MONOPSONY POWER AND COVID-19: SHOULD WE APPOINT EXEMPT MONOPSONISTS TO DEAL WITH THE CRISIS?

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I. INTRODUCTION

Over the spring of 2020, the novel strain of coronavirus COVID-19 has upended countless areas of life, from home economics to the structure of global supply chains. Since the beginning of the outbreak, key supplies have been immediately and unexpectedly in high demand worldwide. As many supplies were bid away from hard-hit areas, some U.S. officials and policymakers began calling for a consolidated buyer to countervail the power of overseas manufacturers and direct supplies to the areas within the U.S. that needed them most.

This article questions whether such a consolidated buyer — in competition terms, a "monopsonist" — could adequately address the crises of demand and distribution presented by COVID-19 in a manner consistent with the U.S. antitrust laws. In particular, we consider whether an exemption from the antitrust laws to allow for buyer coordination in the context of the COVID-19 crisis is necessary. We conclude that, while a specific exemption would be unnecessary — and likely cause significant anticompetitive harm — there are ways for buyers to coordinate to address the crisis that are fully consistent with contemporary understandings of the U.S. antitrust laws.

II. COMPETITION ISSUES CREATED BY COVID-19

There are two problems unique to the COVID-19 crisis and sharply different from normal market conditions that lead to the demand for a consolidated buyer.

The first is the demand shock. Under normal conditions, the demand for medical supplies, pharmaceuticals, and personal protective equipment is at least predictable. COVID-19, however, created an immediate and drastic jump in demand, not only from typical medical-supply buyers like hospitals, but also from consumers who, until the coronavirus hit, had very little demand for things like N95 face masks. Even assuming that global supply chains are strong enough to weather the crisis, the gap between the pre- and post-crisis demand for these goods means that existing supplies and capacity would be insufficient to meet the new demand. In the absence of price-gouging laws (which do not exist in the U.S. at the federal level), this would also cause prices to jump, at the same time that the economy entered a recession that leaves businesses and consumers with less spending money.

The second is the distribution shock. There may be localities that experience a sudden rise in COVID-19 cases but lack the resources to bid against other large buyers (such as the state of New York) in a market where supply is scarce. While ordinarily we may consider the market efficient when it directs resources toward those with the highest willingness to pay, the outcome here may leave the outbid areas with significant public health problems that cannot be measured solely in economic terms — and which may in turn spread to other areas as well. This distribution

problem exists on the national level, where the federal government and states bid against each other for supplies. But it also exists at the international level for those U.S. buyers that source directly from overseas, in which case they may be bidding against many other wealthy and powerful buyers in Asia, Europe, and elsewhere.

III. INITIAL STEPS TOWARD MONOPSONY

Responding to this disruption, the federal government took initial steps toward creating some sort of consolidated buyer power with the so-called "Project Airbridge." Under this project, the Federal Emergency Management Agency ("FEMA") would oversee the direct and expedited shipment of critical supplies from overseas manufacturers, and then provide them to five U.S. supply companies for distribution.[2]

Likewise, the U.S. and other foreign governments have initiated measures that, in various ways, centralize market power among certain private actors to respond to the crisis, despite or through exemptions from the competition laws. The Defense Production Act, which President Donald Trump first invoked in late March 2020, provides antitrust immunities for businesses working jointly under the direction of the Executive Branch to deal with the coronavirus crisis.[3] The U.S. Department of Justice ("DOJ") has officially announced that it would not challenge coordination among the five Project Airbridge distributors for purposes of carrying out the federal plan,[4] while regulators in the EU, UK, and Australia have similarly granted critical businesses a limited antitrust immunity to coordinate for the efficient distribution of consumer supplies.[5] Similar coordination could easily be envisioned on the supply side, where groups of U.S. health care facilities or emergency supply buyers consolidate their power to direct goods toward the U.S. on more favorable terms.

Nonetheless, certain state officials have criticized the federals programs for not doing enough to centralize buyer power. Illinois Governor J.B. Pritzker announced that Illinois will source the state's supplies directly from China, because the federal programs still left room for unhealthy competition among states, who would continue to bid against each other for supplies.[6] New York Governor Andrew Cuomo likewise expressed exasperation with the nationwide bidding system that pit all 50 states and the federal government against each other in escalating bids for ventilators and other critical supplies and called instead for a single purchasing agent to buy all needed supplies and allocate them to the states based on need.[7]

The idea of such consolidated buyer power at this time of crisis has some surface appeal. There is a market anomaly caused by a large uptick in demand for certain products, combined with the downtick in supply caused by manufacturing facilities being impacted by the pandemic. Allowing single buyers would reduce prices and perhaps make distribution more efficient.

However, the establishment of even well-intentioned monopsonists departs from the antitrust mainstream. It hearkens back instead to older conceptions of competition law that are now viewed as antiquated. For instance, early antitrust legislation such as the Shipping Act of 1916[8] or the Capper-Volstead Act of 1922,[9] expressly permitted shipping and agricultural businesses to agree on price levels and output restrictions

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2 *FEMA COVID-19 Supple Chain Task Force: Supply Chain Stabilization*, FEMA (April 8, 2020), https://www.fema.gov/news-release/2020/04/08/fema-covid-19-supply-chain-task-force-supply-chain-stabilization.

3 50 U.S.C. § 4558(j).

4 *Department of Justice Issues Business Review Letter to Medical Supplies Distributors Supporting Project Airbridge Under Expedited Procedure for COVID-19 Pandemic Response*, U.S. Dep't of Just. (April 4, 2020), https://www.justice.gov/opa/pr/department-justice-issues-business-review-letter-medical-supplies-distributors-supporting.

5 *Antitrust: Commission provides guidance on allowing limited cooperation among businesses, especially for critical hospital medicines during the coronavirus outbreak*, European Commission (April 8, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_618; *Supermarkets to join forces to feed the nation*, Gov't of the U.K. (March 19, 2020), https://www.gov.uk/government/news/supermarkets-to-join-forces-to-feed-the-nation; *COVID-19: CMA approach to essential business cooperation*, Gov't of the U.K. (March 19, 2020), https://www.gov.uk/government/news/covid-19-cma-approach-to-essential-business-cooperation; *Medicine manufacturers to coordinate on COVID-19 response*, Australian Competition & Consumer Commission (April 3, 2020), https://www.accc.gov.a.u/media-release/medicine-manufacturers-to-coordinate-on-covid-19-response.

6 *Medline part of FEMA's controversial protective gear shipment push*, Crain's Chicago Business (April 7, 2020) https://www.chicagobusiness.com/health-care/medline-part-femas-controversial-protective-gear-shipment-push.

7 *'It's like being on eBay': US States competing to buy ventilators, says Cuomo – video*, The Guardian (March 31, 2020), https://www.theguardian.com/us-news/video/2020/mar/31/its-like-being-on-ebay-us-states-competing-to-buy-ventilators-says-cuomo-video.

8 46 U.S.C. § 801, *et seq.*

9 9 U.S.C. § 291, *et seq.*

for the perceived common good. Most antitrust scholars believe that these acts are out of date — that the common good is best served through competition, not government-sanctioned monopoly — but struggle with how to remove them from businesses that have built around and come to rely upon them.

IV. MONOPOLY vs. MONOPSONY: LEGAL AND ECONOMIC ANALYSES

Will creating a monopsonist and exempting it from antitrust scrutiny solve COVID-19's demand and distribution problems?

To answer that question requires an understanding of monopsony in the context of U.S. antitrust law. In general, the antitrust laws do not distinguish between restrictions imposed by buyers and those imposed by sellers. The purpose of the law is to prevent anticompetitive activity, regardless of where in the supply chain the anticompetitive activity occurs. This may be seen, for instance, in the DOJ's recent moves to police "no-poach" employment agreements — where businesses agree to not make job offers to competitors' employees — as naked price-fixing.[10] According to the DOJ, these agreements reflect a naked restriction on trade by the buyers of labor, driving down the wage price by making it more difficult for job candidates to find prospective employers.

But despite similarities with sales-side price-fixing, many of the buy-side cases price-fixing cases have not been treated in the same way that a naked price-fixing sales cartel would be. Court decisions in a series of high-profile cases that challenged the NCAA's "amateurism" restrictions, which prohibited members from paying student athletes a salary, ultimately permitted these restrictions under the rule of reason, as necessary to keep college sports distinct from professional sports.[11] The DOJ and Federal Trade Commission ("FTC") likewise note that many competitor agreements to jointly purchase inputs for their goods "do not raise antitrust concerns and indeed may be procompetitive."[12]

This enforcement history makes sense in light of the often-stated modern maxim that "antitrust law protects competition not competitors." The antitrust laws are indifferent to questions of business welfare that do not affect consumer welfare, and see the free play of competition, unconstrained by monopoly power, as the best way to ensure consumer welfare via the ensuing low prices and variety of goods and services. Thus, the laws are actively hostile to business protectionist measures that would increase prices. Many of these — such as price-fixing or output restrictions — are classic examples of exactly what the antitrust laws are designed to *prevent*, and would be condemned as illegal per se. In contrast, most buy-side activity has the opposite effect. To the extent that buyers, singly or jointly, exercise their power as buyers, they would typically do so to drive down the prices they pay. All else being equal, in the short term this should lead to lower prices not only to the monopsony firms, but also to each of the buyers beneath them in the supply chain — all the way to the end consumer — who would benefit from the lower costs that the monopsonist obtained.

Indeed, given the law's focus on low prices, it is perfectly reasonable for the U.S. antitrust law to be more lenient toward buyer power than it is to seller power. This leniency toward monopsony power is merely a logical extension of the existing law's consumer welfare goals, Thus, most cases where buy-side power was found anticompetitive consist of a buyer taking some action that restricts supply or raises prices in a different market.[13] By contrast, the exemptions contained in the Shipping Act or the Capper-Volstead remain fundamentally inconsistent with contemporary consumer welfare goals. They are best conceived as old carve-outs to industries that persist for historical reasons and likely would not pass if included in new legislation today.[14] Therefore, if we are to characterize particular buyer power as beneficial it is not out of any political determination of the sort that the twentieth century reformers sought (i.e. to give them legislative immunity from the antitrust laws), but rather from some intrinsic procompetitive aspect of the power they actually wield. In the context of COVID-19 then, the important antitrust question becomes whether the centralized buyers that some envision really fits this definition of procompetitive benevolence.

10 *NO-POACH APPROACH*, U.S. Dep't of Just., https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach (last updated Sept. 30, 2019).

11 *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 4:14-md-02541-CW, Dkt. 1162 (N.D. Cal. Mar. 8, 2019).

12 U.S. Fed. Trade Comm'n and U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors*, U.S. Fed. Trade Commission 14 (April 2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

13 See, e.g. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 549 U.S. 312, 324-26 (2007) (holding that a predatory bidding claim is only actionable if it leads to a "dangerous probability" of higher prices in the output market to recoup losses in the bidding market).

14 See John Roberti, Kelse Moen & Jana Steenholdt, *The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law*, U.S. Dep't of Just. 1-2, https://www.justice.gov/atr/page/file/1042806/download (last visited on May 1, 2020).

V. MONOPSONY: INEFFICIENCIES AND ANTICOMPETITIVE IMPACT

The above analysis should not imply that monopsonies are legal or efficient. For one thing, even non-predatory, well-intentioned monopsonies can eliminate competition upstream by foreclosing new entrants through the mere act of driving too hard of a bargain. If a single firm has the power to drive prices down in an upstream market to the point where upstream producers begin restricting supply or closing their businesses, then the contraction in the marketplace may offset any benefits of the low prices that the monopsonist achieved. This contraction may also cause prices to rise again over time in the downstream market; even if the monopsonist is able to keep prices down for its own inputs, the downstream suppliers, operating under competitive conditions and unable to determine prices on their own, would see market prices increase as a result of the declining supply. Conversely, even if the monopsonist does not drive prices down, new entrants who would otherwise compete with the monopsonist and bring new innovation and service to its market may well never be able to gain sufficient traction in the face of a monopsonist that is able to buy in high volume. The antitrust enforcers would likely not challenge this behavior's *legality* so long as it was the outcome of freely competitive market activity and not through some type of bad action (like predatory pricing) or anticompetitive mergers. But even still, its anticompetitive *economic* effect is clear.

VI. COMPETITIVE IMPLICATIONS OF A COVID-19 SUPPLY MONOPSONIST

We now return to the question posed at the outset: is encouraging monopsony power by creating an antitrust exemption for buyers of critical supplies the solution to the demand and distribution shocks caused by COVID-19? This exemption could occur, for instance, by allowing for U.S. buyers to collaborate together to coordinate bids to foreign manufacturers, potentially up to the point where one single buyers' cooperative serves as the sole gateway point for foreign manufacturers to supply the U.S. market.

On the international level, the monopsony firms would create several advantages that may address the demand and distribution issues that U.S. consumers face.

For one, foreign manufacturers may prefer to deal with a single firm acting on behalf of all U.S. purchasers, because this lowers the inefficiencies and transaction costs inherent in dealing with a patchwork of smaller firms. Moreover, the act of eliminating many different U.S. bidders from the international marketplace would prevent prices from rising as sharply as they otherwise would. While the U.S. monopsony firm would still have to bid against international suppliers, the fact that it would no longer have to bid against the numerous other U.S. suppliers would curtail the bidding wars that Gov. Cuomo and others have lamented, which pit all states against each other in an escalating war of rising costs. Finally, if the monopsony firm were still unable to procure adequate supplies for the U.S., it may be able to use its combined resources to temporarily bid higher for goods than each independent constituent buyer would be able to do on its own, thus making the U.S. a more attractive buyer and diverting more supplies to the U.S. market. By adding to the U.S. supply, higher bidding would also help close the gap between supply and demand that would lead to higher prices domestically.

Problems of distribution may still exist *within* the U.S., as the federal government, states, and other private actors would still bid against each other to buy the supplies from the monopsony buyers. However, if the monopsony firms successfully leveraged their buying power to increase the U.S. supply, then demand would better match supply, such that prices would not be expected to rise as much as they otherwise would. Of course, some of the pricing benefit could be offset by the fact that the monopsony firms may have to increase downstream prices if international competition forces them to pay higher prices to acquire their products. While in the short-term, the they could cover these increased costs through higher revenues based on the increased U.S. demand for medical supplies and personal protective equipment, once the crisis abates this demand would decrease to normal levels and any benefit of paying higher prices to redirect resources would disappear.

Nonetheless, there are other significant tradeoffs to allowing antitrust exemptions for a COVID-19 supply monopsonist, which emphasize why any such program would be an ill-advised solution to the crisis.

The clearest tradeoff is the restricted choice for U.S. consumers. The entire U.S. market would be dependent on a single entity's buying decisions. While the monopsony power would be helpful to make up for the demand and distribution problems caused by COVID-19, the presence of a single buyer would also cause the relative quality of the goods being distributed to decrease when measured by other criteria aside from just quantity and price. In the pre-COVID-19 world, where many buyers sourced goods from overseas and sold them into the U.S. independently, the buyers would compete for business on dimensions beyond just price, such as customer service and product quality. Different buyers might

also source from different geographic areas and from different manufacturers — some of which may be found to offer better quality goods or better deals — or to source alternative products to meet the same needs. Competition is good in part because it facilitates this kind of discovery process and incentivizes competitor firms to experiment in areas that one single firm might overlook. This multiplicity of choices benefits consumers just as low prices do, and eliminating that choice to establish one gateway buyer does present a real trade-off.

Moreover, the longer that a single supply monopsonist exists, the more it will tend to stifle the dynamic discovery process of a free market and foreclose other businesses. Forcing upstream suppliers to sell at less profitable levels than they would in a market of many competing bidders will tend in the long-term to cause those suppliers to restrict production, as discussed above. Causing international suppliers to curtail production would also mean that U.S. long-term supply will decrease.

Indeed, the long-term impact of an antitrust exemption allowing for anticompetitive behavior may be the most deleterious effect of all. In previous government-sanctioned monopolies, the process of deregulation was often painful and imposed substantial short-term costs for consumers. It took a half century to fully deregulate the U.S. telephone industry from the formation of the Bell Telephone monopoly in the mid-twentieth century. Even after the so-called "Ma Bell" monopoly was broken up into independent "Baby Bell" companies in 1984 (each of which maintained a regional monopoly), it took decades of subsequent regulation at the state and federal level to open up competition in the regional monopolies and allow upstart competitors the chance to enter the monopolized market. Even some of the most important deregulatory changes of the time, such as the 1996 Telecommunications Act, served in the short term to trigger *increased* mergers and consolidation among the Baby Bell companies. The threat that monopoly privileges, once bestowed, create new interest groups that resist repeal of their privileges should not be taken lightly.

The question of whether such trade-offs are justified in the unique context of COVID-19 is ultimately a political one. It is certainly reasonable to believe that, given severe public health concerns, it is better to ensure adequate supply and sacrifice some non-price competition for the sake of addressing significant human needs. Similar concerns likely influence the FTC and DOJ's inclinations to provide significant leeway to joint healthcare purchasers in the U.S. already, going back decades before the COVID-19 outbreak began. Still, the competitive concerns noted above indicate that, even if the immediate effects of a national coronavirus supply monopsonist would benefit U.S. consumers through increasing the supply of scarce goods, policymakers should not neglect the long-term concerns that make monopsonies anticompetitive in the first place.

VII. PROCOMPETITIVE SOLUTIONS TO THE COVID-19 CRISIS

However, there is a final reason why an antitrust exemption is likely not necessary here. Antitrust jurisprudence has evolved to a place where the risk of a false positive finding of anticompetitive behavior has been diminished. At times, organizations have argued that they need an exemption from the antitrust laws because procompetitive activity will wrongly be mistaken for anticompetitive. This may have been a plausible basis for an exemption in the early twentieth century. But since then, the courts have widened the use of the rule of reason in antitrust cases, opening the door for many collaborations and combinations justified on other procompetitive grounds to be analyzed on their merits, rather than being found per se unlawful.[15]

This leaves open many options to address the demand and distribution shocks short of creating an exemption. For example, some buyers could purchase jointly, or could collaborate to temporarily harmonize distribution.

Buyers could likely find support for such collaboration in existing FTC and DOJ guidance for healthcare companies going back to 1996. The agencies' "Statement of Antitrust Enforcement Policy in Health Care" specifically notes that "[m]ost joint purchasing arrangements among hospitals or other health care providers do not raise antitrust concerns" as "such collaborative activities typically allow the participants to achieve efficiencies that will benefit consumers."[16] The Statement goes on to say that the agencies will not challenge any collaborations between health care providers to make joint purchases from suppliers so long as (1) these purchases account for less than 35 percent of the total sales of the product or service in the relevant market and (2) the products purchased jointly account for less than 20 percent of the total sales revenue from each of the members of the joint purchasing arrangement.[17] In a world of globalized supply chains, it is very likely that US buyers alone purchase

15 *Id.*

16 U.S. Fed. Trade Comm'n and U.S. Dep't of Justice, *Statements of Antitrust Enforcement Policy in Health Care*, U.S. Dep't of Just. 55 (August 1996), https://www.justice.gov/atr/page/file/1197731/download.

17 *Id.* at 54-55.

less than 35 percent of the world's medical supplies. The sales of these products would likely also account for less than 20 percent of the purchasers' total revenue, especially if the crisis dissipates and medical spending regresses to its pre-COVID-19 norm.

The agencies also provide suggestions for buyers entering a joint purchasing arrangement to lessen anticompetitive concerns. They recommend that buyers appoint an independent agent who is not employed by any member to act on behalf of the purchaser and to make all communications between that agent and any given member confidential, and not shared with the other members.[18] As is typical in buy-side antitrust enforcement, the agencies primarily express concern that the purchasing collaborations could be used to standardize and fix the buyers' downstream prices where they compete against each other in sales. But following the enumerated firewalls against sharing joint buyer information, according to the DOJ and FTC, "will reduce substantially, if not completely eliminate, use of the purchasing arrangement as a vehicle for discussing and coordinating the prices of healthcare services offered by the participants."[19] Some precedent already exists for the antitrust enforcers to find similar collaboration procompetitive in the coronavirus context. The DOJ already considered the collaboration at issue in Project Airbridge, between five medical supply distributors, and determined, not only that it would not take enforcement action, but that the distributors "should be applauded."[20]

By contrast, an antitrust exemption by its nature carves out conduct that it likely to be broader than necessary and difficult to undo. For example, if an exemption were granted, the firms could use their position in a predatory manner to gain an unfair advantage in other areas, such as raising sales prices permanently or tying the sale of COVID-19 supplies to sales of another of the monopsonist's unrelated products. An exemption would enable this behavior by cementing the buyer's market power under the force of law. But the antitrust laws as they currently exist would allow the procompetitive elements of joint buying but always allow the option that, if anticompetitive conduct occurs, the agencies can step in and end the collaboration.

Undoubtedly, the coronavirus is wreaking havoc on the U.S. economy and creating distortions that cannot be ignored. However, the antitrust laws allow necessary collaboration to meet the crisis. Encouraging the consolidation of buyer power without scrutiny under the antitrust laws is not the right solution.

18 *Id.* at 57.

19 *Id.*

20 *Department of Justice Issues Business Review Letter to Medical Supplies Distributors Supporting Project Airbridge Under Expedited Procedure for COVID-19 Pandemic Response*, U.S. Dep't of Just. (April 4, 2020), https://www.justice.gov/opa/pr/department-justice-issues-business-review-letter-medical-supplies-distributors-supporting.

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