

ANTITRUST AND COMPETITION LAW IN GLOBAL SUPPLY CHAINS: RECENT DEVELOPMENTS AND BEST PRACTICES



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Significant supply chain disruptions have become prevalent in the context of the COVID-19 pandemic and, more recently, ongoing political conflict. These disruptions involve important and interconnected national and global industries, including logistics, consumer goods, pharmaceuticals, healthcare, retail, and agriculture. Following complaints submitted by businesses and industry groups, five national competition agencies — in the U.S., the UK, Canada, Australia, and New Zealand — announced that they are collaborating to share intelligence regarding rising supply chain prices, which could be caused by breaches of competition law, including cartel behavior. All five agencies are signatories to a cooperation framework. This article outlines the supply chain and competition law considerations that gave rise to this cooperation framework, how competition agencies in the U.S., the UK, and the EU, in particular, have previously tackled supply-chain concerns, as well as their potential next steps for unilateral and collaborative enforcement under the framework agreement. Further, this article proposes recommended best practices for businesses to consider to avoid the scrutiny of enforcement agencies.

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I. INTRODUCTION

On February 17, 2022, five competition authorities announced that they had created a working group to develop and share market intelligence to monitor and investigate suspected anti-competitive behavior impacting global supply chains. These authorities are the UK Competition and Markets Authority (“CMA”),⁴ the United States Department of Justice (“DOJ”),⁵ the Australian Competition and Consumer Commission,⁶ the Canadian Competition Bureau⁷ and the New Zealand Commerce Commission (“NZCC”)⁸ (the so-called “Five Eyes”). The parties signed a Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities (the “Five Eyes Framework”) on September 2, 2020.

This development arises in the context of significant supply-chain disruptions in the wake of the COVID-19 pandemic, global inflation concerns, as well as ongoing political conflict. According to recent United States labor data, consumer prices increased by 7.5 percent from January 2021 to January 2022, the fastest rate since February 1982.⁹ Similarly, the Office for National Statistics in the United Kingdom reports that the Consumer Price Index rose by 5.5 percent in the 12 months to February 2022, the highest CPI 12-month inflation rate in the National Statistics series beginning in January 1997.¹⁰

The working group announcement also follows complaints submitted by businesses and industry groups to the CMA, including the manufacturers’ organization Make UK and the British Chambers of Commerce, which expressed concerns about whether extreme rises in shipping costs, in particular, were justified.

The five competition authorities have publicly expressed concerns that certain businesses are taking advantage of supply chain disruptions to engage in collusion and other forms of anticompetitive behavior. To that end, the authorities will assess whether supply-chain disruptions, and related cost increases resulting from demand and supply shocks, account for price increases, or whether those price increases are the result of anti-competitive conduct – whether unilateral or coordinated.

This article outlines the supply chain and competition law considerations that gave rise to this cooperation framework, how competition agencies in the US, the UK, and the EU, in particular, have previously tackled supply-chain concerns, as well as potential next steps for unilateral and collaborative enforcement under the framework agreement. Further, this article proposes recommended best practices for businesses to consider to avoid the scrutiny of enforcement agencies.

II. HISTORICAL APPROACH IN THE UNITED STATES

The DOJ has statutory authority to bring civil and criminal actions against individuals and companies that harm American consumers by engaging in offenses that violate the U.S. antitrust laws.¹¹ Criminal enforcement of the U.S. antitrust laws by the DOJ historically has been reserved for the most serious offenses, such as naked conspiracies among competitors for price fixing, bid rigging, or allocating markets or customers. Such

4 *Competition and Markets Authority Press Release, International Agencies Put Supply Chains on Notice Against Collusion*, COMPETITION AND MARKETS AUTHORITY (February 17, 2022), <https://www.gov.uk/government/news/international-agencies-put-supply-chains-on-notice-against-collusion> (last visited on March 18, 2022).

5 *Department of Justice Press Release, Department of Justice Announces Initiative to Protect Americans from Collusive Schemes Amid Supply Chain Disruptions*, DEPARTMENT OF JUSTICE (February 17, 2022), <https://www.justice.gov/opa/pr/department-justice-announces-initiative-protect-americans-collusive-schemes-amid-supply-chain> (last visited on April 8, 2022) (last visited on April 8, 2022).

6 *Australian Competition and Consumer Commission Press Release, Five Eyes Competition Authorities to Focus on Collusion in International Trade*, AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (February 17, 2022), <https://www.accc.gov.au/media-release/five-eyes-competition-authorities-to-focus-on-collusion-in-international-trade> (last visited on March 18, 2022).

7 *Canadian Competition Bureau Press Release, International Working Group Targets Potential Collusion by Competitors in Supply and Distribution of Goods*, CANADIAN COMPETITION BUREAU (February 17, 2022), <https://www.canada.ca/en/competition-bureau/news/2022/02/international-working-group-targets-potential-collusion-by-competitors-in-supply-and-distribution-of-goods.html> (last visited on March 18, 2022).

8 *Competition Agencies Work Together to Identify Potential Cartel Conduct in Global Supply Chains*, NEW ZEALAND COMMERCE COMMISSION (February 17, 2022), <https://comcom.govt.nz/news-and-media/media-releases/2022/competition-agencies-working-together-to-identify-potential-cartel-conduct-in-global-supply-chains> (last visited on March 18, 2022).

9 See US BUREAU OF LABOR STATISTICS, <https://www.bls.gov/opub/ted/2022/consumer-prices-up-7-5-percent-over-year-ended-january-2022.htm> (last visited on April 8, 2022).

10 See OFFICE FOR NATIONAL STATISTICS, <https://www.ons.gov.uk/economy/inflationandpriceindices/bulletins/consumerpriceinflation/february2022> (last visited on April 8, 2022).

11 In the United States, both the DOJ and the Federal Trade Commission (“FTC”) investigate and regulate competition. However, the DOJ, rather than the FTC, joined the working group likely because the DOJ prosecutes both civil and criminal actions.

violations have been unanimously condemned in the U.S. as especially harmful to consumer welfare and lacking procompetitive benefits that may justify the conduct.

The DOJ also has substantial experience investigating and prosecuting antitrust activity related to supply chains in a variety of industries, such as air cargo, freight forwarding, ocean shipping, among others. In numerous instances, these investigations have also resulted in lengthy parallel private litigations.

A. Air Cargo

From 2006 until 2011, the DOJ prosecuted global airlines and their executives for a price-fixing scheme that artificially inflated passenger and cargo fuel surcharges between 2000 and 2006 to make up for lost profits. At least 22 airlines and 21 executives were charged, and more than \$1.8 billion in criminal fines were assessed against the defendants.¹²

The DOJ, in conjunction with the European Commission (“EC”), began investigating the air cargo industry in 2005 after officials with German-based Lufthansa notified the DOJ that the airline had been conspiring to set cargo surcharges. Following a year-long investigation, FBI agents and their European counterparts raided airline offices in 2006. Investigators eventually found a paper trail laying out agreements stretching back to 2000 to set passenger and cargo fuel surcharges.

The DOJ filed criminal lawsuits beginning in 2006, alleging that airlines conspired to suppress and eliminate competition by fixing particular cargo base rates or fees charged to customers for certain international air shipments, including to and from the United States.¹³ The result was an unreasonable restraint of interstate and foreign trade and commerce in violation of Section 1 of the Sherman Act. The conspiracy, according to the DOJ’s findings, was conducted through participation in meetings, conversations, and communications related to cargo rates and fees for international air shipments, the levying of cargo rates in accordance with the agreements reached, and the monitoring and enforcement of the agreed-upon cargo rates.¹⁴

Shortly after the DOJ’s criminal prosecution began, consumers of air cargo services brought more than 90 class action lawsuits against dozens of air cargo carriers. These cases were later consolidated in the Eastern District of New York in a multidistrict litigation (or “MDL”) titled *In re: Air Cargo Shipping Services Antitrust Litigation*.¹⁵ Mirroring the DOJ indictments, the MDL complaint alleged that air cargo carriers agreed in secret meetings, conversations, and other communications on cargo rates to and from the United States. The court ultimately certified a class of tens of thousands of direct purchasers of air cargo shipping services. However, the Second Circuit dismissed the indirect-purchaser class, finding that federal aviation law pre-empted price-fixing claims brought against foreign carriers under state antitrust statutes. The *Air Cargo* MDL resulted in more than \$1.2 billion in settlements and more than \$100 million in attorney’s fees.¹⁶

B. Freight Forwarding Industry

Between 2010 and 2011, the DOJ prosecuted 16 companies and executives in the freight forwarding industry, which arrange for and manage the shipment of goods, including receiving, packaging and otherwise preparing cargo destined for international ocean shipment. These prosecutions lead to the imposition of more than \$120 million in criminal fines.¹⁷ The DOJ alleged that the companies colluded regarding freight forwarding services to fix, raise, and maintain prices charged to customers. According to the DOJ, the companies met in the United States and elsewhere to discuss and agreed to fix prices in violation of Section 1 of the Sherman Act.

12 See *EVA Airways Corporation Agrees to Plead Guilty and to Pay \$13.2 Million Fine for Price Fixing on Air Cargo Shipments*, DOJ NEWS (May 27, 2011), <https://www.justice.gov/opa/pr/eva-airways-corporation-agrees-plead-guilty-and-pay-132-million-fine-price-fixing-air-cargo> (last visited on April 8, 2022); See also *Martinair Airline Executive Indicted in Conspiracy to Fix Surcharge Rates on Air Cargo Shipments*, DEPARTMENT OF JUSTICE, <https://www.justice.gov/opa/pr/martinair-airline-executive-indicted-conspiracy-fix-surcharge-rates-air-cargo-shipments> (last visited on April 8, 2022); *Polar Air Cargo LLC Agrees to Plead Guilty to Price Fixing on Air Cargo Shipments*, <https://www.justice.gov/opa/pr/polar-air-cargo-llc-agrees-plead-guilty-price-fixing-air-cargo-shipments> (last visited on April 8, 2022); *Major International Airlines Agree to Plead Guilty and Pay Criminal Fines Totaling More Than \$500 Million for Fixing Prices on Air Cargo Rates*, <https://www.justice.gov/archive/opa/pr/2008/June/08-at-570.html> (last visited on April 8, 2022).

13 See e.g. *United States v. Eva Airways Corp.*, No. 1:11-cr-00170-JDB (D.D.C. 2011), <https://www.justice.gov/atr/case-document/file/495316/download> (last visited on April 8, 2022).

14 *Id.*

15 No. 11-5464 (E.D.N.Y.)

16 *\$100M in Attn Fees Approved in Air Cargo Antitrust MDL*, LAW360 (October 6, 2016), <https://www.law360.com/articles/848942> (last visited on April 8, 2022).

17 *Japanese Freight Forwarding Company Agrees to Plead Guilty to Criminal Price-Fixing Charge*, UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/opa/pr/japanese-freight-forwarding-company-agrees-plead-guilty-criminal-price-fixing-charge> (last visited on April 8, 2022).

Again in 2018 and 2019, DOJ prosecuted freight forwarders for a conspiracy to fix prices. Several executives were sentenced to prison for this conduct.¹⁸

The EC similarly also announced that it had sent statements of objection to several companies in 2010 in connection with its investigation of the industry.¹⁹

C. Ocean Shippers

Beginning in 2014, DOJ brought charges in Maryland federal court — the most recent filed in 2018 — against five carriers based in Japan, Norway, and Chile, plus 13 individual employees, for price fixing, bid rigging, and allocating customers in the international ocean shipping industry for “roll-on, roll-off” (“RoRo”) cargo, a method used to ship vehicles and agricultural equipment.²⁰ The shippers were ordered to pay more than \$255 million in criminal fines, and several executives received prison sentences.²¹

More recently, on July 9, 2021, President Joe Biden took aim at the ocean shipping sector of the maritime industry with the issuance of his Executive Order (“E.O.”) on Promoting Competition in the American Economy.²² The E.O. specifically references consolidation in the maritime shipping industry during the past couple of decades, suggesting that such consolidation may disadvantage U.S. exporters. The E.O. encourages the Federal Maritime Commission (“FMC”) “to ensure vigorous enforcement against shippers charging American exporters exorbitant charges” and to “consider further rulemaking to improve detention and demurrage practices and enforcement of related Shipping Act prohibitions.”²³ The E.O. further encourages the FMC to cooperate with DOJ on enforcement efforts—focusing on the fees imposed on U.S. exporters by increasingly consolidated foreign shipping conglomerates.

On July 12, 2021, the Antitrust Division and FMC entered into a memorandum of understanding (“MOU”) to collaborate and redouble their efforts to enforce antitrust laws and Shipping Act protections applicable to the maritime industry.²⁴

On February 28, 2022, the Biden Administration issued a press release and fact sheet stating that the DOJ is expanding its cooperation with the FMC, and will “provide the FMC with the support of attorneys and economists from the Antitrust Division for enforcement of violations of the Shipping Act and related laws.” Likewise, the FMC will share shipping industry experience with the DOJ for Sherman Act and Clayton Act enforcement actions.²⁵

18 See *DOJ News, Freight Transportation Company Agrees to Plead Guilty to Antitrust Charge*, UNITED STATES DEPARTMENT OF JUSTICE (September 17, 2019), <https://www.justice.gov/opa/pr/freight-transportation-company-agrees-plead-guilty-antitrust-charge> (last visited on April 8, 2022); *Third Freight Transportation Executive Pleads Guilty to Antitrust Charge*, UNITED STATES DEPARTMENT OF JUSTICE <https://www.justice.gov/opa/pr/third-freight-transportation-executive-pleads-guilty-antitrust-charge> (last visited on April 8, 2022).

19 In New Zealand, the NZCC filed proceedings against several shipping logistics companies, including units of the Deutsche Bahn Group, accusing them of agreeing to fix surcharges and other fees for air freight-forwarding services. The NZCC has reached settlements with two of the defendants. In addition, competition authorities in Italy and Brazil are reportedly investigating freight-forwarding companies.

20 *Fourth Ocean Shipping Executive Pleads Guilty to Price Fixing on Ocean Shipping Services for Cars and Trucks*, UNITED STATES DEPARTMENT OF JUSTICE (MARCH 26, 2015), <https://www.justice.gov/opa/pr/fourth-ocean-shipping-executive-pleads-guilty-price-fixing-ocean-shipping-services-cars-and> (last visited on April 8, 2022).

21 *Japanese Company Agrees to Plead Guilty to Price Fixing on Ocean Shipping Services for Cars and Trucks*, UNITED STATES DEPARTMENT OF JUSTICE (September 26, 2014), <https://www.justice.gov/opa/pr/japanese-company-agrees-plead-guilty-price-fixing-ocean-shipping-services-cars-and-trucks>; <https://www.justice.gov/opa/pr/fourth-ocean-shipping-executive-pleads-guilty-price-fixing-ocean-shipping-services-cars-and> (last visited on April 8, 2022); *Two International Shipping Executives Indicted for Participating in Long-Running Antitrust Conspiracy*, UNITED STATES DEPARTMENT OF JUSTICE (JUNE 26, 2019) <https://www.justice.gov/opa/pr/two-international-shipping-executives-indicted-participating-long-running-antitrust> (last visited on April 8, 2022).

22 *Executive Order on Promoting Competition in the American Economy*, THE WHITE HOUSE (July 9, 2021) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/> (last visited on April 4, 2022).

23 *Id.*

24 *Memorandum of Understanding between the Federal Maritime Commission and the Antitrust Division, Department of Justice*, UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/opa/press-release/file/1411101/download> (last visited on April 8, 2022).

25 Fact Sheet: Lowering Prices and Leveling the Playing Field in Ocean Shipping, THE WHITE HOUSE (February 28, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-lowering-prices-and-leveling-the-playing-field-in-ocean-shipping/> (last visited on April 8, 2022).

D. Other Industries & Enforcement Efforts

In addition to the above-mentioned enforcement efforts, the DOJ has sought to protect supply chains against anti-competitive conduct in the following settings:

- *Capacity Constraints:* The DOJ has brought antitrust enforcement actions to prevent agreements that artificially restrain the supply of goods, with a particular emphasis on the food supply chain. For example, the DOJ is currently investigating the meat and poultry industries, where it is alleged that a lack of competition and dominant producers control so much of the supply chain that they can increase their own profits at the expense of both farmers and consumers.²⁶ The DOJ has cited meat and poultry prices as driving food inflation and has identified market concertation in the meatpacking industry as an area of focus.
- *Merger Context:* The DOJ also assesses potential supply chain concerns in the context of its merger review responsibilities. For example, in late November 2021, the DOJ announced it was filing a civil antitrust suit to block the merger of U.S. Sugar Corp. and Imperial Sugar Co.²⁷ This decision was based in part on the DOJ's concerns regarding the impact of the merger on the supply chain for refined sugar.²⁸ The DOJ alleges that United Sugars and Imperial Sugar compete head-to-head to supply refined sugar to customers across the South-eastern United States, resulting in lower prices, better-quality products and more reliable service for customers across the region. Because transportation costs make up a significant portion of the total price customers pay for refined sugar, the nearest sugar products are often customer's best competitive options. As such, DOJ alleges that U.S. Sugar's proposed acquisition of Imperial Sugar would further consolidate an already concentrated market for refined sugar.
- *State Price-Gouging:* The DOJ has also worked in conjunction with state enforcement authorities to take action against suspected price gouging efforts. Approximately 38 states and the District of Columbia have statutes or regulations prohibiting price increases for certain essential products. For example, during the beginning of the COVID-19 pandemic, the federal and state enforcement authorities worked together to stop and prevent price gouging of essential medical supplies such as face masks, respirators, and diagnostics.²⁹

III. HISTORICAL APPROACH IN THE EUROPEAN UNION AND THE UNITED KINGDOM

Competition authorities in the European Union and the United Kingdom have similarly investigated, and issued substantial administrative penalties, in respect of the sectors that are likely to be scrutinized by the five eyes with renewed interest.

As noted above, in several well-known cases the logistics and transportation industry has previously been scrutinized by the EC, in parallel investigations with their US counterparts.

Like the DOJ, in 2012, the EC found that a number of competitors in the freight forwarding sector had engaged in infringements of Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU") and Article 53(1) of the Agreement creating the European Eco-

²⁶ *Four Executives and Company Charged with Price Fixing in Ongoing Investigation into Broiler Chicken Industry*, UNITED STATES DEPARTMENT OF JUSTICE (July 29, 2021) <https://www.justice.gov/opa/pr/four-executives-and-company-charged-price-fixing-ongoing-investigation-broiler-chicken> (last visited on April 8, 2022).

²⁷ *Press Release, Department of Justice, Justice Department Sues to Block U.S. Sugar's Proposed Acquisition of Imperial Sugar*, UNITED STATES DEPARTMENT OF JUSTICE (November 23, 2021), available at: <https://www.justice.gov/opa/pr/justice-department-sues-block-us-sugar-s-proposed-acquisition-imperial-sugar> (last visited on April 8, 2022); *U.S. v. U.S. Sugar Corporation, et al.*, No. 1:21-cv-01644 (D. Del.).

²⁸ Assistant Attorney General Jonathan Kanter stated that "[t]his deal substantially lessens competition at a time when global supply chain challenges already threaten steady access to important commodities and goods . . . [The lawsuit seeks to] protect the resiliency of the American domestic sugar supply." *Press Release, Fed. Trade Comm'n, FTC Launches Inquiry into Supply Chain Disruptions* (November 29, 2021).

Less than a week after the DOJ filed suit to block the U.S. Sugar merger, the Federal Trade Commission announced its intention to study supply chain disruptions to the extent "these disruptions are causing ongoing hardships for consumers and harming competition in the U.S. economy." Section 6(b) of the FTC Act authorizes the FTC to engage in investigative studies that need not have a law enforcement purpose. See 15 U.S.C. § 46. In its 6(b) study relating to the supply chain, the FTC ordered several large retailers, wholesalers, and goods suppliers to respond to questions and to provide internal documents regarding supply chain disruptions. As such, the issue of supply chains is being attacked from multiple fronts.

²⁹ *Memorandum for All Heads of Department Components and Law Enforcement Agencies*, OFFICE OF THE ATTORNEY GENERAL WASHINGTON, DC (March 24, 2020), <https://www.justice.gov/file/1262776/download> (last visited on April 8, 2022).

conomic Area (“EEA”) when they entered into agreements and concerted practices to fix air freight forwarding surcharges.³⁰ In particular, those surcharges related to new export systems, advanced manifest systems, currency adjustment factors and peak season surcharges. The conduct was found to amount to a single and continuous infringement between at least 2003 and 2007, facilitated by meetings and email exchanges. The conduct related to routes between China/South China and Hong Kong and the EEA; between the EEA and the United States; and between the United Kingdom and third countries outside the EEA. The total amount of the fines imposed on the firms amounted to EUR 169 million. Deutsche Post was granted conditional immunity. In 2018, the Court of Justice of the European Union upheld the amount of the fines imposed by the EC.³¹

Other examples of the EC finding cartel infringements in the logistics sector include:

- *“Blocktrain” cargo services*:³² On July 15, 2015, the EC announced that it had fined Express Interfracht, part of the Austrian railway incumbent Österreichische Bundesbahnen (“ÖBB”), and Schenker, part of the German railway incumbent Deutsche Bahn (“DB”) a total of EUR 49 million for their involvement in a cartel arrangement to fix prices and allocate customers for “blocktrain” cargo services between 2004 and 2012.³³ Kühne+Nagel, a Swiss-based company, was not fined as it was granted immunity.
- *Air cargo*: In 2017, the EC fined 10 air cargo carriers a total of EUR 776 million for engaging in price fixing between December 1999 and February 2006 in relation to airfreight services covering flights to and within the EEA, in contravention of Article 101 of the TFEU. The EC reissued fines that were originally issued in 2010, but which had been annulled by the European General Court.³⁴
- *Ocean Shippers*: On February 21, 2018, the EC found that five maritime car carriers had engaged in a single and continuous infringement on various international trade routes between October 18, 2006 and 6 September 2012 to coordinate prices and allocate customers for the provision RoRo deep sea carriage services for new motor vehicles, cars, trucks, and high and heavy vehicles.³⁵ The amount of the fines imposed totaled EUR 395 million.

At the national level, in Spain, on March 9, 2018, the Comisión Nacional de los Mercados y la Competencia (“CNMC”) announced that it had fined parcel delivery companies, including CEX, FedEx, UPS, DHL, and TNT a total of EUR 68 million for entering into a total of nine customer allocation agreements (executed through WhatsApp conversations, internal email exchanges and verbally) in relation to their commercial clients in Spain.³⁶ On October 28, 2019, the French Autorité de la Concurrence imposed a fine amounting to EUR 3.98 million on Astre road transport group (an industry association of small and medium-sized road transporters) for its involvement in customer allocation through a bid-rigging arrangement over a period of two decades.³⁷ On June 20, 2020, the Office for the Protection of Competition (“OPC”) in the Czech Republic imposed fines equivalent to approximately EUR 690 million on AWT Čechofracht a.s., Interfracht s.r.o., Argo Logistics, s.r.o. and Spedica, s.r.o. for implementing a cartel arrangement in the sector of international rail freight transport and forwarding through allocating customers and contracts and coordinating prices for their services between 2004 and 2013.³⁸ Most recently (since November 2021) the CMA has been investigating

30 The EC defined freight forwarding as “the organisation of transportation of items (possibly including activities such as customs clearance, warehousing, ground services etc.)”. The EC segmented the freight forwarding business into domestic and international freight forwarding and freight forwarding by air, land, and sea. EC Decision *CASE AT.39462 – Freight forwarding*, EUROPEAN COMMISSION, https://ec.europa.eu/competition/antitrust/cases/dec_docs/39462/39462_6408_3.pdf (March 28, 2012) at para 3.

31 EC Press Release No 09/18: *The Court of Justice Upholds the Fines Imposed by the Commission on a Number of Companies for their Participation in Cartels in the International Air Freight Forwarding Services sector*, EUROPEAN COMMISSION (February 1, 2018), <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-02/cp180009en.pdf> (last visited on March 23, 2022).

32 The EC defined blocktrains as cargo trains that deliver goods from one site to another without being stored or split up on the way.

33 See *EC Press Release: Antitrust: Commission Fines Cargo Train Operators EUR 49 million for Cartel*, EUROPEAN COMMISSION (July 15, 2015), https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5376 (last visited on March 23, 2022).

34 See *EC: Antitrust: Commission re-adopts decision and fines air cargo carriers EUR776 million for price-fixing cartel*, EUROPEAN COMMISSION (March 17, 2017), https://ec.europa.eu/commission/presscorner/detail/en/IP_17_661 (last visited on March 18, 2022).

35 EC Decision *CASE AT.40009 – Maritime Car Carrier*, European Commission (February 21, 2018), https://ec.europa.eu/competition/antitrust/cases/dec_docs/40009/40009_2427_7 (last visited on April 8, 2022).

36 See *CNMC Press Release*, CNMC, https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2018/20180308_NP_Sancionador_Paqueteria_eng.pdf (last visited on March 27, 2022).

37 See *Autorité de la Concurrence Press Release* (October 28, 2019), *The Autorité de la concurrence fines the Astre transport group €3.8 million for anticompetitive practices*, <https://www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-fines-astre-transport-group-eu38-million-anticompetitive> (last visited on March 27, 2022).

38 See *OPC Press Release The Office imposed fine for the third cartel agreement in rail freight transport* (June 22, 2020), https://www.concurrences.com/IMG/pdf/office_for_the_protection_of_competition_news_-_competition_the_office_imposed_fine_for_the_third_cartel_agreement_in_rail_freight_transport.pdf?61170/f4e66f-cb111994d7a6b364556da0c47c5d75d9e7 (last visited on March 27, 2022).

whether a capacity-sharing agreement between P&O Ferries and DFDS – two ferry operators on the Dover-Calais route – has the potential to prevent, restrict or distort competition within the United Kingdom.³⁹

These findings have the potential to give rise to private follow-on damages actions. For example, in the United Kingdom, in relation to the “ocean shippers”/RoRo cartel, on February 22, 2022, the UK Competition Appeal Tribunal (“CAT”) certified follow-on damages claims brought on behalf of consumers who purchased or financed new cars or commercial vehicles from the relevant car manufacturers (amounting to more than 17 million vehicles).⁴⁰ Those claimants are automatically part of the relevant class, as collective proceedings were brought on an opt-out basis. Relevant to the claim is the degree of pass-through or pass-on of the price increases, which will require the presentation of robust economic evidence, and which will be determinative of the extent of harm suffered by claimants. As these developments illustrate, follow-on damages actions that are brought in the United Kingdom may rely on EC decisions as prima facie evidence of an infringement where those decisions were issued prior to the United Kingdom exiting the European Union on January 31, 2020.

The above decisions reflect that (i) competition authorities are likely to closely scrutinize pricing in the logistics sector as the authorities have previously identified these sectors as conducive to coordination; and (ii) firms could face considerable penalties where they are found to have engaged in coordinated conduct and unilateral exploitative conduct. A challenge for the Five Eyes will be separating price increases resulting from exogenous shocks, on the one hand, from price increases resulting from conduct undertaken in violation of the competition laws, on the other hand.

However, notably, on March 21, the European Competition Network (comprising the 28 competition authorities within the European Union and the DG Competition of the European Commission) in a statement indicated that it would not actively intervene to address necessary and temporary cooperation to ensure the purchase, supply, and distribution of scarce products in the context of the ongoing political conflict.⁴¹

While the EC is not a party to the Five Eyes Framework, the EC regularly coordinates with competition authorities worldwide on a bilateral basis, including the individual members of the Five Eyes, in the context of reciprocal waivers issued in the context of specific cases.

IV. POTENTIAL NEXT STEPS

If, following their collaboration, the authorities identify that firms in key sectors have engaged in unilateral or coordinated conduct that has led to the high prices, they could take further steps to gather information or to launch investigations or other enforcement functions.

The EC has the ability to compel the production of information in the context of sector inquiries, which are frequently, but not always, made public. Under Article 20(1) of Regulation 1/2003, the Commission is empowered to conduct “all necessary inspections” for the application of Articles 101 and 102 TFEU. During the pandemic, the EC has begun to apply more intensive remote investigation tools and is now back conducting dawn raids.⁴² In the UK, the CMA has broad powers to request documents and information from parties subject to strict penalties for non-compliance. The CMA may call for the production of documents in the context of a market study. For example, in the context of its market study into online platforms and the digital advertising market in the UK, the CMA collected information from online platforms.⁴³ Additionally, the

39 See *CMA Press Release: Investigation into a capacity sharing agreement between P&O Ferries and DFDS*, COMPETITION AND MARKETS AUTHORITY (November 12, 2021): <https://www.gov.uk/cma-cases/investigation-into-a-capacity-sharing-agreement-between-p-and-o-ferries-and-dfds> (last visited on April 8, 2022).

40 CMA: UK Competition Appeal Tribunal: *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others* (1339/7/17/20), *1339/7/17/20 Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others* | Competition Appeal Tribunal (catribunal.org.uk) (last visited on March 20, 2022).

41 See *European Commission Press Release: ‘ECN authorities’ statement on the application of competition law in the context of the Russian invasion of Ukraine*, EUROPEAN COMMISSION (March 21, 2022), https://ec.europa.eu/neighbourhood-enlargement/news/competition-ecn-authorities-statement-application-competition-law-context-russian-invasion-ukraine-2022-03-21_en (last visited on March 31, 2022).

42 See press releases: *Antitrust: Commission carries out unannounced inspections in the manufacturing and distribution of garments sector*; *Antitrust: Commission carries out unannounced inspections in the animal health sector in Belgium* Concurrences-Mayer Brown, *Competition Inspections in 21 Jurisdictions: a Practitioner’s Guide*, edited by Nathalie Jalabert-Doury.

43 *Online Platforms and Digital Advertising Market Study Final Report*, COMPETITION AND MARKETS AUTHORITY (1 July 2020), available at: https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf (last visited on April 1, 2022).

CMA may call for the production of documents when performing an enforcement function,⁴⁴ as well as in the context of dawn raids.⁴⁵ In March 2019, the CMA issued its first administrative penalty (amounting to £25,000) for obstruction of an inspection through failure to produce document.⁴⁶

In addition, the Five Eye's investigation could potentially give rise to some of the authorities' scrutiny of firms' pricing as a unilateral exploitative abuse of dominance (specifically, excessive pricing), if a firm is shown to have "directly or indirectly imposed an unfair purchase or selling price" which has "no reasonable relation to the economic value of the product supplied."⁴⁷ While relatively rare, excessive pricing rules have recently been applied in several cases in the pharmaceutical sector in the United Kingdom and under state price gouging laws in the U.S.⁴⁸

For example, in an ongoing case initiated prior to the COVID-19 pandemic, a pharmaceutical company's pricing practices for an epilepsy drug have come under scrutiny by the CMA. Following a remittal by the UK CAT and an appeal by Flynn to the Court of Appeal of England and Wales, the CMA on August 5, 2021 provisionally found (subject to reviewing representations from the parties) that Pfizer and the distributor Flynn had abused their dominant positions by overcharging the National Health Service for vital anti-epilepsy drugs.⁴⁹ Further, in two additional excessive pricing cases, in July 2021, the CMA announced that it had fined firms (i) £260 million for excessive pricing in relation to hydrocortisone tablets (a corticosteroid);⁵⁰ and (ii) £100 million for excessive pricing in relation to the supply of liothyronine tablets (used to treat hypothyroidism), respectively.⁵¹ Under EU/UK law, the competition authorities do not apply any single test when determining whether a price is excessive, and a company may face a high burden of proof to rebut extensive economic evidence based on comparator prices (where the price at issue is "appreciably higher than those comparators"), cost-price analyses and, possibly, profitability tests.⁵²

Exploitative abuses in the pharmaceuticals sector have also been considered in Europe,⁵³ Italy⁵⁴ and Spain⁵⁵ in respect of Aspen. Further, firm's prices for essential products during the pandemic were monitored by governments in the context of consumer protection law and, specifically, price gouging prohibitions. Price gouging could potentially be tackled as an exploitative excessive pricing abuse if the authorities were to adopt narrow market definitions and reach findings of temporary or collective dominance.⁵⁶ While certain extraordinary measures adopted

44 Section 174 of the Enterprise Act, 2002 ("EA02").

45 Inspections without a warrant may occur under Section 27 of the Competition Act 1998 ("CA98") and inspections with a warrant may occur under Section 28 CA98. Where the CMA has reasonable grounds for suspecting that there may be an agreement which affects trade within the United Kingdom, and "has as its object or effect the prevention, restriction or distortion of competition within the United Kingdom" (Section 25 CA28), the CMA may compel the production of documents relevant to its investigation under Section 26 of CA98.

46 CMA Press Release: "Penalty Notice: Musical instruments and equipment: suspected anti-competitive agreements": Case: 50565-3, COMPETITION AND MARKETS AUTHORITY (March 6, 2019), https://assets.publishing.service.gov.uk/media/5c9a1b27e5274a3cab0beb97/Fender_Europe_Penalty_Notice__26_March_2019__FINAL__Redacted.pdf (last visited on March 20, 2022).

47 *The United Brands Company and United Brands Continentaal BV v Commission of the European Communities – Case 27/76 (1978)*, at para 235; Article 102(a) of the TFEU.

48 For example, as recently as March 2022, New York sought public comment on crafting a law to prevent price gouging at every point in the supply chain. See *New York State Office of the Attorney General, Advance Notice of Proposed Rulemaking*, NEW YORK ATTORNEY GENERAL (March 3, 2022); https://ag.ny.gov/sites/default/files/information_notice_for_price_gouging_anprm_.pdf (last visited on April 1, 2022).

49 See CMA Press Release: *CMA accuses pharma firms of illegal pricing*, Competition and Markets Authority (August 5, 2021), <https://www.gov.uk/government/news/cma-accuses-pharma-firms-of-illegal-pricing> (last visited on March 23, 2022).

50 See CMA Press Release: *CMA finds drug companies overcharged NHS*, COMPETITION AND MARKETS AUTHORITY (JULY 15, 2021), <https://www.gov.uk/government/news/cma-finds-drug-companies-overcharged-nhs> (last visited on March 23, 2022).

51 See CMA Press Release: *CMA fines pharma firm over pricing of crucial thyroid drug*, COMPETITION AND MARKETS AUTHORITY (JULY 29, 2021): <https://www.gov.uk/government/news/cma-fines-pharma-firm-over-pricing-of-crucial-thyroid-drug> (last visited on April 8, 2022).

52 See e.g. CaseC-177/16 AKKA/LAA EU:C:2017:689, para 49; *Deutsche Post AG – Interception of cross-border mail OJ* [2001] L 331/40.

53 *European Commission case file AT.40394 Aspen*, https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40394 (last visited on March 25, 2022).

54 *Italian Competition Authority case file A480 – Price Increase of Aspen's drugs*, https://en.agcm.it/dotcmsDOC/pressrelease/A480_eng.pdf (last visited on March 25, 2022).

55 *Comisión Nacional de los Mercados y la Competencia Case File S/DC/0601/16: Laboratorios Aspen*.

56 Notably, Commissioner Vestager stated at an online event at the beginning of the pandemic that the EU Commission "will stay even more vigilant than in normal times if there is a risk of virus-profiteering."

at the start of the pandemic, including exemptions for co-ordination, have been relaxed,⁵⁷ competition authorities' and governments' scrutiny of firms' pricing may endure. As the CMA noted in a November 2020 report, “[t]he pandemic has . . . brought the reliance of the UK economy on international supply chains into focus”.⁵⁸

Regarding next steps in the United States, the DOJ has worked in conjunction with the United States Federal Bureau of Investigation (“FBI”) to focus on investigating potentially anticompetitive activity in a variety of industries affected by supply chain disruptions. Often, these cases begin as civil investigations used to challenge conduct for which the competitive effect may be ambiguous. That is, the conduct is not unlawful unless it is on balance more anticompetitive than procompetitive. Such ambiguous business conduct may include competitive joint ventures, mergers, and distribution restraints. However, the DOJ may pursue criminal enforcement if the conduct appears to be inherently anticompetitive and unlawful, such as price fixing and other “*per se* illegal” conduct undertaken with criminal intent.

V. RECOMMENDED BEST PRACTICES

With the above guidelines and patterns of enforcement activity in mind, we would recommend that firms:

- Perform risk assessments to understand the company’s legal obligations (including not just competition law compliance, but also obligations under consumer protection, human rights reporting, supply chain due diligence laws, etc.) as well as those of their suppliers in the respective markets in which they operate.
- Document procurement cost increases and make clear how price increases are related and proportionate to those cost increases. Consider whether the firm is in a dominant position and be prepared to objectively justify higher prices against actual or potential competitors' prices.
- Keep thorough records of industry meetings with competitors, and to keep minutes of those meetings.
- Ensure that the company’s compliance policies are up-to-date— including in respect of dawn raids conducted at domestic premises — and being monitored and enforced consistent with local best practices and recommendations from enforcement agencies.⁵⁹
- Seek legal guidance before entering into any agreements with competitors to ensure that its actions do not raise antitrust trust concerns.
- Closely review vertical agreements to determine whether these are compliant with the new draft Vertical Block Exemption Regulations in Europe and the UK (which are due to come into force this Spring).

Enforcement agencies are also providing guidance on best practices in order to avoid liability. For instance, the CMA has published supply chains due diligence principles on its website,⁶⁰ as well as supply chains guidelines.⁶¹ In general, the CMA recommends that companies perform due diligence to enable them to make an informed judgment on transactions and the integrity of their supply chains. Principles for due diligence include performing risk assessments to understand the company’s legal obligations and those of their suppliers in the respective markets in which they operate. Relatedly, on February 23, 2022, the EC issued a proposal on due diligence obligations to protect

57 For example, exclusion orders in the groceries, health services and maritime crossings sectors applied in the United Kingdom during the pandemic were lifted in October 2020. See CMA Guidance on competition law exclusion orders relating to COVID-19, available at: <https://www.gov.uk/guidance/competition-law-exclusion-orders-relating-to-coronavirus-covid-19> (last visited on 7 April 2022).

58 See *CMA Report: The State of UK Competition* (November 2020), COMPETITION AND MARKETS AUTHORITY, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939636/State_of_Competition_Report_Nov_2020_Final.pdf (last visited on April 7, 2022).

59 For instance, the DOJ has issued guidance on the evaluation of compliance programs in the context of criminal violations of the Sherman Act. See *DOJ, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations*, UNITED STATES DEPARTMENT OF JUSTICE (July 2019), available at: <https://www.justice.gov/atr/page/file/1182001/download> (last visited on April 8, 2022) (last visited on April 8, 2022).

60 See *CMA: Advice on applying supply chain due diligence principles to assure your labour supply chains*, COMPETITION AND MARKETS AUTHORITY, available at: <https://www.gov.uk/government/publications/use-of-labour-providers/advice-on-applying-supply-chain-due-diligence-principles-to-assure-your-labour-supply-chains#supply-chain-due-diligence-principles> (last visited on April 7, 2022).

61 *Id.*

human rights and environmental considerations across supply chains in certain “high-risk sectors” and where certain size and revenue thresholds are met.

VI. CONCLUSION

The Five Eyes are expected to scan the environment internationally in relation to all levels of supply chains in various industries, such as air cargo, freight forwarding, ocean shipping, pharmaceuticals, and possibly key raw materials, to consider whether anti-competitive conduct could be the cause of supply chain disruptions. While they have not yet formally launched any investigations, the Five Eyes will coordinate to share information that might support the opening of investigations. Past enforcement by the authorities regarding coordinated conduct and unilateral abuses, for which examples have been provided in the United States, Europe, and the United Kingdom in this article, has been focused and far-reaching. Enforcement decisions have the potential to result in follow-on damages actions across jurisdictions with significant repercussions. We advise that firms remain vigilant regarding engaging in the above-recommended best practices to manage their risk exposure and to remain compliant with the competition and antitrust laws applicable to the regions in which they are active.



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