

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.<sup>25</sup> 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.<sup>26</sup>

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,

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<sup>25</sup> STAFF OF THE BUREAU OF COMPETITION, FED. TRADE COMM'N, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS (1999).

<sup>26</sup> *Id.*

which may increase the buyer's vulnerability to the seller's behavior.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup>

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 as-

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *See id.*

<sup>32</sup> *Id.*