U.S. Department of Justice

ANTITRUST DIVISION update

Protecting and Promoting Competition

Spring 2006

Thomas O. Barnett, Assistant Attorney General, at a DOJ news conference announcing the Samsung plea agreement.

MESSAGE FROM THE AAG

As Assistant Attorney General, my goal for the Division is to get to the right answers as quickly as possible with the least burdens necessary to make responsible enforcement decisions. To be clear, efficient enforcement is more than reducing second request production volumes and closing investigations promptly. Equally important, efficiency includes identifying violations of the antitrust laws and pursuing them to an expeditious and successful resolution.

The Division pursues efficient enforcement most generally through an enforcement hierarchy that emphasizes aggressive cartel enforcement, expeditious merger review, and objective standards for unilateral conduct. Within each area, the Division strives to identify and pursue vigorously the most harmful violations, to increase transparency so that private parties can better predict our enforcement actions, and to reduce the time and costs associated with our investigations.

Cartel Enforcement

Cartels, as the Supreme Court observed in the *Trinko* decision, are the "supreme evil of antitrust." Accordingly, cartels remain the Division's top enforcement priority. The Division seeks to maximize deterrence of cartels not only through substantial monetary fines, but also by ensuring that key participants serve time in a U.S. prison.

The last year has seen significant progress. The Division obtained the second largest fine in its history ($300 million), obtained the largest fine ever for a purely domestic cartel ($29 million), added another country with citizens who have agreed to serve time in U.S. prisons (Korea), made significant progress toward its first extradition of a foreign national for an antitrust offense, and executed the broadest coordinated international search in its history. We also are seeing benefits from the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 as companies have become even more eager to apply for amnesty.

As we continue to improve our cooperation with other jurisdictions and to see the spread of effective criminal cartel enforcement across the globe, the world is becoming increasingly risky for cartels and their individual participants.

Merger Enforcement

Most mergers are either competitively neutral or affirmatively beneficial to consumer welfare. Therefore, the Division clears the large majority of transactions during the initial waiting period and focuses on those few that threaten harm to competition. With respect to those transactions that receive a second request, recent trends in document and data retention have dramatically increased productions. Accordingly, merger review presents one of the largest opportunities for reducing burden.

In 2001, the Division launched a merger review process initiative that has significantly enhanced efficiency. The initiative identified key information that parties can provide voluntarily during the initial waiting period and improved the communication between parties and staff. The initiative has thereby helped reduce the average percentage of preliminary investigations that lead to second requests by more than 40 percent.

The initiative also has improved the second request process. As illustrated by the Division's review of the NYSE and NASDAQ transactions, better communication has helped the Division to resolve a number of investigations–either by closure or an enforcement action–more quickly than might have been the case previously. One point bears emphasis: the process works best when the parties cooperate to help the Division get the information essential to a responsible enforcement decision.

To increase the transparency of its merger enforcement, the Division also has recently issued jointly with the FTC a commentary on the Horizontal Merger Guidelines (HMG). The commentary provides examples of the agencies' application of the HMG to relevant markets, competitive effects, and efficiencies.

While progress has been made, more can be done. The Division has been evaluating the merger review process and expects to expand the 2001 initiative soon.

Unilateral Conduct

Section 2 enforcement presents some of the most difficult challenges. The antitrust laws should encourage vigorous competition, even by companies with a large share of the relevant market. Because the current state of the law does not always define clearly the line between lawful and unlawful conduct, uncertainty can chill procompetitive behavior while undermining deterrence of anticompetitive conduct. To advance legal and economic knowledge in this area, the Division and the FTC will hold hearings to address unilateral conduct issues.

Competition Advocacy

The Division has long promoted the benefits of competition wherever possible. The Division, for example, held a joint hearing with the FTC last fall studying competition in the crucial area of real estate brokerage. The Division also provided comments to numerous state legislatures and real estate commissions on proposed measures that might inhibit competition.

The Division also supported three amicus briefs filed this term in the Supreme Court by the Solicitor General. They addressed the Robinson-Patman Act, patents and antitrust law, and the application of the per se rule to joint ventures. The Court decided all three cases in a manner consistent with the amicus filings. In addition to clarifying the laws in each context, the opinions reflect a remarkable degree of consensus among the justices on these important antitrust issues. Indeed, two of the decisions were unanimous.

The Division engages more and more with competition officials across the globe on specific cases, technical assistance, and broader competition policy. We participate in the International Competition Network, the OECD, numerous bilateral and trilateral relationships, and a wide range of conferences and informal discussions among government officials. On specific cases, we seek to encourage consistent substantive analyses and to avoid inconsistent outcomes. On broader issues, we seek to provide the benefit of our experience while learning from theirs as well.

"The Division strives to...pursue vigorously the most harmful violations, to increase transparency...and to reduce the time and costs associated with our investigations."

– Thomas O. Barnett

Conclusion

The men and women of the Antitrust Division have worked hard for many years to improve the efficiency of their enforcement efforts. By minimizing false positives and false negatives and reducing burdens, the Division has helped and will continue to help ensure that consumers reap more of the benefits of competition – lower prices, greater innovation, and increased consumer choice.

SIGNIFICANT EVENTS MARCH 2005 - MARCH 2006

- Hynix Semiconductor Inc. agrees to plead guilty and to pay a $185 million fine (third-largest ever) for its role in an international conspiracy to fix prices in the multi-billion dollar DRAM market *(April 2005)*
- International Competition Network adopts Recommended Practices on merger process *(May 2005)*
- Irving Materials Inc. pleads guilty and is sentenced to pay a $29.2 million criminal fine, the largest ever in a domestic antitrust case, for fixing the price of ready mixed concrete in the Indianapolis area *(June 2005)*
- Antitrust Division settles lawsuit against Kentucky Real Estate Commission, which agrees to cease enforcement of regulations that had prohibited real estate brokers in the commonwealth from offering rebates and other inducements to consumers *(July 2005)*
- Antitrust Division sues the National Association of Realtors over policies that limit competition among real estate brokers by restricting the distribution of real estate listings to consumers via the Internet *(September 2005)*
- Antitrust Division and Federal Trade Commission issue antitrust guidance and institute expedited procedures for the review of collaborations among businesses working to assist and rebuild communities affected by Hurricanes Katrina and Rita *(September 2005)*
- Antitrust Division and Federal Trade Commission hold the first ever joint workshop on competition policy in the real estate industry *(October 2005)*
- Samsung Electronics and its U.S. subsidiary agree to plead guilty and to pay a $300 million fine (second-largest ever) for their role in the international DRAM price-fixing conspiracy *(October 2005)*
- The Sixth Circuit reverses district court decision dismissing an antitrust challenge to the merger of two Kentucky dairies in the DFA/ Southern Belle case and sends the matter back to the district court for trial *(October 2005)*
- Consent decrees require Verizon and SBC to divest portions of local fiber-optic network facilities in 19 metropolitan areas in order to resolve competition concerns arising from their respective acquisitions of MCI and AT&T *(October 2005)*
- U.S. Supreme Court *Volvo* decision holds that a manufacturer that offers different prices to its dealers may not be held liable for Robinson-Patman Act price discrimination absent a showing that it discriminated between dealers competing to sell to the same retail customer *(January 2006)*
- Elpida Memory Inc. agrees to plead guilty and to pay an $84 million fine for its role in the international DRAM price-fixing conspiracy *(January 2006)*
- U.S. Supreme Court *Dagher* decision holds that it is not per se illegal under Section 1 of the Sherman Act for a lawful, economically integrated joint venture to set the prices at which it sells its products *(February 2006)*
- U.S. Supreme Court *Independent Ink* decision holds that in all cases involving a tying arrangement, the existence of market power cannot be presumed as a matter of law from the fact that the tying product is patented *(February 2006)*
- Antitrust Division and the FTC release Commentary to the Horizontal Merger Guidelines *(March 2006)*

CARTEL ENFORCEMENT — THE YEAR IN REVIEW

The Division continues to make rooting out and prosecuting illegal cartels its highest priority. Unlike most conduct in the marketplace, price-fixing cartels have no plausible procompetitive justification. In the words of Supreme Court Justice Antonin Scalia, price-fixing cartels are, "the supreme evil of antitrust."

In 2005 and early 2006, the Division obtained large fines in domestic and international price-fixing cases and worked to advance anti-cartel cooperation overseas. Since individual incarceration has a greater deterrent effect than fines alone, the Division continued to emphasize prison terms for executives who participate in cartels. The Division also intensified its advocacy of individual accountability regimes and worked to secure extradition for antitrust offenses.

Case Highlights

The Division filed numerous criminal cases in the past 12 months against both domestic and international cartels, including several cases that led to record fines and record numbers of prison sentences for individuals.

Dynamic Random Access Memory

The Division continues to produce record results from its investigation of the price-fixing cartel for high-tech dynamic random access memory (DRAM) products. The investigation has yielded total fines of more than $730 million and charges against nine executives. Following the $160 million criminal fine imposed in 2004 against German manufacturer Infineon Technologies AG, the Division in 2005 obtained $185 and $300 million criminal fines, respectively, against Korean manufacturers Hynix Semiconductor Inc. and Samsung Electronics Company Ltd. (jointly with its U.S. subsidiary, Samsung Semiconductor Inc.) and, most recently, an $84 million fine against Japanese manufacturer Elpida Memory Inc. The Samsung, Hynix, and Infineon fines were respectively the second, fourth, and fifth largest criminal fines in Division history. On the individual front, one corporate executive pleaded guilty to obstructing the investigation and a record number of seven foreign high-level corporate executives, including three German nationals and four Korean nationals, collectively from Infineon and Hynix, have served or agreed to serve time in U.S. prisons for their participation in this conspiracy.

San Francisco Field Office, DRAM Team (L-R): Trial Attorney May Lee, Assistant Chief Niall Lynch,, Trial Attorney Nat Cousins, and Trial Attorney Brigid Biermann.

Ready Mixed Concrete

In June 2005, the Division obtained the largest fine ever imposed in a domestic antitrust investigation. Irving Materials Inc., an Indiana ready mixed concrete producer, pleaded guilty to fixing the price of ready mixed concrete in the Indianapolis area and was sentenced to pay a $29.2 million criminal fine. The Division also prosecuted four executives from Irving Materials, including three vice presidents and the president and chief executive officer. The executives were sentenced to pay fines ranging from $100,000 to $200,000 and to serve five month jail sentences, followed by five months of home detention. The Division's investigation is continuing.

Nationwide E-Rate Investigation

The Division's nationwide investigation of bid rigging and fraud in the E-Rate program continues. Congress created the E-Rate funding program to help needy schools and libraries connect to the Internet. In early 2006, Premio Inc. pleaded guilty to charges of bid rigging and fraud regarding the E-Rate program. In 2005, the Division indicted six corporations and six individuals for bid rigging, wire fraud, and conspiracy to commit mail and wire fraud involving E-Rate projects school districts located in seven states. To date, the Division has charged a total of 10 individuals and nine companies as part of the nationwide E-Rate investigation and has obtained fines and restitution of more than $30 million.

International Cartel Enforcement

The Division has long advocated strong international enforcement against price-fixing cartels, including increased penalties and methods to speed detection and increase cooperation between competition agencies. The Division actively promotes convergence of cartel enforcement and devotes significant resources to bilateral meetings, the International Competition Network and the Competition Committee of the Organization for Economic Cooperation and Development (where it chairs the Working Party on Cooperation & Enforcement). The global reach of modern cartels – as illustrated by the DRAM investigation – means that criminal conspiracies outside U.S. borders often have significant effects on U.S. consumers; therefore, international advocacy and coordination efforts are crucial to U.S. cartel enforcement.

The Division has recently focused on the investigative benefits of amnesty regimes and frequently provides technical assistance to other enforcement agencies with respect to the development of amnesty programs. In 2006, new legislation enhanced enforcement powers and created or strengthened amnesty programs in several nations. In addition, the Division has advocated the deterrent effect of prison sentences – as opposed to a "fines only" approach – and the prospect of extradition to the locus of a cartel's economic harm. A major step toward such deterrence occurred in 2005 with the first extradition order by a foreign court for a defendant in a U.S. antitrust case.

Foreign Antitrust Law Developments

In February 2005, the Australian government announced that it will seek to amend its competition law to introduce criminal penalties for serious cartel conduct, including jail sentences for individuals. In September 2005, the Australian Competition and Consumer Commission (ACCC) implemented a revised immunity policy that allows oral applications

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SENTENCING GUIDELINES AFTER ACPERA AND BOOKER

In November 2005, the United States Sentencing Commission responded to the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA) by revising the guidelines for Sherman Act penalties. In January 2005, the Supreme Court held in *United States v. Booker*, 543 U.S. 220 (2005), that the United States Sentencing Guidelines (USSG) should be applied in an advisory rather than a mandatory manner. While these developments are significant, they have not led to a sea change in actual practice: *Booker* has required only small modifications in antitrust sentencing practice, while the revised antitrust guideline strengthens enforcement within a well-established framework.

ACPERA and Sentencing Guidelines Revisions

ACPERA more than tripled the Sherman Act maximum jail term, from three years to 10 years. The Sentencing Commission therefore increased the penalties provided under the antitrust guideline, USSG § 2R1.1, taking into account both the revised maximum and recent experience with the enormous volumes of commerce affected by international cartels. The new § 2R1.1 adds enhancements for affected volumes of commerce more than $250 million, $500 million, $1 billion, and $1.5 billion. The maximum jail term provided under § 2R1.1 is now nine years and a longer term is possible via adjustments from other guidelines sections, such as "role in the offense" enhancement. While the new § 2R1.1 is not mandatory, *Booker* requires district courts to consult it under 18 U.S.C. § 3553(a). *Booker* did not discard the guidelines, as subsequent appellate decisions have noted, and does not require the Division to allege guidelines sentencing factors in an indictment or prove them at trial.

Charging Practice Modification

The Division's only *Booker*-related change to its charging practice will occur when the Division seeks a fine above the Sherman Act statutory maximum, under 18 U.S.C. § 3571(d), which provides for a fine of twice the gross gain or loss. In such cases, the Division will allege the amount of gain or loss in an indictment and, if necessary to obtain an appropriate fine, will allege the gain or loss attributable to the entire cartel, not just the defendant.

Plea Agreement Modifications

The Division has modified its plea agreements under *Booker* by requiring the defendant to stipulate that the recommended sentence is reasonable, that there are no aggravating or mitigating circumstances justifying a USSG § 5K2.0 departure, and that no departures or adjustments will be sought that are not identified in the plea agreement. A waiver of sentencing appeals, to apply if the sentence is consistent with or below the recommended sentence, is already common in Division plea agreements. In plea agreements involving recommended fines above the Sherman Act maximum, the Division also will include language addressing the gain or loss. And to provide additional incentive for cooperating defendants, the Division will continue to support substantial assistance departures under USSG §§ 5K1.1 and 8C4.1 in appropriate cases.

ANTITRUST DIVISION RESPONDS TO GULF COAST HURRICANES

In the face of the Gulf Coast devastation caused by Hurricanes Katrina and Rita in 2005, the federal government has undertaken one of the largest disaster relief and recovery efforts in the nation's history. The Antitrust Division is doing its part by providing antitrust guidance to other federal agencies as part of the Department of Justice's overall relief effort – clearing the way for appropriate collaboration between competitors that speeds relief to the affected areas – while helping to ensure that consumers are not further victimized by price fixing, bid rigging, or other cartel activity.

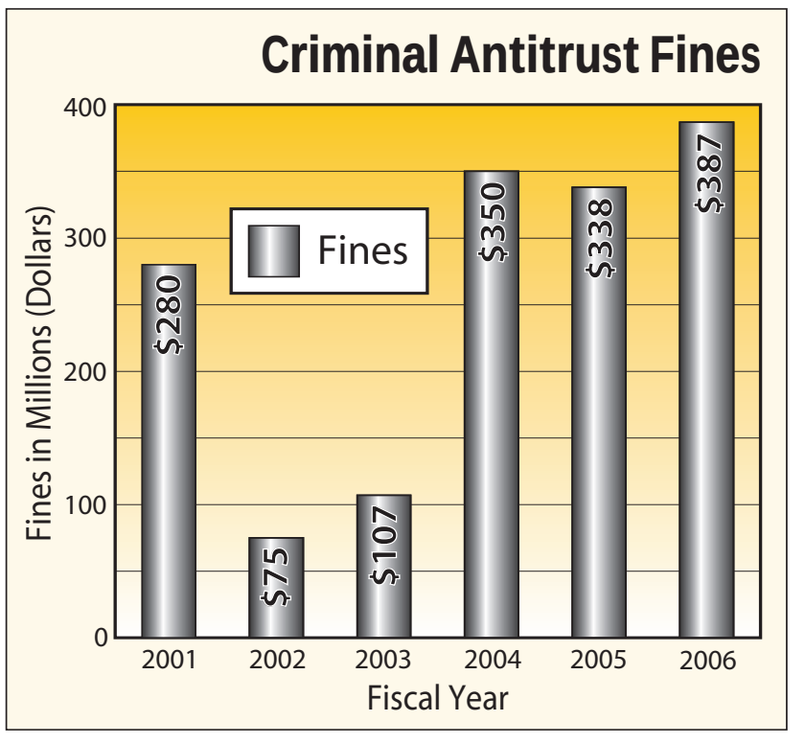
The Division has actively participated in the Department of Justice Hurricane Katrina Fraud Task Force, which is led by the Department's Criminal Division and includes a host of DOJ components and other federal agencies, such as the Department of Homeland Security and the General Services Administration. Nezida Davis and Duncan Currie, respectively Chiefs of the Antitrust Division's Atlanta and Dallas Field Offices, have given presentations to Task Force members at the Task Force's Joint Command Center in Baton Rouge, Louisiana on training and assistance the Division can provide in identifying and preventing collusion. Other Division attorneys have trained federal agents and procurement officials in the prevention and detection of collusive conduct in the post-Katrina marketplace, and more extensive training is planned. More information about the Task Force can be found on the Department's web site at *http://www.usdoj.gov/katrina/Katrina_Fraud/index.html.*

Duncan Currie, Chief of the Antitrust Division's Dallas Field Office.

Nezida Davis, Chief of the Antitrust Division's Atlanta Field Office.

The Division has also worked with other federal agencies to speed up relief to affected areas. The Division and the Federal Trade Commission (FTC) advised federal agencies that they can encourage companies to respond to the crisis on an individual basis, and that antitrust concerns generally would not arise from a company's individual action in response to such encouragement. Because collaborations between and among businesses sometimes are required to respond to a crisis, the Division and the FTC also provided assistance focused on a quick review of potential collaborations. At the same time, the Division and the FTC cautioned agencies to remember that the mere involvement of a federal agency in encouraging or approving a private agreement does not create immunity from the antitrust laws.

Finally, the Division was pleased to host five students from Tulane University Law School and one from Loyola University New Orleans School of Law last fall. These students interned with the Division's Atlanta, Chicago, Dallas and San Francisco field offices, and in the National Criminal Enforcement Section in Washington, D.C. They returned home when their schools reopened in January.



Source: DOJ Antitrust Division

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Cartel Enforcement

and full amnesty to the first qualifying applicant, even after an investigation has begun, if the ACCC has not yet received legal advice that it has sufficient evidence to bring a case.

Also in 2005, South Korea implemented a number of measures to strengthen its cartel enforcement, including a doubling of the maximum administrative fine to 10 percent of sales. The Korean Fair Trade Commission (KFTC) revised its leniency program to provide that only the first two qualifying applicants will benefit. The first qualifying applicant will receive a complete exemption from administrative fines and corrective measures, while the second qualifying applicant will receive a 30 percent reduction in the administrative fine. The KFTC also added an "amnesty plus" program for informers who help expose a separate cartel from the one currently under investigation.

Effective January 2006, Japan adopted major revisions to its Antimonopoly Act. The amendments include a substantial increase in the ability of the Japanese Fair Trade Commission (JFTC) to impose administrative fines on cartel participants, authority for JFTC to obtain compulsory search warrants in investigations where it pursues a criminal accusation, and introduction of a leniency program. The leniency program eliminates the administrative fine for the first applicant prior to a JFTC investigation and reduces the administrative fines for the second and third leniency applicants. In October 2005, the JFTC announced that it would not file criminal accusations against the first qualifying pre-investigation leniency applicant or its employees.

These revisions bring these foreign jurisdictions' enforcement practices with respect to cartel behavior in closer conformity with U.S. practices and will help with the global detection, prosecution, and prevention of cartel behavior.

Extradition of Foreign Nationals – the Norris Case

In June 2005, in *The Government of the United States of America v. Ian P. Norris*, a United Kingdom magistrates' court found a British national to be extraditable on an U.S. antitrust charge. The Bow Street Magistrates' Court ruled that price fixing and obstruction offenses, which the Division filed against Mr. Norris in 2004 as part of its carbon brushes investigation, were extraditable offenses under the U.K. Extradition Act of 2003. Mr. Norris argued that he was not extraditable because his alleged price-fixing conduct is to have occurred before antitrust offenses were criminalized in the United Kingdom. However, the court found that the underlying conduct at issue could amount to a U.K. conspiracy to defraud and therefore satisfied the "dual criminality" provision in the U.K. Extradition Act. The court found that the Extradition Act did not require that the same criminal offense exists in the United Kingdom, but rather that the underlying conduct constitute some U.K. offense punishable by imprisonment of 12 months or more. The magistrates' court then referred the case to the U.K. Secretary of State, who ordered the defendant's extradition in September 2005.

Norris filed multiple appeals in the U.K. High Court of Justice. On February 24, 2006, the High Court rejected an appeal under which Norris had challenged the designation of the United States under the U.K. Extradition Act due to the current lack of ratification by the United States of the 2003 U.S./U.K. Extradition Treaty and the alleged lack of consistency between extraditions requested by the United States and extraditions requested by the United Kingdom. Additional appeals by Norris are still pending in the High Court.

ENCOURAGING COOPERATION & CONVERGENCE — THE ANTITRUST DIVISION ABROAD

No country is an island in our increasingly interdependent global economy. Enforcement decisions in Washington can reverberate around the world, and the actions of far-away competition agencies can have a significant impact on competition here at home. With more and more countries adopting antitrust enforcement laws and regulations, the Division has made strengthening international cooperation and promoting antitrust policy convergence particular priorities. In 2005-2006, the Division pursued these goals by continuing to work closely with multilateral organizations around the world, and by working to develop and maintain strong bilateral relationships with enforcement agencies in other countries.

Multilateral Efforts — ICN and OECD

Two organizations stand out for their recent work in achieving consensus on important antitrust issues: the International Competition Network (ICN), which the Division and the Federal Trade Commission (FTC) helped to launch in 2001, and the Organization for Economic Cooperation and Development (OECD).

The ICN – which in only five years has grown from 15 founding members into a global network of 95 members from 84 jurisdictions – provides an opportunity for senior antitrust officials and non-governmental advisors from developed and developing countries to work together to achieve practical improvements in international antitrust enforcement. At the ICN's most recent annual conference, held in June 2005 in Bonn, Germany, members launched a new working group on telecommunications and adopted new recommended practices for merger notification and review procedures, adding to those adopted at previous conferences. Many ICN member agencies have developed and amended their merger review laws and policies with an eye to those practices, bringing greater consistency to the merger review process across jurisdictions and reducing delay and the investigative burden on merging firms. To date, nearly 40 ICN member jurisdictions have made or proposed changes that would bring their merger regimes into closer conformity with the Recommended Practices; since the last ICN conference alone, Austria, Australia, Belgium, Brazil, Czech Republic, Denmark, Greece, Hungary, Ireland, Italy, and the United States have made or proposed such changes. In addition to chairing the ICN's Merger Working Group, the Division is active in the ICN's Cartel Working Group, which is addressing important issues like interagency cooperation, obstruction of justice, and the relationship between government enforcement and private litigation. Members are gearing up for the ICN's next annual meeting, which will be held in May 2006 in South Africa, where a new working group on unilateral conduct is likely to be created.

The OECD's 30 member countries share a commitment to democratic government and market-based economies, and the OECD provides a setting where governments can seek answers to common problems, identify best practices, and coordinate policies. The Division has been closely involved with all phases of the OECD's competition work and has had the privilege to act as chair of its Competition Committee's working party on enforcement and cooperation, through former Assistant Attorney General Hew Pate, and as of February 2006, through Assistant Attorney General Tom Barnett. During the past year, the Competition Committee addressed such important topics as predatory pricing and the use of economists in antitrust enforcement. In March 2005, the OECD's Council of Ministers adopted a recommendation relating to merger review that buttresses the ICN's important work in this area. In October 2005, the Competition Committee approved a set of best practices on information sharing among antitrust authorities in cartel investigations, which strengthens the international consensus on the value of meaningful law enforcement cooperation against cartels.

Agency - to - Agency Relationship

The Division remains committed to developing strong, productive bilateral relationships with its foreign counterparts. Improving the already strong relationship with the European Commission remains a priority, and the Division continues to work closely with its counterpart in Brussels on a wide range of cartel, merger, and other enforcement and policy matters. For example, in February 2006 the Division confirmed publicly that it was coordinating with the EC and other foreign competition authorities in an investigation into the possibility of anti-competitive practices in the air cargo industry. Closer to home, the Division has worked on strengthening its already good working relationships with Canada and Mexico, and in November 2005 participated in the first ever trilateral meeting of the heads of the three countries' competition agencies, a meeting that focused on developments in the monopolization and intellectual property areas.

International cooperation is also fostered by the Division's technical assistance program, through which the Division works with many new antitrust agencies around the world to help ensure that their systems reflect sound economics and consumer welfare goals. In the past 15 years, the Division and the FTC – often with USAID funding – have conducted more than 360 missions to scores of countries, on both short-term trips and multi-month advisory programs. In 2005-06, recipients of this type of training included antitrust agencies in Egypt, India, Russia, and several Latin American and Southeast Asian nations. The agencies have hosted many foreign officials here in the U.S. as well, in order to share what the agencies do, and why and how they do it.

The Division also encourages convergence by working with other nations' enforcement institutions as they draft antitrust laws and enforcement guidelines. For example, the Division is consulting with the European Commission as it begins the complex work of refining its enforcement policies in single-firm abuse of dominance cases. On the other side of the world, China is finalizing its first comprehensive antitrust law. The Division has provided comments on several draft versions of China's law, met in Washington, D.C. with Chinese officials, and participated in a number of meetings in China to discuss sound competition policy, including visits by Assistant Attorney General Barnett in June 2005 and Deputy Assistant Attorney General Jerry Masoudi in March 2006. Both countries agree on the importance of continued dialogue, and additional work with Chinese officials is expected in the coming year.

Deputy Assistant Attorney General of International, Policy, and Appellate Matters Gerald Masoudi; Assistant Chief, Foreign Commerce Section, Anne Purcell White; Attorney Stuart Chemtob.

DIVISION AND FTC ISSUE COMMENTARY ON HORIZONTAL MERGER GUIDELINES

In March 2006, the Department of Justice and the Federal Trade Commission (FTC) jointly issued a commentary on their Horizontal Merger Guidelines. The commentary project is the latest chapter in the agencies' ongoing efforts to increase transparency in merger enforcement by providing guidance to the antitrust bar and businesses regarding how the agencies enforce section 7 of the Clayton Act. These efforts also have included the Department's 2001 Merger Review Process Initiative, which will be revised shortly; the 2003 merger data release; the Department's October 2004 Policy Guide to Merger Remedies; and the Department's increased use of explanatory closing statements in merger investigations.

In 2003, the Antitrust Division and the FTC initiated a comprehensive review of their horizontal merger investigations and cases over the previous five years, focusing on market shares and concentration levels associated with decisions to challenge transactions. In February 2004, following the release of the results of the 2003 study, the agencies held a joint three-day merger enforcement workshop, the primary purpose of which was to assess the practical application and efficacy of the merger guidelines. The consensus of workshop participants was that while the guidelines themselves did not need to be amended or otherwise revised, the agencies might consider offering more guidance to the business community, the antitrust bar, foreign antitrust enforcement officials, and industry regulators regarding how the agencies apply the guidelines to analyze horizontal mergers.

The Horizontal Merger Guidelines Commentary project, which the agencies announced in November 2004, was a direct response to that request. The commentary explains how the agencies have applied particular guidelines' provisions relating to market definition, competitive effects (including coordinated interaction and unilateral effects analysis), entry conditions, and efficiencies. Included throughout the commentary are summaries of actual mergers that the agencies have analyzed.

The commentary explains that the agencies do not apply the guidelines as a linear, step-by-step progression that inevitably starts with market definition and ends with an analysis of the efficiencies claimed by the parties or a determination of whether the acquired company is a failing firm. Instead they perform an integrated analysis focused on whether the merger is likely to affect the competitive process in a way that harms consumer welfare by raising prices, lowering quality, or reducing innovation.

The commentary should provide greater transparency and foster deeper understanding of how the two federal agencies responsible for U.S. antitrust law enforcement analyze horizontal mergers through the application of the principles and methods set forth in the guidelines.

DOJ AND FTC ANNOUNCE HEARINGS ON SINGLE-FIRM CONDUCT

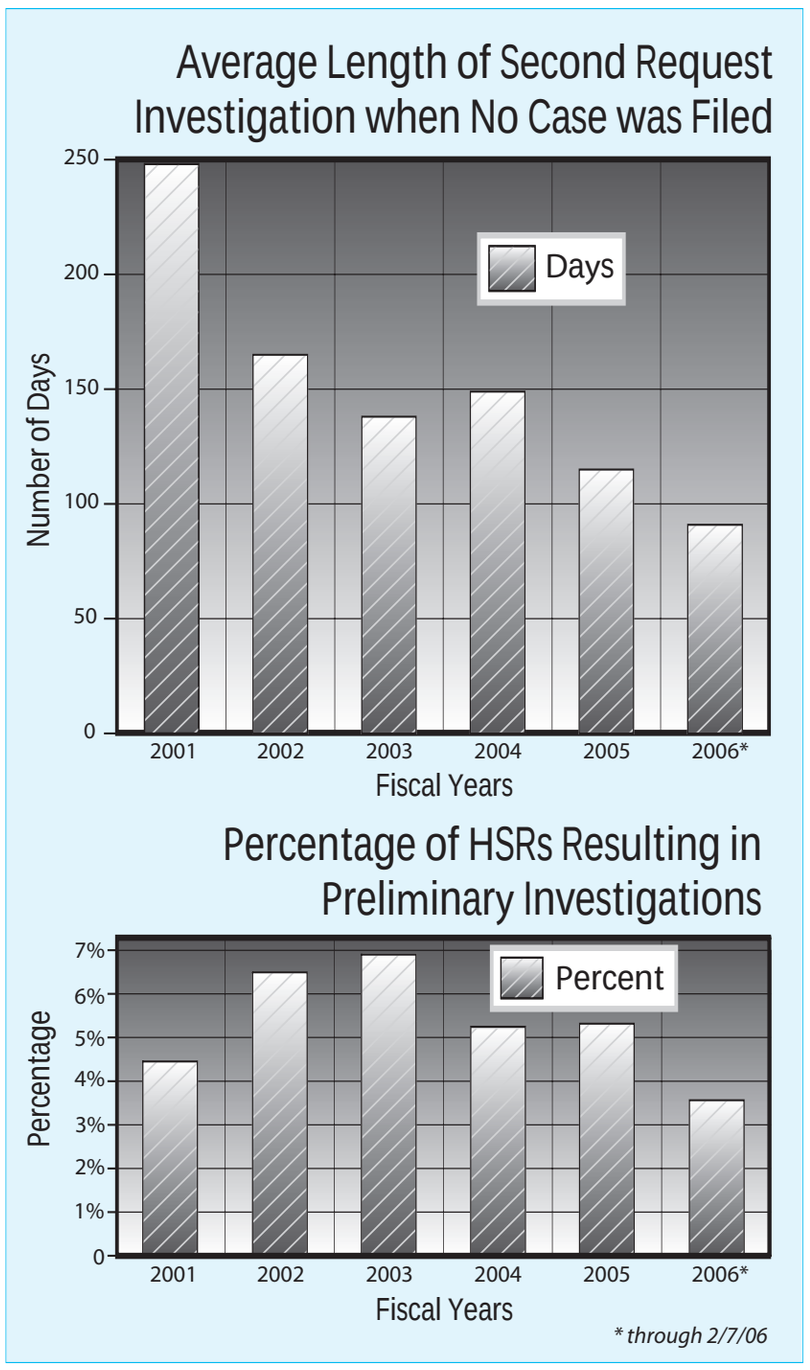
On November 28, 2005, the Antitrust Division and the Federal Trade Commission (FTC) announced that they will be holding a series of joint public hearings in 2006 to examine the antitrust implications of single-firm conduct. The hearings are intended to foster discussion and ultimately to enable better guidance to the business community by clarifying the line between what is appropriate under the antitrust laws and what is not. Line-drawing is a particular challenge when it comes to single-firm conduct, and thus a primary goal of the hearings will be to articulate areas of consensus about when specific types of single-firm conduct are procompetitive or benign, and when they may harm consumers.

Defining the circumstances constituting unilateral misconduct under Section 2 of the Sherman Act has proven to be a challenge because it is often difficult to distinguish procompetitive from anticompetitive unilateral conduct. The Supreme Court's most recent Section 2 decision underscored this tension and the corresponding need to avoid chilling procompetitive conduct. In *Verizon v. Trinko*, the Court made clear that neither possessing monopoly power nor charging monopoly prices is in itself illegal; indeed, the Court called it an important element of the free-market system. Similarly, neither intending to harm rivals nor actually doing so is in itself illegal. Instead, the critical focus is on whether an element of anticompetitive conduct accompanies the possession of, or the attempt to acquire, monopoly power.

Hearing participants will critically examine and discuss the standards used in recent cases, including the DOJ's enforcement actions against Microsoft, American Airlines, and Dentsply; the FTC's actions against Intel, Unocal, and Rambus; and private actions, such as the *Trinko* and *LePage's* cases. Participants will also discuss the practical business implications of single-firm conduct and examine what economic learning contributes to the analysis of exclusionary or predatory conduct.

The antitrust enforcement agencies, the private antitrust bar, and the business community all recognize the importance of articulating an objective, transparent, and economically sound framework for evaluating single-firm conduct. As the Supreme Court reasoned in *Trinko*, the "cost of false positives counsels against an undue expansion of § 2 liability." At the same time, the unlawful creation or preservation of monopoly power hurts consumer welfare.

Clear standards will help businesses comply with the antitrust laws and avoid chilling procompetitive behavior that benefits consumers. These hearings on the antitrust implications of single-firm conduct hopefully will seek to help the agencies achieve this objective and advance their learning in this important area.



Source: DOJ Antitrust Division

LOCATION, LOCATION, LOCATION...AND COMPETITION:

The Division's Efforts to Ensure Competitive Real Estate Services Markets

For many people, the purchase or sale of a home not only represents the fulfillment of the American dream, but is their single most significant personal transaction. In 2004, American consumers paid their real estate brokers more than $60 billion in commissions for brokerage services, an increase of almost 50 percent from the commissions paid the year before. In order to protect these commissions, some real estate brokers have instituted efforts to foreclose competition from new Internet-based competitors and other brokerage models. In response, the Antitrust Division has increased its enforcement activities and competition advocacy efforts to ensure that the industry remains open to all business models, and that consumers can enjoy the benefits – better services, increased consumer choice, and lower prices – that result from competition.

The Division is investigating real estate practices in numerous markets, and last year filed two actions to block attempts to limit competition from others with innovative approaches to serving their customers. In March 2005, the Division filed suit against the Kentucky Real Estate Commission in U.S. District Court for the Western District of Kentucky, challenging its regulations that prohibited Kentucky brokers from using cash rebates and other inducements to attract customers. Kentucky brokers who supported the rebate ban had been quoted as saying that it prevented a "bidding war" among brokers that could "lessen [broker] profits." In settling the lawsuit, the commission agreed not to enforce or adopt rules that limited broker discounting. Shortly thereafter, the South Dakota Real Estate Commission, in response to a Division inquiry, rescinded its rebate ban.

In September 2005, the Division filed suit against the National Association of Realtors (NAR), alleging that certain NAR policies are harming competition. The Divisions's lawsuit is currently pending in U.S. District Court in Chicago.

NAR has hundreds of affiliated Multiple Listing Services across the country – one in virtually every community. Each MLS maintains a database to which member brokers contribute the property listings of the customers they represent. An MLS participating broker thus has access to all or nearly all of the property listings in the local market and can distribute those listings to customers. Some brokers have recently begun delivering listings to customers via the Internet, through what are known as Virtual Office Websites, or VOWs. NAR's recent VOW policies include an "opt-out" provision that allows brokers to prevent Internet-based competitors from providing the same listing information over the web that other brokers can provide from their offices.

The lawsuit also challenges a NAR membership rule that denies access to MLS listings to brokers that operate referral services. This rule effectively prevents two brokers from working together in what can be a more innovative and efficient way, with one attracting new business and educating potential buyers about the market, and the other guiding the buyer through home tours and the contract and closing process.

In numerous states, often in collaboration with the Federal Trade Commission, the Division has commented on the competitive effects of legislative and regulatory proposals requiring all brokers to provide a set package of traditional real estate services to each consumer. Although these so-called "minimum service" proposals are pitched as consumer protection laws, they, in fact, limit competition from brokers offering a "fee-for-service" business model that can save consumers thousands of dollars on a transaction be-cause they pay only for the services they want. Importantly, the Division has found no significant evidence indicating that fee-for-service business models mislead or otherwise harm consumers.

To date, six states have minimum services provisions that do not allow for waiver or other pro-consumer modifications. Others, however, have either modified their provisions to allow consumers to waive their rights to a mandated package of services or have decided not to adopt a minimum service provision at all. At least one state declined to require the provision of specific services, but did mandate disclosure of all services offered. The Division continues to provide information and competition analysis to state lawmakers, real estate commissions, realtor associations and other professionals in many other states that are contemplating minimum services provisions.

The Division is also engaged in a broader effort to ensure that U.S. consumers benefit from competition in the real estate services industry. A well-attended workshop in October 2005 in Washington, D.C. on "Competition Policy and the Real Estate Industry," which was jointly sponsored by the Division and the Federal Trade Commission, was a key part of that effort. Participants from brokerage firms, NAR and local realtor associations, fee-for-service and internet referral brokers, and buyers' brokers spotlighted the competitive issues facing this industry. The Division also provides speakers upon request to various real estate-related organizations.

The Chiefs and Assistant Chiefs of the Civil Litigation Sections. Front Row (L-R): Joe Miller, Nina Hale, Donna Kooperstein, Jim Tierney. Back Row (L-R): Maribeth Petrizzi, Mark Botti, William Stallings, Scott Scheele, Renata Hesse, John Read. (Not pictured: Nancy Goodman and Laury Bobbish).

MERGER ENFORCEMENT — THE YEAR IN REVIEW

Merger enforcement continues to be one of the Antitrust Division's top priorities. In reviewing mergers, the Division seeks to pursue two goals simultaneously: to separate those few deals that are likely to create or increase market power and harm consumer welfare from the vast majority that are unlikely to reduce competition substantially, and to get out of the way of the latter kinds of mergers as quickly as possible. The Division continues to work to increase the transparency of the merger review process so that companies and their counsel can plan transactions with greater certainty about what to expect, and wherever possible to reduce the burdens that the process places on merging parties.

In fiscal year 2005 and early 2006 the Division dedicated substantial resources to investigate some of the most significant transactions in recent years.

The Numbers

The Division initiated 90 preliminary investigations into Hart-Scott-Rodino (HSR) - reportable transactions in FY05, a 16 percent increase over FY04. However, the percentage of HSR-reportable transactions that resulted in investigations remained relatively constant from FY04 to FY05 (5.2 percent and 5.3 percent, respectively), because the number of transactions also increased, from 1454 to 1695.

In FY05, 27.8 percent of the Division's merger investigations resulted in the issuance of second requests (25 out of 90 investigations). To put that figure in perspective, approximately 1.5 percent of the transactions reported to the agencies in FY05 resulted in second requests being issued by the Division, which is consistent with previous years, when the figure has wavered between 1 and 2 percent. In FY05, the Division challenged four mergers, or about 4 percent of the transactions that it investigated.

Telecommunications Industry Mergers

In 2005, the nation's telecommunications industry went through a consolidation phase, as horizontal competitors sought to join forces in both the wireless and wireline sectors of the industry. The Division's Telecommunications & Media section shouldered responsibility for reviewing each of those transactions.

The most significant transaction in the wireless sector in FY05 was Sprint's proposed $70 billion acquisition of Nextel. The Division's extensive investigation focused on the merger's potential effects on competition in the provision of mobile wireless voice and data services, including push-to-talk services, as well as on developing products where the companies were potential competitors, such as advanced wireless broadband services. The Division concluded that the merger would not give the combined company market power in any of these markets, that the services of other wireless carriers and new wireless technologies would likely provide alternatives for the merging parties' customers, and that those alternatives collectively would prevent the merger from harming competition.

The Division faced even larger challenges in reviewing the simultaneous mergers of SBC Communications Inc. with AT&T Corp. and Verizon Communications Inc. with MCI Inc. The Division investigated thoroughly all areas in which the merging firms competed, including residential local and long distance service, Internet backbone services, and a variety of telecommunications services provided to business customers. The Division carefully examined competition from cable companies, emerging technologies such as voice over Internet protocol (VOIP), changing regulatory requirements such as the Federal Communication Commission's Triennial Review Remand Order, and the substantial efficiencies that the parties claimed would result from the mergers.

In the end, the Division determined that the mergers would likely result in higher prices for certain business customers in 19 metropolitan areas throughout Verizon's and SBC's respective franchised territories. The investigations revealed that Verizon and MCI were the only two firms that owned or controlled the direct wireline connection that is used to supply voice and data telecommunications services to businesses in hundreds of commercial buildings in eight metropolitan areas in Verizon's territory. Similarly, SBC and AT&T were the only two firms that owned or controlled a direct connection to hundreds of buildings in 11 metropolitan areas in SBC's territory. In the absence of new entry, the Division concluded, the mergers would eliminate competition for facilities-based local private line service to those buildings. In separate consent decrees, the parties to the two transactions agreed to divest connections to hundreds of buildings in 19 cities, to a single buyer in each city. The Division otherwise found that the transactions were likely to generate substantial efficiencies that should benefit consumers.

Exchange Mergers

In 2005, the nation's leading equity exchanges entered a period of consolidation that promises to result in a major restructuring of the financial markets. On April 20, the privately-held, non-profit New York Stock Exchange announced plans to merge with Archipelago Holdings Inc., operator of the largest all-electronic stock market in the world, to become a publicly traded, for-profit enterprise that will offer both trading-floor and electronic exchange services. Two days later NASDAQ Stock Market Inc. announced its intention to acquire Instinet Group Inc., the electronic trading network controlled by the Reuters Group.

After detailed investigations of the two mergers, the Division determined that neither was likely to reduce competition substantially. Thanks in part to timing and discovery agreements that the Division reached with the parties, the Division was able to focus its investigations on the critical and determinative issue of entry. After the two transactions were announced, several separate enterprises, including regional exchanges such as the Boston Stock Exchange and the Philadelphia Stock Exchange, announced their intent to enter and compete in the equity trading facilities services, listing services, and/or the market data services industries. Some of the ventures were backed by many of the nation's leading investment banks and securities firms, including Merrill Lynch, Citigroup, Credit Suisse First Boston, Morgan Stanley, Goldman Sachs, and Fidelity Investments. The Division concluded that this planned entry was likely to result in additional, viable alternatives to the two merged firms sufficient to resolve any competitive concerns raised by the transactions, and closed its investigations.

☆☆☆

Press releases describing these and other 2005 merger enforcement decisions can be found on the Antitrust Division's website, at *http://www.usdoj.gov/atr*.

ANTITRUST AT THE SUPREME COURT

The Supreme Court has decided three significant antitrust cases this term. The cases – *Texaco v. Dagher* (consolidated with *Shell Oil v. Dagher*), *Illinois Tool Works v. Independent Ink*, and *Volvo Trucks North America v. Reeder-Simco GMC* – raise issues ranging from the ability of a joint venture to set prices for its products, to the interplay between antitrust and intellectual property law in the context of tying, to the Robinson-Patman Act.

Dagher

In order to compete in modern markets, competitors sometimes need to collaborate, and from an antitrust perspective such collaborations often are not only benign but actually procompetitive. The *Dagher* cases, decided on February 28, 2006, were class actions brought by gasoline service stations against Texaco and Shell, which had formed a joint venture (now defunct) to refine and market their branded gasoline in the western United States. A divided panel of the Ninth Circuit held that Texaco and Shell might have committed a per se violation of the Sherman Act when they agreed that the joint venture must set prices for both brands of gasoline that would be the same in each market and remanded for a factual determination at trial as to whether the pricing parity policy was reasonably necessary achieve the efficiencies of the joint venture.

The United States urged the Supreme Court to grant review, and the Court not only granted review, but reversed 8-0 in an opinion by Justice Thomas (Justice Alito not participating). The Court held, consistent with the United States's arguments as amicus, that it is not per se illegal under Section 1 for a lawful, economically integrated joint venture to set the prices at which it sells its products. The Court determined that the joint venture's pricing decisions were not a price-fixing agreement between competitors because Texaco and Shell did not compete with one another in the relevant market – gasoline sales to service stations in the western United States – but instead participated in that market exclusively through their investments in the joint venture. For antitrust purposes, therefore, Texaco and Shell should be regarded as a single firm competing with other sellers, and while the joint venture's pricing policy "may be price fixing in a literal sense... it is not price fixing in the antitrust sense." The Court further reasoned that the ancillary restraints doctrine, on which the Ninth Circuit relied, did not apply because the challenged practice involved the core activity of the joint venture itself – the pricing of the goods that it produced and sold – as opposed to activity outside the venture.

Independent Ink

Illinois Tool Works v. Independent Ink, decided on March 1, 2006, presented the question of whether market power can be presumed from the existence of a patent in tying cases. The Court's modern tying jurisprudence insists that plaintiffs allege and prove coercive economic power in the tying product market to justify per se condemnation of a tie under Section 1. But the Federal Circuit, feeling itself bound by older Supreme Court decisions such as those in *International Salt Co. v. United States* and *United States v. Loew's Inc.*, held that the existence of a patent on the tying product gave rise to a rebuttable presumption of market power as a matter of law.

The Supreme Court vacated that decision in an 8-0 opinion by Justice Stevens (Justice Alito not participating). The Court held, consistent with arguments raised by the United States as amicus, that in all cases involving a tying arrangement the plaintiff must prove that the defendant has market power in the tying product. The Court reasoned that "the presumption that a patent confers market power arose outside the antitrust context as part of the patent misuse doctrine," and had "migrated from patent law to antitrust law" in International Salt. However, the Court noted that Congress has since changed the patent laws to require proof of market power, thereby undermining the presumption. The Court further noted that its own historical disapproval of tying arrangements has substantially diminished in recent years; that the presumption was inconsistent with the Department of Justice and Federal Trade Commission Antitrust Guidelines for the Licensing of Intellectual Property, which reject the presumption as a matter of enforcement policy; and that the vast majority of academic literature recognizes that a patent does not necessarily confer market power.

Volvo

Volvo presented the question of whether a manufacturer that offers different wholesale prices to its dealers may be held liable for unlawful price discrimination under the Robinson-Patman Act absent a showing that it discriminated between dealers that were competing to resell its product to the same retail customer. In a decision written by Justice Ginsburg and issued on January 10, 2006, the Court reversed the Eighth Circuit and held that such a showing is essential in order to establish injury to competition and liability for unlawful price discrimination under the Act. The Court's decision was again consistent with the United States's position in its amicus brief.

Economic Analysis Group Chiefs and Assistant Chiefs (L-R): Eric Emch, Ronald Drennan, Kenneth Heyer, Beth Armington, Norm Familant, Dan O'Brien, Robert Majure.

PROFILE: THE DIVISION'S ECONOMIC ANALYSIS GROUP

Economics plays a central role in antitrust analysis. The Antitrust Division has its own in-house team of professional economists – the Economic Analysis Group (EAG) – to provide expert advice in this essential area.

EAG is made up of more than 50 economists, almost all of whom have PhDs and advanced training in industrial organization, and a smaller number of financial analysts. Its three sections – Economic Litigation, Economic Regulatory, and Competition Policy – support various aspects of the group's overall mission: undertaking rigorous analysis of specific Division matters; conducting research to test new analytical tools and expand understanding of antitrust economics; and engaging in outreach to the public, other governmental bodies, and other nations. EAG's Director is Kenneth Heyer, who currently also serves as the acting Deputy Assistant Attorney General for Economics.

Over the past decade, courts, practitioners, and the agencies have placed increasing emphasis on rigorous economic analysis in antitrust enforcement. EAG's role has grown accordingly and economics staff now works closely with Division attorneys on virtually all matters that come before the Division. In a typical enforcement matter, EAG staff participate in the decision to open an investigation, identify issues for study, help draft investigative demands and analyze parties' responses, and perform independent analysis of markets, the state of competition, and potential remedies. At trial, EAG staff may help legal staff support an independent testifying economist or appear as the Division's testifying expert. In addition to analyzing existing matters, the Division's economists track trade publications and industry conferences to identify business conduct that merits further investigation by the Division. And EAG frequently participates in staff exchanges with foreign competition agencies, universities, and other entities to familiarize the economics community with U.S. enforcement practices and promote the continuing development of economic science.

The Division's 2005 investigations of the Verizon-MCI and SBC-AT&T mergers provide a detailed example of EAG's value to the Division. These mergers involved numerous potential product markets and geographic markets within more than 40 states. EAG staff assembled and analyzed data covering the extent of competitive local infrastructure in 79 major metropolitan areas, the sales process to more than 70,000 corporate customers, and the purchasing behavior of millions of residential subscribers. This massive data analysis enabled the Division to identify several markets where the mergers were likely to produce anticompetitive effects, which it addressed through consent decrees containing divestiture remedies.

EAG also played a critical role in the Division's analysis of the acquisition of Instinet Group Inc. by The NASDAQ Stock Market Inc. and the merger of the New York Stock Exchange Inc. and Archipelago Holdings Inc. In both mergers, EAG's extensive analysis of entry conditions and expansion opportunities, as well as other empirical work, was instrumental in the decision not to challenge the mergers.

The Division also relied greatly on the input of its economists in the area of competition advocacy. In its May 2005 filing with the Federal Aviation Administration, the Division laid out the case for employing more market-based solutions for allocating scarce takeoff and landing rights (slots) at O'Hare Airport and other congested airports. And, in an August 2005 filing before the Department of Transportation, the Division critiqued a request for expanded antitrust immunity for Delta, Air France, KLM and Northwest Airlines – domestic and international airlines that had argued that expanded immunity was necessary to efficiently integrate two international alliances in the wake of the Air France-KLM merger. The Economic Analysis Group also played a significant role in the Division's investigations into the real estate industry – including the Division's case against the National Association of Realtors.

When not actively engaged in case work, EAG produces a large body of research that enhances the knowledge base and adds to the "tool kit" of competition authorities and the antitrust community at large, as well as many papers in its "discussion group" series. EAG includes outreach and academic research as part of its core mission.

ANTITRUST DIVISION SECTION CONTACTS

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The Office of Operations coordinates investigations and litigation policies and procedures affecting the Division's operations.

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FIELD OFFICES

Each of the Division's field offices handles criminal matters within its respective area and serves as the Division's liaison with U.S. Attorneys, state attorneys general, and other regional law enforcement agencies. The field offices also handle national and international matters that arise within their territories.

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Antitrust Division: *www.usdoj.gov/atr*

OBTAIN DOCUMENTS
Law firms and the general public may obtain paper copies of Division documents from the Antitrust Documents Group:

Phone: 202-514-2481
Fax: 202-514-3763
E-mail: *atrdocs.grp@usdoj.gov*

WEB LINKS
The following links may be used to obtain Division documents online:

Public Court
and Administrative Filings:
http://www.usdoj.gov/atr/cases.html

Guidelines and Policy
Statements:
http://www.usdoj.gov/atr/public/guidelines/guidelin.htm

Speeches:
http://www.usdoj.gov/atr/public/speeches/speeches.htm

Congressional Testimony:
http://www.usdoj.gov/atr/public/testimony/testimon.htm

CONTACT INFORMATION *cont.*:

Business Review Letters:
http://www.usdoj.gov/atr/public/busreview/letters.htm

PRESS RELEASES

Copies of Division press releases (from 1994 to the present) can be found online at:
http://www.usdoj.gov/atr/public/press_releases/2004/index04.htm

Media may contact the Office of Public Affairs at:

Phone: 202-514-2007
Fax: 202-514-5331

Law firms and the general public should contact the Antitrust Documents Group to obtain other documents.

ASSISTANT ATTORNEY GENERAL AND DIVISION STAFF

For contact information for the Office of the Assistant Attorney General and the Division's sections and field offices, see *http://www.usdoj.gov/atr/offices2.htm.*

Use the following link to obtain phone numbers for Division employees:

http://www.usdoj.gov/atr/contact/phoneworks.htm

Comments

To comment on past or ongoing investigations, send an e-mail to antitrust.atr@usdoj.gov.

Report Possible Antitrust Violations

If you have information about a possible antitrust violation or potential anticompetitive activity please contact the Division:

E-Mail:
newcase.atr@usdoj.gov
Phone: 1-888-647-3258
(toll-free in the U.S. and Canada) or
1-202-307-2040

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