DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

Global Merger Enforcement

Prepared Remarks of
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I. Introduction

I want to thank the International Bar Association for inviting me to speak today about global merger enforcement. My remarks today cover current trends in merger enforcement, focusing on the increasing international nature of our enforcement efforts. As always my remarks represent my own views and not necessarily those of the FTC or any of its Commissioners.

Since we are approaching the close of our fiscal year, I want to begin with some relevant statistics. The merger wave continues unabated. In fiscal year 1999 to date, there have been almost 4600 HSR filings which is just slightly below the record pace of filings we received last year. The number of filings is almost three times the number we received six years ago when we had almost identical resources devoted to our merger enforcement efforts. Our limited resources force us to become more efficient and proficient at promptly identifying and remedying problematic mergers. This year we have issued 43 second requests which is just slightly below the rate of last year. We have brought 17 enforcement actions, some of which I will discuss later in my remarks. And in 12 cases the parties dropped the merger based on concerns raised by the FTC staff.

Today my primary topic is global merger enforcement, but I want to also touch on other topics relevant to general merger enforcement. First, I will discuss our investigation of Barnes & Noble's acquisition of Ingram. I want to use this case to illustrate some of the issues in vertical merger analysis that we are grappling with on an increasingly frequent basis. Second, I will discuss several recent merger enforcement actions which have an international component. These cases illustrate the increasingly effective cooperation between the U.S. and foreign antitrust enforcers. Third, I will discuss the report of the FTC staff on merger divestitures and how we have applied the lessons of that study to our current cases. Finally, I will leave you with some of my thoughts on issues that are likely to become increasingly important in government merger enforcement.

II. Barnes & Noble/Ingram

Earlier this year Barnes & Noble, Inc., the largest book retailer in the United States, sought to acquire Ingram Book Group, the largest wholesaler of books in the United States. After an extended investigation and analysis by Commission staff from the Bureaus of Competition and Economics, the acquisition was abandoned by the parties this past June, following press reports that we would seek an injunction to prevent it from going forward.(1)

Although my main reason for discussing this case is to analyze it in vertical terms, in a merger investigation we always look first for horizontal effects - the impact of the disappearance of direct competition between the parties to the transaction. Here, as I indicated, one party was a retailer and the other a wholesaler, so it might not seem at first blush that they competed. But Barnes & Noble had its own distribution centers, through which B&N was essentially internalizing a part of the wholesaling function for its own retail operations. There were two horizontal competitive concerns. First, Barnes & Noble could compete directly with Ingram by wholesaling to other bookstores. In fact, Barnes & Noble announced publicly that it was considering providing wholesale services to other book retailers. This clearly would have put greater competitive pressureon Ingram. Second, Ingram wanted to retain Barnes & Noble as a customer and so offered competitive prices, expanded its range of titles, and improved service. All of Ingram's customers, including independent bookstores, were beneficiaries of this competition; I was concerned that the acquisition would have eliminated that stimulus to competition. These concerns were heightened because Ingram generally faced rather limited competition. As a wholesaler to the segment of the market not captive to internal distribution, Ingram is overwhelmingly dominant. The gap between Ingram and the next largest wholesaler, Baker and Taylor, is very large. There are also indications that Ingram is even more important to the bookselling industry in a qualitative sense than its quantitative dominance suggests - that it simply does a better job of distribution - and that it is particularly important to the growing Internet segment of book retailing because of its ability to turn around orders quickly. It is also critical for the hard-pressed independent booksellers who try to win customers from the chains and the Internet by offering superior service, particularly for special orders. I felt that the combination of Ingram with Barnes & Noble's distribution center would have increased the already high concentration in the overall book wholesaling market and customers would have paid higher costs if they had to rely on less efficient alternatives.

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My main interest in the case is in our vertical analysis, which relied on what is called a "raising rivals' cost" theory that is relatively recent in origin.(2) This theory predicted that Barnes & Noble could raise the costs of rivals such as independent book retailers or Internet retailers by acquiring Ingram. That is, through this acquisition, Barnes & Noble would acquire the power to foreclose its retail competitors from access to an important upstream supplier. If foreclosing access to critical Ingram services such as its deep inventory or identification and pre-stocking of hot titles raised the costs of Barnes & Noble's retail competitors, Barnes & Noble might be able to increase its profits at the retail level or prevent its profits from being eroded from competition by new forms of competition such as Internet retailing.

The raising rivals' costs theory has been developed in the economic literature of the last decade or so, and focuses on the actual impact on competition from foreclosure.(3) The issue is whether the integrated firm after the vertical merger has both the incentive and the ability to increase its rivals' costs by denying access to essential inputs upstream or to essential outlets for production downstream. Under this theory, a vertical merger "has the potential to cause anticompetitive results only when the remaining alternatives (upstream or downstream) are either inferior, inadequate, or more costly, thus imposing higher costs on the rivals of the integrating firm and permitting it to raise its own prices."(4) It is important to note that absolute foreclosure is not required. Rather, competitive concerns are raised if rivals are forced to use more costly or less efficient alternatives.

The analysis is of course a lot more sophisticated than just concluding that if vertically related companies combine they are going to freeze out companies that aren't vertically integrated themselves. As I already suggested, the question we ask is whether the newly vertically-integrated company will have an incentive (and, of course, the ability) to raise the costs of its rivals. That is, will it be profitable to do so?

In this case, I was concerned that the combined Barnes & Noble/Ingram could choose to raise the costs of their downstream, retailer, rivals - independent bookstores, other national or regional chains, or Internet retailers - in a number of ways, including strategies short of an outright refusal to sell to the non-Barnes & Noble bookstores. For example, Barnes & Noble/Ingram could choose to (1) sell to non-Barnes & Noble bookstores at higher prices; (2) slow down book shipments to rivals; (3) restrict access to hot titles; (4) restrict access to Ingram's extended inventory or back list; or (5) price services higher or discontinuing or reducing these services.

Whether Barnes & Noble/Ingram would actually have had the incentive to raise its retailer rivals' costs would have depended on the relative magnitudes of all of the consequences of doing so. For example, assume for the sake of discussion that Barnes & Noble/Ingram makes $1 for every wholesale sale and $4 for every retail sale. A raising rivals' costs strategy could lead to lost sales at the wholesale level as the rival downstream retail firms switched to other suppliers. But Barnes & Noble/Ingram could lose three wholesale sales for every retail sale gained and this strategy would still be profitable.

It is obvious that the ability of a merged Barnes & Noble/Ingram to raise rivals' costs would have depended to a great extent on how good the wholesaler alternatives to Ingram were, or could become; and I was concerned that the answer was, "not very good." Even the largest of them, Baker & Taylor, was far smaller than Ingram. Ingram had several warehouses, efficiently placed throughout the U.S. The other wholesalers would have been more costly to use: they don't offer the title selection, speed, services or fill rate that Ingram does. Although some of these smaller wholesalers could expand, they were substantially smaller than Ingram.

Of course, retailers do purchase some books directly from publishers. While retailers could have been expected to consider increasing their direct purchases from publishers in an effort to compensate for the loss of Ingram's services, that strategy was unlikely to be successful. The key service provided by wholesalers is next day replenishment of fast selling books. Publishers take two to four weeks, or even months, to deliver books, and customers generally will not wait that long. Also, of course, ordering books publisher by individual publisher rather than all from a single wholesaler would greatly increase transaction costs.

I was concerned about the impact of this transaction on all segments of retailing: chains, Internet retailers, and independent booksellers. Independents appear to bring value to consumers in several respects: they are located in geographically diverse and often in underserved locations; they are an important source of product diversity; and they provide a significant level of service for customers. Strong independent booksellers can and do tailor their selection to a local or interest group niche market. And the diversity at issue is not limited to what is on the shelf at a given moment in time, butincludes diversity in what can be expected to get distributed at all and ultimately what can be expected to be published. Independent booksellers provide a mechanism by which new authors become known to the reading public. Independent booksellers read new releases, including books by unknown authors, and, if they like them, display and recommend them to customers. Independent booksellers, as a group, serve as a sort of third national presence - along with large chains and Internet retailers - and a reduction of the significance of one of three national competitive forces could harm consumers.

Another concern that the "raising rivals' costs" analysis raises is that the vertically integrated firm may, through its subsidiary that deals with firms that are otherwise rivals, obtain competitively sensitive information that will distort competition. This sort of concern has led us to obtain protective order provisions - so-called "firewall" provisions - in other cases.(5) I was concerned that Barnes & Noble would gain access to two types of such information that the rivals provide to Ingram: the financial information they supply to obtain credit, and the titles and quantities of books they purchase from Ingram. The concerns went to the propositions that Barnes & Noble might use this information for such purposes as targeting promising store locations, identifying competitors' weaknesses, and reaping the fruits of others' marketing efforts. Whether the fears were realistic or not, the fact that they were out there could have had its own dampening effect on competition. For example, independents may have less incentive to develop a market for special interest books if they believe B&N would simply free-ride on their efforts. But whether a firewall could be designed to solve these problems also seemed doubtful.

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Before leaving the subject of vertical mergers, I should add one thought in the interest of maintaining perspective: In assessing potential incentives of a firm to raise the costs of its rivals, it is important not to lose sight of the proposition that vertical mergers are also very likely to achieve important efficiencies.(6) In examining claims of potential efficiencies, however, we will seek to determine their realism and the extent to which they are "merger specific" - that is, depend on the particular merger in question and are not achievable through less anticompetitive alternative means.

III. "Global" Mergers and How Enforcers Deal with Them

It is almost impossible to give a speech about mergers these days without discussing globalization. As we have observed it through our merger investigations, globalization presents both opportunities and challenges to business. On the one hand, it has become easier for firms to do business in other countries for a variety of reasons: reductions in tariff and non-tariff barriers to trade; similar easing of restrictions, both statutory and cultural, to foreign direct investment; improvements in transportation and communication modes and facilities; and, in some industries, convergence, if not harmonization, of technical and other standards. I think it is fair to say that many U.S. firms embraced these developments which in turn has contributed to the robustness of the U.S. economy, enabling it to withstand economic setbacks in other parts of the world, such as Asia. On the other hand, these same factors plus new technological developments have exposed the weaknesses in some industries and firms in those industries that are carrying excess capacity or otherwise have not maintained the efficiency of their operations. So, mature or declining industries are seeking to wring out excess capacity, and newer, growing industries are seeking technologies and access to markets to foster their growth. So far, we, on the enforcement side, are still able to say that the vast majority of mergers do not raise competitive concerns. Furthermore, most of those that do raise competitive concerns involve matters that usually can be resolved through negotiation and settlement.

As business activity has "globalized," so, too, has antitrust enforcement. Antitrust enforcement agencies around the world are in regular and increasing contact with one another on individual merger cases as well as on general issues of mutual enforcement interest. Through instruments such as the 1995 Recommendation of the Organization for Economic Co-operation and Development (OECD)(7) that its 29 members cooperate with one another in antitrust enforcement and bilateral agreements like that which exists between the United States and the European Community,(8) the antitrust agencies notify one another when a case under investigation affects another's important interests and they share what information they can and otherwise cooperate in the investigation and resolution of those cases.(9)

Quite a few of the cases that have gone to second request at the FTC over the past few years have also been subject to review by antitrust agencies in other jurisdictions. And, in turn, quite a few of those cases have led to coordinated settlements of antitrust concerns arising in one or more of the territories in which the merging companies do business. For example, in fiscal year 1998, out of the 28 merger enforcement actions by the FTC, 13 involved notifications to foreign governments and, of those, 6 involved substantial discussions with foreign authorities also reviewing the matters. In thecurrent fiscal year, up through July 31, we had issued 38 second requests in merger cases, and 21 of them involved notifications to foreign governments; 12 have involved substantial discussions with our foreign counterparts. In addition, there have been about a dozen other mergers in which discussions took place between FTC staff and other enforcement authorities where we concluded that no enforcement action was necessary.

I will talk about several cases which illustrate both the effects of globalization of business activities and the extent of cooperation and coordination that takes place among antitrust enforcement authorities in reviewing proposed mergers and seeking to remedy their potential anticompetitive effects. One thing to keep in mind about these cases is that while most of the companies involved can be identified with a particular country as "home base," they all obtain significant revenues from their activities in other countries. Thus, no one should any longer be surprised by the competition authorities in one jurisdiction requiring parties to take remedial measures - including divestitures - in other countries in which they do business.

In discussing this group of cases covering a wide range of products, I will focus on the process of identifying the measures necessary to remedy anticompetitive effects arising from these mergers for a couple of very practical reasons. First, I know that you are interested in helping your clients get to the bottom line as quickly as possible. Second, the FTC has recently issued a detailed study of divestitures, which I will touch on later. This study has both reinforced some of our approaches to remedies and caused us to re-think others.(10) Let me now turn to highlight several cases illustrative of the effects of globalization as well as our cooperation with other enforcement authorities in achieving settlements aimed at maintaining competition in the relevant markets.

Federal-Mogul/T&N plc(11) - Federal Mogul and T&N, based, respectively in the United States and the United Kingdom, were leading producers of a wide range of automotive parts in both Europe and the United States. The merger was mostly complementary with one major exception: the merged firm would have accounted for 80% of sales in the worldwide market for thinwall bearings used in car, truck, and heavy equipment engines. The transaction fell below the European Union's jurisdictional thresholds, but was reviewed by the U.K., French, German, and Italian competition authorities. Extensive consultations among staff of all of those agencies led to mutual conclusions that the merger would be anticompetitive in the thinwall engine bearing market, and, further, that T&N's research facilities in Great Britain were critical to the ability of a purchaser of divested assets to compete effectively. The parties responded initially with a proposal to all of the involved authorities to divest a package of assets from both Federal-Mogul and T&N in Europe and the U.S., including some assets from the T&N research facility; they even presented an "up front" buyer. While substantial, this offer, upon close examination, was found wanting. Rather than offering an on-going business unit, the parties offered some of their least efficient production facilities. More importantly, they offered insufficient research and development assets. We concluded that the upfront buyer's ability to maintain competition in this market with these assets was questionable at best. We ultimately obtained the divestiture of T&N's entire thinwall bearings business which consisted of the assets and plants that T&N used to make thinwall 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 OEMs will develop in the future. The order also required Federal-Mogul to hold separate the assets to be divested, and it provided for the appointment of an interim trustee to oversee the management of those assets until their divestiture - ultimately to the Dana Corporation, another U.S.-based auto parts maker that is also active in Europe, in December 1998, some nine months after the FTC provisionally accepted the consent agreement with the parties.

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I cannot say enough about the cooperation we enjoyed with each of the agencies involved. The achievement of this remedy was closely coordinated with the European authorities, particularly the U.K. Office of Fair Trading and the German Federal Cartel Office. It is a reminder that not all merger cases go to DG-IV in Brussels, and that we are fortunate to have excellent working relations not only with DG-IV, but with the EU Member State competition authorities as well. The parties aided the process by waiving confidentiality as to information provided in connection with the divestiture proposal to permit fully-informed discussions among the reviewing authorities.

ABB/Elsag Bailey(12) - ABB is a multinational enterprise (with headquarters both in Sweden and Switzerland) that, among other things, constructs railways and power generating stations, provides financial services, and is one of the world's leading manufacturers of analytical instruments used in manufacturing processes. Its worldwide revenues (1997) exceeded $24 billion. In October 1998, ABB sought to acquire Elsag Bailey Process Automation of the Netherlands (Elsag) for $1.1 billion.

The proposed acquisition raised concerns in the worldwide markets for gas chromatographs and gas spectrometers. ABB and Elsag are the world's two leading manufacturers of gas chromatographs, instruments used in petrochemical refining, pharmaceuticals and chemicals manufacturing, and pulp and paper processing to measure the composition of gas or a volatile liquid to ensure that the manufacturing processes are working correctly. In 1997, the worldwide market for gas chromatographs was $137 million; the parties expected it to grow to $170 million by 2002. The acquisition would have given ABB almost 70 per cent of the world market for gas chromatographs; the nearest competitor has about 10 per cent.

ABB is also one of only three manufacturers of mass spectrometers, instruments that analyze the composition of gases and are used primarily in natural gas processing. The worldwide market amounts to about $20 million, but is growing. ABB has about 45 per cent of that market worldwide as does Thermal Electron. Elsag has developed a new mass spectrometer that works faster and is less expensive than the mass spectrometers currently available; Elsag plans to introduce it this year. ABB's acquisition of Elsag would eliminate a significant source of actual potential competition in this market.

The parties notified the merger simultaneously to the US and European Commission (EC) authorities, and expressed willingness to waive confidentiality in order to coordinate and - hopefully, from their perspective - speed the process. FTC staff immediately made contact with the EC's case handlers and found that they shared our concerns. Thus, when the parties met sequentially with the EC and then with FTC staff, they heard the same message from both agencies. The FTC-EC staff discussions also led to recognition of a workable remedy - the divestiture of Elsag's Applied Automation division. The parties agreed and their waiver of confidentiality allowed EC and FTC staff to discuss the terms of the proposal thoroughly. The EC's decision, requiring the divestiture, was issued on December 16, 1998, and the FTC's on January 11, 1999, just over two months after the parties notified the deal. Divestiture to Siemens AG took place in July of this year.

Zeneca/Astra(13) - The merger of Zeneca, based in the United Kingdom and Astra, based in Sweden, raised concern both in the EU and in the United States in the market for long-acting local anaesthetics. Astra is the world's leading supplier and is one of only two companies with FDA approval for manufacture and sale of such anaesthetics. Zeneca does not currently sell long-acting local anaesthetics, but it had entered into an agreement with Chiroscience to market and assist in the development of Chiroscience's new anaesthetic known commercially as Chirocaine. Chirocaine, which is expected to be introduced in the U.S. market in 1999, represents the only potential new competition in the long-acting local anaesthetic market for the foreseeable future. Thus, through its agreement with Chiroscience, Zeneca is an actual potential competitor in the U.S. market for long-acting local anaesthetics.

As in *ABB/Elsag Bailey,* FTC and EC staff quickly established contact with each other, discussed the affected markets, agreed on the competitive effects and on a potential remedy - Zeneca severing its relationship with Chiroscience in a way that maintained Chiroscience's ability to bring Chirocaine to the market. The parties agreed to waive confidentiality to facilitate EC/FTC discussion of that proposed settlement. Several discussions took place among the parties and EC and FTC staff to reach agreement on the terms of the settlement. The EC's decision, incorporating the final settlement terms, was issued on February 26, 1999, and the FTC's on March 25 - as in *ABB/Elsag Bailey*, about two months after notification was filed.

Sorin/Cobe Laboratories(14) - In this case, an Italian firm, Sorin Biomedica S.p.A., a subsidiary of SNIA S.p.A., acquired from the Swedish firm, Gambro AB, U.S.-based companies COBE Cardiovascular, Inc., and COBE Laboratories Inc. The FTC was concerned that the $260 million acquisition would eliminate substantial competition between SNIA and Gambro in the market for research, development, manufacture and sale of heart-lung machines - the durable equipment portion of an extracorporeal bypass system that replaces the function of the heart and lungs by circulating and supplying oxygen to a patient's blood during open heart surgery. Because these machines are subject to national regulatory approvals (in the United States from the Food and Drug Administration), we concluded that the relevant geographic market was limited to the United States. However, the proposed acquisition had similar competitive consequences in the United Kingdom, and our staff worked very closely with the U.K. Office of Fair Trading in the investigation leading to a settlement in the case. The settlement, while permitting the acquisition, required SNIA to divest all of COBE's heart-lung machine business to Baxter Healthcare Corporation within ten days after the FTC provisionally accepted the proposed agreement. That, in fact, was accomplished. The settlement also provided for the appointment of an interim trustee to monitor the smooth transition of the divested assets and to ensure Baxter's efforts to obtain its own regulatory approvals.

Overview of Cooperation - Before I turn to the divestiture study, I would like to take a moment to reiterate the importance of cooperation among enforcement authorities. I know that the proliferation of merger control, especially in this decade, concerns many in the business community and the bar. Some question whether national authorities can take a sufficiently "global" view of a transaction and appropriately evaluate it. What these and many other cases demonstrate is that the agencies are up to the job and that they are willing to work with one another to achieve complementary results. There is widespread convergence on market definition and on analysis of competitive effects. When, on extremely rare occasions, the agencies differ in outcomes, it is because of differences in the substantive standards in their respective laws.

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These cases also demonstrate something else that is related to the importance of cooperation among enforcement authorities, and that is the subject of geographic market definition. In the cases I mentioned here, the FTC and the other reviewing agencies either concluded that the relevant market was worldwide in geographic scope or that the competitive effects of a transaction mirrored themselves in separate geographic markets. That won't always be the case. But our experience has taught us that, even where we and other reviewing agencies find distinct geographic markets, we nevertheless must take care in our efforts to remedy separate and distinct consequences in our respective territories, to avoid limiting the ability of other reviewing authorities to achieve effective remedies. An example of such a circumstance occurred in the examination of the merger of the Swiss pharmaceutical firms, Ciba-Geigy and Sandoz, by the FTC and EC. The EC was concerned about Sandoz' monopoly in the production of methoprene, while the FTC needed to assure a reliable supply of methoprene to the divestee of Sandoz' U.S. and Canadian flea control business. Discussions between FTC and the EC resulted in complementary orders that remedied the market for methoprene while assuring supply to the divestee in the flea control business.

IV. The FTC Divestiture Study

Let me now summarize our divestiture study and tell you how these recent cases I have just described illustrate some of what we learned in the divestiture study.

In August, the Commission released a Bureau of Competition staff report entitled *A Study of the Commission's Divestiture Process*. This is the first systematic analysis of Commission divestiture orders since the passage of the Hart-Scott-Rodino premerger notification act in 1976. It looks at divestitures that were ordered between 1990 and 1994. Based on interviews, conducted in a case-study format, the report discusses factors that have made divestitures more and less successful, and concludes with recommendations for assuring more effective divestitures. The experience reflected in this report should provide a clearer framework for understanding the Commission's divestiture remedies.

I can only touch on some of the report's highlights here. The case studies have produced three general findings. First, most divestitures appear to have created viable competitors in the markets with which the Commission was concerned. Second, respondents tend to look for buyers that won't offer the strongest competition and may engage in strategic conduct to impede the success of the buyer. Third, many buyers of divested assets do not have access to sufficient information to prevent mistakes in the course of their acquisitions.

This third point has altered some long held assumptions we have had about the dynamics of the divestiture process. In general, we assumed that buyers and potential buyers of divested assets could be relied upon to advise Commission staff what assets would be necessary to frame an effective remedy. However, in many of the divestitures that were studied, there was an informational and bargaining imbalance between the respondents and the buyers of divested assets, particularly where the buyers have never operated in the industry. These imbalances caused buyers to underestimate the assistance they needed from the respondent, and caused difficulties with know-how and technology transfers. Some buyers, however, were able to overcome these and other problems with their divestitures.

Based on the review of these divestitures, the report recommends that the Commission include specific order provisions that are designed to protect buyers and that mitigate the effects of a buyer's lack of information. You will recognize that some of these provisions - such as, upfront buyers, buyer business plans, monitor trustees, and so-called "Crown Jewels" - have already been included more often in recent Commission orders. The report describes the rationale and experience which have led the staff to recommend these and other divestiture provisions.

The report also identifies some rules of thumb about what kinds of divestitures are most likely to be successful. Most notably, the case studies indicate that divestiture of an ongoing business is more likely to create a successful competitor than divestiture of a single product line or divestiture only of proprietary technology. Furthermore, divestiture to a firm experienced in a related business is more likely to be successful than divestiture to a new entrant.

The report may help you to understand some of the order provisions that we have recommended to the Commission in the past and are likely to seek in the future. We prefer to have an upfront buyer for the assets to be divested pursuant to a Commission order. In the past three years, the Commission has used an upfront buyer in approximately 60 percent of the consents where assets are to be divested. These cases have involved a broad range of markets from pharmaceuticals to industrial products to consumer goods.

There are several advantages to an upfront buyer. It allows us to market test the assets. It eliminates problems of bargaining imbalance identified in the Study. And, it eliminates the threat of interim competitive harm. We will almost always insist on the identification of an upfront buyer if something less than an on-going business is to be divested. Where the divested assets constitute less than an entire business and the buyer will be dependent on the respondent for technical assistance, component materials, or final products, we will typically insist on having a monitor trustee and a crown jewel provision to make sure that the transitional process is effective in establishing a new and independent competitor.

V. Recent Cases Illustrate the Divestiture Report Findings and Recommendations

The remedies in the FTC's recent decisions that I described earlier illustrate some of the considerations discussed in the divestiture report. The remedy in each of these cases had some unique aspects, but all were to some extent informed by the greater understanding provided by the study.

Sorin most closely tracks recommendations in the report. Sorin divested to Baxter COBE's heart lung machine business at the time it acquired COBE. The order requires that Sorin provide an interim supply of the product to Baxter; that Baxter be permitted to hire relevant employees; and that Sorin provide Baxter with technical assistance. Baxter's rights to the device were contingent on approval by the Commission as a suitable buyer and on obtaining FDA approval to produce the device. The order also requires that Sorin pay for an interim trustee to monitor Sorin's and Baxter's compliance with the order and the divestiture agreement. A monitor trustee, who has knowledge of the technical difficulties of moving production equipment and obtaining FDA approval is necessary in this kind of agreement. The Commission staff lacks the specialized knowledge needed to determine whether a respondent is really providing effective assistance or merely going through the motions. Because the monitor trustee has to work so closely with the respondent and the buyer of the divested assets, we make every effort to make sure that the respondent and the buyer approve the

so closely with the respondent and the buyer of the divested assets, we make every effort to make sure that the respondent and the buyer approve the trustee and in many cases they are the ones who suggest the trustee to Commission staff. For many transactions the role of the trustee is so critical, we seek to have the parties sign agreements with the trustees at the same time that the Agreement Containing Consent Agreement is submitted to the Commission. That ensures the staff will be effectively informed of compliance from the outset.

The *Zeneca* order, which ordered the return of rights acquired from Chiroscience in a new long-lasting anaesthetic, also includes a monitor trustee. However, in this order the primary focus of the trustee was less the transfer of technical information to its joint venture partner and more providing assurance that Zeneca was not breaching the firewall established by the order.

The order in *Federal-Mogul* involved a very different kind of trustee. This trustee, described as an Independent Auditor in the Hold Separate Agreement Federal-Mogul signed with the Commission, had operational authority over the to-be-divested assets. Because there was no upfront buyer the to-be-divested assets were likely to be operated separately for some period of time. The respondent appointed a management team with experience to operate the business, but we did not deem them as sufficiently independent from the respondent. Accordingly, the Independent Auditor who was proposed and paid for by the respondent, was appointed by the Commission and reported to the Commission. He provided the buffer to establish and maintain the independence of the to-be-divested assets until they were sold to Dana Corporation nine months after the Commission provisionally accepted the consent agreement.

The order in *ABB* required neither an upfront buyer nor a Hold Separate Trustee. The unit to-be-divested was very different from the T&N assets. ABB divested a distinct legal entity whose business had recently been acquired, Applied Automation, Inc. Accordingly, it is likely that failure to maintain the competitiveness and viability of that business would have been easier to identify. Even so, the Commission protected the effectiveness of the remedy by providing for the divestiture of a crown jewel business in place of the to-be-divested assets if the respondent allowed the business to deteriorate and could not find an acceptable buyer. Divestiture to Siemens AG was approved in July of this year, about six months after the Commission and the EC adopted their decisions in the matter.

The varied solutions in these cases do not detract from our singular concern that divestiture remedies be effective in maintaining competition. Our obligation as antitrust enforcers is to restore competition as quickly and effectively as possible. Thus, the use of upfront buyers will always be at the forefront of our alternatives in approaching remedies. Moreover, future respondents should not expect to avoid monitor trustees or crown jewels because some other respondent recently or in the distant past did not have such provisions in its orders.

V. Thoughts on the Future of Merger Enforcement

Let me close with a few observations about where I think merger enforcement is going, or areas where you can expect increased attention.

Coordinated interaction. Perhaps one of the most significant developments in U.S. antitrust enforcement is the Justice Department's successful prosecution of several international cartels. Although these are criminal cases involving explicit collusion, I think they contain an important lesson for merger enforcement. The fact that a market is worldwide and that competitors come from different countries does not necessarily dampen the incentive or ability to coordinate. In fact, the globalization of commerce may increase the incentive to protect regional or national dominance. I think that these cases suggest that merger enforcers need to be more critical in their analysis of the potential for coordination, even where competitors are international.

Potential Competition. Many of our recent enforcement actions involve concerns over potential competition. I think those concerns will continue to arise. While it is somewhat difficult to characterize the markets where they are most likely to occur, our recent cases are illustrative. They fall into three categories. The first is an acquisition of a firm or assets involving competing technologies. We have had cases involving medical technologies,(15) scientific instruments,(16) and pharmaceuticals.(17) The second is markets in which one or both firms have been expanding into the other's geographic markets, or are likely to do so. Recent cases have involved office products superstore chains (18) and supermarkets.(19) The third category involves markets that are likely to experience entry during or following deregulation. We have had a case involving natural gas pipelines,(20) and the Department of Justice recently had a case involving telephone services.(21)

Vertical mergers. I think the enforcement agencies have gone far in reinvigorating vertical merger enforcement. Unfortunately, there has been no new vertical merger law - e.g., court opinions - for almost a generation. I think it will be important for the enforcement agencies not only to bring sensible vertical merger enforcement cases, but also to try to clarify this area of the law through careful litigation. I think the Barnes & Noble discussion highlights the critical issues likely to arise in these cases.

Concerns over buyer power. Almost all of the agencies' recent merger enforcement actions concern the ability of *sellers* to extract higher prices. But in many cases there can be concerns over the exercise of market power by buyers. The Justice Department recently brought two cases addressing the potential exercise of monopsony power - *United States v. Aetna, Inc.* and *United States v. Cargill, Inc.* I think concerns over buyer powers are a legitimate basis for Section 7 enforcement and we will be continuing to look at this issue thoughtfully in future investigations.

Challenges in resolving competitive concerns. Our Divestiture Study contains several important lessons for our approach to merger enforcement. Based on the report, I think we are generally more skeptical about whether a transaction can be remedied by anything less than the divestiture of an on-going, free-standing business. And some transactions may not be capable of being remedied because the overlaps are so pervasive or numerous. There is an increasing number of strategic mergers in many industries, some with international dimensions. Our obligation is to assure that competition not be reduced one iota - that may mean that some transactions can not be remedied short of an injunction.

Administrative Litigation. One final thought on litigating these cases. The Commission has brought less than a handful of merger cases in administrative litigation over the past few years. Yet the cases we brought, *ADP/Autoinfo* and *Monier Lifetile*, were resolved very promptly. I think that is partially due to the reforms in administrative litigation enacted by the Commission in 1995, which now carefully restrict the ability of parties to

that is partially due to the reforms in administrative litigation enacted by the Commission in 1995, which now carefully restrict the ability of parties to engage in tactics to delay the trial and the ultimate day of judgment. Let me share a personal observation about these rules. As an experienced litigator, I found that litigating the *Intel* case before the ALJ was challenging and demanding, but also efficient and prompt.

FTC administrative litigation has been an important source of merger and joint venture jurisprudence over the years, in cases like *Brunswick Corporation*, *Hospital Corporation of America, Occidental Petroleum*, and *Olin Corporation*. With these procedural reforms, I think it can be an even more effective means of bringing important cases and clarifying the law, part of the FTC's unique mission. I look forward to finding ways for the Bureau to use administrative litigation more effectively in future merger matters.

Thank you for your attention and I look forward to your questions.

Endnotes:

1. See, e.g., Stephen Labaton, Staff of F.T.C. Is Said to Oppose Barnes & Noble Bid to Wholesaler, N.Y. Times, June 1, 1999, at A1, C9; Patrick M. Reilly and John R. Wilke, FTC Staff to Fight Barnes & Noble Bid for Wholesaler, Wall Street Journal, June 1, 1999, at B16.

2. For a comprehensive discussion of vertical merger enforcement, see M. Howard Morse,"Vertical Mergers: Recent Learning," 53 Bus. Lawyer 1217 (1998).

3. See Janusz A. Ordover, Garth Saloner, and Steven C. Salop, Equilibrium Vertical Foreclosure, 80 Am. Econ. Rev. 127 (1990); Michael H. Riordan and Steven C. Salop, Evaluating Vertical Mergers: A Post-Chicago Approach, 63 Antitrust L.J. 513 (1995); Michael H. Riordan, Anticompetitive Vertical Integration by a Dominant Firm, 88 Am. Econ. Rev. 1232 (1998).

4. Phillip E. Areeda and Herbert Hovenkamp, IVA Antitrust Law ¶ 1008a at 179 (1998).

5. *Martin Marietta Corp.*, FTC Dkt. No. C-3500, 117 F.T.C. 1039 (1994); *Eli Lilly and Co.*, FTC Dkt. No. C-3594, 120 F.T.C. 243 (1995).

6. There is much recent economic literature on the efficiencies to vertical integration and extensive empirical work has been done supporting these theories. The key theoretical work in this area is Oliver Williamson's work on how vertical integration allows a firm to internalize the transaction between a manufacturer and its supplier, leading to a reduction in transaction and contracting costs. Oliver E. Williamson, The Economic Institutions of Capitalism (1985).

7. The 1995 Recommendation of the OECD Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade, OECD Doc. C(95)130/FINAL (1995)(hereafter "OECD Recommendation"), *available at* <http://www.oecd.fr/daf/clp/rec8com.htm>.

8. Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, 23 Sept. 1991, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,504, and OJ L 95/45 (27 Apr. 1995), *corrected at* OJ L 131/38 (15 June 1995) (hereafter "1991 EC/US Agreement"), *available at* <http://www.usdoj.gov/atr/public/international/docs/ec.txt>.

9. A detailed, current discussion of the instruments and mechanics of enforcement cooperation among antitrust authorities may be found in article by John J. Parisi, entitled "Enforcement Cooperation among Antitrust Authorities," published in the March 1999 edition of European Competition Law Review, Vol. 20, Issue 3, at 133.

10. *A Study of the Commission's Divestiture Process*, prepared by the Staff of the Bureau of Competition of the Federal Trade Commission, 1999, *available at* <http://www.ftc.gov/os/1999/9908/index.htm#6>.

11. *Federal Mogul Corporation and T&N PLC*, FTC Dkt. No. C-3836, Decision and Order, Dec. 9, 1998, *reported in* 5 Trade Reg. Rpt. (CCH) ¶ 24,400.

12. *ABB/Elsag-Bailey*, Case No IV/M.139, European Commission Decision of 16 Dec. 1998; *In the Matter of ABB AB and ABB AG,* FTC Dkt. No. C-3867, Decision and Order, Apr. 22, 1999, *available at* <http://www.ftc.gov/os/1999/9904/abbd%26opj.htm>.

13. *Astra/Zeneca,* Case No IV/M.1403, European Commission Decision of 26 Feb. 1999; *Zeneca Group plc,* FTC Dkt. No. C-3880, Decision and Order, June 10, 1999, *available at* <http://www.ftc.gov/os/1999/9906/zenecad&o.htm>.

14. *In the Matter of SNIA S.p.A., a corporation*, FTC Dkt. No. C-3889, Decision and Order, Aug. 6, 1999, *available at* <http://www.ftc.gov/os/1999/9908/c3889d%26o.htm>.

15. *Boston Scientific Corp.*, FTC Dkt. No. C-3573 (consent order, April 28, 1995) (Chairman Pitofsky recused; Commissioner Azcuenaga concurring in part and dissenting with respect to the agreement to abbreviate the public comment period.) (intravascular ultrasound (IVUS) imaging catheters).

16. *ABB AB, supra* (process mass spectrometers).

17. *Zeneca Group plc*, *supra* (long-acting local anesthetics).

18. *FTC v. Staples, Inc.*, 977 F. Supp. 1066 (D.D.C. 1997).

19. *The Kroger Co.*, FTC File No. 991-0041 (consent agreement accepted for public comment, May 27, 1999).

20. *FTC v. Questar Corp.* No. 2:95CV 1137S (D. Utah 1995) (transaction abandoned); FTC Press Release, *FTC to Challenge Questar Acquisition of Kern River, Alleging Monopoly Over Natural Gas Transmission into Salt Lake City Area,* Dec. 27, 1995.

21. *United States v. SBC Communications, Inc. and Ameritech Corp.*, Civil No. 1:99CV00715 (D.D.C) (complaint and proposed judgment filed Mar. 3, 1999).

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