



On the COVID-19 Vaccine Corporate Pledge

Posted by Barak Orbach (University of Arizona), on Thursday, September 10, 2020

Editor's note: Barak Orbach is Professor of Law at the University of Arizona James E. Rogers College of Law.

The COVID-19 pandemic created a race for the development of vaccines. On September 8, 2020, CEOs of nine major pharmaceutical companies signed a [pledge](#) promising not to file for regulatory approval or authorization of their experimental COVID-19 vaccines until their safety and efficacy are demonstrated through established scientific standards. Fearing that political pressures would compromise regulatory processes, the CEOs agreed to curb competition among their companies.

The companies' commitments to "high ethical standards" and "sound scientific principles" are critically important to the success of public health policies and the long-term profitability of pharmaceutical companies. Agreements among competitors to defer competition, however, could be unlawful under U.S. antitrust laws and competition laws of other countries. Should the antitrust agencies investigate the nine companies and their CEOs? The devastating costs of the COVID-19 pandemic create powerful incentives to discount the virtues of antitrust enforcement.

The relationship between national emergencies and antitrust enforcement is an old antitrust theme that [one of my recent papers](#) examines. The United States partially suspended antitrust enforcement in three prior national crises: WWI, WWII, and the Great Depression. Approving the WWII suspension, President Franklin D. Roosevelt explained the rationale underlying the suspensions: "For unless [our effort to win the war] is successful, the antitrust laws, as indeed all American institutions, will become quite academic."

There is a broad consensus among antitrust experts that the suspensions in the first half of the 20th century were ill-conceived and unproductive. Learning from past experiences, over the past twenty years, the DOJ's Antitrust Division and FTC developed policies, which recognize that national emergencies might require immediate action and cooperation among businesses. Applying these standards, in March 2020, the DOJ and FTC issued a "[Joint Statement Regarding COVID-19](#)." The statement reiterates an ideological conviction that "efficiency-enhancing" R&D collaborations are "typically procompetitive." In actuality, efficient collaborations among competitors could also eliminate competition.

Some antitrust experts would undoubtedly argue that the pledge's expected efficiencies are vast and public trust in vaccines is likely boost competition in the pharmaceutical industry. Under the "rule of reason," the legal standard used to evaluate the legality under antitrust law of most agreements, courts compare alleged pro- and anti-competitive effects of challenged agreements. It is, however, far from clear that the expected benefits of the pledge are procompetitive.

The pledge does not intend to produce efficiencies. Rather, its purpose is to circumvent problems caused by the tarnished reputation of the federal health agencies. President Trump has repeatedly promised that a vaccine for the novel coronavirus would be ready for distribution before Election Day and has been pressing health officials to expedite the delivery of such vaccines. Public health experts, in turn, believe that the timeline that the President has in mind is not realistic. These tensions between the President's public statements and the scientific consensus empowered antivaccination activists and are expected to decrease the public willingness to be vaccinated. The national crisis that the pledge seeks to address is the erosion of public confidence in institutions, not the pandemic itself.

It is, however, also unclear that the pledge would accomplish its goal. The corrosive effects of the Trump Administration on federal agencies have been particularly conspicuous at the Department of Justice. U.S. Attorney General William Barr has distinguished himself by doing the President's bidding. A decision of Barr to direct the Antitrust Division to investigate and possibly prosecute the parties to the pledge would be consistent with other decisions he has made. Worse, enforcement actions of the Department of Justice's Antitrust Division that align with the political preferences of President Trump became a pattern in recent years.

There are no good policy prescriptions for the present dilemma: should the United States relax antitrust enforcement standards to compensate for the compromised credibility of the federal health agencies? The Antitrust Division and FTC are trapped in a position in which every choice is likely to impair their professional credibility. This is an outcome that the pharmaceutical industry would welcome.