

**Restricted**

**DAFFE/CLP(97)1/07**



Organisation de Coopération et de Développement Economiques  
Organisation for Economic Co-operation and Development

**OLIS : 10-Apr-1997**  
**Dist. : 16-Apr-1997**

**Or. Eng.**

**DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS  
COMMITTEE ON COMPETITION LAW AND POLICY**

**DAFFE/CLP(97)1/07**  
**Restricted**

Cancels & replaces the same document:  
distributed 10-Feb-1997

**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN  
THE UNITED STATES (1 October 1995-30 September 1996)**

*The attached report is submitted by the Delegate of the United States to the Committee on Competition Law and Policy FOR CONSIDERATION at its forthcoming meeting on 12-13 February 1997, under Item 6b) of the Draft Agenda.*

**50760**

Document complet disponible sur OLIS dans son format d'origine  
Complete document available on OLIS in its original format

**Or. Eng.**

**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS  
IN THE UNITED STATES**

*(October 1, 1995 through September 30, 1996)*

**Summary of highlights from Fiscal Year 1996**

In fiscal year 1996 (October 1, 1995 -September 30, 1996), the Telecommunications Act of 1996 was signed into law, designed to open up the entire telecommunications industry to the influence of competitive market forces. The Antitrust Division of the Department of Justice and the Federal Trade Commission announced revisions that expand upon earlier statements on health care provider networks. The new guidelines, clarifying that the more flexible rule of reason analysis will be applied to all provider-controlled networks likely to produce significant efficiencies that benefit consumers, are an effort to promote innovation in the industry without lessening antitrust scrutiny of anticompetitive arrangements. The agencies also adopted new rules amending pre-merger notification requirements, exempting certain classes of transactions not likely to raise antitrust concerns.

In May, the FTC issued a staff report on the findings of its Fall, 1995 hearings on Global and Innovation-Based Competition which examined whether marketplace changes in competition require any adjustments in U.S. antitrust law and policy. The report makes certain proposals concerning, for example, the treatment of efficiencies and the approach to "innovation market" analysis in examining mergers. In September, the Commission adopted amendments to its rules governing litigation of administrative cases which are intended to minimise delay and streamline procedures.

During FY96, the Division opened 347 investigations and filed 71 antitrust cases, both civil and criminal, in federal court. The Division filed 42 criminal cases against 41 corporations and 22 individuals. Thirty-one corporate defendants and 16 individuals were assessed fines totalling \$26.8 million and 5 defendants were sentenced to a total of 2,431 days of incarceration. Another 8 individual defendants were sentenced to spend a total of 1,148 days in some form of alternative confinement. In October 1996, the Division obtained the highest criminal antitrust fines ever in its investigation of the lysine and citric acid markets. The \$100 million fine paid by Archer Daniels Midland Co. was the biggest fine ever imposed in a criminal antitrust matter. The Division opened 331 civil investigations, both merger and non-merger, and issued 1,878 civil investigative demands (a form of compulsory process). The Division filed 20 non-merger civil complaints.

In the non-merger area, the FTC pursued a variety of legal theories, including horizontal restraints, exclusive dealing and resale price maintenance, in such sectors as pharmacy network services, truck-mounted fire pumps, athletic footwear and specialty wood products. Six consent agreements were accepted, and one administrative complaint was filed against Toys "R" U.S. for, among other things, using its market power to keep toy prices higher. An initial decision was issued by an Administrative Law Judge in *International Association of Conference Interpreters* upholding a 1995 Commission complaint alleging price fixing and other restraints of competition in the provision of interpretation services in the

United States. The Commission also issued a final order prohibiting the California Dental Association from imposing a variety of restrictions on truthful and non-deceptive advertising and solicitation practices of its members.

The two agencies reviewed 3,087 transactions reported under the pre-merger notification provisions of the Hart-Scott-Rodino ("HSR") Act. A wide variety of industries were involved including defence, medical equipment, industrial gases, supermarkets, pharmaceuticals, chemicals, computer software systems, cable television, funeral homes, radio stations, paper products, ski resorts, and legal publishers. The Division investigated 186 transactions, requesting additional information in 102 cases, and investigated 49 non-HSR mergers. The FTC investigated 36 transactions with second requests. The Commission's investigations resulted in 23 consents, 4 abandoned transactions, and authorisation of the filing of preliminary injunction actions to block three proposed mergers, two of which were abandoned by the parties. The FTC's most notable merger investigation involved Time Warner's \$7.5 billion acquisition of Turner Broadcasting, which was allowed subject to a consent order requiring a combination of structural and non-structural remedies. In addition, the FTC secured a record \$7.8 million in civil penalties in HSR enforcement actions against firms that failed to observe the pre-merger notification requirements and waiting periods under the HSR Act before consummating a notifiable merger.

**All public documents issued by the FTC and DOJ are available on the Internet. The FTC's World Wide Web site is located at: <http://www.ftc.gov>. The Division's address is [gopher@usdoj.gov](mailto:gopher@usdoj.gov) or <http://www.usdoj.gov>; the Division's e-mail address is [antitrust@usdoj.gov](mailto:antitrust@usdoj.gov). More detailed descriptions or full texts of many of the matters referred to in this report are available there.**

**TABLE OF CONTENTS**

Introduction .....6

I. Changes in Law or Policies .....6

    A. Changes in Antitrust Rules, Policies or Guidelines .....6

    B. Proposals to Change Antitrust Laws, Related Legislation or Policies .....7

II. Enforcement of Antitrust Laws and Policies .....7

    Action against Anticompetitive practices.....7

    A. Department of Justice and FTC Statistics.....7

        1) DOJ Staffing and Enforcement Statistics .....8

        2) FTC Staffing and Enforcement Statistics .....9

    B. Antitrust cases in the Courts .....9

        1) United States Supreme Court.....9

            a. DOJ or FTC Cases.....9

            b. Private Cases .....9

        2) Court of Appeals Cases .....9

            a. Significant DOJ Cases Decided in FY96.....9

            b. FTC Cases Decided in FY96.....10

        3) Private Cases Having International Implications .....10

    C. Statistics on Private and Government Cases Filed During FY 1996 .....11

    D. Significant DOJ and FTC Enforcement Actions.....12

        1) DOJ Criminal Enforcement .....12

        2) DOJ Non-Merger Civil Enforcement .....13

        3) Modification or Termination of DOJ Consent Decrees.....14

        4) FTC Non-Merger Enforcement Actions .....15

            a. Commission administrative Decisions .....15

            b. Federal District Court Decisions .....16

    E. Business Reviews Conducted by the Department of Justice .....17

III. Enforcement of Antitrust Laws and Policies: Mergers and Concentrations.....17

    A. Department of Justice and FTC Merger Statistics .....17

        1) DOJ Review of Mergers .....18

        2) FTC Reviews of Mergers.....18

        3) Enforcement of Premerger Notification Rules .....18

    B. Significant Merger Cases.....19

        1) DOJ Merger Challenges or Cases.....19

        2) Merger Cases Brought by the FTC.....20

            a. Preliminary Injunctions Authorized .....20

            b. Commission Administrative Decisions .....20

IV. Regulatory and trade Policy Matters.....22

    A. Regulatory Policies .....22

        1) DOJ Activities with Respect to Federal and State Regulatory Matters .....22

2)	FTC Activities with respect to Regulatory and State Legislative Matters .....	23
a.	Federal Agencies .....	23
b.	States .....	23
B.	Department of Justice Trade Policy Activities .....	24
V.	Next Studies related Antitrust Policy .....	25
A.	Antitrust Division Economic Analysis Group Discussion Papers .....	25
B.	Commission economic reports, Economic Working Papers and Miscellaneous Studies .....	26
1)	Economic Reports .....	26
2)	Working Papers .....	26

## **Introduction**

1. This report describes federal antitrust developments in the United States for Fiscal Year 1996 ("FY96" -- October 1, 1995 through September 30, 1996). It summarises the activities of the Antitrust Division ("Division") of the U.S. Department of Justice ("Department" or "DOJ") and of the Bureau of Competition of the Federal Trade Commission ("FTC" or "Commission").
2. Joel I. Klein became Acting Assistant Attorney General when Anne K. Bingaman departed on October 18, 1996. A. Douglas Melamed became Principal Deputy Assistant Attorney General, overseeing the Division's civil enforcement program, appellate activities, and international efforts, on October 15, 1996. Andrew S. Joskow became the Deputy in charge of Economic Analysis in October 1996, having been acting deputy since May.

## **I. CHANGES IN LAW OR POLICIES**

### **A. Changes in Antitrust Rules, Policies or Guidelines**

3. The "Telecommunications Act of 1996," Public Law 104-104, was signed into law by President Clinton on February 8, 1996. It is designed to open up the entire telecommunications industry to the influence of competitive market forces. By bringing down long-established barriers to competition in the local telephone and cable markets, and requiring incumbent telecommunications monopolies to open their network facilities to competing firms, the new law should enable consumers to benefit from lower prices, improved service, increased choices, and improved technology. For additional details on the law, see United States Annual Report for FY95, paragraphs 17-22 (DAFFE/CLP(96)17/07).
4. As was reported in last year's annual report, the FTC proposed on July 21, 1995, new rules, drafted in co-operation with the Department, to exempt from HSR reporting requirements certain classes of transactions that, based on enforcement experience, are not likely to raise antitrust concerns. The exemptions are intended to reduce an unnecessary regulatory burden on business and to allow both the FTC and DOJ to focus resources on transactions more likely to pose competitive harm. The proposals were subject to public comment until September 25, 1995. On March 25, 1996, the Commission adopted new rules amending the HSR reporting requirements that would exempt the following classes of transactions: (1) certain purchases of goods or realty in the ordinary course of business, including certain purchases of used durable goods where the purchase is designed to replace or expand production capacity; (2) certain real estate acquisitions, such as acquisitions of shopping centres and hotels and motels, not likely to violate the antitrust laws; (3) acquisitions of oil and natural gas reserves and certain associated production and exploration assets valued at \$500 million or less; (4) acquisitions of coal reserves and certain associated productions and exploration assets valued at \$200 million or less; (5) acquisitions of voting securities of companies that hold real property or carbon-based mineral reserves the direct acquisition of which would be exempt, and other assets valued at \$15 million or less; and (6) acquisitions of realty acquired solely for rental or investment purposes.
5. On March 26, 1996, the Division issued a *Protocol for Increased State Prosecution of Criminal Antitrust Offense*. The protocol, which sets forth the circumstances where the Division may transfer prosecutorial responsibility for certain antitrust offenses to the States, is designed to enhance co-operation and antitrust enforcement efforts between the federal government and the State Attorneys General.

6. In May, 1996, the Commission issued a staff report on the findings of its 1995 hearings on Global and Innovation-Based Competition which examined whether marketplace changes in competition require any adjustments in U.S. antitrust law and policy. Entitled "Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace," the report makes certain proposals concerning, for example, the treatment of efficiencies and the approach to "innovation market" analysis in examining mergers.

7. In August, 1996, the FTC and DOJ announced revisions that expand upon statements on health care provider networks contained in their joint *Statements of Enforcement Policy in Health Care and Antitrust*, last revised in 1994. The most important changes clarify that the more flexible rule of reason analysis will be applied to all provider-controlled networks that are likely to produce significant efficiencies that benefit consumers. The new guidelines are an effort to promote innovation in the industry but do not lessen antitrust scrutiny of anticompetitive health care arrangements.

8. In September, 1996, the Commission adopted amendments to Part III of the FTC Rules of Practice and related rules governing litigation in administrative cases. These procedural amendments will apply to all Part III proceedings begun on or after January, 1997 and are intended to minimise delay and streamline procedures for Part III matters.

## **B Proposals to Change Antitrust Laws, Related Legislation or Policies**

9. In February, 1996, Chairman Pitofsky testified before a Congressional panel recommending against enactment of H.R. 2925, which would specify that certain kinds of health care provider networks must be judged under the rule of reason. While preventing restrictive treatment of provider networks is laudable, the Commission believes that health care markets are changing too quickly to allow potential efficiencies of provider collaboration to be based on any single set of criteria. Also, retaining the per se prohibition of certain forms of highly anticompetitive conduct, such as price fixing or market allocation, avoids complex and costly inquiries where the potential harm to competition is clear.

10. In 1996 legislators continued work on deregulatory proposals affecting the U.S. postal monopoly, the electric power industry and ocean shipping, all of which are likely to be taken up again by the 105th Congress. Lawmakers are also expected to take up proposals affecting the application of the antitrust laws to professional sports, the health care industry, and intellectual property.

## **II. ENFORCEMENT OF ANTITRUST LAWS AND POLICIES: ACTION AGAINST ANTICOMPETITIVE PRACTICES**

### **A. Department of Justice and FTC Statistics**

#### *1) DOJ Staffing and Enforcement Statistics*

11. At the end of FY96, the Division had 767 employees: 325 attorneys, 50 economists, 163 paralegals and 229 support staff.

12. During FY96, the Antitrust Division opened 347 investigations and filed 71 antitrust cases, both civil and criminal, in federal court. The Division was a party to 13 U.S. antitrust cases decided by the federal Courts of Appeals and filed *amicus curiae* briefs in six Court of Appeals cases and three Supreme Court cases.

13. During FY96, the Division filed 42 criminal cases against 41 corporations and 22 individuals. Thirty-one corporate defendants and 16 individuals were assessed fines totalling \$26.8 million and 5 defendants were sentenced to a total of 2,431 days of incarceration. Another 8 individual defendants were sentenced to spend a total of 1,148 days in some form of alternative confinement. The Division obtained the highest criminal antitrust fines ever in its investigation of the lysine and citric acid markets. The \$100 million fine paid by Archer Daniels Midland Co. (see below, paragraph 33) was the biggest fine ever imposed in a criminal antitrust matter.

14. The Division investigated 186 mergers and challenged nine; 21 transactions were restructured or abandoned prior to the filing of a complaint as a result of an announced challenge. The Division opened 331 civil investigations, both merger and non-merger, and issued 1,878 civil investigative demands (a form of compulsory process). The Division filed 20 non-merger civil complaints. Also during FY96, the Division responded to 24 requests for review of written business proposals.

## *2) FTC Staffing and Enforcement Statistics*

15. At the end of FY96, the FTC's Bureau of Competition had 212 employees: 146 attorneys, 35 other professionals and 31 clerical staff. The FTC also employs about 40 economists who participate in its antitrust enforcement activities.

16. Based on its review of pre-merger notification filings, the FTC investigated 36 transactions with second requests for information. The Commission authorised the staff to seek preliminary injunctions in federal district court to block three proposed mergers (two of which were abandoned after such authorisation), and accepted 21 consent agreements for public comment to settle anticompetitive concerns raised by proposed transactions. In addition, acting on two cases begun in previous years, the Commission dismissed two administrative complaints. Another four mergers or acquisitions were abandoned before the Commission could act and after FTC staff raised concerns that the transactions might reduce competition.

17. In the non-merger area, six consent agreements were accepted during FY96 involving a variety of legal theories, including horizontal restraints, exclusive dealing and resale price maintenance, in such sectors as pharmacy network services, fire engine fire pumps, athletic footwear and specialty wood products. The Commission issued one administrative complaint and one final order. An initial decision was issued by an Administrative Law Judge upholding a 1995 Commission complaint.

18. The Commission secured a record \$7.8 million in civil penalties in HSR enforcement actions against firms that failed to observe the pre-merger notification requirements and waiting periods under the HSR Act before consummating a notifiable acquisition. An additional \$250,000 was obtained for a company's violation of a final cease and desist order.

19. Staff of the Bureau of Competition provided guidance to industry through five advisory opinion letters on whether specific health care arrangements might violate antitrust laws.

## B. Antitrust Cases in the Courts

### 1) *United States Supreme Court*

#### a. *DOJ or FTC Cases*

20. There were no DOJ or FTC cases decided in the Supreme Court in FY96.

#### b. *Private Cases*

21. The United States filed an *amicus* brief in *Anthony Brown v. Pro Football, Inc.*, 116 S.Ct. 2116 (1996). The issue in the case was whether federal labor laws preclude an antitrust challenge to an agreement among owners of professional sports teams to implement the terms of their last offer to a labour union after negotiations reached an impasse. Among other things, the Court rejected the government's argument that the non-statutory exemption from the antitrust laws should end when the labour negotiations reach an impasse. The Court concluded that the exemption applied to the employer conduct at issue in this case because that conduct occurred during and immediately after negotiations with the union, concerned issues that the parties were required to negotiate collectively, grew out of and was directly related to the lawful operation of the bargaining process, and concerned only parties to the collective bargaining agreement.

### 2) *Court of Appeals Cases*

#### a. *Significant DOJ Cases Decided in FY96*

22. There were nine decisions in Antitrust Division cases by appellate courts in FY96 but only two published decisions. The two reported decisions were both in criminal cases and did not involve any issues of antitrust policy.

23. *United States v. Nippon Paper Indus. Co., Ltd* (available in Westlaw at 1996 WL 528426 (D. Mass. Sept. 3, 1996) is a district court decision which has been appealed to the First Circuit. The United States obtained indictments against a Japanese Corporation and its successor entity charging that it violated Sherman Act Section 1 by conspiring with other manufacturers of thermal facsimile ("fax") paper to raise the price of fax paper sold for importation into the United States. Defendant moved to dismiss the Indictment for failure to state an offence on grounds that (1) the Indictment alleged conspiratorial conduct undertaken entirely outside the United States; and (2) such wholly foreign conduct did not state a criminal Sherman Act violation. The Court agreed with both arguments. First, although the Indictment identified certain trading houses that purchased fax paper from the manufacturers at inflated prices and resold it within the United States as co-conspirators, that averment, the Court believed, did not suffice to show in-US conspiratorial conduct. Second, the court held that the Sherman Act, when enforced criminally, did not embrace a conspiracy in which all the overt acts are undertaken abroad, even if the scheme produces substantial intended effects within the United States. Although the Supreme Court in *Hartford Fire* construed the Sherman Act to reach such conduct in a civil setting, civil precedents, the Court held, did not control in a criminal case. And the criminal prosecution of wholly foreign conduct, the Court believed, would raise substantial notice concerns.

*b. FTC Cases Decided in FY96*

24. *FTC v. Coca Cola Bottling Co. of the Southwest* is an appeal from a Commission decision that ordered Coca Cola Bottling Co. of the Southwest to divest the franchise to bottle Dr Pepper acquired in 1984. In June, 1996, the U.S. Court of Appeals for the Fifth Circuit reversed and remanded the Commission's divestiture order, holding that the Commission should have evaluated the acquisition under standards of the Soft Drink Interbrand Competition Act. 85 F.3d 1139 (5th Cir. 1996). The Commission subsequently dismissed its complaint.

25. *FTC v. Crestwood Dodge, Inc.* is an appeal from a Commission decision that ordered certain Detroit automobile dealers to remain open for certain hours during the week in order to remedy an agreement by those dealers to close on weekends and week nights. In May, 1996, the U.S. Court of Appeals for the Sixth Circuit reversed and remanded the Commission's order, directing that the Commission consider whether the order was justified in light of changed circumstances since issuance of the Commission's complaint. 84 F.3d 786 (6th Cir. 1996).

26. *FTC v. Freeman Hospital* is a suit to enjoin a proposed consolidation of two hospitals pending an administrative proceeding to determine the legality of the transaction under Section 7 of the Clayton Act. The Eighth Circuit Court of Appeals held that the district court did not abuse its discretion in concluding that the Commission had failed to make the requisite showing of a geographic market in support of its complaint. 69 F.3d 260 (8th Cir. 1995). The Commission subsequently dismissed its complaint.

**3) *Private Cases Having International Implications***

27. In *Optimum, S.A. v. Legent Corp.*, 926 F.Supp. 530 (W.D. Penn. 1996), an Argentine software distributor sued a U.S. software company, its wholly-owned Argentine distributor, and an Argentine company which had marketed the software through an exclusive contract with the plaintiff until the U.S. defendant acquired a controlling interest in it, alleging Sherman Act violations. Plaintiff argued that its contractual rights to act as exclusive representative and distributor of the software were terminated in an effort by defendants to monopolise the Argentine market. The Court granted the defendants' motion to dismiss for lack of subject matter jurisdiction. The Court held that the alleged anticompetitive conduct involved commerce with a foreign nation and U.S. export commerce, and therefore Section 6(a) of the Sherman Act required the plaintiff to show that the alleged conduct "had a direct, substantial, and reasonably foreseeable effect either upon United States domestic commerce, United States import commerce, or export commerce which injures export business in the United States." Plaintiff's only attempts to meet this burden were allegations concerning income flows between corporations in the U.S. and in Argentina. The Court held these allegations to be insufficient to establish the requisite domestic effect. The plaintiff further alleged that defendant's large market share created a barrier to entry for other U.S. companies, but the Court ruled that "plaintiff, a foreign corporation, cannot maintain an action under the Sherman Act based merely upon injury to United States exporters attempting to enter the Argentine computer software market."

28. In *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir.), *cert. denied* 117 S.Ct. 181 (1996), Metro, an importer and wholesaler of kitchenware, sued Sammi, a South Korean exporting company, and two of its U.S. subsidiaries, alleging, *inter alia*, that a Korean design registration system, which gave Korean hollowware producers the exclusive right to export a particular hollowware design for three years, constituted a market division that is a per se violation of Section 1 of the Sherman Act. Metro alleged that Sammi used this registration system to prevent Metro and other kitchenware importers from

acquiring Korean-made stainless steel steamers from any of Sammi's competitors in Korea. In affirming summary judgement for the defendants, the Court of Appeals held that the design registration system was not an illegal market division arrangement subject to per se treatment under the Sherman Act. The Court went on to say that even if the per se rule would have been applicable to the defendants' conduct had it occurred in a domestic context, per se rules are not applicable to conduct occurring outside the United States. The Court held further that facts supporting jurisdiction had been properly pleaded, and that comity and fairness would not bar an assertion of jurisdiction. Summary judgement was appropriate, however, because Metro failed to produce any evidence of the injury to competition required in rule of reason cases.

29. In *Hammons v. Alcan Aluminum Corp.*, No. SACV 96-0319-LHM(EEx) (C.D. Cal. July 1, 1996), the Court entered summary judgement for defendants in a state antitrust law action brought on behalf of a class of aluminum consumers alleging an illegal international conspiracy to restrict aluminum output and raise prices. The complaint was filed under California's Cartwright Act, but its relevant provisions appear to have been interpreted under federal Sherman Act precedents by the Court. Plaintiff alleged that U.S. and other aluminum producers had agreed to curtail output around the beginning of 1994 in conjunction with an inter-governmental "Memorandum of Understanding" designed to alleviate international aluminum oversupply problems by requiring the Russian government to reduce Russian output. In a brief opinion, the District Court applied three separate federal antitrust defences: the non-justiciability of a "political question," the "act of state doctrine" and the *Noerr-Pennington* protection for petitioning government action. The court found no genuine issues of fact supporting claims that a private -- as opposed to intergovernmental -- production agreement had occurred.

30. In *Caribbean Broadcast System Ltd. v. Cable and Wireless PLC*, 1996-1 Trade Cas. (CCH)¶ 71,263 (D.D.C. 1995), the plaintiffs, a radio broadcasting company organised under the laws of the British Virgin Islands and its U.S. citizen sole shareholder, sued various British companies alleging violations of the Sherman Act and of the Lanham Trademark Act. Plaintiffs alleged that the defendants misrepresented the coverage and strength of their radio station, thereby creating a barrier to plaintiffs' entry into the television and radio market in the British Virgin Islands by preventing plaintiffs from gaining access to advertising revenues. In granting defendants' motion to dismiss, the Court found that plaintiffs had demonstrated no adverse effect on U.S. commerce, or on prices and supplies in the relevant market, as the only harm alleged was to the plaintiff broadcaster itself, which at most would form the basis for a commercial tort action. In addition, the Court found that jurisdiction was lacking because the plaintiffs were neither importers nor exporters of U.S. goods and services, but rather were foreign sellers of a foreign product, namely broadcast airtime on stations in Tortola. "Because there are no allegations that Defendants' alleged misconduct has had any kind of anticompetitive effect on U.S. advertisers or consumers, and there are no facts showing how U.S. commerce has been adversely affected, the antitrust claims must be dismissed for lack of subject matter jurisdiction ... ."

### C. Statistics on Private and Government Cases Filed During FY 1996

31. According to the annual report of the Director of the Administrative Office of the U.S. Courts, 720 new civil and criminal antitrust actions, both governmental and private, were filed in the federal district courts in the FY96.

**D. Significant DOJ and FTC Enforcement Actions**

***1) DOJ Criminal Enforcement***

32. On August 27, 1996, the Division filed six one-count felony informations in the U.S. District Court in Chicago, charging two Japanese firms and one US-based Korean subsidiary with conspiring to fix prices to eliminate competition and allocate sales in the lysine market world-wide. The Division alleged that Ajinomoto Co. Inc. of Tokyo, Japan and its executive Kanji Mimoto, Kyowa Hakko Kogyo Co. Ltd. of Tokyo, Japan and its executive, Masaru Yamamoto, and Sewon America Inc. of Paramus, New Jersey and its President, Jhom Su Kim, agreed to increase the price of lysine and allocate the volume of lysine to be sold among the corporate conspirators, and participated in meetings and conversations for the purpose of monitoring and enforcing adherence to the agreed-upon prices during the period of June 1992 through June 27, 1995. On October 15, 1996, following a guilty plea, the defendants were fined more than \$20 million.

33. On October 15, 1996, in the same investigation, the Division filed a two-count felony information in the U.S. District Court in Chicago charging Archer Daniels Midland Co. with conspiring to suppress and eliminate competition in the lysine market and in the citric acid market. Following a guilty plea, ADM agreed to pay a \$100 million criminal fine -- the largest criminal antitrust fine ever -- for its role in the conspiracy. Lysine, a \$600 million a year industry, is an amino acid used by farmers as a feed additive to ensure the proper growth of poultry and swine. Citric acid, a \$1.2 billion a year industry, is a flavour additive and preservative found in soft drinks, processed food, detergents, pharmaceutical and cosmetic products. Three ADM executives have also been indicted in this investigation.

34. On December 13, 1995, a grand jury in the District of Massachusetts returned a two-count felony indictment presented by the Antitrust Division charging various companies and individuals with fixing prices of jumbo rolls of thermal facsimile paper. Count I of the indictment alleged that Jujo Paper Co., Ltd. of Tokyo, Japan, and Nippon Paper Industries Co., Ltd. of Tokyo, Japan participated in a conspiracy to fix fax paper prices charged in North America in 1990. Count II of the indictment charged that Appleton Papers, Inc. of Appleton, Wisconsin, Jerry Wallace, an executive of Appleton Papers Inc., and Hirinori Ichida, an executive of Mitsubishi Paper Mills, Ltd. participated in a conspiracy to fix prices for fax paper charged in North America in 1991 and 1992. The charges against Appleton Papers and Wallace were subsequently severed and transferred to the Eastern District of Wisconsin. On January 13, 1997, a jury sitting in the U.S. District Court for the Eastern District of Wisconsin found Appleton Papers and Wallace not guilty of the charges of price fixing. Upon motion by Jujo Paper and Nippon Paper, on September 3, 1996, the Court in the District of Massachusetts dismissed the indictment against them for failure to adequately allege subject matter jurisdiction. The Antitrust Division appealed the Court's decision to the Court of Appeals for the First Circuit. That appeal has been briefed and argued, and the parties are waiting for a decision (see para 23 above).

35. On April 24, 1996, the grand jury in the District of Massachusetts returned two additional indictments against three fax paper industry executives, all of whom are Japanese nationals. The first indictment alleged that Yoshihiro Kurachi, an executive with Kanzaki Paper Manufacturing Co., Ltd. and Noburu Kurushima, an executive with Mitsubishi Paper Mills, Ltd., met in Japan in 1991 and agreed to increase the prices of fax paper to a particular U.S. customer. The second indictment alleged that Koichi Tano, an executive with Kanzaki Paper Manufacturing Co, Ltd., participated in a price fixing conspiracy in 1991 and 1992 to increase fax paper prices in North America.

36. On April 26, 1996, again as a result of its investigation into the thermal fax paper industry, the Division filed a one-count felony information in the U.S. District Court in Massachusetts charging Honshu Paper Co. of Tokyo, Japan, with conspiring with others to increase the prices of thermal fax paper sold in the United States in 1991. Following a guilty plea, Honshu was ordered by the Court to pay a criminal fine of \$225,000.

37. On March 6, 1996, the Division filed a one-count felony information in the U.S. District Court in Dallas, against ETI Explosives Technologies International Inc. of Wilmington, Delaware, charging a conspiracy to restrain competition in the commercial explosives industry. Following a guilty plea, ETI Inc. was fined \$950,000 for rigging bids on explosives contracts sold to customers in Alaska. On September 16, 1996, similar charges were brought against six distributors of commercial explosives. Amos L. Dolby Co. of Corsica, Pennsylvania, Douglas Explosives Inc. of Philipsburg, Pennsylvania, D.C. Guelich Explosives Co. of Clearfield, Pennsylvania, Hilltop Energy Inc. of Lisbon, Ohio, Kesco Inc. of Butler, Pennsylvania, and Ren-Loi Inc. of Cuddy, Pennsylvania, all pleaded guilty to the charges and agreed to pay a total of \$900,000 in criminal fines.

38. On September 26, 1996, the Division filed a one-count felony information in the U.S. District Court in Dallas, charging Austin Powder Co. and its Evansville regional manager, Thomas F. Mechtenburg, with conspiring with others between 1987 and 1992 to fix prices of commercial explosives and to rig bids submitted to certain customers. Following a guilty plea, Austin Powder Co. was fined \$7 million and Mechtenburg was fined \$20,000. Commercial explosives, a \$1 billion per year industry in the United States, are used primarily in the mining, construction, and oil and gas exploration industries. Since September 1995, the Division's investigation into this industry has resulted in 12 guilty pleas by eleven corporations and two individuals, and \$36 million in criminal fines.

39. On May 30, 1996, the Division filed a one-count felony information in the U.S. District Court in Philadelphia, charging A&L Mayer Associates, Inc. with conspiring with others to suppress and eliminate competition in the sale of tampico fibre from January 1990 to April 1995. Tampico fibre, a \$4-5 million a year industry in the US, is a vegetable fibre imported from Mexico used to make household scrub brushes and brooms, and consumer and industrial brushes. Following a guilty plea, A & L Mayer Associates agreed to pay a \$700,000 criminal fine. The Division also filed a civil complaint and proposed consent decree alleging that A & L Mayer Associates, A & L Mayer Inc., and Fibros Saltillo (their Mexican processor) engaged in anticompetitive activity, including retail price maintenance agreements which artificially inflated prices. On September 26, 1996, similar criminal and civil charges were filed in the U.S. District Court in Philadelphia against Ixtlera de Santa Catarina, S.A. de C.V., the other primary Mexican processor, and MFC Corporation of Laredo, Texas, its U.S. distributor. Following guilty pleas, these defendants agreed to pay a total of \$1.5 million in fines.

## **2) DOJ Non-Merger Civil Enforcement**

40. In February 1996, the Division brought its fourth challenge of a most favoured nation clause provision in U.S. v. *Delta Dental of Rhode Island*. The Division's complaint alleged that Delta Dental, Rhode Island's largest dental care insurer, reduced competition in the dental services and dental insurance markets through agreements with its participating dentists that had the effect of preventing dentists from cutting fees below those offered in the Delta Plan. See 1996-2 Trade Cases (CCH) ¶ 71,609 for the text of the complaint.

41. The Division filed a complaint and proposed consent decree in *U.S. v. American National Can* (D.D.C. filed June 25, 1996) to break up an exclusive deal between two of the leading producers of equipment used to make laminated tubes for toothpaste, both of whom also manufactured and sold these tubes in the U.S. and owned and licensed rights to laminated tube-making technology world-wide. According to the Division's complaint, KMK Maschinen AG, a Swiss corporation whose U.S. laminated tube-making operations were conducted through Swisspack, a New Jersey corporation, exited the U.S. tube market by selling Swisspack to American National Can, agreed to sell its tube-making equipment exclusively to American National Can, and gave American National Can exclusive rights to license KMK's technology in North America. In return, American National Can agreed to buy all tube-making equipment and to license any related technology for use in North America only from KMK; at about the same time, American National Can exited the tube-making equipment business. The proposed settlement would increase the source of tube-making equipment and technology by terminating the exclusive licensing agreement between the two companies and would enable KMK to re-enter the laminated tubes market in North America. The text of the final consent decree appears at 7 Trade Reg. Rep. (CCH) ¶ 50,805.

42. In *U.S. v. Alex. Brown & Sons, Inc., et al.*, the Division filed a civil antitrust suit and proposed settlement charging 24 major Nasdaq market-makers who buy and sell stocks to the investing public with inflating the quoted "inside spread" -- the difference between the best buying price and the best selling price of a stock -- in a substantial number of Nasdaq stocks, resulting in investors having to pay more to buy or sell stocks than they would have in a competitive market. The Division's complaint alleged that the firms and others adhered to and enforced a "quoting convention" that was designed to deter price competition among the firms and other market-makers in the trading of Nasdaq stocks. The proposed settlement requires the settling firms to stop the practice that inflated transaction costs and to monitor and record up to 3.5% of the telephone conversations of their Nasdaq traders. In addition, under the proposed settlement, Division representatives can listen in on traders' conversations, to monitor compliance with the decree. A text of the proposed settlement appears at 7 Trade Reg. Rep. (CCH) ¶ 50,806.

43. In *U.S. v. Universal Shippers Association, Inc.*, the Division filed a civil antitrust suit on August 26, 1996, challenging an agreement between Universal, one of the country's largest wine and spirits importers' association based in Bedford, Virginia, and the Lykes Bros. Steamship Company Inc., a major carrier of wine and spirits headquartered in Tampa, Florida. The Division's complaint alleged that the agreement required Lykes to charge other importers at least five percent more in shipping costs than it charged Universal, giving Universal an unreasonable advantage over its competitors. The consent decree prohibits Universal from agreeing to or enforcing an automatic rate differential clause in any contract and also nullifies any automatic rate differential clause in any existing contract. The text of the final consent decree appears at 7 Trade Reg. Rep. (CCH) ¶ 50,808.

### **3) Modification or Termination of DOJ Consent Decrees**

44. On October 11, 1995, the Division filed a motion to modify the Modification of Final Judgment of the 1982 AT&T consent decree and to allow U.S. West Inc. to provide long distance telephone services outside of its 14 state region to customers outside of its region who sign up for its planned local telephone services. The Division stated that the ability to offer long distance services to customers who choose U.S. West's competitive local telephone services is likely to make those services more attractive to customers, and encourage the development of local telephone service in the markets that U.S. West will enter.

45. Following passage of the Telecommunications Act of 1996, the United States moved for an order formally terminating the 1982 AT&T consent decree. On April 11, 1996, the district court (Judge Harold Greene) granted the motion, and terminated the decree, *nunc pro tunc*, as of February 8, 1996, the date the Act had become law. *United States V. Western Electric Co.*, 1996 Trade Cas. ¶ 1,364, 1996 WL 2559904 (D.D.C.). As the Court, the Department, and all parties agreed, termination was appropriate because the 1996 Act, which builds upon the success of the decree in promoting competition, expressly provides (in ¶ 601) that the Communications Act of 1934 as amended by the 1996 Act -- and not the decree -- prospectively governs the BOCs' activities. The court further ruled that the Department of Justice and the FCC may use, in connection with their duties under the 1996 Act, certain documents that the Department obtained from the BOCs pursuant to the decree. Finally, the court dismissed as moot all other pending motions under the decree.

46. On July 2, 1996, the Division filed documents in the U.S. District Court in New York, agreeing to terminate the remaining provisions of the 1956 antitrust consent decree with IBM. The decree's main provisions were entered to create a market in used equipment that competed with IBM's new machines and to limit its monopoly power in the computer market. The proposed settlement would terminate by July 2001 the decree's provisions as they currently apply to IBM's midframe and mainframe computers.

#### **4) FTC Non-Merger Enforcement Actions**

##### *a. Commission Administrative Decisions*

47. In March, 1996, the Commission issued an order prohibiting the California Dental Association (CDA), a professional association with 19,000 members, from imposing a variety of restrictions on truthful and non-deceptive advertising and solicitation practices of its members. The Commission determined that the CDA had illegally restrained advertising of the price, quality, and availability of dental services and coerced compliance through expulsion and other means. In a key section of its opinion, the Commission found that broad, categorical bans on advertising of low prices and discounts are as anticompetitive as outright price fixing. *California Dental Ass'n*, Docket No. 9259, 5 Trade Reg. Rep. (CCH) ¶ 24,007.

48. In May, 1996, the Commission issued an administrative complaint charging that Toys "R" Us, the nation's largest toy retailer, used its market power to keep toy prices higher and to reduce toy outlet choices for consumers. The Commission seeks an order prohibiting Toys "R" U.S. from engaging in the anticompetitive activities alleged in the complaint. The matter is presently in litigation before an Administrative Trial Judge. *Toys "R" Us, Inc.*, Docket No. 9278, 5 Trade Reg. Rep. (CCH) ¶ 24,034.

49. The Commission, in September, 1996, dismissed on public interest grounds its administrative complaints against six of the largest publishers in the U.S. charging that they had favoured large bookstore chains with price and promotional discounts not available to independent book stores. The grounds for the dismissal were (1) changes in the industry that have replaced the principal forms of alleged price discrimination and (2) private litigation that had resulted in settlements with four of the publishers. *Harper & Row*, Docket No. 9217, *Macmillan*, Docket No. 9218, *Hearst/Morrow*, Docket No. 9219, *Putnam Berkley*, Docket No. 9220, *Simon & Schuster*, Docket No. 9222, *Bantam*, File No. 801-0059, 5 Trade Reg. Rep. (CCH) ¶ 23,288.

50. In July, 1996, an Administrative Law Judge issued an initial decision finding that the International Association of Conference Interpreters (AIIC), a voluntary professional association of interpreters based in Geneva, Switzerland, and the U.S. Region of AIIC (its U.S. affiliate members), conspired to fix or stabilise the fees for interpretation services performed in the US, and imposed a variety of restrictions that illegally restrained competition among them. The initial order prohibits the organisations from, among other things, fixing, or otherwise interfering with price, fee or certain other forms of competition among members working in the U.S. The case is currently on appeal before the Commission. *International Ass'n of Conference Interpreters*, Docket No. 9270, 5 Trade Reg. Rep. (CCH) ¶ 24,080.

51. The Commission, in May, 1996, issued a final consent order settling charges that Dell Computer Corporation restricted competition in the personal computer industry and undermined the standard-setting process by threatening to exercise its patent rights, which Dell failed to disclose during such process, against computer manufacturers adopting the VL-bus standard. Under the final order, Dell cannot enforce its patent rights against computer manufacturers using the VL-bus, the technology of choice in computers that use "486" chips. *Dell Computer Corp.*, Docket No. C-3658, 5 Trade Reg. Rep. (CCH) ¶ 24,054.

52. In June, 1996, the Commission gave final approval to a consent order settling charges against RxCare of Tennessee, Inc., a leading provider of pharmacy network services in that state, that its use of a "most favoured nation" clause in its pharmacy participation agreements discourages pharmacies from discounting and thereby limits price competition among such pharmacies in their dealings with pharmacy benefits managers and third-party payers. The order bars the respondent from having such clause in its pharmacy participation agreements. *RxCare of Tennessee*, Docket No. C-3664, 5 Trade Reg. Rep. (CCH) ¶ 23,957.

53. Two leading manufacturers of truck-mounted fire pumps agreed to settle FTC charges that each imposed restraints requiring their customers to deal exclusively in that manufacturer's pumps, thereby reducing competition between the two firms and impeding entry into this market by other firms. The consent order prohibits the companies from engaging in the challenged practices or similar ones. *Hale Products, Inc.*, Docket No. C-3693, C-3694, 5 Trade Reg. Rep. (CCH) ¶ 24,076.

54. Other consent orders, final or proposed subject to public comment, are:

- *Precision Moulding Co., Inc.* (attempt to fix prices of stretcher bars for artist's canvases), Docket No. C-3682, 5 Trade Reg. Rep. (CCH) ¶ 24,049 (Final).
- *New Balance Athletic Shoe Inc.* (resale price maintenance), File No. 921-0050, 5 Trade Reg. Rep. (CCH) ¶ 24,098 (Proposed).

*b. Federal District Court Decisions*

55. Federated Department Stores agreed to pay a \$250,000 civil penalty for allegedly violating a 1979 FTC order prohibiting it from interfering with entry of another tenant in any shopping mall in which it operates a store. The complaint and proposed consent judgement were filed in October, 1996 in federal district court. *Federated Department Stores Inc.*, Docket No. C-2958, 5 Trade Reg. Rep. (CCH) ¶ 23,912.

## **E. Business Reviews Conducted by the Department of Justice**

56. From October 1, 1995 to September 30, 1996, the Antitrust Division responded to 24 requests for review of written business proposals. In 22 of the responding letters, the Division stated that it would not challenge the proposed conduct. The approved business practices include nine nonexclusive physician networks, three medical data and clinic networks, and three health care managing networks. In addition, the Division approved practices including: joint proposals to truck and rail carriers by transportation companies; advance pricing negotiation by a credit union representative for car sales; and the development of a national marketing program for independent automotive damage appraisers. All of these business review letters can be found at 6 Trade Reg. Rep. (CCH) ¶ 44,096; those of particular interest are described below.

57. On February 22, 1996, the Division approved the proposal by Southwest Power Pool, Inc. to create a computerised trading system that would allow real-time trading of electric power on a next-hour basis. The Division stated that the proposal will not likely foster price collusion and an increased efficiency could foster price rivalry to the benefit of the consumer.

58. On May 13, 1996, the Division stated that it would not challenge a proposal by three Texas oil-well-drilling suppliers -- Baker Hughes Inteq and M-1 Drilling Fluids of Houston and Dresser Industries Inc. of Dallas -- to buy jointly Chinese produced barite, a chemical used in the oil-drilling process. The Division stated its belief that the proposed joint venture will not likely have an anticompetitive effect since Chinese barite purchased by the three firms accounts for less than 35 percent of world barite production.

59. On March 1, 1996, the Division announced that it would not approve a proposal by a group of southern New Jersey pediatricians to form a physician network. The proposed network would have been formed by pediatricians to negotiate and contract with managed care plans to provide basic health care for children. The Division stated that the network would comprise approximately 50 -75 percent of the primary-care pediatricians in several local markets for pediatric services and could likely be used to raise prices to consumers without countervailing procompetitive benefits.

60. On March 8, 1996, the Division advised five groups of anesthesiologists based in Orange County, California, that it would not approve their proposal to deal jointly through a single price-setting unit with managed health care plans. The Division explained in a business review letter that the proposal would have reduced the number of anesthesia groups available to serve local hospitals in Orange County from six to two and would have likely resulted in higher health care costs. The Division also concluded that new groups were unlikely to enter the area to offset the substantial reduction in competition.

## **III. ENFORCEMENT OF ANTITRUST LAWS AND POLICIES: MERGERS AND CONCENTRATIONS**

### **A. Department of Justice and FTC Merger Statistics**

61. The Department and the Commission maintain statistics respecting the mergers and acquisitions reported under the Hart-Scott-Rodino Act (HSR). The HSR Pre-merger Notification Program was enacted to provide the enforcement agencies with a meaningful opportunity to review proposed transactions and to take enforcement action, if appropriate, to prevent consummation of transactions that violate the antitrust laws. Only those mergers meeting certain size or other criteria are required to be reported under the Act.

62. During FY96, 3,087 proposed mergers and acquisitions were submitted for review under the notification and filing requirements of the HSR Act. This was a record number -- a nine percent increase over the number reported in the previous fiscal year. The purchase price of 836 of these transactions exceeded \$100 million. More than half involved acquisitions of only voting securities. A wide variety of industries were involved including defense, medical equipment, industrial gases, supermarkets, pharmaceuticals, computer software systems, chemicals, cable television and funeral homes.

### 1) DOJ Review of Mergers

63. The Division initiated 237 merger investigations, 186 HSR and 49 non-HSR. Of the 186 HSR investigations, 102 involved second requests and/or civil investigative demands ("CIDs"). Of the 49 non-HSR merger investigations, 15 involved the issuance of CIDs.

### 2) FTC Review of Mergers

64. Based on its review of pre-merger notification reports, the FTC investigated 36 transactions with second requests for information.

### 3) Enforcement of Pre-merger Notification Rules

65. The Commission and the Department actively have enforced the filing requirements of the Hart-Scott-Rodino (HSR) Act by bringing cases in federal court to obtain civil penalties. In FY 96, four civil penalty actions were brought. In addition, a "hold separate" agreement was negotiated in a pending investigation.

66. In February, 1996, Sara Lee Corporation agreed to pay a record \$3.1 million civil penalty for deliberately failing to pre-notify its acquisition of Reckitt and Coleman's shoe care products assets as required by the HSR Act. *Sara Lee Corporation*, File No. 921-0023, 5 Trade Reg. Rep. (CCH) ¶ 23,972.

67. Automatic Data Processing agreed in March, 1996 to pay \$2.97 million for failing to include key competitive documents in a HSR filing in connection with its April, 1995 acquisition of AutoInfo, Inc.'s assets. (The documents ultimately were submitted.) *Automatic Data Processing, Inc.*, File No. 951-0113, 5 Trade Reg. Rep. (CCH) ¶ 24,006.

68. Other civil penalty actions are: *Foodmaker, Inc.*, File No. 941-0056, 5 Trade Reg. Rep. (CCH) ¶ 24,087 (\$1.45 million, knowing failure to make HSR filing); and *Titan Wheel International, Inc.*, File No. 941-0110, 5 Trade Reg. Rep. (CCH) ¶ 24,026 (\$130,000, failure to observe HSR waiting period).

69. In a pending investigation of a consummated transaction, the Commission in September, 1996 negotiated a "hold separate" agreement with Mahle GmbH, a German firm, to prevent it from exercising any control over its competitor, Metal Leve S.A., a Brazilian firm in which Mahle acquired a controlling interest without first making the required HSR filings. Civil penalties are under consideration. *Mahle GmbH*, File No. 961-0085, 5 Trade Reg. Rep. (CCH) ¶ 24,096.

## B. Significant Merger Cases

### 1) DOJ Merger Challenges or Cases

70. On December 12, 1995, the Division and the State of Texas filed a joint complaint and proposed consent decree in connection with the proposed merger of Kimberly Clark Corporation and Scott Paper Co. The complaint alleged that a combination of the companies as proposed would control nearly 60 percent of sales of facial tissue and more than 55 percent of sales of baby wipes, allowing them to increase prices to consumers and substantially reduce competition. Under the consent decree, the companies are required to divest Scott's baby wipes and facial tissue business. *See* 1996-1 Trade Cases ¶ 71,405 for the text of the final consent decree.

71. On March 29, 1996, the Division filed a civil antitrust suit and proposed consent decree in connection with the proposed merger of Georgia-Pacific Corporation, one of the nation's largest gypsum drywall producers, and Domtar Inc., a Canadian corporation. The complaint alleged that the merger would lessen competition for drywall gypsum, also known as wallboard or sheetrock, facilitate co-ordinated pricing activity and raise prices to consumers in the north-eastern United States. The consent decree requires Georgia-Pacific to divest plants in Wilmington, Delaware and Buchanan, New York. *See* 1996-2 Trade Cases (CCH) ¶ 71,560 for the text of the final consent decree.

72. On June 11, 1996, the Division filed a civil antitrust suit in the U.S. District Court in Washington to block American Skiing Company's proposal to purchase S-K-I Ltd, challenging that the deal would raise prices and eliminate discounts of skiing packages. At the same time, the Division filed a proposed consent decree that would require American Skiing to sell its New Hampshire ski resorts at Waterville Valley and Mount Cranmore to preserve competition. *See* 1996- 2 Trade Cases (CCH) ¶ 71,627 for the text of the final consent decree.

73. On June 19, 1996, the Division and Attorneys General from seven states challenged the proposed merger of two of the nation's largest legal publishers. In a joint antitrust suit filed in the U.S. District Court in Washington, the Division and Attorneys General from California, Connecticut, Illinois, Massachusetts, New York, Washington and Wisconsin alleged that the proposed merger of Thomson Corp. and West Publishing Co. would reduce competition substantially in nine markets for enhanced primary law, and in a number of markets for secondary legal sources such as treatises and legal guides, and in the on-line computer legal research market. Under the proposed consent decree, Thomson is required to divest more than 50 products. *See* 7 Trade Rep. Reg. (CCH) ¶ 50,803, Case No. 4217 for the text of the proposed consent decree.

74. On August 5, 1996, the Division filed a civil antitrust suit in the U.S. District Court in Cincinnati to block the proposed merger of Jacor Communications Inc. and Citicasters Inc., two of the nation's largest radio station owners. The Division alleged that a combination of the two companies would control more than 50 percent of sales of radio advertising time in Cincinnati, and could enable the companies to increase prices to advertisers and substantially lessen competition. Under a consent decree filed at the same time, Jacor and Citicasters agreed to divest WKRQ-FM, a leading Cincinnati contemporary music station, to an independent buyer. *See* 7 Trade Rep. Reg. (CCH) ¶ 50,807, Case No. 4225 for the text of the final consent decree.

75. On September 13, 1996, in a joint settlement, the Texas Attorney General's office and the Division approved a deal between the two largest tortilla flour manufactures, after the companies agreed to divest a flour mill in the Texas panhandle simultaneously with the closing of the transaction. As a result of

the restructuring, Archer Daniels Midland Co. was permitted to acquire 22 percent of Gruma S.A. de C.V., a Mexican company. The two companies will also be able to form a partnership to combine their U.S. masa flour milling operations.

## 2) *Merger Cases Brought by the FTC*

### a. *Preliminary Injunctions Authorised*

76. In December, 1995, the Commission sought a federal court order to enjoin, pending the outcome of an administrative trial, a proposed acquisition by Questar Corp. of certain pipeline assets of Tenneco, Inc. that allegedly would have allowed Questar to reassert a monopoly over the transmission of natural gas to industrial customers in the Salt Lake City, Utah area. The defendants abandoned the transaction after the complaint was filed. The court then dismissed the complaint without prejudice. *Questar Corp.*, File No. 961-0001, 5 Trade Reg. Rep.(CCH) ¶ 23,949.

77. In January, 1996, the Commission sought a federal court order to enjoin, pending the outcome of an administrative trial, a proposed transaction that would combine the two leading general acute care hospitals, Butterworth Health Corp. and Blodgett Memorial Medical Center, in Grand Rapids, Michigan. Following a hearing, a district court judge denied the Commission's request for preliminary injunctive relief. The Commission appealed and was granted an expedited hearing before the U.S. Court of Appeals for the Sixth Circuit. *Butterworth Hospital*, File No. 951- 0126, Case No. 1:96-CV-49, 7 Trade Reg. Rep. (CCH) ¶ 71,571.

78. In April, 1996, the Commission was prepared to seek a federal court order to enjoin, pending the outcome of an administrative trial, a proposed acquisition of Revco D.S. Inc., by Rite Aid Corp., which would merge the two largest retail drug chains in the U.S. and allegedly reduce substantially competition for prescription drugs sold in retail pharmacy outlets in numerous areas. The parties abandoned the transaction just before the complaint was filed. *Rite-Aid Corp.*, File No. 951-0120, 5 Trade Reg. Rep. (CCH) ¶ 24,041.

### b. *Commission Administrative Decisions*

79. In February, 1996, the Commission gave final approval to a consent agreement with The Upjohn Co., and Pharmacia Aktiebolag, a Swedish firm, regarding their \$13.9 billion merger which raised antitrust concerns in an innovation market. The consent order, which requires divestiture of certain Pharmacia assets to a Commission-approved buyer, is designed to preserve competition in the research and development of drugs for treating colorectal cancer and to assure lower prices when those drugs reach the market. *Upjohn Co.*, Docket No. C-3638, 5 Trade Reg. Rep. (CCH) ¶ 23,914.

80. In April, 1996, the Commission issued a final consent order settling charges that the acquisition by the Scottish firm Devro International PLC (through its U.S. subsidiary), of Teepak International, Inc., by combining the nation's top two producers of collagen sausage casings, likely would substantially reduce competition and result in higher prices in this market. The order requires Devro to divest the assets it uses to produce such casings in the U.S. to a Commission-approved buyer. *Devro International plc*, Docket No. C-3650, 5 Trade Reg. Rep. (CCH) ¶ 23,940.

81. A final consent order was issued in May, 1996 settling charges that Litton Industries, Inc.'s acquisition of PRC Inc. would give it access to competitively sensitive, non-public information about the only other Aegis destroyer producer, thereby giving Litton a competitive advantage and result in increased prices for the U.S. Navy's Aegis destroyer program. The consent order requires Litton to divest PRC's \$40 million systems engineering and technical assistance contract for the Aegis program and represents the first divestiture order in a defense industry market. *Litton Industries, Inc.*, Docket No. C-3656, 5 Trade Reg. Rep. (CCH) ¶ 23,983.

82. The Commission in June, 1996 gave final approval to a consent agreement with Compagnie de Saint-Gobain and its U.S. subsidiary, Saint-Gobain/Norton to settle charges that its acquisition of The Carborundum Company from British Petroleum Company likely would lead to monopolies or near-monopolies in the markets for three products used in industrial furnaces and home appliances (fused cast refractories, silicon carbide refractories, and hot surface gas igniters). The consent order requires Saint-Gobain to divest businesses and associated assets in each of these markets. *Compagnie de Saint-Gobain*, Docket No. C-3673, 5 Trade Reg. Rep. (CCH) ¶ 23,985.

83. Lockheed Martin Corp. settled FTC charges that its \$9.1 billion acquisition of the Loral Corporation would reduce competition in the markets for air traffic control systems, commercial low earth orbit satellites, commercial geosynchronous earth orbit satellites, military tactical fighter aircraft and unmanned aerial vehicles. The final order, issued in September, 1996, among other things, requires divestiture of an air traffic control system-related contract; limits Lockheed Martin's ownership of Loral Space (a newly-created company consisting of Loral's space and telecommunications businesses); prohibits Lockheed Martin from providing certain technical services or information regarding satellites to Loral Space; and requires firewalls to limit information flows about competitors' tactical fighter aircraft and unmanned aerial vehicles. *Lockheed Martin Corp.*, Docket No. C-3685, 5 Trade Reg. Rep. (CCH) ¶ 24,126.

84. The Commission in July, 1996 accepted, subject to public comment, a proposed consent agreement with Fresenius AG and its U.S. subsidiary to divest its Lewisberry, Pennsylvania hemodialysis (HD) concentrate plant to Di-Chem, Inc., to resolve antitrust concerns stemming from Fresenius' proposed acquisition of National Medical Care, Inc. (NMC). According to the FTC complaint, Fresenius' proposed acquisition of NMC would combine two significant producers of HD concentrate in the U.S. in a highly concentrated market, thereby increasing the likelihood of co-ordinated interaction about HD concentrate producers and likely leading to higher prices for the product. *Fresenius AG*, File No. 961-0053, 5 Trade Reg. Rep. (CCH) 24,077.

85. In September, 1996, the Commission accepted, subject to public comment, a proposed consent agreement with Time Warner Inc. that restructured its \$7.5 billion acquisition of Turner Broadcasting System, Inc. to settle charges that the merger would restrict competition in cable television programming and distribution. The Commission complaint alleged that the acquisition, along with related agreements, would allow Time Warner to raise unilaterally consumer prices for cable television and to limit programming choices. The proposed order would require the parties to make a number of structural changes and to abide by certain restrictions designed to break down the entry barriers create by the deal. *Time Warner Inc.*, File No. 961-0004, 5 Trade Reg. Rep. (CCH) ¶24,104.

86. Other consent orders, final or proposed, are the following: *Loewen Group International, Inc.*, Docket No. C-3677 (final) (funeral homes), 5 Trade Reg. Rep. (CCH) ¶24,027; *Loewen Group Inc.*, Docket No. C-3678 (final) (funeral homes), 5 Trade Reg. Rep. (CCH) ¶ 24,027; *Service Corp. International, Inc.*, Docket No. C-3646 (final) (funeral homes, crematories), 5 Trade Reg. Rep. (CCH) ¶ 24,018; *Stop and Shop Companies Inc.*, Docket No. C-3649 (final) (grocery stores), 5 Trade Reg. Rep.

(CCH) ¶ 24,018; *Johnson & Johnson Inc.*, Docket No. C-3645 (final) (cranial shunts), 5 Trade Reg. Rep. (CCH) ¶ 23,994; *Praxair Inc.*, Docket No. C-3648 (final) (industrial gases), 5 Trade Reg. Rep. (CCH) ¶ 23,952; *Illinois Tool Works, Inc.*, Docket No. C-3651 (final) (industrial power sources and engine drives), 5 Trade Reg. Rep. (CCH) ¶ 23,968; *Hughes Danbury Optical Systems, Inc.*, Docket No. C-3652 (final) (deformable mirrors), 5 Trade Reg. Rep. (CCH) ¶ 23,976; *Raytheon Co.*, Docket No. C-3681 (final) (submarine satellite communications equipment), 5 Trade Reg. Rep. (CCH) ¶ 24,051; *Koninklijke Ahold N.V.*, Docket No. C-3687 (final) (grocery markets), 5 Trade Reg. Rep. (CCH) ¶ 24,071; *NGC Corp.*, File No. 961-0046 (proposed) (natural gas liquids fractionation), 5 Trade Reg. Rep. (CCH) ¶ 24,093; *Castle Harlan Partners*, File No. 961- 0067 (proposed) (class rings), 5 Trade Reg. Rep. (CCH) ¶ 24,113; and *Wesley-Jessen Corp.*, File No. 961-0060 (proposed) (opaque contact lenses), 5 Trade Reg. Rep. (CCH) ¶ 24,117.

#### IV. REGULATORY AND TRADE POLICY MATTERS

##### A. Regulatory Policies

###### 1) *DOJ Activities with Respect to Federal and State Regulatory Matters*

87. The Division participated actively in regulatory proceedings in order to promote competition. During FY96, the Division filed comments in:

- Federal Communications Commission proceedings involving revision of rules and policies for direct broadcast satellite services; implementation of the local competition provisions in the Telecommunications Act of 1996; the petition of MFS Communications Company, Inc. for pre-emption by the FCC of local entry barriers (certification requirements) in the District of Columbia; and rule-making to amend the Commission's rules to redesignate certain frequency bands and to establish rules and policies for local multipoint distribution service and for fixed satellite services.
- Department of Transportation (DOT) proceedings: the Division filed comments supporting a DOT notice of proposed rulemaking that would bar computer reservation systems ("CRSs") from requiring airlines to participate at as high a level on their CRS as they do on any other CRS. The comments also supported an exception to the rule that would permit CRSs to require equal participation from airlines that owned, were affiliated with, or marketed a competing CRS.
- *Union Pacific/Southern Pacific Merger*: the Department actively participated in proceedings before the Surface Transportation Board (STB) on the Union Pacific/Southern Pacific (UP/SP) merger. The UP and SP were two of only three Class I railroads (those with annual operating revenues over \$250 million) in the western United States. In April 1996, the Department filed comments and expert testimony with STB concluding that the merger would significantly reduce competition in many markets where the number of competing railroads would decline from two to one or from three to two. The Department's economic evidence also showed that the trackage rights agreement with Burlington Northern/Santa Fe proposed by the Applicants was insufficient to remedy the competitive harms of the merger. The Department further concluded that the efficiencies claimed by the parties were overstated and that the financial condition of SP did not warrant approval of the transaction.

In June 1996, the Department filed a brief urging the STB to reject the merger application. The Department argued that the competitive harms arising from the merger could only be remedied by extensive divestitures, and urged disapproval as the most certain and expeditious way to restore competition. In August 1996 the STB issued a decision approving the merger application as proposed by the parties with only minor additional conditions.

- Federal Energy Regulatory Commission proceedings involving policies and procedures for Federal Power Act review of utility mergers.

88. In FY96, the Division reviewed three applications for new Export Trade Certificates submitted under the Export Trading Company Act and its implementing regulations and concurred in the issuance of two new certificates. (One application was withdrawn.) The goods covered by the certificates included leaf-tobacco and milled rice.

## ***2) FTC Activities with Respect to Regulatory and State Legislative Matters***

89. The goal of the Commission's advocacy activities is to reduce harm to consumers and competition by informing appropriate governmental and self-regulatory bodies about the potential effects, both positive and negative, of proposed legislation, rules or industry guides or codes. The following are examples of some of these activities in FY96.

### *a. Federal Agencies*

90. FTC staff commented on Federal Communications Commission (FCC) policies for awarding licenses for local multipoint distribution service (LMDS) to local phone or cable companies. Staff said that: i) local phone or cable companies that acquired a LMDS license for the same geographic area in which they offer their current service, given enough market power, could either warehouse the LMDS license to forestall a third party from coming in and competing, or could raise the price of both services they offer; and ii) until effective competition is present in these markets, the acquisition of LMDS spectrum licenses by competing local exchange carriers and cable operators presents potentially significant risks.

91. FTC staff filed comments with the Copyright Office on a recommendation to extend the cable compulsory license to Open Video Systems (OVS), and place copyright liability on the firm providing the programming on the OVS. Staff said that applying the cable compulsory license to OVS would lead to an allocation of resources that better reflected the relative costs of different video distribution methods, and that it would reduce that OVS's cost of acquiring programming and make its acquisition costs comparable to that of other distribution technologies.

### *b. States*

92. FTC staff supported proposed legislation in Tennessee that would permit veterinarians to practice as employees of non-veterinarians under certain conditions. Allowing new business formats, which Tennessee's law now prohibits, could enhance competition and afford consumers a wider selection of services at lower costs.

93. FTC and DOJ staff opposed the Virginia State Bar's proposal to prevent non-lawyers and title company attorneys from handling closings of real estate transactions and refinancings. They argued that the proposal would increase costs to consumers who would not otherwise hire an attorney and would lead to higher prices for lawyers' settlement services by eliminating competition from lay settlement services.

94. FTC staff opposed a proposed rule by the Washington legislature requiring candidates for Certified Public Accountant status to earn at least 150 semester hours of undergraduate academic credit since this would raise the educational entry requirements for CPA licensure, likely resulting in increased costs of entry and higher prices for CPAs.

## **B. Department of Justice Trade Policy Activities**

95. The Division is extensively involved in interagency discussions and decision-making with respect to the formulation and implementation of U.S. international trade policy. The Division participates in interagency trade policy discussions chaired by the Office of the U.S. Trade Representative and is a participant in the trade policy activities of the National Economic Council (NEC), a cabinet-level advisory group. The Department provides antitrust and other legal advice to U.S. trade negotiators. Both DOJ and FTC participate in bilateral and multilateral discussions and work projects to improve co-operation in the enforcement of competition laws.

96. The Division and FTC participate in a number of negotiations and working groups related to regional trade agreements. The Division chairs the U.S. delegation to a working group on trade and competition under the North American Free Trade Agreement, and participates with the Office of the U.S. Trade Representative, the Federal Trade Commission, and State and Commerce Departments in competition policy working groups associated with the Free Trade Area of the Americas and Asia-Pacific Economic Co-operation. The antitrust agencies will also play an important role in the working group to be established in 1997 by the World Trade Organisation to study issues relating to the interaction between trade and competition policy.

97. The Division represents the Department on the Committee on Foreign Investment in the United States (CFIUS), an interagency group chaired by Treasury that advises the President on enforcement of the Exon-Florio provision, a 1988 statute that permits the President to block or suspend foreign acquisitions of U.S. assets that "threaten to impair the national security."

98. The Department and the FTC have an extensive program to provide technical assistance in antitrust development to countries with emerging market economies. In addition to advancing the adoption of competition policies that incorporate sound economic principles and effective enforcement mechanisms, these programs create long-term co-operative relationships with policy and enforcement officials in the countries involved.

99. The Division co-chairs (with the Office of the U.S. Trade Representative) the Deregulation and Competition Policy portion of the US-Japanese Framework discussions. In these discussions, the United States has urged the Japanese government to strengthen its enforcement of Japan's antimonopoly law, to make its administrative procedures fair and open, and to accelerate an effective program of deregulation to open markets to competition.

**V. NEW STUDIES RELATED TO ANTITRUST POLICY**

**A. Antitrust Division Economic Analysis Group Discussion Papers**

100. The Division issued nine Economic Analysis Group Discussion Papers during the period October 1, 1995 through September 30, 1996.

96-1 Werden, Gregory J., "A Robust Test for Consumer Welfare Enhancing Mergers Among Sellers of Differentiated Products," EAG 96-1, June 14, 1996. Published at 44 *Journal of Industrial Economics* 409 (1996).

96-2 Werden, Gregory J., "Simulating the Effects of Differentiated Products Mergers," EAG 96-2, June 24, 1996. Revised versions forthcoming under different titles in *George Mason Law Review* and Julie A. Caswell & Ronald W. Cotterill eds., *Strategy and Policy in the Food System: Emerging Issues*.

96-3 McCabe, Mark J., and James G. Hewlett, "Dynamic Behavior of Regulated Firms: Evidence from Nuclear Utilities," EAG 96-3, July 1, 1996.

96-4 Dunham, Wayne R., "Moral Hazard and the Market for Used Automobiles," EAG 96-4, July 11, 1996.

96-5 Alexander, Cindy R., and Mark A. Cohen, "New Evidence on the Origins of Corporate Crime," EAG 96-5, July 12, 1996.

96-6 Einhorn, Michael A., "INTELSAT: A Reform Proposal," EAG 96-6, July 15, 1996.

96-7 Alexander, Cindy R., and Mark A. Cohen, "Why Do Corporations Become Criminals? An Agency Explanation," EAG 96-7, July 16, 1996.

96-8 Werden, Gregory J., and Luke M. Froeb, "The Entry Inducing Effects of Horizontal Mergers," EAG 96-8, September 20, 1996.

96-9 Raskovich, Alexander, "Contracts to Mitigate Deadweight Loss," EAG 96-9, September 23, 1996.

Copies of these reports may be obtained by contacting Janet Ficco at 600 E Street, N.W., Suite 10000, Washington, D.C. 20530 or at (202) 307-3779. Other Division public materials may be obtained through the public information unit of the Division's Office of Operations. Requests should be directed to Ms. Janie Ingalls, Room 221, Liberty Place Building, 325 7th Street, N.W., Washington, D.C. 20530. Ms. Ingalls may be reached at (202) 514-2481.

**B. Commission Economic Reports, Economic Working Papers and Miscellaneous Studies**

101. The following may be obtained from the Federal Trade Commission, Division of International Antitrust, 6th and Pennsylvania Ave., N.W., Washington, D.C. 20580.

***1) Economic Reports***

1. The Salt Producers Discount Practices Before and After the Robinson-Patman Act and the FTC's Challenge to Them: The Morton and International Salt Cases , John L. Peterman, October 1995.
2. Disentangling Regulatory Policy: The Effects of State Regulations on Trucking Rates, Timothy P. Daniel and Andrew N. Kleit, November 1995.
3. The Effectiveness of Collusion Under Antitrust Immunity: The Case of Liner Shipping Conferences, Paul S. Clyde and James D. Reitzes, January 1996.

***2) Working Papers***

1. The Political Economy of Federal Trade Commission Administrative Decision Making in Merger Enforcement, (WP#210), Malcolm B. Coate and Andrew N. Kleit, November 1995.
2. A Game Theory Model of Celebrity Endorsements, (WP #211), Mark N. Hertzendorf, March 1996.
3. Entry Policy and Entry Subsidies, (WP #212), James D. Reitzes and Oliver R. Grawe, April 1996.