

Unclassified

English - Or. English

10 June 2023

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

Working Party No. 2 on Competition and Regulation

Assessing and Communicating the Benefits of Competition Interventions – Note by the United States

12 June 2023

This document reproduces a written contribution from the United States submitted for Item 6 of the 75th meeting of Working Party 2 on 12 June 2023.

More documents related to this discussion can be found at
<https://www.oecd.org/competition/assessing-and-communicating-the-benefits-of-competition-interventions.htm>

Federica MAIORANO
Email : Federica.MAIORANO@oecd.org

JT03521630

United States

1. Introduction

1. The Antitrust Division of the U.S. Department of Justice (“Division”) and the Federal Trade Commission (“FTC”) (collectively, the “Agencies”) offer this joint submission in response to the Working Party 2’s consideration of the assessment and communication of the benefits of competition interventions. In this paper, the Agencies acknowledge the importance of regularly evaluating the effects of their enforcement and policy initiatives. Such evaluation provides a valuable audit of the Agencies’ efforts and progress against their goals and promotes valuable transparency and accountability necessary to maintain the trust of the American public.

2. The Agencies believe that communicating the benefits of their competition interventions to Congressional leaders, other U.S. federal agencies, states, companies, and the general public is vital and helps encourage competition more broadly. Promoting these benefits can ensure that the Agencies’ funding levels are adequate to meet the demands of their statutory obligations. The Agencies’ publicization of their enforcement activities and clear messaging about prevailing legal standards in guidance documents also ensure that market participants are sufficiently deterred from violating the antitrust laws. Finally, communicating the Agencies’ efforts to protect competition aids in preserving the credibility of the Agencies—both assuring the American public that their budgets are being well spent and conveying to market participants who may come to the Agencies with complaints of unlawful behavior that their complaints will be taken seriously. Communicating the benefits of competition interventions allows the Agencies to continue to effectively promote market competition.

2. Assessment of Benefits

3. The Agencies’ enforcement and policy interventions are guided by their mission: to enforce the federal antitrust laws, which help ensure economic opportunity by promoting free and fair competition.

4. It has long been recognized under U.S. antitrust law that there are many benefits—both quantitative and qualitative—that result from competition. As the Supreme Court has acknowledged:

The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. ‘The heart of our national economic policy long has been faith in the value of competition.’ ... The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.¹

¹ National Society of Professional Engineers. v. U.S., 435 U.S. 679, 695 (1978) (citing Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951)); see also Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104 n.27 (1984) (quoting N. Pac. Ry. Co. v. U.S., 356 U.S. 1, 4–5 (1958)) (The Sherman Act “rests on the premise that the unrestrained interaction of competitive

5. Consistent with U.S. antitrust law, the Agencies assess both quantitative and qualitative benefits within their evaluations of their interventions.

2.1. Quantitative Benefits

6. Each agency provides an assessment of certain measurable benefits of its interventions in its annual Congressional Submissions.² These reports contain measurable goals for each agency related to their mission to enforce the antitrust laws and promote competitive markets. They are produced in accordance with the Office of Management and Budget’s requirements and typically report outcomes from the prior year.³ These submissions provide an overview of the Agencies’ enforcement and policy efforts, including examples of major enforcement matters and policy priorities in addition to economic trends that impact their work. The submissions also include a summary of filing fees that the Agencies receive along with the criminal fines that the Division collects.⁴

7. Within the Division’s submission, certain quantitative benefits are reported separately for the Division’s criminal and civil enforcement efforts. These metrics include the percentages of cases favorably resolved (“success rates”) and a dollar value of savings to U.S. consumers (“consumer savings”) that can be tied directly to enforcement actions resolved during the fiscal year. For example, in 2020, the Division reported that the total consumer savings as a result of its enforcement activities was \$114 million for Division criminal activities and \$598 million for Division civil activities.⁵ Other quantifiable benefits of the Division’s enforcement activities include the dollar volume of criminal fines (\$529 million in 2020) that the Division received and the number of active investigations/grand juries or opened preliminary inquiries.⁶ If anything, these estimates of consumer savings are conservative. For example, economist Thomas Philippon calculates that “a return to the level of competition prevailing in the United States in the late 1990s would add about \$1.44 trillion to labor income in the United States.”⁷ The White House has cited Philippon’s work in noting that higher prices and lower wages caused by

forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress...”).

² These submissions are accessible to the public via the Division’s and FTC’s websites. See DEP’T. OF JUSTICE, ANTITRUST DIV., Congressional Submission FY 2022 Performance Budget (2022), <https://www.justice.gov/jmd/page/file/1398291/download> [hereinafter FY22 ATR Congressional Submission]; FED. TRADE COMM’N, Annual Performance Report for Fiscal Year 2021 and Annual Performance Plan for Fiscal Years 2022 to 2023 (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/21apr_22-23app.pdf.

³ See OFFICE OF MGMT. AND BUDGET, Circular A-136 (Revised), <https://www.whitehouse.gov/wp-content/uploads/2022/06/2022-A-136.pdf>.

⁴ See FY22 ATR Congressional Submission, supra note 2 at 2 (“In FY 2020 the Division was appropriated \$166.8 million, but took in \$101.6 million in civil filing fees and obtained \$529.4 million in criminal fines. Similarly, in FY 2019 the Division was appropriated \$165.0 million, but took in \$129.4 million in civil filing fees and obtained \$364.7 million in criminal fines.”).

⁵ Id. at 23–24.

⁶ Id. at 41.

⁷ Thomas Philippon, “Causes, Consequences, and Policy Responses to Market Concentration,” at 26 (Aspen Economic Strategy Group, Nov. 21 2019), <https://www.economicstrategygroup.org/wp-content/uploads/2019/12/Maintaining-the-Strength-of-American-Capitalism-Causes-Consequences-and-Policy-Responses-to-Market-Concentration.pdf>.

lack of competition cost the median American household \$5,000 per year.⁸ The savings from the Division’s work in fighting anti-competitive bid rigging are also significant. OECD has estimated that eliminating bid rigging and other forms of collusion in procurement could save the government 20 percent of expended funds—or more.⁹

8. The FTC’s quantitative assessment of its activities is contained within its Strategic Plan, organized by the agency’s goals and objectives. The metrics track consumer savings through merger and nonmerger actions that the FTC has taken to maintain competition. In 2021, the FTC reported a total of \$1.64 billion in savings for consumers through merger actions and \$1.13 billion in savings through nonmerger actions.¹⁰

9. The Agencies continue to quantify consumer savings in a manner consistent with many of the same principles described in the OECD’s 2014 Report.¹¹ In line with this report, these regular assessments are based upon applicable methodologies using case-specific data where available.¹² As described in the OECD 2014 Report, the consumer savings estimate often does not account for dynamic effects—though greater competition produces increases in innovation and productivity, these benefits are difficult to measure. The Agencies’ estimates typically do not account for these savings unless they are included in case-specific estimates derived from the targets’ own ordinary course documents. The Agencies’ estimates also have not taken into account labor effects or the deterrent effect of intervention given challenges with quantifying these effects. Lack of quantification of this effect by no means diminishes the vast importance of this effect and its ability to incentivize firms to obey the competition laws.

10. The Agencies also publish an annual fiscal-year report on pre-merger notification activity pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”).¹³ The Agencies’ Annual HSR Report provides a detailed statistical analysis of pre-merger notification activity reported under the HSR Act, including the number of transactions, filings received, Second Requests issued, and early termination requests.¹⁴

⁸ Fact Sheet: Executive Order on Promoting Competition in the American Economy, July 9, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>

⁹ “Fighting bid rigging in public procurement” Organization for Economic Cooperation and Development. Viewed on September 16, 2021. www.oecd.org/competition/bidrigging.

¹⁰ FED. TRADE COMM’N, Annual Performance Report for Fiscal Year 2021 and Annual Performance Plan for Fiscal Years 2022 to 2023 (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/21apr_22-23app.pdf.

¹¹ See ORG. FOR ECON. COOPERATION & DEVELOPMENT (OECD), Guide for Helping Competition Authorities Assess the Expected Impact of their Activities (Apr. 2014), <https://www.oecd.org/daf/competition/Guide-competition-impact-assessmentEN.pdf> (Annex 1 detailing USDOJ’s assumptions used in cartel cases, merger cases, and abuse of dominance/monopolization cases).

¹² Reference the FTC’s “Data Quality Appendix” submitted to Congress as part of the agency’s performance reports. It explains the FTC’s various methodologies (including, where applicable, case-specific data vs. proxy measures).

¹³ FED. TRADE COMM’N, Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, <https://www.ftc.gov/policy/reports/annual-competition-reports>.

¹⁴ See, e.g., FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, Hart Scott-Rodino Annual Report, Fiscal Year 2021 at 2 (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf (reporting that

The report also shows the percentage increase or decrease in transactions relative to previous fiscal years, as well as the number of enforcement challenges, final consent orders, abandonments or restructurings, and initiated administrative or federal court litigation. Finally, the report summarizes recent developments within the pre-merger notification program and provides narrative summaries of merger enforcement challenges initiated by each agency.

11. Since 1984, the FTC’s Bureau of Economics (“BE”) has undertaken and published the results of merger retrospectives for a range of consummated mergers spanning more than three decades.¹⁵ The goals of the FTC’s merger retrospectives are “to understand whether the agency’s threshold for bringing an enforcement action in a merger case has been too permissive, thus allowing too many potentially harmful mergers,” and “to assess the performance of tools that agency economists use to predict the effects of proposed mergers prospectively.”¹⁶ BE is currently pursuing several studies to inform the FTC’s enforcement and policy efforts.¹⁷

2.2. Qualitative benefits

12. Qualitative benefits from competition enforcement efforts are similarly emphasized within the Agencies’ Congressional Submissions and can include higher quality of products and services, increased innovation, greater resiliency, and greater economic dynamism. Though it is often difficult to quantify the effects of these benefits, they are no less important to the Agencies’ enforcement efforts.

13. Protecting and promoting incentives for innovation is a key benefit of the Agencies’ enforcement efforts, particularly involving acquisitions of nascent or potential competitors.¹⁸ The FTC sought to prevent the “dampening [of] future innovation” when it

the FTC and the Division collectively brought 32 merger enforcement challenges in fiscal year 2021).

¹⁵ For a recent list of retrospectives conducted by BE, see FED. TRADE COMM’N, List of FTC Bureau of Economics Retrospective Studies, https://www.ftc.gov/system/files/attachments/press-releases/ftc-announces-agenda-14th-session-its-hearings-competition-consumer-protection-21st-century/list_of_be_retrospective_studies.pdf.

¹⁶ FED. TRADE COMM’N, Overview of the Merger Retrospective Program in the Bureau of Economics (2022), <https://www.ftc.gov/policy/studies/merger-retrospective-program/overview#end1>.

¹⁷ The FTC is currently conducting two retrospective studies using its authority under Section 6(b) of the FTC Act, 15 U.S.C. § 46(b). The first relates to mergers involving health care systems that were allowed to proceed under state regulatory authority despite antitrust concerns. The second study considers how physician practice mergers impact health outcomes of Medicare patients and the extent to which that effect depends on the level of market concentration.

¹⁸ For example, the Division heralded its suit against Visa for its acquisition of nascent competitor Plaid—and the companies’ subsequent abandonment of the deal—as promoting competition by allowing for innovation in the fintech space. See DEP’T OF JUSTICE, Visa and Plaid Abandon Merger After Antitrust Division’s Suit to Block (Jan. 12, 2021), <https://www.justice.gov/opa/pr/visa-and-plaid-abandon-merger-after-antitrust-division-s-suit-block> (“In a victory for American consumers and small businesses, Visa has abandoned its efforts to acquire an innovative and nascent competitor . . . Now that Visa has abandoned its anticompetitive merger, Plaid and other future fintech innovators are free to develop potential alternatives to Visa’s online debit services. With more competition, consumers can expect lower prices and better services.”). Similarly, the FTC noted that its order requiring Illumina to divest cancer detection test maker Grail would promote innovation—and save lives. FED. TRADE COMM’N, FTC Orders Illumina to Divest Cancer Detection

sued to block Meta from acquiring Within Unlimited and its virtual reality dedicated fitness app Supernatural in 2022.¹⁹ Although the court did not enjoin the merger, its decision reinforced the legal grounds for stopping mergers that eliminate a potential competitor.²⁰ In addition, Division Assistant Attorney General (“AAG”) Jonathan Kanter has highlighted the need for “competition for creative ideas,” which prompted the Division’s case against the merger between book publishers Penguin-Random House and Simon & Schuster.²¹ Protecting innovation is also one of the cited reasons for the Agencies’ ongoing effort to modernize the federal merger guidelines.²²

14. The Agencies recognize that even when there is no clear price effect of their interventions, competition tends to increase product quality. The need to enforce the antitrust laws to preserve the benefits of quality under competitive forces is particularly acute in the healthcare industry, where mergers between rival hospitals often result in lower quality of care.²³

15. The Agencies also regularly highlight qualitative benefits to promoting competition in labor markets, including increased worker mobility. The FTC’s recent proposal to adopt a rule banning certain non-compete restrictions on workers emphasized the potential adverse effects of reduced labor mobility on competition.²⁴ Similarly, the Division’s

Test Maker GRAIL to Protect Competition in Life-Saving Technology Market (Apr. 3, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-orders-illumina-divest-cancer-detection-test-maker-grail-protect-competition-life-saving> (“Ultimately, the Opinion holds that letting competition spur through innovation among MCED test providers would do more to save lives than allowing a monopolist to vertically integrate and capture the market.”).

¹⁹ FED. TRADE COMM’N, FTC Seeks to Block Virtual Reality Giant Meta’s Acquisition of Popular App Creator Within (Jul. 27, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-seeks-block-virtual-reality-giant-metas-acquisition-popular-app-creator-within>.

²⁰ FTC v. Meta Platforms Inc., No. 5:22-cv-04325 (N.D. Cal. 2023) (slip op.).

²¹ DEP’T OF JUSTICE, ANTITRUST DIV., Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks at Howard Law School (Jan. 12, 2023), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-howard-law>.

²² DEP’T OF JUSTICE, ANTITRUST DIV., Justice Department and Federal Trade Commission Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-seek-strengthen-enforcement-against-illegal> (“Illegal mergers can inflict a host of harms, from higher prices and lower wages to diminished opportunity, reduced innovation and less resiliency”) (emphasis added).

²³ FED. TRADE COMM’N, FTC Policy Perspectives on Certificates of Public Advantage at 12 (Aug. 15, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/COPA_Policy_Paper.pdf (“the weight of the empirical evidence indicates that “[i]n the long run, hospital mergers shielded with COPAs often lead to higher prices and reduced quality from unconstrained market power.”).

²⁴ Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3537 (Jan. 19, 2023) (“When workers subject to noncompete clauses are blocked from switching to jobs in which they would be better paid and more productive, unconstrained workers in that market are simultaneously denied the opportunity to replace them. This collective decline in job mobility means fewer job offers and an overall drop in wages, as firms have less incentive to compete for workers by offering higher pay, better benefits, greater say over scheduling, or more favorable conditions.”).

comment in support of the FTC’s rulemaking noted the potential for the agreements to restrict worker mobility, dampening competition in labor markets.²⁵

16. The Agencies also monitor and in appropriate settings report the overall benefits that derive from a competitive economy—or the harms that exist when markets become less competitive or less resilient and more fragile. For example, the Agencies acknowledge many, but not all, empirical studies have found increasing levels of concentration in the U.S. economy.²⁶ This concentration could result in higher prices for consumers and lower wages for workers. For example, the share of national income going to workers has fallen sharply since 2000, so the share of income going to workers today is now 6 to 8 percentage points below the share in 1980. One potential explanation for this decline is decreased competition.²⁷

3. Communicating the Benefits of Competition and the U.S. Agencies’ Enforcement and Policy Efforts

17. The Agencies seek to reach the broadest audience in raising awareness of their enforcement and policy efforts. They view engaging with a diversity of views and stakeholders as imperative to the efficacy of the Agencies’ enforcement and policy efforts.²⁸ To do so, agency personnel routinely participate in public events where they

²⁵ DEP’T OF JUSTICE, ANTITRUST DIV., Comment on the Antitrust Division of the United States Department of Justice, FTC Docket No. 2023-007 (Apr. 19, 2023), <https://www.justice.gov/atr/page/file/1580551/download>.

²⁶ See, e.g., Council of Economic Advisers Issue Brief, Benefits of Competition and Indicators of Market Power at 5 (Apr. 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf (noting change in revenue share earned by the 50 largest firms in each sector); David Autor et al., The Fall of the Labor Share and the Rise of Superstar Firms, 135 Q.J. ECON. 645 (2020) (finding that the top 4 firms in the top sectors of the economy became steadily and significantly more concentrated); Thomas Philippon, Causes, Consequences, and Policy Responses to Market Concentration in ASPEN ECONOMIC STRATEGY GROUP, MAINTAINING THE STRENGTH OF AMERICAN CAPITALISM (2019) (reviewing literature on concentration in the U.S. economy). Dominic Smith and Sergio Ocampo, The Evolution of US Retail Concentration, WP, find increases in retail concentration at both the local and national level over time. However, Lanier Benkard et al., Concentration in Product Markets, WP, find decreases in concentration over time for many consumer packaged good markets.

²⁷ See, e.g., Gene M. Grossman and Ezra Oberfield, The Elusive Explanation for the Declining Labor Share,

Annual Review of Economics 2022 14:1, 93-124.

²⁸ See, e.g., DEP’T OF JUSTICE, ANTITRUST DIV., Assistant Attorney General Jonathan Kanter Delivers Remarks on Modernizing Merger Guidelines (Jan. 18, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-modernizing-merger-guidelines> (highlighting the need to consult with a “diverse group of stakeholders” including “consumers, workers, innovators, and others on the ground” when revising the Merger Guidelines); see also FED. TRADE COMM’N, Remarks of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement (Jan. 18, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599783/statement_of_chair_lina_m_khan_regarding_the_request_for_information_on_merger_enforcement_final.pdf (“I want to . . . encourage those beyond the antitrust community . . . to share feedback and evidence. The quality of our review and any subsequent revisions to the guidelines will depend on robust public participation, and we are especially eager to hear from a broad set of market participants.”).

present the Agencies' enforcement and policy efforts to a wide variety of audiences and through a variety of mediums, including interviews and editorials in general news outlets.²⁹ In addition, the Agencies promote the benefits of competition through their policy communications, including interagency coordination, amicus briefs in litigation matters, and statements of interest in ongoing litigation.

18. The AAG of the Antitrust Division, Chair of the FTC, FTC Commissioners, and agency senior leadership periodically provide testimony before Congress where the Agencies' antitrust efforts are discussed as well as a variety of other competition topics of interest to lawmakers.³⁰ This testimony is frequently covered in the U.S. press and is an important communication tool to ensure that the Agencies' enforcement efforts are fully appreciated by Congress as it looks towards appropriations and other legislative efforts.³¹

19. During Congressional testimony, the AAG and FTC Chair typically highlight some of the quantifiable benefits covered in the Agencies' most recent Congressional Submission, including the number of active cases before the Agencies and the number of notifiable transactions received. The AAG and FTC Chair also typically include statistics on monetary remedies obtained by the Agencies in an effort to demonstrate that the benefits to consumers from the Agencies' work far outweigh the Agencies' costs.³² For example, during the Agencies' most recent oversight hearing, AAG Kanter highlighted the efforts of the Division's Procurement Collusion Strike Force ("PCSF") by noting the dollar value of the contracts involved in PCSF's recent enforcement efforts.³³ Similarly, FTC Chair Khan

²⁹ See, e.g., Interview with Lina M. Khan, CNBC (Jan. 6, 2023), <https://www.cnbc.com/2023/01/06/first-on-cnbc-cnbc-transcript-ftc-chair-lina-khan-speaks-with-cnbc-andrew-ross-sorkin-on-squawk-box-today.html>; Lina M. Khan, We Must Regulate A.I. Here's How, NEW YORK TIMES (May 3, 2023), <https://www.nytimes.com/2023/05/03/opinion/ai-lina-khan-ftc-technology.html>.

³⁰ Each agency has testified before Congress on a variety of issues. See DEP'T OF JUSTICE, ANTITRUST DIV., Congressional Testimony by Antitrust Division, <https://www.justice.gov/atr/congressional-testimony>; FED. TRADE COMM'N, Testimony, https://www.ftc.gov/legal-library/browse/testimony?search=&sort_by=search_api_relevance.

³¹ See, e.g., Anna Edgerton and Leah Nylen, Biden's Antitrust Chiefs Seek Funds for Strong Enforcement, WASH. POST (Sept. 22, 2022), https://www.washingtonpost.com/business/on-small-business/bidens-antitrust-chiefs-seek-funds-for-strong-enforcement/2022/09/21/4d95c6d6-39c0-11ed-b8af-0a04e5dc3db6_story.html.

³² DEP'T OF JUSTICE, ANTITRUST DIV., Statement of Jonathan Kanter Before the United States Senate Committee on the Judiciary (Sept. 20, 2022), https://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/2023/02/03/doj_antitrust_division_written_statement_kanter_09.20.22.pdf [hereinafter 2022 Division Oversight Testimony] ("I am pleased to report that the Antitrust Division is delivering results at historic levels and our return on the investment from American taxpayers and Congress is billions of dollars."); FED. TRADE COMM'N, Testimony of the Federal Trade Commission Before the House Committee on Appropriations Subcommittee on Financial Services and General Government (Apr. 27, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p210100houseappropriationstestimonyfy2024.pdf ("Throughout FY 2022, the FTC saved consumers an estimated \$4.1 billion through its merger and nonmerger competition law enforcement actions and its consumer protection law enforcement actions. For FY 2022, every \$1 of the FTC's costs returned an estimated \$30 in FTC-provided benefits to consumers.").

³³ 2022 Division Oversight Testimony ("the PCSF and the Antitrust Division have prosecuted over 30 companies and individuals involving over \$350 million worth of government contracts, and they continue to leverage interagency coordination to investigate and prosecute procurement-related

discussed the FTC's efforts to prosecute anticompetitive activity in the healthcare sector, with one case finding an individual liable for \$64.6 million in disgorgement.³⁴ The Agencies also typically communicate to Congress the benefits of the enforcement efforts that are more difficult to aggregate and quantify, such as increased investment, lower consumer prices, higher worker wages, and increased innovation.³⁵

20. The Agencies communicate the benefits of competition to other U.S. federal agencies through informal engagement, public comments, and policy statements. President Biden's Executive Order on Competition encouraged federal agencies and other stakeholders to consider the impact of competition within their analyses and through their actions.³⁶ Following the Executive Order, the Agencies have continued to encourage regulators to consider competition issues by establishing and expanding their relationships with more than a dozen federal agencies, including the Department of Labor,³⁷ Department of Health and Human Services,³⁸ the Food and Drug Administration,³⁹ and the National Labor Relations Board.⁴⁰ Staff of the Agencies have provided technical assistance,

crimes. Although we cannot put a precise price tag on deterrence, the OECD estimates that bid rigging and other collusion increases procurement prices by as much as 20 percent.”).

³⁴ See Oversight of the Enforcement of the Antitrust Laws, Prepared Statement of the Federal Trade Commission Before the United States Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy, and Consumer Rights (Sept. 20, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf (“Finding that Shkreli’s conduct was egregious, deliberate, repetitive, long-running, and ultimately dangerous, the Court imposed a lifetime ban on Shkreli from participating in the pharmaceutical industry and found him liable for \$64.6 million in disgorgement. The federal court’s decision to ban Shkreli for life from the pharmaceutical industry is a victory for Americans and should signal to corporate executives that they may be held personally liable for antitrust violations that they direct and may be banned for life from certain industries.”).

³⁵ Id. at 5 (“Blocking the [Nvidia/Arm] deal preserved competition for key technologies and safeguarded future innovation while also preventing further disruption to an already distressed semiconductor supply chain.”); Division 2022 Division Oversight Testimony, *supra* note 23 at 12 (discussing “identifying harms to the competitive process as a whole, including harms to privacy, innovation, and other important equities that go beyond price.”).

³⁶ Executive Order 14036 (July 9, 2021).

³⁷ See DEP’T OF JUSTICE, ANTITRUST DIV., Departments of Justice and Labor Strengthen Partnership to Protect Workers (Mar. 10, 2022), <https://www.justice.gov/opa/pr/departments-justice-and-labor-strengthen-partnership-protect-workers>.

³⁸ See DEP’T OF JUSTICE, ANTITRUST DIV., Justice Department’s Antitrust Division and the Office of the Inspector General of the Department of Health and Human Services Announce Partnership to Protect Health Care Markets (Dec. 9, 2022), <https://www.justice.gov/opa/pr/justice-department-s-antitrust-division-and-office-inspector-general-department-health-and>.

³⁹ FED. TRADE COMM’N AND FDA, Summary Report on the FDA/FTC Workshop on a Competitive Marketplace for Biosimilars (March 9, 2020), https://www.ftc.gov/system/files/ftc_gov/pdf/fda-ftc-workshopbiosimilarssummaryreport.pdf.

⁴⁰ See 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>.

conducted training for regulatory agency staff, and entered into memoranda of understanding (“MOUs”) to improve cooperation on enforcement efforts.

21. The Agencies also routinely weigh in on the likely competitive effects of agency action through inter-agency comments and amicus briefs.⁴¹ For example, in comments before the Federal Maritime Commission (“FMC”) regarding a proposed rule involving ocean common carriers and vessel space, the Division emphasized the importance of protecting and promoting competition and suggested certain areas where the FMC’s proposed rule could benefit from additional clarity, particularly around discussions of refusals to deal.⁴² In comments submitted to the New York State Department of Health, the FTC warned that Certificates of Public Advantage (“COPAs”) permitting concentrative hospital mergers frequently lead to higher prices and lower quality care for patients and lower wage growth for nurses and pharmacy workers.⁴³ The Division also submitted an amicus brief before the National Labor Relations Board, urging the Board to consider the potential competitive harm that could arise should the Board adopt an ambiguous standard for classifying employees under the National Labor Relations Act.⁴⁴ The FTC also has worked closely with the National Labor Relations Board over labor concerns, filing an amicus brief in December 2021 in a class action suit by 7-Eleven franchisees in which the FTC successfully argued that the agency’s Franchise Rule cannot be used to obviate state-imposed labor protections.⁴⁵

22. The Agencies routinely engage with the general public to highlight the impact of competition on the economy and solicit information regarding how the public is impacted

⁴¹ The Agencies submit third-party amicus briefs in private litigation matters to clarify the correct application of the antitrust laws and encourage courts to consider the potential competitive effects of the case before it. See, e.g., Brief for the United States of America and the Federal Trade Commission as Amici Curiae in Support of Neither Party, *Deslandes v. McDonald’s US*, Case No. 22-2333 (7th Cir. Nov. 18, 2022) (arguing that no-hire or non-solicitation provisions may be per se unlawful even if they are part of franchise agreements); Federal Trade Commission’s Brief as Amicus Curiae, *Sage Chemical, Inc. v. Supernus Pharmaceuticals, Inc.*, Case No. 1:22-cv-1302-CJB (D. Del. Mar. 22, 2023) (discussing important antitrust issues raised by Supernus’s motion to dismiss and reiterating that the exclusion of lower-cost generic drug competition typically causes significant harm to consumers and to competition); Brief for the United States of America as Amicus Curiae in Support of Neither Party, *Top Agent Network v. National Association of Realtors*, Case No. 21-16494 (9th Cir. Mar. 13, 2023) (highlighting the district court’s misapplication of the “antitrust injury” analysis under the antitrust laws).

⁴² DEP’T OF JUSTICE, Comment of the Antitrust Division of the United States Department of Justice, Federal Maritime Commission, Docket No. 22-44 (Oct. 21, 2022), <https://www.justice.gov/atr/page/file/1567946/download>.

⁴³ See FED. TRADE COMM’N, FTC Staff Opposes Proposed Certificate Of Public Advantage That Could Shield SUNY Upstate Medical University’s Acquisition Of Crouse Health System From Antitrust Scrutiny (Oct. 14, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/10/ftc-staff-opposes-proposed-certificate-public-advantage-could-shield-suny-upstate-medical>.

⁴⁴ Brief of the United States Department of Justice as Amicus Curiae in Support of Neither Party, National Labor Relations Board, *The Atlanta Opera, Inc. and Make-Up Artists and Hair Stylists Union, Local 798, IATSE* (Feb. 10, 2022), <https://www.justice.gov/atr/case-document/file/1470846/download>.

⁴⁵ Brief of the Federal Trade Commission as Amicus Curiae in Support of Neither Party, *Dhananjay Patel v. 7-Eleven*, Case No. SJC-13166 (Mass. S. Ct. Dec. 2, 2021).

by anticompetitive activities.⁴⁶ For example, in a meeting with the National Farmers Union, Division AAG Kanter discussed the state of competition in agriculture markets and provided insights as to how to best strengthen antitrust enforcement to promote competition and protect American farmers, producers, workers, and consumers.⁴⁷ Chair Khan has engaged extensively with small business groups, including a recent meeting with franchisees where they identified concerns about potential unfair methods of competition.⁴⁸

23. Along with the FTC, the Division has also hosted town halls seeking input from the public on the forthcoming revisions to the Agencies' merger guidelines.⁴⁹ In addition, the FTC recently changed its rules of practice to make it easier for members of the public to petition the agency for new rules or changes to existing rules, opening up its processes to greater public input and scrutiny.⁵⁰ And since summer 2021, the FTC has held regular Commission meetings that are open to the public and where members of the public can sign up to share their views and perspectives directly with the Commission. Agency officials have also engaged with the public via interviews in other mediums, including podcasts.⁵¹

⁴⁶ One recent example of this was the Division and FTC's Request for Information seeking public comment on a number of potential revisions to the horizontal and vertical merger guidelines. FED. TRADE COMM'N & DEP'T OF JUSTICE, Request for Information on Merger Enforcement (Jan. 18, 2022), <https://www.regulations.gov/document/FTC-2022-0003-0001>. The Agencies received nearly 6,000 comments in response to their request. The Agencies also hosted a two-day workshop to discuss recent developments at the intersection of competition law and labor. See Making Competition Work: Promoting Competition in Labor Markets, <https://www.ftc.gov/news-events/events/2021/12/making-competition-work-promoting-competition-labor-markets>.

⁴⁷ DEP'T OF JUSTICE, Assistant Attorney General Jonathan Kanter Meets with National Farmers Union (Sept. 13, 2022), <https://www.justice.gov/opa/pr/assistant-attorney-general-jonathan-kanter-meets-national-farmers-union#:~:text=Assistant%20Attorney%20General%20Jonathan%20Kanter%20speaks%20with%20members,competition%20in%20agriculture%20markets%20and%20strengthening%20antitrust%20enforcement>.

⁴⁸ See FED. TRADE COMM'N, Is Franchising Fair? Franchisee Conversations with Chair Khan Antitrust Scrutiny (May 2, 2023), <https://www.ftc.gov/news-events/events/2023/05/franchising-fair-franchisee-conversations-chair-khan>.

⁴⁹ Press Release, FED. TRADE COMM'N, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers>.

⁵⁰ Press Release, FED. TRADE COMM'N, FTC Opens Rulemaking Petition Process, Promoting Public Participation and Accountability (Sep. 15, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-opens-rulemaking-petition-process-promoting-public-participation-accountability>.

⁵¹ See Pivot, Meta Shakes off the FTC, and AAG Jonathan Kanter Takes on Google, <https://open.spotify.com/episode/2Gcke6uJOat1GQSPc6vpWv> (Feb. 3, 2023), (podcast featuring AAG Kanter discussing the AdTech lawsuit and harms to competition stemming from concentration); Sway, Lina Khan Is (Still) Bursting Big Tech's Bubble, <https://www.nytimes.com/2022/01/19/opinion/sway-kara-swisher-lina-khan.html> (Jan. 19, 2022)(podcast featuring Chair Lina discussing the FTC's competition work); Our Curious Amalgam, Are We Understanding the Changes? Evaluating the Antitrust Assumptions, <https://ourcuriousamalgam.com/episode/181-understanding-changes-evaluating-antitrust-assumptions/> (Aug. 15, 2022), (podcast featuring David Lawrence, Policy Director at the Division, discussing the Division's enforcement policies).

24. The Agencies' websites also provide helpful resources regarding the antitrust laws and the Agencies' views on competition matters⁵² and solicit feedback from the public.⁵³ For example, based on important public feedback, the FTC Strategic Plan For Fiscal Years 2022–2026 now reports consumer savings from concluded investigations of potentially anticompetitive conduct and transactions that are specific to Black, Hispanic, American Indian/Alaska Native, or Native Hawaiian/Other Pacific Islander communities, as well as other historically underserved communities.⁵⁴ Speeches by FTC and Division officials are posted on their respective websites and serve as a helpful mechanism to promote competition and provide additional insight into the views of the Agencies and individual FTC Commissioners on the benefits of competition.⁵⁵

4. Conclusion

25. The Agencies view both assessing and communicating the benefits of competition as paramount to the Agencies' mission of enforcing the antitrust laws. These evaluations—and the Agencies' promotion of the evaluations—serve a multifaceted purpose of ensuring that the Agencies are adequately funded and entrusted to continue their work of protecting competition to the benefit of consumers, workers, and innovators.

⁵² DEP'T OF JUSTICE ANTITRUST DIV., Public Documents, <https://www.justice.gov/atr/public-documents>; See FED. TRADE COMM'N, Competition Guidance, <https://www.ftc.gov/advice-guidance/competition-guidance>.

⁵³ DEP'T OF JUSTICE ANTITRUST DIV., Contact Information, <https://www.justice.gov/atr/contact-information>. See FED. TRADE COMM'N, Report an Antitrust Violation, <https://www.ftc.gov/enforcement/report-antitrust-violation>.

⁵⁴ Federal Trade Commission Annual Performance Report for Fiscal Year 2022 and Annual Performance Plan for Fiscal Years 2023 to 2024, https://www.ftc.gov/system/files/ftc_gov/pdf/p859900fy22apr_fy23-24app.pdf; see also Federal Trade Commission, Strategic Plan For Fiscal Years 2022-2026, https://www.ftc.gov/system/files/ftc_gov/pdf/fy-2022-2026-ftc-strategic-plan.pdf.

⁵⁵ DEP'T OF JUSTICE ANTITRUST DIV., Speeches, <https://www.justice.gov/atr/speeches-0>; FED. TRADE COMM'N, Speeches, <https://www.ftc.gov/news-events/news/speeches>.