

**Unclassified**

**DAF/COMP(2008)9/7**

Organisation de Coopération et de Développement Économiques

**TABLE OF CONTENTS**

1.	Introduction.....	3
2.	Changes in law or policies .....	3
2.1	Changes In Antitrust Rules, Policies, or Guidelines .....	3
2.2	Proposals to Change Antitrust Laws, Related Legislation or Policies.....	3
2.3	International Antitrust Cooperation Developments .....	4
3.	Enforcement of antitrust law and policies: actions against anticompetitive practices .....	5
3.1	Department of Justice	

## **1. Introduction**

1. This report describes federal antitrust developments in the United States for the period October 1, 2006, through September 30, 2007 (“FY 2007”). 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”).

2. In April 2007, Deborah A. Garza was appointed as the Deputy Assistant Attorney General responsible for regulatory matters, overseeing transportation, energy, agriculture, telecommunications, and other regulatory matters for the Antitrust Division.

3. In January 2007, following the creation of the Commission’s Office of International Affairs, Randolph Tritell was appointed Director of International Affairs, and Elizabeth Kraus was appointed Deputy Director for International Antitrust. In June 2007, Michael Baye was appointed the Commission’s Director of the Bureau of Economics.

## **2 Changes in law or policies**

### **2.1 Changes In Antitrust Rules, Policies, or Guidelines**

4. On April 17, 2007, the DOJ and FTC issued a joint report, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, to inform consumers, businesses, and holders of intellectual property rights (IPRs) about the agencies’ competition views with respect to a wide range of activities involving intellectual property. The report discusses issues including: refusals to license patents, collaborative standard setting, patent pooling, intellectual property licensing, the tying and bundling of IPRs, and methods of extending market power conferred by a patent beyond the patent’s expiration. The report followed an extensive series of hearings jointly conducted by the agencies, and indicates that the agencies will analyze the vast majority of conduct involving IPRs using a flexible rule of reason approach that considers both the efficiencies of a particular activity as well as any anticompetitive effects it may create.

5. On December 15, 2006, the Department announced it was amending its 2001 Merger Review Process Initiative in order to further streamline the merger investigation process to improve the efficiency of investigations while reducing the cost, time, and burdens faced by parties. The goal of the 2001 Initiative was to help the Division identify critical legal, factual and economic issues regarding proposed mergers more quickly; facilitate more efficient and more focused investigative discovery; and provide for an effective process for the evaluation of evidence. The amendments include a voluntary option that would limit the documents sought in a second request to certain central files and a targeted list of 30 employees whose files must be searched for responsive documents. The Division also changed the model second request to reduce compliance burdens further, for example by reducing the default search period to two years prior to the date of the request’s issuance. Similar FTC reforms were discussed in the agencies’ 2006 annual report.

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

6. On May 8, 2007, the FTC and the Department issued a joint report, *Competition in the Real Estate Brokerage Industry*, to inform consumers and others involved in the industry about important competition issues involving residential real estate, including the competitive structure of the industry, the impact of the Internet, and obstacles to a more competitive environment. The report followed a workshop conducted by the agencies in October 2005. The agencies concluded that although the real estate industry has undergone a number of substantial changes in recent years – particularly as a result of technological advances such as the Internet – competition in the industry has been hindered as a result of actions taken by

some real estate brokers acting through multiple listing services and the National Association of Realtors, state legislatures, and state real estate commissions.

7. In May 2007, the agencies completed the hearings on single-firm conduct that began in June 2006. There were 19 days of hearings, with 29 separate panels and over 100 different panelists making presentations, covering how different kinds of single-firm conduct have been and should be treated under the antitrust laws, and including a session with foreign antitrust officials and practitioners. The topics covered included predatory pricing and predatory bidding, refusals to deal with a rival, tying, exclusive dealing, rebates and discounting, and ascertaining monopoly power. In September 2008, the DOJ issued a report, *Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act*, drawing extensively on the joint hearings. FTC Commissioners Pamela Jones Harbour, Jon Leibowitz, and J. Thomas Rosch jointly issued a statement responding to the DOJ report and Chairman William E. Kovacic issued a separate statement on Section 2 of the Sherman Act.

8. In April 2007, following three years of hearings and deliberations, the Antitrust Modernization Commission (AMC) issued its Report and Recommendations. Among the principal conclusions of the AMC's Report were the following:

Free-market competition should remain the touchstone of United States economic policy.

The core antitrust laws—Sherman Act sections 1 and 2, Clayton Act section 7, and FTC Act section 5—and their application by the courts and federal enforcement agencies are sound and appropriately safeguard the competitiveness of the U.S. economy.

New or different rules are not needed for industries in which innovation, intellectual property, and technological change are central features. Unlike some other areas of the law, the core antitrust laws are general in nature and have been applied to many different industries to protect free-market competition successfully over a long period of time despite changes in the economy and the increasing pace of technological advancement. One of the great benefits of the Sherman and Clayton Acts is their adaptability to new economic conditions without sacrificing their ability to protect competition.

### **2.3 *International Antitrust Cooperation Developments***

9. Assistant AG Thomas Barnett and FTC Chairman Deborah Majoras participated in the sixth annual International Competition Network (ICN) conference in Moscow from May 30 through June 1. The conference took significant further steps towards .7(ryok)13196aexp-1.07 sigcc/exc10.8f7tusf

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

**3.1 Department of Justice and FTC Statistics**

**3.1.1 DOJ Staffing and Enforcement Statistics**

10. At the end of FY 2007, the Division employed 789 persons: 343 attorneys, 62 economists, 183 paralegals, and 201 other professional staff. For FY 2007, the Division received an appropriation of \$147.8 million.

11. During FY 2007, the Division opened 221 investigations and filed 46 civil and criminal cases in

### 3.2 *Antitrust Cases in the Courts*

#### 3.2.1 *United States Supreme Court*

17. In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007), a divided Supreme Court overruled the nearly century-old and much-criticized *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) case law. As the Solicitor General's brief on behalf of the government urged, the Court held that vertical minimum resale price maintenance (RPM) agreements should not be deemed per se illegal under Section 1 of the Sherman Act, but should instead be evaluated under the rule of reason. "Resort to per se rules is confined to restraints . . . 'that would always or almost always tend to restrict competition and decrease output'" (quoting *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, at 723 (1988)). The Court noted that "[m]inimum resale price

of the Solicitor General, the Court held that the standard for predatory pricing set forth in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), applies to such conduct. Thus a plaintiff alleging predatory bidding in violation of Section 2 must prove (1) that the alleged predatory bidding led to below-cost pricing of the predator's outputs and (2) that the defendant had a dangerous probability of recouping its loss through the exercise of monopsony power.

### 3.2.2 U.S. Court of Appeals Cases

#### Significant FTC Cases Decided in FY 2007

21. In *Chicago Bridge & Iron Company N.V., Chicago Bridge & Iron Company, and Pitt-Des Moines, Inc.*, Docket No. 9300 (Federal Trade Commission Decision 2005), the Commission affirmed an Administrative Law Judge's ruling, issued in June 2003, that Chicago Bridge & Iron Company (CB&I) illegally acquired certain Pitt-Des Moines, Inc. (PDM) assets. CB&I completed the acquisition of PDM assets in February 2001, during the pendency of a Commission investigation. The Commission found that CB&I's acquisition of PDM substantially lessened competition in four relevant product markets. Prior to the merger, CB&I and PDM competed against each other as the leading U.S. producers of large, field-erected industrial and water storage tanks. During the trial, economists from the Commission's Bureau of Economics testified that CB&I and PDM were far and away the two strongest competitors in the U.S. market at the time of the merger and that other firms could not readily replace the competition lost through the merger. The Commission held that the acquisition violated Section 7 of the Clayton Act and Section 5 of the FTC Act and therefore was anticompetitive. The Commission ruled to restore competition as it existed prior to the merger, and ordered CB&I to create two separate, stand-alone divisions capable of competing in the relevant markets, and to divest one of those divisions within six months. In January 2008, the U.S. Court of Appeals for the Fifth Circuit ruled in favor of the FTC and upheld the Commission's opinion in the case.

22. In *Equitable Resources/Dominion Peoples*, the Commission filed an administrative complaint in March 2007, and a federal court injunction action in April 2007 to block Equitable Resources' proposed acquisition of The Peoples Natural Gas Company, a subsidiary of Dominion Resources. The Commission challenged the merger-to-monopoly in natural gas distribution. The Commission ruled that the merger would be detrimental to nonresidential customers in certain areas of Allegheny County, Pennsylvania, which includes Pittsburgh. In May 2007, the federal district court in Pittsburgh denied the FTC's motion for a preliminary injunction and dismissed the complaint, ruling that because the Pennsylvania Public Utility Commission has the power to approve the merger, the Commission is barred from taking action under the state action doctrine. In June 2007, the U.S. Court of Appeals for the Third Circuit granted the Commission's motion for an injunction pending appeal. Since then, the parties abandoned the transaction in January 2008, and in February 2008, the Commission dismissed the administrative complaint and moved to vacate the district court's decision. Th





**3.4 Significant DOJ and FTC Enforcement Actions**

**3.4.1 DOJ Criminal Enforcement**

28. **Marine Hose:** On May 2, 2007, agents assisting the Division arrested eight foreign executives from the United Kingdom, France, Italy, and Japan in Houston and San Francisco for their roles in a conspiracy to rig bids, fix prices, and allocate markets for United States sales of marine hose. Marine hose

31. **E-Rate**

Department explained that competition and consumers have benefited from the final judgment entered because of the Department's antitrust enforcement efforts against Microsoft. In particular, the judgment has protected the development and distribution of middleware -- including web browsers, media players, and instant messaging software -- that has increased choices available to consumers. The Department's filing discussed a number of developments in the competitive landscape relating to middleware and to PC operating systems generally that suggest that the final judgment was accomplishing its stated goal of fostering competitive conditions among middleware products, unimpeded by anticompetitive exclusionary obstacles erected by Microsoft. As part of the Department's regular enforcement of the Final Judgment, on June 19, 2007, the Department filed a joint status report (JSR) with the Court announcing that it had reached an agreement with Microsoft to resolve a complaint submitted by Google regarding the lack of alternatives to Microsoft's desktop search function in Windows Vista. The agreement specifies that Microsoft must (1) create a mechanism for end users and original equipment manufacturers to select a default program to handle desktop search and (2) enable independent software vendors to register their desktop search products for this default. Microsoft agreed to incorporate these changes into an updated

3.4.3 *Enforcement of DOJ Consent Decrees*

38. On May 8, 2007, the Department filed a petition asking the district court to find Allied Waste Industries Inc. (Allied) in civil contempt of a 2000 consent decree entered in connection with Allied's acquisition of Browning-Ferris Industries Inc. (BFI). The Department alleged that Allied violated a provision of the decree when it acquired assets in the Chicago area from Homewood Disposal Services Inc. (Homewood) in January 2004, without fi

rsee rl Se Alliedednrl Senin a afif5(r)8r2(f)72o.5(m)1807, the Departmeton o  
a c q u i

h M a y s i 7 7 . 2 ( i ) 2 0

seven jurisdictions that withheld valuable benefits of the MLSs they control from consumers who chose to enter into non-traditional listing contracts with real estate brokers. Six of the seven rules blocked non-

### **3.6 Business Reviews Conducted by the Department of Justice**

47. Under the Department's business review procedure, an organization may submit a proposed action to the Department and receive a statement as to whether the Department would likely challenge the action under the antitrust laws. The Department issued five business review letters in FY 2007.

On October 30, 2006, the Department announced it would not challenge a patent and license disclosure policy proposed by VMEbus International Trade Association (VITA), an organization that promotes standardized computer data path system specifications. The Department concluded that disclosure of a patent holder's most restrictive licensing terms under the policy could generate competitive benefits as patent holders compete to offer the most attractive combination of technology and licensing terms.

On December 27, 2006, the Department announced it would not challenge the Southeastern Public Service Authority of Virginia's (SPSA) proposed one-year service contract with a competing construction and demolition debris disposal services provider. The Department said the contract would not likely facilitate coordination of services or rates between the two competitors.

On April 10, 2007, the Department announced it would not oppose an operational and financial survey of small and midsize trucking companies proposed by the National Association of Small Trucking Companies (NASTC), a coalition of small trucking companies, and Bell & Company (Bell), an independent accounting firm. The Department concluded that adequate safeguards were in place to ensure that the survey would not result in exchanges of competitively sensitive business information.

On April 20, 2007, the Department announced it would not oppose a second patent and license disclosure policy proposed by the Institute of Electrical and Electronics Engineers Inc. (IEEE), an organization that has developed standards in several industries. The Department stated that increased information that may become available under the policy could improve the efficiency of standard-setting activities.

On August 23, 2007, the Department announced it would not oppose the formation of the Advanced Energy Consortium for the purpose of applying nanotechnology research to oil and gas exploration. The Department stated that the terms stipulated for creating the joint venture, which address issues such as funding, ownership, and intellectual property rights, appeared to be structured so as to prevent the research activities from adversely affecting the amount, variety, or commercialization of nanotechnology research, and, to the extent that AEC engages in research efforts not undertaken by individual firms, the joint venture may have the pro-competitive effect of promoting innovation. DOJ business review letters are available at <http://www.usdoj.gov/atr/public/busreview/letters.htm>.

## **4 Enforcement of antitrust laws and policies: mergers and concentrations**

### **4.1 Enforcement of Pre-merger Notification Rules**

48. The Department, at the request of the Federal Trade Commission, filed a civil lawsuit against Texas hedge fund manager James Dondero for failure to comply with the pre-merger reporting and waiting

voting securities of Motient valued in excess of the \$50 million HSR reporting threshold then in effect. The threshold is now adjusted annually to reflect changes in gross national product. Less than a year before the violation alleTD0eoa(fo1727e )10.8(the)112( ce)112(o)-2.1 npoo moa(fo1e a coh)((r))1.8(ce)112(at)8.2(i)-2.7vTD kge

Februaryg28 uent28. A partygis subjtiacv of\$11,.00 fMoit ti5  
ol tlionoe hoeHSR Acat7(.)10.9 Donderon goo poineci75(e)-0.9et. 5

vital products. The consent order required Barr to sell its generic antidepressant trazodone and its generic blood pressure medication triamterene/HCTZ. Barr was also required to divest either Pliva's or Barr's generic nimodipine drug for use in treating ruptured blood vessels in the brain, and to divest Pliva's branded organ preservation solution Custodial.

53. **Johnson & Johnson/Pfizer:** The Commission had concerns about the competitive effects of Johnson & Johnson's (J&J) proposed \$16.6 billion acquisition of Pfizer's Consumer Healthcare in the



59. **Fresenius AG/American Renal Association:** In October 2007, the Commission settled charges stemming from American Renal Associates' (ARA) proposed acquisition of assets from Fresenius AG,

cottonseed, to prevent any significant delay in bringing cottonseed with non-Monsanto traits to the marketplace, and to ensure the continued presence in the market of a firm independent of Monsanto with traited cottonseed development capabilities sufficient to provide a platform for future trait development and commercialization.

62. **Daily Gazette Company/MediaNews Group:** On May 22, 2007, the Department filed a lawsuit in federal district court alleging that the Daily Gazette Company and MediaNews Group Inc. (MediaNews) violated antitrust laws when they entered into a series of transactions that resulted in the Daily Gazette Company's acquisition of the only other daily newspaper in Charleston, West Virginia, from MediaNews. The Department contends that the Daily Gazette Company bought the second newspaper with the intent of shutting it down, but suspended those actions when the Department began its investigation. The Department learned about the transactions after they had been consummated since the parties were not required to report them under the Hart-Scott-Rodino Act. Prior to the transactions, the two firms had been operating under a joint operating agreement as permitted by the Newspaper Preservation Act (15 U.S.C. § 1114).

Alabama, Mississippi, and Tennessee, in order to resolve competitive concerns raised by the companies' proposed merger. The divestitures included the consumer and commercial loans associated with the divested branches. The merger between Regions and AmSouth would create the largest bank in Alabama and Mississippi and the 2<sup>nd</sup> largest bank in Tennessee. The Department maintained that without the divestitures, the merger would adversely affect competition in local markets in the three states for small business lending, resulting in fewer choices for small business customers. The Department emphasized that physical branches are valuable assets because the facilities are already set up for the business of banking and may facilitate entry into or expansion within a market. The companies also agreed that in selected areas in Alabama, Florida, Louisiana, Mississippi and Tennessee where the merging firms overlap, if a branch office is closed within three years of the merger, they will sell or lease the office to a commercial bank-buyer if the offer meets or exceeds the best offer from a non-bank buyer.

66. **AT&T/BellSouth:** On October 11, 2006, the Department announced the closing of its investigation into the proposed acquisition of BellSouth Corporation (BellSouth) by AT&T Inc. (AT&T). The Department determined that the merger was unlikely to reduce competition substantially. The merged firm would continue to face competition in all areas where the two companies competed, including residential local and long distance services, business telecommunications services, and Internet services. Moreover, the Department concluded that the merger would not significantly increase concentration in the ownership of spectrum in any geographic area or give AT&T control over a large enough share of spectrum suitable for wireless broadband services to raise competition concerns.

67. **Dairy Farmers of America/Southern Belle Dairy:** On October 2, 2006, the Department filed a proposed consent decree settlement in U.S. District Court that would require Dairy Farmers of America Inc. (DFA) to divest

sale of real property, preparing contracts or agreements for such transactions, or conducting title searches—activities that non-attorneys commonly provide in many states.

5.1.2 *FTC Staff Activities: Federal and State Regulatory Matters*

69. In FY 2007, FTC staff offered testimony to Congress on issues including pharmaceutical competition, gasoline price regulation, and the real estate brokerage industry. FTC staff also filed numerous comments with state legislatures, as described below.

70. In March 2007, Commission staff filed comments before the Louisiana State Bar Association Rules of Professional Conduct Committee regarding proposed rules on lawyer advertising and solicitation. Staff recognized that false and deceptive advertising by attorneys should be prohibited, but noted that consumers are worse off when states ban an entire class of attorney advertising without evidence that such advertising is either actually or inherently deceptive or misleading. Staff expressed concern that the revised rules would prohibit many forms of non-deceptive attorney advertisements, and that the proposed

cons of 0.5(e95(a)0.2(slt)816ir)-2e95isinf theDm pr(e)1116r oyoi r  
to tee ion,DC7o ltoas90.7(1)40.2IR gaslt62.7(i)40.2nes90.7( )JTJ- co40522 -1.1522 TD0.0013 Tc0.4  
c'sn

development of the Internet and related services and concluded that the FCC should be highly skeptical of calls to substitute special economic regulation of the Internet for free and open competition enforced by the antitrust laws. The comments are available at <http://www.usdoj.gov/atr/public/comments/225767.htm>.

DAF/COMP(2008)9/7

serve rural areas created opportunities for abuse, because it allowed rural incumbent local exchange

programs in Budapest. Jointly with the International Competition Network, the agencies also hosted a merger workshop in Pretoria for ten African countries in June 2007.

84. In addition, in 2007, the FTC began working with the ASEAN Secretariat and several member countries to help in regional coordination and training in the area of consumer protection.

85. The FTC implemented a pilot program for its SAFE WEB “International Fellowship” program,

Dennis W. Carlton, Market Definition: Use and Abuse, EAG 07-6, April 2007.

Russell Pittman, Oana Diaconu, Emanuel Šip, Anna Tomová, and Jerzy Wronka, Will the Train Ever Leave the Station? The Private Provision of Freight Railway Service in Russia and Central and Eastern Europe, EAG 07-5, January 2007. Forthcoming in the *Journal of Competition Law and Economics*.

Jeremy A. Verlinda, Price-Response Asymmetry and Spatial Differentiation in Local Retail Gasoline Markets, EAG 07-4, January 2007.

Dennis W. Carlton, Does Antitrust Need to be Modernized?, EAG 07-3, January 2007. Published in 21 *Journal of Economic Perspectives* 2007.

Wayne R. Dunham, Cold Case Files: The Athenian Grain Merchants 386 B.C., EAG 07-2, January 2007.

Sayaka Nakamura, Cory Capps and David Dranove, Patient Admission Patterns and Acquisitions of “Feeder” Hospitals, EAG 07-1, January 2007.B. Commission Studies and Reports, and Economic Working Papers.

89. Other Division public materials may be obtained through the Antitrust Documents Group of the Division's Office of Operations. Requests should be directed to Ms. Janie Ingalls, Room 215, Liberty Place Building, 325 7th Street, N.W., Washington, D.C. 20530. Ms. Ingalls may be reached via fax at (202) 514-3763 or e-mail ([janie.ingalls@usdoj.gov](mailto:janie.ingalls@usdoj.gov)).

## **6.2 Commission Studies and Reports, and Economic Working Papers**

### **6.2.1 Commission Studies and Reports**

90. In June 2007, the Commission published a report on broadband connectivity competition policy. The report identifies guiding principles that policy makers should consider in evaluating proposed regulations or legislation relating to broadband Internet access and network neutrality. (Report available at <http://www.ftc.gov/reports/broadband/v070000report.pdf>)

91. In April 2007, the Commission released a report on competition in the real estate brokerage industry. The report informs consumers and others involved in the industry about important competition issues involving residential real estate, including the impact of the Internet, the competitive structure of the real estate brokerage industry, and obstacles to a more competitive environment. (Report available at <http://www.ftc.gov/reports/realestate/V050015.pdf>)

92. The Commission published a report on municipal provision of wireless Internet in September 2006. The report describes the various wireless Internet technologies currently in use or under development, identifies a range of operating models that have been used to provide or facilitate wireless Internet service, summarizes the major arguments for and against municipal participation, and describes various types of legislative proposals related to municipal Internet service. (Report available at <http://www.ftc.gov/os/2006/10/V060021municipalprovwirelessinternet.pdf>)

### **6.2.2 Economic Working Papers**

93. The following FTC Bureau of Economics working are available at <http://www.ftc.gov/be/econwork.htm>.



Daniel Hosken, Robert McMillan, Christopher Taylor, Retail Gasoline Pricing: What Do We Know , May 2007; revised February 2008.

R. Dennis Murphy, Pauline M. Ippolito, Janis K. Pappalardo, Consumer Perceptions of Heart-Health Claims for Cooking Oils and Vegetable Oil Spreads, April 2007.

Loren K. Smith, Slow Market Adjustment to Tax Chan

**APPENDICES**

	FTE	Amount (\$ in thousands)
<i>Bureau of Economics</i>	0.1	\$14.2
<i>Regional Offices</i>	0.7	\$98.3
Merger & Joint Venture Enforcement	189.3	\$28 504.1
<i>Bureau of Competition</i>	126.6	\$19 604.0
<i>Bureau of Economics</i>	46.2	\$6 552.3
<i>Regional Offices</i>	16.5	\$2 347.8
Merger & Joint Venture Compliance	7.9	\$1 032.4
<i>Bureau of Competition</i>	7.5	\$975.7
<i>Bureau of Economics</i>	0.4	\$56.7
<i>Regional Offices</i>	--	--
Nonmerger Enforcement	105.5	\$15 356.5
<i>Bureau of Competition</i>	87.1	\$12 729.1
<i>Bureau of Economics</i>	14.4	\$2 056.6
<i>Regional Offices</i>	4.0	\$570.8