

BEFORE THE
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

REQUEST FOR COMMENTS ON
PROMOTING SUPPLY CHAIN RESILIENCE

Docket No. USTR-2024-0002

COMMENT OF
THE ANTITRUST DIVISION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

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The Antitrust Division of the United States Department of Justice (“Antitrust Division”) respectfully submits this comment in response to the Office of the United States Trade Representative’s (“USTR”) request for public comment on promoting supply chain resilience, as described in its Federal Register Notice published on March 7, 2024.¹ USTR’s examination of this topic overlaps with the Antitrust Division’s efforts to protect competition. We commend USTR’s thoughtful request for comments and offer the Antitrust Division’s competition-focused perspective for consideration.

I. INTEREST OF THE ANTITRUST DIVISION

The Antitrust Division is entrusted by the American people with promoting competition through the enforcement of the federal antitrust laws. These laws reflect a legislative judgment that “[t]he heart of our national economic policy long has been faith in the value of competition.”² Protecting competition is “as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”³

The Antitrust Division has experience in enforcing the federal antitrust laws in industries that are essential to supply chains, including the ocean shipping and shipping container industries. The Division has prosecuted a number of companies and individuals for unlawful collusion in the ocean shipping industry, resulting in criminal fines and jail time.⁴ In addition, the Division polices mergers in this industry to protect against a substantial lessening of competition. For example, the Division’s investigation into the proposed acquisition of Maersk Container Industry A/S and Maersk Container Industry Qingdao Ltd. by China International Marine Containers Group Co. Ltd.—which would have resulted in a 90 percent control over refrigerated and insulated container box production—resulted in the abandonment of the deal.⁵ Similarly, Cargotec Corporation abandoned its intended merger with

¹ Request for Comments on Promoting Supply Chain Resilience, 89 Fed. Reg. 16,608 (Mar. 7, 2024).

² *Nat’l Soc’y of Pro. Eng’rs v. United States*, 435 U.S. 679, 695 (1978) (quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951)).

³ *N. Carolina State Bd. Of Dental Examiners v. FTC*, 574 U.S. 494, 502 (2015) (quoting *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972)).

⁴ See e.g., Press Release, Two International Shipping Executives Indicted for Participating in Long-Running Antitrust Conspiracy (Jun. 26, 2019), available at <https://www.justice.gov/opa/pr/two-international-shipping-executives-indicted-participating-long-running-antitrust>; Press Release, Former Shipping Executive Sentenced to 48 Months in Jail for His Role in Antitrust Conspiracy (Jan. 30, 2009), available at <https://www.justice.gov/opa/pr/former-shipping-executive-sentenced-48-months-jail-his-role-antitrust-conspiracy>; Press Release, International Shipping Executives Indicted for Colluding on Bids and Rates (Jun. 27, 2017), available at <https://www.justice.gov/opa/pr/international-shipping-executives-indicted-colluding-bids-and-rates>; Press Release, Third Company Agrees to Plead Guilty to Price Fixing on Ocean Shipping Services for Cars and Trucks (Dec. 29, 2014), available at <https://www.justice.gov/opa/pr/third-company-agrees-plead-guilty-price-fixing-ocean-shipping-services-cars-and-trucks>.

⁵ See Press Release, Global Shipping Container Suppliers China International Marine Containers and Maersk Container Industry Abandon Merger after Justice Department Investigation (Aug. 25, 2022),

Konecranes Plc. one day after the Division informed the parties that their settlement proposal was not sufficient to address concerns that the proposed combination would eliminate important competition in the markets for four types of shipping container handling equipment used by port customers to move goods in the global supply chain.⁶ In 2022, the Division and the Federal Bureau of Investigation announced an Initiative to Protect Americans from Collusive Schemes Amid Supply Chain Disruptions, discussed in more detail below, which enhanced our ability to deter, detect, and prosecute those who would exploit supply chain disruptions to engage in collusive conduct.⁷

II. PROMOTING SUPPLY CHAIN RESILIENCE SHOULD ALIGN WITH THE FUNDAMENTAL NATIONAL POLICY OF COMPETITION

The Antitrust Division agrees with USTR on the importance of strengthening our supply chains, as described in USTR’s Federal Register Notice. That strengthening goes hand in hand with the promotion of competition. Indeed, the Antitrust Division’s view is that supply chains are likely to be more resilient when competition is robust and consumers at every level of a supply chain are not dependent on a monopoly supplier or small oligopoly of suppliers. As the Federal Trade Commission recently determined in its study of the U.S. grocery supply chain, “The pandemic made clear that supply chain bottlenecks, which can be created or exacerbated by limited competition, can leave markets exposed to major supply chain shocks—and that those shocks, in turn, can allow major firms to entrench their dominance and further harm competition. Achieving more diversified supply chains, including through promoting competition, can both limit the severity of supply chain shocks and, in turn, reduce the opportunity for that entrenchment.”

As USTR’s Notice states, “Resilient supply chains provide a range of sources for critical inputs.”⁸ In support of this goal, the Division offers two concerns with how businesses may react to supply chain disruptions and what they might propose to strengthen supply chains.

First, while many individuals and businesses across various sectors in the economy have responded to supply chain disruptions caused by the Covid-19 pandemic with laudable ingenuity—

available at <https://www.justice.gov/opa/pr/global-shipping-container-suppliers-china-international-marine-containers-and-maersk>.

⁶ See Press Release, Shipping Equipment Giants Cargotec and Konecranes Abandon Merger After Justice Department Threatens to Sue (Mar. 29, 2022), *available at* <https://www.justice.gov/opa/pr/shipping-equipment-giants-cargotec-and-konecranes-abandon-merger-after-justice-department>.

⁷ See Press Release, Department of Justice Announces Initiative to Protect Americans from Collusive Schemes Amid Supply Chain Disruptions (Feb. 17, 2022), *available at* <https://www.justice.gov/opa/pr/department-justice-announces-initiative-protect-americans-collusive-schemes-amid-supply-chain>. The press release was shared with more than 650 members of the Procurement Collusion Strike Force to publicize the message.

⁸ 89 Fed. Reg. at 16,608.

bringing goods to communities in need, expanding existing capacity, and developing products and services to meet new needs—companies should not be allowed to exploit supply chain disruptions, or their responses to disruptions, as an excuse to collude to fix prices or wages, rig bids, or allocate markets, all of which are criminal violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, or as an excuse to monopolize or attempt to monopolize a market in violation of Section 2 of the Act, 15 U.S.C. § 2. As part of its Initiative to Protect Americans from Collusive Schemes Amid Supply Chain Disruptions, the Division formed a working group focusing on global supply chain collusion with its global partners, the Australian Competition and Consumer Commission, the Canadian Competition Bureau, the New Zealand Commerce Commission, and the United Kingdom Competition and Markets Authority. The working group is developing and sharing intelligence and utilizing existing international cooperation tools to detect and combat collusive schemes. The Division also expanded its outreach to industry, focusing on trade associations in targeted industries, including pharmaceuticals, trucking, and road building, to increase awareness of the antitrust laws and encourage compliance.

Second, USTR should reject proposals by firms to purportedly strengthen supply chains in highly concentrated industries by mergers, acquisitions, joint ventures, or other combinations that would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. For example, in threatening to sue to block the merger of Cargotec Corporation and Konecranes Plc., the Antitrust Division noted that markets for container handling equipment had experienced decades of consolidation and were highly concentrated.⁹ Indeed, diversification and competition, by distributing risk among multiple suppliers, is likely to strengthen supply chains.

In addition to its potential impacts on supply chain fragility, the Division’s experience is that highly concentrated industries are more susceptible to collusive behavior and make collusion among competitors easier. Any proposal to increase supply chain resilience that would result in increased consolidation in an industry that already is highly concentrated therefore should be viewed with skepticism.¹⁰

To deter and detect conduct that would violate the antitrust laws, the Antitrust Division encourages USTR to take competition equities into account and strengthen the agencies’ cooperation to promote competition. President Biden’s Executive Order on Promoting Competition in the American Economy “recognizes that a whole-of-government approach is necessary to address overconcentration,

⁹ See Note 6, above.

¹⁰ See U.S. DEP’T OF JUSTICE AND FED. TRADE COMM’N, Merger Guidelines (Dec. 18, 2023) at Guideline 1 (“Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market”), Guideline 3 (“Mergers Can Violate the Law When They Increase the Risk of Coordination”), Guideline 7 (“When an Industry Undergoes a Trend Toward Consolidation, the Agencies Consider Whether It Increases the Risk a Merger May Substantially Lessen Competition or Tend to Create a Monopoly”), available at <https://www.justice.gov/atr/2023-merger-guidelines>.

monopolization, and unfair competition” in the economy.¹¹ The Order states that “when agencies have overlapping jurisdiction, they should endeavor to cooperate fully in the exercise of their oversight authority, to benefit from the respective expertise of the agencies and to improve Government efficiency.”¹² The “means of cooperation in cases of overlapping jurisdiction should include, as appropriate and consistent with applicable law: (i) sharing relevant information and industry data; (ii) in the case of major transactions, soliciting and giving significant consideration to the views of the Attorney General or the Chair of the FTC, as applicable; and (iii) cooperating with any concurrent Department of Justice or FTC oversight activities under the Sherman Act or Clayton Act.”¹³

Consistent with the Executive Order, the Antitrust Division has made cooperative agreements with several agencies. For example, in July 2021 the Division and the Federal Maritime Commission formalized a framework, with the signing of a Memorandum of Understanding, for a partnership that enhances cooperation in the enforcement of antitrust and competition laws, including the Shipping Act, 46 U.S.C. §§ 41101-41309.¹⁴ And in February 2022, the Commission and the Division reaffirmed their continuing commitment to jointly enforcing competition laws and strengthening their cooperation to promote competition in the ocean freight transportation system.¹⁵ A whole-of-government approach to promoting competition and partnerships like these can help support supply chain resilience in a procompetitive manner.

USTR’s Notice likewise recognizes the value of this type of collaboration. It states that the “Administration is undertaking a whole-of-government effort to proactively strengthen domestic manufacturing and to secure trusted supply chains through strategic arrangements with trusted partners (friend-shoring) and with regional partners (near-shoring).” In furtherance of these priorities, USTR notes that it “has been crafting a new approach to trade and investment policy that promotes supply chain resilience.” To ensure that trade policy promotes competitive, diversified, resilient, and innovative supply chains, the Antitrust Division welcomes collaboration with USTR. The Division also requests the opportunity to offer technical assistance to ensure that friend-shoring and near-shoring efforts do not inadvertently lead to increased market power for dominant firms.

¹¹ Promoting Competition in the American Economy, Exec. Order No. 14,036, 86 Fed. Reg. 36,987, 36,989 (July 9, 2021), *available at* <https://www.federalregister.gov/documents/2021/07/14/2021-15069/promoting-competition-in-the-american-economy>.

¹² *Id.* at 36,990.

¹³ *Id.*

¹⁴ See Press Release, Justice Department and Federal Maritime Commission Sign Memorandum of Understanding to Support Interagency Collaboration (July 12, 2021), *available at* <https://www.justice.gov/opa/pr/justice-department-and-federal-maritime-commission-sign-memorandum-understanding-support>.

¹⁵ See Press Release, Justice Department and Federal Maritime Commission Reaffirm and Strengthen Partnership to Promote Fair Competition in the Shipping Industry (Feb. 28, 2022), *available at* <https://www.justice.gov/opa/pr/justice-department-and-federal-maritime-commission-reaffirm-and-strengthen-partnership>.

III. CONCLUSION

Competition is integral to lowering prices, improving quality of service, and strengthening supply chain resilience. As USTR considers comments and potential steps to promote resilience in supply chains, the Division encourages USTR to remind businesses and our trading partners that the important goal of strengthening supply chains does not supersede, or provide an excuse for violating, the U.S. antitrust laws. The Antitrust Division will continue to aggressively investigate potential violations of the antitrust laws no matter the industry, no matter the company, and no matter the individual. We appreciate this opportunity to offer our views and look forward to continuing participation as USTR addresses these important issues.

Respectfully Submitted,

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