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

ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE UNITED STATES

(1st October 1996 - 30 September 1997)

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Summary of Highlights

In Fiscal Year 1997, the Federal Trade Commission and the Antitrust Division of the Department of Justice adopted a revision of the efficiencies section of the 1992 Horizontal Merger Guidelines that clarifies what kinds of efficiency claims will be considered, and how they enter into the overall merger analysis. This revision was the result of a joint staff study which was inspired by one of the proposals of the FTC report on its 1995 hearings on Global and Innovation-Based Competition. On April 24, 1997, the agencies announced an antitrust mutual assistance agreement between the United States and Australia, the first such agreement negotiated under the International Antitrust Enforcement Assistance Act (IAEAA) of 1994. Both countries now are pursuing their respective procedures for finalizing the agreement. In April, the Department announced its first formal positive comity request under the terms of the 1991 U.S.-EU antitrust cooperation agreement; the Department asked EU competition authorities to investigate possible anticompetitive conduct by European airlines that may be preventing U.S.-based airline computer reservation systems from competing effectively in certain European countries. In January 1997, the FTC announced its "Joint Venture Project" to clarify and, if necessary, update antitrust policies regarding joint ventures, strategic alliances and other forms of competitor collaborations. The FTC held public hearings in June and December 1997 and is consulting with the Antitrust Division as the project develops.

During FY97, the Division opened 362 investigations and filed 58 antitrust cases, both criminal and civil, in federal court. The Division filed 38 criminal cases, bringing indictments against 29 individuals and 24 corporations. Record criminal fines amounting to $203.9 million were levied against 30 corporate defendants. In addition, seventeen individuals were assessed fines totaling $1.25 million. To date, the Division's investigation into price-fixing and sales allocation in the international food additives industry has yielded more than $195 million in criminal fines, including the two largest criminal antitrust fines in history. The Division opened 362 civil investigations, both merger and non- merger, issued 1,629 civil investigative demands (a form of compulsory process), and filed 6 civil nonmerger complaints during FY97.

The U.S. Court of Appeals for the First Circuit, in *United States v. Nippon Paper Industries*, held that Section 1 of the Sherman Act applies criminal as well as civil penalties to wholly foreign conduct as long as that conduct produced substantial and intended effects within the United States. Accordingly, the court reversed a district court dismissal of an indictment alleging that a Japanese manufacturer and others held meetings in Japan that culminated in an agreement to fix the price of thermal fax paper in North America.

In the non-merger area, the FTC pursued a variety of legal theories, including horizontal restraints such as price fixing and concerted refusals to deal and resale price maintenance, in such sectors

During FY97, the two agencies reviewed 3,702 transactions reported under the Hart-Scott-Rodino ("HSR") Act, an increase of 20 percent over the previous year. A wide variety of industries were involved including defense, hospitals, pharmaceuticals, transportation, computer technology and energy. The Division initiated 277 merger investigations and challenged 14 mergers; 17 transactions were restructured or abandoned prior to the filing of a complaint as a result of an announced challenge. The FTC initiated 285 investigations of HSR transactions and investigated 45 transactions with second requests for information which resulted in 18 consent orders, seven abandoned transactions, and authorization of the filing of preliminary injunction actions to block three proposed mergers, two of which were abandoned by the parties. One of the FTC's most notable merger investigations involved the *Staples/Office Depot* transaction, the largest merger litigated by the government in recent years. The Commission estimates that by blocking the merger, it saved consumers around $1 billion over a five year period. In addition, the FTC secured a record-high of $9.35 million in civil penalties in HSR enforcement actions against firms that failed to observe the premerger notification requirements and waiting periods under the HSR Act before consummating a notifiable merger.

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Introduction

1. This report describes federal antitrust developments in the United States for Fiscal Year 1997 ("FY97" -- October 1, 1996 through September 30, 1997). It summarizes the activities of the Antitrust Division ("Division") of the U.S. Department of Justice ("Department" or "DOJ") and of the Bureau of Competition of the Federal Trade Commission ("FTC" or "Commission").

2. Joel I. Klein was confirmed by the Senate on July 17, 1997 to be the Assistant Attorney General in charge of the Antitrust Division. A. Douglas Melamed became Principal Deputy Assistant Attorney General, overseeing the Division's civil enforcement program, appellate activities, and international efforts, on October 15, 1996.

1. Changes in law or policies

A. Changes in antitrust rules, policies or guidelines

3. On December 18, 1996, the Federal Energy Regulatory Commission (FERC) issued a policy statement concerning its merger policy under the Federal Power Act. In applying the Act's standard that public utility mergers in the electric power industry must be consistent with the public interest, FERC will generally take into account three factors: the effect on competition, the effect on rates, and the effect on regulation. The policy statement indicates that FERC's ?analysis of the effect on competition will more precisely identify geographic and product markets and will adopt the Department of Justice/Federal Trade Commission Merger Guidelines as the analytical framework for analyzing the effect on competition.?

4. The FTC and DOJ adopted a revision of the efficiencies section of the 1992 Horizontal Merger Guidelines in April, 1997. This revision was an outgrowth of one of the proposals of the FTC report on its 1995 hearings on Global and Innovation-Based Competition (*see* FY 1996 report ¶6) which inspired a joint FTC/DOJ staff study of how efficiency considerations should be analyzed in merger investigations and cases. The revised guidelines clarify what kinds of efficiency claims will be considered, and how they enter in the overall analysis of the competitive effects of a merger. The revisions provide merging firms, the agencies and the public a clearer roadmap for determining whether efficiencies will result in lower prices or new products or will otherwise enhance competition.

5. On April 9, 1997, the Department of Defense (DOD) issued a

B. Proposals to change antitrust laws, related legislation or policies

8. In January 1997, the Commission announced its "Joint Venture Project" to clarify and, if necessary, update antitrust policies regarding joint ventures, strategic alliances and other forms of

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

A. Department of Justice and FTC Statistics

1) DOJ Staffing and Enforcement Statistics

12. At the end of FY97, the Division had 804 employees: 345 attorneys, 49 economists, 186 paralegals and 224 support staff.

13. During FY97, the Antitrust Division opened 362 investigations and filed 58 antitrust cases, both civil and criminal, in federal court. The Division was a party to 12 U.S. antitrust cases decided by the federal Courts of Appeals and filed *amicus curiae* briefs in three Court of Appeals cases and two Supreme Court cases.

14. During FY97, the Division filed 38 criminal cases and indicted 24 corporations and 29 individuals. Thirty corporate defendants and 17 individuals were assessed fines totaling $205.2 million and 3 defendants were sentenced to a total of 789 days of incarceration. Another 9 individual defendants were sentenced to spend a total of 1,270 days in some form of alternative confinement.

15. During FY97, 3,702 proposed mergers and acquisitions were reported for review under the notification and filing requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), which represents an increase of 20 per cent over the previous year. A wide variety of industries were involved including defense, hospitals, pharmaceuticals, transportation, computer technology and energy. The Division investigated 277 mergers and challenged 14; 17 transactions were restructured or abandoned prior to the filing of a complaint as a result of an announced challenge. The Division also screened a total of 1,850 bank mergers. The Division opened 362 civil investigations, both merger and non-merger, and issued 1,629 civil investigative demands (a form of compulsory process). The Division filed 6 non-merger civil complaints. Also during FY97, the Division responded to 38 requests for review of written business proposals.

2) FTC Staffing and Enforcement Statistics

16. At the end of FY97, the FTC's Bureau of Competition had 224 employees: 141 attorneys, 44 other professionals and 33 clerical staff. The FTC also employs about 40 economists who participate in its antitrust enforcement activities.

17. The Commission staff initiated 285 investigations of HSR transactions and investigated 45 transactions with second requests for information. The Commission also investigated 89 non-HSR mergers. The Commission's investigations resulted in 18 consent orders, seven abandoned transactions and authorization of the filing of preliminary injunctions actions to block three proposed mergers, two of which were abandoned by the parties. The Commission also issued one administrative complaint and one final order.

18. In the non-merger area, the Commission accepted four consent agreements during FY97 that involved legal theories such as boycotts, resale minimum price fixing, and horizontal price-fixing in such sectors as health care, agricultural chemicals, and retail sales of automobiles. An Administrative Law Judge issued an initial decision upholding a Commission complaint. The Commission issued one final order.

19. In addition, the Commission filed two civil penalty enforcement actions totaling $5.75 million under Section 7A of the Clayton Act for violations of the premerger notification requirements. One represented the largest civil penalty ever obtained under the HSR Act for a single transaction - $5.6 million dollars. In addition, the Commission filed two civil penalty actions for violations of final cease

and desist orders, totaling $3.6 million. The total civil penalties assessed were a record-high of $9.35 million.

20. Staff of the Bureau of Competition provided guidance to industry through 11 advisory opinion letters on whether specific health care arrangements might violate antitrust laws. The arrangements concerned the following: medical standards, pharmaceutical sales, pharmacist network, ambulance network, optical firm network, hospital prices survey, physician network, pharmaceutical sales and oral surgery network.

B. Antitrust cases in the Courts

1) United States Supreme Court

21. There were no antitrust cases decided in the Supreme Court in FY97.

2) Court of Appeals cases

a. Significant DOJ Cases Decided in FY97

22. There were eight dispositions by the courts of appeals in Antitrust Division cases in FY97, but only three of these resulted in published opinions. One of these three involved an issue of mootness, and another involved interpretation of the Tunney Act (a statute that prescribes procedures to be followed prior to entry of consent judgements in government antitrust cases). The third, described in the next paragraph, concerned international antitrust enforcement.

23. In *United States v. Nippon Paper Industries*, 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 685 (1998), the district court had dismissed the indictment in this criminal case, for failure to state an offense, but the court of appeals reversed. The indictment alleged that a Japanese manufacturer and others held meetings in Japan that culminated in an agreement to fix the price of thermal fax paper in North America. The court of appeals held that Section 1 of the Sherman Act, 15 U.S.C. §1, applies criminal as well as civil penalties to wholly foreign conduct as long as that conduct produced substantial and intended effects within the United States. Accordingly, the court held, the indictment adequately alleged an offense, and should not have been dismissed.

b. FTC cases decided in FY97

24. *FTC v. Butterworth Health Corp.* was an appeal from a decision of the district court that denied the Commission's request for a preliminary injunction to prevent a proposed merger between the two leading hospitals in the state of Michigan's second largest city, Grand Rapids. In July, 1997, the United States Court of Appeals for the Sixth Circuit affirmed the district court's decision of the previous year. In an unpublished decision, the court of appeals held that the district court did not abuse its discretion in concluding that the welfare of consumers would be enhanced by the merger and that competition would therefore not be lessened. 1997-2 Trade Cas. (CCH) ¶71,863 (6th Cir. 1997). The Commission subsequently dismissed its complaint pursuant to its 1995 policy statement under which the FTC determines case-by-case whether to pursue administrative litigation where a federal district court declines its request for a preliminary injunction.

25. *California Dental Ass'n v. FTC* was an appeal from a decision of the Commission that ordered the California Dental Association to refrain from enforcement of ethical guidelines that in practice had the effect of prohibiting truthful, nondeceptive advertising by dentists. In October 1997, the United States Court of Appeals for the Ninth Circuit affirmed the Commission's order, holding that the Commission had

jurisdiction over the activities of nonprofit trade associations that provided substantial pecuniary benefits to their members, and that the Commission had properly found CDA's price and non-price advertising restraints unlawful under a "quick look" rule of reason analysis. 128 F.3d 720 (9th Cir. 1997).

3) Private cases having international implications

26. In *In re Potash Antitrust Litigation*, 954 F. Supp. 1334 (D. Minn. 1997), purchasers of potash, a mineral used in the manufacture of fertilizers, alleged that Canadian and U.S. potash producers had

losses relating to a cordless telephone manufacturing plant built by Megga in China using Lucent technology. The district court dismissed the monopolization claims, which were based on lost sales to Lucent, on jurisdictional grounds, noting that there were ?no factual allegations that plaintiffs themselves imported or planned to import any product into the United States.?

30. In *Filetech S.A.R.L. v. France Telecom*, 978 F. Supp. 464 (S.D. N.Y. 1997), a French corporation and its U.S. subsidiary sued France Telecom and its U.S. subsidiary alleging a section 2 (monopolization) violation of the Sherman Act for failure to make available to Filetech usable information on French telecom subscribers for use in preparing a data base to be sold as a direct marketing tool. The district court described a long history of litigation, much of it ongoing, concerning competition and data privacy issues involving Filetech, France Telecom, and other parties before French commercial and criminal courts and competition authorities. The court granted France Telecom's motion to dismiss on grounds of international comity. The court could not determine, based on the parties' diametrically opposing interpretations of French law, whether French law ultimately would conflict with a ruling under U.S. antitrust law. However, ?France Telecom's substantial claim, consistently asserted in France and not yet

C. Statistics on Private and Government Cases Filed During FY 1997

33. According to the annual report of the Director of the Administrative Office of the U.S. Courts, 632 new civil and criminal antitrust actions, both governmental and private, were filed in the federal district courts in FY97.

D. Significant DOJ and FTC Enforcement Actions

1) DOJ Criminal Enforcement

34. On August 27, 1996, the Division filed six one-count felony informations in the U.S. District Court in Chicago, charging two Japanese firms, a U.S. subsidiary of a Korean company, and three of their executives with conspiring to fix prices to eliminate competition and allocate sales in the lysine market worldwide. The Division alleged that Ajinomoto Co. Inc. and its executive Kanji Mimoto, Kyowa Hakko Kogyo Co. Ltd. and its executive, Masaru Yamamoto, and Sewon America Inc. and its President, Jhom Su Kim, agreed to increase the price of lysine and allocate the volume of lysine to be sold among the corporate conspirators, and participated in meetings and conversations for the purpose of monitoring and enforcing adherence to the agreed-upon prices during the period of June 1992 through June 27, 1995. On October 15, 1996, following guilty pleas, the defendants entered plea agreements to pay fines in excess of $20 million.

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

36. On December 3, 1996, a third round of charges was filed in conjunction with this investigation. Three ADM executives, Michael D. Andreas, Mark E. Whitacre, and Terrance S. Wilson, as well as the managing director of Ajinomoto Co. Inc., Kazutoshi Yamada, were indicted in the U.S. District Court in Chicago for their role in the conspiracy (trial has been scheduled for July 1998). The same day, Cheil Jedang Ltd. (a.k.a. Cheil Foods & Chemicals), a Korean company agreed to plead guilty and pay a $1.25 million fine for participating in the lysine price fixing and sales volume allocation scheme.

37. In the fourth round of charges brought in the investigation, the Division filed a felony information in the U.S. District Court for the Northern District of California on January 29, 1997, charging Harmaan & Reimer Corporation, a U.S. subsidiary of the German firm Bayer AG, with participating in an

antitrust violations in the lysine and citric acid industries has yielded almost $200 million in criminal fines.

39. On September 24, 1997, the Division brought charges against two Dutch pharmaceutical

jury in Houston found Maloof guilty of both counts. He is currently awaiting sentencing. (most recent case: *U.S. v. Mark Albert Maloof*).

2) DOJ Non-merger civil enforcement

42. On December 3, 1996, the Department announced it would close its investigation into the way AC Nielsen Co. contracted its services for tracking retail sales because the company had reached an agreement with the European Commission that alleviated any anticompetitive concerns. The Division had been investigating whether Nielsen, in contracting with multinational customers, had illegally bundled or tied the terms of contracts in one country with those of other countries. This type of conduct occurred mostly in Europe and had its greatest impact there, and was the subject of an antitrust investigation by EU competition authorities. DOJ and DG-IV officials cooperated extensively throughout the course of their investigations, and when Nielsen formally committed to the European Commission that it would not tie or link the terms of its contracts in one country to the terms of contracts for similar services in other countries, the Department concluded that the practices it had been investigating would not continue, and closed its investigation.

43. On January 22, 1997, Judge Harold Greene ruled on an important discovery issue relating to the Department's investigation of allegations of worldwide price-fixing and group boycott behavior by the five major record companies in connection with music videos supplied to music video programmers. The record companies had responded to civil investigative demand (CID) requests related to their domestic activities but refused to produce U.S.-located documents and information related to foreign activity on the grounds that the Division lacked jurisdiction to investigate this conduct. Judge Greene rejected these arguments, holding that (1) jurisdictional challenges to CIDs should not be upheld absent a ?patent lack of jurisdiction;? (2) the Foreign Trade Antitrust Improvements Act does not exempt foreign price-fixing from the reach of the Sherman Act if that activity has the requisite effect on U.S. domestic or export commerce; and (3) it was premature to consider the issue of international comity at the investigative stage.

44. On April 28, 1997, the Department disclosed that it had made a formal request to the EU's competition authorities to investigate possible anticompetitive conduct by European airlines that may be preventing U.S.-based airline computer reservation systems from competing effectively in certain European countries. This was the first formal positive comity request under the 1991 U.S.-EU antitrust cooperation agreement. The Department had been investigating whether the three large EU airlines that own Amadeus, the dominant computer reservation system in Europe, maintained that dominance by withholding air fare information and functionality from U.S. computer reservation systems that do business in Europe. The Department concluded that the European Commission was in the best position to investigate the conduct because it occurred in its home territory and consumers there are the ones principally harmed if competition has been diminished. The Department maintains a strong interest in the matter, and will continue to investigate the possibility that similar conduct may be preventing U.S.-based computer reservations systems from competing effectively in a number of countries in South America.

45. On July 18, 1997, the Division filed a civil suit against two U.S. and one Swiss oil trading firms for allegedly colluding in order to lower their payments to U.S. oil brokers. In *United States v. AIG Trading Corporation* (7 Trade Reg. Rep. (CCH) ¶45,097 Case No. 4295, S.D.N.Y.), the Division alleged that the three companies exchanged information on broker commissions involving contracts for North Sea crude oil in an effort to lower their payments to U.S. brokers. According to the terms of the consent decree reached between the Division and the defendants, the companies are prohibited from agreeing with any trader to fix, lower, raise, stabilize, or maintain any brokerage commission or to exchange any information concerning such commissions.

3) Modification or termination of DOJ Consent Decrees

46. On July 30, 1997, the Division initiated a consent decree modification regarding a 1950 consent decree governing the foreign licensing activities of the American Society of Composers, Authors, and Publishers (ASCAP). The court approved the requested modifications on November 12, 1997. The modifications removed language in the decree, written long before the advent of home taping royalties, that prevented ASCAP from being able to collect these monies from foreign performing rights societies. Provisions restricting ASCAP's interaction with foreign performing rights societies (e.g., the ability to cross license) were also removed. Other provisions, however, which prohibit ASCAP from interfering with its members' right to license music directly to users outside the U.S. remain in force.

4) FTC Non-merger enforcement actions

a. Commission administrative decisions

47. The Commission in March 1997, issued a final decision finding that the International Association of Conference Interpreters ("AIIC") and its U.S. affiliate members conspired to fix or stabilize the fees for interpretation services performed in the U.S. The final order prohibits AIIC and its U.S. affiliate members from entering into agreements that fix or suggest fees for the provision of interpretation, translation, or language services performed within the United States. The order also requires the association to amend its rules and bylaws to conform to the Commission's order provisions and further requires the elimination of association rules regarding, among other things, fees, travel expenses, pro bono work, and commissions. *International Ass'n of Conference Interpreters*, Docket 9270, 5 Trade Reg. Rep. (CCH) ¶24,235.

48. In September 1997, an administrative law judge issued an initial decision finding that Toys "R" Us, the nation's largest toy retailer, entered into vertical agreements with toy manufacturers and horizontal agreements among the otherwise competing manufacturers to restrict their sales to warehouse clubs that sold toys at prices lower than Toys "R" Us prices. The net effect of thes D -30.s

February 1998.] *Mesa County Physicians Independent Practice Ass'n, Inc.*, Docket 9284, 5 Trade Reg. Rep. (CCH) ¶24,266.

51. American Cyanamid, in May 1997, agreed to settle allegations that it fixed the resale prices of its agricultural chemical products by entering into agreements with its retail dealers offering substantial rebates if the dealers sold its chemicals at or above specific prices. The consent order prohibits American Cyanamid from entering into agreements that control prices and conditioning the payment of rebates or other incentives on the resale prices its dealers charge for its products. *American Cyanamid Co.*

care industry, in particular mergers among physician practices and the formation of nonexclusive physician networks and other service networks (*e.g.*, hospitals, home health agencies). Among the other Reviews undertaken by the Division during FY97, requests were made by a grocery price auditing firm, a fisheries cooperative seeking to allocate fishing quotas amongst its members, a group developing escalator safety standards, and an organization holding patent licenses and distributing royalties. The texts of the Business Review Letters issued during FY97 can be found at 6 Trade Reg. Rep (CCH) ¶44,097; those of particular interest are described hereafter.

58. A provider of price auditing services for grocery retailers, DataCheck, Inc., sought approval to purchase shelf price data from retailers and then sell it to other retailers. The Division stated in its letter that the measures taken by DataCheck to prevent its proposed system from being used in any manner that would facilitate price fixing were satisfactory and eliminated any potential anticompetitive effects. (Letter dated January 6, 1997.)

59. Attorneys from sixteen law firms (located in 13 cities) sought a Business Review Letter concerning their plan to offer legal services to construction industry clients on a returnable flat fee basis. The plan would not obligate attorneys to charge a certain amount and members would be allowed to withdraw from the group or to accept client engagements on other terms without withdrawing. The Division stated in its letter that the effect may, in fact, be procompetitive by reducing legal prices and client uncertainty and thus did not warrant antitrust intervention. (Letter dated January 17, 1997.)

60. The Russell-Stanley Corporation, a manufacturer of steel drums, sought to organize joint sales ventures among steel drum manufacturing firms with whom it does not compete. This proposal resulted from a request by larger customers who wished to single source bids, an uncommon practice in the industry. According to the proposal, Russell-Stanley would act as the principal contractor of national bids to service those customers wishing to single source their purchases. Because the communication of pricing information would be strictly limited, the Division chose not to challenge the proposed arrangement. (Letter dated May 20, 1997.)

61. A group of four fisheries and fish processors requested a Business Review Letter regarding their proposed formation of The Whiting Conservation Cooperative, an organization to allocate amongst its members the government-established quota of Pacific Whiting, a species of fish. The Division foresaw no anticompetitive effects of the arrangement and thus chose not to challenge the proposal. (Letter dated May 20, 1997.)

62. The National Elevator Industry, Inc., a trade association consisting of thirty-four domestic manufacturers and installers of escalators, proposed a joint venture with an independent consultant to develop more uniform and comprehensive safety standards for escalator design and installation. The Division, while stating that until the new standard is developed it is impossible to ascertain its competitive impact, chose not to challenge the joint venture because it did not involve the exchange of competitively sensitive information and thus did not disadvantage non-members. (Letter dated May 30, 1997.)

63. MPEG LA, L.L.C. sought to offer a package license of intellectual property patents that are essential to compliance with the MPEG-2 compression technology standard, an international standard endorsed by the Motion Picture Experts Group of the International Organization for Standards, the International Electrotechnical Commission, and the International Telecommunications Union Telecommunication Standardization Sector. The firms holding the essential patents and wishing to participate in the joint licensing agreement were the Trustees of Columbia University, Fujitsu Limited, General Instrument Corporation, Lucent Technologies Inc., Matsushita Electric Industrial Co., Ltd., Mitsubishi Electric Corporation, Philips Electronics N.V., Scientific-Atlanta, Inc., Sony Corporation, and Cable Television Laboratories, Inc. In essence, the new group would sell licenses to manufacturers of video compression components seeking to utilize the intellectual property contained in the essential patents. The Division determined that the joint licensing agreement, limited to technically essential

patents as determined by an independent expert, would have procompetitive effects and therefore did not warrant intervention. (Letter dated June 26, 1997.)

64. In the one Business Review denied in FY97, the Division denied a request for approval of a proposed merger among three groups of gastroenterologists in Pennsylvania. The Division concluded that the merger as proposed would likely have anticompetitive effects. In its analysis, the Division found the relevant geographic market to be much smaller than the market claimed by the parties proposing the merger. As a result, the newly created group would have significant market share and would be able to increase prices for gastroenterology services in the area. (Letter dated July 7, 1997.)

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

A. Department of Justice and FTC merger statistics

1) DOJ review of mergers

65. The Division initiated 277 merger investigations, 220 HSR and 57 non-HSR. Of the 220 HSR investigations, 120 involved second requests and/or civil investigative demands ("CIDs"). Of the 57 non-HSR merger investigations, 13 involved the issuance of CIDs.

2) FTC review of mergers

66. Based on its review of premerger notification reports, the FTC investigated 45 transactions with second requests for information.

3) Enforcement of Premerger notification rules

67. The Commission and the Department actively have enforced the filing requirements of the Hart-Scott-Rodino (HSR) Act by bringing cases in federal court to obtain civil penalties. In FY97, two civil penalty actions were brought.

68. In February 1997, Harry Figgie, Jr. and Figgie International Inc. agreed to pay a $150,000 civil penalty for failing to pre-notify Mr. Figgie's acquisition of restricted voting securities of Figgie International as required by the HSR Act. *Figgie International Inc.*, File 941-0027, Civ. Action No. 1:97CV 00302, 5 Trade Reg. Rep. (CCH) ¶24,209.

69. The Commission filed a complaint and consent agreement in federal district court in June 1997, settling charges that Mahle GmbH, a German piston manufacturer, and Metal Leve S.A., a Brazilian competitor, failed to notify Mahle's proposed acquisition of a controlling interest in Metal Leve as required under the HSR Act. The agreement provides for Mahle and Metal Leve to pay a record $5.6 million civil penalty to resolve the charges. *Mahle GmbH*, File 961-0085, Civil Action No. 1:97 CV01404, 5 Trade Reg. Rep. (CCH) ¶24,291.

B. Significant merger cases

1) DOJ merger challenges or cases

70. In FY97, the Division filed four merger lawsuits against radio companies, each resulting in a consent decree requiring the restructuring of the merger. *United States v. American Radio Systems Corporation* (1997-1 Trade Cas. (CCH) ¶71,747, D.D.C.) was the first challenge ever of a radio joint sales

agreement. The original proposal would have given American Radio a 60 percent local market share, allowing it to set prices for advertisers. Under the consent decree approved by the Court, American Radio acquired two rather than four stations, and it abandoned its joint selling agreement with another competitor, thus preserving competitive advertising prices in the local radio market. In this case, the Division explained its use of a ?stepwise? analysis of horizontal agreements that are not *per se* illegal. A second case involved a merger creating the nation's largest radio group. In *United States v. Westinghouse Electric Corporation* (1997-1 Trade Cas. (CCH) ¶71,749, D.D.C.), the Division negotiated a consent decree requiring the new entity to divest two stations in Philadelphia and Boston, thereby preventing the merger from having an effect on advertising prices in these two major markets. The newly formed group operates 77 radio stations in 13 major markets across the United States. In the final two cases, *United States v. American Radio Systems Corporation* (1997-2 Trade Cas. (CCH) ¶71,898, D.D.C.) and *United States v. EZ Communications, Inc.* (1997-1 Trade Cas. (CCH) ¶71,841, D.D.C.), the Division also required the divestiture of two radio stations. The proposed station swap between EZ Communications and Evergreen Media, however, was abandoned as a result of the Division's antitrust concerns. The Division had previously launched an investigation to determine whether the swaps were part of an effort to allocate radio formats in order to lessen competition between the two cooperating groups of owners.

71. On January 3, 1997, the Division, together with the Attorney General of Colorado, filed a civil suit to block Vail Resorts Inc.'s proposed acquisition of Ralston Resorts Inc. At the same time, the Division filed a proposed settlement, agreeing to allow the merger to proceed following the divestiture of Ralston's Arapahoe Basin Ski Resort, which is located in the same area as Vail's other resorts. In *United States v. Vail Resorts, Inc.*

would reduce competition in food-grade salt in a market east of the Rocky Mountains. The two markets total $300 million per year in commerce. Under the final consent decree, Akzo Nobel would divest deicing salt assets and a food-grade salt producing facility.

75. On June 11, 1997, the Division filed a one-count complaint , *United States v. Long Island Jewish Medical Center* (1997-2 Trade Cas. (CCH) ¶71,960, E.D.N.Y.), against Long Island Jewish Medical Center, a not-for-profit academic hospital, and North Shore Health System, Inc., a not-for- profit corporation that owns and manages North Shore University Hospital. In the complaint, the Division alleged that the proposed merger of the two defendants, who compete head-to-head to be the flagship hospital in local managed care networks, would likely lead to higher hospital prices for consumers. On October 23, 1997, however, the District Court ruled in favor of the defendants and dismissed the complaint.

76. In a year of considerable consolidation within the banking industry, the Division's review of banking transactions resulted in the Division reaching agreements for divestitures or other conditions with the parties in seven transactions. In three other transactions, after review, the Division accepted the

b. Commission Administrative Decisions

79. In January 1997, Wesley-Jessen agreed to settle allegations that its acquisition of Pilkington

interchangeable. ADP paid a $2.97 million fine for allegedly failing to include critical documents in its HSR filing. *Automatic Data Processing*, Docket 9282, 5 Trade Reg. Rep. (CCH) ¶24,285.

IV. Regulatory and Trade Policy Matters

A. Regulatory policies

1) DOJ activities with respect to Federal and State Regulatory Matters

91. The Division participates actively in regulatory proceedings in order to promote competition. During FY97, the Division filed comments in:

- various Federal Communications Commission (FCC) proceedings, including Regional Bell Operating Company applications to provide in-region interLATA services in the States of Oklahoma and Michigan, and reform of access charges;

- *Antitrust Immunity for Motor Carrier Rate Bureaus*: On August 18, 1997, the Division filed comments with the Surface Transportation Board opposing continued antitrust immunity for motor carrier rate bureau agreements. Under these agreements, trucking firms enjoy immunity from the antitrust laws to meet, discuss, and agree on general rate increases. The Division's comments explained that even in a competitively-structured industry, such conduct could lead to rates in excess of competitive levels and that there is no reason to take such a risk -- rate bureau functions that benefit the public could continue without immunity. If the Board nonetheless continues antitrust immunity, the Division urged it to deny the rate bureaus nationwide authority because expanding the geographic scope of collective ratemaking could exacerbate rate bureaus' market power;

- *Judicial Conference -- adoption of ABA's recommended citation form*: On March 14, 1997, the Department filed comments with the Committee on Automation and Technology of the Judicial Conference of the United States, recommending that the federal courts adopt the case law citation form recommended by the American Bar Association (ABA). The comments state that ?[b]y keying on a particular publisher and by identifying the location of cited text on the basis of that publisher's layout of a printed book, the current system unnecessarily hampers the usage of other publishers' electronic products in two ways. The chosen publisher enjoys a special advantage and the entire system is founded on a type of textual division that is undesirable in electronic media.? The comments recommend the ABA's media-neutral citation system which will loosen restrictions on competition among case law providers and encourage innovation, outweighing the costs on the courts which would be responsible for numbering paragraphs and assigning sequential opinion numbers;

- *Railroad Merger -- Union Pacific and Southern Pacific*: On August 20, 1997, the Division filed reply comments with the Surface Transportation Board in its oversight proceeding on the effectiveness of trackage rights remedies ordered in its decision approving the UP/SP merger (discussed in FY96 annual report, para 87 -- the Division had opposed the merger as anticompetitive, arguing that it would limit competition in markets with over 6 billion in revenues, and that trackage rights would not preserve competition.) The Division's comments urged the Board to take additional action to protect shippers adversely affected by the merger, such as identifying which shippers BNSF may serve (with its trackage rights) and addressing actions by UP that prevent BNSF from offering competitive service. In addition, the Division argued that the Board should remain wary of the ultimate effectiveness

of trackage rights and should consider structural alternatives to restore competition lost from the merger;

- *Prevention of Anticompetitive Virginia State Bar Rules*: In the fall of 1996, the Virginia State Bar attempted passage of a proposed Supreme Court Opinion that would have prevented non-lawyers from competing with attorneys in performing real estate closings. At the same time, the real estate bar tried to persuade the state legislature to enact similar legislation. On January 3, 1997, the Department and FTC filed a joint letter with the state Supreme Court urging rejection of the Opinion. For over 15 years, Virginia consumers had the choice of using a lay settlement service, rather than a lawyer. In the letter, the Department and FTC pointed out that ending this competition will likely increase real estate closing costs for consumers and has not been justified by a showing of increased consumer protection. A Media General study found that average lay closings cost $158 less than those performed by lawyers. Moreover, the proposed opinion would probably increase the price of lawyers' settlement services, since competition from lay services would no longer restrain the fees lawyers could charge;

- the proposed Opinion would have been a Supreme Court rule that declared lay real estate settlements to be the unauthorized practice of law. After the Justice Department and FTC submitted the joint letter to the Court, copies of the letter were forwarded to the Virginia legislature. The legislature passed legislation allowing lay services to continue to compete with law firms in providing closings. The agencies had argued that while having a lawyer may be desirable, the choice of whether to use a lawyer should belong to consumers; the state government, rather than outright prohibiting lay settlement services, should have considered less-restrictive alternatives that could safeguard consumers from fraud. The

over 100,000 students enrolled at non-SACS schools in the South from transferring credits, and also injured competing accrediting agencies that accredit technical and business colleges and the institutions that they accredit. DOE staff agreed with the DOJ comments and recommended sanctions against SACS. As a result, SACS agreed in December 1997 to eliminate the accreditation standards that the Division had criticized.

92. In FY97, the Division reviewed five applications for new Export Trade Certificates submitted under the Export Trading Company Act and its implementing regulations and concurred in the issuance of five new certificates. The goods covered by the certificates included milled rice, dry sweet whey and edible grade lactose.

2) FTC activities with respect to regulatory and state legislative matters

93. The goal of the Commission's advocacy activities is to reduce harm to consumers and competition by informing appropriate governmental and self-regulatory bodies about the potential effects, both positive and negative, of proposed legislation, rules or industry guides or codes. The following are examples of some of these activities in FY 1997.

a Congress

94. In response to a request by the House of Representatives Task Force on Tobacco and Health,

B. Department of Justice Trade Policy Activities

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

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

99. The Division represents the Department on the Committee on Foreign Investment in the United

97-2 Pittman, Russell, ?Competition Law in Central and Eastern Europe: Five Years Later,? EAG 97-2, June 6, 1997.

97-3 Crooke, Philip, et al., ?Effects of the Assumed Demand System on Simulated Postmerger Equilibria,? EAG 97-3, August 14, 1997.

97-4 McCabe, Mark J., ?Analyzing Welfare in Related Markets: Durable Goods and Aftermarkets,? EAG 97-4, September 12, 1997.

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