

easily reviewable" manner.³⁹ While divestiture is certainly an easier remedy to impose and monitor, it may not always be the most effective way of restoring competition. Because licensing is more flexible and can be tailored more easily to unusual fact situations, it may be the preferred remedy in innovation cases where divestiture could interrupt potentially successful research efforts. In this case, the majority of the Commission determined that the gene therapy research efforts, which contained a number of joint efforts with third parties, would be too difficult to disentangle from the merging firms. The Commission concluded that divestiture would not only hamper efficiency but also could be less effective in restoring competition if it led to coordinated interaction or left the divested business at the mercy of the merged firm.

Another consideration to keep in mind is that many mergers are taking place in a changing market environment. As noted earlier, many mergers are large and complex; they involve strategic combinations of businesses, and may involve new forms of competition. Complex cases are difficult to resolve, and the agencies must be careful that the remedy will fully restore competition. Not surprisingly, parties are presenting the Commission with proposed orders that are increasingly complex and regulatory. As Chairman Pitofsky observed, the FTC's recent experience is that parties are often presenting "proposals that are so extensive and complex that it is impossible to predict with any confidence that competition will be restored and consumer welfare protected."⁴⁰

As a result, the approach to merger remedies may affect the resolution of particular cases. Compared to the practice in the late 1980s and early 1990s, the FTC was somewhat more careful in the use of nonstructural and partial structural relief. During the mid and later 1990s, the Commission was faced with a number of cases in which the parties proposed relief short of divestiture that was simply insufficient to remedy the competitive problem. The nature of the competitive problem has a lot to do with whether there is an acceptable fix. Some of the mergers during the last few years presented new competitive issues that were not easy to fix, short of blocking the merger. Others posed particularly complex issues of relief. The following cases are examples of such complex situations.

A. *Partial Divestiture of the Overlapping Assets*

Often the competitive problems from a merger can be resolved through the divestiture of some assets in overlapping markets. This is frequently the approach in retail markets where divestiture of all the stores in markets where there are overlaps and significant levels of concentration are often required. For example, in the Exxon/Mobil case, the FTC required the divestiture of all gasoline stations from Virginia to Maine to ensure that there was no increase in concentration in northeastern gasoline retail markets.⁴¹ This clean sweep approach resolved the competitive concerns in those markets.

³⁹ *Id.*

⁴⁰ Pitofsky, *supra* note 7.

⁴¹ See Press Release, FTC, *supra* note 17.

1. Drug Wholesalers

Sometimes, such an approach will not be sufficient, especially where competition is not solely local. For example, in the drug wholesalers cases, *FTC v. Cardinal Health, Inc.* and *FTC v. McKesson Corp.*,⁴² the FTC challenged two mergers of the four largest drug wholesalers. As anyone who followed the trial knows, the court explored every opportunity with the parties to find a settlement that could permit the proposed mergers to go forward. The parties suggested that a divestiture of several drug wholesale distribution centers in the Northwest, where there were clear overlaps, would be sufficient to restore competition. The FTC told the court that divestiture would have been severely inadequate because, in the FTC's view, customers demanded firms that could provide national service and divestiture of a handful of distribution centers could not compensate for the loss of two national competitors that would have resulted from the proposed transactions. The court found that regional firms did not offer the same level of competitive restraint as the national firms. Thus, the proposed settlement was appropriately rejected, and the court issued a preliminary injunction.⁴³

2. Rite Aid/Revco

Rite Aid's proposed 1995 acquisition of Revco would have resulted in a single pharmacy chain of over 5,000 stores.⁴⁴ In thirty metropolitan statistical areas in twelve midwestern states, the firm would have had over a thirty-five percent market share, and in most of these markets it would have been more than twice as large as its closest rival.⁴⁵ Rite Aid proposed to divest some stores where there was an immediate geographic overlap. Had the staff been concerned only about those retail overlaps, it might have been able to reach a satisfactory resolution. In previous cases where the relevant market was viewed as direct retail sales to consumers, the Commission had agreed to accept divestitures in towns where the firms had immediate overlaps.

Although that remedy might have been satisfactory in the past, it was not in this case because of the evolution of the markets. The competitive problem was not simply the elimination of competition in direct retail sales to consumers but also in a parallel market, the provision of network pharmacy services to pharmaceutical benefit managers ("PBMs") and other managed care providers. These firms use networks of pharmacies to deliver pharmaceutical benefits to consumers. From the perspective of these PBMs, it was necessary to form a network of pharmacies in geographically diverse locations. Rite Aid and Revco were direct competitors in providing PBMs with a suitable network, and they often competed to be the anchor of the managed care network.

The nature of the competitive concern complicated the remedy issue; it was more difficult to make the divestitures necessary to replace a network than it was to eliminate some local overlaps through the divestiture of a few

⁴² *FTC v. Cardinal Health*, 12 F. Supp. 2d 34 (D.D.C. 1998).

⁴³ *Id.* at 66-68.

⁴⁴ Press Release, FTC, FTC Will Seek to Block Rite Aid/Revco Merger (Apr. 17, 1996).

⁴⁵ *Id.*