U.S. ANTITRUST POLICY FRAMEWORK

Sherman Act (1890 and subsequent amendments)

Section 1:

Formal Cartels (per se illegal)

Ivy League + MIT (Undergrad financial aid)

Vertical Contractual Restraints

RPM (per se illegal)

Information Sharing (Trade Associations)

Tacit Collusion

Section 2:

Monopolization and Attempts To Monopolize (rule of reason)

Monopoly is not illegal

"Monopoly" in the Relevant Market + "predatory" of "exclusionary" behavior

Standard Oil Trust, American Tobacco, Alcoa, United Shoe Machinery, AT&T, IBM, Microsoft

Clayton Act (1914 + amendments)

Section 2: (Robinson Patman Act: 1936)

Price Discrimination

Section 3:

Exclusive Dealing Arrangements

Section 7 and 7A: (1914, 1950, 1976)

Merger Law

Hart-Scott-Rodino Pre-Merger Notification Requirements

Time-Warner + Turner

Staples + Office Depot

Exxon + Mobil

BP-Amoco + Arco

Federal Trade Commission Act (1914 + amendments)

Section 1:

Creates Federal Trade Commission

"Independent" Regulatory Agency

5 Commissioners

Legal and Economic Staffs

Section 5:

Unfair Competition and Deceptive Business Practices

EXEMPTIONS

State Action

- Clearly articulated public policy purpose
- Actively regulated

Specific Industries

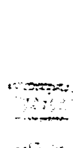
- Agricultural Cooperatives
- Certain regulated industries

THE BOSTON GLOBE • WEDNESDAY, JANUARY 28, 1998

Alcohol price-control law rejected

Comparing prices

Beer and wine prices in Boston are higher than most cities in part because of a state law controlling wholesale prices.



July-Sept. 1997 prices:	BEER Miller Light or Budweiser, 6-pack	WINE Gallo Chablis Blanc, 1.5 liter bottle	SPIRITS J&B Scotch 150ml bottle
Boston	**$5.10**	**$6.02**	**$17.99**
Orlando	4.18	5.41	18.41
Buffalo	4.31	5.49	16.59
Los Angeles	4.15	4.87	16.34
Houston	4.25	5.84	17.10
Minneapolis	4.07	5.24	16.17
NATIONAL AVERAGE	4.33	5.69	18.44

SOURCE: Steve L. Barsby and Assoc. GLOBE STAFF GRAPHIC

Less costly beer and wine could follow

By David Armstrong
GLOBE STAFF

A federal judge yesterday struck down a Massachusetts law that controls the price of alcoholic beverages, a decision that could lead to lower prices for residents who pay among the highest prices in the country for beer and wine.

"Ultimately, consumers will benefit from this decision. Prices will be lower," said Gerald Caruso, an attorney representing several Cape Cod package stores that brought a lawsuit in 1994.

The law requires wholesalers of beer, wine and liquor to announce their prices each month and allows them to match, but not beat, the prices of competitors. Without the law, they could adjust their prices at any time and undercut competitors, meaning lower prices for consumers.

Massachusetts residents pay prices well above the national average for beer and wine. For instance, the average price of a six-pack in the Boston area is $5.10, which is 77 cents above the national average and nearly a dollar higher than in Los Angeles.

US District Court Judge Mark L. Wolf ruled that the 50-year-old state pricing law is "anti-competitive" and violates federal antitrust law.

Wolf said he would delay implementing his ruling until the state is allowed a short period of time to consider whether it will file an appeal. If the state does file an appeal, Wolf will have to decide whether to further delay his decision.

"The decision whether to appeal has not been made yet, but will be made shortly," said a

LIQUOR, Page B4

Judge strikes down alcohol price control

■ LIQUOR
Continued from Page B1

spokesman for the attorney general's office, which is representing the state, a defendant in the lawsuit.

Glenn Alberich, a Boston attorney who represents the Massachusetts Association of Malt Beverage Wholesalers, which inserted itself as a defendant in the case, said an appeal is likely.

If the state does not appeal, however, the wholesalers' position for an appeal would be severely eroded.

Critics complain the current system amounts to a price-fixing scheme that inflates the profits of wholesalers.

Wholesalers, however, say the law doesn't affect their prices because there is already intense competition. They also say the pricing law prevents corruption and unfair selling tactics by creating a level playing field where all of the price information is public record.

"Everyone has wrapped this up in a pro-consumer banner, but this law doesn't do an awful lot that impacts on competition," Alberich said.

Former governor William F. Weld promised to do away with the price-control system and the agency that enforces the law, the Alcoholic Beverages Control Commission, but never followed through.

Five Cape Cod package stores filed the federal lawsuit in 1994, shortly after the ABCC ordered six liquor wholesalers to shut down for five days for violating the price-posting law. The wholesalers allegedly offered illegal price cuts and incentives to an undercover ABCC agent working in a Cape Cod package store.

The package store owners said the ABCC rarely enforced the price-posting law, benefiting selective retailers who violated the law by taking part in illegal price-cut offers. Those who abided by the law were penalized because they paid a higher price for beer and liquor, the package store owners claimed.

Alberich said the absence of any price controls will hurt small package stores, who may be cut out of price cuts offered larger retailers.

"Those who want the law done away with are the more powerful retailers who can seek better deals from wholesalers than what will be given to the mom and pop stores," he said.

He also said the economic benefits to consumers have been over-hyped by those who favor eliminating the price control law.

An analysis by the Federal Trade Commission of the Massachusetts law, however, found that repealing the price-control law would "increase competition."

The commission said the posting of prices "tends to make it easier for industry members to coordinate prices tacitly and to detect and discourage deviation from the consensus price."

Dick Hurley, the owner of Canterbury Liquors & Pantry in Sandwich and one of those who brought the lawsuit, said he has no doubt his customers will benefit.

"If we can enter a free marketplace, it will obviously lower prices for customers," he said. "This is a competitive business and any price savings are usually passed on to the consumers."

Enforcement Framework

Deterrence System

Government Enforcement

Criminal (Section 1)

Civil

Private Enforcement (Trebel Damages)

About 50 private damage actions filed against Microsoft

Government Enforcement

Antitrust Division of the Department of Justice

Federal Trade Commission

Federal Courts

Private Enforcement

Private Parties Can Bring Sherman and Clayton Cases

Liability and Damages

Vast Majority of Antitrust Cases

Court Actions

- Case Law Rather Than Detailed Regulation
- Per Se Rules
    - Clear Signals
- Rule of Reason
    - Balancing Tests
- Trials and Economic Analysis of Liability and Damages

ANTITRUST POLICY OUTSIDE U.S.

TYPICAL DEVELOPED COUNTRY

Cartel Registration Law

Unfair Trade Practices Law

Abuse of Dominant Position (including Mergers)

UK

Competition Commission [Formerly Monopolies and Mergers Commission] (1948, 1973, 1980, 1998)

Referrals from other government ministries or commissions

Mergers

Monopolies

Anticompetitive practices

Utility References (telecom, gas, electricity, water)

EC

Treaty of Rome, Articles 81 and 82 [formerly Articles 85 and 86]

Article 81 (formerly article 85): Behavioral Abuses [agreements or concerted practices that may affect trade between member states which have the intent or effect to prevent, restrict, or distort competition]

Specified exemptions (e.g. exclusive purchasing agreements for beer)

Article 82 (formerly article 86): Abuse of Dominant Position and Mergers (in so far as there effects on trade between member states)

Threshold World and EC sales levels

Can refer mergers back to individual countries and can give deferrence to "legitimate" country interests (e.g. security, plurality of the media)

DG IV

European Commission

European Court

COOPERATION BETWEEN COUNTRIES

Bilateral agreements with antitrust agencies in various countries

- Germany
- Australia
- Canada
- EC
- Israel
- Japan
- Brazil

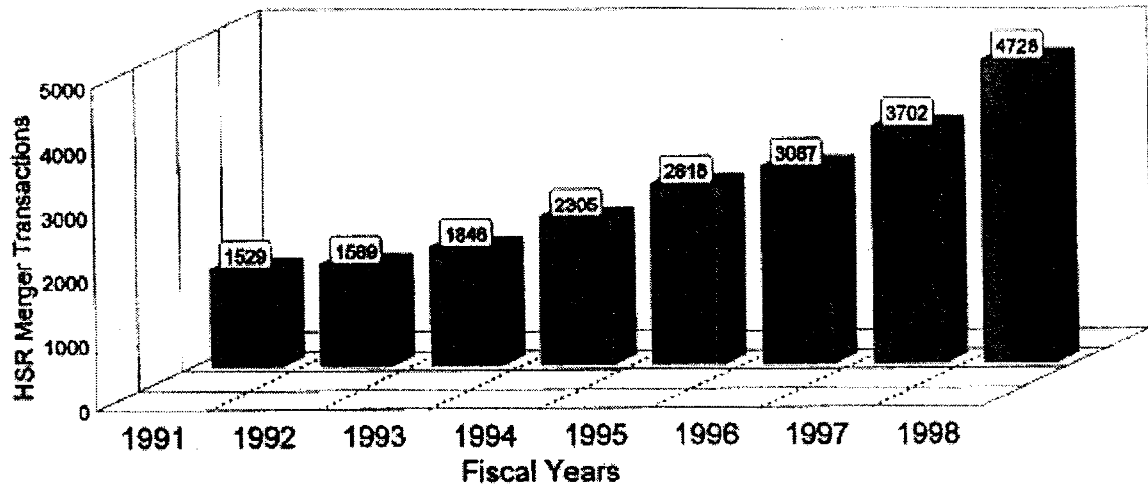
Notification

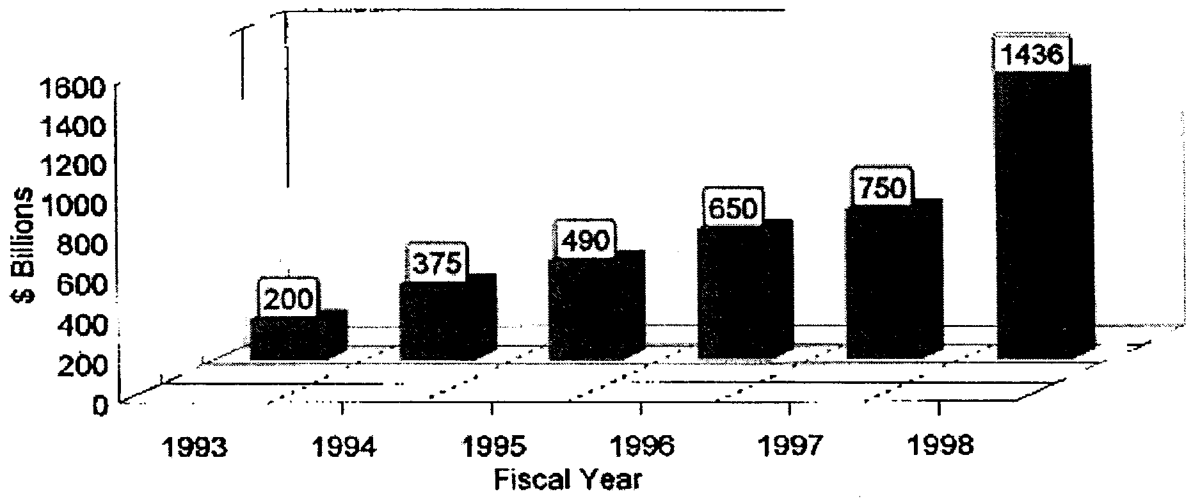
Information Sharing

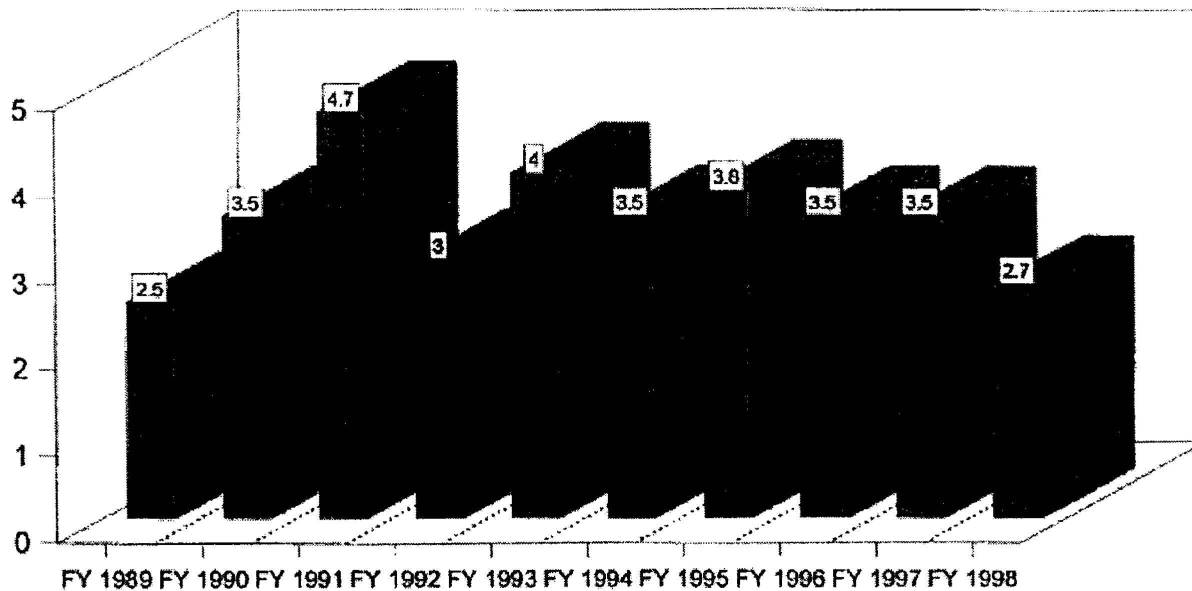
Coordinate investigations

EC/U.S. "Positive Comity" Agreement of 1998

Request EC to take actions against anticompetitive practices affecting U.S. and vice versa (e.g. anticompetitive conduct by European Airlines)


HSR Merger Transactions Reported
Fiscal Years 1991 - 1998
HSR Merger Transactions
5000
4000
3000
2000
1000
0
1529
1589
1846
2305
2816
3087
3702
4728
1991
1992
1993
1994
1995
1996
1997
1998
Fiscal Years


Total Value of All Reported Transactions*
Fiscal Years 1993 - 1998
$ Billions
1600
1400
1200
1000
800
600
400
200
0
200
375
490
650
750
1436
1993
1994
1995
1996
1997
1998
Fiscal Year


Percentage of Transactions Resulting in a Second Request
5
4
3
2
1
0
2.5
3.5
4.7
3
4
3.5
3.8
3.5
3.5
2.7
FY 1989 FY 1990 FY 1991 FY 1992 FY 1993 FY 1994 FY 1995 FY 1996 FY 1997 FY 1998

STAPLES-OFFICE DEPOT MERGER (1996)

- Staples and Office Depot are "office supply superstores" which proposed to merge in 1996

- Staples and Office Depot compete with each other and with other suppliers of office supplies in local geographic areas

  - Staples, Office Depot and OfficeMax are the primary national "office superstores"

  - One, two or all three compete in specific geographic areas (one, two and three superstore towns)

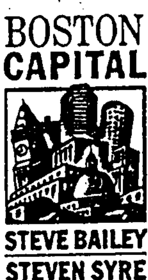
  - Merger would reduce many areas from two to one or from two to three superstore towns currently and projected for 2000

- FTC staff initially tried to negotiate a settlement which would have involved sale of Office Depot stores in two store towns

- FTC Ultimately Opposed Merger
  - Horizontal Merger that Significantly reduced competition in "the market for the sale of consumable office supplies sold through office superstores"
  - Merger would lead to "unilateral" behavior that would significantly increase prices for office supplies sold through superstores
  - Claimed efficiencies from merger either did not exist or were not large enough to overcome price increasing effect of the merger
- Should markets be defined by retailing format (office supply superstores) or by retail product (pencils and paper)?
  - Leads to very different view on market structure
- Does distribution of one, two and three superstore town provide a "natural experiment" to test effects of number of competing superstore suppliers on prices?
- Does stock market reaction to merger, especially that of OfficeMax tell us anything about expected effects of the merger on prices?
  - Increased efficiencies and lower price bad for OfficeMax
  - Higher prices good for OfficeMax

For FTC, a question of market power

Agency seen becoming more assertive in examining mergers



STEVE BAILEY
STEVEN SYRE

To hear Tom Stemberg tell it, he was just run over by federal regulators trying to stretch their antitrust powers to new lengths amid the nation's boom of corporate mergers and acquisitions.

The Federal Trade Commission, which voted 4-1 yesterday to block the $4 billion merger between the company Stemberg runs, Staples Inc. of Westborough, and rival Office Depot, is headed to court. At issue: how to define markets and decide whether consumers will get hurt by a merger.

"The FTC in this case has gone to new levels of intervention," Stemberg fumed after the decision. FTC lawyers said they were only applying well-tested principles that have been employed in other industries, most notably the supermarket business.

The larger question, whether the FTC is taking increasingly aggressive legal positions that will tilt more merger deals, is not entirely clear either.

The Justice Department drew a lot of attention when it stepped up enforcement of antitrust issues early in the Clinton administration. But the FTC, which shares antitrust review duties with Justice, has also raised the bar for many of the deals it examines.

Antitrust lawyers say the FTC has become more assertive in its opinions on market power, the ability of a merged company to force higher prices on the public. But they say the change has been gradual and began even before President Clinton took office. Among the FTC-patrolled industries the shift most often affects: retail, health care, and, increasingly, utilities.

But defining market power and deciding who holds it is not nearly as straightforward a proposition as it might seem.

Just deciding who competes in a particular market is a thorny issue in the Staples dispute. Is it all types of stores, as the FTC argues?

On occasion, the FTC has even waded into "innovation markets," judging the chances a merger could impede the development of new products and diminish competition in markets for goods that do not exist yet.

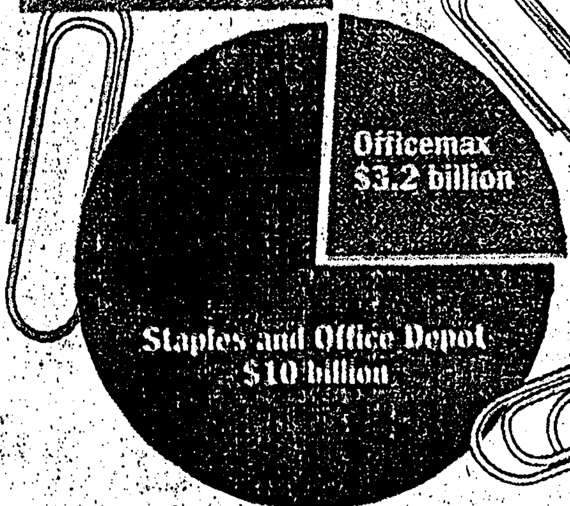
The FTC has benefited from the combined technical skill and political wherewithal of its chairman, Robert Pitofsky, in pursuing some cases. But the sheer number of mergers taking place and the strategic nature of most combinations are also forcing more conflicts.

Compared with the merger wave of a decade ago, acquisitions today are driven by a much greater concern for business efficiencies and market opportunities. These issues, the lawyers note, are much more likely to trip over antitrust questions.

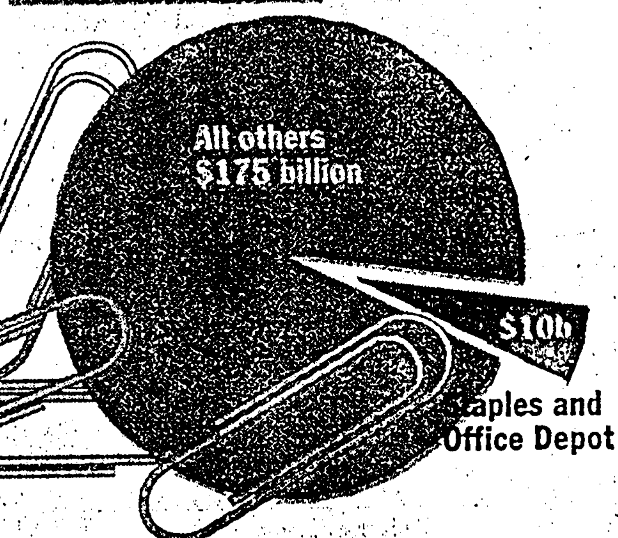
Competing views

At the center of the Federal Trade Commission's attempt to block Staples' buyout of Office Depot is a disagreement over how to define the market for office supplies

FTC view:
Office-supply superstores are a distinct market of about $13 billion. With Officemax the only major competitor, Staples could raise prices



Staples view:
Office-supply superstores are part of a larger $185 billion market that includes Wal-Mart, stationery stores, and other retailers. Lower costs of combined company would allow Staples to cut prices



SOURCE: Bloomberg News

FTC seen getting tougher

■ BOSTON CAPITAL
Continued from Page D1

ed at length. The conflict is usually resolved quickly or a deal collapses in the face of delays that could take years. The FTC or the Justice Department almost always reaches a negotiated settlement before the threat of a legal showdown draws near.

Stemberg insisted Staples and Office Depot were unable to satisfy the FTC in part because they faced two moving targets: a definition of the problem and an acceptable solution.

"The FTC flip-flopped on what the issue was," said Stemberg.

He said a senior FTC official told the company on Feb. 22 it was examining the threat that a merged company would impede an expected price decline in some products. The point was reiterated by Pitofsky, the FTC chairman, four days later. But by yesterday, the FTC complained some prices might actually rise as a result of the merger.

Stemberg said the FTC staff and some commissioners seemed to favor a divestiture of stores to No. 3 Officemax as the only acceptable remedy. But, he said, some other commissioners seemed to favor divestiture to some other entrant, hoping to create a new competitor with bulk.

Regardless, Stemberg said, any efforts to negotiate a sale of some stores to Officemax was hopeless.

"I think Officemax's motives were entirely clear," said Stemberg. "They wanted to screw up the deal."

Meanwhile, the FTC is taking the tenuous position that the merger between Staples and Office Depot would hurt customers, even if they could go elsewhere for many of the products they sought.

The convenience of one-stop shopping, the FTC contends, would still drive customers to the more expensive wares on the office superstore shelves. Government lawyers argue the superstores already hike their prices by 5 to 15 percent in areas where they do not compete head to head.

"This case is all about taking the companies at their word, in the sense that we looked at how they compete, whom they compete against, and why they wanted to do this deal," said William J. Baer, director of the FTC's bureau of competition.

"Our conclusion was they wanted the deal because they were concerned about the level of competition between themselves. They saw benefits to eliminating that competition and we see great risk to consumers," he said.

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

For Release: November 30, 1999

Exxon/Mobil Agree to Largest FTC Divestiture Ever in Order to Settle FTC Antitrust Charges; Settlement Requires Extensive Restructuring and Prevents Merger of Significant Competing U.S. Assets

2,431 Gas Stations in Northeast, Mid-Atlantic, California and Texas to Be Sold; California Refinery Sale Will Prevent Higher Prices; FTC Says Agreement Will Preserve Competitive Gas Prices

The Federal Trade Commission announced today that it has accepted a proposed settlement of charges that Exxon Corporation's acquisition of Mobil Corporation would violate federal antitrust laws. The FTC alleged that the acquisition would significantly injure competition in the markets for refining and marketing of gasoline in the United States and allow Exxon/Mobil to raise gasoline prices for consumers. The proposed settlement would prevent the merger of most of the companies' overlapping U.S. marketing businesses. It would require the largest retail divestiture in Commission history -- the sale or assignment of approximately 2,431 Exxon and Mobil gas stations in the Northeast and Mid-Atlantic (1,740), California (360), Texas (319) and Guam (12). In addition, an Exxon refinery in California; terminals; a pipeline and other assets would be sold. The Commission noted that while the relief ordered in this case is extensive, it would still represent only a fraction of Exxon/Mobil's worldwide assets.

"Because Exxon and Mobil are such large and powerful competitors, and because they now compete in several product and geographic markets in the United States, the Commission insisted on extensive restructuring before accepting a proposed settlement," said FTC Chairman Robert Pitofsky. "This settlement should preserve competition and protect consumers from inappropriate and anticompetitive price increases."

According to the Commission, the proposed merger poses competitive problems in "moderately concentrated" markets (California gasoline refining, marketing and retail sales of gasoline in the Northeast, Mid-Atlantic and Texas) and in "highly concentrated" markets (e.g., jet turbine oil). The most substantial portions of the proposed settlement would resolve the problems in the "moderately concentrated" markets. "Moderately concentrated" markets have more competitors and lower market shares than "highly concentrated" markets, and have been the subject of antitrust challenges less frequently than markets with fewer competitors and higher market shares. "This agreement will stand as the Commission's most significant enforcement effort in moderately concentrated markets in many years," Pitofsky said.

The Commission conducted an extensive investigation of the deal, analyzing competition and the likely effects of the merger in every oil market -- "from the well to the pump." The investigation was coordinated with the European Commission and the Attorneys General of several states. Alaska, California, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, Virginia and Washington and the District of Columbia have entered into agreements with Exxon and Mobil settling charges that the merger would violate both state and federal antitrust laws.

The Commission alleged that the merger would lessen competition in the following markets: (1) the marketing of gasoline in the northeastern and mid-Atlantic United States; (2) the

marketing of gasoline in five metropolitan areas in Texas; (3) the marketing of gasoline in Arizona; (4) the refining and marketing "CARB" gasoline (specially formulated gasoline required in California) in California; (5) the refining of jet fuel for the U.S. Navy on the West Coast; (6) the terminaling of light petroleum products in the Boston, Massachusetts, and Washington, D.C., metropolitan areas; (7) the terminaling of light petroleum products in Norfolk, Virginia; (8) the transportation of refined light petroleum products to the inland portions of Mississippi, Alabama, Georgia, South Carolina, North Carolina, Virginia and Tennessee; (9) the transportation of crude oil from the north slope of the state of Alaska via the Trans Alaska Pipeline System ("TAPS"); (10) the importation, terminaling and marketing of gasoline and diesel fuel in the Territory of Guam; (11) the refining and marketing of paraffinic lubricant base oils in the United States and Canada; and (12) the manufacture and sale of jet turbine lubricants.

The proposed settlement would remedy the alleged anticompetitive effects of the merger by requiring Exxon/Mobil to divest: (1) all of Mobil's gasoline marketing in New Jersey, Pennsylvania, Delaware, Maryland, Virginia and the District of Columbia (the Mobil Mid-Atlantic Marketing Assets) and all of Exxon's gasoline marketing in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut and New York (the Exxon Northeast Marketing Assets); (2) Mobil's gasoline marketing in the Austin, Bryan/College Station, Dallas, Houston and San Antonio, Texas, metropolitan areas; (3) Exxon's option to repurchase retail gasoline stores from Tosco Corp., in Arizona; (4) Exxon's refinery in Benicia, California, and all of Exxon's gasoline marketing in California; (5) the terminal operations of Mobil in Boston and the Washington, D.C. area, and the ability to exclude a terminal competitor from using Mobil's wharf in Norfolk; (6) either Mobil's interest in the Colonial pipeline or Exxon's interest in the Plantation pipeline; (7) Mobil's interest in TAPS; (8) the terminal and retail operations of Exxon in Guam; (9) a quantity of paraffinic lubricant base oil equivalent to Mobil's North American market share; and (10) Exxon's jet turbine oil business.

The Commission noted that the decision whether to approve the proposed acquirers of the divested assets will be made after careful consideration of the refining and marketing experience, financial viability, business plans and environmental records of the acquiring companies. "We want to assure ourselves that in approving the buyers we accomplish the purposes of the remedy contained in the consent order to restore the competition lost by the merger," it said.