

**NEW DIRECTIONS IN MERGER ENFORCEMENT:  
IS IT TIME TO MOVE THE DIVESTITURE PROCESS  
FROM THE CONFERENCE ROOM TO THE COURT ROOM?**

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## **I. THE DIVESTITURE PROCESS**

- A. The parties rely on negotiations with enforcement agencies to identify problem areas that require the divestiture of assets. Parties generally won't divest assets unless they have to.**
  
- B. As the deal moves through the clearance process, the threat of litigation increases the pressure on the parties to reach a negotiated outcome. The agencies' decision to challenge an acquisition in court typically dooms the proposed deal.**

## **II. IDENTIFYING THE PROBLEM: WHAT'S WRONG WITH THE ENFORCEMENT AGENCIES' CURRENT ROLE IN RESTRUCTURING MERGERS?**

### **A. Burden on enforcement agencies**

- 1. The number of HSR filings has increased dramatically during the 1990s and continues at or near record levels. Staffing and resources at the enforcement agencies has not kept pace.**
- 2. Although the agencies work with parties in negotiating deals to minimize potential anticompetitive effects, increasingly complicated deals are requiring elaborate, far-reaching divestitures to overcome antitrust problems.**
  - a. In the largest FTC divestiture ever, the recent Exxon/Mobil settlement requires the sale or assignment of over 2,400 Exxon and Mobil gas stations, a refinery, a pipeline, and other significant assets.**
  - b. Other high-profile mergers, such as BP Amoco/Arco, have taxed the agencies' resources for months without reaching a negotiated settlement.**

**B. Do asset divestitures work?**

- 1. The FTC recently completed a study reviewing the effectiveness of the divestiture process. FTC Bureau of Competition, A Study of the Commission's Divestiture Process (1999).**
- 2. The study identified three general findings:**
  - a. Most divestitures (75%) have created viable competition in the relevant market;**
  - b. Respondents tend to look for marginally acceptable buyers and often engage in conduct designed to impede the success of the buyer; and**
  - c. Most buyers of divested assets do not have access to sufficient information to avoid making mistakes in acquiring and using the divested assets.**

- 3. The study quantified other conclusions:**
- a. Divestitures involving on-going businesses tended to succeed more frequently than divestitures of selected assets;**
  
  - b. On-going relationships and entanglements between buyers and respondents after the divestiture most frequently proved harmful to buyers; and**
  
  - c. Smaller buyers succeed at least at the same rate as larger firms.**

### **III. WHAT IF AGENCIES BECOME LESS WILLING TO WORK WITH PARTIES IN REACHING NEGOTIATED CURATIVE DIVESTITURES, AND BEGIN FAVORING LITIGATED OUTCOMES?**

**A. Which forum is best positioned to decide whether a given merger is likely to lessen competition?**

#### **1. Agencies**

- a. Agencies possess the relevant expertise and are familiar with key industries and players.**
- b. Agencies are designed to have access to the resources needed to address these issues. Certain large cases, however, can overwhelm the agencies and jeopardize their ability to address smaller concerns.**
- c. Agencies sometimes work “in the dark,” making it difficult for parties to know how (and why) certain cases were resolved in certain ways.**

## **2. Federal courts**

- a. Federal courts, by comparison, may lack the same depth of expertise in antitrust and merger policy.**
  
- b. Courts are equipped to handle fewer cases than the agencies. However, courts will be faced with far fewer cases than agencies because many deals will be dropped when faced with costly litigation.**
  
- c. A benefit of courts is that it permits “common law” development of merger policy. In the long run, a substantial body of law in this field may make it easier to predict whether a proposed transaction runs afoul of the antitrust laws.**

## **B. Effect on the economy**

- 1. Increasing emphasis on litigation will certainly kill more deals. This may prove harmful to capital markets and have a chilling effect on the economy as a whole.**
- 2. Will efficiency-creating mergers be chilled as a result?**

## **C. Effect on practitioners**

- 1. Antitrust counsel must be ready to examine deals in advance and recommend divestitures earlier in the process.**
  - a. Practitioners will be forced to make educated guesses in identifying problem areas.**
  - b. Will practitioners err on the side of caution and recommend that clients divest a greater range of assets than would be required through a negotiated result? If so, the change in policy could unnecessarily force the disposal of assets that will not harm competition.**
  - c. Will practitioners err on the other side and recommend that clients divest a narrow range of assets than would be required through a negotiated result? If so, the threat of litigation from the agencies would likely kill the entire deal.**
- 2. How receptive will clients be to hearing that these measures may need to be taken?**

## **D. Other concerns**

- 1. Are the underlying problems found in the majority of the deals? Or does the policy simply need “fine tuning” to handle exceptionally unwieldy or complex transactions?**
- 2. Must one size fit all? Should the agencies’ inclination to reach a negotiated outcome be predicated on the scope and complexity of the underlying transaction?**
- 3. What are the short term costs of the uncertainty and unpredictability of a shift in the agencies’ policy?**