

ANTITRUST TRADE AND PRACTICE

Expert Analysis

Antitrust Enforcers Announce Supply Chain Initiative

On February 17th, the Department of Justice (DOJ) announced an initiative to protect supply chains from anticompetitive behavior amid global disruptions and persistent inflation. The initiative is yet another example of the Biden Administration's aggressive approach to antitrust enforcement since inauguration. From the Administration's "whole-of-government" approach to policing anticompetitive conduct, to abandoning the Vertical Merger Guidelines and recently challenging several mergers, now to the new supply chain initiative, the new Administration has muddled the antitrust landscape and made enforcement less predictable. Despite the altered environment and new initiative, however, certain basic principles of antitrust law have not changed—simply passing costs on to consumers, even during supply chain



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disruptions, is not an antitrust violation.

The DOJ's announcement comes as supply chain disruptions have persisted and inflation has increased. As part of the initiative, the Antitrust Division and FBI seek "to deter, detect and prosecute those who would exploit supply chain disruptions to engage in collusive conduct." Press Release, U.S. Dep't of Just., Department of Justice Announces Initiative To Protect Americans From Collusive Schemes Amid Supply Chain Disruptions (Feb. 17, 2022). This is in line with the DOJ's long-standing partnership with the FBI on antitrust enforcement, including of bid-rigging and price-fixing conspiracies. See generally *Antitrust Enforcement: Success of DOJ/FBI Partnership*, FBI News (Nov. 21, 2011).

The initiative has both a domestic and international component. Domestically, the Antitrust Division is prioritizing existing investigations involving the potential exploitation of supply chain disruptions for illicit profits. The DOJ is also focusing on those industries facing acute supply chain disruptions and will proactively investigate collusion. Internationally, the Antitrust Division has formed a working group with the Australian Competition and Consumer Commission, the Canadian Competition Bureau, the New Zealand Commerce Commission and the United Kingdom Competition and Markets Authority (CMA). The working group will share intelligence and utilize "existing international cooperation tools to detect and combat collusive schemes." Press Release, U.S. Dep't of Just., Department of Justice Announces Initiative To Protect Americans From Collusive Schemes Amid Supply Chain Disruptions (Feb. 17, 2022).

The initiative is designed to put "the business community on notice" that enforcers are looking out for attempts

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to exploit supply chain disruptions to engage in prohibited behavior. *Id.* According to Assistant Attorney General Jonathan Kanter, “[t]emporary supply chain disruptions should not be allowed to conceal illegal conduct,” and “[t]he Antitrust Division will not allow companies to collude in order to overcharge consumers under the guise of supply chain disruptions.” *Id.* Assistant Director Luis Quesada of the FBI’s Criminal Investigative Division echoed Assistant Attorney General Kanter’s sentiment: “The lingering challenge of supply chain disruptions from the COVID-19 pandemic has created an opportunity for criminals to fix prices and overcharge customers ... The FBI and our law enforcement partners will continue to collaborate and investigate schemes that violate our antitrust laws and stifle our economic recovery.” *Id.* The CMA offered similar warnings to potential bad actors. Michael Grenfell, Executive Director of Enforcement at the CMA, said “[t]he CMA is ready to use its legal powers where it finds evidence that the issues in the supply chain might be caused by potential breaches of competition law.” Press Release, U.K. Competition & Mkts. Auth., International Agencies Put Supply Chains on Notice Against Collusion (Feb. 17, 2022).

Antitrust Focus on Supply Chain Disruptions And Inflation

The DOJ’s initiative is another example of President Biden’s emphasis on a

more aggressive approach to antitrust enforcement from the beginning of his term, which has increased amid persistent supply chain disruptions and rising inflation. He appointed progressives to lead the antitrust enforcement agencies: Lina Khan as the chair of the Federal Trade Commission (FTC) and Jonathan Kanter as the head of DOJ’s Antitrust Division. Moreover, he issued the Executive Order on Promoting Competition in the American Economy, Exec Order No. 14,036, Fed. Reg. 36,987 (July 9, 2021). In the order, he criticized

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industry-wide consolidation, called on agencies to protect competition, and declared that “robust competition is critical to preserving America’s role as the world’s leading economy.” *Id.* at 36,987-36,989.

There has been a renewed interest in aggressive antitrust enforcement as supply chain issues from the COVID-19 pandemic have continued and inflation has continued to soar. In February 2021, President Biden signed Executive Order 14017 designed to assess and strengthen the United States’ critical supply chains. Exec Order No. 14,017, Fed. Reg. 11,849 (Feb. 24, 2021). The Executive Order directed a 100-day

review of critical supply chains from the Departments of Commerce, Energy, Defense and Health and Human Services, focusing on pharmaceutical, battery, semiconductor and strategic material supply chains. *Id.* The Order also mandated one-year reviews from the Departments of Defense, Health and Human Services, Commerce, Homeland Security, Energy, Transportation and Agriculture. *Id.* The Biden Administration announced the findings from the reviews directed under the Executive Order in June 2021 and announced a “new Supply Chain Disruptions Task Force to provide a whole-of-government response to address near-term supply chain challenges to the economic recovery.” Press Release, The White House, Biden-Harris Administration Announces Supply Chain Disruptions Task Force to Address Short-Term Supply Chain Discontinuities (June 8, 2021).

In addition to the DOJ’s initiative, the FTC launched an inquiry into supply chain disruptions last fall. The FTC ordered nine large retailers, wholesalers and consumer good suppliers—including Walmart and Amazon—to “provide detailed information that will help the FTC shed light on the causes behind ongoing supply chain disruptions and how these disruptions are causing serious and ongoing hardships for consumers and harming competition in the U.S. economy.” Press Release, FTC, FTC Launches Inquiry Into Supply Chain Disruptions (Nov.

29, 2021). The inquiry will also study “whether supply chain disruptions are leading to specific bottlenecks, shortages, anticompetitive practices, or contributing to rising consumer prices.” Id.

In launching the inquiry, the FTC exercised its authority under §6(b) of the FTC Act, which authorizes broad studies without a specific law enforcement purpose. 15 U.S.C. §46(b). On January 28th, the Commission extended by 30 days the deadline to submit comments as part of the inquiry to February 28th. Press Release, FTC, FTC Extends Deadline for Public Comment on Supply Chain Disruptions (Jan. 28, 2022)). The Commission voted 4-0 to approve the special orders, with Chair Lina Khan expressing hope that “the FTC’s new 6(b) study will shed light on market conditions and business practices that may have worsened these disruptions or led to asymmetric effects.” Press Release, FTC, FTC Launches Inquiry Into Supply Chain Disruptions (Nov. 29, 2021).

The antitrust focus on supply chain disruptions comes at the same time as antitrust efforts to combat rising inflation. The efforts focused on taming inflation arose following the release of the October 2021 Consumer Price Index Report, which showed 6.2% year-over-year inflation. *Consumer Price Index Summary News Release*, U.S. Bureau of Lab. Stat (last modified Nov. 10, 2021). In response to the October 2021 inflation numbers, President Biden stated that revers-

ing inflation was “a top priority” and directed the FTC to “strike back at any market manipulation or price gouging in this sector.” Presidential Statement on the National Economy, 2021 Daily Comp. Pres. Doc. 943 (Nov. 10, 2021).

The antitrust enforcement efforts to combat rising inflation are most notable in the meat processing industry. The Biden Administration called the industry a “textbook example” of consolidation and has repeatedly complained about the lack of competition in the industry. Remarks by President Biden During a Virtual Meeting To Discuss Boosting Competition and Reducing Prices in the Meat-Processing Industry (Jan. 3, 2022). The Administration’s efforts the combat inflation in the meat processing industry include a \$1 billion investment to expand domestic processing capacity; strengthened rules to protect producers like farmers and ranchers; efforts with the Department of Agriculture and a bipartisan group of senators to increase transparency in the industry; and “vigorous[.]” antitrust enforcement. Id.

Conclusion

The Biden Administration is under fire for persistent supply chain issues and its inability to tame inflation. As the midterm elections approach, the Administration’s moves will come under closer scrutiny. President Biden continues to link the two together, blaming the supply chain for inflation. For example, in a February interview

with NBC Nightly News anchor Lester Holt, President Biden stated that “[t]he reason for the inflation is the supply chains were cut off.” Interview by Lester Holt with President Joseph R. Biden Jr. (Feb. 10, 2022). Thus, the DOJ’s new antitrust initiative could play a pivotal role in the most pressing economic issues moving forward.

Ultimately, however, increased costs do not necessarily mean that a violation of the antitrust laws has occurred. Certainly, the new initiative, along with continued focus on supply chain disruptions and more aggressive enforcement from the Biden Administration, has and will continue to make headlines. But new initiatives and increased attention in the area are not a cause for concern alone. Passing on costs is not an antitrust violation—even amidst global supply chain disruptions.