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The Threshold

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CONTENTS

FROM THE CO-CHAIRS

To All Committee Members:

Welcome to the Summer edition of The Threshold! We have several interesting articles that merger practitioners should find both useful and timely.

First, we have two articles involving the FTC's challenge to the Sysco/US Foods merger. Mark Seidman and Melissa Davenport, two members of the FTC trial team, provide an "inside baseball" look at the FTC's approach to defining the relevant product market for broadline services to national customers, the defendants' arguments in opposition to the FTC's approach, and the court's analysis of the national customer market. Next, Megan Browdie and Howard Morse discuss recent attempts by merging parties to litigate the fix. That article assesses the antitrust agencies' arguments against judicial consideration of proposed remedies in preliminary injunction proceedings to block proposed mergers and acquisitions, how courts have addressed the burden of proof when considering proposed remedies, and strategies for parties considering proposing remedies.

Our next four articles involve international issues. David Dueck, Fraser Malcolm, and Mike Maodus discuss a number of noteworthy developments in merger control around the world. Next, Neil Campbell examines the Canadian Competition Bureau's recent challenge to portions of the *Parkland Industries / Pioneer Petroleum* retail gasoline transaction before the Competition Tribunal. The article focuses on the Bureau's approach to timing issues and interim measures on a second phase merger review, the legal standard for obtaining interim relief under Canada's Competition Act, and the treatment of factual evidence by the Competition Tribunal in injunction proceedings.

Brian Facey and Julia Potter discuss the different standards for considering efficiencies in merger analysis in the United States and Canada (and a number of other countries) and how efficiencies are treated in cross-border mergers. This article not only provides a useful overview of recent developments, but also includes practical guidance for arguing the efficiencies defense in cross-border merger review. Finally, Maria Eugênia Novis and Ursula Pereira Pinto discuss the hot topic of gun jumping under the Brazilian antitrust law.

The next Threshold will be out in early November. As always, we would be delighted to publish letters to the editor commenting on any past articles, and we would be doubly delighted to hear from you about any articles you would like to write yourself. In addition, if there are any "inside baseball" stories you could tell that you think would be of interest to our committee membership, please let us know.

Enjoy the newsletter!

Norm Armstrong, Jr. and Ronan Harty

Proposing a Fix? Ready to Litigate the Fix? Recent Cases Should Guide Strategy

Megan Browdie and Howard Morse[*]

Companies considering mergers or acquisitions that raise serious antitrust issues should have a strategy for getting through the Hart-Scott-Rodino review process before finalizing the deal. That strategy may include proposing a "fix"—a divestiture, license, or conduct remedy—to resolve competitive concerns.

Acquiring firms at times state their intention to remedy antitrust concerns early in the process either to get the deal done quickly or because the need for a remedy is clear. At other times, parties will first try to convince the reviewing agency that a proposed transaction will not lessen competition and that no remedy is necessary. Counsel may wait to offer a remedy until the prospect for closing the deal without a fix looks bleak, sometimes only after going up the chain at the DOJ or FTC.

Often, parties will negotiate a divestiture or other remedy with the agency. They may, for example, negotiate over lines of business to be shopped to a buyer after the proposed transaction closes or agree to find a buyer for a defined package of assets up-front. In other cases, parties will come in with a "pre-baked" offer or even a signed agreement to divest to a specific buyer. Parties may propose a remedy to the agencies at any time: early in the review process, once the staff advises that they intend to recommend a challenge, after meeting with more senior officials at the agency, after a complaint is filed, or even on the eve of a preliminary injunction hearing or trial.

In some cases, the parties will adopt self-help measures by unilaterally restructuring the transaction to remedy any alleged lessening of competition. Typically, however, the acquirer will enter into a contract with a third-party

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purchaser to sell assets contingent upon the closing of the main deal. If the case ends up in court, the parties will often attempt to "litigate the fix," i.e. attempt to persuade the court to consider the restructured deal rather than the original transaction.

Whether a court will consider the deal only as originally proposed, or instead consider the proffered "fix" can have a substantial impact, not only on the ultimate outcome of litigation but also on the negotiating dynamic with agency staff regarding whether to settle the matter through a consent decree or consent order that embodies the proposed fix. If staff attorneys know they will be litigating against the original deal with no evidence of the proposed measures to address competitive concerns, they may be more confident in their case and may take a harder line in settlement negotiations. On the other hand, if they have to weigh whether to accept a proffered remedy against having to litigate a restructured deal in court, they may be motivated to accept a weaker remedy rather than risk losing. It is therefore important to consider how to maximize the probability that the court will consider evidence on the fix in the event of litigation challenging the transaction.

This article explores recent attempts by merging parties to litigate the fix. First, we assess the agencies' arguments against courts considering proposed remedies in preliminary injunction proceedings to block proposed mergers and acquisitions. Second, we discuss how courts have addressed the issue of burden of proof in considering proposed remedies. We then review two recent cases in which parties attempted to introduce evidence of fixes. In *FTC v. Ardagh*, the court refused to admit evidence about proposed divestitures.[1] In *FTC v. Sysco*, by contrast, the agency and the parties briefed and the court assessed the impact of

[1] *FTC v. Ardagh Group S.A.*, No. 13-cv-01021 (D.D.C. 2013).

Sysco's agreement to divest assets to a specific buyer.[2] Finally, in light of these precedents, we discuss strategies for parties considering proposing remedies.

I. Some Courts Have Considered Evidence of Proposed Fixes

The agencies have repeatedly argued that courts should not consider evidence of proposed divestitures or other remedies when weighing issuance of a preliminary injunction to block a proposed merger or acquisition alleged to lessen competition.

The agencies regularly file motions in limine to prevent courts from hearing any evidence of proposed fixes. The agencies have argued that evidence of the fix "is irrelevant to the issue for trial, which is solely whether the proposed merger will violate §7."[3]

Despite the agencies' protests, courts have been willing to consider the fix, for example: *FTC v. CCC Holdings* (2009), *FTC v. Arch Coal* (2004), *FTC v. Libbey* (2000), *United States v. Franklin Electric* (2000), *FTC v. Atlantic Richfield* (1977), and *United States v. Atlantic Richfield* (1969).[4]

The agencies have advanced several arguments to explain why it is inappropriate for courts to consider the fix and that the court should instead only hear evidence on the competitive impact of the originally-proposed transaction.

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[2] *FTC v. Sysco Corp.*, No. 15-cv-00256, Slip Op. (D.D.C. 2015).

[3] Order at 2, *United States v. Franklin Elec. Co.*, 130 F. Supp. 2d 1025 (W.D. Wis. 2000) (No. 00-C-0334-C, ECF No. 96).

[4] *United States v. Atl. Richfield Co.*, 297 F. Supp. 1061 (S.D.N.Y. 1969); *FTC v. Atl. Richfield Co.*, 549 F.2d 289 (4th Cir. 1977); *Franklin Elec.*, 130 F. Supp. 2d 1025; *FTC v. Libbey Inc.*, 211 F. Supp. 2d 34 (D.D.C. 2002); *FTC v. Arch Coal*, 329 F. Supp. 2d 109 (D.D.C. 2004); *FTC v. CCC Holdings*, 605 F. Supp. 2d 26 (D.D.C. 2009).

Agency Argument 1: The deal filed under HSR should be the one litigated. The government has argued that the parties must be held to the deal they negotiated and reported in their HSR Act filings.[5]

However, it is clear that parties will not necessarily be required to litigate the acquisition described in their HSR filings if the parties subsequently modify their proposed deal so that the buyer acquires fewer assets than initially proposed. For example, in *Libbey,* the court held that:

> [P]arties 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. And when they do so . . . it becomes the new agreement that the Court must evaluate in deciding whether an injunction should be issued.[6]

Thus, parties may amend an acquisition agreement to transfer fewer assets than originally proposed, and the government must prove that amended acquisition is likely to lessen competition.

Agency Argument 2: Allowing continuous amendments will make agency and judicial review impossible. In *Libbey*, the FTC argued that parties could avoid government and judicial review by continuously amending an agreement, making review impossible.

While "not unsympathetic to the FTC's argument," the court concluded that, upon the facts in front of it, it was "not convinced that defendants were in fact purposely attempting to avoid judicial and FTC review of their agreement. Rather, they made a good-faith effort to address the FTC's concerns regarding the agreement, which it seems is consistent with the policies underlying Section 7."[7]

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[5] *See Atl. Richfield*, 297 F. Supp. at 1068 ("The Government takes the curious position that the sale to BP should be completely ignored by the court and that the merger should be treated as if it would result in a combined Atlantic-Sinclair operation in the Northeast.").

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

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

Courts may refuse to consider a proposed remedy that has been repeatedly altered during the review process, but have been willing to consider good faith efforts to address competitive concerns.[8]

Agency Argument 3: The proposal may be a sham. A related concern expressed by the agencies is that the purported fix is a sham—that a proffered fix is merely a litigation ploy and/or that there is a risk that the parties will abandon the proposed fix after winning in court.

Courts have rejected this argument when based on pure speculation. In *Atlantic Richfield*, for instance, the Court reasoned that "the Government suggests that since the sale is not to be completed until shortly after the merger has taken effect there is the possibility it may be abandoned . . . . The record does not lend the slightest support to such speculation."[9]

In *Arch Coal*, the FTC argued that the proposed divestiture was not incorporated into an amended merger agreement, but was a side agreement with a third party which could be renegotiated and might not close.[10] The *Arch Coal* court accepted the acquirer's and divestiture buyer's testimony that each was "fully committed" and the proposed divestiture would "definitely occur."[11] In doing so, the court rejected the FTC's argument that the form of the agreement was dispositive.[12]

Agency Argument 4: The proposed fix is not reasonably certain. Courts have been more receptive to the government's argument that a proposed

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[8] *See* Memorandum Opinion at 5, *Arch Coal*, 329 F. Supp. 109 (No. 04-0534, ECF No. 67) ("*Arch Coal* Mot. in Limine Ruling") ("The uncontroverted facts . . . reveal that the [divestiture] transaction was proposed as a good faith response to the Commission's investigation and concerns regarding the competitive effects of the Arch-Triton merger.").

[9] *See*, *e.g.*, *Atl. Richfield*, 297 F. Supp. at 1068.

[10] Memorandum in Support of Plaintiff Federal Trade Commission's Motion in Limine at 4, *Arch Coal*, 329 F. Supp. 109 (No. 04-0534, ECF No. 50) ("*Arch Coal* Mot. in Limine").

[11] *Arch Coal* Mot. in Limine Ruling at 5.

[12] *Id*.

fix was not sufficiently certain to be considered and appropriately vetted by the agency.

While it has been clear since before the HSR Act was even passed that courts will not hear evidence about proposed fixes that amount to mere "promises," "intentions," or non-binding offers that had not yet matured into contracts,[13] it is less clear what is required to be sufficiently definitive.

This issue resurfaced in the FTC's recent challenge to Ardagh's acquisition of Saint Gobain, which is discussed below.

Agency Argument 5: Judicial review of the fix usurps FTC authority. The FTC has also argued that it has expertise in fashioning antitrust remedies that the courts lack. Thus, by considering a fix rather than the initial deal, when the FTC is seeking an injunction under Section 13(b) of the FTC Act, pending an administrative trial, the court usurps power granted to the Commission. The FTC argued, for instance, in *Arch Coal*:

> Consideration by this Court of what remedy would be necessary and appropriate would preempt the Commission's ability to carry out its responsibilities under the Acts and . . . order the necessary and appropriate relief . . . Through its adjudicative proceeding, the Commission will apply its administrative expertise to explore the issues presented . . . and, ultimately, fashion appropriate permanent relief for any violations found . . . [I]f the sale of Buckskin were in fact consummated, an important asset of Triton would be placed beyond the reach of the Commission . . . In this sense, failure to enjoin the Arch-Triton merger based on consideration of the proposed Buckskin sale effectively would amount to imposition of a permanent divestiture remedy by this Court that would deprive the Commission of its jurisdictional authority on the merits.[14]

[13] *See Consol. Gold Fields, Inc., v. Newmont Mining Corp.*, 698 F. Supp. 487, 502 (S.D.N.Y. 1988), *rev'd in part on other grounds*, 871 F.2d 252 (2d Cir. 1989); *Chemetron Corp. v. Crane Corp.*, 1977 WL 1491, at *7 (N.D. Ill. 1977).

[14] *Arch Coal* Mot. in Limine at 1-2, 11; *see also* Thomas J. Horton, *Fixing Merger Litigation Fixes*: *Reforming the Litigation of Proposed Merger Remedies Under Section 7 of the Clayton Act*, 55 S.D. L. REV. 165, 212 (2010) (discussing argument that courts considering such fixes "unwittingly have overstepped substantial constitutional, statutory, and judicial boundaries, and

The *Arch Coal* court rejected the argument, reasoning that the FTC had already determined that the fix did not resolve its concerns and that the court's "task in determining the likelihood of the FTC's success in showing that the challenged transaction may substantially lessen competition . . . requires the Court to review the *entire* transaction in question."[15] The court went on to review the amended transaction to determine if it was likely to lessen competition. It explained that "the burden is on the FTC to convince this Court that its judgment is correct that the Arch-Triton merger including the Kiewit transaction raises questions so serious, substantial, difficult and doubtful as to make the challenged transactions fair ground for permanent injunction proceedings before the Commission."[16]

II. Courts Are Not Consistent Regarding Who Bears the Burden of Proof When Considering Proposed Fixes

In *United States v. Baker Hughes*, the D.C. Circuit laid out the burdens of production and persuasion borne by the agencies and the parties in a horizontal merger case:

> 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.[17]

Courts have not consistently addressed where the proposed fix fits in the *Baker Hughes* burden-shifting framework. Underlying the disparity is the

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effectively declared their right to replace the executive branch as America's front-line Clayton Act merger enforcement authority").

[15] *Arch Coal* Mot. in Limine Ruling at 7.

[16] *Id*. at 6.

[17] United States v. Baker Hughes Inc., 908 F.2d 981, 982-83 (D.C. Cir. 1990).

question of whether the "transaction" includes the "fix." If the "transaction" includes the fix, then the burden logically should be on the government to show that the transaction, as fixed, will substantially lessen competition. If, on the other hand, the fix is a method through which the parties can rebut the presumption of competitive harm, the government need only show that the original deal will substantially lessen competition. If it does so, the burden shifts to the parties to produce evidence of the fix sufficient to rebut the presumption of competitive harm.[18] Courts have adopted both approaches.

The *Arch Coal*, *Libbey*, and *Atlantic Ritchfield* courts, for example, placed the burden on the agency to prove that the amended transaction may substantially lessen competition.[19] The *Arch Coal* court explained that "the burden is on the FTC to convince this Court that its judgment is correct that the [transaction, as fixed] raises questions so serious, substantial, difficult and doubtful as to make the challenged transactions fair ground for permanent injunction proceedings before the Commission."[20] The court made clear that its decision depended on being

[18] FTC Commissioners are split on this issue. When Reynolds American Inc. agreed to acquire Lorillard, Inc., the parties proposed a three-way deal under which certain tobacco brands would be sold to Imperial Tobacco Group, plc simultaneously with the close of the acquisition. Three Commissioners approved a consent decree, which treated the sale to Imperial as a remedy. In dissent, Commissioner Wright asserted that "[a]s a matter of principle, when the Commission is presented with a three (or more) way transaction, an order is unnecessary if the transaction—taken as a whole—does not give reason to believe competition will be substantially lessened. The fact that a component of a multi-part transaction is likely anticompetitive when analyzed in isolation does not imply that the transaction when examined as a whole is also likely to substantially lessen competition." Dissenting Statement of Commissioner Joshua D. Wright In the Matter of Reynolds American Inc. and Lorillard Inc., Docket No. C-4533 (July 31, 2015). Commissioner Brill separately dissented, arguing that even the three-way transaction was not sufficient to remedy the anticompetitive harm caused by the Reynolds-Lorillard transaction. Dissenting Statement of Commissioner Julie Brill In the Matter of Reynolds American Inc. and Lorillard Inc., Docket No. C-4533 (July 31, 2015).

[19] *Arch Coal* Mot. in Limine Ruling at 6 (placing burden on FTC with respect to entire transaction including proposed divestiture); *Libbey*, 211 F. Supp. 2d at 51 ("the FTC has established a prima facie case that the *amended* agreement may substantially lessen competition") (emphasis added); *Atl. Richfield*, 297 F. Supp. at 1069 ("the arrangement *viewed as a whole* indicates that, instead of competition being eliminated, a new, vigorous and viable competitive force will be substituted for the present competitor") (emphasis added).

[20] *Arch Coal* Mot. in Limine Ruling at 6.

convinced that the proposed fix "will in fact occur as agreed if the [originally-proposed] merger goes forward."[21]

In *Sysco*, *CCC Holdings*, and *Franklin Electric*, the courts placed the burden on the parties to show that the fix remedied the presumption of harm established by the agency.[22] These courts did so without much analysis. The *CCC Holdings* court, for example, seemed to treat the fix as an argument by the parties that future entry, as assisted by the divestiture, would cure the competitive harm.[23] As discussed further below, the *Sysco* court did not even address the possibility that the burden might lie with the agency. Rather, it lamented the "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."[24]

III. Recent Cases: Why Did the Court Consider the Fix in *Sysco* but not *Ardagh*?

Review of two recent merger challenges helps to further clarify the steps parties must take to be able to "litigate the fix," that is, to ensure that a court will consider a proposed remedy when ruling on a government's motion for a preliminary injunction to block a proposed transaction.

In *Ardagh*, the FTC convinced the district court not to consider a proposed fix: the divestiture of four plants. In *Sysco*, the FTC addressed the proposed fix in its complaint, alleging "Defendants' plan to divest 11 of US Foods' distribution centers to Performance Food Group . . . does not remedy the competitive harm caused by the Merger," and the court considered and rejected the fix.

[21] *Id.* at 7.

[22] Memorandum Opinion at 101, *Sysco*, No. 1:15-cv-00256 (ECF No. 192) ("*Sysco* Opinion"); *CCC Holdings*, 605 F. Supp. 2d 26, 46-47, 56-59 (D.D.C. 2009) (treating proposed fix as one of the parties' rebuttal arguments); *Franklin Elec.*, 130 F. Supp. 2d at 1033 ("defendants have the burden of proving their contention that because of the proposed [fix] the number of competitors will not change.").

[23] *CCC Holdings*, 605 F. Supp. at 56-59.

[24] *Id*. at 101.

A. *FTC v. Ardagh*

In *Ardagh*, after failing to agree with the FTC on a divestiture package, Ardagh decided to "unilaterally agree" on a divestiture proposal and reported it was "in negotiations" to sell four plants, when the court addressed whether it would consider the fix, three weeks before a scheduled preliminary injunction hearing.[25]

Ardagh argued that its proposed fix should be considered because (a) the identity of the four plants that Ardagh was planning to sell had been disclosed to the FTC two weeks earlier (which was five weeks before the preliminary injunction hearing would commence); (b) the FTC had detailed information about each of the plants for months; and (c) the FTC had deposed Ardagh's CEO, as well as the chairman who was leading the process, about the proposed divestiture. Ardagh asserted that this was plenty of time for the FTC to review the proposal: "in the context of lawsuits that often take five, six, seven, eight weeks, five weeks before the hearing gives them plenty of time to address what is really only one sub-issue of the case."[26]

The FTC, on the other hand, argued that Ardagh "[d]ropp[ed] these facts on [the FTC] the night before the CEO's deposition, which [was] already being taken after the close of discovery."[27] The FTC argued that "[w]ithout a buyer in hand, if the proposed set of assets has not been operated as an ongoing business in the past, Commission staff will need time to evaluate the proposal to check whether a potential buyer could operate the assets in a way that preserves the

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[25] Transcript of Pre-Hearing Conference, *FTC v. Ardagh Grp.*, No. 13-1021 (D.D.C. 2013) ("*Ardagh* Transcript") at 18, 21.

[26] *Id*. at 22.

[27] *Id*. at 24-25.

competitive dynamics in the market. Part of that test is a check that interested and approvable buyers exist."[28]

The court also found the lack of a definitive buyer troubling, and ruled from the bench that it would not consider the proposed divestiture, reasoning that the FTC could not be expected to address whether it would be "an adequate cure" and so it would be "premature and precipitous" to consider it.[29] The court asked counsel for Ardagh rhetorically, "You don't even have a definitive name for them to do discovery from or ask about. That's not reasonable, is it?"[30] The court also asked, "Do you think there is a chance that if the commissioners had your current plan in front of them they might come out with a different result?"[31] While the court did not suggest a signed agreement needed to have been presented to the FTC, it suggested any divestiture proposal would have had to be definitive enough to allow the FTC to evaluate it before the court would consider it.[32]

In a subsequent blog post, FTC staff asserted that the court's ruling "reinforces the Commission's approach to designing effective remedies for problematic rulings, the goal of which is to preserve or restore competition." The staff took the position that "[p]arties may present a divestiture proposal at any point in the process, including post-complaint . . . [but] Commission staff will need time to evaluate the proposal to check whether a potential buyer could

[28] Angelike Andrinopoulos Mina and Jim Abell, Federal Trade Commission, *The fix is (not) in*: *lessons from the Ardagh case*, Competition Matters (Apr. 9, 2014), *available at* https://www.ftc.gov/news-events/blogs/competition-matters/2014/04/fix-not-lessons-ardagh-case ("FTC Blog Post").

[29] *Ardagh* Transcript at 29; *id*. at 35 ("I think the most I can do at this point is say we will go ahead with the hearing as scheduled. It will concern the issues that I understood it to concern before I came out here today, i.e., we will not be discussing any divestiture of plants that one side sort of knows about and the other side doesn't. It's not going to be fruitful for me to hear any testimony on that.").

[30] *Id*. at 28.

[31] *Id*. at 23.

[32] *Id*. at 36 ("I use the word 'definitive' in a sort of sliding scale here — but enough for them to be able to do some evaluating of what you're suggesting.").

operate the assets in a way that preserves the competitive dynamics in the market."[33]

After the court ruling and before trial commenced, Ardagh and the FTC agreed on a broader divestiture of six plants, along with Ardagh's headquarters, mold facility, engineering facility, as well as customer contracts, molds, and intellectual property.[34]

B. *FTC v. Sysco*

In the FTC's recent challenge to the Sysco-US Foods merger, the FTC did not seek to exclude evidence about the proposed divestiture. Notably, Sysco publicly announced the proposed divestiture more than two weeks before the Commissioners authorized the filing of a complaint to block the proposed acquisition, i.e. before post-complaint discovery had even commenced.[35] Sysco had not only identified a buyer for the assets,[36] it had signed a definitive agreement with that buyer.[37]

The FTC's complaint included detailed allegations supporting its conclusion that the proposed fix was "inadequate" and would not "prevent the substantial competitive harm" allegedly caused by the merger. The FTC asserted that the divestiture would not address competitive concerns in many local markets and that the proposed buyer lacked the necessary geographic coverage to serve

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[33] FTC Blog Post.

[34] Agreement Containing Consent Orders, Ardagh Grp., Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain, No. 9536 (FTC 2013).

[35] Complaint for Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act at p. 34, *Sysco*, No. 15-cv-00256 (ECF No. 11-1) ("*Sysco* Compl.").

[36] *Id*.

[37] Press Release, Sysco Reaches Agreement to Sell 11 US Foods Distribution Centers to Performance Food Group Contingent on Consummation of Sysco-US Foods Merger (Feb. 2, 2015) *available at* http://investors.sysco.com/press-releases/Press-Release-Details/2015/Sysco- Reaches-Agreement-to-Sell-11-US-Foods-Distribution-Centers-to-Performance-Food-Group-Contingent- on-Consummation-of-Sysco-US-Foods-Merger/default.aspx.

national customers. The buyer, according to the complaint, also lacked the capacity, operational efficiencies, reputation, product breadth, and industry-specific expertise to compete as effectively as the acquired firm.[38]

Interestingly, in its memorandum in support of a preliminary injunction, the FTC pointed to the divestiture proposal as recognition by the defendants of "the anticompetitive nature of the merger."[39] Of course, offering a remedy in an attempt to address stated government concerns should not be taken as an admission that the original transaction would likely lessen competition.[40]

The court granted a preliminary injunction to block the proposed acquisition, even taking into account the impact of the proposed fix.[41] The court pointed out that "there is 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."[42] For guidance, it looked to the U.S. Department of Justice's 2004 and 2011 Policy Guides to Merger Remedies, which concludes that for a remedy to be "successful" it must "maintain the premerger level of competition."[43]

While considering the fix, the *Sysco* court first found that the FTC had established a "strong presumption of anticompetitive harm" with respect to the

[38] *Sysco* Compl. ¶¶ 12, 83-85. *See also* Memorandum in Support of Plaintiff Federal Trade Commission's Motion for Temporary Restraining Order and Preliminary Injunction at 5, *Sysco*, No. 15-cv-00256 (ECF No. 49-1) ("*Sysco* PI Memo").

[39] *Sysco* PI Memo at 5.

[40] This was not the first time that the Commission has made such an argument. *See Arch Coal* Mot. in Limine at 11 ("Inherent in any argument the defendants may have for insisting that this Court consider the Buckskin sale is the concession that, without it, the Arch-Triton merger raises serious and substantial questions."). The authors are not aware of any case where a court has agreed that the mere fact that a defendant attempts to litigate the fix constitutes an admission that the transaction is anticompetitive.

[41] *Sysco* Opinion at 2.

[42] *Id*. at 101.

[43] *Id*. at 110.

transaction as initially proposed.[44] The court then analyzed the proposed fix as one of the rebuttal factors to consider whether the merging parties could defeat the presumption of anticompetitive harm under a *Baker Hughes* burden-shifting framework. The court found that the divestiture and other rebuttal evidence was insufficient to overcome the presumption of anticompetitive harm that the FTC had established.[45] Interestingly, from the public record it does not appear that the parties briefed the argument that the FTC should have had the burden to prove that the entire transaction, as-fixed, would substantially lessen competition.

IV. How to Position a Remedy for Consideration in Court

Parties to future mergers that expect serious antitrust scrutiny should consider all of the precedents addressing "litigating the fix," including *Ardagh* and *Sysco*, in developing their strategy to design and propose a fix to get the deal done.

Propose fix early enough for agency to vet. While parties can go up the chain of command, arguing that a proposed transaction is not anticompetitive, it is clear they must give the agencies a chance to vet a proposed fix, which may mean vetting a proposed buyer or the existence of interested buyers, if they want to maximize the chances a court will consider the fix. As in *Sysco*, if the agency has enough time to assess the proposed remedy, it might not even contest whether the Court should assess the issue. Providing the agency with adequate time to review

[44] *Id*. at 100; *see also Franklin Elec*., 130 F. Supp. 2d at 1030 (concluding that despite a fix offered by the parties, "[t]he presumption the government starts with, which is that a merger of the only two competitors in the market is a violation of § 7, remains unrebutted").

[45] From the redacted briefings on the FTC's Motion for Preliminary Injunction, it does not appear that either the agency or the parties argued where the burden of production lies with respect to evidence related to the fix. However, the parties argued that the proposed divestiture would "replace[] the competitive intensity lost as a result of the merger," thereby arguably conceding the point that the fix was separate from the "transaction." Memorandum of Defendants Sysco Corporation, USF Holding Corp., and US Foods, Inc., In Opposition to Plaintiffs' Motion for a Preliminary Injunction at 38, *Sysco,* No. 15-cv-00256 (ECF No. 137-1). It is therefore not surprising that the court, while noting "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," did not note the split of authority on where to allocate the burden and simply placed the burden on the parties. *Sysco* Opinion at 101.

the proposed fix makes it harder for the agency to argue, as the FTC did in *Ardagh*, that it did not have the opportunity to do sufficient discovery or to obtain the opinions of customers on the divestiture proposal. Proposing the fix early enough in the process also demonstrates that the parties are attempting to remedy the competition concerns in good faith.

While it is not entirely clear what "early enough" is, precedents suggest that the courts may be receptive to fixes proposed even after the agency has filed suit. In *Franklin Electric*, the defendants executed licensing and supply agreements with a third party more than three weeks after the DOJ filed suit.[46] In *Libbey*, a week after the FTC had filed suit, the defendants amended their merger agreement so that the seller would retain sufficient assets (according to the defendants) to remain a viable competitor.[47] In both cases the court considered the fix, and in both cases the court ultimately issued a preliminary injunction, despite considering the fix. By contrast, in *Ardagh* the parties' attempt to introduce evidence of a fix after the close of discovery, a few weeks before trial and without an identified buyer was insufficient.

In both *Libbey* and *Arch Coal* the court noted that the Commission itself had considered the fix before authorizing the staff to file a complaint challenging the transaction.[48] Presenting a fix before the Commission votes, so that the fix can be considered by the Commissioners in assessing the competitive impact of

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[46] *Franklin Elec*., 130 F. Supp. 2d at 1030. The defendants and the third party had signed a letter of intent a month before the filing of the complaint. *Id*.

[47] *Libbey*, 211 F. Supp. 2d at 41. The FTC later amended its complaint to allege that the revised merger agreement "did not materially change the original agreement or its likely detrimental effect on competition." *Id*. at 42. The court ultimately issued the preliminary injunction given concerns about the seller's cost structure after the acquisition would prohibit it from remaining a viable competitor.

[48] *Arch Coal* Mot. in Limine Ruling at 4 ("Arch informed the Commission in late January 2004 that it had signed an agreement and the FTC then issued its administrative complaint challenging the merger after 'determin[ing] that the competitive concerns posed by Arch's acquisition of Triton were not remedied by Arch's offer to sell the Buckskin mine to Kiewit.'"); *Libbey*, 211 F. Supp. 2d at 46 ("The FTC remains capable of vetting the amended agreement, and in fact, in response to the Court's March 29th Order, the Commission submitted a statement indicating that it had indeed voted to enjoin the amended merger agreement.").

the transaction, should enhance the likelihood that a court will subsequently consider evidence about the fix.

Enter into a definitive agreement. The courts have emphasized that the parameters of a proposed fix must be reasonably certain for the agencies and courts to evaluate it.[49] When the defendants present—before the close of discovery—an executed contract, with a specific buyer or licensee, the courts have tended to consider evidence of the fix.[50] Although an identified buyer adds to certainty, it is possible that the agencies and courts would entertain a fix in which no agreement has been reached with a specific buyer. If, for example, the divestiture assets have operated as an ongoing business in the past a court may not insist on an up-front buyer in order to consider the merits of a fix.[51]

V. Strategic Implications for Proposing a Fix to the Agencies

While a proposed fix that is sufficiently definitive and presented early enough likely will be considered by a court in a preliminary injunction hearing, most parties would rather not find themselves in litigation against the government. It is therefore important to consider the strategic implications of adopting a self-help strategy in dealing with the agencies and the courts.

Companies may choose to negotiate a fix with the agency staff initially, come to agreement, and find an up-front buyer after the scope of the fix is identified. This process benefits from increased likelihood that the agency will accept the agreed-upon divestiture, but risks a broader fix. An up-front buyer

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[49] *See Ardagh* Transcript at 29.

[50] *See Arch Coal* Mot. in Limine Ruling at 4 (rejecting challenge to consideration of the fix because, inter alia, the fact that the complaint issued several months *after* the side agreement was signed meant that "the FTC has assessed and is in reality challenging the merger agreement including the [] divestiture"); *see also Libbey*, 211 F. Supp. 2d at 46 n.27 ("based upon the facts of this case, the Court is not convinced that defendants were in fact purposely attempting to avoid judicial and FTC review of their agreement. Rather, they made a good-faith effort to address the FTC's concerns regarding the agreement, which it seems is consistent with the policies underlying Section 7.").

[51] *See* Richard Feinstein, Director, Statement of the Bureau of Competition of the Federal Trade Commission, Negotiating Merger Remedies at 4-5 (January 2012); FTC Blog Post.

requirement also increases the risk of having to sell the assets quickly at below-market prices.

Companies should, however, also consider whether there is strategic value in proposing a fix, which includes a signed agreement with a divestiture buyer that is conditioned only upon the main deal closing. Because the fix is offered as a *fait accompli*, parties offering a serious fix may enjoy more bargaining leverage even if it is not the exact remedy the agency would fashion itself, because the agency would have to recognize the risk of losing (and only ending up with a unilateral fix) if it takes the case to litigation. Because the court is likely to consider a good faith effort to fix all serious anticompetitive concerns, it is presumably harder for the agency to prove that the transaction as modified should be enjoined.[52] That said, the agency may perceive its downside for losing reduced because even if it loses, the market will benefit from the fix, even if it is not the remedy the agency would have liked.

While these strategies will help ensure that the merits of a proposed fix are heard in court,[53] there will still be debate regarding whether the government or the parties bears the burden of proof on the adequacy or inadequacy of the fix. As discussed above, the courts have split on this issue. As the dust settles on the law regarding whether the court will consider a fix at all, this issue is likely to take center stage.

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[52] Of course, firms should also consider substantively what remedy is likely to be accepted by the agencies, as well as the courts. *See* Feinstein, Negotiating Merger Remedies at 4; U.S. Department of Justice, Antitrust Division, Antitrust Division Policy Guide to Merger Remedies at 4-5 (June 2011). Some courts have looked to agency guidance on the subject, which suggests that the answer may be similar. *Sysco* Opinion at 100-101; *but see Libbey*, 211 F. Supp. 2d at 47-48 (concluding that the fix was inadequate based in part on a higher cost structure of the proposed divestiture buyer).

[53] It is important to note that just because the parties are successful in convincing a court to consider evidence of a proposed fix does not mean that they will ultimately prevail. In *Franklin Electric*, *Libbey*, and *Sysco*, the courts ultimately sided with the government and enjoined the proposed transaction, despite allowing the parties to litigate the fix.

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