Unclassified

DAF/COMP(2005)18/07

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

25-May-2005

English text only

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE

ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE UNITED STATES

-- 2003-2004 --

This report is submitted by the Delegation of the United States to the Competition Committee FOR DISCUSSION at its forthcoming meeting (1-2 June 2005). 71.319

Introduction

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Introduction

merger challenges over a five-year period (1999-2003). In February 2004, the FTC released a report that provided data on consumer complaints or "hot" documents (i.e., those revealing a party's expectation of

merger analysis, managed care organisations' bargaining power, and hospital group purchasing

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

A. Department of Justice and FTC Statistics

1) DOJ Staffing and Enforcement Statistics

15. At the end of FY 2004, the Division employed 811 individuals: 364 attorneys, 57 economists, 169 paralegals, and 221 other professional staff. For FY 2004, the Division received an appropriation of \$133.1 million.

16. During FY 2004, the Division opened 211 investigations and filed 50 civil and criminal cases in federal district court. In FY 2004, the Division was party to three civil antitrust cases decided by the federal courts of appeals, and eight criminal appeals.

17. During FY 2004, the Division filed 42 criminal cases in which it charged 20 corporations and 39 individuals. Thirteen corporate defendants and fifteen individuals were assessed fines totalling \$141.2 million and 20 individuals were sentenced to a total of 7,334 days of incarceration. Another four individuals were sentenced to spend a total of 1,575 days in some form of alternative confinement.

18. During FY 2004, 1,454 proposed mergers and acquisitions were reported for review under the HSR Act. In addition, the Division screened a total of 1,127 bank mergers. The Division further investigated 89 mergers and challenged 6 of them in court. An additional three transactions were restructured or abandoned prior to the filing of a complaint as a result of the Division's announcement that it would otherwise challenge the transaction. The Division opened 130 civil investigations (merger and non-merger), and issued 562 civil investigative demands (a form of compulsory process). The Division filed two non-merger civil complaints. Also during FY 2004, the Division responded to two requests for review of written business proposals.

2) FTC Staffing and Enforcement Statistics

19. The FTC has 295 non-administrative staff working on competition enforcement, including 180 lawyers, 49 economists, 66 'other' (the "other" category includes paralegals, investigators, merger analysts, compliance specialists, industry analysts, research analysts, and financial analysts/accountants). The FTC's Maintaining Competition Mission had a budget of \$82.5 million in FY 2004.

20. During FY 2004, the Commission brought a total of 26 competition enforcement actions. The Commission staff opened 184 initial phase investigations under the mergers and joint ventures program and issued requests for additional information ("second requests") in 20 transactions. The Commission challenged 12 mergers. One preliminary injunction was authorised; ten consent orders were accepted; two administrative complaints were issued. In addition, eight transactions were abandoned for antitrust concerns. (One transaction was challenged both through a preliminary injunction as well as an administrative complaint.) Three transactions were abandoned after the issuance of the second request, and five were abandoned during the course of the investigation.

21. The Commission brought 11 enforcement actions challenging a variety of anticompetitive conduct. Seven were tentatively resolved by consent agreements, four of these consent agreements were still pending at the end of FY 2004. There was one administrative complaint issued during the fiscal year.

opinion strictly circumscribed or eliminated expansive theories of antitrust liability under the labels of "essential facilities" or "monopoly leveraging."

- 2) U.S. Court of Appeals Cases
- a. Significant DOJ Cases Decided in FY 2003

26. In *United States v. LSL Biotechnologies*, 379 F.3d 672 (9th Cir. 2004), the court addressed the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a, in connection with an agreement, adopted in Israel, not to compete in the sale of seeds for long shelf life tomatoes in Mexico, where the tomatoes would be sold in the United States. The FTAIA makes the Sherman Act applicable to conduct involving foreign trade only where such conduct has a "direct, substantial, and reasonable foreseeable effect" on United States commerce; in this case, the court thought that the likelihood that the contractually restricted firm would develop a competitive product not barred by the defendant's patent to be speculative, so the agreement did not have a "direct" effect on the market.

27. In *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004) (en banc), the court affirmed the litigated decree entered in the suit by several state governments; only the Commonwealth of Massachusetts had appealed, seeking additional relief. In reviewing the numerous items of additional relief sought, the court applied three general principles: the relief necessary was limited by its earlier findings on liability; it should be directed to restoring competition, not to benefiting individual competitors; and it should not harm consumer interests. The court also allowed two industry organisations to intervene in the Government's suit against Microsoft to challenge the consent decree that had been entered by the district court, but upheld the decree as "in the public interest."

28. In *United States v. Simmons*, 374 F.3d 313 (5th Cir. 2004), the court affirmed the appellant's conviction for price fixing in the sale of auto glass, rejecting challenges to the joint trial with his co-conspirator, the jury instructions, and testimony regarding some of his certain out-of-court statements.

29. In *United States v. Therm-All, Inc.*, 373 F.3d 625 (5th Cir. 2004), the court affirmed the price fixing convictions of two companies involved in the sale of laminated fibreglass insulation, although the jury acquitted the responsible corporate officers. It held, among other things, that the statute of limitations in an antitrust case starts to run from the last overt act in furtherance of the conspiracy, and that a single (rather than multiple) conspiracies was shown by a common goal, the need for cooperation among the conspirators, and the presence of a key actor coordinating their efforts.

3) Private Cases Having International Implications in FY 2003

30. In *Sniado v. Bank Austria AG*, 378 F.3d 210 (2d Cir. 2004), the court reconsidered an earlier decision in the same case, which involved an alleged conspiracy among European banks to fix currency exchange fees. In light of the Supreme Court's intervening decision in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), the court held that the complaint must be dismissed under the FTAIA because it did not allege the cause of action arose from the domestic effects of the conspiracy.

31. In *Prewitt Enterprises, Inc v. Organization of Petroleum Exporting Countries*, 353 F.3d 916 (11th Cir. 2003), the court held that, under the Federal Rules of Civil Procedure, a gas station owner had not, and could not, adequately serve a complaint in an antitrust case on OPEC. Under Austrian law, pursuant to an agreement between the Austrian government and OPEC, OPEC could not be served with judicial process at its headquarters in Vienna without its consent, which OPEC expressly refused.

32. In *In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d 288 (3rd Cir. 2004), the court construed section 12 of the Clayton Act, 15 U.S.C. 22, to allow service of process in an antitrust case

Diamonds: On July 13, 2004, De Beers Centenary AG pled guilty and was sentenced to pay a \$10 million criminal fine to resolve a longstanding indictment for conspiring to fix the price of industrial diamonds in the United States and elsewhere. Diam

40. Other significant criminal investigations reported during FY04 include matters relating to the following industries: linen supply, scrap metal, textbook stores, road construction, printing and graphic services, and roofing contracts.

2) DOJ Civil Non-Merger Enforcement

41. *Movies-on-Demand*: On June 3, 2004, the Department announced that it had closed its investigation into Movielink, a joint venture formed by five major movie studios - Sony (Columbia-TriStar Pictures), Warner Bros., MGM, Paramount and Universal - to provide video-on-demand (VOD) services. VOD is a new technology that has enabled the studios to distribute their films in digital format to consumers over two primary platforms, the Internet and digital cable. The terms of the Movielink agreements provide that each studio determines pricing and release dates for its own films. The Department's investigation focused on whether formation of the joint venture facilitated collusion among the studios or decreased their incentives to license movie content to competing video-on-demand providers. The Department considered several theories of competitive harm but ultimately determined that the evidence does not support a conclusion that the structure of the joint venture increased prices or otherwise reduced competition in the retail markets in which Movielink competes.

42. Digital Music: On December 23, 2003, the Department announced that it was closing its investigation into the major record labels' pressplay and MusicNet joint ventures, two joint ventures formed by the major record labels to distribute music over the Internet. Pressplay began as a joint venture of major labels Sony Music Entertainment and Universal Music Group, but recently was sold to software supplier Roxio. MusicNet is a joint venture of major labels Warner Music Group, EMI Group, and BMG Music, as well as RealNetworks, an Internet media company. In its investigation of pressplay and MusicNet, the Division focused primarily on two questions. First, did the joint ventures restrain competition among the major record labels themselves? Second, did the joint ventures allow the major record labels to impede the growth of the Internet as a channel for the authorised promotion and distribution of music, and thereby help the major labels solidify their central roles in the existing music market? Having answered both questions in the negative, the Department closed the investigation.

43. *Microsoft:* The DOJ's complaint and the subsequent proceedings against Microsoft have been described in prior years' reports. In November 2002, the district court approved the settlement, finding that entry of the Final Judgment was in the public interest. In June 2003, the U.S. Court of Appeals for the District of Columbia soundly approved the District Court's findings, as previously described. The United States continues to actively enforce Microsoft's compliance with the Final Judgment, coordinating its efforts with the various state enforcement authorities to collectively ensure the remedial effect intended by the Final Judgment. Over the past year, the Department has worked to resolve numerous complaints against Microsoft, including a change in web browser default functionality within Windows XP. The Department continues to oversee the communications protocol licensing program, a significant provision of the final judgment. In this role, the Department has worked to expand the scope of the protocols available for use by licensees; extend the life of the licensing program by two years; and improve the completeness, accuracy, and usability of the Technical Documentation.

3) Modification or Enforcement of DOJ Consent Decrees

44. On August 11, 2004, the Department, along with SBC Communications Inc. and BellSouth Corp., filed a request for a modification of a consent decree that prohibited the two firms from reacquiring previously divested spectrum licenses in California and Indiana. The modification, approved by the U.S. District Court in Washington, D.C. on October 13, 2004, allowed SBC and BellSouth, through their joint venture Cingular Wireless LLC, to reacquire certain of the divested spectrum licenses as part of their

Perrigo raised its prices following the agreement. The Commission will use the \$6.25 million payment to reimburse consumers harmed by the alleged illegal conduct. This is the first case in which the Commission has applied its new guidelines on the use of disgorgement in antitrust cases.

e. South Carolina Board of Dentistry: The FTC challenged restrictions against dental hygienists providing basic dental care to South Carolina school children – particularly those that are economically disadvantaged. In July 2004, the Commission denied the South Carolina Board of Dentistry's motion to dismiss the FTC's administrative complaint, rejecting the Board's contention that the State Action doctrine (immunising sovereign state conduct) protected its actions against antitrust challenge. The Commission noted that the Board's actions were not pursuant to a clearly articulated policy of the state and appeared to have been contravened by the legislature. The Commission has agreed to stay the administrative proceedings pending the resolution of the Board's appeal of the Commission's decision.

48. *Energy:* The Commission's efforts to protect competition in the petroleum industry include a significant adjudicative matter involving the alleged acquisition of monopoly power in the technology market for producing a formulation of gasoline in California:

a. Unocal: In an Opinion issued in July 2004, the Commission reversed an Administrative Law Judge's (ALJ) initial decision that the admiod98.2(h)2is(ain)13.3((t)-n,2Du2.9(t)8(r)-2(t

b. Virginia Board of Funeral Directors and Embalmers: In August 2004, the FTC charged the Virginia Board of Funeral Directors and Embalmers with violating the antitrust laws and restraining competition by prohibiting funeral directors from advertising discounts for "pre-need" funeral planning and services. The parties agreed to a settlement, and an order bars the Board from prohibiting or restricting truthful price advertising, including enforcing any regulation that might prevent Board licensees from using truthful advertising to notify consumers of prices and discounts for funeral products and services.

50. Two additional non-merger adjudicative matters are pending before the Commission following appeals from ALJ decisions:

Kentucky Movers: In 2003, the Commission filed a complaint against several associations
of household goods movers, charging that the associations, consisting of competing firms,
each violated the FTC Act by jointly filing tariffs containing collective rates on behalf of
their members. All but one of the matters have settled. In June 2004, the ALJ's Initial
Decision upheld the complaint's allegations that the Kentucky association had engaged in
horizontal price-fixing and that its conduct was not protected by the State Action doctrine

Television Cooperative Inc. (NCTC), a consortium of primarily independent and smaller owners of cable television systems, to jointly purchase national cable programming. The Department said that with respect to the overwhelming majority of NCTC member cable systems, there is no danger that NCTC's procedures will facilitate retail price collusion because those cable systems do not compete with each other in the sale of multichannel video programming distribution (MVPD) services to consumers. Furthermore, it said that the proposed changes to the joint purchasing procedures would result in lower programming costs to members that could be passed on to consumers, so the proposed conduct could potentially have procompetitive effects. On May 25, 2004, the Department announced it would not challenge an online fee survey proposal among competing Internationally Board-Certified Lactation Consultants (IBCLCs). Lactation consultants provide breast-feeding assistance to mothers. Based on information provided in the proposal, the Department said the proposed survey would determine the range of prices customarily charged by self-employed IBCLCs and would allow independent practitioners to set reasonable fees for their area, providing procompetitive benefits while raising little risk of anticompetitive effects.

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

Enforcement of Pre-merger Notification Rules

53. On May 3, 2004, the Department and the Federal Trade Commission announced that Bill Gates had agreed to pay an \$800,000 civil penalty to settle charges that he violated pre-merger reporting

Department worked closely with the European Commi

Department required Dyno Nobel Inc. to divest its 50 percent interest in an industrial grade ammonium nitrate (IGAN) production facility in Utah in order to proceed with the multi-million dollar acquisition. IGAN is an essential ingredient in the production of blasting agent explosives used commercially in industries such as mining and construction. The Department said that the transaction, as originally proposed, would have resulted in higher prices for IGAN purchasers in the western United States. The Department also noted in its complaint that if the acquisition had been allowed to proceed as originally proposed, two firms would have controlled about 90 percent of IGAN sales in western North America. Dyno and El Paso would have had a combined share of about 50 percent, and the proposed transaction would have eliminated competition between them.

61. *DFA/Southern Belle*: On April 24, 2003, the Department filed a lawsuit against Dairy Farmers of America Inc. (DFA) and Southern Belle Dairy Co. LLC to compel DFA to divest its interests in Southern

into the development of a treatment for Pompe disease. The Commission concluded that the transaction was not likely to substantially reduce competition, and would more likely result in major benefits to patients.

- RJR/Brown & Williamson: In June 2004, the Commission outlined three reasons for its conclusion that the merger of these two firms was unlikely to harm competition in the U.S. cigarette market. It explained, first, that Brown & Williamson plays an increasingly minor role in the market, with that trend expected to continue. Second, the investigation found no markets in which the two firms are each other's closest competitors. Third, a majority of the Commissioners believed the evidence indicated that the transaction was unlikely to facilitate or enhance coordination among the major U.S. cigarette manufacturers. (One Commissioner issued a concurring statement.)
- Victory/St. Therese. In July 2004, FTC Commissioners issued two statements explaining their differing assessments of evidence obtained in an investigation of a consummated merger of Victory and St. Therese hospitals in the Waukegan, Illinois area, leading to a 3-2 vote not to challenge the transaction. The majority emphasised that the merged hospital had not succeeded in renegotiating contracts with payers, indicating a lack of market power, that post-merger price increases were no greater than those at similar hospitals, and that the two hospitals had been steadily losing market share before the merger. The two dissenting Commissioners stated that the empirical evidence of post-merger price increases was inconclusive, and that the totality of the evidence, including documents and testimony, supported an enforcement action.

63. In FY 2004, the FTC had three merger cases in adjudicative status. In *Aspen Technology*, the Commission reached a settlement. The second case, *Evanston/ Highland Park* was still in administrative litigation at the close of FY 2004. In the third case, *Arch Coal*, the Commission withdrew the case from adjudication following an unsuccessful action in federal court for preliminary injunction and the subsequent consummation of the transaction, and is considering whether to return the matter to administrative adjudication.

- Evanston/Highland Park: Based on its hospital merger retrospective project, the Commission issued an administrative complaint challenging a hospital acquisition in Chicago's northern suburbs by Evanston Northwestern Healthcare Corporation. The complaint alleges that the merger resulted in large price increases compared to a control group of comparable hospitals. In a separate count, the Commission alleged price fixing by some doctors associated with the hospitals. That count was recently removed from the ongoing litigation for the Commission to consider a settlement proposal.
- Arch Coal: In early 2004, the Commission approved a preliminary injunction action to block Arch Coal's planned acquisition of Triton Coal Company, based on concerns that the merger would harm competition in the market for coal production from Wyoming's Southern Powder River Basin. That area supplies one-third of U.S. coal production and fuels electrical power generation in 26 states. The Commission also issued an administrative complaint against this transaction in April 2004. The district court denied the injunction, stating that the agency's concern over the likelihood of coordinated interaction was based on a "novel theory" of output coordination and that the testimony of the merging parties' customers had little or no probative value. In response to the Commission's emergency motion, the U.S. Court of Appeals for the District of Columbia Circuit denied an injunction pending appeal. Although the court granted an expedited appeal, the parties consummated the transaction shortly after the court ruled. The appellate

competitive price cutting, and lead to higher prices for the states' consumers. Moreover, staff concluded that such bills are unnecessary because federal antitrust laws already cover below-cost pricing that has the potential to harm competition.

- Electricity: The FTC filed two comments with the Federal Energy Regulatory Commission (FERC) in July 2004 about how to assess and safeguard against the exercise of market power and accompanying price increases. The first comment recommended that FERC's assessments of when to permit electric utilities to sell wholesale power at market rates be based on the principles and framework outlined in the DOJ/FTC Horizontal Merger Guidelines. FERC has not yet ruled on these issues. The second comment concerned FERC's policies governing electric utility procurement. FERC cited this comment to support new policies to prevent rate regulation evasion and anticompetitive crosssubsidisation that have the effect of raising consumer prices.
- Corporate Ownership of Funeral Homes: In April 2004, FTC staff commented on a bill to permit corporate ownership of funeral homes in Maryland in response to a legislator's request. Staff concluded that the bill would permit easier entry into the funeral home business, increasing competition and potentially offering consumers lower prices and better quality for funeral home services.
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73. For more than a decade the Department and the FTC have assisted transition and developing economies that have made the commitment to market and commercial law reforms. In addition to advancing the adoption of competition policies that incorporate sound economic principles and effective enforcement mechanisms, these programs create long-term cooperative relationships with policy and enforcement officials in the countries involved. During FY 2004, the technical assistance program was active in India, Southeast Asia, South and Central America, Russia, Southeast Europe, Mexico and South

- 2) Economic Working Papers
- 78. 78. The following papers may be obtained at <u>http://www.ftc.gov/be/econwork.htm</u>.
- Can Ranking Hospitals on the Basis of Patients' Travel Distances Improve Quality of Care?, Daniel P. Kessler, June 2004

Identifying Demand in EBay Auctions, Christopher P. Adams, June 2004

- The Economics of Price Zones and Territorial Restrictions in Gasoline Marketing, David W. Meyer, Jeffrey H. Fischer, March 2004
- The Economic Effects of the Marathon-Ashland Joint Venture: The Importance of Industry Supply Shocks and Vertical Market Structure, Christopher T. Taylor, Daniel S. Hosken, March 17, 2004
- The Union Pacific/Southern Pacific Rail Merger: A Retrospective on Merger Benefits, Denis A. Breen, March 11, 2004 (published in the Review of Network Economics, 2004)
- Is It Always Optimal to "Sell the Firm" to a Risk-Neutral Agent?, Christopher P. Adams, February 2004
- Quantifying Antitrust Regimes, Michael W. Nicholson, February 2004
- Bargaining, Bundling, and Clout: The Portfolio Effects of Horizontal Mergers, Daniel P. O'Brien and Greg Shaffer, December 2003 (forthcoming in RAND Journal of Economics)
- Reconciling the Off-Net Cost Pricing Principle with Efficient Network Utilization, Patrick DeGraba, October 2003 (published in Information Economics and Policy, 2004)

APPENDICES

	FTE	A mount (\$ in thousands)
Non merger Compliance	7	\$805
Bureau of Competition	5	\$572
Bureau of Economics	2	\$233
Regional Offices		
Antitrust Policy Analysis	7	\$815
Bureau of Competition		
Bureau of Economics	7	\$815
Regional Offices		
Other Direct Mission Resources	16	\$1,839
Bureau of Competition	12	\$1,373
Bureau of Economics	4	\$466
Regional Offices		