

## **Annual Report on Competition Policy Developments in the United States**

**21-23 June 2017**

*This report is submitted by the United States to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 21*

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## 1. Introduction

1. This report describes federal antitrust developments in the United States for the period of October 1, 2015 through Ugrvg o dgt"52."4238"\*öH [ "4238ö+0<sup>1</sup> It summarizes the eq o rgvkvkqp" gphqteg o gpv" cpf" rqnke { "cevkxkvkgu" qh" dqvj " vjg" Cpvkvtwuv" Fkxkukqp"\*öFkxkukqpö+" qh" vjg" W0U0" Fgrctv o gpv" qh" Lwuvkeg" \*öFgrctv o gpvö" qt" öFQLö+" cpf" vjg" Hgfgtcn" Vtcfg" Eqo o kuukqp" \*öEqo o kuukqpö" qt" öHVEö+0 The two agencies are collectively referred to vjqtqwi j qwv" vjku" tgrqtv" cu" vjg" öCpvkvtwuv" Cigpekguö" qt" vjg" öCigpekguöö" Hqt" cf fkvkqpcn" kphqt o cvkqp" qp" vjg" Cigpekguö" cevkxkvkgu" kp k

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requires the FTC to revise the thresholds that companies having interlocking memberships on their corporate boards of directors. These thresholds are also adjusted annually, based on the change in gross national product. See <https://www.ftc.gov/news-events/press-releases/2016/01/ftc-announces-new-clayton-act-monetary-thresholds-2016>.

### 3. Enforcement of antitrust law and policies: actions against anticompetitive practices

#### 3.1. Staffing and Enforcement Statistics

##### 3.1.1. FTC

9. During FY 2016, the FTC employed approximately 554 staff and spent approximately \$135.7 million in furtherance of its Maintaining Competition mission.

10. During FY 2016, 1,832 proposed mergers and acquisitions were reported for review under the HSR Act, a 4.5 percent increase from the number of HSR transactions reported during FY 2015. The Commission staff issued requests for additional information for 47 transactions. The Commission challenged 22 mergers, 16 of which were settled with consent orders, one in which the transaction was abandoned or restructured as a result of antitrust concerns raised during the investigation, and five in which the Commission initiated administrative litigation. In the cases in which the Commission issued an administrative complaint, the Commission also voted to seek a preliminary injunction in federal district court to enjoin the acquisition pending administrative litigation.

11. During FY 2016, the FTC staff opened 25 non-merger initial phase investigations. The Commission brought six non-merger enforcement actions, four of which were resolved by a consent order, and one by permanent injunction action in federal court.

12. During FY 2016, the Commission filed *amicus curiae* briefs in eight cases, all before federal appeals courts. The Commission also submitted 24 advocacy filings. See <http://www.ftc.gov/policy/advocacy>.

##### 3.1.2. DOJ

13. At the end of FY 2016, the Division had 703 employees: 328 attorneys, 50 economists, 167 paralegals, and 158 other professional staff. For FY 2016, the Division received an appropriation of \$165.0 million.

14. In FY 2016, the Division opened 23 grand jury investigations and 21 preliminary



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simultaneously comply with Chinese law and U.S. antitrust law. On April 3, 2017, Plaintiffs filed a petition for *writ of certiorari* with the United States Supreme Court.

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to counteract the anticompetitive effects of the merger. On May 19, 2016, Staples and Office Depot abandoned their proposed merger after the district court granted the administrative adjudication. See <https://www.ftc.gov/enforcement/cases-proceedings/1510065/ftc-v-staplesoffice-depot>.

33. **FTC v. Advocate Health Care Network/NorthShore University HealthSystem.** On December 22, 2015, FTC staff issued an administrative complaint alleging that the proposed merger of Advocate Health Care Network and NorthShore University HealthSystem would create the largest hospital system in the North Shore area of Chicago. According to the complaint, the combined entity would operate a majority of the hospitals in the area and control more than 50 percent of the general acute care inpatient hospital services. The Commission also authorized staff to file for a preliminary injunction to maintain the status quo pending the administrative trial. In the federal court proceeding, the district court denied the motion for a preliminary injunction on June 20, 2016.



to commit wire and bank fraud, and the indictment of two former traders for wire fraud and conspiring to commit wire and bank fraud. Trial is scheduled for January 2018. *See* <https://www.justice.gov/opa/pr/former-rabobank-derivatives-trader-pleads-guilty-scheme-manipulate-libor-benchmark>; <https://www.justice.gov/opa/pr/second-foreign-currency-exchange-dealer-pleads-guilty-antitrust-conspiracy> and <https://www.justice.gov/opa/pr/three-former-traders-major-banks-indicted-foreign-currency-exchange-antitrust-conspiracy>.

42. In FY 2016, the Division continued its ongoing investigation into a conspiracy involving price fixing, bid rigging, and market allocation in international ocean shipping services for roll-on, roll-off cargo to and from the United States and elsewhere. Roll-on, roll-off cargo is non-containerized cargo that can be both rolled onto and off of an ocean-going vessel; examples include new and used cars and trucks and construction and agricultural equipmen

opportunity to obtain additional patient volume in exchange for their lower prices. This little need to respond to price-cutting competition that otherwise would put downward pressure on prices. See <https://www.justice.gov/opa/pr/justice-department-and-north-carolina-sue-carolinas-healthcare-system-eliminate-unlawful>.

45. **DIRECTV/AT&T.** On March 23, 2017, the Division reached a settlement that will prohibit DIRECTV and its parent corporation, AT&T, from illegally sharing confidential, forward-looking information with competitors. The Division filed suit on Nov. 2, 2016, alleging that DIRECTV was the ringleader of a series of unlawful information exchanges between DIRECTV and three of its competitors – Cox Communications Inc., Charter Communications Inc. and AT&T (before it acquired DIRECTV) in the Los Angeles area. The settlement will ensure that when DIRECTV and AT&T negotiate with providers of video programming, including negotiations to telecast the Dodgers Channel, they will not illegally share competitively-sensitive information with their rivals. The settlement also requires the companies to monitor certain communications their programming executives have with their rivals, and to implement antitrust training and compliance programs. See <https://www.justice.gov/opa/pr/justice-department-sues-directv-orchestrating-information-sharing-agreements-three> and <https://www.justice.gov/opa/pr/justice-department-settles-civil-antitrust-claim-against-at-and-directv-orchestrating>



FTC Act. The settlement prohibits DTC Group from communicating with competitors about rates or prices (although it does not bar public posting of rates). The settlement also prohibits the company from soliciting, entering into, or maintaining an agreement



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respiratory, skin, and sleep disorders. In addition to the product divestitures, to address

higher prices and lower quality of care than would be the case without the acquisition.

66. **In the Matter of Keystone Orthopaedic Specialists, LLC/Orthopaedic Associates of Reading, Ltd.** On December 18, 2015, following a public comment period, the FTC approved a final order settling charges that a merger combining 76 percent of the orthopedists in Berks County, PA into Keystone Orthopaedic Specialists, LLC was likely anticompetitive and violated U.S. antitrust law. The complaint also named Orthopaedic Associates, one of the six practices that merged into Keystone in 2011. The practice and six of its associates split off from Keystone in 2014, and has become a major player in the market. See <https://www.ftc.gov/news-events/press-releases/2015/12/ftc-approves-final-order-settling-charges-merger-orthopedic>.

67. **In the Matter of Steris/Synergy Health.** On May 29, 2015 FTC issued an acquisition of Synergy Health plc would violate the antitrust laws by significantly reducing future competition in regional markets for sterilization of products using radiation, particularly gamma or x-ray radiation. The Commission also authorized agency staff to seek a temporary restraining order and preliminary injunction in federal court to maintain the status quo pending an administrative trial on the merits. According to the FTC, it is unlikely that new competitors in the market for contract radiation sterilization services would replicate the competition that would be eliminated by the merger. The Commission alleged that the challenged acquisition would eliminate likely x-ray sterilization facilities in the United States, thus depriving customers of an alternative sterilization service and additional competition. On September 25, 2015 the district court denied the FTC motion for a preliminary injunction. On October 30, 2015, the Commission dismissed the administrative complaint. See <https://www.ftc.gov/enforcement/cases-proceedings/151-0032/steris-synergy-health-matter>.

#### 4.2.2. DOJ Public Merger Investigations and Challenges

68. **EnergySolutions/Waste Control Specialists.** On November 16, 2016 the million acquisition of Waste Control Specialists ó a transaction that would combine the two most significant competitors for the disposal of low level radioactive waste available to commercial customers in 35 states, the District of Columbia, and Puerto Rico. According to the lawsuit, the proposed transaction would deny commercial generators of low level radioactive waste ó from universities and hospitals working on life-saving treatments to nuclear facilities producing 20 percent of the electricity in the United States ó the benefits of vigorous competition. If consummated, the combined entity would be the only option for customers in nearly 40 states. Trial took place from April 24, 2017 to May 5, 2017. See <https://www.justice.gov/opa/pr/justice-department-sues-block-energysolutions-acquisition-waste-control-specialists>.

69. **Aetna/Humana.** On February 14, 2017, Aetna abandoned its planned acquisition of Humana, after deciding not to appeal the U.S. District Court for the District of Columbia's decision to block the \$37

court ruled that the sale of Medicare Advantage was a relevant antitrust product market, meaning that competition among Medicare Advantage providers is protected by the antitrust laws. In addition, the court rejected the proposal to divest 290,000 Medicare Advantage customers to Molina Healthcare, a health insurer, would prevent the competitive harm that the merger would produce. The decision followed a 13-day trial in December 2016. See <https://www.justice.gov/opa/pr/us-district-court-blocks-aetna-s-acquisition-humana> and <https://www.justice.gov/opa/pr/justice-department-and-state-attorneys-general-sue-block-anthem-s-acquisition-cigna-aetna-s>.

70. **Anthem/Cigna.** BT 1 0 0 1 195.0500035c0607980671 626.2999878 Tm 2.Tc /





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purchasers of raw organic milk in the northeast. Under the terms of the proposed settlement, which is subject to court approval, Danone must divest its Stonyfield Farms

antitrust agencies on July 27, 2011. See <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-officials-meet-officials-responsible-chinese>

82. On May 20, 2016, the heads of the Agencies met in Toronto with their

closed its investigation without taking enforcement action or that resulted in abandonment of the transaction by the parties, some after second requests were issued.

87. During FY 2016, the Agencies continued to play leadership roles in the development of the Merger Remedies Guide. In April 2016, the Agencies issued a Request for Comments (RFC) on the draft Merger Remedies Guide. On July 28-29, 2016, in Singapore, the ICN adopted the Merger Remedies Guide presented by the Merger Working Group. The Guide details the

programs. In FY 2016, Division attorneys and economists traveled to Argentina, El Salvador, Honduras, Hungary, India, South Korea, Mexico, Peru, Poland, Ukraine and Vietnam. A total of 20 travelers participated in 18 different technical cooperation programs.

93. During the last year, the Division expanded its Visiting International Enforcers Program. The program is designed to increase mutual understanding and enhance relations with enforcement partners. This past year, as a part of this program, the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) sent a Division attorney to the Competition Authority (CMA), and the Directorate General for Competition at the European Commission (DG Comp); while sending a Division economist to the CMA and an



provide to glaucoma patients. Specifically, Representative Jones asked the agencies for views on the possible competitive impact of Massachusetts House Bill 1973 (HB 1973), which would expand the scope of practice for optometrists in Massachusetts by permitting them to treat glaucoma and other optical diseases. See <https://www.ftc.gov/news-events/press-releases/2016/02/federal-antitrust-agencies-submit-joint-statement-encouraging>.

102. **Health Care.** On January 11, 2016, in response to a request by South Carolina Governor Nikki Haley, the Agencies submitted a [statement](#) regarding the competitive implications of certificate-of-need (CON) laws and South Carolina House Bill 3250. [A statement explains that the Agencies historically have urged states to consider repeal or reform of their CON laws because they can prevent the efficient functioning of health care markets, and thus can harm consumers. As the statement describes, CON laws create barriers to expansion, limit consumer choice, and stifle innovation. They can also deny consumers the benefit of an effective remedy for antitrust violations and can facilitate anticompetitive agreements. In addition, incumbent providers seeking to thwart or delay entry by new competitors may use CON laws to that end. Arguments favoring CON laws have not been supported by evidence. See https://www.ftc.gov/news-events/press-releases/2016/01/agencies-submit-joint-statement-regarding-south-carolina.](#)

103. **Energy.** On November 25, 2015, in response to comments that other parties filed concerning the Revenues White Paper, FTC staff submitted a comment in the New York



[releases/2016/04/ftc-doj-issue-joint-statement-preserving-competition-defense.](#)

## **7.2. FTC Conferences, Reports, and Economic Working Papers**

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