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US Competition Order Targets 21st Century Titans

Market Report

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Prepared by the Washington Embassy and Los Angeles Consulate

Summary

- The US Administration is taking action to address what it views as anti-competitive domestic practices occurring in a range of industries including transport, agriculture, health, tech, telecommunications and banking.
- This could reshape parts of the US economy with issues related to shipping costs, meat processing and labelling, and wine regulations in particular having potential ramifications for New Zealand exporters.
- President Joe Biden has argued that these actions are necessary to enable smaller businesses to thrive as well as to drive prices down for American consumers.
- Some agricultural stakeholders have welcomed the move, but other business groups have argued the economy needs both large and small businesses to spur innovation and investment.
- While similar action has been attempted before, prospects for change are better this time around as it comes early in the presidential term and Congress is also working on updating antitrust legislation that would complement the regulatory changes stemming from the executive order.

Report/Findings

1. The US Administration has set its sights on reining in what it sees as the monopolistic practices of some of the largest companies in the American economy. President Joe Biden signed an Executive Order on Promoting Competition that targets a range of sectors from tech to agriculture, health, transport, telecommunications, and banking. He said companies in many sectors over the past few decades have focused on "consuming their competitors" and government intervention is needed to bring competition back to the marketplace and to drive down consumer prices and raise up workers' wages.
2. Notably the order seeks to address high shipping costs which are a major source of concern for exporters right now. The White House says that high freight costs are the result of consolidation within the air, rail and sea transport industry. It notes that nine international maritime cargo carriers, organised in three shipping alliances, control more than 80 percent of the global market for oceangoing vessels compared to ten companies controlling just 12 percent of the market two decades ago. It said that this allows "powerful" container shippers to charge "exorbitant" detention and demurrage changes for the time freight is waiting to be loaded or unloaded.
3. The order tasks the Federal Maritime Commission, which regulates ocean shipping, and the Surface Transportation Board, which oversees trucking and railroads, to seek ways to bring down shipping costs, although it does not provide details of how this will happen. However, global cargo carriers argue the problem has been misdiagnosed and the nation's ports, terminals, trucking fleets and rail lines are being overwhelmed by a pandemic-related import surge, not strangled by monopolies.
4. The order also targets consolidation in the agriculture sector which it claims has limited farmers' options for selling their produce. The White House notes that at a time when four large meatpacking companies dominate over 80 percent of the US beef market, US farmers' share of the price of beef has dropped from over half five years ago to around a third today despite the price of beef in the supermarket having risen.

5. In response, the order emboldens the Department of Agriculture (USDA) to allow farmers to more easily challenge unfair and deceptive practices by meat processors. On the same day the order was signed, USDA committed US$500 million in grants, loans, and other assistance to help new meat and poultry processors enter the US market. These moves have been welcomed by many agricultural groups, although the North American Meat Institute has warned of "unintended consequences for consumers and producers".
6. The order could also result in changes to meat labelling. The White House claims most grass-fed beef labelled "Product of USA" is imported and processed in the US by foreign-owned companies. This makes it "hard or impossible for consumers to know where their food comes from and to choose to support American farmers and ranchers," it said.
7. The order directs USDA to consider issuing new rules defining when meat can bear "Product of USA" labels. The National Cattlemen's Beef Association (NCBA) have long been agitating for these changes because of the potential for animals who have spent their entire lives outside of America to carry this label. An NCBA petition has suggested that it would instead like to see more accurate labelling such as ground beef that might have imported content as "Processed in the USA". Importantly, they are advocating for the labels to remain voluntary rather than mandatory.
8. The order also seeks to improve access in the US market for smaller, independent, and new brewers, winemakers, and distilleries. The Alcohol and Tobacco Tax and Trade Bureau's trade practice regulations will be updated by early March 2022 based on a yet-to-be completed US Treasury Department assessment of any current:
    - regulations around bottle sizes, permitting, or labelling that increase costs without serving any public health, informational, or tax purpose;
    - unlawful exclusionary, discriminatory, or anticompetitive distribution practices that hinder smaller and independent businesses or new entrants from distributing their products; and
    - patterns of consolidation in production, distribution, or retail markets.

9. Big Tech comes under scrutiny by the order. At the same time as Congress is seeking to strengthen legislation against the largest digital companies, the order has asked the Federal Trade Commission (FTC) to prevent internet marketplaces from using their dominant position to gain an advantage over the small businesses that have to sell their goods through them. It is also tasked with addressing the issue of unfair data collection and surveillance practices that - while helping consumers to access services for free - may damage competition, consumer autonomy, and consumer privacy. The FTC has already signalled a stronger stance on allowing consumers to bypass manufacturers' proprietary providers to seek repairs on their products without voiding warranty protections.

10. Elsewhere among the 72 specific initiatives to address anti-competitive behaviours outlined in the order, the Health and Human Services Administration has been directed to increase support for generic and biosimilar drugs and FTC is asked to ban the practice of "pay for delay" of cheaper generic versions once an exclusive patent ends.

11. The US Department of Justice is standing up a taskforce to oversee implementation of the order among the federal government agencies involved.

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