# **SYMPOSIUM:PYRRHIC VICTORIES? REEXAMINING THE EFFECTIVENESS OF ANTITRUST REMEDIES IN RESTORING COMPETITION AND DETTERRING MISCONDUCT: Lessons from the Clinton Administration: The Evolving Approach to Merger Remedies**

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**Text**

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When the history of antitrust enforcement of the Clinton administration is written, scholars will certainly focus on the importance of merger and nonmerger enforcement actions. Perhaps the most significant achievement of the Clinton administration, however, is the focus on merger remedies - the question of whether there is a remedy and what that remedy should be when the agencies approach an anticompetitive merger. These are perhaps the most intriguing and complex issues that the enforcement agencies grappled with in the last decade of the twentieth century.

This article seeks to provide a view of how the Bureau of Competition of the Federal Trade Commission approached the issue of merger enforcement and remedies in the past decade. Part I begins by outlining the important responsibilities of an antitrust enforcement agency in fashioning relief. Part II then discusses how the FTC's approach towards merger remedies has evolved in the past two decades. Part III describes several cases in which the Bureau of Competition chose not to accept various remedies proposed by parties to mergers. These examples illustrate why certain forms of relief, whether they be structural or nonstructural, may be inadequate to resolve certain types of competitive problems. Finally, Part IV addresses a variety of initiatives that the enforcement agencies can take to better clarify and articulate their policy towards merger remedies.

I. The Merger Wave: New Challenges

The most critical factor in merger enforcement in the 1990s was the tremendous wave of mergers, which continued at a rapid and breathtaking pace. Each week there were announcements of new mergers, many of which appear to have restructured industries or created firms of a size that was unimagined a few years ago. The merger wave was characterized as "a frenzy of merger madness, capping a dramatic wave of global corporate consolidation that has been gaining momentum through much of the decade." [[1]](#footnote-2)1 In terms of simple numbers, reported Hart-Scott-Rodino transactions have tripled **[\*953]** since 1991, from 1,529 to 4,642 in fiscal year 1999. [[2]](#footnote-3)2 More important, the total value of these mergers increased eleven-fold during this period, from $ 169 billion to over $ 1.9 trillion. [[3]](#footnote-4)3

Of course, the vast majority of mergers are procompetitive or competitively neutral. [[4]](#footnote-5)4 Some mergers bring together firms in complementary relationships, or involve markets that appear to be converging. That is why at both the FTC and the Justice Department only a small handful of mergers, less than three percent a year, received some type of in-depth investigation. [[5]](#footnote-6)5 At the FTC, the vast majority (over sixty percent) of these investigations resulted in enforcement actions. [[6]](#footnote-7)6

There are several aspects to the merger wave that directly impacted the issue of merger remedies. The problem of designing and securing effective relief is an increasingly complex and challenging problem. Why is that? The primary reason is that mergers are increasingly strategic in nature. Many of the investigated mergers are motivated by strategic concerns, such as the desire to become dominant in a market. Unlike the mergers of the 1980s, which were frequently motivated primarily by financial concerns, today's mergers are based on a desire to strengthen competitive position. Thus, they are more likely to involve substantial horizontal overlaps, some of which are much larger than those the FTC dealt with in the past. Replacing a competitor with thirty percent of the market is far more daunting than replacing one with a five percent market share. Moreover, as each merger occurs, the number of remaining firms diminishes and, in turn, so does the pool of potential acquirers of divested assets. Often, when presented with problems of substantial relief and few remaining competitors, the parties propose putting the FTC in a regulatory position, monitoring remedies short of a clean divestiture.

There are other factors that increase the challenge of remedy. The sheer size of the mergers and the number of markets involved is far greater than in the past. As technology and information continue to assume primacy as driving forces in the economy, relief often must include technological and informational assets. Nonetheless, crafting relief for intangible assets can create tough challenges. For example, some transactions are in regulated or newly deregulated industries where the antitrust agencies must determine whether to rely on regulation to protect competition.

Finally, as described below, the Bureau of Competition recently completed an important study of the divestiture process. The Bureau has learned from the success and failure of remedies in the past and approaches merger remedies with a renewed sense of humility and caution. Unlike other agencies that possess expertise in a specific industry, the FTC has general jurisdiction. Antitrust enforcers are not experts in any particular industry. **[\*954]** Therefore, the agencies have increasingly recognized the need for more thorough examination and care before any particular remedy is adopted. [[7]](#footnote-8)7

A. The Range of Remedial Options - How Do the Agencies Choose?

There are a variety of approaches to curing anticompetitive mergers. First and foremost, the agencies may simply decide that no remedy, short of blocking the transaction, will fully resolve all competitive concerns. Second, the agencies may decide that the resolution of competitive concerns will require the divestiture of an entire ongoing business and related assets. Third, they might conclude that some form of partial divestiture, incorporating various aspects of a business, would be acceptable, because it could facilitate the entry or expansion of a replacement competitor. Fourth, a merger might be resolved through contractual arrangements, such as the licensing of intellectual property or perhaps a supply agreement. Fifth, the agencies may decide to use some form of behavioral relief such as a nondiscrimination provision. Finally, some mergers can be resolved with a combination of these forms of relief.

The Commission has broad discretion to decide whether any one of these possible remedies is acceptable in a particular case, as long as the remedy will cure the competitive problem. [[8]](#footnote-9)8 So how does it decide which approach is most suitable for a given case?

The foremost obligation of antitrust enforcers is to make sure that a merger does not reduce competition to any significant extent. As Justice Brennan recognized over forty years ago in Du Pont: "The key to the whole question of an antitrust remedy is of course the discovery of measures effective to preserve competition." [[9]](#footnote-10)9 Consumers should benefit from the same degree of competition before and after a merger. Thus, the first objective is to determine which remedies will effectively and fully preserve competition.

A second objective is to select a remedy that will preserve competition with as much certainty as possible. Consumers should not bear the risk of inadequate relief or the burden of untimely relief.

The third objective is to preserve the efficiency-enhancing potential of a merger, to the extent that is possible without compromising the obligation to preserve competition. If there are two remedial options, both equally effective (based on experience) and both equally likely to achieve their objective, but with different implications for preserving cognizable merger efficiencies, the agencies should choose the one that is more likely to preserve efficiencies. **[\*955]** They must be effective based on experience; theory alone may not be enough for the risk of a failed remedy to be shifted to consumers.

The approach to remedies evolves, as does the approach to merger enforcement generally. The agencies seek to learn from each case what works and what does not work. Past actions provide guidance, but there are no absolute rules. Remedies are evaluated based on the facts in each individual case. The staff also evaluates the remedy process, as described below, to see if expectations are borne out and the remedies are effective.

In understanding the agencies' remedy analysis, another important factor to consider is what the agencies' responsibilities do not include. The FTC is not a market regulator. Apart from enforcing the prohibitions that are contained in the antitrust laws, its job is not to regulate or prescribe the market behavior of firms. That is a function of the competitive process. Nor are the agencies industrial planners. The obligation of the enforcement agencies is straightforward and simple - make sure that the postmerger world is every bit as competitive as the one that existed before the merger. Of course, nothing in the real world is ever that simple. Tradeoffs and judgment calls need to be made in the process.

Securing appropriate merger relief is obviously a difficult process, often exacerbated by the complexity of the industry involved. Innovative remedies that include a combination of structural and behavioral relief are one of many creative solutions. The roots of the agencies' modern ability to be innovative in merger relief, however, can be found in the enactment of the Hart-Scott-Rodino Act in 1976. [[10]](#footnote-11)10

As a critical innovation in merger policy, the Hart-Scott-Rodino Act revolutionized merger relief. Prior to the enactment, when the agencies litigated against consummated mergers, relief was almost invariably untimely and ineffective. That was the main conclusion of the landmark study by Professor Kenneth Elzinga, who characterized such postmerger enforcement efforts as pyrrhic victories. [[11]](#footnote-12)11 The Act, by requiring a waiting period, put the government in a position where it could enjoin mergers and secure relief prior to the consummation of a merger. Indeed, only six years after the Act was passed, Assistant Attorney General Baxter stressed the importance of taking a fix-it-first approach to relieve competitive problems and divest offending assets before the merger was even consummated. [[12]](#footnote-13)12

B. Is There a Preferred Merger Remedy?

One way to assess the FTC's approach to merger remedies is to determine whether there is some benchmark or preferred remedy it should be trying to achieve. Generally, there is. In most cases, divestiture is the preferred remedy. As Justice Brennan stated in Du Pont: "Divestiture has been **[\*956]** called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should be in the forefront of a court's mind when a violation of 7 has been found." [[13]](#footnote-14)13 Many courts have followed that guidance for the past several decades, as have the enforcement agencies.

The facts in Du Pont illustrate why divestiture is preferable. The parties had proposed various forms of behavioral relief (e.g., barring DuPont from influencing the selection of General Motors officers or directors and prohibiting preferential trade relationships). The Court, however, found that enforcing such a decree would likely be cumbersome and time-consuming, that framing an injunction to address all forms of anticompetitive conduct would be impossible, and that policing the order "would probably involve the courts and the Government in regulation of private business affairs more deeply than administration of a simple order of divestiture." [[14]](#footnote-15)14

Of course, the conclusion that divestiture is the preferred remedy somewhat begs the question: Divestiture of what? The entire acquired entity? A complete, ongoing business? A partial divestiture of assets that might provide the basis for starting a business? In markets where technology is a key to success, is a divestiture of soft assets such as intellectual property sufficient, or is a broader asset package, even an ongoing business, needed to ensure successful entry? The Supreme Court's characterization of divestiture in Du Pont as "simple, relatively easy to administer, and sure" applies most clearly to a clean separation of two ongoing businesses. In fact, the Court in Du Pont held that "complete divestiture is peculiarly appropriate in cases of stock acquisitions which violate 7." [[15]](#footnote-16)15 Du Pont was a postacquisition case, of course, essentially undoing the merger or acquisition. Today, thanks to Hart-Scott-Rodino, the agencies more typically look at the remedy issue in the premerger context, and the lesson of Du Pont would be to prevent the two businesses from combining in the first place.

One issue that arises where the divested facility produces several products is whether divestiture of the entire facility is necessary. Occasionally, parties argue that they should be able to retain those portions of a facility that produce products that do not raise competitive concerns. In order for a divestiture to be effective, however, the divested facility must be viable and be able to independently compete against the new postmerger firm. Sometimes, most importantly, other portions of the facility are necessary to ensure the viability of the divested entity. For example, in Olin Corporation, which involved a chemical plant that manufactured certain swimming pool sanitizers, the respondents sought to exclude from the Commission's order part of the plant that manufactured cyanuric acid. The Commission rejected that request because there was no evidence that the part of the plant that manufactured the swimming pool sanitizers could operate independently from cynamuris acid part. Thus, the Commission concluded that divestiture of the **[\*957]** entire facility was necessary "to give its acquirer a real chance at competitive success." [[16]](#footnote-17)16

As evident from Du Pont and Olin, it is clearly within the Commission's power to require divestiture of a greater set of assets than those included in the overlap markets in order to effectively replace competition. Often the buyers of the divested assets will need other ancillary assets in order to effectively restore competition. Sometimes, without these ancillary assets, the buyer will not be able to replicate the economies of scale or scope of the firm that has been acquired. In other cases, these additional assets will be necessary to give the buyer both the incentive and ability to fully restore competition.

The Commission applied such a principle in both of the recent ***oil*** mega-mergers, Exxon/Mobil and BP/ARCO. In Exxon/Mobil, there was a direct overlap in California between the two firms in ***oil*** refining but a far less significant overlap downstream (in gas stations). [[17]](#footnote-18)17 The FTC required divestiture not only of Exxon's refinery, but also of all of Exxon's downstream assets. The Commission required a clean sweep of all assets in order to assure the buyer had the same level of economies of scale and scope that Exxon possessed prior to the merger. [[18]](#footnote-19)18 A vertically integrated refinery would be a far more significant competitive force.

Similarly, in BP/ARCO, there were significant competitive overlaps in the production, sale, and delivery of Alaska North Slope crude ***oil***. [[19]](#footnote-20)19 The parties entered into a separate agreement with the State of Alaska that would have combined various assets of BP and ARCO. [[20]](#footnote-21)20 This mix-and-match approach at best only partially cured the direct overlaps but failed to create a firm with the efficiencies possessed by ARCO. The Commission rejected the proposed consent and sought to enjoin the merger. Ultimately, after extensive negotiations the parties agreed to the divestiture of all of ARCO's complete, free-standing Alaska businesses, including ***oil*** and gas interests, tankers, pipeline interests, exploration data, and selected long-term supply agreements. [[21]](#footnote-22)21 Again, a clean sweep approach was necessary to provide the acquirer of the assets (Phillips) with ability to fully restore competition.

When the agencies depart from the divestiture remedy of a clean separation of two ongoing businesses such as the one the Court spoke about in Du Pont, it is not always clear that divestiture is "simple, relatively easy to administer, and sure," at least not retrospectively.

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II. The Government's Approach to Merger Remedies over the Years

A. Remedies Before the FTC Divestiture Report

The government's position towards remedy has evolved over the past several decades. Prior to enactment of Hart-Scott-Rodino, the government typically was faced with seeking to remedy a merger several years after it had been consummated. Such a task was almost always hopeless because the assets had been intermingled and the acquired firm typically dissolved. Usually there was relatively little left to divest, at least little that resembled the acquired entity. Sometimes the agencies would require the merged firm to scrabble together various plants and other assets into something that vaguely resembled the acquired entity before the merger. Most often these divestitures were nothing more than pyrrhic victories. [[22]](#footnote-23)22 Du Pont was an easier case, since it involved a partial stock acquisition and it was not difficult (apart from tax considerations) to spin off the acquired stock.

With the enactment of the Hart-Scott-Rodino Act and its mandatory waiting period before merger consummation, the agencies became able to enjoin a merger prior to the scrambling of the asserts. As a result, the agencies and the merging firms were placed on equal footing in terms of finding the appropriate resolution to a problematic merger.

The agencies' initial response to Hart-Scott-Rodino was to almost always seek a preliminary injunction. Sometimes the agencies would seek to enjoin the entire merger even when the amount of overlap was relatively small. The agencies' policy, however, began to change in the early 1980s. The agencies were more willing to allow firms to restructure transactions to avoid competitive problems (fix-it-first) or to engage in partial divestitures. In some cases, such as the GM/Toyota joint venture, the agencies were even willing to resolve their concerns solely on certain forms of behavioral relief. [[23]](#footnote-24)23

During the mid-1980s, there was a shift back toward litigation and away from settlement, at least at the FTC. From 1986 to 1988, for example, of the thirty merger enforcement actions authorized by the Commission, only seven, or twenty-three percent, were settled prior to litigation with some form of divestiture or behavioral relief. [[24]](#footnote-25)24 In the vast majority of enforcement actions, the Commission chose to litigate. Typically, the choice to litigate resulted in the parties' dropping the transaction. In the cases that were litigated, the FTC often prevailed and the merger was preliminarily enjoined.

During the late 1980s and early 1990s, the FTC began to take a more flexible view of merger relief. While divestiture of a plant or facility was typically the most common remedy, the Commission increasingly considered a variety of alternative solutions to competitive problems. In a number of cases, the Commission was willing to accept licensing arrangements (which might eventually result in partial structural relief), supply agreements, and certain forms of behavioral relief, such as firewalls and nondiscrimination **[\*959]** provisions. A number of these cases involved high-technology markets in which licensing was used to convey intellectual property rights to bring a new entrant into the market. The merger process has come a long way from Du Pont. Not surprisingly, this broader remedy policy resulted in a greater number of settlements and far fewer litigated cases.

When Robert Pitofsky became FTC Chairman in 1995, the Bureau of Competition wanted to take a fresh look at the question of merger remedies. There had been a perception, both in the private bar and within the FTC staff, that some merger relief orders had not worked as well as expected. The staffs of the Bureau of Competition and Bureau of Economics were directed to study what happened in a number of merger consent orders issued from 1990 through 1994.

B. The FTC Divestiture Report

The FTC divestiture study began in 1996, and the study both reinforced some of the approaches to remedies and caused the FTC to rethink others. [[25]](#footnote-26)25 The Divestiture Report provided new insight into the divestiture process, and understanding its lessons is vital for all merger lawyers. It found that in the majority of cases, generally, the acquirer of the divested assets was able to enter the market. An important detail, however, was that the likelihood of successful entry was much higher if an ongoing business was divested. A divestiture of selected assets to facilitate entry was significantly more problematic.

These general conclusions are open for criticism. The measure of success of the Divestiture Report was whether the acquirer was able to enter the market. The more appropriate measure of success is whether the acquirer was able to fully restore the competition lost from the merger. Moreover, although the acquirers entered the market, there is no measurement of whether they succeeded, stayed in the market for a long time, or thrived as a competitor. In addition, the Report does not define what is meant by an "ongoing business."

The Divestiture Report also observed that a number of factors can complicate the divestiture process and lessen the likelihood of success, unless they are addressed within the court order. For example, respondents in the divestiture process have incentives: (1) to offer a divestiture package that does not address all the competitive issues raised by the staff; (2) to propose a weak buyer; and (3) to engage in strategic behavior to impede the success of the buyer. Moreover, even if they do not affirmatively try to impede the buyer, respondents normally do not have incentives to assist or cooperate with the buyer during the transition phase. [[26]](#footnote-27)26

One particular problem identified by the Divestiture Report was continuing relationships between the seller and buyer of divested assets after divestiture, such as a supply arrangement or technical assistance requirement, **[\*960]** which may increase the buyer's vulnerability to the seller's behavior. [[27]](#footnote-28)27 Of the nineteen divestitures where a seller had a continuing relationship with the buyer of the assets, in six cases the ongoing relationship was so detrimental that the buyer could not operate effectively, and in seven cases the ongoing relationship was competitively harmful. [[28]](#footnote-29)28 Yet, notably, those ongoing relationships may be critical to the buyer's success, particularly if less than a separate complete business is divested.

Another significant finding was that buyers often have a serious informational disadvantage. [[29]](#footnote-30)29 Buyers may not fully know what assets they need to succeed in the business, or whether the assets offered by respondents are up to the task. This finding came as somewhat of a surprise to the Commission since it was generally assumed that purchasers of divested assets would be informed buyers who could protect their own interests. The assumption, nonetheless, is not necessarily valid when respondent principally holds much of the key information. Unfortunately, the FTC also faces the same informational disadvantage. While the FTC staff tries to learn as much as it can about the industries and businesses it investigates, it does not presume to know how to operate the business.

The Divestiture Report also revealed that buyers may not have the same objectives as the Commission. [[30]](#footnote-31)30 For example, buyers may want to purchase the divestiture assets due to its low cost and the buyer's ability to produce more revenue for a lower cost, or buyers may want to purely increase their market share. Even so, buyers may even have anticompetitive objectives. Due to unknown ulterior buyer motives, the remedial purposes of the order may not be met.

Finally, divestitures that include technology transfers present serious difficulties and challenges. They bring together many of the problems already mentioned: respondent's incentive to limit the asset package, the buyer's informational disadvantage, the buyer's reliance on the respondent for technical assistance and transfer of know-how, and the respondent's incentives to engage in strategic behavior. [[31]](#footnote-32)31 In addition to such issues, technology transfers often involve the divestiture of less than an ongoing business and, thus, the buyer may be at the bottom of the learning curve and have to start with a disadvantage. [[32]](#footnote-33)32

At an early stage of the study, it became evident that the FTC needed to rethink and modify its approach to merger remedies. In fact, the Bureau of Competition began to incorporate many of those lessons into its remedy approach while the study was still being completed. In 1996, the Bureau adopted several reforms based on initial findings of the Divestiture Report:

(1) More frequent use of up-front buyers; (2) Shorter divestiture periods, to minimize the risk of interim harm and dissipation of asset **[\*961]** value. The divestiture periods were shortened from twelve months to typically three or four months; (3) Increased use of full or structural relief. The closer the divestiture package is to an ongoing business - better yet, if it is an ongoing business - the greater the likelihood that competition will in fact be restored; (4) The use of interim trustees, especially where technology transfers are involved. [[33]](#footnote-34)33

The value of up-front buyers and short divestiture periods is illustrated by the consent order in the Schnuck supermarket case, [[34]](#footnote-35)34 which did not require an up-front buyer. Schnuck Markets acquired its chief competitor in St. Louis, Missouri, and the Commission required the divestiture of twenty-four stores within twelve months. Before the stores could be acquired, however, Schnuck failed to maintain them properly, resulting in a relatively unattractive set of assets. [[35]](#footnote-36)35 The Commission filed a civil penalty action, and Schnuck agreed to pay a $ 3 million civil penalty and divest two additional stores. [[36]](#footnote-37)36 While that was a substantial penalty, the FTC cannot rely on civil penalty actions alone to ensure that respondents will respond appropriately. Obviously, the prospect of substantial civil penalties did not deter Schnuck from engaging in strategic behavior, and it may simply have been an investment or cost of doing business to preserve market power. Moreover, by the time the agency can bring a civil penalty action, the damage to the market will have already been done. Accordingly, the agencies must assure up front that the remedy really will work for the parties to the transaction and the market.

Up-front buyers are probably the most vital tool in assuring a successful divestiture. Such buyers enable the FTC to better determine: (1) whether a proposed package of assets that is not a stand-alone business is viable in the real world; (2) whether there is a buyer for the proposed divestiture assets; and (3) the likelihood that the proposed buyer will restore the competition that otherwise would be lost through the merger. The likelihood of restoring competition should continue to receive careful scrutiny. The FTC seeks to assure not only that the buyer will successfully enter, but also that it can restore competition fully.

The FTC during the Clinton administration used up-front buyers in over sixty percent of the cases in which there was some form of nonbehavioral relief. There might have been an impression that the up-front buyer policy is **[\*962]** reserved for cases where assets may waste quickly, such as supermarkets. [[37]](#footnote-38)37 That is not the case. The Commission has used up-front buyers in pharmaceutical cases, in other health care products, industrial products such as refractories, acrylic polymers, lead smelters, industrial power sources, and consumer products. In many cases where the parties have identified an up-front buyer at the beginning of the investigation, the Commission has been able to resolve its concerns and enter a proposed consent order in less than sixty days after the investigation began. The message is straightforward: parties must consider and be able to identify an up-front buyer as part of the merger planning process.

III. Application of Remedy Reforms

The application of remedy reforms over the past few years, especially the greater focus on effective structural relief, has led to claims that the FTC has raised the bar for resolving merger concerns. Yet, such a characterization of the FTC is not entirely accurate. The agency has always insisted on the kind and quantum of relief necessary to protect competition based on its experience and the evidence. It evaluates what it takes to preserve or restore competition. As experience with divestitures grows, the FTC's understanding of what it takes to successfully remedy the potential anticompetitive effects of a proposed merger also grows. The FTC has been more willing today to consider nonlitigated resolutions to merger concerns, but that is no more a lowering of the bar than the recent reconsideration of merger remedies has been a raising of the bar.

In reality, the vast number of mergers raising competitive problems are resolved through consent orders that include a wide variety of approaches to relief. In most cases, structural relief involving divestiture of an ongoing business is required. In many cases, a partial divestiture is appropriate, often because it is clear that the acquiring firm has sufficient assets to replicate the efficiencies of the acquired firm and fully restore competition. In other cases, even more refined relief such as behavioral relief or licensing arrangements may be used, particularly in high-tech markets involving research and development or bundled products. Again, cases of more limited relief require a careful assessment of whether the relief can fully restore competition.

One illustration of the Commission's flexible approach is its evaluation of the merger between Ciba and Sandoz. Although divestiture is the preferred remedy, that does not mean it will be invariably used, especially where it may diminish procompetitive aspects of a merger. This can be a tough issue, particularly in high-technology markets where research and development rights and scientists work together on a number of projects. In the Ciba/Sandoz merger, the Commission chose licensing over divestiture because of the problems of separating ongoing R&D projects. [[38]](#footnote-39)38 Commissioner Azcuenaga dissented as to the licensing aspect of this order, noting that divestiture would cure the anticompetitive problem in a "simple, complete, and **[\*963]** easily reviewable" manner. [[39]](#footnote-40)39 While divestiture is certainly an easier remedy to impose and monitor, it may not always be the most effective way of restoring competition. Because licensing is more flexible and can be tailored more easily to unusual fact situations, it may be the preferred remedy in innovation cases where divestiture could interrupt potentially successful research efforts. In this case, the majority of the Commission determined that the gene therapy research efforts, which contained a number of joint efforts with third parties, would be too difficult to disentangle from the merging firms. The Commission concluded that divestiture would not only hamper efficiency but also could be less effective in restoring competition if it led to coordinated interaction or left the divested business at the mercy of the merged firm.

Another consideration to keep in mind is that many mergers are taking place in a changing market environment. As noted earlier, many mergers are large and complex; they involve strategic combinations of businesses, and may involve new forms of competition. Complex cases are difficult to resolve, and the agencies must be careful that the remedy will fully restore competition. Not surprisingly, parties are presenting the Commission with proposed orders that are increasingly complex and regulatory. As Chairman Pitofsky observed, the FTC's recent experience is that parties are often presenting "proposals that are so extensive and complex that it is impossible to predict with any confidence that competition will be restored and consumer welfare protected." [[40]](#footnote-41)40

As a result, the approach to merger remedies may affect the resolution of particular cases. Compared to the practice in the late 1980s and early 1990s, the FTC was somewhat more careful in the use of nonstructural and partial structural relief. During the mid and later 1990s, the Commission was faced with a number of cases in which the parties proposed relief short of divestiture that was simply insufficient to remedy the competitive problem. The nature of the competitive problem has a lot to do with whether there is an acceptable fix. Some of the mergers during the last few years presented new competitive issues that were not easy to fix, short of blocking the merger. Others posed particularly complex issues of relief. The following cases are examples of such complex situations.

A. Partial Divestiture of the Overlapping Assets

Often the competitive problems from a merger can be resolved through the divestiture of some assets in overlapping markets. This is frequently the approach in retail markets where divestiture of all the stores in markets where there are overlaps and significant levels of concentration are often required. For example, in the Exxon/Mobil case, the FTC required the divestiture of all gasoline stations from Virginia to Maine to ensure that there was no increase in concentration in northeastern gasoline retail markets. [[41]](#footnote-42)41 This clean sweep approach resolved the competitive concerns in those markets.

**[\*964]**

1. Drug Wholesalers

Sometimes, such an approach will not be sufficient, especially where competition is not solely local. For example, in the drug wholesalers cases, FTC v. Cardinal Health, Inc. and FTC v. McKesson Corp., [[42]](#footnote-43)42 the FTC challenged two mergers of the four largest drug wholesalers. As anyone who followed the trial knows, the court explored every opportunity with the parties to find a settlement that could permit the proposed mergers to go forward. The parties suggested that a divestiture of several drug wholesale distribution centers in the Northwest, where there were clear overlaps, would be sufficient to restore competition. The FTC told the court that divestiture would have been severely inadequate because, in the FTC's view, customers demanded firms that could provide national service and divestiture of a handful of distribution centers could not compensate for the loss of two national competitors that would have resulted from the proposed transactions. The court found that regional firms did not offer the same level of competitive restraint as the national firms. Thus, the proposed settlement was appropriately rejected, and the court issued a preliminary injunction. [[43]](#footnote-44)43

2. Rite Aid/Revco

Rite Aid's proposed 1995 acquisition of Revco would have resulted in a single pharmacy chain of over 5,000 stores. [[44]](#footnote-45)44 In thirty metropolitan statistical areas in twelve midwestern states, the firm would have had over a thirty-five percent market share, and in most of these markets it would have been more than twice as large as its closest rival. [[45]](#footnote-46)45 Rite Aid proposed to divest some stores where there was an immediate geographic overlap. Had the staff been concerned only about those retail overlaps, it might have been able to reach a satisfactory resolution. In previous cases where the relevant market was viewed as direct retail sales to consumers, the Commission had agreed to accept divestitures in towns where the firms had immediate overlaps.

Although that remedy might have been satisfactory in the past, it was not in this case because of the evolution of the markets. The competitive problem was not simply the elimination of competition in direct retail sales to consumers but also in a parallel market, the provision of network pharmacy services to pharmaceutical benefit managers ("PBMs") and other managed care providers. These firms use networks of pharmacies to deliver pharmaceutical benefits to consumers. From the perspective of these PBMs, it was necessary to form a network of pharmacies in geographically diverse locations. Rite Aid and Revco were direct competitors in providing PBMs with a suitable network, and they often competed to be the anchor of the managed care network.

The nature of the competitive concern complicated the remedy issue; it was more difficult to make the divestitures necessary to replace a network than it was to eliminate some local overlaps through the divestiture of a few **[\*965]** stores. The proposed divestitures offered by Rite Aid would have eliminated the direct local overlaps but were simply insufficient for an acquirer of those assets to fully restore competition in this managed care market. Ultimately, the Commission refused the proposed divestiture and authorized the staff to seek an injunction. Rite Aid dropped the acquisition, and Revco was acquired by CVS, which currently competes aggressively with Rite Aid in the markets where competitive concerns were raised. [[46]](#footnote-47)46

3. Mediq/UHS

Mediq Inc. and Universal Hospital Services ("UHS") are the two largest firms in the country that rent durable, movable medical equipment - such as respiratory devices, infusion devices, and monitoring devices - to hospitals on an as-needed, short-term basis. Much of the contracting for durable medical equipment is done on a national basis, and hospital chains and group purchasing arrangements require a national network for this equipment. [[47]](#footnote-48)47 Mediq's proposed acquisition of UHS in 1997 would have given Mediq a near monopoly in the national market and a near monopoly in numerous local geographic markets as well. [[48]](#footnote-49)48 Competitive concerns were heightened because earlier acquisitions by Mediq had led to higher prices.

In an attempt to forestall litigation, the parties presented a purported "fix-it-first" solution involving Medical Specialties, a firm in the business of renting infusion pumps to home healthcare customers. The parties proposed to sell rental equipment to Medical Specialties and provide it with an option to lease several facilities. [[49]](#footnote-50)49 The FTC's assessment, and that of customers, was that Medical Specialties would not have been an adequate replacement for UHS. [[50]](#footnote-51)50 The new firm would have had a substantially smaller inventory than UHS, which itself was considerably smaller than Mediq. Customers - particularly national ones like hospital buying groups - testified that Medical Specialties would not have the amount and breadth of equipment necessary to replace UHS. Moreover, much of the business that Medical Specialties claimed it needed in order to compete successfully in the hospital rental market was under long-term exclusive contracts with UHS and Mediq.

The Commission found the proposed relief inadequate and authorized the staff to seek a preliminary injunction. [[51]](#footnote-52)51 The defendants attempted to short-circuit the litigation by asking Judge Sporkin to approve the proposed settlement, but the judge was unwilling to second guess the FTC. On the eve **[\*966]** of the preliminary injunction hearing, the parties dropped the proposed acquisition. [[52]](#footnote-53)52

B. Behavioral Relief

Of course, behavioral relief is typically a less satisfactory solution than structural relief because it often involves some sort of ongoing regulation. Nonetheless, this does not mean that it is never used. In appropriate cases, the Commission has used behavioral relief such as firewalls and nondiscrimination provisions, particularly to remedy vertical concerns. For example, in the Time Warner/Turner transaction, the Commission approved the merger based on a wide variety of behavioral rules. In other cases, a behavioral approach may be inadequate. [[53]](#footnote-54)53

1. Questar/***Kern*** River

The proposed Questar/***Kern*** River transaction in 1995 involved a situation in which a monopolist sought to acquire a fifty percent ownership interest in a firm that was on the verge of entering its market. Questar was the only transporter of natural gas to the Salt Lake City area, and ***Kern*** River Transmission Corp. had a gas pipeline that ran past Salt Lake to points further west. ***Kern*** River, which was jointly owned by Tenneco and Williams, planned to build a lateral pipeline to serve Salt Lake customers as well. The focus of the case was on transportation service to industrial customers, which could bypass the local utility and purchase gas directly from suppliers and pay separately to have it transported to their facility. [[54]](#footnote-55)54 ***Kern*** River had begun to solicit customers and was already having an effect on the market. Due to ***Kern*** River's marketing efforts, Questar sought and obtained a tariff to lower its rates to certain industrial customers to persuade them not to switch to ***Kern*** River. Questar then sought to acquire Tenneco's fifty percent interest in ***Kern*** River, with the other fifty percent to be retained by the Williams Companies. [[55]](#footnote-56)55 The transaction obviously raised concerns because it would eliminate the current price effect of ***Kern*** River's presence in the market and prevent future competition and the erosion of Questar's monopoly. [[56]](#footnote-57)56

Questar proposed what was in effect a competitive rules joint venture: it would be permitted to acquire a fifty percent interest in the ***Kern*** River pipeline while at the same time allowing Williams to have a large degree of independence on decisions as to where to enter. There were several problems **[\*967]** with the proposal. First, the agreement undermined Questar's incentives to discount its own pipeline because it would hold a fifty percent interest in its only competitor. Questar's fifty percent interest in ***Kern*** River would have diminished its incentives to engage in unfettered competition with ***Kern*** River. Even if Questar lost a bid, it would still have a big share of the business through its interest in ***Kern*** River, so it was less likely to bid aggressively. Second, ***Kern*** River shipped all the way to California, and the remedy would not diminish Questar's incentives or ability to direct ***Kern*** River's capacity away from Salt Lake City. Third, although the competitive rules had a capital forcing mechanism in which Williams theoretically could have secured Questar's commitment for capital expansion projects, it was unclear that this mechanism could work. The Bureau rejected the remedy as inadequate and too regulatory. The Commission authorized a preliminary injunction action, and Questar abandoned the transaction. [[57]](#footnote-58)57 Ultimately, Tenneco sold its share of the pipeline to Williams, which competes aggressively with Questar today.

2. Barnes & Noble/Ingram

Barnes & Noble's 1999 attempt to buy Ingram Book Group raised a different set of issues. Barnes & Noble is the largest book retailer, and Ingram is the largest wholesaler of books in the United States. Thus, it was largely a vertical transaction. [[58]](#footnote-59)58

The transaction raised concerns principally under the raising rivals cost theory. The Bureau was concerned that the acquisition of an important upstream supplier such as Ingram might enable Barnes & Noble to raise the costs to its bookselling rivals, such as independent book retailers or Internet retailers, by foreclosing access to Ingram's books and services or denying access on competitive terms. The rivals would be less able to compete, and Barnes & Noble could increase its profits at the retail level or prevent its profits from being eroded as a result of competition from new business forms such as Internet retailing. The FTC staff was concerned that the combined Barnes & Noble/Ingram could do that in a number of ways, including strategies short of an outright refusal to sell to the non-Barnes & Noble bookstores. For example, Barnes & Noble/Ingram could choose to: (1) sell to non-Barnes & Noble bookstores at higher prices; (2) slow down book shipments to rivals; (3) restrict access to hot titles; (4) restrict access to Ingram's extended inventory or back list; or (5) price services higher or discontinue or reduce these services. Vertical integration concerns permeated throughout the proposed transaction.

**[\*968]** The parties did not present a complete settlement proposal, which makes a discussion of remedies hypothetical. There were reasons to be skeptical that the deal could have been fixed. The nature of the competitive problem would have made it very difficult to address from a remedy standpoint. Structural relief would seem to require the creation of a substitute for Ingram but that did not seem to be a realistic possibility. The only remedy that might have addressed the situation is a set of behavioral rules - essentially, a set of nondiscrimination or fair dealing provisions. Those kinds of rules, however, can be problematic because they are susceptible to evasion and difficult to monitor, particularly in a transactional setting where discrimination could be exercised in subtle ways on several different variables. While the Commission has on occasion accepted some forms of behavioral relief in mergers, those approaches may not have worked in this context. Recall the Supreme Court's admonition in Du Pont that "the public interest should not in this case be required to depend upon the often cumbersome and time-consuming injunctive remedy" to enforce behavioral rules. [[59]](#footnote-60)59

Another concern about the merger was that Barnes & Noble could use Ingram to obtain competitively sensitive information about its bookselling rivals. Independent booksellers raised concerns about two types of information they provide to Ingram in the course of their supplier-customer relationship: the financial information they supply to obtain credit, and the titles and quantities of books they purchase from Ingram. Barnes & Noble might use this information for such purposes as targeting promising store locations, identifying competitors' weaknesses, and reaping the fruits of others' marketing efforts. Whether or not the fears were realistic, the fact that they existed could have had its own dampening effect on competition. For example, independents may have less incentive to develop a market for special interest books if they believe Barnes & Noble would simply free-ride on their efforts or might have returned their usage of Ingram and been forced to rely on other higher cost book wholesalers.

This concern has been addressed in other cases by obtaining a remedy commonly called a firewall. Could a firewall work effectively in this case? Most of the cases in which a firewall has been used are situations, such as defense mergers, where there is a regulator who can identify violations of the firewall. [[60]](#footnote-61)60 Even if a firewall could address the information access problem, there was the discriminatory access problem discussed earlier. In the end, the staff did not have to decide these remedy issues because there was no proposal on the table, but it would have been difficult to find a satisfactory solution. The parties chose to abandon the transaction following press reports that Bureau staff would recommend a preliminary injunction. [[61]](#footnote-62)61

**[\*969]**

C. Divestiture of an Ongoing Business

Divestiture of an entire business will usually resolve the FTC's competitive concerns because there will be some evidence that the business unit has operated effectively and efficiently. That will not always be the case, however, as illustrated by a review of the Ahold/Pathmark merger.

In 1999, Ahold, the fourth largest supermarket in the United States with over 1,000 supermarkets in fifteen states, attempted to acquire Pathmark stores, a regional supermarket chain of 135 stores in metropolitan New York, Philadelphia, and New Jersey. The acquisition was valued at approximately $ 1.75 billion. Unlike most of the supermarket mergers the Commission had reviewed over the past several years, this deal involved a much more dramatic and clear geographic overlap. Previous supermarket mergers were resolved through consent agreements primarily because the acquisitions enabled the acquiring firm to gain entry into new markets that did not pose competitive problems, and the limited overlap areas that in fact did present competitive problems were resolved through divestitures. The competitive concerns raised by the Ahold/Pathmark transaction were much more serious. Ahold was acquiring a supermarket chain that competed head-to-head with Edwards, a chain that Ahold already operated in the same geographic areas. This was not a geographic extension merger but rather the elimination of a direct competitor.

The parties' initial proposal of relatively modest divestitures of individual stores in various overlapping markets did not meet the standards of recent consent orders in the industry. Based on the FTC's concerns from prior supermarket mergers, it typically requires divestiture of a single chain's stores to an up-front buyer to resolve competitive concerns. That is, divestiture of a sufficient number of stores to maintain competition at the premerger level was required.

The parties eventually proposed to divest all of the Edwards stores. While that would eliminate the competitive overlap at least nominally, i.e., zero delta, a serious question remained whether a suitable purchaser existed that would fully restore competition. Edwards was a strong rival to Pathmark primarily because it was funded by a much larger parent organization, Ahold. Many efficiencies of being part of Ahold would have been lost if Edwards was divested to a smaller rival. The assessment was that divesting the entire Edwards chain still might not be sufficient to adequately restore competition because another firm might not be able to provide the level of support necessary to keep this same level of rivalry.

The FTC insisted on a high probability of success in the Ahold/Pathmark matter because there is some sense that many of the divestitures in its supermarket merger orders do not succeed. In retail markets, a chain's assets consist of far more than just the individual stores and the fixtures inside (assets that clearly can be divested). Customer and supplier relationships are critical assets that cannot be conveyed in a divestiture. Thus, even where large numbers of stores have been divested, if the stores are not an entire ongoing business, frequently they do not succeed.

**[\*970]**

D. Mix-and-Match Approach

Sometimes parties will offer to divest a combination of assets selected from both of the merging firms. This mix-and-match approach requires a more careful review by the agencies than the divestiture of a single firm's business because the agencies must determine whether the mixed assets can function effectively as an ongoing business. The agencies also must determine whether the mixed assets will be capable of producing comparable efficiencies and economies of scale and scope as the acquired firm. Merging parties must recognize that this type of evaluation will delay the merger review process and take that into account in their merger planning. The Commission has accepted a mix-and-match approach in some cases, such as the Albertsons/American Stores merger, where the divestiture included stores from both firms. [[62]](#footnote-63)62 In other cases, such as BP/ARCO, a mix-and-match approach was rejected because the proposed divestiture could not replicate the competitive significance of the acquired firm.

The merger between Federal-Mogul and T&N PLC [[63]](#footnote-64)63 is an example of why a mix-and-match approach may not work as an appropriate remedy. Both firms were leading producers of a wide range of automotive parts in Europe and the United States, and the merged firm would have accounted for eighty percent of sales in the worldwide market for thin-wall bearings used in car, truck, and heavy equipment engines. [[64]](#footnote-65)64 The merger was investigated by multiple jurisdictions. Rather than offering to divest an ongoing business unit, the parties initially proposed to divest a package of assets from both Federal-Mogul and T&N in both Europe and the United States; they even presented an up-front buyer. Upon close examination, this offer, while substantial, was found wanting and insufficient to address competitive concerns. The divestiture package included some of the parties' least efficient production facilities. More important, the parties offered insufficient research and development assets. The FTC concluded that the up-front buyer's ability to maintain competition in the United States with these assets was questionable at best. The FTC ultimately obtained the divestiture of T&N's entire thin-wall bearings business, which consisted of the assets and plants that T&N used to make thin-wall bearings, as well as the assets, including intellectual property, that T&N used to develop and design new bearings to meet the bearings needs of engines that original equipment manufacturers will develop in the future. [[65]](#footnote-66)65 The assets were ultimately divested to the Dana Corporation.

**[\*971]**

E. Ongoing Relationships Between Merged Firm and Acquirer of the Divested Assets

Many FTC consent orders require ongoing relationships between the merged firm and the acquirer of the divested assets. Often ongoing relationships will be required, especially in pharmaceutical cases, where the acquirer has to undertake a regulatory approval process and may need an interim source of supply during that period. Although the Divestiture Report observes that these relationships can be problematic, often they are successful. The Abbott/ALZA merger illustrates where ongoing relationships may raise concerns.

Many of the FTC's recent enforcement actions have involved pharmaceutical markets. In 1999, it reviewed the proposed acquisition of ALZA Corporation by Abbott Laboratories. The investigation revealed that the proposed merger would lead to serious anticompetitive effects in the market for palliative hormone drug treatment for advanced prostate cancer. [[66]](#footnote-67)66 At the time of the proposed merger, Abbott already had an eighty percent market share in a two-firm market. ALZA was not yet in the market but was poised to enter within a relatively short period of time, and the investigation confirmed that ALZA would provide vigorous competition after entry. ALZA was planning to enter with an innovative delivery mechanism providing longer drug deliveries for patients. [[67]](#footnote-68)67

Over the course of the investigation, the parties presented several settlement proposals that involved selling various assets related to Viadur, ALZA's product, which was still in development, to another pharmaceutical company. The staff had serious concerns about competition being restored based on this arrangement for several reasons. First, the completion and commercial scale-up of Viadur would depend upon the research and development know-how associated with individuals from throughout ALZA's organization for several years as Viadur and its manufacturing processes were optimized and made most efficient. Ascertaining the necessary ALZA individuals was impossible before the product or process variables were known. Second, the acquiring party was a pharmaceutical company that was not in the business of developing innovative drug delivery systems the way ALZA is; the potential acquirer had experience transferring technology associated with ongoing pharmaceutical businesses, not those still in development. Third, the acquirer would have taken several years to be approved by the FDA at its own facility after trying to replicate facilities and processes of Abbott/ALZA's that were not yet even in place and would have been dependent upon Abbott/ALZA's supplying the product for several years after it completed the development and commercial scale-up process. With Abbott controlling eighty percent of the market, and having such a critical role in the success of any buyer of the assets, it was uncertain whether any divestiture could effectively work. In addition, the length of the supply contract, which **[\*972]** would had to have been more than two years, posed significant competitive concerns.

An alternative upon which the acquisition might have been approved would have been for Abbott to divest its own cancer product. Such a divestiture could have resulted in something that resembled the preacquisition state of the market. Nevertheless, this was not a viable option for Abbott and the transaction was terminated by the parties.

F. Potential Competition Mergers

Increasingly, the elimination of potential competition is a concern in mergers, especially in telecommunications, energy, and grocery markets. In many cases, where the scope of potential competition is relatively modest, divestiture may be sufficient relief. For example, competitive concerns in several supermarket mergers have been resolved through the divestiture of various land sites that were purchased in order to enter new markets. In other cases, where the scope of potential competition is far more substantial, divestiture may be inadequate as illustrated by the Staples/Office Depot merger.

Staples's proposed acquisition of Office Depot in 1997 involved the two largest office supply superstore chains in the United States. In many geographic markets, the merger would have resulted in a monopoly, and at most there was only one other superstore competitor, Office Max. The parties sharply disputed that office supply superstores were a relevant market, but the district court ultimately agreed with the FTC. [[68]](#footnote-69)68 As with the Rite Aid/Revco merger, the parties offered to divest stores in local markets where they had direct overlaps. They proposed a divestiture of sixty-three stores, primarily in merger to monopoly markets.

There were two problems with the proposed solution. First, it did not address a significant potential competition issue. Both Staples and Office Depot had been rapidly expanding into each others' geographic markets where they did not already have a store. The evidence in the case clearly showed that prices were lower in markets where there were two competing superstores, rather than a single superstore, and lower still in markets where there were three superstore competitors. [[69]](#footnote-70)69 The merger would have eliminated the likelihood of lower prices as Staples and Office Depot continued to invade the other's backyard. In addition, the proposed divestitures were unable to remedy such a negative competitive effect.

The second problem with the parties' proposed remedy was that the most likely purchaser of the divested stores probably was Office Max, which was already in the market and could provide a basis for achieving reasonable scale economies. A divestiture to Office Max, however, would result in a duopoly in the overlap markets. It was clearly better to have three competitors **[\*973]** than two. Consequently, the Commission rejected the proposed divestitures [[70]](#footnote-71)70 and sought a preliminary injunction, which the court granted. [[71]](#footnote-72)71

The enforcement action has clearly led to substantial benefits to consumers. Both Staples and Office Depot have expanded at a rapid rate. Within three years after the merger was abandoned each firm has surpassed the size that the merged Staples/Office Depot would have achieved. Both firms are competing aggressively. They are invading each other's markets and driving prices down to levels not even seen before the merger was proposed. In addition, both firms compete aggressively on the Internet, where Office Depot is the clear leader.

G. Coordinated Interaction

As markets are becoming more concentrated, there are increasing concerns over mergers that may enhance the ability of firms to engage in coordinated interaction. Almost invariably these mergers are resolved through significant divestitures, typically of ongoing businesses. Yet, where there is no acquirer with the incentives and ability to fully restore competition, even a substantial divestiture may be insufficient to remedy the threat of coordination.

DuPont's proposed acquisition of the Tioxide division of Imperial Chemical Industries in 1998 was structured in a way that sought to avoid antitrust problems. However, the FTC found that it fell short of a satisfactory solution. DuPont was the leading supplier both in the United States and the world of titanium dioxide (TiO<2>) pigments, which are used in paints, plastics, paper, inks, and other products to provide whiteness, enhance brightness, and improve opacity. ICI was the second-largest supplier in the world, with plants located both in the United States and abroad. The deal was structured so that DuPont would acquire ICI's TiO<2> facilities outside North America, and NL Industries, another competitor, would acquire ICI's TiO<2> assets in the United States. [[72]](#footnote-73)72

The DuPont/ICI transaction therefore avoided a production overlap in North America. Even so, the proposed transaction did not avoid a competitive overlap because ICI also was a significant importer of TiO<2> into the United States, especially for use in plastics and architectural coatings. In fact, imports accounted for a majority of ICI's sales to North American customers. ICI was also developing new sulfate-based TiO<2> products to compete with DuPont's chloride-based products. Consequently, the acquisition would still give DuPont control over a very substantial percentage of the supply of TiO<2> for North American customers. The concern was that the elimination of an important import competitor like ICI could facilitate or increase the likelihood of coordinated behavior. [[73]](#footnote-74)73

**[\*974]** DuPont tried to address the concerns by proposing a supplemental basket of other arrangements: it would exclude from its acquisition one of ICI's European plants, which instead would be acquired by NL Industries; DuPont would supply TiO<2> products to NL for two years; DuPont would not compete against NL for North American customers by sourcing them from plants acquired from ICI; and DuPont would divest ICI's North American customer lists, current contracts, and customer information. There were several problems with these proposals. The plant that DuPont proposed not to acquire was a relatively minor supplier to North America, and the noncompetition agreement would be an oddity for an antitrust order. The most critical deficiency was that the proposal did not address the elimination of a competitor that stood in the way of coordinated behavior. As a result, the parties abandoned the transaction in January 1999.

IV. Conclusion

As the other articles in this issue articulate, there has been an important transition in policy towards merger remedies during the last decade of the 1990s. The antitrust agencies, primarily the FTC, have achieved a great deal by addressing the issue of merger remedies and strengthening both the scope and comprehensive nature of those remedies. However, as the articles in this symposium also suggest, there is a significant disparity between the agencies' approach to issues and the understanding of the private bar. Much of the agencies' position has been weakly articulated, and the controversies that currently exist suggest a significant need for the agencies to better articulate their policies and approach to merger remedies.

Although the antitrust agencies have achieved a great deal in approaching merger remedies, there are areas in which the process and the understanding of that process can be improved. Here are several suggestions for how the agencies could address the issues raised by the articles in this symposium:

**[\*975]**

A. Transparency

Much of the controversy raised in the articles in this symposium arise because the parties, the merging parties, acquirers of divested assets, and consumers, know relatively little about the agencies' policies on merger remedy issues. There are no guidelines in this area and very little guidance except some speeches by FTC officials (and none by Antitrust Division officials). Speeches are necessarily incomplete and cannot provide a thorough discussion of remedy issues. Moreover, since the divestiture study began, neither the FTC nor the Antitrust Division have ever articulated what remedies were considered and rejected, why those remedies were rejected, and the basis for rejecting those remedies.

Moreover, the agencies have not articulated what the standards are for a variety of issues, including when a divestiture of an entire business is necessary, what is meant by this divestiture of an ongoing business, when a mix-and-match approach is appropriate, and how the time period for divestiture is determined. The agencies should endeavor to articulate each of these issues in their merger enforcement actions.

As discussed below, the agencies should issue guidelines that articulate the standards on each of these issues, along with other issues. When the agencies take action inconsistent with the guidelines in an individual case, they should articulate the reasons for these actions. Moreover, as was done in this article, in individual cases they should discuss rejected remedies and the basis for rejecting those proposed remedies.

B. Further Studies

The Divestiture Report performed a valuable service in assessing the success of a set of divestitures leading to important reforms of the divestiture process. But it suffered from two shortcomings. First, the time period was relatively short (1990-1994). In addition, the definition of "success" was a relatively limited one. The FTC defined success as whether the acquirer of the divested assets was able to make some sales into the market, whereas a more appropriate definition of success would be whether the acquirer was able to restore competition to the market.

The agencies should conduct a new divestiture study examining the divestitures of the last part of the 1990s. This study should follow the format of the earlier study, but also examine whether the divestiture was effective in restoring competition to the market. The study should include the active input and review by academics, economists, and members of the private bar.

C. Workshops and Guidelines

There is currently an incredible paucity of information on divestitures. As the articles in this symposium have noted, all of the caselaw on the divestitures is basically from the 1960s. There are almost no cases decided on divestitures, including the appropriate scope and requirements of divestiture, over the past three decades.

To facilitate the understanding of the business community and the private bar on divestitures, the antitrust agencies should hold a series of workshops **[\*976]** on the issue, bringing together business people, academicians, investment bankers, lawyers, and economists. These workshops should attempt to facilitate a dialogue between the government and the private bar on how divestitures should be approached and structured.

Based on the workshops, the agencies should endeavor to issue guidelines on divestitures. These guidelines should address the issues noted above on subjects such as upfront buyers, the scope and scale of remedies, and the other issues identified above.

D. A Report on the Use of Trustees

Trustees are increasingly used, especially in cases in which some form of regulatory relief is utilized. The FTC has used trustees in about twenty cases over the past three years. The agencies should review the use of the trustee process and issue a report on the effectiveness of trustees in these types of cases.

E. Consistency Between the Antitrust Agencies

One of the striking aspects of this entire discussion is that the innovations to merger remedies have been almost exclusively adopted by the FTC. The Antitrust Division of the Justice Department has not used a similar approach to issues such as up-front buyers or the preference for a clean sweep divestiture. There is no reason why the two agencies should take different approaches to these issues, and they should work to develop a consistent approach.

F. Recognition of the Costs of Delay

Although the FTC's stronger approach to remedies is generally laudatory, there is a hidden cost that is often overlooked: tougher remedies and especially the requirement of up-front buyers significantly delay the resolution of merger investigations. Merger investigations now take significantly longer than in the past and often take up to nine to twelve months. During the course of an investigation the to be acquired assets deteriorate, as employees leave to other companies and customers defect. It is unlikely the acquired firm will continue to invest in new products or plant improvements. Uncertainty undermines the ability of firms to effectively compete. Moreover, the efficiencies from a merger are lost during the delays of the investigation.

This means that the agencies should be more flexible towards remedies especially where the overlap is only a small part of the acquisition. For example, if the overlap consists of less than five percent of the acquired assets and the acquisition offers significant efficiencies, delays may actually harm competition and consumers. In this type of setting the agencies should be more willing to moderate their approach to divestitures.

G. Alternative Options in the Divestiture Process

The antitrust agencies should consider new alternatives for grappling with divestiture. I present two suggestions:

**[\*977]** First, the agencies should consider using stepped relief in some cases. Under this approach the agency can use a more limited form of relief initially and then if unsuccessful, use more extensive relief. For example, an agency could use some form of behavioral relief and then reexamine whether or not that behavior relief has been successful. If that relief is unsuccessful based on some type of independent review, the agencies could secure more significant relief such as structural relief.

A second approach might be to use auctions for divestiture. There is an inherent problem in the divestiture process that the merging firms choose a buyer, and it is in their interests to choose a weak acquirer. One approach to this concern would be to sell the assets through an independent auction. In that way, the marketplace can ensure that assets are put to their optimal use.

Ultimately, the question of whether the FTC's approach to merger divestitures is successful will be left to history and other scholars. Although the articles in this symposium raise many controversies, there can be little dispute that the FTC's efforts have improved the merger divestiture process. In addition, there is little doubt that these efforts to ensure that consumers are fully protected are vital. Ensuring that merger remedies are more than pyrrhic victories is one of the most critical responsibilities of the antitrust enforcement agencies. As the new Bush administration FTC Chairman Timothy Muris has observed: "An effective remedy is a fundamental part of merger enforcement… . We must protect consumers, not help you get your deal through at consumers' expense." [[74]](#footnote-75)74

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1. 1 Sandra Sugawara, Merger Wave Accelerated in 99; Economy, Internet Driving Acquisitions, Wash. Post, Dec. 31, 1999, at E01. [↑](#footnote-ref-2)
2. 2 Richard G. Parker, Report from the Bureau of Competition, Prepared Remarks Before the American Bar Association (Apr. 7, 2000). [↑](#footnote-ref-3)
3. 3 Id. [↑](#footnote-ref-4)
4. 4 Id. [↑](#footnote-ref-5)
5. 5 Id. [↑](#footnote-ref-6)
6. 6 Id. [↑](#footnote-ref-7)
7. 7 For a more elaborate discussion of many of these factors, see Robert Pitofsky, The Nature and Limits of Restructuring in Merger Review, Prepared Remarks Before Cutting Edge Antitrust Conference (Feb. 17, 2000). [↑](#footnote-ref-8)
8. 8 FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952). Courts have long and consistently held that the Commission's authority to enforce section 7 includes the ability to condition approval of a merger on the parties' divestiture of certain assets or interests, either by negotiating a consent decree or through litigation. See, e.g., Lieberman v. FTC, 771 F.2d 32, 34 (2d Cir. 1985); Yamaha Motor Co. v. FTC, 657 F.2d 971, 984-85 (8th Cir. 1981); United States v. Beatrice Foods Co., 493 F.2d 1259, 1273 (8th Cir. 1974). [↑](#footnote-ref-9)
9. 9 United States v. E.I. Du Pont de Nemours & Co., 366 U.S. 316, 326 (1961). [↑](#footnote-ref-10)
10. 10 Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (current version at 15 U.S.C. 18a (1994)). [↑](#footnote-ref-11)
11. 11 See Kenneth G. Elzinga, The Antimerger Laws: Pyrrhic Victories?, 12 J.L. & Econ. 43, 65 (1969). [↑](#footnote-ref-12)
12. 12 Press Release, U.S. Dep't of Justice (Apr. 16, 1982) ("Where the problem can be cured … the Antitrust Division will insist that it be cured prior to consummation."). [↑](#footnote-ref-13)
13. 13 Du Pont, 366 U.S. at 330-31; see also California v. American Stores Co., 495 U.S. 271, 285 (1990) (divestiture is the remedy best suited to redress the ills of an anticompetitive merger); Ford Motor Co. v. United States, 405 U.S. 562, 573 (1972) (divestiture is particularly appropriate in merger cases). [↑](#footnote-ref-14)
14. 14 Du Pont, 366 U.S. at 334. [↑](#footnote-ref-15)
15. 15 Id. at 328. [↑](#footnote-ref-16)
16. 16 In re Olin Corp., 113 F.T.C. 400, 619 (1991), aff'd, Olin Corp. v. FTC, 986 F.2d 1295 (9th Cir. 1993). [↑](#footnote-ref-17)
17. 17 Press Release, FTC, 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 Assets (Nov. 30, 1999). [↑](#footnote-ref-18)
18. 18 Id. [↑](#footnote-ref-19)
19. 19 Statement of Commissioners Anthony, Swindle, and Leary, In re BP Amoco/ARCO, File No. 991-0192, Docket No. C-3938 (FTC Apr. 13, 2000). [↑](#footnote-ref-20)
20. 20 Press Release, Office of the Governor, Knowles Administration, BP Reach Acquisition Agreement (Nov. 5, 1999). [↑](#footnote-ref-21)
21. 21 See Statement of Commissioners, supra note 19. [↑](#footnote-ref-22)
22. 22 Elzinga, supra note 11. [↑](#footnote-ref-23)
23. 23 In re General Motors Corp., 103 F.T.C. 374 (1984). [↑](#footnote-ref-24)
24. 24 Richard G. Parker & David A. Balto, The Evolving Approach to Merger Remedies, 5-2000 Antitrust Rep. 2, 8. [↑](#footnote-ref-25)
25. 25 Staff of the Bureau of Competition, Fed. Trade Comm'n, A Study of the Commission's Divestiture Process (1999). [↑](#footnote-ref-26)
26. 26 Id. [↑](#footnote-ref-27)
27. 27 Id. [↑](#footnote-ref-28)
28. 28 Id. [↑](#footnote-ref-29)
29. 29 Id. [↑](#footnote-ref-30)
30. 30 Id. [↑](#footnote-ref-31)
31. 31 See id. [↑](#footnote-ref-32)
32. 32 Id. [↑](#footnote-ref-33)
33. 33 See Parker & Balto, supra note 24, at 10. [↑](#footnote-ref-34)
34. 34 FTC v. Schnuck Markets, Inc., Civ. No. 01830 (E.D. Mo. Sept. 5, 1997). [↑](#footnote-ref-35)
35. 35 Id. Schnuck was required to divest twenty-four supermarkets in the St. Louis area as a result of its 1995 acquisition of National Food Markets and was subject to an asset maintenance agreement pending divestiture. In re Schnuck Markets, Inc., No. 941-0131, 1995 LEXIS 51 (FTC 1995). As soon as it closed on the National Foods acquisition, it began treating the divested stores as second-class citizens. It closed departments, failed to keep others adequately stocked and staffed, unlisted store phone numbers, and referred customers to Schnuck stores that were not being divested. During the year it had to sell the stores, the sales for those stores declined approximately thirty-five percent. See Staff of the Bureau of Competition, supra note 25. For further discussion of the Schnuck case and other supermarket mergers, see David A. Balto, Supermarket Merger Enforcement, 8-1999 Antitrust Rep. 2. [↑](#footnote-ref-36)
36. 36 Schnuck Markets, Inc., Civ. No. 01830. [↑](#footnote-ref-37)
37. 37 Balto, supra note 35. [↑](#footnote-ref-38)
38. 38 In re CIBA-GEIGY Ltd., 123 F.T.C. 842, 898-99 (1997) (Azcuenaga, Comm'r, concurring in part and dissenting in part). [↑](#footnote-ref-39)
39. 39 Id. [↑](#footnote-ref-40)
40. 40 Pitofsky, supra note 7. [↑](#footnote-ref-41)
41. 41 See Press Release, FTC, supra note 17. [↑](#footnote-ref-42)
42. 42 FTC v. Cardinal Health, 12 F. Supp. 2d 34 (D.D.C. 1998). [↑](#footnote-ref-43)
43. 43 Id. at 66-68. [↑](#footnote-ref-44)
44. 44 Press Release, FTC, FTC Will Seek to Block Rite Aid/Revco Merger (Apr. 17, 1996). [↑](#footnote-ref-45)
45. 45 Id. [↑](#footnote-ref-46)
46. 46 Press Release, FTC, Rite Aid Abandons Proposed Acquisition of Revco After FTC Sought to Block Transaction (Apr. 24, 1996); Press Release, FTC, CVS to Divest 120 Revco Drug Stores in VA, NY to Settle FTC Charges that Revco Acquisition Would Raise Prices (May 30, 1997). [↑](#footnote-ref-47)
47. 47 Press Release, FTC, FTC Will Move to Block Merger of Hospital Equipment Rental Firms (July 29, 1997). [↑](#footnote-ref-48)
48. 48 Id. [↑](#footnote-ref-49)
49. 49 FTC v. Mediq, Inc., No. 97-1916 (D.D.C. Aug. 22, 1997). [↑](#footnote-ref-50)
50. 50 William J. Baer, New Myths and Old Realities: Perspectives on Recent Developments in Antitrust Enforcement, Prepared Remarks Before the Bar Association of the City of New York (Nov. 17, 1997). [↑](#footnote-ref-51)
51. 51 Mediq, Inc., No. 97-1916. [↑](#footnote-ref-52)
52. 52 Press Release, FTC, Mediq Informs FTC that It Will Abandon Merger with UHS in Face of Challenge (Sept. 22, 1997). [↑](#footnote-ref-53)
53. 53 For a discussion of remedies in vertical merger cases, see Richard G. Parker & David A. Balto, The Merger Wave: Trends in Merger Enforcement and Litigation, 55 Bus. Law. 351 (1999). [↑](#footnote-ref-54)
54. 54 Press Release, FTC, FTC to Challenge Questar Acquisition of ***Kern*** River, Alleging Monopoly over Natural Gas Transmission into Salt Lake City Area (Dec. 27, 1995). [↑](#footnote-ref-55)
55. 55 Questar Corp./***Kern*** River Gas Transmission Co., No. 961-00001 (FTC Dec. 27, 1995) (preliminary injunction action authorized); FTC v. Questar Corp., No. 2:95CV 1137S (D. Utah 1995) (transaction abandoned). [↑](#footnote-ref-56)
56. 56 Robert Pitofsky, Competition Policy in Communications Industries: New Antitrust Approaches, Prepared Remarks Before the Glasser LegalWorks Seminar on Competitive Policy in Communications Industries: New Antitrust Approaches (Mar. 10, 1997). [↑](#footnote-ref-57)
57. 57 Id. [↑](#footnote-ref-58)
58. 58 Although the firms stood principally in a vertical relationship, the transaction also had horizontal implications. At the horizontal level, there were two competitive concerns. First, Barnes & Noble, which had its own distribution centers, could compete directly with Ingram by wholesaling to other bookstores. In fact, Barnes & Noble had announced publicly that it was considering providing wholesale services to other book retailers. Second, Ingram wanted to retain Barnes & Noble as a customer and so offered competitive prices, expanded its range of titles, and improved service. All of Ingram's customers, including independent bookstores, were beneficiaries of this competition, and there were concerns that the acquisition would have eliminated that stimulus to competition. [↑](#footnote-ref-59)
59. 59 United States v. E.I. Du Pont de Nemours & Co., 366 U.S. 316, 333-34 (1961). [↑](#footnote-ref-60)
60. 60 See, e.g., In re Eli Lilly & Co., 120 F.T.C. 243 (1995); In re Martin Marietta Corp., 115 F.T.C. 1039 (1994). [↑](#footnote-ref-61)
61. 61 See, e.g., Stephen Labaton, Staff of FTC Is Said to Oppose Barnes & Noble Bid to Wholesaler, N.Y. Times, June 1, 1999, at A1; Patrick M. Reilly & John R. Wilke, FTC Staff to Fight Barnes & Noble Bid for Wholesaler, Wall St. J., June 1, 1999, at B16. [↑](#footnote-ref-62)
62. 62 For a description of the Albertsons/American Stores merger and the mix-and-match approach, see Balto, supra note 35. [↑](#footnote-ref-63)
63. 63 In re Federal Mogul Corp., No. C-3836 (F.T.C. Dec. 9, 1998). [↑](#footnote-ref-64)
64. 64 Press Release, FTC, Federal-Mogul Would Divest T&N's Bearings Assets as Part of Agreement with FTC (Mar. 6, 1998). [↑](#footnote-ref-65)
65. 65 Id. [↑](#footnote-ref-66)
66. 66 Press Release, Alza Corp., Abbott Laboratories and Alza Corporation in Discussions with the Federal Trade Commission (Sept. 13, 1999). [↑](#footnote-ref-67)
67. 67 Press Release, Alza Corp., Alza and Abbott Complete Merger Termination (Jan. 20, 2000). [↑](#footnote-ref-68)
68. 68 FTC v. Staples Inc., 970 F. Supp. 1066 (D.D.C. 1997). [↑](#footnote-ref-69)
69. 69 Id. [↑](#footnote-ref-70)
70. 70 Press Release, FTC, FTC Rejects Proposed Settlement in Staples/Office Depot Merger (Apr. 4, 1997). [↑](#footnote-ref-71)
71. 71 Staples, Inc., 970 F. Supp. at 1093. [↑](#footnote-ref-72)
72. 72 Press Release, DuPont, DuPont Terminates Agreements to Acquire ICI's White Pigments Business Outside North America and to Establish a Polyester Joint Venture in Pakistan (Jan. 4, 1999). [↑](#footnote-ref-73)
73. 73 The investigation revealed that ICI had a unique incentive to import substantial quantities of TiO<2> into North America because of the configuration of its extensive European facilities. ICI in fact had demonstrated a commitment to supply U.S. customers during peak demand periods, and it had been attracting increasing sales. Given its incentive to import, ICI was a potential disruptive force in any scheme to coordinate output or prices in North America. By removing that threat, it could become much easier for DuPont and remaining suppliers to engage in coordinated behavior. Concerns about coordinated behavior were sharpened by the presence of a number of factors that generally facilitate collusion, e.g., inelastic demand and substantial information flows between competitors. Firms had considerable knowledge of their competitors' capacity, pricing, and sales to individual U.S. customers. Thus, firms were capable of monitoring pricing and output and detecting cheating. In addition, DuPont already played a strong price leadership role in the industry with other firms taking their cues from DuPont. The elimination of ICI's import competition could only strengthen that role. Those concerns were heightened by evidence that North America's price declines during slack demand periods already were shallower relative to other regions. FTC staff also were concerned that with a more commanding position worldwide, DuPont would have increased incentives to close some of the capacity acquired from ICI to demonstrate its resolve to promote higher prices and encourage investment restraint by other suppliers. [↑](#footnote-ref-74)
74. 74 Timothy Muris, Antitrust Enforcement at the Federal Trade Commission: In a Word - Continuity (Aug. 7, 2001), http:/www.ftc.gov/speeches/muris/murisaba.htm. [↑](#footnote-ref-75)