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**THE PROMOTION OF COMPETITIVE NEUTRALITY BY COMPETITION AUTHORITIES -
Contribution from the United States**

- Session III -

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More documentation related to this discussion can be found at: oe.cd/pcnca.

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The Promotion of Competitive Neutrality by Competition Authorities

Executive Order on Competition in the American Economy

– Contribution from the United States –

1. Introduction

1. This paper of the United States discusses President Biden’s Executive Order on Competition,¹ and is submitted for the OECD’s Global Forum on Competition program on the promotion of competitive neutrality by competition authorities.
2. The Executive Order takes a “whole-of-government” approach, and is aimed at promoting and maintaining competitive markets through a combination of pro-competitive regulation and law enforcement.
3. The Antitrust Division (Division) of the U.S. Department of Justice (DOJ or Department) and the U.S. Federal Trade Commission (FTC) have been actively engaged in implementing President Biden’s Executive Order on Competition in the American Economy,² including several key steps: (1) building capacity within the federal government to support interagency engagement that promotes competition; (2) building on and expanding existing agency relationships; (3) working together on substantive and process reforms; and (4) empowering prosecutors and procurement officials.

2. Background

4. In the United States, the President has the authority to issue Executive Orders (EOs), which are signed, written and published directives that manage operations of the federal government. Executive orders are not legislation; they require no approval from Congress, and Congress cannot simply overturn them. Congress may, however, pass legislation that could make it difficult, or even impossible, to carry out the order (e.g., removing funding that supported an order), but only a sitting President can overturn an existing executive order by issuing another executive order that does so. EOs are an important tool for a President, and thus are used with some frequency. In fact, President Trump issued 219 in his term as President, and President Obama issued 276 over his two terms. To date, President Biden has issued 70 EOs.³

¹ Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021).

² “*Id.*”

³ *Executive Orders*, FEDERAL REGISTER (last visited Nov. 23, 2021, 3:33PM), <https://www.federalregister.gov/presidential-documents/executive-orders/joe-biden/2021>.

5. On July 9, President Biden signed an Executive Order on Promoting Competition in the American Economy, which calls for a “whole-of-government approach . . . to address overconcentration, monopolization, and unfair competition,” which “threaten[] basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers.”⁴ The Order asks the Department and the FTC to work together with agencies that regulate specific industries to promote and maintain competitive markets through a combination of pro-competitive regulation and law enforcement.

6. The EO notes that over recent decades, as industries have consolidated, competition has weakened in many markets, from agriculture to transportation to technology. The EO explains that consolidation has resulted in a host of ills that affect consumers, workers, farmers, innovators, and small businesses, to name a few.

7. The EO is supportive of the U.S. competition agencies, whose mission is to enforce the antitrust laws “to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony[.]”⁵ The EO goes further to explain that in addition to the traditional antitrust laws, the U.S. Congress has also enacted industry-specific fair competition and anti-monopolization laws that often provide additional protections. Some of these can be seen in the Packers & Stockyards Act, Bank Merger Act, and Telecommunications Act.

8. The EO establishes a White House Competition Council comprised of the heads of cabinet-agencies, including the Attorney General and secretaries of the Treasury, Defense, Agriculture, Commerce, Labor, Health and Human Services, and Transportation, along with participation from the Chair of the FTC and four other independent agencies, to coordinate, promote and advance government efforts to address overconcentration, monopolization, and unfair competition in or directly affecting the American economy.⁶ The Competition Council is tasked with, among other actions, developing procedures and best practices for agency cooperation and coordination on matters of overlapping jurisdiction and to address potential legislative changes necessary to further the policies in the EO. The Competition Council helps to facilitate agency collaboration.

9. The EO identifies a number of specific obligations for the Department of Justice, including: to vigorously enforce the antitrust laws; to collaborate across agencies to promote competition; to review and consider revision of existing agency guidance in several different areas including (1) merger guidance (with the FTC), (2) human resources guidance (with the FTC); (3) F/RAND encumbered SEPs guidance (with the PTO and FTC), and (4) bank merger enforcement guidance (with banking regulators); and to work with Departments of Labor and Treasury and the FTC to study a lack of competition in

⁴ Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021).

⁵ *Id.* at §1.

⁶ The Council members are: Attorney General of the United States, Merrick Garland; Chair of the Federal Trade Commission, Lina Khan; Secretary of Treasury, Janet Yellen; Secretary of Labor, Marty Walsh; Secretary of Commerce, Gina Raimondo; Secretary of Agriculture, Tom Vilsack; Secretary of Transportation, Pete Buttigieg; Secretary of Defense, Lloyd Austin; Secretary of Health and Human Services, Xavier Becerra; Acting Director of the Office of Management and Budget, Shalanda Young; Chair of the Securities & Exchange Commission, Gary Gensler; Chair of Federal Communications Commission, Jessica Rosenworcel; Chair of the Surface Transportation Board, Marty Oberman; Chair of the Federal Maritime Commission, Daniel Maffei; Acting Chairman of the Commodity Futures Trading Commission, Rostin Behnam; and Acting Director of the Consumer Financial Protection Bureau, Dave Uejio. *White House Competition Council*, THE WHITE HOUSE (last viewed Nov. 23, 2021, 3:39PM), <https://www.whitehouse.gov/competition/>.

labor markets, with Commerce and the FTC to study the mobile applications ecosystem, and with Treasury and the FTC to draft a report on beer, wine and spirits distribution.

10. Likewise, the EO encourages the FTC to vigorously enforce the antitrust laws; to collaborate across agencies to promote competition; to review and consider revision of existing agency guidance in several different areas including (1) merger guidance (with the DOJ), and (2) human resources guidance (with the DOJ); to consider rulemaking to address (1) non-compete clauses and other terms limiting worker mobility in employment contracts, and (2) a variety of industry-specific practices; and to work with the Departments of Labor and Treasury and the DOJ to study a lack of competition in labor markets; with the Department of Agriculture to study concentration in retail food markets; with Commerce and the DOJ to study the mobile applications ecosystem; with Health and Human Services to identify and address impediments to generic drug and biosimilar competition, and with Treasury and the DOJ to draft a report on beer, wine and spirits distribution.

11. Immediately following the issuance of the EO, Associate Attorney General Vanita Gupta (Associate AG Gupta) issued a memorandum calling on the Division to develop a plan of action for outreach and implementation of the Order.⁷ Associate AG Gupta gave the Antitrust Division specific direction on how to implement the EO, starting with establishing a task force and an action plan for outreach and implementation.

12. In the memo, Associate AG Gupta outlined several priorities, including: developing new interagency relationships and technical assistance programs that support regulators' consideration of competition; promoting rulemaking efforts by other agencies to open critical sectors to competition; encouraging agencies that apply a public interest standard to consider competition more effectively in their deliberations; filing comments on mergers or similar transactions under the purview of other federal agencies; strengthening the Division's work with the Department of Labor to help implement antitrust whistleblower protections; and continuing the Division's leadership of the Procurement Collusion Strike Force, a group designed to maximize DOJ's impact and efficiency in protecting the procurement process and taxpayer dollars by expanding coordination, training, and outreach with partner U.S. Attorneys' Offices, the FBI, and Federal agency offices of inspector general, and by providing training to Federal, state, and local procurement agencies.

3. Implementation of the Executive Order

13. In response to Associate AG Gupta's memo, the DOJ established a Task Force within the Antitrust Division to help implement the Order (Task Force). The Task Force is staffed primarily with Division managers with experience both in the specific industries their partner agencies oversee and in broader organizational and operational challenges likely to arise from interagency engagement.

14. The Division and the FTC are engaged in several key initiatives to expand existing agency relationships and to forge new relationships that foster competition in industries across the U.S. economy.

⁷ Memorandum from Associate AG Vanita Gupta on Promoting Competition in the American Economy to the Antitrust Division (July 9, 2021).

15. Joint Report on Competition in Beer, Wine and Spirits: The Executive Order directs the Secretary of the United States Department of the Treasury to issue an industry report, in consultation with the Attorney General and the Chair of the FTC, “assessing the current market structure and conditions of competition, including an assessment of any threats to competition and barriers to new entrants.”⁸

16. Joint Report on Effects of Lack of Competition in Labor Markets: The Executive Order directs the Secretary of the Treasury, in consultation with the Attorney General, the Chair of the FTC, and the Department of Labor to issue a report on the effects of lack of competition in labor markets. The Division and the FTC are co-hosting a virtual workshop titled Promoting Competition in Labor Markets on December 6 and 7. The workshop allows for a broader public engagement on labor competition issues and may further inform the report.

17. Rulemaking Assistance on Packers & Stockyards Act: For more than two decades, the Department has maintained a Memorandum of Understanding with the U.S. Department of Agriculture (USDA), which provides for coordinating and sharing information that would otherwise be difficult to share because it is protected by confidentiality restrictions. In some cases, the USDA refers matters to the Antitrust Division. In other cases, the DOJ works closely with the USDA to leverage its expertise in understanding how a merger might affect specific agricultural markets. One example of our collaboration was in 2010 when the DOJ held joint public workshops with the USDA to explore competition issues affecting the agricultural sector in the 21st century and the appropriate role for antitrust and regulatory enforcement in agriculture.

18. Now, the Department and the FTC are working with the USDA to revitalize its enforcement of the Packers & Stockyards Act, which was signed into law in 1921 after a Congressional investigation found that the incumbent meat packers had “attained such a dominant position that they control at will the market in which they buy their supplies, the market in which they sell their products, and hold the fortunes of their competitors in their hands.”⁹ The Packers & Stockyards Act is a tool to protect the competitiveness of agricultural markets, but there have been concerns in Congress and the White House that it has been underenforced, so the EO directs the USDA to improve its ability to enforce the Act and more broadly to maintain competitive markets in agriculture. The Division and the FTC continue to work with the Department of Agriculture to support the revision of the Packers & Stockyards Act rules to improve competition in food supply chains. This is another priority for the Division as described in Associate AG Gupta’s memo on implementing the EO.

19. Joint Report on Access to Food Retail Markets: The Executive Order directs the Secretary of Agriculture, in consultation with the Chair of the FTC, to issue a report on “the effect of retail concentration and retailers’ practices on the conditions of competition in the food industries.”¹⁰ In particular, the EO focuses attention on practices that may violate the FTC Act, which prohibits unfair methods of competition, and the Robinson-Patman Act, which prohibits price discrimination. The EO further directs the report to address how grants, loans, and other support “may enhance access to retail markets by local and regional food enterprises.”

⁸ Exec. Order No. 14,036, 86 Fed. Reg. 36,987 §5(j) (July 9, 2021).

⁹ REPORT OF THE FEDERAL TRADE COMMISSION ON THE MEAT PACKING INDUSTRY, PART 1 at 24, FED. TRADE COMM’N (June 24, 1919).

¹⁰ Exec. Order No. 14,036, 86 Fed. Reg. 36,987 §5(j) (July 9, 2021), at Sec. 5(i)(iv).

20. Substantive and Process Reforms: The EO requests that the Division and the FTC partner on substantive and process reforms to antitrust enforcement. The sister enforcement agencies are working together to review the Horizontal and Vertical Merger Guidelines¹¹ and the Joint Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments issued in 2019.

4. Conclusion

21. The Department and the FTC will continue to actively pursue EO implementation and move forward on the various initiatives outlined above. With a number of initiatives underway, staff continue to explore ways to use the Executive Order to promote sound competition policy and assist our interagency partners.

¹¹ Press Release, U.S. Dep't of Justice, Justice Department Issues Statement on the Vertical Merger Guidelines (Sept. 15, 2021), <https://www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines>.