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Commentators acknowledge we are on the verge of a merger wave with 2005 expected to see a worldwide surge in international deal-making. United States deals are expected to lead the way with domestic companies the targets of foreign acquirers. United States economic forces are uniquely aligned to drive this global merger boom: interest rates are relatively low; corporate profits are strong and getting stronger with many companies sitting on large cash reserves; and corporate pent up demand for the big deal is at a four-year high. In the final weeks of 2004 the dollar volume of merger deals in the United States exploded, sending the worldwide volume of announced deals for the year up over 40% compared to 2003 to almost \$2 trillion. Indeed, the number of Hart-Scott-Rodino merger filings in 2004 increased about 42% over the prior year (from 968 to 1377). Recently announced United States deals pushed December to a record deal-making month both in the U.S. and worldwide. Combined with other large domestic deals announced earlier in the year, 2004 was as a banner year for mergers and signals that the boom is clearly underway.

**Biggest U.S. Deals - December 2004**

<b>Acquirer</b>	<b>Acquired</b>	<b>Announced</b>	<b>\$ Billions</b>
Sprint	Nextel	Dec. 15	39.0
Johnson & Johnson	Guidant	Dec. 15	25.9
Symantec	Veritas Software	Dec. 16	13.5
Exelon	Public Service Enterprise	Dec. 20	12.3

**Other Big U.S. Deals - 2004**

<b>Acquirer</b>	<b>Acquired</b>	<b>Announced</b>	<b>\$ Billions</b>
J.P. Morgan	Bank One	Jan. 14	58.8
Cingular Wireless	AT&T Wireless	Feb. 17	41.0
Wachovia	SouthTrust	June 21	14.2
K-Mart	Sears	Nov. 17	10.9
Citizens Financial	Charter One	May. 4	10.5
Cox Enterprises	Cox Communications	Aug. 2	8.4

What, then, will be the response of the FTC - and the antitrust enforcement agencies - to this expected merger wave? Will it be business as usual, or will we see increased aggressiveness? Newly appointed

Chairman Majoras at the November 18 ABA Antitrust Section Fall Forum laid out her proposed merger policy initiatives for the upcoming year. Her comments indicate few significant changes lie ahead on the merger enforcement front.

Central to Chairman Majoras' antitrust enforcement program is the review of mergers, which she noted, with or without a merger wave, will remain a "core function" at the agency under her leadership. The FTC will not "sit back and turn on cruise control," she informed the Fall Forum. The Chairman's merger agenda will focus on all aspects of merger review, including substantive analysis and enforcement, the merger review ("HSR") process, merger remedies, and coordination with states and foreign antitrust authorities.

Importantly, Chairman Majoras de-emphasized the differences between the two enforcement agencies. She explained that there is a common perception that the two antitrust agencies approach the issue of mergers differently. "Having now held senior positions at both the DOJ and FTC, however, I believe that most differences between the agencies are largely overblown and in the past and that both agencies today strive for flexibility, above all, in crafting merger remedies in particular transactions."

While addressing merger process reform, which seems to be a key component of her agenda, Chairman Majoras commented that she has "long pushed for improvements in merger review procedures, both as a government enforcer and private practitioner." As a result, she indicated that it "should come as no surprise, then, that one of my priorities will be to lend renewed vigor to merger process reform." One wonders if process reforms under the new Chairman will trump substantive enforcement. I suspect it will.

The Chairman discussed four process-related projects already underway at the agency:

- First, the FTC is continuing to work internally and with DOJ to determine the most effective methods for identifying responsive materials stored in various types of electronic formats.
- Second, the FTC is working to improve its ability to receive and review electronic productions.
- Third, the FTC is working on a model letter that would modify the standard Second Request instruction to permit and provide specifications for electronic production; and
- Fourth, the FTC is working to produce and hopes to release in the near future an updated model Second Request, along with annotations that should provide useful information to parties and practitioners.

"Cooperation" is now the new mantra at the Commission. Chairman Majoras emphasized the importance of cooperation in merger review. "Cooperating with foreign competition agencies and promoting convergence toward best practices, both on a bilateral and multilateral basis, will continue to be key components of the FTC's enforcement program under my leadership." Additionally, as antitrust regimes are continuing to grow around the world, "the FTC will continue to devote significant resources to assisting new agencies as they strive to formulate and implement sound competition policy."

It is worth noting that Chairman Majoras specifically commented on the role of customer testimony after the *Oracle* and *Arch Coal* decisions at an earlier gathering. At a George Mason University School of Law Symposium on October 6, she emphasized quite clearly that customer complaints and customer testimony provided the enforcement agencies with real-world tests of product market and with examples of

anticompetitive effects and consumer harm. Such testimony, she observed, is practical and realistic and not theoretical. Chairman Majoras vowed to continue to base FTC merger challenges on customer testimony and complaints.

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## **THE EUROPEAN COURT OF FIRST INSTANCE UPHOLDS MICROSOFT REMEDIES**

On December 22 the President of the Court of First Instance, Mr. Bo Vesterdorf, (the “President”) dismissed an interim measures application by Microsoft Corporation (“Microsoft”), by which it sought to suspend the remedies imposed by the European Commission (the “Commission”) in its decision finding that Microsoft had breached Article 82 of the EC Treaty. The President found that Microsoft had shown that it had a prima facie case. However, Microsoft had not produced sufficient evidence to show that the implementation of the remedies might cause it serious and irreparable damage.

### **Background**

On 24 March 2004, the Commission adopted a decision finding that Microsoft had infringed Article 82 of the EC Treaty by:

- Refusing to supply its competitors with certain necessary interoperability information and preventing them from using this information to develop competing products, thereby foreclosing them from the market for work group server operating systems.
- Making availability of the Windows client personal computer operating system conditional on the acquisition of Windows Media Player (“WMP”) software, thereby foreclosing the market for media player software.

The Commission imposed a fine of EUR 497 million, and ordered Microsoft to bring the abuses to an end, and to:

- Disclose, within 120 days, the relevant interoperability information and allow competitors to use it on reasonable and non-discriminatory terms to develop compatible server products (the “interoperability remedy”).
- Within 90 days, offer a fully functional version of its Windows client operating system which does not incorporate WMP. Microsoft was still permitted to offer a bundled version of Windows including WMP (the “tying remedy”).

On June 8 2004, Microsoft lodged an appeal with the European Court of First Instance (“CFI”) challenging the Commission’s decision. Microsoft subsequently sought interim relief to suspend the operative parts of the Commission’s decision (the order to bring the infringements to an end and the imposition of the two remedies). Following this application, the Commission agreed that it would not seek to enforce the parts of its decision relating to the remedial orders until the application for interim relief had been decided. The President granted leave for various parties to intervene in the appeals.

### **The Order**

In order for interim measures to be granted, the applicant must:

- Demonstrate the seriousness of the main application and put forward the pleas of fact and law establishing a prima facie case for the interim measures applied for (that is, the main action must not be manifestly inadmissible or unfounded).
- Establish the urgency of the request, showing that serious and irreparable damage would be caused, should the measures sought not be granted.

The President considered separately the case for suspension of the interoperability remedy and the tying remedy.

### **The Interoperability Remedy**

#### **Prima Facie Case**

The President concluded that the requirement to demonstrate a prima facie case was satisfied. Microsoft's challenge to the Commission's finding of abuse raises a number of questions of principle and issues which require a thorough examination. In particular,

- The case raises the question of whether the conditions laid down by the European Court of Justice in *IMS Health (Case C-418/01)* are necessary (as argued by Microsoft) or merely sufficient (as argued by the Commission). The Commission contends that the existence of exceptional circumstances must be assessed on a case-by-case basis, and that it cannot therefore be excluded without a thorough examination of each case, that a refusal be abusive, even though the conditions previously laid down by the European Courts are not satisfied. Microsoft maintains that a refusal to supply can be found to be abusive only where the conditions described by Community case law are satisfied.
- There is a question whether, where the exercise of IP rights is in issue, the nature of the protected information should be taken into account. The President noted that the secret and technical nature of the information which Microsoft is required to disclose is fundamentally different from the information in the previous cases. The CFI must, therefore, assess whether the secret nature of the information and its value alters the legal principles established in those cases.

- There is a genuine dispute between the Commission and Microsoft as to the indispensability of the information at issue. The question of whether the information requested from Microsoft is actually necessary for interoperability requires a thorough examination of facts and law.
- Microsoft's argument that its refusal to supply was objectively justified on the basis of protection of its IP rights can not be rejected as unfounded. The question of whether the Commission was right in finding that Microsoft's rights to protect its IP did not justify its refusal to supply requires a full evaluation of the interests involved and on the balance to be struck between the protection of IP rights and the requirements of free competition.

#### **Urgency**

Microsoft claimed that the implementation of the contested decision would damage its IP rights, its commercial freedom and capacity to develop its products, and would irreversibly alter market conditions. The President considered each of these claims in turn. He concluded that in each case Microsoft had not sufficiently demonstrated that the urgency condition was satisfied. For example, Microsoft had not explained the type of irreparable damage that might be caused by the fact that third parties had knowledge of data disclosed by it, and had ignored the possibility of contractual safeguards concerning the confidentiality and use of the disclosed information pending the decision in the main action by the CFI. The President also found that the Commission decision was not fundamentally different from the disclosure policy already implemented by Microsoft under its Settlement Agreement with the United States. Finally, Microsoft did not demonstrate that there would be

obstacles preventing it from regaining a significant part of any market share which it may lose as a result of the remedy.

### **The Tying Remedy**

#### **Prima Facie Case**

The President considered that Microsoft had established that there was a prima facie case. Its main arguments raised complex issues which the CFI must resolve in the main action:

- Microsoft argued that the Commission has unlawfully applied a new theory on tying. It argued that the Commission's conclusion that the media player market would "tip" in Microsoft's favor was based on pure supposition, and did not take into account the realities of the market. The President considered that this argument is likely to raise one or more important questions of principle, in particular, about the extent to which the Commission legitimately relied on a finding of "indirect network effects". Further, there is a question whether the Commission may rely on the probability that a market will "tip" in favor of a dominant company as a basis for imposing a sanction in respect of tying, which might not otherwise be seen to have an anti-competitive effect.
- An important question arises as to whether the Commission should have given greater weight to the positive effects of the Windows operating system "design concept". The CFI may consider whether anti-competitive tying can be objectively justified.
- The factual basis on which the Commission's conclusions were based requires detailed analysis in order to assess Microsoft's arguments. In particular, the CFI will need to test Microsoft's argument that the Commission's finding of "indirect network

effects" is contradicted by evidence that content providers continue to have recourse to different media formats.

- Finally, Microsoft's arguments that the Commission incorrectly identified a separate media player market cannot be regarded as prima facie unfounded. Complex economic assessment is required to consider this point.

#### **Urgency**

Microsoft claimed that the tying remedy would irreversibly affect the value of the Windows platform, causing it to sustain serious and irreparable harm to the "basic design concept" of the Windows operating system and to its reputation. The President rejected both these arguments, and concluded that Microsoft had not established to the requisite legal standard that the urgency condition was satisfied.

The President did not consider that this interference with Microsoft's commercial freedom could be considered to be irreparable as there was no evidence that, in the event that the contested decision is annulled, Microsoft would not be able to reapply its basic design concept (Windows including WMP) to all its products. The President also concluded that Microsoft had not provided sufficient details of the disadvantage that it would suffer as a result of creating a new version of Windows without WMP. Financial costs are not, other than exceptionally, sufficient for these purposes. Microsoft had also not demonstrated that the alleged benefits of a uniform Windows platform would be irreversibly lost.

The President also held that Microsoft has not demonstrated that its customers would associate any problems encountered with a malfunction of Microsoft's product such that its reputation would be damaged. End customers can be made aware

of the consequences of buying a system without WMP. Microsoft had further not demonstrated that it would be unable to take the necessary public relations and advertising measures to address any potential damage to its reputation that might occur.

## **Conclusion**

The President concluded that due to Microsoft's failure to demonstrate to the necessary legal standard that either of the remedies imposed by the Commission might cause serious or irreparable damage, the urgency condition was not satisfied. The interim measures application was therefore dismissed in its entirety.

## **Comment**

As a result of this order, the remedies imposed in the Commission's decision become effective immediately. The Commission noted that Microsoft had already prepared an unbundled version of Windows which should be available on the market in a few weeks. With regard to the interoperability remedy, Microsoft had told the Commission that it has set up a "work group server protocol program" through which it will make available the interoperability information. The Commission and Microsoft are discussing an appropriate monitoring mechanism.

Microsoft has two months in which to appeal this order to the European Court of Justice. The Commission had suspended the implementation of the remedies pending the President's order. However, it has stated that it is not its practice to voluntarily suspend its own decision where the President has already rejected an interim measures application. Further, it states that it is not aware of any precedent whereby the ECJ has suspended implementation pending its review of the CFI's order.

In a press statement, Microsoft noted that it was encouraged that the President recognized that it had a prima facie case. It noted that it is "hopeful that the issues highlighted.... will create an opportunity for the parties to discuss settlement".

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## **DIFFERENCES IN APPROACH TO MERGER REMEDIES BY THE FTC AND THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION**

It takes merging parties longer and longer to negotiate settlements with the U.S. antitrust regulators. Indeed, negotiating merger settlements can be a burdensome, complicated, and complex process. To provide guidance to the business community and antitrust bar regarding the analytical framework used by the Department of Justice ("DOJ") when negotiating merger remedies, the Antitrust Division ("Division") recently released a Guide to Merger Remedies ("Guide"). The Guide is available on the Division's website at [www.usdoj.gov/atr/public/guidelines/205108.htm](http://www.usdoj.gov/atr/public/guidelines/205108.htm).

## **Background**

While the Guide is not a significant departure from previous practice, it does represent an effort to provide greater certainty in the process. The release of the Guide is also noteworthy because it follows the release of the Federal Trade Commission's ("FTC") April 2, 2003 Statement on Negotiating Merger Remedies ("FTC Statement"). It also demonstrates that there are some subtle but significant differences between the Division's and the FTC's approaches.

The Guide reaffirms the Division's position that there must be a significant nexus between the

proposed transaction, the nature of the harm, and the proposed remedial provisions. The Guide also places emphasis on ensuring that the remedy fits the violation and flows from the theory of competitive harm. The regulators usually focus on two theories of harm; (1) coordinated effects theory is when a merger makes it more likely that post merger competitors will be able to coordinate pricing, and (2) unilateral effects theory is when the merged firm can profitably raise prices after the merger because the merged parties were uniquely close competitors. If the staff is concerned about coordinated effects, the staff might insist on a divestiture of assets to a buyer that is outside the concentrated market. Therefore, the Division's position is to analyze each merger on its specific facts and to fashion a remedy that is appropriate to the particular anticompetitive effect.

### **Guiding Principles**

The Division's Guide offers the following principles as a foundation for the development of remedies in all Division merger cases:

- Remedies will not be accepted unless there is a sound basis for believing a violation will occur.
- Remedies must be based on a careful application of sound legal and economic principles to the particular facts of the case at hand.
- Restoring competition is the key to an antitrust remedy.
- The remedy should promote competition, not competitors.
- The remedy must be enforceable.
- The Division will commit the time and effort necessary to ensure full compliance with the remedy.

### **Fashioning the Remedy**

There are two basic forms of merger remedies. One form addresses the structure of the market, while the other addresses the conduct of the merged firm. Structural remedies usually involve divestitures. Conduct remedies entail provisions in a consent decree that require the antitrust agency to manage or regulate the merged firm's post merger business conduct.

According to the Guide, structural remedies (divestitures) are preferred over conduct (behavioral) remedies. However, the Guide notes that a divestiture must include all assets necessary for the purchaser to be an effective long-term competitor, and that the divestiture of an existing stand-alone business entity is preferred over a sale of assets that are cobbled together. Further, the merged firm must divest rights to critical intangible assets where firms with alternative patent rights are merging. Such rights can be transferred by a sale of through licensing. Conduct relief is appropriate only in limited circumstances, such as where is it an adjunct to a structural remedy such as a short term supply agreement to a buyer of divested assets.

### **Implementation of Remedy**

The Guide addresses implementation of the merging parties' chosen remedy, explicitly endorsing the use of the so-called "fix-it-first" remedy, which is usually a divestiture of overlapping assets proposed by the merging parties as a means to resolve anticompetitive concerns without the need for a formal consent decree. The Guide cautions, however, that a "fix-it-first" remedy is unacceptable if the remedy must be monitored. The FTC, in contrast, has no formal "fix-it-first" policy, and the Commission almost always requires parties to enter into a consent order.

The Guide expresses a desire for divestitures to be accomplished quickly rather than identifying an acceptable buyer prior to entering into a consent decree. Indeed, the Division usually will enter into a consent decree with the merging parties that provides them with a period of time to reach an agreement to sell the required assets. The Division also retains the ability to approve the buyer. The FTC, on the other hand, typically requires the specific buyer of the divested assets to be identified and named in the consent decree before the Commission will approve a consent decree and allow the deal to close. It justifies this “buyer up-front” requirement on the ground that it minimizes the risk that (a) there will not be a purchaser for the assets proposed to be divested, (b) the buyer will not be able to restore competition, and (c) the competitive value of the assets, and competition itself, will diminish while the merging parties search for a buyer.

### **Crown Jewel Provisions Disfavored**

The Guide disfavors crown jewel provisions because it is viewed as something more than is necessary to remedy the competitive problem, while the FTC allows for the use of crown jewel provisions because it provides huge incentives for the merging parties to find an acceptable buyer. A crown jewel provision requires the merging parties to sell a larger or more attractive set of assets if they are unable to find a buyer for the original divestiture package within a specified period of time. Some in the antitrust bar have claimed in the past that some FTC negotiations may take longer than Division negotiations because of the FTC’s use of crown jewel provisions. The use of crown jewel provisions complicate settlement negotiations because parties believe that they seriously dilute the value of the divested assets as buyers may intentionally delay negotiating so they can purchase the assets at a lower price.

### **Trustee Provisions**

The Guide states that it is standard practice for the Division to include a divestiture trustee provision in its consent decrees, however, it is less common for the Division to include provision relating to operating trustees (trustees that oversee the operation of the business to be divested) and monitoring trustees (trustees that monitor compliance with the consent decree). The FTC, on the other hand, favors the appointment of monitoring trustees to ensure compliance with the decree.

### **Compliance with Decrees**

The Guide states that the Division’s consent decrees must be binding on the merging parties to ensure that they fulfill their consent decree obligations. The consent decree must provide a means to investigate compliance with the decree. The Division also makes clear that it will vigorously enforce its decrees.

### **Conclusion**

As stated previously, the Guide does not really depart from previous practice with regards to the methods used to determine merger remedies, however, it is noteworthy because (1) it indicates subtle differences between the FTC and the Division, and (2) it provides for more transparency in the settlement negotiation process.

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## **DOJ WHITE COLLAR CRIME UPDATE**

The Antitrust Division continues to send a strong message to corporations and corporate executives engaged in potential bid rigging and price-fixing schemes. On December 8, Inter-Tel Technologies



Inc. (“Inter-Tel”), a subsidiary of Inter-Tel Incorporated, agreed to plead guilty and to pay an \$8.71 million criminal fine, civil settlement, and restitution relating to charges of bid rigging and wire fraud in connection with the Federal Communication Commission’s E-Rate program. The E-Rate program, created by Congress in the Telecommunications Act of 1996, provides funding for needy schools and libraries to connect to and utilize the Internet. Under the E-Rate program which is funded by monies collected from telephone users, schools apply for monies to provide cabling, Internet backbone equipment (i.e. servers, PBX, and switches), and to pay for monthly connectivity service fees.

In a two-count felony charge filed under seal on December 6, 2004 and unsealed on December 8 in the U.S. District Court in San Francisco, Inter-Tel was charged with one count of allocating contracts and submitting rigged bids for E-Rate projects at two different school districts in Michigan and California. Inter-Tel also was charged with one count of wire fraud and aiding and abetting by willfully entering into a scheme to defraud the E-Rate program in San Francisco by inflating bids, agreeing to submit false and fraudulent documents to hide the planned installation of ineligible items, and submitting false and fraudulent documents to defeat inquiry into the legitimacy of the funding request. Inter-Tel negotiated a resolution of this case, which, if approved by the court, requires the company to pay \$1.71 million in criminal fines and \$7 million in restitution and civil settlement.

In May 2004, NEC-Business Network Solutions Inc., a subsidiary of NEC America Inc., pleaded guilty and paid a total \$20.6 million criminal fine, civil settlement and restitution relating to charges of collusion and wire fraud. NEC/BNS continues to cooperate in the ongoing nationwide

investigation headed by the Antitrust Division. Additionally, the U.S. Attorney's Office in San Francisco brought a case involving a San Francisco Unified School District official, Desmond McQuoid, who pleaded guilty to mail fraud and was sentenced to 22 months in prison for his part in submitting false billings to the school district and for his participation in the attempted E-Rate program fraud in San Francisco.

The charges resulted from an ongoing federal investigation of fraud and anti-competitive conduct in the E-Rate program. The investigation is being conducted jointly by the U.S. Department of Justice's Antitrust Division, and the United States Attorney's Office for the Northern District of California, along with the assistance of the San Francisco, Los Angeles, Fresno, and Detroit offices of the FBI. The civil case is being handled jointly by the U.S. Attorney's Office for the Northern District of California and the Department of Justice's Civil Division.

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## **RECENT ACTIVITIES**

### **DOJ ANTITRUST HIGHLIGHTS**

- On December 20, International Steel Group Inc. announced that the Antitrust Division did not formally issue a second request for additional information and that it received early termination of the waiting period under the Hart-Scott-Rodino Antitrust Improvements Act. The previously announced merger of ISG and Ispat International N.V. created the largest steel manufacturer in the world.
- On December 16, the Antitrust Division announced a settlement with the Eastern Mushroom Marketing Cooperative (“EMMC”), the nation’s largest mushroom farmer cooperative, requiring the EMMC to stop buying mushroom farms only to shut them down, and to make farms it had previously shut down available to competing farmers. The Antitrust Division filed a lawsuit along with a proposed consent decree that resolved its concerns regarding EMMC’s alleged conduct, in the U.S. District Court for the Eastern District of Pennsylvania. The lawsuit alleged that EMMC’s Supply Control campaign was an agreement in restraint of trade in violation of Section 1 of the Sherman Act. According to the complaint, the EMMC, which controls approximately 90 percent of the common table mushrooms grown in the eastern United States, launched a campaign in May 2001 to prevent nonmember farmers from buying or leasing available mushroom farms. Allegedly, EMMC’s members contributed more than \$6 million to purchase mushroom farms, or lease options on them, only for the purpose of placing deed restrictions that barred mushroom farming on the land. The EMMC is organized under the Capper-Volstead Act, which gives farmers limited antitrust immunity to act together voluntarily in collectively processing, preparing for market, handling, and marketing their products. The complaint, however, alleges that the immunity of the Capper-Volstead Act does not apply to the EMMC’s Supply Control campaign. According to the complaint, the Capper-Volstead Act provides no immunity for members of a cooperative to conspire to prevent independent, nonmember farmers from competing with the cooperative or its members.
- On December 16, the Antitrust Division and the FTC released a joint letter urging the Massachusetts Bar Association to narrow substantially or reject a proposal that would unnecessarily reduce or eliminate competition between nonlawyers and lawyers to provide many services. According to the letter, signed by the Department’s Assistant Attorney General for Antitrust R. Hewitt Pate and FTC Chairman Deborah P. Majoras, the proposal, a model definition of the practice of law, could be interpreted to prevent real estate agents from explaining smoke detector or lead laws to clients; prohibit software makers from selling will-writing and other software; and prevent many advocacy organizations and individual advocates from competing with lawyers to provide citizens with information about legal rights and issues and to help them negotiate solutions to problems. The proposed definition also could prohibit income tax preparers, accountants, investment bankers and other business planners from providing advice to their clients that includes information about various laws. Many states permit nonlawyers to provide such services in competition with lawyers. Competition between lawyers and nonlawyers has promoted consumer benefit. Assistant Attorney General Pate observed, that “this proposal to define the practice of law to restrain competition between lawyers and nonlawyers will likely raise prices and harm consumers. Those who would not pay for a lawyer would be forced to do so, and, traditionally, lawyers charge more than lay providers for such services. Further, without competition from nonlawyers, lawyers’ fees are likely to increase.”

## **RECENT ACTIVITIES**

### **DOJ Antitrust Highlights (Continued)**

- On December 15, National Oilwell, Inc. (“National Oilwell”) and Varco International, Inc. (“Varco”) jointly announced that they expected to substantially comply with the second request issued by the Antitrust Division by the end of 2004. The information request regarding the merger between the companies was issued under the HSR Act. National Oilwell and Varco stated that they remain confident that the merger will proceed and expect closing within the first quarter of 2005.
- On December 15, Sprint and Nextel Communications, Inc. (“Nextel”) announced that their boards of directors unanimously approved a definitive agreement for a merger of equals. The combination will create a leading wireless carrier. The new company will be called Sprint Nextel. Sprint and Nextel currently have a combined total equity value of approximately \$70 billion and serve more than 35 million wireless subscribers on their networks and 5 million additional subscribers through affiliates and partners. The two companies, along with their affiliates and partners, operate networks that directly cover nearly 262 million people, more of the U.S. population than any other carrier. The deal is expected to be scrutinized by the Antitrust Division as the Division just completed its review of Cingular’s acquisition of AT&T Wireless.
- On December 9, a consortium comprised of Sony Corporation of America, Providence Equity Partners, Texas Pacific Group, Comcast Corporation and DLJ Merchant Banking Partners, together with Metro-Goldwyn-Mayer Inc. announced that the waiting period under the HSR Act, relating to the proposed acquisition of MGM by LOC Acquisition Company expired without a second request from the Antitrust Division.

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## **FTC ANTITRUST HIGHLIGHTS**

- In a unanimous Commission opinion announced on January 6, 2005, the Federal Trade Commission ruled that Chicago Bridge & Iron Company (“CB&I”) illegally acquired certain Pitt-Des Moines, Inc. (“PDM”) assets. CB&I completed the acquisition of PDM assets in February 2001, during the pendency of a Commission investigation. According to the unanimous opinion, signed by Commissioner Orson Swindle, the acquisition substantially lessened competition in four relevant product markets in the United States. The Commission held that the acquisition violated Section 7 of the Clayton Act and Section 5 of the FTC Act. To restore competition as it existed prior to the merger, the Commission ordered CB&I to create two separate, stand-alone divisions capable of competing in the relevant markets, and to divest one of those divisions within six months. Following an administrative trial to resolve these charges, an administrative law judge ruled that the acquisition was anticompetitive and ordered CB&I to divest all assets obtained in the acquisition. Both CB&I and counsel supporting the complaint appealed this initial decision, and the case was reviewed by the full Commission. In the opinion released on January 6, the Commission upheld the initial decision’s finding that the acquisition was unlawful, but differed with that decision’s analysis on certain issues and with the decision’s final relief.

## RECENT ACTIVITIES

### FTC Antitrust Highlights (Continued)

- On December 31, William E. Kovacic, FTC General Counsel, left the Commission to return to academic life as the E.K. Gubin Professor of Law at the George Washington University Law School. Chairman Majoras designated John D. Graubert, currently Principal Deputy General Counsel, to serve as Acting General Counsel.
- On December 28, the Commission approved a petition from Liberty Media Corporation (“Liberty”) requesting that the FTC reopen and modify the final order in the matter of *Time Warner, Inc., et al.* (Docket No. C-3709), as it applies to Liberty and its continuing ownership of Time Warner stock during the term of the order. Under the original order, Liberty was prohibited from holding any ownership interest in Time Warner that is entitled to exercise voting power, with certain limited exceptions. To allow Liberty to continue to hold stock in Time Warner after the order became final, Time Warner created a special class of non-voting stock for Liberty, but that stock may not be held by any other shareholders. In its petition, Liberty expressed interest in lending some of its Time Warner stock to a financial institution to earn fees that will offset costs it is incurring elsewhere. As part of the stock loan, however, Liberty’s special non-voting stock would have to be converted to regular Time Warner voting stock as it is transferred to the borrower. Accordingly, Liberty requested that the Commission reopen and modify the final order to allow it to lend the Time Warner stock in a way that involves the stock being converted to voting stock, provided that Liberty cannot direct, control, or influence the voting of any Time Warner stock during the period of the loan. The Commission approved that request by a vote of 3-0-2, with Chairman Deborah Platt Majoras recused and Commissioner Jon Leibowitz not participating.
- On December 21, the Commission received a petition from Aventis S.A. (“Aventis”), the successor company to Hoechst AG and Rhone-Poulenc S.A. (“RP”) to reopen and modify a final consent order regarding the 1999 merger of the two companies. Under the terms of the Commission order, which became final on January 20, 2000, Aventis was required to reduce to five percent its holdings in Rhodia, a French-based chemical company in which RP held a 67 percent share at the time of the merger. The respondents were given approximately five years to complete their sale of Rhodia shares. In the petition, Aventis requested that the Commission reopen the final order to modify and set aside certain sections. Specifically, it would like the FTC to release the respondents from any obligation with respect to the Rhodia shares and the conduct of Rhodia’s cellulose acetate business, due to changes that have occurred within the industry. Aventis states that the Kuwait Petroleum Company’s sales of all of its shares of Celanese to BCP Crystal Acquisition Group GmbH & Co. KG, an entity affiliated with the Blackstone group, severs the common link between Celanese and Rhodia that was the basis of the Commission’s concern. Aventis therefore requests that the Commission set aside those sections of the order that requires it to divest its Rhodia shares because the Commission’s remedial objective, through this changed industry condition, has already been met. Aventis also contends that these changes would be in the public interest. The FTC is accepting public comments on the petition until January 19, 2005.
- The Commission approved a final consent order on December 21 concerning Buckeye Partners, L.P. (“Buckeye”) and Shell Oil Company (“Shell”) related to Shell’s sale of a package of refined petroleum product pipeline and terminal assets to Buckeye, and to send a response letter to the commenter of record. The Commission’s vote to approve the final order and send the letter was 5-0.

## RECENT ACTIVITIES

### FTC Antitrust Highlights (Continued)

- On December 21, the Commission approved a modified final consent order concerning AspenTechnology, Inc., (“AspenTech”) which requires AspenTech to divest certain process engineering simulation software assets based on the FTC’s contention that its acquisition of Hyprotech, Ltd. had anticompetitive effects in several high technology markets. The Commission received several comments on the proposed consent order in this matter, and has made technical modifications based on some of the comments received. Through the action announced on December 21, the FTC formally approved the final order. The Commission vote to modify the final order, approve the final order, send the letters, and approve the proposed divestiture was 4-0-1, with Commissioner Pamela Jones Harbour not participating.
- The Federal Trade Commission announced on December 21 that it will host a public conference in Washington, DC, on January 14, 2005, to examine the price effects of mergers and concentration in the United States petroleum industry. The conference, which is open to the public, will be held at the FTC’s Conference Center located at 601 New Jersey Ave., NW. The conference brings together a group of independent economic experts to evaluate two studies examining price effects within the petroleum industry. The first is a March 2004 case study of the effects of the recent Marathon/Ashland Corp. joint venture. The second is the May 2004 report by the Government Accountability Office that examined the effects of mergers and market concentration in the U.S. petroleum industry. The economists scheduled to participate in the econometric discussion are from the U.S. Department of Justice, the Massachusetts Institute of Technology, the University of Texas, the University of Chicago, and the University of California at San Diego.
- On December 20, the FTC announced that it will conditionally allow Genzyme Corporation’s (“Genzyme”) proposed \$1 billion acquisition of ILEX Oncology, Inc. (“Ilex”), provided the companies divest overlapping assets in the U.S. market for solid organ transplant (“SOT”) acute therapy drugs. Under the terms of the consent agreement with the Commission, competition in the SOT acute therapy drug market will be maintained through Genzyme’s divestiture of all contractual rights to Ilex’s monoclonal antibody Campath®, for use in solid organ transplants, to Schering AG (“Schering”). According to the FTC, Genzyme’s Thymoglobulin®, a polyclonal antibody, competes directly with Campath, and the two products are two of the primary therapies available in the U.S. SOT acute therapy drug market. To address the possible anticompetitive effects of the transaction as originally proposed, the consent order requires Genzyme to divest all contractual rights related to Ilex’s Campath, for use in SOT, to Schering, including Ilex’s portion of future U.S. earnings from the sales of Campath in SOT. Through existing contracts, Schering already distributes and markets Campath in the United States and also participates in the drug’s development activities. The FTC believes that Schering is well-positioned to acquire the Campath assets and vigorously compete in the SOT acute drug therapy marketplace. In addition, because Campath is manufactured by a third party, there is no need for an interim supply agreement pending divestiture to Schering.

Under the terms of the order, the companies will be assisted by an FTC-approved monitor to implement a formula to determine the portion of U.S. Campath earnings attributable to SOT sales. That formula is based in large part on sales information from the United Network for Organ Sharing (“UNOS”), including UNOS’s federally mandated database, which will help determine the portion of Campath sales attributable

## **RECENT ACTIVITIES**

### **FTC Antitrust Highlights (Continued)**

to SOT. The order also allows for the formula to be reevaluated based on changes in the market for, or in the use of, Campath. The Commission vote to accept the consent agreement and place a copy on the public record was 4-0-1, with Commissioner Pamela Jones Harbour recused and Commissioner Jon Leibowitz issuing a separate concurring statement.

- On December 15, Chairman Majoras appointed John H. Seesel to fill the new position of Associate General Counsel for Energy within the FTC's Office of the General Counsel. He will play a key role in reviewing and making recommendations on the Commission's energy-related work, including investigations and cases, legislative initiatives, advocacy comments, and studies and reports. Mr. Seesel will focus particularly on developments in the petroleum industry, and will initiate and coordinate the Commission's response. He also will serve as liaison with other federal and state agencies on energy issues. He joined the Commission's staff in 1975 as an attorney in the Bureau of Competition, has served as an attorney advisor to Commissioner Orson Swindle since 1997. He was an attorney advisor to Commissioner Roscoe B. Starek, III, from 1993 to 1997, and previously occupied various positions in the Bureau of Competition management, including Executive Assistant to the Director and Deputy Assistant Director of a merger litigation division.
- On December 1, Chairman Majoras named Caswell O. Hobbs, III, the 2004 recipient of the Miles W. Kirkpatrick Award for his outstanding contributions to the Commission in the public and private sectors. Citing his exemplary commitment to the Commission's mission, the Chairman stated that Hobbs "throughout his professional career has worked tirelessly to make the FTC worthy of the trust and respect of the American consumer whom it serves," stated FTC Chairman Majoras.

*For more information on any of these activities, please contact Robert W. Doyle, Jr.  
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## **FTC CONSUMER PROTECTION HIGHLIGHTS**

- On December 20, the FTC put an end to a fraudulent and misleading pitch for work-at-home envelope stuffing business opportunities. The action stemmed from complaints brought as part of "Operation Pushing the Envelope," a law enforcement sweep designed to protect consumers from opportunities that sound too good to be true – and actually are. In the action last month, the FTC settled its litigation against several Florida-based defendants through a court order barring them from pitching any home-based business opportunities or helping others to market such opportunities, as well as requiring them to pay \$110,000. The action announced settled all FTC charges against the following defendants: Vinyard Enterprises, Inc., d/b/a Comfort Castle Enterprises, a Florida corporation; Sunshine Advertising & Marketing, Inc., d/b/a Dynamic Data Services, a Florida Corporation; Ray A. Thompson, as an individual and officer of one or more of the above-mentioned companies, also d/b/a Dynamic Data Services, Dectura Direct Service, and D.D. Service; Judith Livingston, as an individual and d/b/a Direct Business Services and Dynamic Data; and Jason Lunan, as an individual and d/b/a

## **RECENT ACTIVITIES**

### **FTC Consumer Protection Highlights (Continued)**

Dynamic Data Express and Comfort Castle Associates. According to the FTC's complaint, since at least August 1997, the defendants, or people acting on their behalf, set up numerous post office boxes and commercial mailboxes in the greater Miami area, that they used to sell work-at-home mailing opportunities to consumers through flyers and mail delivered to consumers' houses. The business opportunity consisted of two or more "tiers," with instructions for consumers either to recruit a second or third generation of buyers using flyers or to market the defendants' book reports on how to make money from home.

- The Federal Trade Commission issued final regulations on December 16 to facilitate the determination of whether an e-mail message has a commercial primary purpose and is subject to the provisions of the CAN-SPAM Act. The CAN-SPAM Act requires the Commission to issue regulations "defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message." The FTC published a Federal Register notice of proposed rulemaking (NPRM) on August 13, 2004, seeking public comment on its proposed primary purpose criteria. The NPRM followed an Advance Notice of Proposed Rulemaking, issued on March 11, 2004. As detailed in the Federal Register notice, the final Rule is substantially similar to the proposal contained in the NPRM, but adds a criterion for determining the primary purpose of an e-mail message containing only "transactional or relationship" content, among other minor changes. The CAN-SPAM Act regulates both commercial messages and transactional or relationship messages. The notice makes clear that the Commission does not intend to regulate non-commercial speech through the Rule. The notice also addresses public comments received about the constitutionality of the CAN-SPAM Act, as well as of the FTC's primary purpose criteria. The final Rule sets forth criteria for determining the primary purpose of various kinds of e-mail messages.
- On December 15, the FTC sued a diet patch manufacturer and a retailer that marketed the patch directly to Spanish-speaking consumers. In two separate federal court actions, the FTC charged that the patch manufacturer, Transdermal Products International Marketing Corporation, and the retailer, SG Institute of Health & Education, Inc. ("SG Institute"), falsely claimed that the skin patch caused substantial weight loss. The FTC complaints in both cases also challenged false claims that the patch or its main ingredient, sea kelp, had been approved by the Food and Drug Administration. The FTC further alleged that Transdermal Products provided retailers with deceptive marketing materials that could be used to mislead consumers. The FTC's case against Transdermal Products and its president, William Newbauer, will proceed to litigation in the U.S. District Court for the Eastern District of Pennsylvania. SG Institute and its principals settled with the FTC and agreed to stop making the deceptive claims. The defendants in both cases allegedly used one or more of the seven bogus weight-loss claims that are part of the FTC's "Red Flag" education campaign announced in December 2003. The ongoing Red Flag campaign provides guidance to assist media outlets and others in spotting false claims in weight-loss ads. According to the FTC, one of the most common false weight-loss claims is that diet patches, topical creams and gels, body wraps, and other products worn on the body or rubbed into the skin can cause substantial weight loss.
- A company that sells legal document preparation franchises agreed on December 13 to pay a \$286,000 civil penalty to settle FTC charges that it violated federal law by failing to disclose lawsuits against it to prospective

## **RECENT ACTIVITIES**

### **FTC Consumer Protection Highlights (Continued)**

franchisees. The FTC alleges that We The People Forms and Service Centers USA, Inc., (“We The People”), which assists consumers in preparing legal documents, including bankruptcy petitions, violated the FTC’s Franchise Rule. In addition to paying a civil penalty, the defendant agreed to receive training to assist it in complying with the Franchise Rule. The FTC’s Franchise Rule requires a franchisor to provide prospective franchisees with a complete and accurate basic disclosure document containing 20 categories of information, including information about the franchisor and its principals, the terms and conditions under which the franchise operates, and certain pending or prior litigation. According to the FTC, since 1996, the California-based company sold legal document preparation franchises nationwide. We The People franchises provide legal document preparation services to consumers who choose to represent themselves in “basic, uncontested legal matters.” These legal disputes or transactions are described as matters not opposed by another party to or person interested in that legal matter – such as bankruptcy petitions, divorce petitions, wills, and trusts. The defendant assists franchisees in preparing legal documents by distributing various workbooks. Consumers are instructed to insert required information into the workbook designed for their particular legal matter. The franchisees then forward the completed workbook to a We The People documentation preparation center, along with a purchase order. Using the workbook information, the documentation preparation center prepares and returns a completed legal document to the defendant’s franchisees.

- On December 9, the FTC announced it had issued a report to Congress containing studies on credit report accuracy and completeness required by the Fair and Accurate Credit Transactions Act of 2003 (“FACTA”). FACTA, which was enacted in December 2003 and amends the Fair Credit Reporting Act, requires the FTC to conduct an ongoing study of the accuracy and completeness of consumer credit reports and to report on four specific topics related to credit report accuracy. The FTC’s report states that the accuracy and completeness of credit report data is essential to consumers. Credit reports are used to make critical decisions about a consumer’s level of risk in providing various goods and services. Although credit reports enable creditors to quickly and accurately decide whether to provide these products and services to consumers, inaccuracies in report data can harm consumers, causing them to lose certain benefits or causing them to pay higher costs for them. The studies address proposals in Section 318 of FACTA and analyze the following: (1) the effects of requiring the nationwide consumer reporting agencies (“CRAs”) to match more points of consumers’ personal identifying information, such as a consumer’s name, Social Security number, or address, to ensure that the correct consumer is matched with the correct credit file; (2) the effects of requiring that a consumer who has been denied credit based on information in his or her credit report receive a copy of the same credit report on which the creditor based the adverse action; (3) the effects of requiring that consumers be notified when negative information has been added to their credit reports; and, (4) whether there are any common financial transactions not generally reported to the CRAs that would provide useful information in determining a consumer’s credit rating. The FTC is also conducting an ongoing, 11-year study of the accuracy and completeness of consumer report information, as required by Section 319 of FACTA.



## RECENT ACTIVITIES

### INTERNATIONAL ANTITRUST HIGHLIGHTS

- On December 28, following an administrative appeal, the Netherlands Competition Authority (“NMa”) confirmed that 11 parties in the shrimp fishery industry had infringed the Dutch and European prohibition on cartels. The fines imposed earlier on eight producers’ organizations of shrimp fisheries and three wholesalers were reduced. The fines imposed on five smaller shrimp wholesalers were also withdrawn. The total amount of the fines following the administrative appeals were reduced from EUR 13.781 million to EUR 6.176 million. At the beginning of 2003, NMa imposed fines on eight shrimp wholesalers, four Dutch and three German producers’ organizations, and one Danish producers’ organization for entering into prohibited agreements on catch quotas and prices for North-Sea shrimps in regular consultations between Dutch, German and Danish producers’ organizations and wholesalers (the so-called Trilateral Consultation). The Dutch producers’ organizations and traders were also fined for obstructing the entry to the fish auction of a new wholesaler. This evidence was upheld in the administrative appeal, except in relation to five smaller shrimp wholesalers.
- The Korea Times reported on December 22 that Korea’s FTC is thoroughly reviewing allegations that Microsoft engaged in unfair trading by providing users of its dominant operating system with its own built-in software. An unnamed FTC official stated that the FTC was delaying its decision on this case as Microsoft had been successfully building up local support by instructing more lawyers, professors and other experts to advocate its case. The anonymous source said that the FTC was also examining the EU’s ruling earlier this year against Microsoft.
- The Danish Government adopted on December 16 an amendment to the Danish Competition Act. The amendment not only implements EU antitrust modernization measures, but it also goes further, giving Danish enforcers new powers against dominant undertakings. Under the revision, dominant undertakings can be forced to reveal certain contract terms (e.g. terms of delivery) to the authorities. The amendment will enter into force on February 1, 2005.
- On December 9, the European Commission announced that it had imposed fines totaling EUR 66.3 million on Akzo Nobel, BASF and UCB. The firms had participated in a cartel which governed the supply of choline chloride (vitamin B4) for use in the animal feed industry. Vitamin B4 is used mainly by animal feed producers as an additive to increase growth, reduce mortality and improve meat quality. Following an investigation, the Commission found that Akzo Nobel, BASF and UCB colluded, alongside three North American companies (Bioproducts and DuCoa of the USA and Chinook of Canada), to fix prices, share customers, and control competitors in the EEA market for vitamin B4. Together, these companies controlled around 80% of the market. In addition to fixing worldwide prices, the North American companies agreed to withdraw from Europe on the basis of a reciprocal withdrawal of the European firms from North America. Between 1994 and October 1998, the European component of the cartel continued to fix prices and allocate national EEA markets and even individual customers. On account of their early withdrawal from the cartel, and in light of the five year limitation period for the imposition of fines, the North American companies were not fined by the Commission.

## **RECENT ACTIVITIES**

### **International Antitrust Highlights (Continued)**

- The European Commission announced on December 9 that it had decided to prohibit under Article 8(3) of the old EC Merger Regulation (Regulation 4064/89) the acquisition of joint control of Gas de Portugal SGPS S.A. (“GDP”) by Electricidade de Portugal S.A (“EDP”) and ENI S.p.A. The Commission was concerned that, in the context of the liberalization of the gas and electricity markets in Portugal, the horizontal and vertical links between the companies could harm market entry. In particular, it was concerned by the removal of GDP and EDP as potential competitors to the other in relation to gas and electricity. Further, it was concerned that the vertical link between GDP’s supply of natural gas and EDP’s electricity generation (using natural gas) could foreclose entry to the electricity markets and deter entry to the gas markets in Portugal. This is the first significant merger decision since Neelie Kroes took over as European Competition Commissioner in November this year. More significantly, this is the first prohibition decision under the EC Merger Regulation since the *Tetra Laval/ Sidel* and *Schneider/Legrand* decisions in October 2001, both of which were subsequently overturned by the European Court of First Instance (CFI). In announcing the decision, Ms. Kroes noted that it was considered very carefully, based on a very thorough and in-depth economic analysis of the case and represented a view that was shared almost unanimously by the member state competition authorities. In stressing the Commission’s belief in the robustness of the decision, Ms. Kroes attempted to address the substance of the CFI’s criticisms of the *Tetra Laval* and *Schneider* decisions.
- The Korean National Assembly passed on December 9 a revised Fair Trade Act. The new legislation introduces three principal corporate reforms which faced strong resistance from major Korean businesses. The legislation 1) reduces the voting rights of business groups in financial affiliates to 15% by 2008 from 30% as present; 2) forces companies to reduce their stakes in related firms; and 3) empowers the government to gain access to the bank accounts of businesses suspected of unfair trading practices. The Korean Fair Trade Commission (“FTC”) and nongovernmental organizations claim that the new Act will enhance the transparency of business management, improve corporate governance structure, and uproot the diversion of corporate funds for non-business purposes. Opponents of the Act stated that it would further depress business investment, expose Korean businesses to more outside corporate raiders, and increase state interference in corporate business.
- On December 8, the chief executive and a senior manager of packing company, Amcor, resigned as the Australian Competition and Consumer Commission (“ACCC”) launched an investigation into alleged cartel behavior in the corrugated box business. Amcor recently advised the ACCC that it had uncovered a possible competition law breach following an internal investigation. Amcor and Visy are the two largest players in the corrugated box market, each holding market shares of around 45%. Carter Holt Harvey is the third largest player, holding around 8% of the market.
- The Norwegian Competition Authority issued a statement of objection on December 8 against the SAS air carrier group, claiming that the carrier had abused its dominant position through predatory behavior on the Oslo-Haugesund domestic air route in May-June 2004. The Competition Authority warned that it may impose a fine of up to NOK 20 million (about €2.5 million). The small carrier Coast Air started to serve the Oslo-Haugesund air route in June 2003, using an ATR 42-320 propeller aircraft with 48 seats and performing two to

## **RECENT ACTIVITIES**

### **International Antitrust Highlights (Continued)**

three daily round trips. The SAS Group was, in comparison, serving the route with Boeing 737 aircraft and five daily departures, offering a capacity of around 600 seats per day each way. On June 13, Coast Air exited the market. The Norwegian Competition Authority found that while Coast Air was present in the market, the SAS Group was charging fares that did not even cover their average variable cost of operation on the route. There was, according to the Norwegian Competition Authority, a strong presumption that the SAS Group had the intent of eliminating its only competitor on the Oslo-Haugesund route. In Norway, abuse of dominance has been illegal only since May 1, 2004, when the present Competition Act entered into force. The Act contains prohibitions corresponding to those laid down in Articles 81 and 82 of the EC Treaty. Thus, although the predatory behavior of the SAS Group seems to have lasted for about 12 months, only the last six weeks represent an infringement of the prohibition against abuse of dominance. This, and the fact that the affected market is quite small (less than 300,000 passengers annually), will have to be taken into account when the amount of the fine is to be finally determined. The Norwegian Competition Authority is still investigating whether similar abuse of dominance has taken place on any other domestic air route.

- On December 7, it was reported that the Japanese Fair Trade Commission had conducted raids on the premises of ten companies, including the Japan Quality Assurance Organization and Nippon Steel Techno Research, suspected of manipulating the bidding process for environmental research services tendered by municipal governments. The cabal are alleged to have pre-selected the winner of various tenders in order to remove effective competition from the process.
- On December 7, the Dutch Senate approved a proposal to make the Netherlands Competition Authority (“NMa”), an independent administrative authority from government, effective April 1, 2005. This means that a government minister will no longer have power to intervene in antitrust cases.
- The Saigon Times Daily reported on December 3 that Vietnam’s National Assembly had passed new antitrust legislation, the Competition Law, which will become operative July 1, 2005. A Competition Commission is to be established within the Ministry of Trade to enforce the new rules. The Law prohibits agreements that restrict “unhealthy” competitive practices and the abuse of a dominant position. The Law will apply to domestic and foreign firms operating in Vietnam, industry associations, and State-owned enterprises. Organizations will be able to apply for exemptions from the new law.
- The UK’s Office of Fair Trading (“OFT”) announced on December 3 that it had referred to the European Commission a complaint by UK consumer’s association, Which?, over Apple’s iTunes service. Which? complained that the service discriminated on price according to the user’s country of residence, and that UK users were unable to benefit from cheaper prices charged on other European iTunes sites, as access to sites serving other countries was barred to non-residents. The complaint reportedly alleges that Apple charges UK customers around 20% more than their French and German counterparts. The OFT decided that the European Commission is better placed to consider the complaint, and to address issues in the context of a wider single market issues relating to how the online exploitation of music is licensed across Europe.

## **RECENT ACTIVITIES**

### **International Antitrust Highlights (Continued)**

- On December 3, Russia's Federal Antitrust Service ("FAS") announced that it was launching an investigation as to whether card payment association, Visa International, had "abused its dominant position on the plastic cards market, and set unjustified membership criteria hampering admission to payment systems" thus violating Articles 5 and 6 of the Russian Federation's Financial Services Market Competition Law. The FAS has formed an ad-hoc commission to conduct the inquiry, and Deputy-Director, Andrei Kashevarov, has been appointed as the commission's chair. Mr. Kashevarov stated that his agency had substantial evidence that Visa International was in breach of Russia's Financial Services Market Competition Law, and that the company's share on that market was over 40%. In a press release, Visa International said it had learned about the Antitrust Service's intention to launch the inquiry from media reports, but had so far received no formal notifications. On December 6, Russian press agencies reported that the FAS had scheduled hearings on the case for December 22, 2004.
- On December 2, the Australian Competition and Consumer Commission ("ACCC") announced that it would not oppose Sonic Health's acquisition of Accord pathology business from Endeavour HealthCare. The ACCC was satisfied that the merged entity would be subject to sufficient competitive constraints, and that the acquisition would lead to only a small increase in Sonic's market share in the New South Wales and Western Australian markets for pathology. The significance of the decision lies in the fact the this was the first transaction to be considered under the new informal merger review process announced on September 23, 2004.
- The Manpower employment service company received a search warrant on December 2 at its Paris headquarters. This follows the launch of an investigation by French antitrust authorities into the world's top three employment service companies, Adecco, Manpower and Vedior. The investigation is concerned with the alleged violations of French and European competition law by the employment services' French subsidiaries. The investigation is reportedly focused on pricing issues, and the alleged exclusion of competitors from tenders.
- On December 1, the French Conseil de la Concurrence reduced a fine imposed on La Poste by 90%. The fine related to allegedly anticompetitive discounts in contracts between the French Post Office, La Poste, and mail order companies. Following the postal service operator's undertaking to allegedly commit to "substantial, credible and verifiable undertakings", the fine was reduced from EUR 6m to EUR 600,000. The undertaking includes *inter alia*, a commitment, where it has a monopoly, to refrain from practicing discounts which discriminate against customers who are operating in the same market and a commitment to refrain from tied reductions and loyalty discounts where it occupies a dominant position.

*For more information on any of these activities, please contact Neil Ray at  
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## RECENT ACTIVITIES

### FCC ANTITRUST HIGHLIGHTS

- On December 22, the FCC released new data on local telephone service competition in the United States. Twice a year, telecommunications carriers must report the number of lines in service and mobile wireless telephone subscribership pursuant to FCC's local competition and broadband data gathering program. The statistics reflect data as of June 30, 2004, filed by providers on FCC Form 477 in the Commission's local competition and broadband data gathering program. For purposes of this report, carriers with at least 10,000 switched access lines, or at least 10,000 mobile wireless telephone service subscribers, in a state were required to file. Total competitive local exchange carrier ("CLEC") end-user switched access lines increased by 7% during the first half of 2004, from 29.8 million to 32.0 million lines. End-user customers obtained local telephone service by utilizing approximately 148.1 million incumbent local exchange carrier ("ILEC") switched access lines, 32.0 million CLEC switched access lines, and 167.3 million mobile wireless telephone service subscriptions. Nationwide, mobile wireless telephone subscribers increased 7% during the first half of 2004 from 157.0 million to 167.3 million. CLECs reported 20.8 million (or 15%) of the 135.4 million lines that served residential and small business end users and 11.2 million (or 25%) of the 44.6 million lines that served medium and large business, institutional, and government customers.
- Sprint Corp. ("Sprint") and Nextel Communications, Inc. ("Nextel") announced on December 15 that their boards of directors unanimously approved a definitive agreement for a merger of equals. The combination will create one of America's premier communications companies – a leading wireless carrier augmented by a global IP network that will offer consumer, business and government customers compelling new broadband wireless and integrated communications services. The new company, which will be called Sprint Nextel, also intends to spin off to its shareholders Sprint's local telecommunications business following the merger. The \$35 billion merger would form the third largest wireless mobile telecommunications company in the United States with 39 million wireless subscribers. Cingular/AT&T, which is owned by SBC Communications Inc. and BellSouth Corp., is the largest with 47 million wireless subscribers, while Verizon Wireless ("Verizon"), which is owned by Verizon Communications Inc. and Vodafone Group Plc, the world's largest mobile-phone operator, is the second largest with 43 million wireless subscribers. Under the merger plan, current Sprint Chief Executive Gary Forsee would serve as chief executive of the combined company while Nextel Chief Executive Timothy Donahue would serve as executive chairman of the new company. Sprint would pay the equivalent of 1.3 shares of its stock, with a small portion of that coming in cash, for each Nextel share. The company would have a 50-50 split among board members and would have its corporate headquarters in Reston, Va., where Nextel is currently based, with an operating headquarters in Overland Park, Kansas, where Sprint is currently based. The FCC, which recently completed its investigation of the Cingular/AT&T merger, will review this deal. In addition, the DOJ will separately investigate the transaction.
- Also on December 15, the FCC adopted rules concerning incumbent local exchange carriers' ("ILECs") obligations to make elements of their network available to other carriers seeking to enter the local telecommunications market. The new framework builds on actions by the Commission to limit unbundling to provide incentives for both incumbent carriers and new entrants to invest in the telecommunications market in a way that best allows for innovation and sustainable competition. The rules directly respond to the March

## RECENT ACTIVITIES

### FCC Antitrust Highlights (Continued)

2004 decision by the U.S. Court of Appeals for the D.C. Circuit which overturned portions of the Commission's Unbundled Network Element ("UNE") rules in its Triennial Review Order. Key issues resolved in the December 15 FCC decision include (i) Unbundling Framework, (ii) Dedicated Interoffice Transport, (iii) High-Capacity Loops, and (iv) Mass Market Local Circuit Switching.

- On December 8, the FCC decided to take another 90 days to review a request by SBC Communications Inc. ("SBC") that could set the stage for large phone companies to offer video programming without complying with traditional cable regulations. In invoking its extension authority, the Commission must now issue a decision by early May. SBC has asked the FCC to declare that its Internet-protocol services should not be regulated like traditional telephone services, including requirements to grant access to competing Internet-service providers at nondiscriminatory rates. In essence, the company is asking for the same kind of broadband regulatory freedom that all cable operators, except Time Warner Cable, currently enjoy in providing high-speed-data service. No action by the agency would mean automatic approval for SBC. The FCC said the extension was necessary because SBC had raised "significant questions" about whether its request justifies FCC forbearance. SBC also asked the Commission, in a companion petition filed the same day in February, to declare that traditional rules governing broadcasters and cable companies do not apply to its IP-video programming because voice, data and video packets all converge on the same platform and shouldn't be split apart to conform with legacy regulatory requirements. Although the forbearance petition and the request for declaratory ruling were distinct requests, SBC told the agency that it should see a close relationship between them. However, the FCC does not face a legal deadline to act on SBC's declaratory ruling. SBC has announced plans to spend up to \$4 billion on a fiber network that will reach 18 million homes by the end of 2007. Taking on cable companies, SBC plans to launch "IP-based TV services" starting in the fourth quarter of 2005, according to a company statement in November. An SBC spokesman was quoted elsewhere as saying that the advanced IP network will be capable of delivering four simultaneous video streams, including HDTV and video-on-demand services. Cable operators need local approvals and pay local fees to provide television service, but SBC wants the FCC to immunize its IP-based video services from those requirements – a clash that might require congressional intervention. The National Cable & Telecommunications Association and cable operators have not participated in the debate over SBC's forbearance request. But AT&T Corp., EarthLink Inc. and consumer groups are fighting SBC, saying that broad deregulation is either unwarranted or beyond the agency's authority to grant.
- As mentioned in a December 2 filing with the FCC, City of Dallas regulators are opposing a bid by Comcast Corp. ("Comcast") for total rate deregulation, claiming that the cable operator has not demonstrated that the market is competitive under federal regulations. Comcast filed a petition with the FCC on November 15 for effective competition. If deregulated, the MSO would not need local approval of rates charged for set-top boxes, remote controls and basic-tier programming. According to Dallas regulators, "Comcast wants the benefit of deregulation, but it does not want to expend the effort to prove its case. Instead, it asks the [FCC] to act based on hearsay and innuendo. That request should be rejected." Comcast has about 136,000 subscribers in Dallas, the country's seventh-largest TV market. The operator is entitled to full rate deregulation if it can demonstrate that pay TV competitors serve more than 15% of households in the Dallas franchise area.

## **RECENT ACTIVITIES**

### **FCC Antitrust Highlights (Continued)**

Comcast claimed that competitor penetration is 17.6%. But Dallas regulators are urging rejection, claiming that Comcast relied on either outdated or flawed data. As a result, the FCC should reject the petition and furthermore it should bar Comcast from refiling for at least one year. In its filing, Comcast said DBS services provided by EchoStar Communications Corp. and DirecTV Inc. were widely known to Dallas consumers, and data derived from private and governmental sources demonstrated that DBS penetration exceeded 15% in Dallas. Congress deregulated expanded-basic rates effective March 31, 1999, but kept basic rates regulated until a cable system could demonstrate effective competition. The basic tier includes local TV stations, public-access channels and any cable networks cable systems opt to include. Cable subscribers must buy the basic tier. DBS operators are neither rate-regulated nor required to sell local TV stations. DBS subscribers are not required to buy basic tiers of programming.

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*The Sheppard Mullin Antitrust Review is intended to apprise readers of noteworthy developments involving antitrust matters. The contents are based upon recent decisions, but should not be viewed as legal advice or legal opinions of any kind whatsoever. Legal advice should be sought before taking action based on the information discussed.*

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