

REPORT OF THE SECTION OF ANTITRUST LAW ON ADEQUATE FUNDING FOR THE ANTITRUST AGENCIES

The Section of Antitrust Law of the American Bar Association ("ABA Antitrust Section") hereby reaffirms its support for adequate funding for the enforcement of the antitrust laws by the Department of Justice's Antitrust Division and by the Federal Trade Commission. Accordingly, because of the sharply increased workload of the antitrust agencies, discussed below, the ABA Antitrust Section supports an increase in funding for the Antitrust Division of the Department of Justice (Antitrust Division) and the Federal Trade Commission (FTC) at a level no less than that proposed in the FY2000 budget requests of the Administration.

The views expressed herein are being presented on behalf of the Section of Antitrust Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the Association. This recommendation and report was approved by the Section's Council on May 3, 1999.

RESOLVED, That the Section of Antitrust Law of the American Bar Association, recognizing the critical law enforcement responsibilities and the important role the Justice Department Antitrust Division and Federal Trade Commission play in the economic welfare of the nation

- (a) reaffirms its support for adequate funding for the Justice Department's Antitrust Division and the Federal Trade Commission at levels that will assure the enforcement of our nation's antitrust laws, and**
- (b) supports the increased level of funding proposed for them in the Administration's Fiscal Year 2000 budget requests based on the sharply increased workload of the antitrust agencies.**

The Antitrust Agencies Perform a Critical Function in Our National Economic Life

For more than a century, it has been recognized that vigorous enforcement of the federal antitrust laws is important because long-term economic growth, consumer well being, and the international competitiveness of American enterprises are fostered by effective competition. Maintaining and enhancing competition, and removing unreasonable restraints thereon, are critical elements of the national economic policy. The Antitrust Division and FTC are the federal law enforcement agencies responsible for enforcement of federal antitrust laws. In order to enforce the antitrust laws effectively, the FTC and Antitrust Division require funding and resources adequate to meet the workload they face.

In the recent words of the Chairman of the Senate Judiciary Committee on the floor of the Senate:

". . . the Antitrust Division needs and should have adequate resources to enable it to meet its statutory requirements, including those related to reviewing and investigating increasingly numerous and complex mergers. . . . [F]ew would disagree that it is important to adequately fund the Antitrust Division of the Department of Justice. They are charged with the civil and criminal enforcement of the antitrust laws, including review of corporate mergers, in order to ensure that the consumer benefits from lower prices and better goods that come with vigorous competition in the marketplace."¹

In recognition of the critical role of antitrust enforcement in the nation=s economic well-being, the Senate recently adopted Amendment 207 to S.Con. Res. 20 (106th Cong. 1st Sess.) declaring it to be the sense of the Senate that the Antitrust Division should receive adequate funding. The Antitrust Section applauds that action, but it must be followed by action actually providing such funding.²

The Sharply Increased Workload of the Antitrust Agencies

In 1999, the Antitrust Division has 132 *fewer* full time employees than it had some twenty

¹ Remarks of Senator Orrin Hatch, in support of Amendment No. 207 to S.Con. Res. 20 (106th Cong. 1st Sess.) (the FY 2000 Budget Resolution), which amendment made certain findings in regard to the proposed 16% increase in the budget of the Antitrust Division for FY 2000 over the previous year, and suggested the "sense of the Senate" was both to provide adequate resources to the Division and also to pursue consideration of budget neutral changes in the thresholds of filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 to account for inflation. The amendment was adopted by the Senate. *Congressional Record of March 25, 1999* (S.3392).

² *See in general*, Report of the Section of Antitrust Law of the American Bar Association, Task Force on Competition Policy, March 1, 1993.

years ago, in 1980.³ The Federal Trade Commission today has some 700 *fewer* employees than in 1980. Yet last year the antitrust agencies had to review over *fifteen times more mergers*, confronted *substantially larger, more complex cartels, many of which were international*, that have raised prices to millions of American consumers and businesses, and tried to police competition in an economy over *twice the size* of that in 1980 measured in constant dollars, with an increasingly *global reach*, and embodying *technological revolutions* during the period that have increased the complexity and difficulty of responsible antitrust analysis.⁴

At the beginning of FY 1999, the Antitrust Division's overall workload was 20% higher than one year earlier, with 101 grand juries, 98 other criminal investigations, and 16 civil cases in progress. In FY1998, the Division filed 62 cases, an increase of 60% over FY1997, and maintained a criminal conviction rate of 95%.

Merger filings before the agencies had increased by 30% in one year to a record number of 4,728 premerger filings in FY1998, and the value of the merger transactions had increased 68% over FY1997, to a record total value of reportable transactions of almost \$1.5 trillion. This followed an increase of 20% in FY1997 and a 10% increase in FY1996, over the previous years, and amounted to seven times the 1991 level. Indeed, merger review accounts now for some 76% of the Antitrust Division's workload, compared to 36% in 1980, meaning that non-merger antitrust enforcement has suffered a significant cut-back.

In FY1998, the antitrust agencies reviewed 4,728 premerger filings, conducting investigations in 600 of them (300 for each agency). The Antitrust Division challenged 51 mergers, while the FTC negotiated 23 consent decrees, opposed 3 mergers in federal court, and saw 10 merger abandoned as a result of its investigations. In FY 2000, the best estimates of both agencies are that there will be a further increase in the number of merger filings to be reviewed and, where appropriate, investigated.

³ Based on Antitrust Division and FTC statistics accompanying Budget Submissions.

⁴ See Joel I. Klein, Assistant Attorney General in charge of the Antitrust Division, Testimony before the Antitrust, Business Rights, and Competition Subcommittee, United States Senate Committee on the Judiciary (Feb. 26, 1998); John M. Nannes, Deputy Assistant Attorney General, Antitrust Division, *Antitrust in An Era of High-Tech Innovation* (Speech before the National Institute on Representing High Technology Companies) (October 22, 1998).

The continued growth of the American economy underlies the increased workload, and complicates the analyses required to be conducted by the antitrust agencies.⁵ Moreover, competition has become increasingly global in nature, requiring the antitrust agencies to take into account the competition authorities of foreign jurisdictions. And finally, major technological revolutions have made antitrust analysis much more complicated, and the deregulation of industries such as telecom, electric, gas, and transportation have added further complexity.

In short, there can be no doubt about the vastly increased workload of the antitrust agencies, for which adequate funding is necessary if our national economic policy of competition is to be maintained and fostered. Experience allows us to predict quite accurately the likely effects of shortfalls in funding for the antitrust agencies: the effect will be a decline in antitrust law enforcement and a decline in antitrust law compliance.⁶

An Increase in Funding Is Necessary to Achieve Adequate Funding

The Administration has proposed a FY2000 Budget for the Antitrust Division of \$114 million (up 16.3% from the \$98 million of FY1999), and for the FTC of \$134 million (up 12.6% from \$119 million), meaning a budget for the antitrust and consumer protection functions of the two agencies in total of \$244 million (a total increase of \$31 million for both agencies).

The Section of Antitrust Law supports an increase in funding for the Antitrust Division and FTC, at levels *no less than* those proposed by the Administration in its FY1999 Budget Requests. It should be noted that a significant portion of these "increases" in fact go simply to cover inflation. For example, some \$6,543,000 of the Antitrust Division "increase" is simply to cover mandatory adjustments to annual base costs, such as salary and rent increases; only \$9,555,000 would be for programmatic enhancement of antitrust enforcement.

⁵ The Gross Domestic Product of the United States, expressed in constant dollars adjusted for inflation, is 112% of that some twenty years ago. The Gross Domestic Product continues to rise, with a 14% increase in absolute dollars from the first quarter of 1996 through the third quarter of 1998. *See* Annual Report of the Council of Economic Advisors 330 (Feb. 1999).

⁶ See ABA Antitrust Section 1993 Report, *supra*, n.2.

The Section of Antitrust Law notes that even with the increased funding proposed by the Administration, both antitrust agencies will be hard-pressed to do an adequate job, and must continue their efforts at more efficient enforcement of the antitrust laws.⁷

Consistent with its support for increased funding, the Section of Antitrust Law opposes that portion of S. Con. Res. 20 which would reject the Administration's proposed budget increase for the Antitrust Division.

Impact of the Additional Funding on the Treasury

One of the ironies of the present funding situation of the antitrust agencies is that, because of the filing fees collected by the Treasury under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (currently set at \$45,000 per premerger filing), those fees are expected to cover virtually the whole of the budgets of both. In addition, the Antitrust Division collects in criminal fines significant revenues beyond that amount (nearly \$500 million in the past two years). The Antitrust Division has announced consent judgments for fines in excess of \$750 million in the first half of 1999. Thus, the antitrust agencies regularly turn into the Treasury almost twice the dollars that they take out in enforcement expenditures and sometimes considerably more. While antitrust enforcement actions should never be motivated by "profit-to-the-Treasury" concerns, and should never be viewed as a means of taxing the American economy, the Congress should be aware that, from a narrow "profit-center perspective," the antitrust agencies produce a positive contribution to the Treasury in simple dollar terms of over \$250 million a year net of expenditures. In contrast, the proposed increases in the FY2000 Budget requests amount to only \$31 million. Put in this perspective, the funding increases proposed for the antitrust agencies in the FY2000 Budget are modest indeed.

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⁷ See, Report from the Bureau of Competition (1999), prepared remarks of William J. Baer, Director, Bureau of Competition, Federal Trade Commission before the ABA Antitrust Section Spring Meeting, April 15, 1999 (p. 34-37).