entire facility was necessary "to give its acquirer a real chance at competitive success."[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] 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] 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] The parties entered into a separate agreement with the State of Alaska that would have combined various assets of BP and ARCO.[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] 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.

---

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).

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).

18 *Id.*

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).

20 Press Release, Office of the Governor, Knowles Administration, BP Reach Acquisition Agreement (Nov. 5, 1999).

21 *See* Statement of Commissioners, *supra* note 19.

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] *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]

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] 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

---

22 Elzinga, *supra* note 11.

23 *In re* General Motors Corp., 103 F.T.C. 374 (1984).

24 Richard G. Parker & David A. Balto, *The Evolving Approach to Merger Remedies*, 5-2000 ANTITRUST REP. 2, 8.