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.

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] 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] 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] 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] The assets were ultimately divested to the Dana Corporation.

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62 For a description of the Albertsons/American Stores merger and the mix-and-match approach, see Balto, *supra* note 35.

63 *In re* Federal Mogul Corp., No. C-3836 (F.T.C. Dec. 9, 1998).

64 Press Release, FTC, Federal-Mogul Would Divest T&N's Bearings Assets as Part of Agreement with FTC (Mar. 6, 1998).

65 *Id.*