A First Glance at the Biden Executive Order on Competition: The Good and the Bad (Including Much that Looks Ugly)
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The Biden Administration's July 9 Executive Order on Promoting Competition in the American Economy is very much a mixed bag—some positive aspects, but many negative ones.

It will have some positive effects on economic welfare, to the extent it succeeds in lifting artificial barriers to competition that harm consumers and workers—such as allowing direct sales of hearing aids in drug stores—and helping to eliminate unnecessary occupational licensing restrictions, to name just two of several examples.

But it will likely have substantial negative effects on economic welfare as well. Many aspects of the order appear to emphasize new regulation—such as Net Neutrality requirements that may reduce investment in broadband by internet service providers—and imposing new regulatory requirements on airlines, pharmaceutical companies, digital platforms, banks, railways, shipping, and meat packers, among others. Arbitrarily imposing new rules in these areas, without a cost-beneficial appraisal and a showing of a market failure, threatens to reduce innovation and slow economic growth, hurting producers and consumer. (A careful review of specific regulatory proposals may shed greater light on the justifications for particular regulations.)

Antitrust-related proposals to challenge previously cleared mergers, and to impose new antitrust rulemaking, are likely to raise costly business uncertainty, to the detriment of businesses and consumers. They are a recipe for slower economic growth, not for vibrant competition.

An underlying problem with the order is that it is based on the false premise that competition has diminished significantly in recent decades and that "big is bad." Economic analysis found in the February 2020 Economic Report of the President, and in other economic studies, debunks this flawed assumption.

In short, the order commits the fundamental mistake of proposing intrusive regulatory solutions for a largely nonexistent problem. Competitive issues are best handled through traditional well-accepted antitrust analysis, which centers on promoting consumer welfare and on weighing procompetitive efficiencies against anticompetitive harm on a case-by-case basis. This approach:

1. Deals effectively with serious competitive problems; while at the same time

2. Cabining error costs by taking into account all economically relevant considerations on a case-specific basis.

Rather than using an executive order to direct very specific regulatory approaches without a strong economic and factual basis, the Biden administration would have been better served by raising a host of competitive issues that merit possible study and investigation by expert agencies. Such an approach would have avoided imposing the costs of unwarranted regulation that unfortunately are likely to stem from the new order.

Finally, the order’s call for new regulations and the elimination of various existing legal policies will spawn matter-specific legal challenges, and may, in many cases, not succeed in court. This will impose unnecessary business uncertainty in addition to public and private resources wasted on litigation.

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