ARTICLE

LITIGATING THE FIX: A LEGAL OVERVIEW

Taylor M. Owings, William H. Rooney, Adriana Morton, Sarah Zhang*

When a proposed merger or acquisition draws the scrutiny of the U.S. antitrust agencies (the Department of Justice or Federal Trade Commission), parties sometimes propose divestitures targeted to address the competitive concerns. If the proposed divestitures are deemed unsatisfactory by the reviewing agency, the parties may propose them in defense of the transaction in court as an effectively modified transaction. That process is known as "litigating the fix." The 2023 William Howard Taft Lecture, sponsored by the Antitrust Law Section of the New York State Bar Association in collaboration with the Columbia Business Law Review on November 29th, 2023,

*Taylor M. Owings is a partner in the Antitrust and Competition Practice Group of Wilson Sonsini Goodrich & Rosati. William H. Rooney is a Lecturer in antitrust law (and other subjects) at the Columbus School of Law at The Catholic University of America and a former partner of Willkie Farr & Gallagher LLP and former co-chair of the firm's U.S. Antitrust Practice. Adriana Morton is a litigation associate of Willkie Farr & Gallagher LLP. Sarah Zhang is an associate in Baker Botts L.L.P.'s Antitrust and Competition Practice Group. The authors wish to acknowledge and thank Willkie Farr & Gallagher LLP law clerk, Yujin Kim, for her excellent and invaluable assistance in drafting this article.

The authors and Ms. Kim prepared this draft in connection with the 2023 William Howard Taft Lecture, which was organized by the New York State Bar Association, Antitrust Law Section. This article represents the thoughts of the authors and Ms. Kim and should not be construed as the position of any other person or entity. This article was prepared as a general introduction to the Taft Lecture only and does not take into account the qualifications, exceptions, and other considerations that may be relevant to particular situations. Nothing contained herein constitutes, or is to be considered, the rendering of legal advice, generally or as to a specific matter, or a warranty of any kind. Readers are responsible for obtaining legal advice from their own legal counsel. The authors and Ms. Kim disclaim liability for any errors in, or any reliance upon, this information.

addressed the proper legal standard that courts should apply when evaluating such "fixed" transactions. This Article, authored by the Moderators of the Lecture, summarizes the regulatory structure, enforcement perspectives, and developing law relating to "litigating the fix" as a foundation for the following articles on the subject by the 2023 Taft Co-Lecturers, Mr. Daniel Haar and Ms. Sara Razi.

I. Introduction 2
II. The Agencies' Current Approach 4
III. The HSR Act and implementing Rules 10
IV. Relevant Case Law 14
A. Relevant Transaction Before the Court 14
B. Analysis Under Philadelphia National Bank and the Baker Hughes Burden-Shifting Framework 18
1. Prima Facie Case 19
2. Standard on Rebuttal: Liability vs. Remedy 24
3. Evaluating the Adequacy of Proposed Fixes 29
a. Timing of the Proposal 29
b. Likelihood of the Divestiture 30
c. Experience of the Buyer 31
d. Scope of the Divestiture 33
e. Independence of the Buyer 34
f. Purchase Price 36
V. Conclusion 37

I. INTRODUCTION

Hosts of mergers have been cleared under the Hart-Scott-Rodino ("HSR") premerger notification regime on the basis of agreed-upon divestitures that have eliminated or mitigated overlapping assets or, less frequently, conduct commitments that protect against future practices that would lessen competition in the market.[1] Since early 2021, however, the Antitrust

[1] For statistics on the disposition of mergers subject to investigations in the two decades prior to this Administration, see Logan Billman & Steve Salop, *Merger Enforcement Statistics: 2001-2020*, 85 ANTITRUST L.J. 1 (2023).

Division of the Department of Justice ("DOJ") and the Federal Trade Commission (the "FTC" and, with DOJ, the "Agencies") have become less receptive to "remedy proposals" and have preferred to devote their resources to litigation preparation.[2] That change in policy appears to have arisen from a conviction that Section 7 of the Clayton Act has been substantially under-enforced over the last 40 years since the Reagan administration.[3]

In the expressed view of Agency leadership, under-enforcement has resulted in part from settlements that have not protected competition and have permitted an increase in concentration across industries.[4] To reverse that economy-wide trend toward concentration and to avoid ineffective merger settlements, the Agencies have chosen to challenge mergers that, in earlier administrations, may have been cleared with agreed-upon divestitures or conduct commitments.[5]

Merging parties, however, have not discarded the prospect of divestitures and conduct commitments to respond to possible competitive issues that the Agencies have identified during the HSR review. Even as the Agencies have rejected those proposals and proceeded to litigation, the parties have signed contractual obligations to undertake the proposed divestiture or to commit to protective conduct if the originally proposed merger is consummated. In response to the Agencies' complaints under Section 7, the parties have argued that the originally proposed transaction cannot be considered as notified under the HSR Act but must be assessed in light of a contractual obligation to divest certain assets or not to engage in potentially anticompetitive conduct.[6]

In the articles that follow, the 2023 Taft Co-Lecturers, Mr. Daniel Haar and Ms. Sara Razi, address the proper legal standard by which courts should resolve an Agency's complaint challenging an originally notified transaction when the parties have a mitigating commitment. Such commitments

---

2 *See infra* Part II.

3 *See* Exec. Order No. 14,036, 86 Fed. Reg. 36987, 36988 (July 14, 2021).

4 *See infra* Part II.

5 *See id.*

6 *See infra* Part IV.

typically have taken the form of contractual obligations to divest overlapping assets or not to engage in certain concerning conduct if the notified transaction is consummated. These articles will focus primarily on the case of divestiture, though they will draw from cases involving conduct commitments when they use relevant reasoning or are otherwise analogous.

In Parts II and III of this article, we summarize the Agencies' recent disfavor with respect to proposed merger settlements and discuss the HSR rule, and its underlying rationale, that exempts transactions approved either by the Agencies or a court as an acceptable resolution to competitive concerns identified by the Agencies. We then summarize in Part IV recent case law on a variety of aspects of the proper legal standard for "litigating the fix" to assist the reader in assessing the positions that Mr. Haar and Ms. Razi take in their respective articles.

II. THE AGENCIES' CURRENT APPROACH

In recent years, the Agencies have become increasingly skeptical towards consent judgments, suggesting that there is less room to negotiate divestiture packages. Agency leadership is signaling a preference for outright injunctions to block mergers. Keeping with that preference, the DOJ withdrew its 2020 Merger Remedies Manual in April 2022, and declined to reinstate prior guidance (either from 2004 or 2011) that covered the same topics.[7] As a result, the DOJ currently has, for the first time in nearly 20 years, no guidance at all in place on whether and when it will consider negotiated resolutions to competitive concerns about mergers. If the Agencies are indeed unwilling to enter consent judgments, then parties must "fix-it-first"—at least before the litigation if not before the initial HSR filing—with their own divestiture agreements, leaving an open question about how a court should factor those signed divestiture agreements into its analysis of a Section 7 case.

---

[7] *See* ANTITRUST DIV., U.S. DEP'T OF JUST., MERGER REMEDIES MANUAL (Sept. 2020) (withdrawn Apr. 2022), https://www.justice.gov/atr/page/file/1312416/download [https://perma.cc/LC8X-CY2E].

Shortly after Lina Khan was sworn in as the Chair of the FTC, she expressed a desire to challenge more mergers on new theories of harm and to take a skeptical view of remedies in letter exchanges with Senator Elizabeth Warren. Chair Khan shared Senator Warren's "skepticism about the efficacy of behavioral remedies," which she believes "pose significant administrability problems and have often failed to prevent the merged entity from engaging in anticompetitive tactics enabled by the transaction."[8] She went on to suggest skepticism of remedies in general: "While structural remedies generally have a stronger track record than behavioral remedies, studies show that divestitures, too, may prove inadequate in the face of an unlawful merger. In light of this, I believe the antitrust agencies should more frequently consider opposing problematic deals outright."[9]

Following her letter exchange with Senator Warren, Chair Khan hired Professor John Kwoka as Chief Economist to the Chair, signaling her support for a no-remedies approach to FTC enforcement.[10] Professor Kwoka's scholarship has focused on the failure of the Agencies' negotiated remedies, and has advocated that the Agencies should only consider "fix-it-first" remedies that are pre-negotiated before HSR filing.[11] More recently, Chair Khan and Commissioner Rebecca Slaughter reaffirmed their skepticism for merger remedies in a modification of a divestiture remedy that the FTC had

8 Letter from Lina M. Khan, Chair, Fed. Trade Comm'n, to Elizabeth Warren, Senator (Aug. 6, 2021), https://www.warren.senate.gov/imo/media/doc/chair_khan_response_on_behavioral_remedies.pdf [https://perma.cc/W483-WWER].

9 *Id.*

10 *See* Press Release, Fed. Trade Comm'n, FTC Chair Lina M. Khan Announces New Appointments in Agency Leadership Positions (Nov. 19, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-chair-lina-m-khan-announces-new-appointments-agency-leadership-positions [https://perma.cc/2S8W-2UAL].

11 John Kwoka & Spencer Weber Waller, *Fix It or Forget It: A "No-Remedies" Policy for Merger Enforcement*, CPI ANTITRUST CHRON., Aug. 2021, at 2, 7.

accepted in 2018.[12] They stated: "[O]rders with numerous, complicated, and long-standing entanglements like this one are strongly disfavored . . . The history of this consent order and the multiple modifications that have been necessary demonstrate why such orders are currently and will continue to be disfavored."[13]

On the DOJ side, Assistant Attorney General ("AAG") Jonathan Kanter has also expressed a desire to litigate rather than accept remedies on multiple occasions. He made clear in his opening remarks for the 2022 Spring Enforcers Summit that litigation is a priority for the DOJ, noting: "I want to say clearly that we are committed to litigating cases using the whole legislative toolbox that Congress has given us to promote competition."[14] He reiterated these points in a speech later that year, stating that it is the policy of the DOJ to vigorously litigate rather than pursue settlements.[15]

Senior staff from both the FTC and DOJ have recently echoed this preference to litigate rather than accept remedies. Doha Mekki, Principal Deputy Assistant Attorney General in the Antitrust Division, noted that the DOJ is willing to challenge mergers even before the companies have substantially complied with a second request, suggesting that a protracted

---

[12] Statement of Commissioner Rebecca Kelly Slaughter, Joined by Chair Lina M. Khan, Fed. Trade Comm'n, In the Matter of Linde AG; Praxair, Inc.; and Linde PLC (Nov. 15, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/RKS-Statement-on-Linde-Praxair-%281710068%29-Joined-by-Chair-Khan-FINAL.pdf. [https://perma.cc/7TB4-67R8].

[13] *Id.*

[14] Jonathan Kanter, Assistant Attorney General, U.S. Dep't of Just., Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers [https://perma.cc/DV2M-H267].

[15] Jonathan Kanter, Assistant Attorney General, U.S. Dep't of Just., Keynote Speech at Georgetown Antitrust Law Symposium: Respecting the Antitrust Laws and Reflecting Market Realities (Sept. 13, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-speech-georgetown-antitrust [https://perma.cc/ZZ3T-9TYY].

negotiation over a remedy may be unlikely.[16] The DOJ proved its willingness to employ this strategy when it filed a lawsuit to block Booz Allen Hamilton's acquisition of EverWatch Corp. before the parties had substantially complied with their second requests, let alone engaged on a potential remedy.[17]

Deputy Assistant Attorney General Andrew Forman noted that merging parties face a "very high bar" when presenting settlements to the Department of Justice and stated, "the best way to remedy an anticompetitive merger is to block it."[18] Holly Vedova, then the Director of the Bureau of Competition at the FTC, stated in early 2023 that past divestitures "have not worked nearly as well as we had hoped, and definitely not as well as was necessary to prevent the illegal mergers from undermining competition."[19] She summarized that a much stricter approach to merger remedies is "necessary so that the Agency does not saddle consumers with the harmful effects of a merger that goes forward with an ineffective remedy. Alternatively, the Commission may avoid this risk altogether and move to block a merger."[20]

The FTC and DOJ have seemed particularly concerned about private equity divestiture buyers under the current leadership. Chair Khan issued a statement last year expressing her concern over "stealth roll-ups by private equity

---

[16] Bryan Koenig, *DOJ Willing to Challenge Mergers Before Investigations End*, LAW360 (Apr. 6, 2022), https://www.law360.com/articles/1481559/doj-willing-to-challenge-mergers-before-investigations-end [https://perma.cc/JEU8-DL2C].

[17] *See* Press Release, U.S. Dep't of Just., Justice Department Sues to Block Booz Allen Hamilton's Proposed Acquisition of EverWatch (June 29, 2022), https://www.justice.gov/opa/pr/justice-department-sues-block-booz-allen-hamilton-s-proposed-acquisition-everwatch [https://perma.cc/T2NK-MP7N].

[18] Ben Remaly, *DOJ Reiterates Distaste for Merger Settlements*, GLOB. COMPETITION REV. (Sep. 13, 2022), https://globalcompetitionreview.com/gcr-usa/article/doj-reiterates-distaste-merger-settlements [https://perma.cc/B2HA-PCM9].

[19] Holly Vedova, Director, Fed. Trade Comm'n, Remarks at 12th Annual GCR Live: Law Leaders Global Conference 11 (Feb. 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/vedova-gcr-law-leaders-global-conference.pdf [https://perma.cc/8QEZ-G3GV].

[20] *Id.*

firms."[21] She described a general concern with the business model of some private equity firms: "[T]actics such as leveraged buyouts, which saddle businesses with debt and shift the burden of financial risk[,] . . . can undermine long-term health and competitive viability."[22] Similarly, Deputy AAG Forman revealed in a speech in June 2022 that the DOJ is "thinking a lot about enhancing antitrust enforcement around a variety of issues surrounding private equity,"[23] and AAG Kanter stated in an interview with the Financial Times in the same month that "[i]f [the DOJ is] going to be effective, we cannot just look at each individual deal in a vacuum detached from the private equity firm."[24]

The Agencies have made similar comments about the suitability of private equity firms as buyers of divestiture assets in merger settlements, questioning whether private equity firms are incentivized to compete aggressively with the divested assets. AAG Kanter remarked in a speech last year that "too often partial divestitures ship assets to buyers like private equity firms who are incapable or uninterested in using them to their full potential."[25] This approach is not just an

[21] Statement of Chair Lina M. Khan, Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya, Fed. Trade Comm'n, In the Matter of JAB Consumer Funds/SAGE Veterinary Partners 3 (June 13, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2022.06.13%20-%20Statement%20of%20Chair%20Lina%20M.%20Khan%20Regarding%20NVA-Sage%20-%20new.pdf [https://perma.cc/G25H-E2FB].

[22] *Id.*

[23] Andrew Forman, Deputy Assistant Attorney General, U.S. Dep't of Just., Keynote Address at the ABA's Antitrust in Healthcare Conference: The Importance of Vigorous Antitrust Enforcement in Health Care (June 3, 2022), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-andrew-forman-delivers-keynote-abas-antitrust [https://perma.cc/7BLD-3KBV].

[24] Stefania Palma & James Fontanella-Khan, *Crackdown on Buyout Deals Coming, Warns Top U.S. Antitrust Enforcer*, FIN. TIMES (May 19, 2022), https://www.ft.com/content/7f4cc882-1444-4ea3-8a31-c382364aace1 [https://perma.cc/TV2P-LRCT].

[25] Jonathan Kanter, Assistant Attorney General, U.S. Dep't of Just., Keynote at the University of Chicago Stigler Center, Antitrust Enforcement: The Road to Recovery (Apr. 21, 2022),

empty threat; indeed, the DOJ has opposed divestiture proposals in recent cases on the grounds that the proposed buyers were private equity firms.[26] This represents a departure from the approach of the DOJ under the previous Administration, which issued the now-withdrawn 2020 Merger Remedies Manual that instructed, "in some cases a private equity purchaser may be preferred."[27] Chair Khan echoed AAG Kanter's views on private equity in an interview last year, stating that regulators should be "skeptical" when private equity firms take on the divested assets so as to not "miss the bigger

https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler [https://perma.cc/ZYL9-GNDE].

[26] For example, the DOJ argued at trial in United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118 (D.D.C. 2022) that the proposed divestiture to TPG Group, a private equity firm, would not cure the problems with the transaction because the "incentives or commitments to innovation [of private equity firms] are not always aligned with those of the strategic buyer." Kenneth Schwartz, Michael Singer & Isabel Tecu, *Private Equity and Competition—Comparing U.S. Agency Views to Recent Policy and Empirical Evidence*, ABA ANTITRUST MAG., April 2023, at 2, https://www.americanbar.org/groups/antitrust_law/resources/source/2023-april/private-equity-and-competition/ [https://perma.cc/VAE8-6R6D]. The DOJ also recently rejected Assa Abloy's proposal to divest assets to a private equity buyer to address DOJ's concerns about the company's acquisition of Spectrum Brands' hardware and home improvement business. *See* Bryan Koenig, *DOJ Told Assa Abloy: No Private Equity Buyers*, LAW360 (Apr. 24, 2023), https://www.law360.com/articles/1600512/doj-told-assa-abloy-no-private-equity-buyers [https://perma.cc/V4WU-MRAN].

[27] ANTITRUST DIV., U.S. DEP'T OF JUST., MERGER REMEDIES MANUAL 24–25 (Sept. 2020) (withdrawn Apr. 2022), https://www.justice.gov/atr/page/file/1312416/download [https://perma.cc/5WTL-MVJ9] ("The Division will use the same criteria to evaluate both strategic purchasers and purchasers that are funded by private equity or other investment firms. Indeed, in some cases a private equity purchaser may be preferred. The Federal Trade Commission's study of merger remedies found that in some cases funding from private equity and other investment firms was important to the success of the remedy because the purchaser had flexibility in investment strategy, was committed to the divestiture, and was willing to invest more when necessary. The study also identified cases in which a purchaser's lack of flexibility in financing contributed significantly to the failure of the divestiture.").

picture" that an industry may have "a huge private equity firm controlling [it]."[28]

III. THE HSR ACT AND IMPLEMENTING RULES

A principal purpose of the HSR Act is to prevent businesses from secretly executing anticompetitive transactions that would be difficult to unwind once the transactions have closed.[29] Congress authorized the FTC to implement the HSR Act through promulgating regulations that are "necessary and appropriate" to carry out its purposes, in accordance with the Administrative Procedure Act, 5 U.S.C. § 553, and with the concurrence of the Assistant Attorney General of the DOJ Antitrust Division.[30]

The implementing regulations to the HSR Act prescribe a number of exemptions from the HSR filing requirement. One of the exemptions, originally issued in 1978, covers "acquisitions subject to order," pursuant to congressional authorization to the FTC to promulgate rules to "exempt from requirements of [the HSR Act], classes of . . . transactions which are not likely to violate the antitrust laws."[31] The full regulation read:

> § 802.70 Acquisitions subject to order.
> An acquisition shall be exempt from the requirements of the act if:
> (a) The voting securities or assets are to be acquired from an entity ordered to divest such voting

[28] Stefania Palma, Mark Vandevelde & James Fontanella-Khan, *Lina Khan Vows 'Muscular' US Antitrust Approach on Private Equity Deals*, FIN. TIMES (June 9, 2022), https://www.ft.com/content/ef9e4ce8-ab9a-45b3-ad91-7877f0e1c797 [https://perma.cc/X966-HM2M].

[29] The "principal purpose" of the HSR Act is to "facilitate Government identification of mergers and acquisitions likely to violate federal antitrust laws before the proposed deals are consummated." Pharm. Rsch. & Mfrs. of Am. v. FTC, 790 F.3d 198, 199 (D.C. Cir. 2015). The Act was intended to "help prevent the consummation of so-called 'midnight' mergers, which are designed to deny the government any opportunity to secure preliminary injunctions." H.R. REP. NO. 94-1373, at 11 (1976).

[30] 15 U.S.C. § 18a(d).

[31] 16 C.F.R. § 802.70 (2023); 15 U.S.C. § 18a(d)(2)(B).

> securities or assets by order of the Federal Trade Commission or of any Federal court in an action brought by the Federal Trade Commission or the Department of Justice; or
>
> (b) The acquiring person or entity is subject to an order of the Federal Trade Commission or of any Federal court requiring prior approval of such acquisition by the Federal Trade Commission, such court, or the Department of Justice, and such approval has been obtained.[32]

The original exemption applied to acquisitions required to be divested by a final order of the Commission or of any federal court in an action brought by the Commission or by the Department of Justice.[33] In the Background Information to § 802.70 for the original exemption, the Commission explained:

> Because the information normally obtained by the courts, the Commission, or the Department of Justice in these divestiture situations will be much the same as that required by the Notification and Report form, the Commission determined that the imposition of the act's requirements was unnecessary. These groups of acquisitions are by their nature already subject to careful antitrust scrutiny by the agencies.[34]

Regulation 802.70[35] was amended in 1998 to extend the exemption to "divestitures pursuant to consent agreements that have been accepted by the Commission for public comment or have been filed with a court by the Commission or the Department of Justice and are subject to public comments, but are not yet final orders."[36] The Commission's reasoning for extending the scope of the exemption, as described in an

[32] Premerger Notification; Reporting and Waiting Period Requirements, 43 Fed. Reg. 33450, 33547-48 (July 31, 1978).

[33] *See* Premerger Notification; Reporting and Waiting Period Requirements, 63 Fed. Reg. 34592 (June 25, 1998) (codified at 16 C.F.R. pt. 802).

[34] Premerger Notification; Reporting and Waiting Period Requirements, 43 Fed. Reg. at 33505.

[35] 16 C.F.R. § 802.70 (2023).

[36] Premerger Notification; Reporting and Waiting Period Requirements, 63 Fed. Reg. at 34592.

accompanying Statement of Basis and Purpose for the amendment, was that:

> Acquisitions pursuant to divestiture orders are inherently unlikely to be anticompetitive. Such transactions are already subject to the approval of the agencies and such approval would not be granted if the transaction would be anticompetitive. This is true whether or not the divestiture order is final. Accordingly, there is no need for a separate HSR filing.[37]

The Commission further explained its rationale for enacting the original exemption:

> Section 802.70 already exempts from the reporting requirements transactions that satisfy divestiture requirements under Commission or Court orders in cases brought by the Commission or the Department of Justice. The amendment merely extends the exemption to transactions entered into before the relevant order has been made final. Whatever delay and cost result from the HSR reporting requirements are contrary to the public interest where the antitrust agencies already have notice of the transaction and have completed their review. Notice and comment in this matter are unnecessary because the Commission has already exempted acquisitions pursuant to a final divestiture order, and there is no relevant difference between the two situations. The agencies in each case already have all the notice and information they would otherwise obtain under HSR.[38]

As a matter of practice, the Agencies have accepted for their review proposed transactions, without an accompanying HSR notification, that are designed to respond to competitive concerns identified with respect to the originally notified transaction. If the Agencies and parties reach a consent agreement that includes the newly proposed transaction, the Agencies ask the court or the Commission, as the case may be, to approve by order the negotiated consent decree, including the

[37] *Id.* at 34594.
[38] *Id.* at 34592.

divestiture transaction that was not notified separately under the HSR Act.[39]

If the Agency and the parties fail to negotiate a divestiture that resolves the Agency's concerns as part of a consent decree, then the Agency challenges the transaction by requesting that a court issue an injunction (or preliminary injunction) to block the deal from closing on the basis that it violates (or likely violates) Section 7 of the Clayton Act.[40] In such cases, the issue for discussion of the 2023 Taft Lecture is presented—by what standard should the court evaluate the adequacy of the divestiture proposal in deciding whether to grant the requested injunction?

We know of no case that has suspended the litigation and required an HSR notification of the proposed divestiture transaction. Courts, however, have inquired whether the Agency had a fair opportunity to assess the transaction and had been allowed discovery of the proposed transaction in preparation for the hearing on the Agency's motion for a preliminary injunction.[41] In addition, the parties typically assess the adequacy of the proposed divestiture during the hearing on the preliminary injunction to permit the court, if it finds the proposed divestiture adequate, to order the divestiture transaction and thereby exempt it from HSR notification under Rule 802.70.[42]

---

[39] *See, e.g.*, United States v. Deutsche Telekom AG, No. CV 19-2232, 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020); United States v. CVS Health Corp., 407 F. Supp. 3d 45, 54–56 (D.D.C. 2019); United States v. Newpage Holdings Inc., No. 14-CV-2216, 2015 WL 9982691, at *5–*6 (D.D.C. Dec. 11, 2015).

[40] *See, e.g.*, United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118 (D.D.C. 2022).

[41] *See, e.g.*, FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 45–47 (D.D.C. 2002) (accepting the merging parties' amended merger agreement that added a divestiture provision to address the FTC's competitive concerns, which was executed one week after the FTC filed its complaint to challenge the transaction, because the FTC had an opportunity to review and reject the transaction as amended).

[42] *See, e.g.*, *UnitedHealth Grp. Inc.*, 630 F. Supp. 3d at 140 n.8 (rejecting Agency challenge and ordering the divestiture to proceed as proposed, noting that "[a] divestiture ordered by a federal court in an action brought by

IV. RELEVANT CASE LAW

A. Relevant Transaction Before the Court

As a threshold consideration, a court must decide whether to evaluate a transaction as originally filed or as subsequently amended. The FTC argued in *FTC v. Libbey, Inc.* that amended transactions should not be considered because doing so would allow defendants to "evade FTC and judicial review by proposing the amended agreement."[43] The court rejected that argument on the basis that the "FTC remains capable of vetting the amended agreement."[44] In *Libbey*, the FTC reviewed the amended agreement and "indeed voted to enjoin the amended merger agreement."[45]

Although the court in *Libbey* acknowledged the FTC's concerns that defendants may "unscrupulously attempt to avoid judicial and FTC review of an agreement by continuously amending it," the court also acknowledged that a defendant's "good-faith effort to address the FTC's concerns regarding the agreement" is consistent with the policy goals of Section 7.[46] The court held that "parties to a merger agreement that is being challenged by the government can abandon that agreement and propose a new one in an effort to address the government's concerns."[47] If the parties do so, the original transaction and the proposed divestiture "become[] the new agreement that the Court must evaluate in deciding whether an injunction should be issued."[48]

In another case, the FTC argued that whether a court should evaluate an amended transaction depends on whether the divestiture is structured as part of the original transaction

the Federal Trade Commission or the Department of Justice is exempt from the filing requirements of the Hart-Scott-Rodino Antitrust Improvements Act. 16 C.F.R. § 802.70." (internal quotations omitted)).

[43] *Libbey, Inc.*, 211 F. Supp. 2d at 46.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 46 n.27.

[47] *Id.* at 46.

[48] *Id.*

or as an entirely separate transaction.[49] The district court rejected the FTC's argument that, when a divestiture is structured as a separate transaction, the divestiture was "merely a proposed remedy" and instead found that "the FTC has assessed and is in reality challenging the merger agreement *including* the . . . divestiture."[50]

The structure of the amended transaction has thus not been found to be "dispositive on the issue whether the [divestiture] should be considered in the preliminary injunction proceeding."[51] Instead, the primary relevant considerations have been whether the divestiture is certain to occur if the merger were to close[52] and whether the divestiture resolves the Agency's objections to the merger.[53]

Less than a month after the Taft Lecture took place, in *Illumina, Inc. v. FTC*, the Fifth Circuit considered the question of whether a proposed conduct commitment "should be treated as a 'market reality'—as Illumina contend[ed]—or a remedy—as the Commission found."[54] The court concluded that the conduct commitment did not "fit[] neatly into either bucket"[55] and fell "somewhere in between a fact and a remedy."[56] It observed that the offer was "not just a normal commercial supply agreement but instead a direct response to anticompetitive concerns over the Illumina-Grail merger."[57] But, the court also

---

49 *See* FTC v. Arch Coal, Inc., No. 04-cv-00534-JDB, 2024 WL 7389952 at *2–*3 (D.D.C. July 7, 2004) (denying FTC's motion in limine to exclude evidence and argument regarding a divestiture by Arch Coal conditioned on the original transaction).

50 *Id.* at *2 (emphasis added).

51 *Id.*

52 *See id. See also* United States v. Aetna, Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017) ("Part of that burden of production [on rebuttal] includes producing evidence that the divestiture will actually occur."); United States v. AT&T, Inc., 916 F.3d 1029, 1041 (D.C. Cir. 2019) ("[T]he district court also credited the efficacy of Turner Broadcasting's '*irrevocable*' offer of arbitration agreements with a no-blackout guarantee." (emphasis added)).

53 *See infra* Section IV.B.3.

54 Illumina, Inc. v. FTC, 88 F.4th 1036, 1055 (5th Cir. 2023).

55 *Id.*

56 *Id.* at 1056.

57 *Id.* at 1055.

noted, the offer was "different in kind from a Commission- or court-ordered 'remedy,' which, as the Commission itself noted, can be imposed only on the basis of a violation of the law, i.e., after a finding of liability."[58] We will discuss the Fifth Circuit's treatment of the parties' conduct commitment further below.

Additionally, a dispute "must be extant at all stages of review, not merely at the time the complaint is filed."[59] A case that becomes moot at any point during the proceedings is "no longer a 'Case' or 'Controversy' for purposes of Article III," and is outside the jurisdiction of the federal courts.[60] That aspect of the mootness doctrine may raise the question of whether a court that is evaluating a transaction that is subsequently amended by a proposed divestiture, even after a complaint has been filed, must assess the lawfulness of the amended transaction or dismiss the case as moot. To our knowledge, no court reviewing an Agency challenge to a notified transaction and an alteration proposed by the merging parties has discussed the issue of whether a challenge solely to the original transaction, either to establish a prima facie case or support a finding of liability, would be subject to a finding of mootness. The mootness doctrine provides that the voluntary cessation of allegedly illegal conduct renders a motion for an injunction moot if it is "absolutely clear" that the conduct sought to be enjoined "could not reasonably be expected to recur."[61]

In *FTC v. H.J. Heinz Co.*, the court applied that standard in holding that the FTC's motion for a preliminary injunction against a merger that had already been abandoned by the parties was moot.[62] The parties in *Heinz* had not abandoned the original transaction by proposing an alteration to that transaction that necessarily would occur upon the closing of the original transaction. Still, the mootness principle acknowledged by *Heinz* in the context of a contested merger may be applicable to a challenge of an original transaction that the

58 *Id.* at 1056 (internal quotation marks omitted).

59 Preiser v. Newkirk, 422 U.S. 395, 401 (1975).

60 Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013).

61 Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 170 (2000).

62 FTC v. H. J. Heinz, Co., 164 F. Supp. 2d 659 (D.D.C. 2001).

parties no longer propose consummating on a stand-alone basis.

Original transactions that have already occurred seem less susceptible to mootness arguments. In *United States v. Dairy Farmers of America, Inc.*, for example, Dairy Farmers of America ("DFA") had acquired a 50 percent stake in Southern Belle Dairy Co. in an original transaction that triggered government action. In a revised agreement that was executed six days before defendants filed motions for summary judgment in the government action challenging the original transaction, DFA "exchange[d] its common member interests in Southern Belle for non-voting preferred capital interests, thus eliminating DFA's right to vote on any matter or to sit on the Southern Belle Representative Committee."[63]

The district court granted summary judgment to DFA against the government on the basis that "DFA had no voting interests in Southern Belle"[64] but did not "rule on the legality of the original Southern Belle agreement . . . and did not offer any explanation of its failure to do so."[65] Upon review, the Sixth Circuit held that the government's claim against the original transaction "was not mooted by the adoption of the revised agreement, and the district court should have considered it."[66] The court cited Supreme Court rulings stating that "'[a] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice,' unless 'subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'"[67] The Sixth Circuit ultimately reversed and remanded to the district court, finding in pertinent part that "the government [had] raised a genuine issue of material fact regarding whether [the original

[63] United States v. Dairy Farmers of Am., Inc., 426 F.3d 850, 853 (6th Cir. 2005).

[64] *Id.* at 855.

[65] *Id.* at 857.

[66] *Id.*

[67] *Id.* (quoting Friends of the Earth, Inc. v. Laidlaw Env't Servs., 528 U.S. 167, 189 (2000)) (citations omitted).

transaction] was in violation of Section 7"[68] such that summary judgment should not have been granted in favor of DFA.

The original transaction in *Dairy Farmers of America*, however, was completed a year before the government first filed a complaint seeking divestiture,[69] distinguishing it from an original transaction that has been proposed but remains uncompleted and effectively amended at the time that the court is reviewing a mootness claim.

B. Analysis Under Philadelphia National Bank and the Baker Hughes Burden-Shifting Framework

Assuming the amended transaction is properly before the court, Section 7 of the Clayton Act requires a determination of whether the effect of the merger "may be substantially to lessen competition" in any line of commerce in any section of the country.[70] In *United States v. Philadelphia National Bank*, the Supreme Court articulated the following standard for determining whether a merger would violate Section 7:

> [A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[71]

Although the Court did not "specify the smallest market share which would still be considered to threaten undue concentration, [it was] clear that 30% presents that threat" [72] on the facts of *Philadelphia National Bank*. The Court found "nothing in the record . . . to rebut the inherently

[68] *Id.*at 861.

[69] *See* United States v. Dairy Farmers of Am., No. 03-206-KSF, 2004 U.S. Dist. LEXIS 8382 (E.D. Ky. Apr. 13, 2004).

[70] 15 U.S.C. § 18.

[71] United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963).

[72] *Id.* at 364.

anticompetitive tendency manifested by these percentages" and enjoined the transaction.[73]

United States v. Baker Hughes, Inc. implemented *Philadelphia National Bank*'s rebuttable presumption of illegality that arises from a proposed merger's producing an "undue concentration" by way of a burden-shifting framework.[74] *Baker Hughes* outlined that framework as follows:

> By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition. The burden of producing evidence to rebut this presumption then shifts to the defendant. If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times.[75]

The *Baker Hughes* framework has been widely adopted by subsequent courts in conducting Section 7 inquiries.[76]

1. Prima Facie Case

The *Baker Hughes* framework requires plaintiffs to first establish a prima facie case that a merger will substantially harm competition.[77] The question arises whether the government can establish a prima facie case that the "merger" will substantially harm competition on the basis of the originally notified transaction or whether the proposed divestiture or

[73] *Id.* at 366.

[74] United States v. Baker Hughes, Inc., 908 F.2d 981, 982 (D.C. Cir. 1990).

[75] *Id.* at 982–83 (citations omitted).

[76] *See, e.g.*, United States v. United Tote, Inc., 768 F. Supp. 1064 (D. Del. 1991); FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001); United States v. Trib. Publ'g Co., No. CV 16-01822-AB, 2016 WL 2989488 (C.D. Cal. Mar. 18, 2016); United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118 (D.D.C. 2022).

[77] *Baker Hughes, Inc.*, 908 F.2d at 991.

other alteration forms an integral part of the transaction that is before the court as to which the prima facie showing must be made.

Some courts have considered the defendants' proposed amended transaction in assessing whether the government has established a prima facie case. As noted above, the court in *FTC v. Libbey,* for example, first observed that, when defendants abandon their "agreement and propose a new one in an effort to address the government's concerns[,] . . . it becomes the new agreement that the Court must evaluate in deciding whether an injunction should be issued."[78] In assessing the effects of the proposed amended acquisition on competition with respect to whether the FTC had established a prima facie case,[79] the court noted that the FTC did not present analysis "regarding the potential anti-competitive effects the proposed amended agreement might have on the market."[80] The court nonetheless accepted other evidence from the FTC, including evidence "that the proposed merger might effectively eliminate [the entity] as a competitor . . . in a market that is already highly concentrated" even in light of the amended agreement.[81]

Other courts have considered evidence regarding the effects of a divestiture at the prima facie stage. In *FTC v. Sysco Corp.*, the FTC's expert on the merger's effect on competition presented calculations for market share and the Herfindahl-Hirschman Index ("HHI") both for the original merger and after accounting for defendants' proposed divestiture.[82] Because the FTC's expert calculations and testimony confirmed that the merger would substantially lessen competition, even in light of the proposed divestiture, the court found that the FTC had successfully made its prima facie case.[83]

In *United States v. UnitedHealth Group Inc. ("UHG")*, the court applied the DOJ's preferred standard by evaluating the

[78] FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 46 (D.D.C. 2002).

[79] *See id.* at 41.

[80] *Id.* at 47.

[81] *Id.* at 47–48.

[82] *See* FTC v. Sysco Corp., 113 F. Supp. 3d 1, 53 (D.D.C. 2015).

[83] *Id.* at 53, 61.

originally proposed transaction before determining the effect of the divestiture, but only because it concluded that the government could not meet even that lower standard for challenging the merger. The court found that "[t]he evidence established that the merging entities (*absent the divestiture*) would control over 90 percent of the relevant market," and that "the merger (*again, absent the divestiture*) would produce a market with an HHI of 8,831, an increase in HHI of 3,577 over the pre-merger HHI."[84] Because the government showed that, "*absent the divestiture*, the 'merger would produce a firm controlling an undue percentage share of the relevant market, and would result in a significant increase in the concentration of firms in that market[,]'" the government had established a "presumption that the merger violates Section 7."[85]

The *UHG* court, however, disagreed in dicta that the government should be able to "meet its *prima facie* burden with market-share statistics" relating only to the original transaction because those statistics would "have no connection to the post-acquisition world."[86] The court further stated that to consider only the original transaction in whether the government had established a prima facie case would "not only [be] inconsistent with the text of Section 7 but would make a mess of the *Baker Hughes* framework and the ultimate burden of persuasion."[87] The court did so only because "the evidence [led] to the same result under either" the standard proposed by the DOJ or the standard proposed by the defendants.[88] That is, the court held that the merging parties ultimately prevailed under either standard because it found that they had rebutted the presumption of illegality.[89]

In discussing whether to consider the original or amended transaction at the prima facie stage, the *UHG* court did not

---

[84] United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 134 (D.D.C. 2022) (emphasis added).

[85] *Id.* (emphasis added).

[86] *Id.* at 133.

[87] *Id.*

[88] *Id.* at 134.

[89] *Id.*

address the mootness issue discussed above.[90] As noted, we also have not identified any other court that has considered the justiciability of disclaimed original transactions in light of a potential mootness objection when one or both of the defendants have contractually agreed to divest material overlapping assets or alter pre-merger competitive conduct.

In *FTC v. Microsoft Corp.*, the court considered the FTC's request for a preliminary injunction under Section 13(b) of the Federal Trade Commission Act.[91] The "FTC claim[ed] it [did] not have to account for any agreements in its prima facie showing,"[92] such as the defendants' commitments to maintain open licensing. However, the court stated that "the caselaw that directly addresses the issue contradicts the FTC's position,"[93] citing *UHG*,[94] *United States v. AT&T*,[95] and *FTC v. Arch Coal*.[96] The court accordingly suggested that "the FTC must address the circumstances surrounding the merger as they actually exist."[97] The court ultimately found that "the FTC has not raised serious questions regarding whether the proposed merger is likely to substantially lessen competition"[98] and denied its motion for a Section 13(b) preliminary injunction.

---

90 *See id.* at 132–34.

91 FTC v. Microsoft Corp., No. 23-cv-02880-JSC, 2023 U.S. Dist. LEXIS 119001 (N.D. Cal. July 10, 2023).

92 *Id.* at *15.

93 *Id.*

94 *UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118, 139-51 (D.D.C. 2022).

95 916 F.3d 1029 (D.C. Cir. 2019) (affirming the district court, which had credited the efficacy of the defendant's irrevocable proposed agreements in finding that the government had failed to make out a prima facie case).

96 329 F. Supp. 2d 109 (D.D.C. 2004), *appeal dismissed*, No. 04-5291, 2004 U.S. App. LEXIS 19405, 2004 WL 2066879 (D.C. Cir. Sept. 15, 2004). In *Arch Coal*, the court denied the FTC's motion to exclude all evidence related to the divestiture, reasoning that "determining the likelihood of the FTC's success in showing that the challenged transaction may substantially lessen competition in violation of Section 7 of the Clayton Act requires the Court to review the entire transaction in question." FTC v. Arch Coal, Inc., No. 04-cv-00534-JDB, 2024 WL 7389952 at *3 (D.D.C. July 7, 2004).

97 FTC v. Microsoft Corp., No. 23-cv-02880-JSC, 2023 U.S. Dist. LEXIS 119001, at *54 (N.D. Cal. July 10, 2023).

98 *Id.* at *73.

The FTC appealed, and the case is currently before the Ninth Circuit.[99] In a reply brief submitted to the Ninth Circuit by the FTC, the Agency argued that it had indeed "raised serious questions about the merger's harm to competition" to the lower court, meeting its 13(b) burden.[100] The FTC questioned the district court's ability to "determine that a proposed remedy is sufficient to negate a merger's anticompetitive effects when those effects have yet to be ascertained or quantified" by a full factual record.[101] It also criticized the district court's reliance on cases with different procedural postures to support its decision to include Microsoft's licensing agreements in its prima facie evaluation, such as *United States v. AT&T* (a merits adjudication), and *UHG* (not involving Section 13(b)).[102] How the Ninth Circuit will address the FTC's arguments, and the relevant transaction issue overall, remains to be seen.

Most recently, in *Illumina, Inc. v. FTC*, the Fifth Circuit agreed with the Commission's view that, in the specific context of the burden-shifting structure of administrative litigation before the Commission, the amendment to the originally noticed transaction "only c[ame] into play as part of Illumina's *rebuttal* to Complaint Counsel's prima facie case."[103] At the same time, however, the court noted that "the burden-shifting framework is somewhat artificial"[104] because "in practice[,] … evidence is often considered all at once and the burdens are often analyzed together."[105] As such, the court noted that, practically speaking, this means that the finder of fact "need only assess the rebuttal evidence in light of the prima facie

99 FTC v. Microsoft Corp., No. 23-15992, 2023 U.S. App. LEXIS 17985 (9th Cir. July 14, 2023).

100 Reply Brief of the Federal Trade Commission at 3, FTC v. Microsoft Corp., No. 23-15992, 2023 U.S. App. LEXIS 17985 (9th Cir. 2023) (No. 112).

101 *Id.* at 21-22 ("Absent full adjudication on the merits, competitive harm simply cannot be ascertained, let alone putatively remedied. Until the Commission is able to evaluate the merger's potential impact on cloud gaming, for example, it is difficult to determine whether Microsoft's self-interested offers and deals alleviate those concerns.").

102 *Id.* at 22 n.17, n.18.

103 Illumina, Inc. v. FTC, 88 F.4th 1036, 1057 (5th Cir. 2023).

104 *Id.* (internal quotations omitted).

105 *Id.* (internal quotations omitted).

case rather than switch the burden of production back-and-forth."[106]

2. Standard on Rebuttal: Liability vs. Remedy

If plaintiffs are able to establish a prima facie case, defendants have an opportunity to "show that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition."[107] This rebuttal evidence can be used to discredit data supporting the plaintiff's prima facie case or otherwise show that a transaction is unlikely to substantially lessen competition.[108] Courts almost universally allow defendants to present evidence of a divestiture on rebuttal so long as the divestiture is sufficiently certain to occur and timely disclosed to the government.[109]

The standard for rebuttal, however, has varied from requiring the parties to demonstrate that the proposed divestiture refutes the government's prima facie showing that the transaction may substantially lessen competition[110] (the "SLC Standard") to requiring that the parties demonstrate that the

---

[106] *Id.* at 1058 (internal quotations omitted).

[107] United States v. Baker Hughes, 908 F.2d 981, 991 (D.D.C. 1990).

[108] *See* FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 116 (D.D.C. 2004) ("Defendants can then rebut the presumption by producing evidence that market-share statistics produce an inaccurate account of the merger's probable effects on competition in the relevant market.").

[109] *See generally*, David Gelfand & Leah Brannon, *A Primer on Litigating the Fix*, 31 ANTITRUST 10, 11 (2016). Gelfand and Brannon state that "agencies generally have not disputed that courts have authority to consider fixes, and the courts have typically considered parties' proposed remedies." The article highlights two cases in which a court has refused to consider a proposed fix. In *FTC v. Ardagh*, the defendant waited to inform the FTC of its divestiture until late in the case and the divestiture was not sufficiently certain to occur. Stipulation and Order, FTC v. Ardagh, No. 13-CV-1021-BJR (D.D.C. 2013). In *FTC v. Staples*, the merging parties chose not to present any defense at trial. FTC v. Staples, Inc., 190 F. Supp. 3d 100, 137 n.15 (D.D.C. May 17, 2016).

[110] *See* United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 133 (D.D.C. 2022) (internal citations omitted) ("By requiring that UHG prove that the divestiture would preserve exactly the same level of competition that existed before the merger, the Government's proposed standard would effectively erase the word 'substantially' from Section 7.").

divestiture would "'replac[e] the *competitive intensity* lost as a result of the merger'" (the "Remedies Standard").[111] The latter standard resembles the showing that is typically required of an antitrust remedy, and the former standard evaluates the proposed divestiture or conduct commitment in light of the showing required to establish antitrust liability.

The standard for assessing the adequacy of a remedy is typically whether the remedy restores the competition lost as a result of a transaction. In 1961, for example, the Supreme Court in *United States v. E. I. du Pont de Nemours & Co.* considered the adequacy of divestiture as a remedy for a stock acquisition that had occurred between competitors and had been adjudicated by the Court to be a violation of Section 7.[112] The Court wrote that "the violation was not *actual* monopoly but only a *tendency* towards monopoly" and "[t]he required relief therefore is a remedy which reasonably assures the elimination of that tendency."[113] According to the Court, "[t]he key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition."[114]

Eleven years later, in *Ford Motor Co. v. United States*, the Court confirmed that "[t]he relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.'"[115] This language reoccurred in the DOJ's 2004 Remedies Guidelines, which stated: "Restoring competition requires *replacing the competitive intensity lost* as a result of the merger rather than focusing narrowly on returning to premerger HHI levels[;]"[116] but the 2004 Remedies Guidelines did not cite to a case or statute in asserting that requirement.

---

[111] United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017) (citing FTC v. Sysco Corp., 113 F. Supp. 3d 1, 72 (D.D.C. 2015)).

[112] United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316 (1961).

[113] *Id.* at 325–26.

[114] *Id.* at 326.

[115] Ford Motor Co. v. United States, 405 U.S. 562, 573 (1972) (citing *E.I. du Pont*, 366 U.S. at 326).

[116] ANTITRUST DIV., U.S. DEP'T OF JUST., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 5 (2004) (emphasis added), https://www.justice.gov/d9/pages/attachments/2019/07/30/205108.pdf. [https://perma.cc/YQ4G-CJW9].

The 2004 Remedies Guidelines expressed the criteria by which the DOJ would assess whether to consent to a proposed divestiture and allow the transaction to go forward without challenge. The 2004 Remedies Guidelines did not address that, under the HSR framework, the DOJ considers the proposed divestiture before the transaction closes so that, at the time of review, no injury to competition has occurred. Nonetheless, some courts have employed the criteria adopted by the DOJ in the now-withdrawn 2004 Remedies Guidelines – "replacing the competitive intensity lost" – as the legal standard that defendants must meet to rebut the government's prima facie case under the *Baker Hughes* burden-shifting framework.

In *FTC v. Sysco Corp.*, for example, the district court first noted "a lack of clear precedent providing an analytical framework for addressing the effectiveness of a divestiture that has been proposed to remedy an otherwise anticompetitive merger."[117] The court then adopted the Remedies Standard, citing both the 2004 Remedies Guidelines and the 2011 Policy Guide that replaced them, as relevant guidance.[118] In *United States v. Aetna Inc.*, the district court, citing *Sysco*, wrote that "the divestiture must 'replac[e] the *competitive intensity* lost as a result of the merger.'"[119] At the same time, the court acknowledged that the DOJ's policy statements on merger remedies, like other merger guidelines, are not binding law, though they frequently guide courts in their analysis.[120]

Later, in *FTC v. RAG-Stiftung*, the district court did not mention the DOJ's policy statements on merger remedies and simply adopted the Remedies Standard as the rebuttal standard under *Baker Hughes*: "Defendants have the burden to show that a proposed divestiture will replace the merging firm's competitive intensity."[121] In *UHG*, the court expressed

117 FTC v. Sysco Corp., 113 F. Supp. 3d 1, 72 (D.D.C. 2015).

118 *Id.* at 72–73.

119 United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017) (citing *Sysco*, 113 F. Supp. 3d at 72).

120 *Id.* at 60.

121 FTC v. Rag-Stiftung, 436 F. Supp. 3d 278, 304 (D.D.C. 2020) (citing *Aetna*, 240 F. Supp.3d at 60) (finding that the government had failed to meet

its view in dicta that the DOJ's proposed Remedies Standard would require the defendant to "produce evidence clearly disproving future anticompetitive effects" and thereby to "rebut a probability with a certainty."[122] The Remedies Standard, the court opined, would thus "free the government from its ultimate burden of persuasion."[123]

In *FTC v. Microsoft Corp.*, because the court found that the FTC had failed to establish a prima facie case, there was no extended discussion of the rebuttal standard. In the court's discussion of the legal framework, however, the court wrote that, "'once the prima facie case is established, the burden shifts to the defendant to present evidence that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition, or to sufficiently discredit the evidence underlying the prima facie case.'"[124] This language appears to reflect the SLC Standard and to fall short of requiring defendants to show that an amended transaction would "replac[e] the competitive intensity lost as a result of the [transaction]."[125]

The FTC disputed that standard on appeal in its recent reply brief before the Ninth Circuit, arguing that, "even if Appellees' proposed remedies . . . could be considered at the preliminary injunction stage, those still would need to effectively eliminate the merger's competitive harm."[126] The FTC continued: "The 'crucial question' regarding remedies in a Section 7 case is whether the record supports a conclusion that the remedy 'reasonably assures the elimination' of the merger's

its prima facie burden and nonetheless holding that Defendants met their burden of showing competitive intensity would be replaced).

[122] United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 130 (D.D.C. 2022) (internal citations omitted).

[123] *Id.* at 130 (internal citations omitted).

[124] FTC v. Microsoft Corp., No. 23-cv-02880-JSC, 2023 U.S. Dist. LEXIS 119001, at *41 (N.D. Cal. July 10, 2023) (quoting United States v. AT&T, 916 F.3d 1029, 1032 (D.C. Cir. 2019)).

[125] United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017) (citing FTC v. Sysco Corp., 113 F. Supp. 3d 1, 72 (D.D.C. 2015)).

[126] Reply Brief of the Federal Trade Commission at 25, FTC v. Microsoft Corp., No. 23-15992, 2023 U.S. App. LEXIS 17985 (9th Cir. 2023) (No. 112).

competitive harms."[127] The FTC's use of the word, "remedies," presents the question of how amendments proposed before original transactions are completed should be construed within the legal framework of merger litigation.

The Fifth Circuit recently addressed whether the SLC or Remedies Standards governs a court's review of a proposed divestiture or conduct commitment.[128] In *Illumina*, the court traced the history and origin of the Remedies Standard—from *du Pont* and *Ford*, through *Sysco*, *Aetna*, *RAG-Stiftung*, and to *UHG* and *Microsoft*—and agreed with the court in *UHG* that "the total-negation standard 'contradicts the text of Section 7.'"[129] The court concluded that the district courts in the District of Columbia had erroneously applied *du Pont*'s remedy-stage standard in their liability-stage analyses in *Sysco*, *Aetna*, and *RAG-Stiftung*.[130] The Fifth Circuit thus held that the Commission had similarly erred in the present case by requiring Illumina to show that the conduct commitment would "restore the pre-[merger] level of competition."[131]

The Fifth Circuit remanded the *Illumina* case to the Commission for reconsideration of the effect of the parties' proposed conduct commitment under the proper standard.[132] Before the remand and reconsideration could occur, however, the parties abandoned the proposed transaction.[133]

[127] *Id.* at 25 (quoting United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 325–26 (1961)). As the district court in *FTC v. Microsoft Corp.* pointed out, however, *du Pont* "involved a remedy proposed *after* a finding of a Section 7 violation . . . say[ing] nothing about . . . offered and executed agreements made before any liability trial, let alone liability finding." FTC v. Microsoft Corp., No. 23-cv-02880-JSC, 2023 U.S. Dist. LEXIS 119001, at *53–54 (N.D. Cal. July 10, 2023).

[128] Again, this guidance followed the November 2023 Taft Lecture.

[129] Illumina, Inc. v. FTC, 88 F.4th 1036, 1058 (5th Cir. 2023) (quoting United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 132 (D.D.C. 2022).

[130] *Id.* at 1055–59.

[131] *Id.* at 1058.

[132] *Id.* at 1062.

[133] Nicole Sperling, *Gene-Sequencing Company Illumina to Sell Cancer Test Developer*, N.Y. TIMES (Dec. 17, 2023),

3. Evaluating the Adequacy of Proposed Fixes

Courts typically assess the adequacy of a proposed divestiture, whether under the SLC Standard or the Remedies Standard, based on the resulting competitor's "ability to compete effectively in the post-merger world."[134] To do so, courts have considered several factors, including "the likelihood of the divestiture; the experience of the divestiture buyer; the scope of the divestiture; the independence of the divestiture buyer from the merging seller; and the purchase price."[135] Courts also consider when the parties submit the proposed modification (divestiture or conduct commitment) for the Agency's or court's review in assessing the adequacy of the modification.[136]

a. Timing of the Proposal

In *FTC v. Ardagh Grp.*, the court considered a divestiture that had been proposed after the close of discovery, without an identified buyer, and concluded that the defendant had not given the government sufficient time to consider the proposal and prepare its case for trial.[137] The court noted that the

https://www.nytimes.com/2023/12/17/business/media/illumina-cancer-detector-sale.html [on file with the Columbia Business Law Review].

134 FTC v. Sysco Corp., 113 F. Supp. 3d 1, 74 (D.D.C. 2015).

135 FTC v. Rag-Stiftung, 436 F. Supp. 3d 278, 304 (D.D.C. 2020); *See also* United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 135 (D.D.C. 2022). Before the formal enumeration of these factors in *RAG-Stiftung*, courts evaluated similar considerations. For example, the court in *Sysco* evaluated the effectiveness of the divestiture based on (1) the post-merger competitive pressure exerted by the company to which the defendants would divest, (2) additional disadvantages faced by that company post-merger, and (3) the ability of that company to be an independent competitor without relying on the merged entity. *See Sysco*, 113 F. Supp. 3d at 72–78.

136 *See infra* Part IV.B.3.a.

137 *See* Transcript of Pre-Hearing Conference at 28, FTC v. Ardagh Grp., No. 13-1021 (D.D.C. Sept. 24, 2013), https://www.ftc.gov/sites/default/files/documents/cases/130924ardaghtranscript.pdf [https://perma.cc/QF27-MMV7] ("Then they can't do their discovery in three weeks. You don't even have a definitive name for them to do discovery from or ask about. That's not reasonable, is it?").

government, and therefore the court, would not have an adequate basis on which to assess the proposed divestiture.[138]

Where, however, an adequate opportunity in discovery exists for the government to examine the proposed divestiture, as in *Libbey,* where the parties had amended their agreement one week after the FTC filed its complaint, the court may, as it did there, accept the proposed divestiture for consideration.[139] The court observed that defendants had "attempt[ed] to address the concerns expressed by the FTC by amending the proposed merger agreement."[140] Similarly, in *UHG*, the court did not reject a divestiture that was announced one month before the DOJ filed its complaint and finalized with an identified buyer two months after the complaint (four months before trial).[141]

b. Likelihood of the Divestiture

The court in *Aetna* stated that defendants must demonstrate that "the divestiture will actually occur," although it "need not be iron clad for a court to consider it," as "antitrust deals in 'probabilities, not certainties.'"[142] "[O]nce the divestiture is sufficiently non-speculative for the court to evaluate its effects on future competition, then further evidence about the likelihood of the divestiture goes to the weight of the evidence regarding the divestiture's effects."[143] In *Aetna*, however, the court found that, because "the divestiture would not counteract the loss of competition from the proposed merger even if it were to occur as planned, there [was] no need for the [c]ourt to … consider the divestiture's likelihood."[144]

---

[138] *See id.* at 29 ("I don't think the FTC would be in a position in three weeks to present their side or their opinion about whether this really is an adequate cure to their concern about competition.").

[139] FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 46 (D.D.C. 2002).

[140] *Id.*

[141] United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 128 (D.D.C. 2022).

[142] United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017) (quoting Brown Shoe v. United States, 370 U.S. 294, 323 (1962)).

[143] *Id.*

[144] *Id.* at 64.

In *RAG-Stiftung*, the court found that the divestiture was "highly likely to occur," as the parties "ha[d] agreed to use all commercially reasonable efforts to ensure the closing conditions [were] satisfied [and the buyer was] capable of closing financially" and "excited" to do so.[145] In addition, the Canadian Competition Bureau had investigated and approved the merger and divestiture, and "[t]he record lack[ed] any significant obstacles to closing."[146]

In *UHG*, the court found the divestiture to be "a virtual certainty," as parties had "already entered a definitive purchase agreement, and all conditions of that agreement ha[d] been satisfied, except for those to be satisfied at closing or by resolution of [the] lawsuit."[147]

c. Experience of the Buyer

In *Aetna*, even as the court found the divestiture "likely enough for the court to consider whether it would counteract the anticompetitive effects of the merger . . . the evidence d[id] not show that it would."[148] The court stated: "Although [the divestiture buyer] has substantial experience serving the Medicaid population, the [c]ourt concludes that this experience will not transfer so as to enable it to be a successful competitor in the individual Medicare Advantage market."[149] Internal communications "reveal[ed] the board, CFO, and CEO all doubted [buyer]'s ability to successfully operate the divestiture plans."[150] The buyer also had a history of unsuccessful attempts to enter the relevant market.[151]

The buyer's lack of in-market experience, however, is not always determinative. In *UHG*, "the Government contend[ed] that TPG's lack of experience in claims editing, as well as its

[145] FTC v. Rag-Stiftung, 436 F. Supp. 3d 278, 304 (D.D.C. 2020).

[146] *Id.* at 304–305.

[147] United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 135 (D.D.C. 2022).

[148] United States v. Aetna Inc., 240 F. Supp. 3d 1, 73 (D.D.C. 2017).

[149] *Id.*

[150] *Id.* at 74.

[151] *Id.*

status as a private-equity firm, doom[ed] any claim that TPG w[ould] be able to restore the competitive pressure" that existed before the merger.[152] The court disagreed, finding that "TPG has significant experience with 'carve-out investments' . . . [and] in the healthcare industry"[153] in general, even if that experience was not specific to claims editing.

Additionally, the *UHG* court reasoned that TPG's lack of experience would be offset by the scope of the divestiture, which would include the divested business's "current senior leadership and management team—including some of the same people who elevated [the divested business] to the top of the claims editing market."[154] The court further noted how "[t]his approach is consistent with the Government's own Merger Remedies Manual, which recognizes that '[p]rivate equity purchasers often partner with individuals or entities with relevant experience, which may inform the Division's evaluation of whether the purchaser has sufficient experience to compete effectively in the market over the long term.'"[155]

The government in *UHG* also argued that the buyer would "be less competitive because [it] is a private-equity firm . . . and private equity firms can have incentives that [are different from those of] the strategic buyers."[156] The court rejected that argument, finding that "TPG's incentives are geared toward preserving, and even improving, [the divested business's] competitive edge."[157] The court further observed that the DOJ's 2020 Merger Remedies Manual, which had not yet been withdrawn when DOJ filed suit in the case, recognized that "'in some cases a private equity purchaser may be preferred' to a strategic buyer because a private-equity firm has more 'flexibility in investment strategy, [i]s committed to the

[152] *UnitedHealth Grp. Inc.*, 630 F. Supp. at 136.

[153] *Id.* at 135.

[154] *Id.* at 136.

[155] *Id.* (quoting ANTITRUST DIV., U.S. DEP'T OF JUST., MERGER REMEDIES MANUAL 25 (2020) (withdrawn Apr. 2022)).

[156] *Id.*

[157] *Id.*

divestiture, and [i]s willing to invest more when necessary.'"[158]

d. Scope of the Divestiture

In *Libbey*, the parties proposed amending their agreement to exclude a business from the merger and transfer it to a competitor.[159] The court found that proposal inadequate, however, because the loss of access to the merged parties' manufacturing plants would result in higher costs for the competitor, which would jeopardize the competitor's ability "to provide effective competition against" the merged parties.[160]

In *Sysco*, the court found inadequate the merging parties' divestiture of 11 distribution centers to buyer, noting that, "even assuming that PFG can [incorporate the centers] seamlessly, the new PFG will have only 35 distribution centers—far fewer than the at least 100 distribution centers owned by the combined Sysco/USF."[161] The court cited in support of its holding "internal PFG communications [that] re-affirmed the need for more than 11 distribution centers" to compete nationally.[162] Although PFG had proposed larger divestiture packages, Sysco decided "it would rather litigate wi[th] the FTC than sell more than 11[.]"[163]

The *UHG* court, in addition to being persuaded by the fact that the divestiture package included "the same team that turned [the divested business] into the market leader in first-pass claims editing[,]"[164] found "that the success of [the divested business] d[id] not turn on its being part of a broader suite of payment-accuracy products[,]" as the government had contended.[165] Rather, the evidence showed that the divested

[158] *Id.* at 137 (quoting ANTITRUST DIV., U.S. DEP'T OF JUST., MERGER REMEDIES MANUAL 24–25 (2020) (withdrawn Apr. 2022)).

[159] FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 42 (D.D.C. 2002).

[160] *Id.* at 48.

[161] FTC v. Sysco Corp., 113 F. Supp. 3d 1, 74 (D.D.C. 2015).

[162] *Id.* at 75.

[163] *Id.* (internal quotations omitted).

[164] United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 138 (D.D.C. 2022).

[165] *Id.* at 139.

business customarily "was sold as a standalone product . . . [and] no customer ha[d] ever bought [the product] in conjunction with another[.]"[166]

e. Independence of the Buyer

The *Sysco* court objected to the divestiture in part on the basis that PFG would "be dependent on the merged entity for years following the transaction" due to PFG's continuing need to license the merged entity's products.[167] The court stated, "it can be a 'problem' to allow 'continuing relationships between the seller and buyer of divested assets after divestiture, such as a supply arrangement or technical assistance requirement, which may increase the buyer's vulnerability to the seller's behavior.'"[168]

In some cases, of course, a continuing relationship between the divesting party and the divestiture purchaser is necessary in the form of a transition services agreement. Before the DOJ withdrew its policy statements on remedies, its guidance consistently stated that "[t]ailored conduct relief may be useful in certain circumstances to facilitate effective structural relief. Temporary supply agreements, for example, may be useful when accompanying a structural remedy[] . . . [in order to] help prevent the temporary loss of a competitor from the market."[169] The guidance also stressed that the DOJ will pay "close attention to the appropriate duration of these types of

166 *Id.* at 138.

167 FTC v. Sysco Corp., 113 F. Supp. 3d 1, 77 (D.D.C. 2015).

168 *Id.* (quoting FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26, 59 (D.D.C. 2009)).

169 ANTITRUST DIV., U.S. DEP'T OF JUST., MERGER REMEDIES MANUAL 14 (2020) (withdrawn Apr. 2022); *see also* ANTITRUST DIV., U.S. DEP'T OF JUST., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 18–19 (2011) ("In other circumstances, conduct relief will be necessary to help perfect structural relief. For example, the Division might require a supply agreement to accompany a divestiture if the purchaser is unable to manufacture the product for a transitional period . . . In those circumstances, a supply agreement can help prevent the loss of a competitor from the market, even temporarily.").

supply agreements . . . [but] does not have a one-size-fits-all limit on how long" such agreements can exist.[170]

RAG-Stiftung is an example of a case where the court approved a divestiture even though the buyer would be an ongoing customer and tenant of the merged parties. The court instead focused on other factors, finding "no reason to question whether [buyer] will be an independent competitor" from the factual record.[171] The court also emphasized that the divestiture was "highly likely to occur[,]"[172] that the buyer had a "wealth of experience[,]"[173] and that "the scope of the proposed divestiture [wa]s more than sufficient" for the buyer to compete effectively.[174]

Courts may also look at past dealings between the divestiture buyer and seller to determine whether the two will truly act independently in the future. In *UHG*, "TPG ha[d] done deals in the past with UnitedHealth Group[,]" but because the preexisting relationship "consist[ed] of a few 'heavily and hotly negotiated' deals that were each conducted 'at arm's length,'" the court found "no serious reason to doubt that TPG will compete vigorously with UHG."[175]

---

[170] ANTITRUST DIV., U.S. DEP'T OF JUST., MERGER REMEDIES MANUAL 14 n.48 (2020) (withdrawn Apr. 2022) ("[A]greements that are too short may not give a purchaser sufficient time to establish a viable operation, while agreements that are too long may reduce a purchaser's incentives to compete effectively as an independent entity."); *see also* ANTITRUST DIV., U.S. DEP'T OF JUST., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 18 n.41 (2011) ("Long-term supply agreements between the merged firm and third parties on terms imposed by the Division can raise serious competitive issues. Given the merged firm's incentive not to promote competition with itself, competitors reliant upon the merged firm for product or key inputs may be disadvantaged in the long term.").

[171] FTC v. Rag-Stiftung, 436 F. Supp. 3d 278, 306 (D.D.C. 2020).

[172] *Id.* at 304.

[173] *Id.* at 305.

[174] *Id.*

[175] United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 139 (D.D.C. 2022).

f. Purchase Price

In *Aetna*, in addition to the buyer's lack of experience in the relevant market, "the extremely low purchase price[] raise[d] genuine concern about [buyer]'s prospects for broad success" in the market.[176] The court recognized the defendants' contention that the "low price [could] reflect[] the parties' relative bargaining power" (i.e., the leverage divestiture buyers may hold over sellers facing an antitrust investigation and likely litigation).[177] Still, the court was concerned that "an extremely low purchase price reveals the divergent interest between the divestiture purchaser and the consumer: an inexpensive acquisition could still 'produce something of value to the purchaser' even if it does not become a significant competitor and therefore would not 'cure the competitive concerns.'"[178]

In *RAG-Stiftung*, "[t]he FTC argue[d] that the purchase price [was] cause for concern because it [was] far lower than other third-party valuations of the plant."[179] The court, however, credited the defense's argument that "a potential buyer of an asset sold to facilitate a merger under scrutiny by two countries' antitrust authorities has enormous leverage over the seller because it knows the seller must divest the asset quickly to proceed with the merger."[180] It also found that, "by bidding the lowest price possible, [the buyer] acted like any rational actor in this circumstance."[181] The court wrote, "the evidence shows that [the buyer] is a good-faith purchaser" with "strong incentives" to compete effectively in the relevant market.[182]

* * *

[176] United States v. Aetna Inc., 240 F. Supp. 3d 1, 74 (D.D.C. 2017).

[177] *Id.* at 72.

[178] *Id.* (quoting ANTITRUST DIV., U.S. DEP'T OF JUST., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 9 (2011)).

[179] FTC v. Rag-Stiftung, 436 F. Supp. 3d 278, 307 (D.D.C. 2020).

[180] *Id.*

[181] *Id.*

[182] *Id.*

Together, these and other factors bearing on the adequacy of a proposed fix give fact-finding courts wide discretion to decide whether a transaction with a proposed divestiture will either "substantially lessen competition" or result in the same "competitive intensity" as pre-merger.

V. CONCLUSION

In sum, there are numerous legal questions implicated in cases where the enforcement agencies reject negotiated remedies and instead "litigate the fix." The doctrine will continue to develop in short order, we believe, because the current leadership at the DOJ and FTC are choosing to challenge more deals where remedial divestitures are possible, and merging parties are entering deals knowing they may need to pursue and litigate the sufficiency of those remedies. The 2023 Taft Lecture previews the arguments that courts will need to resolve to bring clarity to this area of the law.