

Antitrust Enforcers Heeding President's Call on Agriculture and Transportation

President Joe Biden issued Executive Order 14036 on Promoting Competition in the American Economy on July 9, 2021. Touting the advantages of an "open and competitive economy," the executive order highlights how competitive markets benefit farmers through "more choices among suppliers and major buyers, leading to more take-home income, which they can reinvest in their enterprises," and travelers through "more flight options at better prices and with improved service." Asserting that a "whole-of-government approach is necessary," Executive Order 14036 instructs agencies with overlapping jurisdiction to "endeavor to cooperate fully in the exercise of their oversight authority."

Though there has been ample discussion and debate over how Executive Order 14036 will affect Big Tech, other key aspects of the executive order have received far less attention. This update discusses those aspects, touching upon competition in agricultural and transportation markets, and then analyzes how antitrust enforcers and other federal agencies have thus far responded to the president's call to action in these sectors.

Agriculture

[Executive Order No. 14036](#) states that "[c]onsolidation in the agricultural industry is making it too hard for small family farms to survive" and "farmers' share of the value of their agricultural products has decreased, and poultry farmers, hog farmers, cattle ranchers, and other agricultural workers struggle to retain autonomy and to make sustainable returns." In particular, the executive order calls out "unfair anticompetitive restrictions on third-party repair or self-repair of items, such as the restrictions imposed by powerful manufacturers that prevent farmers from repairing their own equipment." Seeking to improve the "conditions of competition" in agricultural markets, the executive order instructs the secretary of agriculture to submit to the chair of the White House Competition Council a "plan to promote competition in the agricultural industries and to support value-added agriculture and alternative food distribution systems." The executive order recommends that the plan include several specific elements, including "creation or expansion of useful information for farmers, such as model contracts, to lower transaction costs" and "measures to enhance price discovery, increase transparency, and improve the functioning of the cattle and other livestock markets."

Repair Restrictions

Less than a month after the executive order was issued, the U.S. Federal Trade Commission (FTC) [unanimously voted](#) to "ramp up law enforcement against repair restrictions" that prevent businesses and consumers from "fixing their own products." Chair Lina M. Khan stated during an open meeting that the "FTC has a range of tools it can use to [root out unlawful repair restrictions](#)." Promising to "move forward on this issue with new vigor," [Chair Khan indicated](#) that the FTC would "scrutinize repair restrictions for violations of the antitrust laws," including whether such restrictions "constitute unfair acts or practices" in violation of Section 5 of the FTC Act. The FTC intends to "bring an interdisciplinary approach to this issue, using resources and expertise from throughout the agency to combat unlawful repair restrictions." Focusing on agricultural markets, former [Commissioner Rohit Chopra echoed the executive order](#) in pointing out that "[f]armers relying on tractors and other equipment have been blocked from an open repair market, which can lead to spoiled crops and missing out

on critical income."

Businesses considering whether to place physical, economic, or contractual restrictions on where and how customers and third parties may repair devices and equipment should closely monitor these developments and consult with experienced antitrust counsel.

US Department of Justice and US Department of Agriculture Partner to Launch Online Reporting Tool

In an effort to create "competitive agricultural markets that are fairer to producers and consumers," The U.S. Department of Justice (DOJ) and the U.S. Department of Agriculture (USDA) have [launched an online tool](#) to enable "farmers and ranchers to anonymously report potentially unfair and anticompetitive practices in the livestock and poultry sectors." [Farmerfairness.gov](#), described as a "one-stop shop to report potential violations of our competitions laws," allows users to submit complaints and tips to the DOJ Antitrust Division and USDA Packers and Stockyards Division. To help protect and encourage whistleblowers, citizens fearful of retribution can submit information anonymously. According to Attorney General Merrick B. Garland, Farmerfairness.gov will enable the DOJ and USDA to "collaborate early and ensure economic opportunity and fairness for all." In accord, Secretary of Agriculture Tom Vilsack touted that reporting potential violations through the online tool will allow federal agencies to "take appropriate action to create more competitive markets in the agricultural sector." These joint efforts serve as an important reminder that federal enforcers are closely monitoring conduct that affects farmers and ranchers.

Transportation

President Biden's executive order directs the secretary of transportation to consider measures to support increased "gate access, [and] implementation of airport competition plans." By encouraging federal agencies to facilitate "market entry to promote competition and economic opportunity," Executive Order 14036 seeks to "provide consumers with more flight options at better prices and with improved service, and to extend opportunities for competition and market entry as the industry evolves."

DOJ and US Federal Maritime Commission Sign Memorandum of Understanding

Just three days after President Biden issued the executive order, the DOJ and the U.S. Federal Maritime Commission (FMC) signed a [memorandum of understanding](#) (MOU) to achieve deeper interagency coordination. Remarking that collaboration "is important to ensuring healthy competition in the maritime industry," Acting Assistant Attorney General Richard A. Powers of the Antitrust Division noted that the DOJ's partnership with the FMC was "one of the many ways in which the Antitrust Division is prepared to play its role in achieving the competition objectives of the President's Competition Executive Order." FMC Chairman Daniel B. Maffei mirrored this sentiment in remarking that the MOU "supplements and strengthens the FMC's ability to detect, address, and pursue violations of the law or anticompetitive behavior by those we regulate." Specifically, the MOU "establishes a framework for the Antitrust Division and the FMC to continue regular discussions and review law enforcement and regulatory matters affecting competition in the maritime industry" through "periodic meetings" and "exchange of information and expertise." Given the significant antitrust enforcement activity around [ocean shipping services](#) and [seafood](#), it is not surprising that the Antitrust Division and FMC are formalizing a framework for collaboration. Businesses should implement trainings and review best practices to avoid even the appearance of improper discussions with competitors.

United States, et al. v. American Airlines, et al. No. 1:21-cv-11558 (D. Mass. July 21, 2021)

The Antitrust Division and several states have brought a civil lawsuit challenging an agreement between American Airlines Group, Inc. (American) and JetBlue Airways Corporation (JetBlue) to "share their revenues and coordinate which routes to fly, when to fly them, who will fly them, and what size planes to use on flights to and from four major airports" in Boston (Logan) and New York (JFK, LaGuardia, and Newark Liberty). [The complaint alleges](#) that this agreement, known as the "Northeast Alliance," will "eliminate significant competition between American and JetBlue that has led to lower fares and higher quality service for consumers traveling to and from those airports."

Throughout the complaint, JetBlue is portrayed as an "important and steadfast source of competition" to other major airlines. The so-called "JetBlue Effect" has allegedly "forced" American and other major airlines to lower their fares in Boston, resulting in an estimated \$3 billion in consumer savings since it commenced Boston operations in 2004. It is further alleged that internal JetBlue documents similarly suggest that JetBlue acted as a "disruption" and "influenced change" by other major airlines at JFK. The complaint alleges that "JetBlue's own estimate shows that it has saved consumers a total of more than \$10 billion since the airline's founding."

In announcing the lawsuit, Attorney General Garland indicated that the Northeast Alliance "would result in higher fares, fewer choices, and lower quality service if allowed to continue." Defendants have responded that the Northeast Alliance "has been underway for nine months, yet Plaintiffs do not allege that it has caused a single higher price, any reduction in quality or the slightest reduction in output." The case is currently in discovery and is scheduled for trial in September before Judge Leo T. Sorokin in the U.S. District Court for the District of Massachusetts.

DOJ Statement on the US Department of Transportation's Newark Airport Reassignment Notice

The Antitrust Division's lawsuit challenging the Northeast Alliance isn't the only development that could affect New York airports. On September 20, 2021, the Office of the Secretary of the U.S. Department of Transportation (DOT), the U.S. Federal Aviation Administration (FAA), and the DOT published a notice of reassignment schedules at Newark Liberty International Airport in the U.S. Federal Register that could have far-reaching impacts. Specifically, [regulators intend](#) to "approve schedule plans, for a single low-cost carrier (LCC) or ultra-low-cost carrier (ULCC), to operate the 16 peak afternoon and evening runway timings previously approved for operation by Southwest Airlines."

By way of background, Southwest obtained takeoff and landing rights (slots) at Newark Liberty in 2010 as part of the consent decree in the merger between United and Continental Airlines. In closing its investigation into the \$3 billion merger, the [DOJ determined](#) that the transfer of slots and other assets to Southwest resolved its "principal competition concerns and will likely significantly benefit consumers on overlap routes as well as on many other routes." On July 25, 2019, however, [Southwest announced](#) that it would cease operations at Newark. The DOJ quickly opined that Southwest's decision implicated the "relief [they] negotiated with United Airlines as a condition of its merger with Continental in 2010" because "Southwest used the slots to introduce new low-fare competition to United on multiple routes resulting in substantially lowered fares and increased service." [The Antitrust Division went on to recommend](#) that "DOT and FAA should seek to resolve the reallocation issue in a way that preserves competition at the airport."

In support of its plan for a LCC or ULCC to operate the former Southwest slots, regulators cited a study that found the "presence of LCCs and ULCCs causes a decrease in average one-way fares of between \$15-\$36." The DOT stated that these "potential savings to consumers are important objectives of the President's Executive Order on competition." Notably, the reassignment notice also highlights that the proposal is "in furtherance of the whole of government approach to competition embodied in the President's Executive Order 14036." Acting Assistant Attorney General Powers lauded the proposed action, observing that LCCs "play an important role in keeping the airline industry competitive." Powers further stated that the Antitrust Division "look[s] forward to

working with the Department of Transportation to address similar concerns at capacity-constrained airports, and to bring consumers more choices and lower prices."

Conclusion

Antitrust enforcers and other federal agencies have acted swiftly in working to achieve the goals set forth in President Biden's executive order. In bringing enforcement actions and coordinating with other government agencies, the DOJ and FTC are heeding the administration's call for greater focus on competition in agricultural and transportation markets. Companies in the seed, farming equipment, crop, poultry, livestock, fishing, forestry, logging, trucking, ocean shipping, air freight, automotive, road, construction, rail, and airline industries should be aware that antitrust enforcers are scrutinizing these areas more closely than ever.

These important developments will be addressed in "Biden's Big Moves: Antitrust Beyond Big Tech" at the American Bar Association's 70th Annual Antitrust Law Spring Meeting on Wednesday, April 6, 2022. The program will be moderated by Perkins Coie Antitrust & Unfair Competition Litigation Chair Shylah R. Alfonso and will include FTC Commissioner Christine Wilson, among other panelists.

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