ICLE International Center for Law & Economics

Comments of the International Center for Law & Economics

RE: Impact of Supply Chain Disruptions on Competition in Consumer Goods and Retail (Docket ID FTC-2021-0068)

Submitted Via Electronic Filing, Feb. 28, 2022

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Dear Chair Khan and Commissioners Phillips, Slaughter, & Wilson:

The International Center for Law & Economics (ICLE) is a nonprofit, nonpartisan research center that promotes the use of law & economics methodologies to inform public-policy debates. We believe that intellectually rigorous, data-driven analysis will lead to efficient policy solutions that promote consumer welfare and global economic growth.

The Commission's investigation of the impact of supply-chain disruptions on competition in consumer goods and retail coincides with recent interest in the topic demonstrated by some law-makers. In particular, there have been concerns raised that rising concentration and alleged anti-competitive behavior by both suppliers (e.g., meat packers; oil & gas companies) and retailers (e.g., groceries; online retailers) has been the cause of sharp increases in consumer prices. Under this thinking, vigorous antitrust enforcement is an essential tool to stop the scourge of rising prices.

The most obvious problem with this thesis, however, is that while consumer prices have increased sharply this past year, concentration numbers in the relevant markets have been relatively unchanged for years or even decades. The best case that can be mustered for a linkage between concentration and rising consumer prices is that existing market structures may slightly exacerbate short-term price dislocations whose ultimate cause is exogenous supply and demand shocks brought about by the COVID-19 pandemic and government responses to it.

The purpose of antitrust law is to protect competition, not to guarantee low prices, in and of themselves. Indeed, high or rising prices are not an antitrust violation, as these prices may be the result of the undistorted competition that antitrust ultimately protects. It is widely understood that the price system is the most effective means of resource allocation, even when the process itself is painful. There are a host of reasons to expect higher prices in the current environment, but virtually none of the evidence points to anticompetitive conduct as one of them.

Take retail grocery prices, for example. Some have blamed rising grocery prices on market concentration, going so far as to propose breaking up Kroger.[1] But Kroger and its subsidiaries have less than 10% market share, and retail profit margins are generally minuscule: hardly consistent with monopoly exploitation. While 2020 saw grocery net margins approach 3.0%, in 2021, the margins moved closer to their long-run average of around 1.25%.[2] Over the longer term, U.S. consumers have also enjoyed marked improvements in their grocery shopping experience.[3] From 1990 to 2020, the number of items stocked in grocery stores nearly doubled from 16,500 to 31,119. From 1995 to 2020, the average store size grew by 30%.[4]

Moreover, while food prices have risen in recent years, it hasn't been by appreciably more than overall consumer prices. The U.S. Department of Agriculture's Economic Research Service

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[1] Elizabeth Warren (@SenWarren), TWITTER, (Jan 7, 2022, 9:49 AM), https://twitter.com/senwarren/status/1479465304795324422.

[2] *Grocery Stores Industry Profitability*, CSIMARKET, https://csimarket.com/Industry/industry_Profitability_Ratios.php?ind=1305.

[3] Leonard I. Nakamura, *The Measurement of Retail Output and the Retail Revolution*, FEDERAL RESERVE BANK OF PHILADELPHIA, Working Paper No. 97-4, (May 1997), available at https://www.philadelphiafed.org/-/media/frbp/assets/working-papers/1997/wp97-4.pdf.

[4] *Supermarket Facts*, THE FOOD INDUSTRY ASSOCIATION, https://www.fmi.org/our-research/supermarket-facts.

(ERS) finds that all-food CPI rose by 7.8% from 2016 to 2020, the same as all-items CPI.[5] The ERS attributes recent sharp price rises to pandemic-related shifts in consumption patterns. In 2020, for example, food-at-home spending accounted for 51.9% of total food expenditures, the first year it has accounted for more than half of food spending since 2008.[6]

Not coincidentally (and inconsistent with a monopoly-exploitation story), price increases haven't been homogenous. Much of the rise in beef prices, for example, has been driven by price increases of cuts of beef typically consumed at home, while prices of beef cuts typically consumed in restaurants have fallen. These changes have also closely tracked pandemic-related supply-chain disruptions, further suggesting the pandemic and the ensuing government-mandated lockdowns, and not excessive concentration, are to blame.

Some have also proposed reinvigorated enforcement of the Robinson-Patman Act of 1936, including President Joe Biden in his July 2021 Executive Order on Promoting Competition in the American Economy. But it should be noted that the stated intention behind Robinson-Patman—initially passed to protect smaller retailers and counter the perceived market power of then-dominant A&P—was to raise prices. It did this by constraining the kinds of efficiency enhancements that are seen in industries that enjoy economies of scale and network externalities. The largest grocery chains, for example, are vertically integrated. Many have their own logistics divisions that lead to supply-chain stability and lower prices. Breaking them up or constraining them could reduce their efficiency (and thus raise prices).

Reviving such outdated ideas would hurt, not help, consumers. Indeed, competition regulators have an inglorious history of misguided interventions in competitive retail markets. Consider *U.S v. Von's Grocery*.[7] The case arose from the U.S. Justice Department's challenge of the 1960 merger between Von's and Shopping Bag, in which the combined firm would have had less than 8% of the market. Ignoring the economic environment of the time (the car-induced shift toward supermarkets drawing from a larger geographic area and supplanting small, local stores), the Supreme Court

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[5] *Food price inflation over 2017–2021 slower than only housing and transportation*, U.S. DEPARTMENT OF AGRICULTURE ECONOMIC RESEARCH SERVICE, (Feb. 23, 2022), https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58350.

[6] *U.S. food-at-home spending surpasses food-away-from-home spending in 2020*, U.S. DEPARTMENT OF AGRICULTURE ECONOMIC RESEARCH SERVICE, (Aug. 20, 2021), https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58364.

[7] Joshua Wright, *Von's grocery and the concentration-price relationship in grocery retail*, 48 UCLA LAW REV. 743-771, (February 2001), https://www.researchgate.net/publication/294851918_Von's_grocery_and_the_concentration-price_relationship_in_grocery_retail.

upheld the DOJ's challenge to "prevent economic concentration" and "keep a large number of small competitors in business."

There are many possible causes of recent food-price inflation, including increased demand driven by fiscal stimulus; disruptions arising from an unprecedented set of simultaneous supply and demand shocks; the incentive effects of government responses to the COVID-19 pandemic; and an increase in the money supply, among others. There are also any number of concerns arising from the food supply chain that may merit legislative or regulatory attention. It may be important to protect farmers in certain circumstances, or to protect the environment. There may even sometimes be countervailing benefits to regulations that have the effect of increasing prices.

But the specific characteristics of the responses to disruptions from the pandemic are consistent with competitive markets, and antitrust is an entirely inappropriate tool to address economy-wide inflation. Rather, vigorous antitrust enforcement in these markets will not stop the scourge of rising prices.

For a fuller treatment of this topic, we also attach here ICLE's testimony to the recent hearing by the U.S. House Judiciary Committee's Antitrust Subcommittee on "Addressing the Effects of Economic Concentration on America's Food Supply."[8]

Sincerely,

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Attachment: *Testimony of Geoffrey A. Manne, Hearing on "Reviving Competition, Part 5: Addressing the Effects of Economic Concentration on America's Food Supply,"*

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[8] Geoffrey A. Manne, *Written Testimony of Geoffrey A. Manne, Hearing on "Reviving Competition, Part 5: Addressing the Effects of Economic Concentration on America's Food Supply,"* U.S. HOUSE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW, (Jan. 19, 2022), *available at* https://docs.house.gov/meetings/JU/JU05/20220119/114345/HHRG-117-JU05-Wstate-ManneG-20220119.pdf.