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English - Or. English

18 November 2024

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

Competition in the Food Supply Chain – Contribution from BIAC

- Session IV -

2-3 December 2024

This contribution is submitted by BIAC under Session IV of the Global Forum on Competition to be held on 2-3 December 2024.

More documentation related to this discussion can be found at: oe.cd/gfc24.

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JT03555667

Competition in the Food Supply Chain

- Contribution from BIAC –

1. Introduction

1. *Business at OECD* (BIAC) is grateful for the opportunity to provide comments to the Global Forum on Competition on competition in the food supply chain.

2. The world economy has facilitated the investment of capital and the operation of businesses across borders, and functions as a unified entity, operating in real-time on a global scale.¹ This is nowhere more evident than in the Global Food Value Chain (GFVC) which is continually expanding and attracting new market entrants, particularly in developing and emerging economies.²

3. The GFVC is comprised of all activities within the food system, including the research, development, production and storage of seeds and other critical inputs such as fertilizers, crop and animal protection products, veterinary services, and animal feeds, the development and application of new methods that are applied to farming and the production of crops, the harvesting, transport, storage and processing of farm produce, the trading, wholesale and retail of downstream foodstuffs, and the consumption by the final consumer. This global system is also characterized by, inter alia, detailed trade policies, preferential access to markets, and either state-directed domestic targeted, or scale focused export-oriented agricultural regimes, which tend to favor large-scale agri-businesses within the broader GFVC.³

4. Changes observed within this system suggest that agri-food GFVCs develop in similar ways to those in the manufacturing sector, often with a strong intra-regional dimension, despite the growth of extra-regional trade. In this regard, both ends of the value chain tend to be concentrated around specific hubs, with emerging markets being important in the middle of the chain by their supplying of agri-food intermediates.⁴

5. Many developing countries have a number of small to medium-sized farmers and firms which contribute towards a country's level of agricultural production. The existence of large incumbents at other levels of the GFVC value chain can, however, exert a significant amount of pressure on smaller players, resulting in market foreclosure and exits.⁵ In this regard, there is an increasing trend, particularly within developing economies, to move away from the standard “consumer welfare” standard, as a benchmark for testing

¹ Manuel Castells, *The Information Age: Economy, Society and Culture – The Rise of the Network Society* 92 (1996).

² OECD, *Global Value Chains in Agriculture and Food: A Synthesis of OECD Analysis* (2020), <https://doi.org/10.1787/6e3993fa-en>.

³ U.N., *Interim Report of the Special Rapporteur on the Right to Food*, A/78/202 (July 18, 2023), <https://www.ohchr.org/en/documents/thematic-reports/a78202-interim-report-special-rapporteur-right-food>.

⁴ OECD, *Global Value Chains in Agriculture and Food*, supra note 2.

⁵ T.S. Jayne et al, *Africa's Changing Farm Size Distribution Patterns: The Rise Of Medium-Scale Farms*, 47 *Agric. Econ.* 197 (2016).

theories of harm, towards one that is more protectionist in favor of small and medium sized firms (SMEs), even if there is not necessarily any immediate prospect of consumer harm.

6. Nevertheless, a firm's size, irrespective of its position in the GFVC value chain, should not be an inherent cause for concern. Even larger firms are affected by broader micro- and macro-economic factors and natural causes, which may have concomitant effects downstream. These factors may include, for example, currency fluctuations, droughts, fires, floods, frosts, and global conflicts, all of which contribute to demand and supply shocks.

7. This submission explores two areas of inquiry:

- recent developments in select jurisdictions to combat perceived concentration levels in fast-moving-consumer-goods (FMCG) markets by utilizing buyer power and price discrimination toolkits to address unequal bargaining power dynamics; and
- price gouging as a risk to the GFVC and lessons learned from the COVID-19 pandemic in the event of future global supply and demand shocks, whatever the reason.

8. We submit that traditional competition law toolkits are adequate to address actual or perceived anti-competitive effects in the GFVC market and policies or enforcement decisions which disregard the efficiencies associated with scale may have several unintended consequences which are likely to directly harm competition, and ultimately consumers, such that these novel policies should be guarded against.

2. Protectionism in Assessment of Buyer Power and Price Discrimination Prohibitions

2.1. Buyer Power

9. There has historically been very limited enforcement against abuses of buyer power, whether it be the exercise of monopsony or countervailing (bargaining) power. This is primarily because there continues to be evidence that buying efficiencies can lower prices and enhance consumer welfare and, consequently, a general skepticism that the exercise of buyer power necessarily has a prejudicial effect on consumer welfare or economic efficiencies.⁶ Often, large volume buyers, who are able to extract lower wholesale prices, tend to pass on at least some of these benefits in the form of lower retail prices to consumers.

10. Contrary to this skepticism, there has been a renewed interest in the effect of abuses of buyer power within developing economies. South Africa and Kenya, for example, have both had notable legislative and enforcement developments in recent years with the aim of protecting SMEs rather than necessarily protecting end consumers. This is clear from the South African Competition Commission's (SACC) *Buyer Power Enforcement Guidelines*, which state:

2.2.2 The inquiry does not, in the Commission's view, require an assessment of the effects on final consumers. For instance, it is not relevant whether an unfairly low price achieved through the exercise of buyer power is passed through to

⁶ OECD, Purchasing Power and Buyers' Cartels – Background Note, at 5 (2022), https://www.oecd.org/en/publications/purchasing-power-and-buyers-cartels_3fab0781-en.html.

*consumers or not. The legislation does not require any weighing up of the welfare of suppliers in the designated class against final consumers.*⁷

11. Similarly, the Competition Authority of Kenya's (CAK) *Buyer Power Guidelines* state:

*The [CAK] will not inquire into the effects of the conduct in question on final consumers. Investigation will not weigh up consumer welfare as against the welfare of the relevant supplier. It is therefore not relevant for instance, that a buyer passed on the benefits of an unfairly low price achieved through the abuse of Buyer Power to consumers.*⁸

12. While competition authorities are typically required to first establish that an abuse of buyer power results in a substantial lessening or prevention of competition (SLC),⁹ the SACC and CAK's approaches towards the enforcement of abuses of buyer power are premised on the protection of SME suppliers, particularly in South Africa's instance, rather than the process of competition, or benefits to end-consumers.¹⁰ Evidently, this approach appears to have a reduced focus on the traditional SLC and consumer welfare standards in exchange for the overarching standards of fairness towards and protection of an identified class of suppliers.

13. While there can be little objection to policy and legislative developments which result in a more vibrant and competitive market, it is less clear that such a more vibrant and competitive market will arise simply from protecting the continued operation of a greater number of SMEs, without due regard to the ultimate effects on consumers. Fundamentally, the exercise of buyer power – where it does not reduce output below competitive levels – may objectively result in efficiencies and benefits to end-consumers in that particular jurisdiction **and** other jurisdictions across the globe, through the linkages between supply chains in different countries, in particular within the GFVC. An overly protectionist approach to buyer power that is overly focused on the protection of SMEs in one jurisdiction is likely to have trade-offs (and indeed costs) not only in that jurisdiction, but also on competitiveness of domestic suppliers in foreign jurisdictions as these markets are often extraterritorial in scope. National competition agencies should allow buyers to objectively demonstrate how the exercise of buyer power might give rise to more effective competition, and consumer welfare benefits in that particular jurisdiction. GFVCs are global in nature, and the effects of enforcement must be considered and appropriately balanced in this light.

14. Separately, powerful buyers serve as an important deterrent and counterweight to powerful upstream suppliers, who might otherwise exert upstream market power on their customers. Preventing buyers from exercising countervailing bargaining power may facilitate exploitative conduct upstream which will either have to be absorbed downstream

⁷ S. Afr. Competition Comm'n, Buyer Power Enforcement Guidelines ¶ 2.2.2 (May 12, 2020), <https://www.compcor.co.za/wp-content/uploads/2020/05/Buyer-Power-Guidelines.pdf> (emphasis added).

⁸ Competition Auth of Kenya, Buyer Power Guidelines ¶ 18 (Mar. 2022), https://www.cak.go.ke/sites/default/files/Buyer_Power_Guidelines_2022.pdf (emphasis added).

⁹ See European Comm'n, Draft Guidelines on the Application of Article 102 of the Treaty on the Functioning of the European Union to Abusive Exclusionary Conduct by Dominant Undertakings (2024), available at https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en.

¹⁰ See Competition Act 89 of 1998 § 8(4) (S. Afr.) (only an SME or a firm owned or controlled by a historically disadvantaged person may rely on South Africa's abuse of buyer power provision).

or, more likely, be passed down to end-consumers. Kenya has seemingly acknowledged that abusive contractual arrangements can exist at either the buyer or seller levels of a value chain with the proposed replacement of its existing “abuse of buyer power” provision with an “abuse of superior bargaining position.” This new approach is more akin to the “abuse of economic dependence” currently used in some other developed jurisdictions.¹¹ In markets which are already characterized by high degrees of concentration, competition authorities must again acknowledge the global nature of GFVCs in which buyers operate and that such countervailing power may be an effective deterrence to exploitative practices upstream, that might exist across a number of jurisdictions.

15. Legislative initiatives can provide an alternative to amending competition laws, as seen in the European Union’s adoption of its Directive on Unfair Trading Practices (UTPs)¹² in business-to-business relationships within the agricultural and food supply chain. This directive focuses on how the agricultural and food supply chains are particularly vulnerable to UTPs, as a result of significant power imbalances between smaller suppliers and larger buyers, or other operators within the supply chain. This legislative measure forms part of a broader governance agenda aimed at creating a more efficient and fair food supply chain. However, experts that have reviewed the Directive’s implementation have observed significant divergences across EU Member States, as some had expanded the scope, or opted to add to the list of prohibited UTPs, which ultimately has resulted in differing levels of enforcement architectures (and indeed differing levels of reasoning applied to the protection of domestic firms within the supply chain) across the region.

16. BIAC submits that the effects of buyer power are not uniform across different instances of the exercise of buyer power. In this regard, BIAC emphasizes the size of the buyer should not be determinative and that buyer power should be assessed under a rule-of-reason analysis. The GFVC is inherently important, and any price increase may have a significant and prejudicial impact on the livelihoods of end-consumers. This is particularly true for developing economies which are already characterized by, inter alia, high levels of poverty. Against this backdrop, there are certain efficiencies, such as economies of scale, which are attributable to a firm’s “bigness” and which can serve to reduce prices.¹³ The populist or protectionist policies that view “big as bad” or serve to protect SMEs even in the light of demonstrable harms to consumer welfare, may ultimately harm the intended beneficiaries of competition law. Rather, the existing toolkits and economic assessments to identify and prosecute anti-competitive conduct which may flow from an abuse of market power are adequate and have been suitably developed over time to remedy adverse effects on competition and consumers.

2.2. Price Discrimination

17. As with the buyer power provisions discussed above, price discrimination laws are being increasingly considered in the context of protecting SMEs in the GFVC.

18. For example, South Africa’s Competition Act was amended to prohibit dominant firms from engaging in price discrimination which “imped[e]s the ability of small and

¹¹ See, e.g., France; Germany; Greece; Italy; Portugal and Belgium.

¹² Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, 2019 O.J. (L 111) 59.

¹³ Anthony Niblett & Daniel Sokol, *Up to the Task; Why Canadians Don’t Need Sweeping Changes to Competition Policy to Handle Big Tech* 13 (Nov. 2021), https://macdonaldlaurier.ca/mli-files/pdf/202110_Up_to_the_task_Niblett_Sokol_PAPER_FWeb.pdf.

medium businesses or firms controlled or owned by historically disadvantaged persons, to participate effectively [in the market].”¹⁴

19. The amendments to South Africa’s Competition Act have parallels with the United States Robinson-Patman Act of 1936 (Robinson-Patman Act).¹⁵ Following changing economic thought on the Robinson-Patman Act’s main premise of frequently serving to protect competitors instead of competition, the law has become effectively disused since the 1980’s. Despite its long period of relative inactivity, there appears to be a desire by some to reinvigorate the Robinson-Patman Act to protect farmers and small businesses in the U.S. once again.¹⁶

20. Firms may have a valid economic rationale to extend different pricing or trading terms to customers. While a supplier’s “intention” is not necessarily decisive from an economic perspective, failing to even consider why a supplier might want to engage in a pricing strategy that impedes its downstream customers from “participating effectively” may lead to decisions being made by adjudicative authorities that ignore the underlying reason for the price differences, and accordingly do not properly engage with the substantive consideration of the practice in question.

21. A supplier may have strong incentives to offer better discounts to a retailer who aggressively promotes and sells a supplier’s product, or provides the supplier with some other substantial benefit, support, or promotion. This is not designed to, nor does it have the likely effect of, impeding competition in the market, but rather encourages and incentivizes retailers to compete more aggressively.¹⁷ This is inherently pro-competitive. Other benefits of price discrimination include, for example, volume-based discounts that encourage customers to purchase larger volumes, resulting in an increase in supply which, in turn, ordinarily leads to an increase in both consumer and total welfare.

22. Price discrimination can often lead to an efficient allocation of product and is ordinarily either pro-competitive, or at worst competitively benign. Such a presumption is likely to be safe particularly where suppliers lack market power. Suppliers are better incentivized to invest if price discrimination would enable more capacity to be sold, than under uniform pricing, so as to recoup fixed or sunk costs. Price discrimination can also ensure greater competition both upstream, by incentivizing suppliers to target its competitors’ customers without having to offer the same favorable terms to all its customers, and downstream, by ensuring that retailers are able to compete by negotiating more favorable terms with their suppliers. Prohibiting price discrimination outright may dampen competition and facilitate collusive market outcomes as pricing discrimination provides greater incentives for cartelists to “cheat” and makes it considerably more difficult for fellow cartelists to monitor compliance with a collusive arrangement.¹⁸

¹⁴ Competition Act 89 of 1998 § 9(1)(a)(ii) (S. Afr.).

¹⁵ 15 U.S.C. § 13.

¹⁶ See Letter from Senator Elizabeth Warren, et al. to Lina Khan, Chair, Fed. Trade Comm’n (Mar. 28, 2024), <https://www.warren.senate.gov/imo/media/doc/2024.03.28%20Letter%20to%20FTC%20re%20Robinson%20Patman%20Act1.pdf>.

¹⁷ Herbert J. Hovenkamp, Discounts and Exclusions (2005), https://scholarship.law.upenn.edu/faculty_scholarship/1919.

¹⁸ Michael-James Currie, South Africa’s Amended Price Discrimination Provision: An Analytical Framework in Relation to the Grocery Retail Market (2020) (Master’s Dissertation, Kings College London), available at https://www.primerio.international/wp-content/uploads/2024/04/Currie_Masters-Dissertation_Kings-College_2020.pdf.

23. While some commentators raise concerns surrounding the waterbed effect, a situation where a price reduction imposed on one part of the market, typically through regulatory interventions, leads to price increases elsewhere in the market as a firm might attempt to recover lost profits from this regulated area. The economic rationale underpinning this theory is thin, and actual empirical evidence of this phenomenon is very limited. In the context of the grocery retail markets, imposing obligations on suppliers to resist the buyer power of large purchasers is not only likely to harm competition but also unlikely to achieve the intended industrial policy outcomes. Suppliers will invariably not risk losing a formal retail chain given its importance as a route to market. Further, large retailers could turn to other non-dominant suppliers, who are not subjected to the price discrimination prohibitions and have even less bargaining power, or increase investment in their own label products.¹⁹

24. Prohibiting secondary-line price discrimination which harms small customers was one of the primary objectives underpinning the Robinson-Patman Act. The Robinson-Patman Act, and the approach adopted by the Supreme Court in interpreting the Robinson-Patman Act, has been criticized on the basis that it seeks to protect inefficient competitors at the expense of consumer welfare.²⁰ BIAC cautions that legislative interventions and policy tools should not ignore the efficiencies and pro-consumer benefits that flow from large-scale operations and diversification that are achievable through larger firms. The converse naturally applies in that if an efficient supplier is prevented from engaging in price discrimination, this may have the concomitant effect of dampening competition, and increasing prices for end-consumers.²¹

3. Price Gouging in a Time of Global Supply and Demand Shocks

25. Price gouging occurs when sellers of goods and/or services increase their prices to unreasonable or unfair levels, usually during periods of extreme supply or demand changes in the market.²²

26. The COVID-19 pandemic emphasized the impact that global events may have on demand and supply levels and, concomitantly, pricing. For example, the SACC prosecuted a firm which had a market share of less than 5% following it increasing the price of face masks by some 888% (*Babelegi*).²³ As South Africa did not already have dedicated legislation or regulations to specifically prohibit price gouging, *Babelegi* had to be prosecuted as a typical excessive pricing case, which in South Africa requires a firm to be dominant. *Babelegi* saw the significant dilution of South Africa's excessive pricing regime in that (i) the Competition Tribunal limited its market power assessment to a period of little over a month; and (ii) a firm with less than 5% market share was found to have had market power. On appeal, the Competition Appeal Court stressed that the extreme and unique circumstances associated with the COVID-19 pandemic were noteworthy, and not intended

¹⁹ Id.

²⁰ Id.

²¹ D. Daniel Sokol, *Reinvigorating Criminal Antitrust?*, 60 Wm. & Mary L. Rev. 1545, 1573 (2019).

²² Willem H. Boshoff, *South African Competition Policy on Excessive Pricing and its Relation to Price Gouging during the Covid-19 Disaster Period*, 89 S. Afr. J. Econ. 112 (2021).

²³ Competition Comm'n v. *Babelegi Workwear Overall Mfrs. & Indus. Supplies*, CC CR003Apr20 at [115] (S. Afr.).

to suggest that any supply and demand shocks would infer dominance.²⁴ Nevertheless, the SACC's response to price gouging in the COVID-19 pandemic emphasizes the challenges and risks that may come from over-enforcement more generally, but also raise the question of whether competition authorities, and firms that are subject to their scrutiny, have had adequate notice of the tools that might be applied within the context of global demand and supply shocks.

27. The GFVC is particularly vulnerable to issues of price manipulation and disruption, especially during periods of naturally induced supply and demand shocks.²⁵ This is most evident from recent geopolitical tensions and conflicts. The onset of the conflict between Russia and Ukraine led to a rise in global food prices, in particular through prices in inputs such as fertilizer, and wheat, which is heavily traded through the Black Sea, as the Ukrainian agricultural market faced significant disruptions in its production, distribution channels and trade routes, and as of December 2023, food and grain prices are around 12-13% higher than what they were in December 2020 prior to the conflict.²⁶ Specifically:

- Fertilizers are used to provide crops with the nutrients they need to grow optimally and produce the requisite harvests. Fertilizers are thus an essential input within the GFVC, and a shock within the fertilizer industry will be felt throughout the entire GFVC. The war in Ukraine has caused a surge in energy prices and resulted in restrictive trade policies being put in place. Together, these significantly impact the price of fertilizer globally, and most noticeably in developing countries that have a heavy reliance on agricultural inputs that are often priced in foreign currency.²⁷
- Russia and Belarus are both major global producers of fertilizer, collectively accounting for around 40% of the global potash production – a key mineral in fertilizer production. However, due to the sanctions on firms within either of these countries, a large portion of this supply is inaccessible to the global market. It has been clear that this disruption has the potential to contribute to a global food crisis.²⁸
- The availability of fertilizer has a direct influence in farmers' decision-making processes, specifically on what to plant and how best to manage their crops. For example, soybeans require less fertilizer than corn. Therefore, in the instance of a fertilizer shortage, or too high prices, farms may opt to plant more soybeans in lieu of corn. This shift in crop choice has cascading effects throughout the GFVC, affecting both the food supply and the wider market dynamics.²⁹

28. Competition agencies must remain responsive to global developments that may result in unjustified and excessive price increases. It is prudent for competition authorities

²⁴ Babelgi Workwear & Indus. Supplies CC v. Competition Comm'n of S. Afr. 186 CAC CASE NO: 186/CAC/JUN20.

²⁵ Giuliana Viglione, Experts: What is causing food prices to spike around the world?, CarbonBrief (June 19, 2024), <https://www.carbonbrief.org/experts-what-is-causing-food-prices-to-spike-around-the-world/>.

²⁶ Lotanna Emediegwu, Update: How is the War in Ukraine Affecting Global Food Prices?, Econ. Observatory (Feb. 23, 2024), <https://www.economicobservatory.com/update-how-is-the-war-ukraine-affecting-global-food-prices>.

²⁷ The Table for 10 Billion, World Bank's Food for 10 Billion Podcast: Fertilizer Volatility and the Food Crisis, World Bank (July 22, 2022), <https://www.worldbank.org/en/news/podcast/2022/07/22/fertilizer-volatility-and-the-food-crisis>.

²⁸ Id.

²⁹ Id.

to develop specific legislation that not only allows these authorities to adequately prosecute instances of price gouging but to also allow firms to proactively self-regulate their conduct to mitigate price gouging from arising in the first instance. However, competition authorities are cautioned not to become a price regulator. Excessive pricing cases, which are pursued too liberally based on short-term assessments of market power and without clear benchmarks as to what constitutes “excessive,” amount to price regulation, or at least an attempt to price regulate. It is important to allow markets to respond naturally to supply and demand shocks, and the private sector typically reacts more swiftly and efficiently to global shocks than regulatory and government intervention in any event. Without adequate price signals, supply responses would be weaker, smaller, and slower, in addressing surges in demand, such as new demand for face masks.

4. Mergers

29. This paper does not explore in any detail merger analysis in the GFVC market. Suffice it to say, this area does not, from an economics point of view, require a departure from traditional merger tools and assessments in order to assess whether a proposed merger is likely to give rise to anti-competitive effects or not. Unlike some of the unilateral-conduct assessments discussed above, most jurisdictions’ merger assessments remain predominantly focused on evaluating whether the merger under consideration will raise prices, retard innovation, or deprive consumers of choice. This remains a sensible approach.

30. While broader public-interest considerations are at play in merger-control assessments in many countries, there is nothing inherently unique about the GFVC that would justify an overly interventionist approach or departure from traditional merger assessments.

5. Impact on Global Trade and Political Intervention

31. Although true for many sectors, the GFVC is one area in particular where competition enforcement at a national level may impact regional and global trade. Antitrust agencies will need to be mindful of their policy choices as an antitrust policy which disproportionately favor local SMEs may undermine the competitiveness and consumer welfare enhancing effects typically associated with global trade.

32. The policy decision to favor a specific group of competitors rather than consumers risks policy tension. Take for example the development of the African Continental Free Trade Agreement (AfCFTA). Consisting exclusively of developing and emerging economies, the signatories to the AfCFTA are on the one hand seeking to lower, and ultimately remove, trade barriers between member states. Adopting a national competition policy to center on local suppliers may undermine trade not only among member states but also with those countries outside the economic bloc. Absent a competent, well-resourced, and independent supranational regulator, the significant strides made to facilitate and bolster trade could be stymied. Developing economies who do or who are likely to form part of a broader economic bloc, may well consider these tensions when developing their domestic competition laws and policies.

6. Conclusion

33. The GFVC is a critical sector and one which impacts both developed and developing jurisdictions. The use of existing competition law toolkits to address any anticompetitive effects that may arise should be a priority. There does not appear to be a demonstrable need for novel competition tools, particularly in light of other regulatory schemes that often are in place, nor does it follow that there should be presumptions that the exercise of higher levels of concentration are necessarily problematic. Sound evidence-based decision making based on well-established economic principles remains a sensible and achievable outcome in this sector.

34. We do however note that there are several examples of policy and legislative changes where SME players in GFVC are prioritized perhaps over consumers. While we endorse a more vibrant economy in which smaller players are able to compete, using legislative tools should be done in a transparent way where public policy choices are identified and explained. Using competition law to favor inefficient competitors and ignoring the efficiencies that might otherwise arise from scale and the potentially disciplining effects associated with countervailing bargaining power would both harm competition and consumers. Accordingly, if agencies do depart from a consumer welfare standard, there are several unintended consequences that may arise if these trade-offs are not fully developed and weighed up and netted off against each other.

35. The GFVC is particularly susceptible to price swings and opportunistic pricing. Competition law may not be the most desirable toolkit to address price gouging cases. While regulators around the world attempted to address price gouging cases during the COVID-19 pandemic, and adjudicative agencies were at pains to contextualize the extreme market dynamics at play, in the current global context, it is quite conceivable that similar (albeit perhaps not as extreme) market shocks could impact the GFVC. These market shocks provide important signals to the market that it needs to adjust to fill the supply void that exists. Suppressing these signals is likely to lead to ongoing imbalances, underinvestment, and ultimately greater consumer harm. It would be more appropriate to have a set of rules designed specifically for such anomalies.

36. Finally, the GFVC is a globally integrated sector. Ultimately, lower barriers to international trade are positive for consumers. This should not be hindered by adopting competition policies that are protectionist in nature and would undermine internationally competitive markets.