the Troubled Asset Relief Program (‘TARP’), and those considerations do not include preserving competition.139

Indeed, some of the considerations might have encouraged the Secretary to favour already-large corporations when purchasing troubled assets, thereby exacerbating existing monopolies.140 For example, in determining eligibility for a programme called the Targeted Investment Programme, the Treasury could consider ‘whether the institution is sufficiently important to the nation’s financial and economic system . . .’.141 Furthermore, the Secretary was not required to consult antitrust agencies before purchasing troubled assets.142 Ultimately, the lion’s share of the troubled asset relief funds went to the largest companies.143 The message was that if a company became large enough and posed systematic risk, the US government would guarantee its risky investments.144

Lessons from the great depression and the great recession

In summary, the NIRA demonstrated that weak antitrust enforcement allows industries to hold production at suppressed levels and thereby prolong an economic slump. About seven decades later, the Great Recession demonstrated that weak competition policy can also cause a recession by giving companies the confidence to act recklessly, knowing that if their risks backfire, the US government will be forced to bail them out.

Those lessons should guide the US government’s preparation for and response to a pandemic. That is, a proper response should recognize the dangers of relaxing antitrust regulations during a recession: (i) it could allow industries to suppress output and maintain high prices, and (ii) consolidation could allow companies to become ‘too big to fail’, which could encourage them to act recklessly and take risks that might deepen the recession or cause a subsequent recession.

V. USING NON-ANTITRUST REGULATIONS TO MITIGATE THE RISKPOSED BY RELAXING ANTITRUST LAWS DURING AN ECONOMIC SLUMP

Sections 1–3 argued that the US government should relax some antitrust laws during a pandemic in order to allow the private sector to adequately respond to a boom in demand for healthcare and pharmaceutical goods and services. As explained in

139 ibid, at 293.
140 ibid, at 293–94.
141 ibid, at 294.
142 ibid, at 293.
143 ibid, at 294.
144 While campaigning for President, Barack Obama sharply criticized the Bush Administration for its lack of emphasis on competition policy in responding to the Recession that had, in the first place, been caused partly by inadequate antitrust enforcement. Messe (n 121), at 1641.
Section IV, however, relaxing antitrust laws has historically been harmful to the economy during a severe economic downturn. Thus, even though it is necessary to relax some antitrust rules during a pandemic, those accommodations should be accompanied by regulations that mitigate the associated risks. This part explores tools that the US government can use to mitigate the risks associated with relaxing antitrust laws.

Managing prices and output levels through the Defense Production Act

Fundamentally, the risk raised by a lack of antitrust enforcement is that competitors will collaborate by fixing prices and suppressing output in order to collect monopoly rents. The most direct way to mitigate that risk is to directly regulate output and dictate prices. The Defense Production Act of 1950 is the primary source of presidential authorities to expedite and expand the critical supplies and services from the private sector to promote national defence. Specifically, it gives the President authority to require private companies to accept contracts and orders from the federal government and prioritize them. It also allows the President to allocate materials, services, and facilities for the national defence and take actions to restrict hoarding of needed supplies. When the need for the production is urgent and there is no time for free-market processes—like bidding and lengthy negotiations—to set a price, Presidents often invoke the Defense Production Act to set a price and demand adequate output.

During the coronavirus pandemic, President Trump used the Defense Production Act to order General Motors to produce ventilators, to order 3M to produce respirator masks, and to prevent hoarding of essential supplies. He was generally hesitant to use the Act, though, because he was concerned that invoking the Defense Production Act could constitute ‘nationalizing our business’. Invoking the Defense Production Act should not be equated with nationalizing a business because the ownership and management of the companies remain privatized. It is better conceived as a macroeconomic device to temporarily set price and output levels when free-market processes cannot determine them. Thus, it should not be considered a last resort; it should be used routinely during a pandemic because without the competitive conditions that allow free markets to operate, centralized control is necessary. It is necessary because if competitive free markets are not determining price and output, and central controls are not determining price and output, then unchecked corporations are determining those variables. During a

145 Federal Emergency Management Agency, Use of Defense Production Act Authorities to Support the Pandemic Response (2020).
146 ibid.
147 Anshu Sirpurapu, ‘What Is the Defense Production Act?’ Council on Foreign Relations <https://www.cfr.org/in-brief/what-defense-production-act> (10 April 2020).
148 Zolan Kanno-Youngs and Ana Swanson, ‘Wartime Production Law Has Been Used Routinely, but Not With Coronavirus’ New York Times (31 March 2020) (noting that the Defense Department estimates that it has used the Defense Production Act’s powers 300,000 times a year).
149 Sirpurapu (n 147).
150 Kanno-Youngs and Swanson (n 148).
public health emergency, unchecked corporations have incentives to restrict output and collect monopoly rents.

**Setting prices and output through agency oversight of private sector collaborations**

The Defense Production Act is the most important tool for the US government to set price and output levels for government contracts. Many of the contracts for medical equipment and services, however, are made between private parties. Because the relaxation of antitrust laws and the urgency of the negotiations threatens the competitiveness of the free markets, the US government should use its regulatory powers to ensure that the contracts between private parties are fair and efficient.

As discussed in Sections II–III, the DOJ issued business review letters during the coronavirus pandemic permitting companies to collaborate—under the supervision of FEMA and HHS—to distribute medical equipment and services. Those companies were allowed to discuss competitively sensitive information with each other, such as price and output levels. As a safeguard to ensure that the companies did not use those discussions to cohesively raise prices, the business review letters stated that FEMA would oversee and approve any pricing decisions.

The antitrust agencies should use the same strategy to control the price and output levels for other joint ventures. That is, the agencies should allow the private sector to discuss strategies for manufacturing and distributing medical equipment and services, which might include discussions about prices and output levels. But to ensure that the goals of those conversations are to meet the growing need for medical supplies and services—rather than restrict output or raise prices—the agencies should have the final say on the price and output levels for collaborative arrangements.

**C. Mitigating financial risk through the Dodd–Frank Act**

As discussed in Section IV, President Bush’s EESA arguably exacerbated a systematic issue in the economy that contributed to the Great Recession. Specifically, the EESA confirmed companies’ expectations that, in the event that a large bank began to fail and pose a systemic risk to the economy, the US government would treat that bank favourably and bail it out. Moreover, the EESA allowed large banks to purchase additional assets and thereby pose an even greater systemic risk to the economy, which would further incentivize the government to bail the banks out in the event they started to fail again in the future.

After he was elected President, Obama signed into law the Dodd–Frank Act, which provided a new approach for the US government to avoid exacerbating monopolies in a future economic crisis. The Act gives the Federal Reserve Board oversight of certain transactions that might have a systemic impact on the financial

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151 See above nn 47–51 and accompanying text.
152 ibid.
153 ibid.
154 See above Section ‘The Great Recession’.
155 ibid.
156 ibid.
system, and instructs the Board to ‘consider the extent to which the proposed acquisition would result in greater or more concentrated risks to global or United States financial stability or the United States economy’. The transactions that are subject to approval by the Federal Reserve Board must also complete Hart–Scott–Rodino filings that give the Department of Justice Antitrust Division oversight over the transactions. By giving the Federal Reserve Board and the Antitrust Division joint oversight over transactions that could create systemic risk, the Dodd–Frank Act aims to avoid situations in which the US government is forced to favour monopolies that have become too big to fail.

The Dodd–Frank Act also creates a procedure for liquidating failing firms whose failures might pose a systemic risk to the economy, instead of bailing those firms out with a programme like TARP. Specifically, the Act allows the Secretary of the Treasury to merge the failing company with another company, or transfer any asset or liability of the failing company. The Act provides for antitrust review for mergers ordered by the Secretary of the Treasury.

Together, Dodd–Frank’s measures help remove the government guarantee on large financial institutions’ systemically risky assets. As a result, financial institutions will be more reluctant to take on those risky assets in the first place. Notably, the Dodd–Frank Act also contains certain prohibitions and restrictions on the ability of financial companies to engage in risky behaviour, such as proprietary trading or cooperation with private equity funds.

Those pre-emptive measures will mitigate any economic downturn during a pandemic because the presence of risky assets tends to deepen a financial crisis. For example, before the Great Recession, mortgage-backed securities—highly risky assets—became popular. Banks and other financial entities created mortgage-backed securities by issuing high-interest mortgages, and then selling bundles of those loans to purchasers. Once the consumers started to default on their loans, mortgage-backed securities lost value, and the effects rippled across the whole economy to those who originally issued the loans, those who insured the loans, and those who purchased the loans.

Dodd–Frank prohibits banks from investing in some such risky assets, and it disincentivizes banks from taking on risky assets by establishing procedures to liquidate banks whose assets fail, instead of bailing those banks out. By doing so, it puts the USA in a less vulnerable position in economic downturns.

157 Samuel N Weinstein, ‘When Systemic Risk Meets Antitrust: Dodd-Frank’s Impact on Competitive Markets in the Wake of an Economic Crisis’ (2016) 21 Stanford Journal of Law, Business & Finance 286, 313.
158 ibid, at 314.
159 ibid.
160 ibid, at 315.
161 ibid.
162 ibid.
163 Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub L No 111-203, s 619 (2010).
164 Daniel Covitz Nellie Liang and Gustavo A Suarez, ‘The Evolution of a Financial Crisis: Collapse of the Asset-Backed Commercial Paper Market’ (2013) 68 The Journal of Finance 815, 815.
165 ibid; David B Grusky and other, ‘The Great Recession’ (2011) 21, Russell Sage Foundation.
Maintaining market integrity by using broadly applicable antitrust policies
It may be tempting for antitrust agencies to make small, individual exemptions from antitrust policies during a pandemic, rather than announce policies that broadly relax antitrust enforcement for the duration of the emergency. Making only individual exemptions, one could argue, would limit the consolidation in the markets, reduce opportunities for anti-competitive conduct, and lessen the spread of sensitive information between competitors.

Providing individual corporations with special exemptions, however, would have unintended consequences similar to the EESA’s. Such a policy would likely favour the largest corporations because they have the greatest capacity for quick production of medical goods and services. When those large corporations received exemptions from antitrust policies, they would grow faster than their competitors, which would increase their monopoly power. Furthermore, by granting individualized exemptions, the US government would send a message to investors and would-be entrepreneurs that it would continue to favour large corporations, which would discourage competition. Put differently, just as the EESA made banks ‘too big to fail’, individualized exemptions from antitrust policies would make healthcare companies ‘too big to regulate’. Thus, even though individualized antitrust exemptions may limit market consolidation in the short term, its long-term consequences would repeat the failures of Bush’s response to the Great Recession.

CONCLUSION
The coronavirus pandemic presents a novel challenge for antitrust regulators. On the one hand, they need to allow companies to collaborate to urgently respond to the public health crisis. On the other hand, they also need to prevent monopolistic conduct that could deepen a recession by keeping prices elevated and output suppressed.

As I have suggested, the two-part problem requires a two-part solution. First, the US government should temporarily adjust antitrust laws to allow companies to helpfully collaborate to respond to the public health crisis. The government should emphasize clear safety zones for collaborations tailored to the coronavirus response so that companies have the confidence to urgently work together. Secondly, the US government should implement non-antitrust regulations to mitigate the economic downturn, including price and output controls. While this article’s investigation has been limited in scope to the USA, its conclusions are applicable to other countries as well.

It is too late to implement those measures in response to the coronavirus outbreak that began in the spring of 2020, but the government should be prepared to implement them in response to the next pandemic.