

- b. Studies and Reports
- 2) Economic Working Papers

Appendices

Department of Justice: Fiscal Year 2002 FTE and Actual Amount by Enforcement Activity
Federal Trade Commission: Fiscal Year 2002 Competition Mission FTE and
Dollars by Program by Bureau/Office

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

(October 1, 2001 through September 30, 2002)

Introduction

1. This report describes federal antitrust developments in the United States for the period October 1, 2001, through September 30, 2002 (“FY 2002”). It summarizes the activities of both the Antitrust Division (“Division”) of the U.S. Department of Justice (“Department” or “DOJ”) and the Bureaus of Competition and Economics of the Federal Trade Commission (“Commission” or “FTC”).

I. Changes in law or policies

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

2. On January 4, 2002, AAG James announced a modernization of the Antitrust Division so as to address new industrra3(od8C con)18.9(e)0.t(om9.7(p)9.6(eti)8.7(i,on)18. [(aon)18. od th)18.9(a3(odr e(om9.ergth)18.i

4. The Commission's Bureau of Competition has established three new task forces. The Merger Litigation Task Force is be responsible for reinvigorating the Commission's hospital merger program, which includes a review of, and potential challenge to, consummated transactions that may have resulted in

II. Enforcement of antitrust laws and policies: actions against anticompetitive practices

A. *Department of Justice and FTC Statistics*

1) *DOJ Staffing and Enforcement Statistics*

B. Antitrust Cases in the Courts

1) *United States Supreme Court*

20. The United States Supreme Court did not decide any antitrust cases in FY 2002. The Court denied Microsoft's petition for certiorari in an Antitrust Division case (*Microsoft Corp. v. United States*, 122 S. Ct. 350 (2002)) and denied a petition for certiorari in a case where the United States submitted a brief amicus curiae opposing review (*Statoil ASA v. HeereMac v.o.f.*, 122 S. Ct. 1059 (2002)).

2) *U.S. Court of Appeals Cases*

a. Significant DOJ Cases Decided in FY 2002

21. There were two dispositions by the U.S. courts of appeals in Antitrust Division cases in FY 2002, one civil and one criminal. The civil case concerned interpretation of a consent decree (*United States v. Broadcast Music, Inc.*, 275 F.3d 168 (2d Cir. 2001)). The criminal case grew out of the investigation into price fixing by the Christie's and Sotheby's auction houses. The court upheld the conviction of A. Alfred Taubman, the former chairman of Sotheby's (*United States v. Taubman*, 297 F.3d 161 (2d Cir. 2002)).

22. There were also two final decisions in cases where the United States participated as amicus curiae.

3) *Private Cases Having International Implications in FY 2002*

23. In *Kruman v. Christie's International PLC*, 284 F.3d 384 (2d Cir. 2002), a class action follow-on to the criminal price-fixing investigation of the Christie's and Sotheby's auction houses, the court of appeals reversed the district court's dismissal of the case for lack of subject matter jurisdiction and allowed the class of buyers and sellers at *foreign* auctions to proceed. The court reasoned that the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) (codified at 15 U.S.C. 6a), did not change the prior law of the Second Circuit, under which anticompetitive conduct directed at foreign markets is regulated by the Sherman Act if has the effect of causing injury to domestic commerce by (1) reducing the competitiveness of a domestic market, or (2) making possible anticompetitive conduct directed at domestic commerce. The court disagreed with the Fifth Circuit, which held previously that Section 6a(2) of the FTAIA requires that the "effect" on domestic commerce be the basis for the alleged injury suffered by the plaintiff (*Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001)). The case was recently settled by the

C. *Statistics on Private and Government Cases Filed*

25. According to the annual report of the Director of the Administrative Office of the U.S. Courts, 830 new civil and criminal antitrust actions, both government and private, were filed in the federal district courts in FY 2002.

D. *Significant DOJ and FTC Enforcement Actions*

1) *DOJ Criminal Enforcement*

26. **Federal Emergency Management Agency (FEMA):** On January 22, 2002, Austin “Sonny”

drug rehabilitation center. The fraudulent schemes affected contracts valued at more than \$210 million. The sentence at the time was the longest prison term ever imposed in a case prosecuted solely by the Department's Antitrust Division. Merberg was also ordered to pay a total of \$2.2 million in restitution to 138 victims as well as to file accurate amended tax returns and pay an estimated \$2 million in back taxes, penalties, and interest. Merberg was the 17th food company executive sentenced to prison in connection with this ongoing investigation.

31. In March 2002, Toho Tenax Co. Ltd. (Toho Japan) of Tokyo, Japan, formerly known as Toho Rayon Co. Ltd., its American subsidiary, Toho Carbon Fibers Inc. (Toho USA), and Jinnosuke Takeda, a Toho Japan executive, were indicted by a federal grand jury in Los Angeles for obstruction of justice in connection with the investigation of possible price fixing in the carbon fiber industries. The indictment charges that Toho Japan, Toho USA, and Takeda caused incriminating documents to be secretly removed from the U.S. headquarters of Toho USA and to be sent to the headquarters of Toho Japan in Tokyo, in an effort to prevent the grand jury from receiving the documents which had been subpoenaed in January 1999 by a federal grand jury investigating possible violations of Section 1 of the Sherman Act. These documents were later discovered in Toho Japan headquarters by Japanese law enforcement officials.

2) *DOJ Civil Non-Merger Enforcement*

32. **Federation of Physicians and Dentists**

nine states sought a broad array of remedies in addition to those secured by the United States. The district court rejected virtually all of the non-settling states' proposals, finding that they exceeded the proper scope of the case. Two of the non-settling states have appealed that decision.

35. **National Association of Police Equipment Distributors:** On July 29, 2002, the DOJ reached a

agreements in the future. The order is the Commission's first enforcement action regarding an allegedly anticompetitive agreement between two competing generic drug manufacturers. (C-4057)

39. **Biovail-Tiazac:** In a separate action the Commission agreed to settle its charges against Biovail for allegedly illegally acquiring an exclusive patent license and wrongfully listing that patent in the U.S. Food and Drug Administration's (FDA) "Orange Book" for the purpose of blocking generic competition to its branded drug Tiazac. According to the Commission's complaint, Biovail unlawfully acquired an

producing products in compliance with those standards. The complaint asserts that a number of large memory manufacturers - including such well-known companies as Samsung, Hitachi, NEC, and Toshiba - have acquiesced to Rambus's royalty demands. Under these existing license agreements, Rambus is entitled to collect royalties in the range of \$50 to \$100 million per year.

According to a detailed "Notice of Contemplated Relief" attached to the complaint, such relief may include, among other things, an order preventing Rambus from enforcing any United States patents against producers and users of SDRAM technology, to the extent such patents derive from patent applications filed prior to Rambus's withdrawal from JEDEC. In addition, such relief may include an order preventing Rambus from enforcing certain foreign patents against producers and users of SDRAM technology, with respect to products intended for import into or export from the United States. The administrative proceeding is pending before an administrative law judge. (D-9302)

42. **Physician Organizations:** The FTC reached settlements in four cases presenting similar allegations that physician organizations and various individuals entered into agreements to fix fees and to refuse to deal with payers except on collectively agreed-upon terms. According to the complaints, in all cases the challenged conduct restrained price and other forms of competition among competing physicians and their organizations, caused fees for physician services to rise, and harmed purchasers of health care services, including health plans, employers, and individual patients.

Sometimes a network of competing physicians uses an agent to convey to payers information obtained individually from the physicians about fees or other significant contract terms that the physicians are willing to accept. The agent also may convey all payer contract offers to the physicians, which the physicians then unilaterally decide whether to accept or reject. Such a "messenger model" arrangement, which is described in the 1996 Statements of Antitrust Enforcement Policy in Health Care jointly issued by the FTC and U.S. Department of Justice (*see* <http://www.ftc.gov/reports/hlth3s.htm>), can facilitate contracting between physicians and payers and minimize the costs involved, without fostering an agreement among competing physicians on fees or fee-related terms.

The complaints allege generally that the respondents did not use a legitimate messenger model arrangement, but instead orchestrated boycotts and agreements among physicians to fix the prices and other terms they would accept from payers. Respondents and their members have not engaged in any cooperative joint activity that would justify collective negotiations over their terms of dealing with health plans. Under the orders' core provisions, the respondents are prohibited from entering into, participating in, or facilitating any agreement: 1) to negotiate on behalf of physicians with any payer or health care provider; 2) to deal or to refuse to deal with any payer or health care provider; 3) regarding any term or condition on which physicians deal, or are willing to deal, with any payer; or 4) not to deal individually with any payer, or to deal with any payer only through an arrangement involving the respondent(s). The proposed order also would bar the respondents from exchanging information concerning any physician's willingness to deal with a payer.

Final consent orders were entered in the matters: Physician Integrated Services of Denver, Inc. (C-4054) and Aurora Associated Primary Care Physicians, L.L.C. (C-4055); System Health Providers, Inc., and Genesis Physicians Group, Inc. (C-4064); R. T. Welter and Associates, Inc. (the order names one corporation, one individual and 8 physician practice groups) (C-4063); Obstetrics & Gynecology Medical Corp. of Napa Valley (OGMC) (the order names one corporation and six individuals) (File No. 011 0153).

43. **The Three Tenors**

United States of any audio or video product. As previously reported, the FTC had charged Warner Communications and PolyGram (predecessor to Vivendi Universal), two of the largest music distribution companies in the world, with fixing prices in connection with an otherwise legitimate joint venture (D-9298). The charges against Warner were settled earlier in a consent order. (C-4052)

E. Business Reviews Conducted by the Department of Justice

44. In FY02 the DOJ issued five business review letters announcing that it had no current intention to challenge proposals by (1) the Washington State Medical Association to conduct a fee and reimbursement survey of physicians and physician assistants and to publish the survey results, (2) a group of seven small, geographically dispersed community hospitals in Michigan to form a network to negotiate contracts on their behalf with insurance companies, employers, and managed care plans, (3) the National Consumer Telecommunications Data Exchange to expand its credit data exchange service, currently providing credit data exchange histories to telecommunications carriers, to include the electric power, gas, and water industries, (4) the Association of Fund-Raising Distributors and Suppliers to establish a uniform product ordering format for products sold to non-profit organizations for resale in their fund-raising activities, and (5) ten towing and barge companies that operate in various U.S. waters to exchange historical cost information in an effort to reduce operating costs.

III. Enforcement of antitrust laws and policies: mergers and concentrations

A. Enforcement of Premerger Notification Rules

lessened competition by reducing the number of independent competitors in the corn wet milling industry to four and making coordination among the remaining firms more likely.

48. **Aggregate/Wakefield:** On September 6, 2002, the Department announced that it would require Wakefield Materials Company to divest a ready-mix concrete facility serving northern metropolitan Boston in order to resolve antitrust concerns relating to the proposed \$85 million acquisition of Wakefield by Aggregate Industries plc. Wakefield agreed to sell its ready-mix concrete facility in Wakefield, MA, to J.G. MacLellan Concrete Co., Inc., a ready-mix concrete producer that operates plants in north-eastern Massachusetts and New Hampshire. In addition to the divestiture of the Wakefield facility, Aggregate Industries reached an agreement with the Massachusetts Attorney General's Office that required it to relinquish the lease held by Wakefield to a ready-mix concrete plant located in Worcester, MA.

49. **Manitowoc/Grove Investors**

in the sale of shared hot site disaster recovery services provided to consumers in the event of an interruption or failure of a computer data center due to natural disaster or some other incapacitating event. After an expedited trial in November 2001, the Court declined to enjoin the transaction, finding that the Department had failed to prove that shared hot site services were a relevant product market.

2) *FTC Merger Challenges or Cases*

a. Preliminary Injunctions Authorized

53. **Cytec/Digene:** The Commission authorized staff to seek a preliminary injunction to block Cytec Corporation's (Cytec) proposed \$420 million acquisition of Digene Corporation (Digene). According to the complaint, the combination of these companies would lead to reduced competition and increased consumer prices within the highly concentrated market for primary cervical cancer screening tests, both now and in the future. Cytec's product accounts for 93 percent of U.S. liquid-based Pap tests, which are the most widely used primary screening tool available for the detection of cervical cancer. The only other company currently producing and selling an FDA-approved liquid Pap test in the United States is TriPath Imaging (TriPath). Digene is the only company in the U.S. selling a DNA-based test for the human papillomavirus (HPV) which is believed to cause nearly all cervical cancer cases. Digene's HPV test is most commonly and efficiently conducted using a residual sample obtained from a liquid Pap test. According to the FTC,

56. **Hearst/Medi-Span:** In a previously reported action filed in federal court, the Commission reached a proposed settlement with Hearst Corporation (Hearst) under the terms of which Hearst will divest the former Medi-Span business and pay \$19 million as disgorgement of unlawful profits. The settlement is the first time the Commission has sought either divestiture or disgorgement of profits in a federal court action for a consummated merger. Hearst will divest the Medi-Span business to Facts and Comparisons, a St. Louis based business unit owned by Wolters Kluwer, n.v. The integratable drug

in January 2000 had an adverse effect on competition in the nitrous oxide market in the United States and Canada (North America). Under the agreement, Airgas agreed to divest a nitrous oxide business to Air Liquide America Corporation (Air Liquide). Nitrous oxide is a clear, odorless gas mainly used in dental

64. **Nestle/Ralston:** The Commission reached a proposed consent order with Nestle Holdings, Inc. (Nestle) and Ralston Purina Company (Ralston) that would permit Nestle to complete its \$10.3 billion acquisition of Ralston, while remedying potential anticompetitive effects in the market for dry cat food. Under the terms of the order, Nestle would be required to divest both Ralston's Meow Mix and Alley Cat brands to J.W. Childs Equity Partners II, L.P. In addition, Nestle would be required to relinquish all international trademarks related to Meow Mix and Alley Cat, and would be required to co-pack both brands for Childs for a set period of time. (C-4028)

65. **Bayer/Aventis:** The Commission announced a proposed consent order with Bayer AG (Bayer) and Aventis S.A. (Aventis) that will allow Bayer's proposed purchase of Aventis's subsidiary Aventis CropScience Holdings S.A. (ACS). According to the Commission's complaint, the transaction would reduce competition in the U.S. markets for: 1) new generation chemical insecticide products; 2) new generation chemical insecticide active ingredients; 3) post-emergent grass herbicides for spring wheat; and 4) cool weather cotton defoliant. Under the terms of the order, Bayer will be required to divest businesses and assets in each of the four product markets. Bayer is a German corporation and Aventis is headquartered in France. The FTC's conditional approval of the \$6.2 billion acquisition follows the European Commission's approval of the transaction. (C-4049)

66. **Solvay/Ausimont:** The Commission accepted a final consent agreement to resolve competitive concerns in the polyvinylidene fluoride (PVDF) market arising from Solvay SA's proposed \$1.3 billion acquisition of Ausimont S.p.A. from Italenergia S.p.A. (Italenergia). The settlement would require Solvay to divest its U.S. operations, including its Decatur, Alabama PVDF plant and its interest in the Alventia LLC (Alventia) joint venture, which manufactures the main raw material for PVDF. The FTC and the European Commission co-operated in their analysis of Solvay's acquisition of Ausimont. (C-4046)

67. **Amgen/Immunex:** Under the terms of a final consent agreement, the Commission allowed Amgen Inc.'s (Amgen) proposed \$16 billion acquisition of Immunex Corporation (Immunex) to proceed subject to conditions. In its complaint the FTC alleged that the transaction, as originally structured, would reduce competition in the markets for: 1) neutrophil (white blood cell) regeneration factors; 2) tumor necrosis factor (TNF) inhibitors; and 3) interleukin-1 (IL-1) inhibitors. The order requires the companies to sell all of Immunex's assets related to Leukine - a neutrophil regeneration factor - to Schering AG, to grant a license to certain intellectual property rights related to TNF inhibitors to Serono S.A., and to grant certain intellectual property rights related to IL-1 inhibitors to Regeneron Pharmaceuticals Inc. Neutrophil

According to the FTC, the combination of the two companies has resulted in a monopoly in the U.S. markets for two of the more difficult and costly products to construct -- LNG tanks and thermal vacuum chambers. In addition, the combination of the two companies has resulted in a dominant firm in the U.S. markets for LPG tanks and LIN/LOX/LAR tanks. (D-9300)

IV. Regulatory and trade policy matters

A. *Regulatory Policies*

clean fuel regulations may impose costs on consumers by increasing average costs to produce unique gasoline fuel blends. Second, such changes may give rise to conditions that make short-term price spikes more prevalent. Third, changes in clean fuel regulations may create or enhance market power of certain

administrative procedures fair and open, and 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*

86. The Economic Analysis Group issued the following papers during FY2002. Copies may be obtained by contacting Janet Ficco at 600 E Street, N.W., Suite 10000, Washington, D.C. 20530 or at (202)

1) *Commission Studies and Reports*

a. Conferences and Workshops

87. **Healthcare:** The Commission held a two-day workshop to consider the impact of competition law and policy on the cost, quality, and availability of health care and the incentives for innovation in the field. The workshop featured presentations by representatives of various federal agencies and state governments and a number of academics. There were panel discussions on: 1) Health Care Services: Provider Integration; 2) Health Insurance: Payer/Provider Issues; 3) Hospital Group Purchasing Organizations; 4) Generics and Branded Pharmaceuticals; and 5) Consumer Protection and Pharmaceuticals: Direct-to-Consumer Advertising and Off-Label Promotion. Materials from the workshop are available at <http://www.ftc.gov/ogc/healthcare/index.htm>.

88. **E-Commerce:** The Commission held a three-day workshop on possible anticompetitive efforts to restrict competition on the Internet. The workshop featured testimony from senior representatives of industry, academia, state and federal government agencies, and independent public policy organizations. Testimony was presented regarding industries that have experienced substantial growth in commerce via the Internet, but that also may have been hampered by anticompetitive restrictions: (1) wine sales; (2) cyber-charter schools; (3) contact lenses; (4) automobiles; (5) caskets; (6) online legal services; (7) health care (telemedicine and online pharmaceutical sales); (8) auctions; (9) real estate, mortgages, and financial services; and (10) retailing. The workshop built on a Congressional hearing on "Possible State Impediments to E-commerce." The FTC's testimony at this hearing is available at <http://www.ftc.gov/os/2002/09/020926testimony.htm>. Materials from the workshop are available at <http://www.ftc.gov/ogc/healthcare/index.htm>.

89. **Refined Petroleum Prices:** The Commission held a two-day public conference to examine factors that affect prices of refined petroleum products in the United States. The goal of the conference was to solicit information and views on the major factors affecting the prices of refined petroleum products, along with the relative importance of such factors. Chairman Muris announced that the FTC has developed a statistical model that is being used to identify and monitor "unusual" gasoline price movements in 360 cities across the country. This model "will allow FTC staff to identify and track gasoline price spikes on a 'real-time' basis and to identify as quickly as possible the contributing factors," Muris said. The FTC also will publish two reports on the petroleum industry in the United States: the first will detail merger and acquisition activity by major petroleum companies and structural changes in the industry, and the second will provide an extensive review of the factors affecting the level and volatility of prices of refined petroleum products and their trends nationwide. Materials from the conference are available at <http://www.ftc.gov/bc/gasconf/index.htm>.

industries. On average, a decline in demand is the single most important factor reducing output and revenue for these industries, and has a larger effect than unfairly traded imports. The report is available at <http://www.ftc.gov/be/economicissuespapers.htm>.

2) *Economic Working Papers*

91. The following may be obtained at <http://www.ftc.gov/be/econwork.htm>. If you have trouble accessing one of these papers, please contact Tangelia Roundtree at (202) 326-2361.

Does Size Really Matter? Empirical Evidence on Group Incentives (WP# 252) Christopher P. Adams, October 2002.

Efficient Inter-carrier Compensation for Competing Networks When Customers Share the Value of a Call (WP#251) Patrick DeGraba, September 2002.

Intellectual Property Rights, Internalization and Technology Transfer (WP# 250) Michael W. Nicholson, July 2002.

Price and Quality Relationships in Local Service Industries (WP#249) R. Dennis Murphy, June 2002.

Generic Drug Industry Dynamics (WP#248) David Reiffen and Michael R. Ward, February 2002.

Selection of "High Performance Work Systems" in U.S. Manufacturing (WP#247) Christopher P. Adams, March 2002.

Demand System Estimation and its Application To Horizontal Merger Analysis (WP#246) Daniel Hosken,

Daniel O'Brien, David Scheffman, and Michael Vita, April 2002.

The Welfare Effects of Third Degree Price Discrimination In Intermediate Good Markets: The Case of

Bargaining (WP#245) Daniel P. O'Brien, January 2002.

The Effect of Offer Verifiability on the Relationship Between Auctions and Multilateral Negotiations

(WP#244) Charles J. Thomas and Bart J. Wilson, November 2001.

Evidence on Mergers and Acquisitions (WP#243) Paul A. Pautler, September 2001.

Appendices

Department of Justice: Fiscal Year 2002 FTE and Actual Amount by Enforcement Activity

	FTE	AMOUNT
Criminal Enforcement	270	\$40,254,000
Civil Enforcement	502	\$74,758,000
TOTAL	772	\$115,012,000

Federal Trade Commission: Fiscal Year 2002 Competition Mission FTE and Dollars by Program by Bureau/Office¹

	FTE	AMOUNT
Total MC Mission	504.7	\$74,349.6
<i>Bureau of Competition</i>	271.6	\$31,704.7
<i>Bureau of Economics</i>	75.6	\$8,776.6
<i>Regional Offices</i>	32.7	\$3,598.4
<i>Mission Support</i>	124.8	\$30,269.9
Premerger Notification	28.7	\$2,934.5
<i>Bureau of Competition</i>	28.2	\$2,880.9
<i>Bureau of Economics</i>	0.3	\$32.8
<i>Regional Offices</i>	0.2	\$20.8
Merger & Joint Venture Enforcement	190.2	\$22,512.0
<i>Bureau of Competition</i>	125.3	\$15,055.4
<i>Bureau of Economics</i>	44.8	\$5,241.4

Federal Trade Commission: Fiscal Year 2002 Competition Mission FTE and Dollars by Program by Bureau/Office¹ (cont'd)

	FTE	AMOUNT
--	-----	--------

	FTE	AMOUNT
Other Direct Mission Resources	22.2	\$2,979.7
<i>Bureau of Competition</i>	16.9	\$2,226.9
<i>Bureau of Economics</i>	5.3	\$695.8
<i>Regional Offices</i>	0.0	\$57.0