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Antitrust, Ancient Rome and Kamala Harris' Proposed Ban on Price Gouging

Klaus Kowalski (European Commission) · Monday, September 9th, 2024

In her first economic policy speech as Presidential Candidate, Kamala Harris pledged to introduce a federal ban on price gouging in the food sector. Claiming that prices failed to return to pre-pandemic levels despite improvements to supply chains following prior breakdowns and that “[m]any of the big food companies are seeing their highest profits in two decades”[1], she urged to act where businesses are not playing by the rules. Emphasising her experience, she pointed to her track record in antitrust enforcement as Attorney General in California going after “companies that illegally increased prices” or “conspired with competitors to keep prices high”.

Against this background, the proposed ban on price gouging bears notable similarity to what has often been considered some of the earliest precursors to modern antitrust legislation. Two millennia ago, the Roman *Lex Iulia de Annona* penalised partnerships with the intention to drive up the price for grain and, more generally, actions prejudicial to the public grain supply.[2] It also contained a separate prohibition on holding back ships or sailors or any action with malicious intent by which these may be delayed,[3] thus highlighting both the importance and fragility of maritime supply chains for the food supply at the time (e.g. most of the grain consumed in Rome was produced in Egypt[4]). About five hundred years later, the Roman emperor Zeno introduced the earliest known general prohibition on monopolies and restrictive practices. Here too, various types of food feature prominently among the exemplary list of products covered.[5]

This similarity is hardly surprising, given that “[r]estrictive trade practices are as old as trade itself. They represent nothing more than the attempts of intelligent men to interfere, to their own advantage, or that of the industry in which they are engaged, with the free working of supply and demand and with the results of competition.”[6] Further, as the essential consumer goods par excellence, basic food staples generally have a very low elasticity of demand. In other words, food is probably the one product category that consumers simply cannot forgo no matter what. This was also alluded to by Kamala Harris, claiming that food prices are among “the high costs that matter most to most Americans”.

Kamala Harris described her goal as “help[ing] the food industry become more competitive”, based on her belief that “competition is the lifeblood of our economy. More competition means lower prices”. From these quotes, as well as the earlier reference to her work as Attorney General in California, it is evident that Kamala Harris herself does not see her proposed ban on price gouging in the food industry as mere sector regulation but rather within the wider context of competition law.

So, have we come full circle? Not really. The *Lex Iulia de Annona* was not intended to protect competition or increase consumer welfare but rather the food supply of (and thus public order in) Rome as well as public finances.[7] The grain to feed this metropolis was to a large extent sourced and distributed (often for free) by public authorities.[8] It was primarily these authorities, rather than consumers, that stood to benefit financially from the *Lex Iulia de Annona*. Still, after several crises in recent years that directly impacted the cost of living, the food industry has clearly returned to the limelight.

In any case, Kamala Harris giving the proposed ban on price gouging a centre stage in her first speech on economic policy just days before the Democratic National Convention might also allude to (even) more political interest in future competition law enforcement in the US. This also fits with the fact that the word “*competition*” is used twice as often in the Democratic Party’s 2024 platform than its 2020 counterpart (18 compared to nine times).[9] However, it remains to be seen how this ban would look in practice as details remain scarce in Kamala Harris’ first outline: “*I will work to pass the first-ever federal ban on price gouging on food. My plan will include new penalties for opportunistic companies that exploit crises and break the rules. And we will support smaller food businesses that are trying to play by the rules and get ahead.*” Perhaps unsurprisingly, her speech accepting the nomination as Presidential Candidate at the Democratic National Convention did not shed any further light on the proposed ban, merely stating: “*as president, I will bring together labour and workers and small-business owners and entrepreneurs and American companies to create jobs, to grow our economy and to lower the cost of everyday needs like health care and housing and groceries.*”.[10] That said, it appears not unlikely that the proposed ban would be modelled on recent congressional efforts, specifically the “*Price Gouging Prevention Act of 2024*”, introduced by democrats in February 2024 both in the Senate and House of Representatives. This bill would provide the FTC with the authority to issue and enforce more detailed rules and also allow individual states to sue for violations.[11]

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[1] For this and all following quotes of Kamala Harris’ speech, see <https://abcnews.go.com/US/video/harris-unveils-economic-agenda-cracking-price-gouging-112902258>, timestamp 7:20 to 10:20.

[2] See Digest 48.12.2 (*Ulpianus 9 de off. procons.*); for an English translation see Watson, *The Digest of Justinian*, Vol. 4, p. 345: “*The lex Julia on the corn supply lays down a penalty for the man who does something prejudicial to the corn supply or who enters into a partnership with the intention of putting up the price of the corn supply. The same statute also contains a provision that no one is to hold back a ship or a ship master or to do anything with malicious intent by which they may be delayed. [...]*”.

[3] Ibid.

[4] See, in detail, *Erdkamp*, *The Grain Market in the Roman Empire*, pp. 143-237; Höbenreich,

Annona. Juristische Aspekte der stadtrömischen Lebensmittelversorgung im Prinzipat, pp. 50-51; Rickman, The corn supply of Ancient Rome, 101-134.

[5] See Codex 4.59.2 (*Imperator Zeno a Constantino*); for an English translation see Blume/Frier, The Codex of Justinian. A New Annotated Translation with parallel Latin and Greek text, pp. 1045 and 1047: “We order that no one dare to exercise a monopoly over any type of clothing, fish, shellfish, or sea urchin, or over any other type of commodity (species) or material that pertains to sustenance or to any other use, not on his own authority, (or) after eliciting a sacred rescript, (or) by eliciting one in the future, (or) by a general sanction (pragmatica), or by the sacred decision (in answer to a petition) of Our Piety, and that no one, after holding illicit meetings, swear or make a pact that the commodities of diverse associations (corpora) not be sold for a lower price than what they have agreed among themselves. [...]”.

[6] Wilberforce/Campbell/Elles, The law of restrictive trade practices and monopolies, 2nd edition, p. 2.

[7] See, inter alia, v. Brunn, Vom Kartellrecht der Römer, in: Lehmann (ed.), Recht und Wirtschaft. Festschrift für Justus Wilhelm Hedemann, pp. 48-49, 51, 54-56; Höbenreich, Annona, pp. 163.

[8] See, in detail, Erdkamp, The Grain Market in the Roman Empire, pp. 240-257; Höbenreich, Annona, pp. 43-47; Rickman, The corn supply of Ancient Rome, pp. 156-197; on the broader legal framework for the supply chains, see Sirks, Food for Rome.

[9] See *The Verge*, The Democratic platform is doubling down on tech antitrust and kids online safety, available at <https://www.theverge.com/2024/8/21/24224676/democratic-platform-2024-tech-antitrust-kids-safety>.

[10] Kamala Harris, Democratic National Convention Acceptance Speech, available at <https://www.nytimes.com/2024/08/23/us/politics/kamala-harris-speech-transcript.html>.

[11] See Jeffrey May, Consumer Protection News: Harris proposes ban on price gouging in food/grocery industry (Aug 16, 2024), available at <https://www.vitalaw.com/news/consumer-protection-news-harris-proposes-ban-on-price-gouging-in-food%2Fgrocery-industry/ald01cd540551149b4922b091051b84a79349>; see further US Senate, bill S.3803, available at <https://www.congress.gov/bill/118th-congress/senate-bill/3803>; US House of Representatives, bill H.R.7390, available at <https://trackbill.com/bill/us-congress-house-bill-7390-price-gouging-prevention-act-of-2024/2519647/>.

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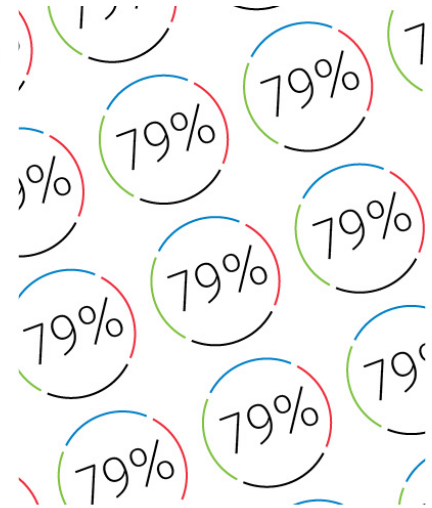
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