Lessons from the Clinton Administration: The Evolving Approach to Merger Remedies

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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] In terms of simple numbers, reported Hart-Scott-Rodino transactions have trip-

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[1] Sandra Sugawara, *Merger Wave Accelerated in 99; Economy, Internet Driving Acquisitions*, Wash. Post, Dec. 31, 1999, at E01.

led since 1991, from 1,529 to 4,642 in fiscal year 1999.[2] More important, the total value of these mergers increased eleven-fold during this period, from $169 billion to over $1.9 trillion.[3]

Of course, the vast majority of mergers are procompetitive or competitively neutral.[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] At the FTC, the vast majority (over sixty percent) of these investigations resulted in enforcement actions.[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.

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2 Richard G. Parker, *Report from the Bureàu of Competition*, Prepared Remarks Before the American Bar Association (Apr. 7, 2000).

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

Therefore, the agencies have increasingly recognized the need for more thorough examination and care before any particular remedy is adopted.[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] 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] 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 efficien-

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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).

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).

9 United States v. E.I. Du Pont de Nemours & Co., 366 U.S. 316, 326 (1961).