cies. 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]

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] 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]

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

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)).

11 *See* Kenneth G. Elzinga, *The Antimerger Laws: Pyrrhic Victories?*, 12 J.L. & ECON. 43, 65 (1969).

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.").

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] 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]

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] *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

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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).

14 *Du Pont*, 366 U.S. at 334.

15 *Id.* at 328.