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**INTERACTIONS BETWEEN COMPETITION AUTHORITIES AND SECTOR REGULATORS –
Contribution from the United States**

- Session III -

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This contribution is submitted by the United States under Session III of the Global Forum on Competition to be held on 1-2 December 2022.

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

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Interactions between Competition Authorities and Sector Regulators

- Contribution from the United States -

1. The U.S. contribution to the 2021 Global Forum on Competition roundtable on competitive neutrality¹ focused on President Biden’s July 2021 *Executive Order on Promoting Competition in the American Economy*² (“EO”). The EO calls for a novel “whole-of-government” approach to promoting procompetitive policies and markets across the United States. It has enhanced opportunities for the U.S. antitrust agencies (the Department of Justice (“DOJ”) and Federal Trade Commission (“FTC”), collectively “the Agencies”) to partner with federal agencies and collaborate across government both to address the need for more vigorous competition in the U.S. economy and to promote fair competition.

2. This submission discusses recent developments relating to the interaction between the Agencies and sector regulators following the EO’s promulgation.³ It describes the EO’s objectives and the infrastructure established to facilitate interagency cooperation, and identifies actions for outreach and implementation of the EO. It concludes by highlighting specific interactions between the Agencies and the U.S. Department of Agriculture and the National Labor Relations Board.

1. The Executive Order on Promoting Competition in the American Economy

3. The EO 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 It asks the Agencies to work together with agencies

¹ Contribution of the United States, *The Promotion of Competitive Neutrality by Competition Authorities: Executive Order on Competition in the American Economy*, DAF/COMP/GF/WD(2021)19 (Dec. 7, 2021), [https://one.oecd.org/document/DAF/COMP/GF/WD\(2021\)19/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2021)19/en/pdf).

² Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021).

³ Prior submissions to the OECD examine the jurisdiction and responsibilities of the Agencies and sector-specific regulators with respect to the promotion of competition in the United States and the framework for their interaction. See, e.g., Note by the United States, *Competition Enforcement and Regulatory Alternatives*, DAF/COMP/WP2/WD(2021)12 (May 27, 2021), [https://one.oecd.org/document/DAF/COMP/WP2/WD\(2021\)12/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2021)12/en/pdf) (provides an overview of (1) competition enforcement and economic regulation in the U.S.; (2) express and implied immunities from the antitrust laws in regulated markets; and (3) the respective roles of the Agencies and sectoral regulators in enforcing competition laws in various industries, and discusses the Agencies’ advocacy role with respect to regulators at the federal, state, and local level); Note by the United States, *Independent Sector Regulators*, DAF/COMP/WP2/WD(2019)18 (Nov. 22, 2019), [https://one.oecd.org/document/DAF/COMP/WP2/WD\(2019\)18/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2019)18/en/pdf) (provides an overview of sector-specific regulators in the United States and describes the general framework for interaction between regulatory oversight and antitrust enforcement, with examples of shared jurisdiction in the telecommunications, electricity, and aviation industries).

⁴ Exec. Order No. 14,036, 86 Fed. Reg. at 36,987, 36,989.

that regulate specific industries to promote and maintain competitive markets through a combination of pro-competitive regulation and law enforcement.

4. The EO supports the 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 US Congress has also enacted industry-specific fair competition and anti-monopolization laws that often provide additional protections. Examples include the Packers & Stockyards Act, Bank Merger Act, and Telecommunications Act.

5. The EO establishes a White House Competition Council comprising the heads of cabinet agencies, including the Attorney General and secretaries of 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. 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.

6. Immediately following the issuance of the EO, DOJ developed a plan for outreach and implementation of the EO, establishing a task force and an action plan for outreach. Priorities included developing new and strengthening existing 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; and filing comments on mergers or similar transactions under the purview of other federal agencies.

7. In the year following the issuance of the EO, the Agencies have established and expanded relationships with a dozen federal agencies, including the Department of Health and Human Services and its Food and Drug Administrations, the Department of Agriculture, and the Department of Labor. Staff of the Agencies have provided technical assistance, conducted training for regulatory agency staff, and entered into memoranda of understanding (“MOUs”) to improve cooperation on enforcement efforts.

8. Staff of the Agencies have also advocated for pro-competitive policies through the issuance of comments to federal regulators. For example, the Agencies recently submitted a joint comment to the Federal Energy Regulatory Commission (“FERC”) on its proposed rulemaking on “Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection.”⁶ Citing to the EO, the comment

⁵ *Id.* at 36,988.

⁶ Press Release, Fed. Trade Comm’n, Federal Trade Commission, DOJ Urge FERC to Preserve Robust Wholesale Electricity Markets (Aug. 17, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/federal-trade-commission-doj-urge-ferc-preserve-robust-wholesale-electricity-markets>. See also Comment of Fed. Trade. Comm’n Staff to the Food and Drug Admin. (Jan. 18, 2022), available at https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-federal-drug-administration-docket-no-fda-2021-n-0555-concerning-over-counter/v220000staffcommenttohearingaids2.pdf (in support of the Food and Drug Administration’s proposed rule establishing over-the-counter hearing aids).

describes FERC's role in protecting conditions of fair competition. The Agencies highlighted concerns regarding the possible reinstatement of a right of first refusal ("ROFR") for incumbents, identified in the proposed rulemaking, on grounds that ROFR would enable incumbent electricity transmission owners to block competitors from bidding to design, construct, and own certain new interstate transmission facilities, and thereby deprive consumers of the benefits of competition. The Agencies then identified their concern that ROFR was unjustified in light of other proposals contained in the rulemaking.

9. Consistent with the Executive Order, the Agencies have consulted with several executive branch agencies to issue reports on the competitiveness of certain sectors of the economy. This includes conferring on two U.S. Treasury reports, one on the state of labor market competition in the United States,⁷ and another on impediments to competition in the distribution of beer, wine, and spirits.⁸ The FTC also consulted with the Department of Commerce on its study of the mobile app ecosystem, which highlighted concerns about the ability of app developers to obtain distribution on mobile devices, and worked with the Department of Commerce's National Institute of Standards and Technology on a range of reports concerning the digital economy.⁹

10. Vigorous enforcement by sector regulators of statutes that prohibit anticompetitive conduct in specific industries is a key part of promoting competition in the economy. But many such statutes have been chronically underenforced. Among other challenges, the agencies charged with implementing these statutes sometimes lack experience with complex competition litigation, and some agencies also lack sufficient authority to compel the production of information needed to support such litigation. To address these concerns, the Agencies have begun considering ways to improve direct and indirect support to other agencies charged with enforcing competition law statutes.

11. The Agencies enforce the federal antitrust laws, including the Sherman and Clayton Acts, and therefore have significant expertise in detecting, pursuing, and deterring anticompetitive conduct. Many other federal agencies are also charged with enforcing statutes that prohibit anticompetitive practices in specific industries. For example, the Federal Maritime Commission has exclusive jurisdiction under the Shipping Act to challenge ocean common carrier agreements, which are otherwise exempt from the antitrust laws; and the U.S. Department of Agriculture (USDA) has authority to enforce the Packers & Stockyards Act against anticompetitive conduct in agriculture markets. But historically the Federal Maritime Commission and USDA have not always used these statutes to their full potential to challenge anticompetitive conduct.

12. DOJ staff has considered certain options for expanding enforcement of these statutes aimed at promoting competition. These include: (1) direct enforcement by DOJ when enforcement is not within the exclusive authority of the partner agency, or when enforcement may be delegated to DOJ by the other federal agency; (2) deputizing DOJ

⁷ DEP'T OF THE TREASURY, THE STATE OF LABOR MARKET COMPETITION (2022), <https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf>. The Report found that employer concentration and anticompetitive labor practices causes wage declines of roughly twenty percent for workers. *Id.* at ii. The report also addresses concerns about misclassification of 'gig workers' as independent contractors, especially those working for ride-sharing companies. *Id.* at 13.

⁸ DEP'T OF THE TREASURY, COMPETITION IN THE MARKETS FOR BEER, WINE, AND SPIRITS (2022), <https://home.treasury.gov/system/files/136/Competition-Report.pdf>.

⁹ See Notice and Request for Comment, Developing a Report on Competition in the Mobile App Ecosystem, 87 Fed. Reg. 24,134 (Apr. 22, 2022).

litigators to support agency-led competition enforcement; or (3) entering into MOUs with federal agencies to formalize the agencies' shared commitment to increase their institutional capacity for detecting and pursuing anticompetitive conduct through information sharing, consultation, delegation or case referral, attorney details, and in appropriate cases joint enforcement.

2. The Agencies' Interactions with the US Department of Agriculture

13. Since 1999 the Agencies have maintained an MOU with USDA which provides for coordinating and sharing information that is otherwise protected by confidentiality restrictions. In some cases, USDA refers matters to DOJ and the FTC. In other cases, DOJ relies on USDA's expertise, to facilitate greater understanding of complex agricultural markets.

14. In February 2022, DOJ and USDA signed a second MOU providing both agencies with authority to initiate and pursue violations of the Packers & Stockyards Act. The Packers & Stockyards Act contains expansive prohibitions on a range of harmful, unfair, discriminatory, or anticompetitive practices and 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."¹⁰ The Packers & Stockyards Act is a tool to protect the competitiveness and fairness of agricultural markets, but there have been concerns in Congress and the White House that it has been underenforced. The EO directs USDA to improve its ability to enforce the Act and more broadly to maintain competitive markets in agriculture. The Agencies continue to work with USDA to support the revision of the Packers & Stockyards Act rules to improve competition in food supply chains.

15. USDA announced an Inclusive Competition and Market Integrity Rule under the Packers and Stockyards Act in September 2022. DOJ consulted with USDA on this rule and will assist in implementation as needed. USDA also announced an "Agricultural Competition Challenge" to ramp up enforcement cooperation with State Attorneys General. DOJ will collaborate with USDA on implementation of this challenge and expand its partnerships in agricultural enforcement with individual states.

16. In conjunction with the FTC's announcement of a new rule that will crack down on marketers who make false, unqualified claims that their products are Made in the USA, USDA announced that it will complement the FTC's efforts with its own initiative on labeling for products such as beef, and other agricultural products regulated by the Food Safety and Inspection Service.¹¹ Under the FTC rule, marketers making unqualified Made in USA claims on labels should be able to prove that their products are "all or virtually all" made in the United States. The new rule codifies a broader range of remedies by the FTC, including the ability to seek redress, damages, penalties, and other relief from those who lie about a Made in USA label. It will enable the FTC for the first time to seek civil penalties of up to \$43,280 per violation of the rule. After considering the many comments received by the FTC and USDA on this issue, USDA is initiating a top-to-bottom review of the

¹⁰ FED. TRADE COMM'N, REPORT OF THE FEDERAL TRADE COMMISSION ON THE MEAT-PACKING INDUSTRY pt. 1 at 24 (June 24, 1919).

¹¹ Press Release, U.S. Dep't of Agric., USDA Announces Efforts to Promote Transparency in Product of the USA Labeling (July 1, 2021), <https://www.usda.gov/media/press-releases/2021/07/01/usda-announces-efforts-promote-transparency-product-usa-labeling>.

“Product of USA” label that will, among other things, help USDA to determine what that label means to consumers.

17. FTC Chair Lina M. Khan submitted a comment supporting USDA rules that address unfair contract terms and business practices in the poultry sector.¹² The comment expresses support for potential rulemaking to prohibit a wide array of unfair, deceptive, and discriminatory business practices to revive competition in the poultry sector. The comment also states that a separate proposed rule that would require poultry processors to provide information about key aspects of their business relationship with poultry growers is a constructive first step toward a more fair and resilient food system.

18. In February 2022, DOJ and USDA announced a “Farmer Fairness” online portal, allowing farmers and ranchers anonymously to report anticompetitive abuses and support cooperation among competition partners.

19. In March 2022, DOJ staff conducted a virtual competition training for USDA staff. Hundreds of USDA employees attended the training, which addressed how to identify anticompetitive conduct and how to promote competitive markets through rulemaking, and presented high voltage interregional transmission as an example of how research and data collection can be a helpful means for regulators to promote competitive markets.

20. In May 2022, the FTC launched an inquiry into the U.S. infant formula crisis to assess the long-term causes of the crisis with the goal of applying lessons learned to prevent future shortages going forward.¹³ As part of its inquiry, the FTC requested information from the public on deceptive, fraudulent, or otherwise unfair business practices in the industry, factors that have led to concentration in the market and the fragility of the supply chains for these products, and whether the FTC or other state or federal agencies may have inadvertently contributed to fragile supply chains. The FTC announced that it will work together with the USDA, which administers the Special Supplemental Nutrition Program for Women, Infants and Children, which accounts for about half of the baby formula market, to assess the information received and help determine what policy changes may be needed.

21. Finally, in July 2022, DOJ’s partnership with USDA led to a DOJ lawsuit under the Packers & Stockyards Act, alleging that two poultry processors engaged in deceptive practices associated with the “tournament system” to pit chicken growers against each other. At the same time, DOJ filed an antitrust suit under the Sherman Act and entered into a consent decree with poultry processors and a data consulting firm and its president. The suit and subsequent decree ended a long-running conspiracy to share wage and benefit information about poultry plant processing workers and earned the workers restitution.

3. The Agencies’ Recent Interactions with the National Labor Relations Board

22. In July 2022, both the FTC and DOJ signed MOUs with the National Labor Relations Board (NLRB). The NLRB enforces US labor law that guarantees the rights of employees to join together to improve their wages and working conditions, to organize a union and bargain collectively, and to engage in protected concerted activity. The law

¹² Comment of Fed. Trade Comm’n Chair Lina M. Khan to U.S. Dep’t of Agric., available at https://www.ftc.gov/system/files/ftc_gov/pdf/Comment%20of%20Lina%20M.%20Khan%20on%20USDA%20ANPR%20re%20Poultry%20Growing%20Tournament%20Systems.pdf.

¹³ Press Release, Fed. Trade Comm’n, [Federal Trade Commission Launches Inquiry into Infant Formula Crisis](https://www.ftc.gov/news-events/news/press-releases/2022/05/federal-trade-commission-launches-inquiry-infant-formula-crisis) (May 24, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/05/federal-trade-commission-launches-inquiry-infant-formula-crisis>.

prohibits unfair labor practices, including discrimination or retaliation based on employees' engagement in these activities. The Agencies and the NLRB share an interest in promoting the free flow of commerce and fair competition in labor markets, including through the protection of American workers.

23. The DOJ's MOU aims to strengthen the partnership between DOJ and the NLRB "through greater coordination in information sharing, coordinated investigations and enforcement activity, training, education, and outreach."¹⁴ The FTC's MOU with the NLRB aims to bolster the FTC's efforts to protect workers by promoting competitive US labor markets and putting an end to unfair practices that harm workers.¹⁵ The new MOU between the FTC and NLRB outlines ways in which the FTC and NLRB will work together moving forward on key issues such as labor market concentration, one-sided contract terms, and labor developments in the "gig economy."

24. The new agreement enables the FTC and the NLRB to closely collaborate by sharing information, conducting cross-training for staff at each agency, and partnering on investigative efforts within each agency's authority. The MOU identifies areas of mutual interest for the two agencies, including the extent and impact of labor market concentration; the imposition of one-sided and restrictive contract provisions, such as noncompete and nondisclosure provisions; labor market developments relating to the "gig economy" and other alternative work arrangements; claims and disclosures about earnings and costs associated with gig and other work; the impact of algorithmic decision-making on workers; the ability of workers to act collectively; and the classification and treatment of workers.

25. In February 2022 DOJ filed a brief as amicus curiae before the NLRB in a case, recommending that the NLRB clarify its definition of "employee" to account for substantial changes to labor markets in the "gig economy." The brief suggested that a sound and consistent approach to worker classification is necessary to protect workers' rights to organize without subjecting them to prohibitions under the antitrust laws.¹⁶ As provided for in the MOU, DOJ and NLRB intend to continue to collaborate on data sharing, cross-training, and technical assistance in order to maximize the effectiveness of their shared missions. DOJ also recently entered into an MOU with the Department of Labor, which similarly provides for collaboration on shared goals with that agency.

¹⁴ Memorandum of Understanding, Dep't of Just. & Nat'l Lab. Rels. Bd. (July 26, 2022) (available at <https://www.justice.gov/opa/press-release/file/1522096/download>).

¹⁵ Press Release, Fed. Trade Comm'n, Federal Trade Commission, National Labor Relations Board Forge New Partnership to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices (July 19, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/07/federal-trade-commission-national-labor-relations-board-forge-new-partnership-protect-workers>.

¹⁶ Brief for U.S. Dep't of Justice as Amicus Curiae Supporting Neither Party at 9, *Atlanta Opera, Inc. v. Make-Up Artists & Hair Stylists Union Local 798*, No. 10-RC-276292 (N.L.R.B. Feb. 10, 2022) (available at <https://apps.nlr.gov/link/document.aspx/09031d458369c7e3>).