# Allocating Evidentiary Burdens When Parties Litigate the Fix

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## I. INTRODUCTION

Historically, when the Federal Trade Commission (FTC) or Antitrust Division of the Department of Justice (DOJ) are concerned that an impending merger may be substantially anticompetitive in a market, their concerns are negotiated and settled pre-trial with a consent decree.[1] Current leadership in both agencies have begun demanding more exacting

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1. *See* U.S. DEP'T OF JUST., ANTITRUST DIVISION WORKLOAD STATISTICS FY 2010-2019, at 6 (2020), https://www.justice.gov/atr/file/788426/download [https://perma.cc/Z9P4-4UPG] (showing a majority of recent merger cases ending in settlement); *Data Sets*, FED. TRADE COMM'N, https://www.ftc.gov/policy-notices/open-government/data-sets (click on and download "FTC Merger Enforcement Actions") (showing a majority of FTC merger actions ending in consent orders).

standards before agreeing to a negotiated decree.[2] Indications are that the agencies' heightened standards have drastically increased the number of cases litigated.[3]

As the agencies have shifted to seeing settlements as "the exception, not the rule";[4] the terms have not fallen by the wayside. Companies whose terms have been dismissed by the agency may altogether abandon settlement talks to unilaterally bring their terms before the court. Those unilateral terms have been coined a "fix," as the unilateral modification attempts to fix the anticompetitive potential of the transaction.[5] Fixes are meant to minimize the anticompetitive potential of the post-consummated merger, either modifying the structure of the deal[6] or regulating the firm's post-transaction conduct.[7] When the merging firms bring these unilateral fixes to the court, they are said to be "litigating the fix."[8]

As the DOJ and FTC stray further from pre-trial settlements, litigating the fix may begin to subsume the function of settlements between the agency and merging parties. But

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2. *See* Jonathan Kanter, Assistant Att'y Gen. for the Antitrust Div., U.S. Dep't of Just., Keynote Speech at the University of Chicago Stigler Center (Apr. 21, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler [https://perma.cc/58C9-5QNJ] ("Our duty is to litigate, not settle, unless a remedy fully prevents or restrains the violation."); Margaret Harding McGill, *FTC's New Stance: Litigate, Don't Negotiate*, AXIOS (June 8, 2022), https://www.axios.com/2022/06/09/ftcs-new-stance-litigate-dont-negotiate-lina-khan [https://perma.cc/8KMW-KY43] (reporting from an interview with Lina Khan, FTC Chair, that "Khan said the pattern of companies coming to the FTC . . . expecting agency staff . . . to 'fix' [illegal deals] through divestiture or other means is not happening under her watch"); *see also* Daniel A. Crane, *The Radical Challenge to the Antitrust Order*, 59 WAKE FOREST L. REV. 399, 428–29 (2024) (discussing how current heads of the FTC and DOJ have minimized settlements in their investigations); Steven C. Salop & Jennifer E. Sturiale, *Fixing "Litigating the Fix"*, 85 ANTITRUST L.J. 619, 620–21 (2024).

3. *DAMITT Q3 2023: Merger Control Is a Marathon, Not a Sprint*, DECHERT LLP (Oct. 30, 2023), https://www.dechert.com/knowledge/publication/2023/10/damitt-q3-2023--merger-control-is-a-marathon--not-a-sprint.html [https://perma.cc/W7ES-Q2CB] ("[I]t looks like 2023 will set a new record as all significant investigations . . . resulted in either a complaint or abandoned transaction. Four of the last five quarters have seen no consent decrees from either agency."); *see also Competition Policy, Antitrust, and Consumer Rights: Hearing Before the Subcomm. on Competition Pol'y, Antitrust, & Consumer Rts. of the Sen. Comm. on the Judiciary*, 117th Cong. (2022) (Statement of Jonathan Kanter, Att'y General for Antitrust Div., U.S. Dep't of Just.), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-testifies-senate-judiciary [https://perma.cc/4PEE-ZXUQ] ("We will litigate more merger trials this year than in any fiscal year on record.").

4. Jonathan Kanter, Assistant Att'y Gen. for the Antitrust Div., U.S. Dep't of Just., Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york.

5. *E.g.*, Eleanor Tyler, *Analysis: How 'Litigating the Fix' Is Upending Merger Review*, BLOOMBERG L. (May 11, 2023), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-how-litigating-the-fix-is-upending-merger-review (on file with the *Journal of Corporation Law*).

6. Structural remedies "generally will involve the sale of business or assets by the merging firms." ANTITRUST DIV., U.S. DEP'T OF JUST., 2020 MERGER REMEDIES MANUAL 4 (2020); *see also* FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 289 (D.D.C. 2020) (proposed fix would divest a hydrogen peroxide plant).

7. Conduct remedies "usually entail[] injunctive provisions that would, in effect, regulate the merged firm's post-merger business conduct or pricing authority." 2020 MERGER REMEDIES MANUAL, *supra* note 6, at 4; *see also* United States v. Franklin Elec. Co., 130 F. Supp. 2d 1025, 1026 (W.D. Wis. 2000) (proposed fix was a licensing agreement agreeing to provide competitors with access to intellectual property and a contractual right to purchase a subsidiary of the merged firm's product that the competitors could sell under its own name for at least two years).

8. *See, e.g.*, Darren S. Tucker, *The Elephant in the Room: Litigating the Fix After* Arch Coal *and* Dairy Farmers, ANTITRUST SOURCE, Jan. 2006, at 1, 1.

while recent enforcement trends have opened the door to parties litigating the fix more often, the evidentiary standard for incorporating the fix into the existing judicial framework has remained inconsistent.[9] Without an accepted standard, even in intra-court cases, judges evaluate fixes differently without a clear policy reason for doing so.[10] The lack of a clear standard has required parties to invest significant time and resources to fight over how a judge should incorporate the fix.[11]

This Note proposes a consistent standard for allocating evidentiary burdens to the litigants when a fix is brought to the court.[12] In doing so, it incorporates the existing judicial framework for evaluating a merger. Part II reviews the existing framework for evaluating a merger, and the pre-trial process for having the fix considered at trial. It ends with the "threshold" questions posed by Judge Nichols of the D.C. District Court: "[*w*]*ho* bears the burden of proving the competitive implications of the [fix], *when* must that party satisfy its burden, and *what* exactly must that party prove?"[13] Part III assesses the dueling incentives for the merging parties before returning to Judge Nichols's threshold questions. Finally, Part IV answers how a court should allocate the evidentiary burdens.

## II. BACKGROUND

### *A. Section 7 of the Clayton Act*

Section 7 of the Clayton Act legislates transactions "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly."[14] The FTC and DOJ have overlapping jurisdiction to enforce section 7 and are empowered to seek injunctions to prevent a transaction from consummating.[15] Since section 7 is enforced through injunctions, equitable considerations apply.[16]

Congress's use of the words "*may be* substantially to lessen competition" indicates its intent to legislate "probabilities, not certainties."[17] Section 7 is a forward-looking statute

9. *See* FTC v. Sysco Corp., 113 F. Supp. 3d 1, 72 (D.D.C. 2015) ("[T]here is a lack of clear precedent providing an analytical framework for addressing the effectiveness of a [fix] that has been proposed to remedy an otherwise anticompetitive merger."); United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 132 (D.D.C. 2022) (noting "threshold matter[s]" that have been decided differently in intra-court decisions).

10. *See UnitedHealth*, 630 F. Supp. 3d at 132–33 (collecting D.C. district court cases that have applied different standards).

11. *See, e.g.*, *id.* at 132–34 (noting the pre-trial argument between the merging parties and the agency on how the court should frame the fix); Minute Order, United States v. ASSA ABLOY AB, No. 22-cv-02791 (D.D.C. Dec. 5, 2022) (requesting briefing on how the court should answer *UnitedHealth*'s threshold questions).

12. This Note assumes that a court has agreed to consider the fix and makes no normative comments about whether fixes are "good" or "bad" for merger enforcement. In most situations, courts have been willing to admit a fix. *See* David Gelfand & Leah Brannon, *A Primer on Litigating the Fix*, 31 ANTITRUST 10, 11 (2016) ("Since *Arch Coal*, [(2004), the FTC and DOJ] generally have not disputed that courts have authority to consider fixes, and the courts have typically considered parties' proposed remedies.").

13. *UnitedHealth*, 630 F. Supp. 3d at 132.

14. Clayton Act § 7, 15 U.S.C. § 18.

15. The FTC is empowered to seek preliminary injunctions under section 13(b) of the Federal Trade Commission Act of 1914, 15 U.S.C. § 53(b). The DOJ may seek injunctive relief under section 15 of the Clayton Act, 15 U.S.C. § 25.

16. FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1041 (D.C. Cir. 2008).

17. Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962).

"intended to arrest anticompetitive tendencies in their 'incipiency.'"[18] In other words, if the challenging agency proves by a preponderance of the evidence that a proposed merger has the potential to substantially lessen competition, the merger would be enjoined. Because of the speculative nature of section 7, violations do not require an "absolute certainty of competitive harm," but rather, proof beyond a "mere possibility."[19]

The incipiency standard permits agencies to reach theories of anticompetitive harm that otherwise cannot be touched by other federal antitrust statutes. For example, the Sherman Act legislates against contemporaneous anticompetitive practices to prevent anticompetitive combinations, conspiracies, or a company leveraging its monopoly position to restrain trade.[20] Conversely, section 7 "extend[s] to acquisitions which are not forbidden by the Sherman Act. . . . [Its] intent . . . is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding."[21] Because the Clayton Act extends beyond normal Sherman Act violations, it may reach theories of anticompetitive harm that are otherwise not actionable under the Sherman Act.[22] Effectively, an agency's failure to catch the incipient harm pre-merger under the Clayton Act will render it untouchable post-merger.

### *B. The Hart-Scott-Rodino Act and HSR Transactions*

Before Congress passed the Hart-Scott-Rodino Act (HSR Act), the Clayton Act did not afford the FTC or DOJ advance notice to review a proposed transaction before it was consummated. The lack of notice to agencies permitted merging parties to quickly consummate mergers before either agency could review its potential for anticompetitive harms.[23] When consummated, the assets of the two firms would become "hopelessly and irreversibly scrambled together."[24] As a result, even if the DOJ or FTC later proved the

18. United States v. Phila. Nat'l Bank, 374 U.S. 321, 362 (1963).

19. United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 129 (D.D.C. 2022) (citing United States v. Baker Hughes Inc., 908 F.2d 981, 984 (D.C. Cir. 1990)).

20. *See* Sherman Act § 1, 15 U.S.C. § 1 (preventing combinations and conspiracies in restraint of trade); Sherman Act § 2, 15 U.S.C. § 2 (preventing a firm from leveraging its monopoly power in the restraint of trade).

21. Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 741 & n.5 (2d Cir. 1953) (discussing the legislative history of the Clayton Act and its amendments).

22. An example where the Clayton Act can reach beyond the Sherman Act is the threat of future tacit collusion. Tacit collusion is not actionable under the Sherman Act. *See In re* Text Messaging Antitrust Litig., 782 F.3d 867, 872 (7th Cir. 2015) ("Express collusion violates [the Sherman Act]; tacit collusion does not."). However, the Clayton Act can reach mergers that "mak[e] it easier for the firms in the market to collude, expressly *or tacitly*." Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1386 (7th Cir. 1986) (emphasis added).

23. *See* 122 CONG. REC. 15312 (daily ed. May 25, 1976) ("Under existing law, the Department of Justice can neither compel production of information relating to a merger until after it has occurred, nor can the Department or the Federal Trade Commission force a delay of the merger until after they have had a chance to gather the necessary information and make an evaluation.").

24. H.R. REP. NO. 94-1373, at 5 (1976); *see also* 122 CONG. REC. H8138 (daily ed. Aug. 2, 1976) ("The problem [the HSR Act] cures is startlingly simple, but it goes to the very foundations of our merger law. Under present law, companies need not give advance notification of a planned merger to the [FTC] or [DOJ]. But if the merger is later judged to be anticompetitive . . . [divestiture] is usually a costly exercise in futility—untangling the merged assets and management of the two firms is like trying to unscramble an omelet.").

merger was anticompetitive, little could be done to remedy the situation.[25] Congress's solution was the HSR Act, an amendment to the Clayton Act requiring the merging parties to notify and delay their transaction to give the agencies time to review the proposed transaction before the assets could be scrambled.[26]

Only transactions that meet certain criteria require notification before it may be consummated.[27] For this Note, a transaction that meets such criteria will be referred to as an "HSR transaction." The process that an HSR transaction takes begins with the merging parties filing an initial notification to the FTC and DOJ detailing general information of the merger for the agencies to preliminarily review.[28] If either agency has concerns about the transaction and believes that further investigation is necessary, the two will then select which agency will review the filing.[29] The initial filing process subjects the transacting parties to a mandatory wait period before the transaction may be consummated.[30] If the agencies do not take action, the merging parties are free to consummate the merger.[31]

The agencies rarely take action after the initial filing.[32] But if, after an investigation, the reviewing agency is still concerned that the proposed transaction may substantially lessen competition, it may issue a request for additional information and documentary materials (second request).[33] The second request subjects the transacting firms to an additional wait period and requires the firm to supply significantly more information to the agency for review.[34] Substantially complying with a second request is costly and time-consuming, often costing millions of dollars and months of additional time before the second wait period even begins to toll.[35] If the reviewing agency is still concerned about

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25. *See* William J. Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 ANTITRUST L.J. 825, 827 (1997) (discussing an anticompetitive merger that took the DOJ 17 years to successfully unwind).

26. 122 CONG. REC. H8139 (daily ed. Aug. 2, 1976).

27. There are three applicable tests to determine whether the transacting parties must file an HSR notification: (1) the commerce test; (2) the size-of-transaction test; and (3) the size-of-person test. *Steps for Determining Whether an HSR Filing is Required*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/steps-determining-whether-hsr-filing [https://perma.cc/827X-AWJG].

28. *See* 16 C.F.R. pt. 803 app. A–B (2024) (providing the notification form including the information required to be filed).

29. U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105790, DOJ AND FTC JURISDICTIONS OVERLAP, BUT CONFLICTS ARE INFREQUENT 11 (2023).

30. The initial waiting period for cash tender offers is 15 days, otherwise the wait period is 30 days. 15 U.S.C. § 18a(b)(1)(B).

31. *Id.*

32. In the fiscal year 2022, only 1.5% of proposed mergers resulted in a second request. 45 FED. TRADE COMM'N & U.S. DEP'T OF JUST., HART-SCOTT-RODINO ANN. REP.: FISCAL YEAR 2022, app. A. Between 2013 and 2022, the percentage of HSR notifications that resulted in a second request has never exceeded 4%. *Id.*

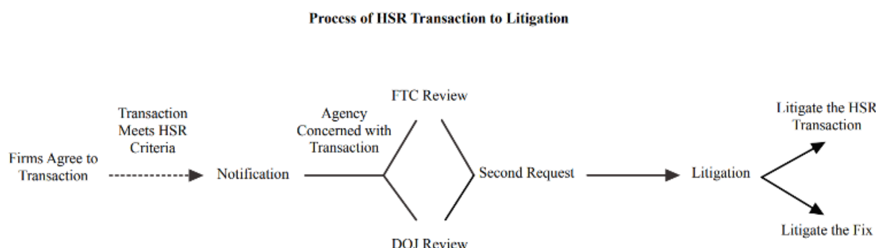
33. 15 U.S.C. § 18a(e).

34. *Id.*; *see also* FED. TRADE COMM'N, MODEL REQUEST FOR ADDITIONAL INFORMATION AND DOCUMENTARY MATERIAL (SECOND REQUEST) 1–12 (revised Oct. 2021), https://www.ftc.gov/system/files/attachments/premerger-introductory-guides/introductory_guide_iii_oct2021modelsecondrequest.pdf [https://perma.cc/4578-WCGG] (providing the specifications of the information provided in a second request).

35. *Findings From the Second Request Compliance Burden Survey*, THE THRESHOLD (A.B.A. Sec. Antitrust L.), Summer 2014, at 26, 28–36 (reporting the average costs and time it took for firms to comply with second

the potential anticompetitive effects of the transaction after the second request, litigation will often follow. At any time in the HSR process, the firm may seek to settle the issue with a fix or abandon the transaction altogether.

The illustration below provides a rough overview of the HSR process to litigation. At any time before or during litigation, the transacting party may abandon its transaction or agree to a consent decree with the agency.[36]




### *C. The Fix: Considerations for Admitting the Fix & Assessing Its Strength*

By litigating the fix, two decisions must be made. First, the merging firm must decide to litigate the fix rather than the original HSR transaction. Second, the court must decide whether it will admit the fix at trial.

First, the transacting firm must decide to pursue a fix. The decision requires a cost-benefit analysis of litigating the originally proposed HSR transaction or the comparatively less-risky "fixed" merger. Litigating the HSR transaction poses a higher risk of the transaction being enjoined but yields a higher reward if the transaction ultimately consummates. Conversely, litigating the fix ameliorates some risk of the transaction being rejected by the court, but ultimately yields a lower reward.

Should the HSR transaction consummate, the firm will wield greater market power (for horizontal mergers) with additional resources to utilize in the long term. However, the firm's increased market power and resources could be the merger's undoing as the greater the plus-side, the more tools the agency has at its disposal to enjoin the merger.[37] Litigating the fix mitigates the risk of the transaction not consummating by cutting the final market share or resources the firm would have at its disposal post-consummation. But by divesting certain assets in the deal or agreeing to conduct its operations a certain way, the benefits of merging will necessarily be comparatively lower. Because the transaction has less anticompetitive potential, the chances of the firms consummating the merger are higher.

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requests). After substantial compliance when the time does begin tolling, the agency will have another 15 or 30 days to review the documents depending on the type of offer that the transaction was based. 15 U.S.C. § 18a(e)(1)(A).

36. The FTC or DOJ may also seek remedies for non-HSR reportable transactions, but circumstances when the agencies litigate a non-HSR reportable transaction go beyond the scope of this Note.

37. FED. TRADE COMM'N & DEP'T OF JUST., HORIZONTAL MERGER GUIDELINES 18–19, 34 (2010); FED. TRADE COMM'N & DEP'T OF JUST., MERGER GUIDELINES 2–3 (2023).

If the firm decides to litigate the fix, the court must still agree to admit it. In the past twenty years, courts have been likely to consider a fix so long as (1) the remedy was proposed in good faith;[38] (2) the fix is sufficiently likely to happen should the transaction be approved;[39] and (3) the agency has a reasonable amount of time to review the remedy.[40] When the court is satisfied that each consideration has been met, the fix will likely be admitted.[41]

After a court admits a fix, the strength of the fix will be a key issue at trial. The fix must sufficiently ameliorate the anticompetitive concerns of the merger to pass judicial scrutiny. Whether the fix is a structural remedy or conduct remedy is not dispositive,[42] but is relevant to the strength of the fix.[43] If the fix is a structural remedy, metrics such as the experience of the third-party buyer of the divested assets, the buyer's independence from the seller, which assets are being divested, and the purchase price of the assets are some possible considerations for the court.[44] If the fix is a conduct remedy, the proposed regulations must eliminate incentives to act in an anticompetitive fashion.[45] When the fix is considered at trial, it must be sufficiently strong that the transaction as a whole will not violate section 7.

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38. *See* FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 46 n.27 (D.D.C. 2002) ("The [c]ourt is not unsympathetic to the FTC's argument that parties to an agreement might, in some cases, unscrupulously attempt to avoid judicial and FTC review of an agreement by continuously amending it. However, based upon the facts of this case . . . [the firm] made a good-faith effort to address the FTC's concerns regarding the agreement . . . .").

39. *See* FTC v. Arch Coal, Inc., No. 04-0534, 2004 WL 7389952, at *2 (D.D.C. July 7, 2004) (determining that the proposed fix "will in fact take place" if the transaction consummates); *cf.* United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017) ("[T]he divestiture need not be iron clad for a court to consider it. Rather, once 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.").

40. *See* Transcript of Pre-Hearing Conference at 29, FTC v. Ardagh Grp., No. 13-cv-01021 (D.D.C. Sept. 24, 2013) ("I do not believe that [the fix] can be thoroughly investigated in the three weeks between now and my hearing. . . . I don't think it's fair to the other side . . . . So given what I have heard today, I would not be considering [the fix] in my decision.").

41. Tucker, *supra* note 8, at 3–4 (listing good-faith effort, reasonable likelihood, and sufficient notice as the three requirements for a court to consider the fix).

42. *See Arch Coal*, 2004 WL 7389952, at *2 ("[T]he Court does not find th[e] structural choice to be dispositive on the issue whether the . . . transaction should be considered in the preliminary injunction proceeding.").

43. 2020 MERGER REMEDIES MANUAL, *supra* note 6, at 13 ("Structural remedies are strongly preferred [to conduct remedies] . . . because they are clean and certain, effective, and avoid ongoing government entanglement in the market.").

44. FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 304 (D.D.C. 2020); Hugh Hollman, Elaine Johnston & Nicholas Putz, *Parties are More Willing than Ever to 'Litigate the Fix' in the United States*, GLOB. COMPETITION REV. (Oct. 25, 2023), https://globalcompetitionreview.com/guide/the-guide-merger-remedies/fifth-edition/article/parties-are-more-willing-ever-litigate-the-fix-in-the-united-states [https://perma.cc/Y5EY-E3A8].

45. *See* United States v. AT&T Inc., 310 F. Supp. 3d 161, 223 (D.D.C. 2018) (finding that a conduct modification agreeing to arbitration clauses with competitors made future anticompetitive conduct by transacting firms economically unviable), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

### *D. How Courts Review a Section 7 Case*

Courts exercise their equitable authority when deciding whether to grant an injunction. In the section 7 context, courts have generally adopted a burden-shifting framework for evaluating a challenged merger. The framework is as follows:

> [T]he first step of the test allows the government to establish a prima facie case and a presumption of anticompetitive effects by demonstrating undue concentration within the relevant market. The second step shifts the burden to the defendants, who must demonstrate in rebuttal that real-world conditions make market concentration alone an unreliable predictor of the merger's anticompetitive effects. If the defendants successfully rebut the prima facie case, the burden shifts back to the government in the third step "and merges with the ultimate burden of persuasion, which remains with the government at all times."[46]

Essentially, the agency may establish a prima facie showing that the merger is illegal through the market's high level of concentration. The prima facie showing is a structural presumption of anticompetitive consequences—an inference that the merger will have anticompetitive consequences—and is not proof of harm in itself.[47] If the agency succeeds, the burden shifts to the defendant to show why the agency's market statistics alone are not strong predictors of future anticompetitive harm.[48] If the defendant successfully rebuts the prima facie showing, the burden returns to the agency to introduce further evidence of the transaction's anticompetitive potential.[49] While the burden-shifting framework was developed by the D.C. Circuit Court, other circuits find the framework persuasive.[50]

While the burden-shifting framework creates a step-based, piecemeal framework, some courts recognize that, "in practice, evidence is often considered all at once and the

46. United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 23 (D.D.C. 2022) (citations omitted) (quoting United States v. Baker Hughes, Inc., 908 F.2d 981, 983 (D.C. Cir. 1990)). The framework as described only works when assessing a horizontal merger as vertical mergers—mergers of firms in separate markets—will not immediately change market concentration statistics. *AT&T*, 310 F. Supp. 3d at 192. There is "no short-cut way to establish anticompetitive effects" in a vertical merger; the agency must make its prima facie showing without a presumption. *Id.*

47. New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 206 (S.D.N.Y. 2020) ("[P]resumptions are not self-executing; for the circumstances presumed to transform into actual effects would require real-world conduct and decisions by the actors involved.").

48. FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26, 46 (D.D.C. 2009) ("Upon the showing of a *prima facie* case, the burden shifts to Defendants to show that traditional economic theories of the competitive effects of market concentration are not an accurate indicator of the merger's probable effect . . . .").

49. If the defendant successfully rebuts the agency's prima facie case, the market statistics used to establish the prima facie case remain evidence of potential anticompetitive consequences alongside the additional evidence introduced by the agency. *See* FED. R. EVID. 301 notes of advisory committee on proposed rule ("The so-called 'bursting bubble' theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact . . . is rejected as according presumptions too 'slight and evanescent' an effect.").

50. *E.g.*, United States v. U.S. Sugar Corp., 73 F.4th 197, 203–04 (3d Cir. 2023); Illumina, Inc. v. FTC, 88 F.4th 1036, 1048 (5th Cir. 2023).

burdens are often analyzed together."[51] Practically, the agency's case-in-chief will introduce its prima facie case and attempt to control the narrative by preempting any possible defenses a defendant may raise. Realistically, the agency strengthens its prima facie case by adding to its market concentration statistics.[52] But while the framework may be divorced from the course of trial, it does offer the court a method for organizing its thoughts and explaining its ultimate decision.

### *E. How Intra-Court Opinions Inconsistently Apply the Fix to the Framework*

When a fix is introduced, the existing framework to evaluate a merger becomes muddled. While courts have consistently considered a fix at some point in the litigation, how the courts consider a fix is far from consistent—even within a judicial district.[53] In 2022, *UnitedHealth* broke down three threshold matters that the D.C. District Court has inconsistently applied:

> [T]he key question is whether the divestiture . . . resolves the Government's horizontal claim. Before answering that question, however, the Court must consider a threshold matter: Who bears the burden of proving the competitive implications of the divestiture, when must that party satisfy its burden, and what exactly must that party prove?
>
> The Government's briefs, and some of its arguments during trial . . . ha[ve] some support in District case law. . . .
>
> UHG counters that the Government's standard (at least as articulated in its briefs) contradicts the text of Section 7 and the Baker Hughes burden-shifting framework.[54]

Courts understand that a "key question" is how they allocate evidentiary burdens, but the courts have failed to develop a consistent standard. The issue immediately arose again in *United States v. ASSA ABLOY AB*,[55] requiring the court to request briefing on *UnitedHealth*'s threshold questions,[56] and accept *amicus curiae* briefing on the issue.[57]

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51. *Illumina*, 88 F.4th at 1048 (citing Chicago Bridge & Iron Co. v. FTC, 534 F.3d 410, 424 (5th Cir. 2008)); *accord* United States v. AT&T, 310 F. Supp. 3d 191 n.17 (D.D.C. 2018), *aff'd* 916 F.3d 1029 (D.C. Cir. 2019) (noting that the framework "may be somewhat academic").

52. *See, e.g.*, FTC v. Sysco Corp., 113 F. Supp. 3d 1, 61, 65, 67, 70–72 (D.D.C. 2015) ("In summary, the FTC has bolstered its *prima facie* case with additional proof that the merger would harm competition . . . .").

53. *See id.* at 72 ("[T]here is a lack of clear precedent providing an analytical framework for addressing the effectiveness of a [fix] that has been proposed to remedy an otherwise anticompetitive merger.").

54. United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 132–33 (D.D.C. 2022) (emphasis in original).

55. United States v. ASSA ABLOY AB, No. 22-cv-02791 (D.D.C. Sept. 15, 2022).

56. Order Requesting Parties' Brief the Applicable Legal Standard to be Applied at Trial, *ASSA ABLOY AB*, No. 22-cv-02791 (Dec. 5, 2022) (requesting parties "set forth the applicable legal standard to be applied at trial," including the questions posed in *UnitedHealth*); Defendants' Supplemental Pre-Trial Brief, *ASSA ABLOY AB*, No. 22-cv-02791 (Mar. 27, 2023) (advocating that the Defendants' divestiture proposal should be evaluated as a part of the Government's prima facie burden).

57. *E.g.*, Brief of Law Professors as Amici Curiae in Support of Neither Party, *ASSA ABLOY AB*, No. 22-cv-02791 (D.D.C. Jan. 3, 2023); Brief of the American Antitrust Institute and the Hon. William J. Baer as Amici Curiae, *ASSA ABLOY AB*, No. 22-cv-02791 (D.D.C. Jan. 13, 2023).

## III. ANALYSIS

This Part examines the rationales behind how different courts answer the *who*, *when*, and *what standard* threshold questions. Reviewing *who* bears the burden, this Part breaks down how a fix creates dueling incentives for the firm proposing it and proposes a basic understanding of how different courts perceive a fix differently. On *when* the court considers the fix, this Part incorporates the burden-shifting framework to find that, while the burden-shifting framework is divorced from practice, its answer changes how a court understands a fix and could implicate what evidence may be introduced at trial. Finally, this Part undertakes a cursory examination of remedies law when courts decide *what standard* a party must prove when grappling with a fix.

### *A. Who Bears the Burden of Contending with the Fix?*

Some judges require the agency to prove that the whole merger, including the fix, violate the applicable standard. Others require the firm justify that its fix sufficiently ameliorates the potential anticompetitive consequences to allow the proposed merger to consummate. The *who* and *when* questions overlap, but a unique consideration for the courts in considering who ought to bear the burden comes from the dueling incentives of the firm proposing the fix.

#### *1. The Dueling Incentives for a Firm Proposing the Fix*

A fix aims to ameliorate the anticompetitive concerns of a merger so that, in its modified form, the proposed merger may be consummated. A fix gives the amended merger a better chance of passing judicial scrutiny, and further, bypasses the need to resubject the merging parties to additional filing costs and wait periods that would come from pulling their HSR filings to resubmit them in an amended form. But after the litigation ends and post-consummation, a fix forecloses the merging firm from taking advantage of certain opportunities it had bargained to receive.

A structural fix will see a strategic buyer divesting synergies that it had originally bargained for and part of what made the merger worthwhile. Not only will the buyer divest synergies, it will also be selling those assets to a competitor. If the structural fix works as the judiciary expects, the divested assets will be used by the firm's competitor to vigorously compete with the firm. So, not only will the firm miss-out on wielding additional market power post-consummation, but the divested assets will also be used to actively compete against the firm. The consequence incentivizes the firm to craft a "faux fix"; a fix that outwardly appears to maintain vigorous competition in the market, but that will ultimately fail.[58]

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58. Examples would include the firm divesting its assets to a weak buyer that would not be able to effectively utilize the assets to compete or divest a comparatively weak package of assets that would not give the buyer the opportunity to compete vigorously. *See Transcript of Merger Remedies Conference Call with Professors John Kwoka and Spencer Weber Waller*, CAP. F. (Sept. 14, 2021), https://thecapitolforum.com/resources/transcript-of-merger-remedies-conference-call-with-professors-john-kwoka-and-spencer-weber-waller [https://perma.cc/NGF5-B86Y] ("The merging parties have an incentive for the divestiture not to restore competition.").

For example, take the fix rejected in *Sysco*.[59] Sysco proposed a merger of two "broadline foodservice distributors" who "deliver[] a 'broad' array of food and related products to just about anywhere food is consumed outside the home."[60] In a bid to close the deal, the transacting firms offered a fix to divest 11 distribution centers and over 4400 personnel to its market competitor, PFG.[61] Despite PFG's internal documents advising it needed a "bare minimum" of 13 distribution centers to "compete effectively for national business";[62] Sysco made the strategic choice that "it 'would rather litigate w[ith] the FTC than sell more than 11.'"[63]

Sysco's failure to include two additional distribution centers despite indications being the two more were minimally necessary demonstrates the dueling incentive for the firm in a structural fix. Instead of playing the fix safely, Sysco rolled the dice hoping its proposed—but ultimately anticompetitive—fix would pass judicial scrutiny. Sysco's gamble failed, but other proposed fixes may eek by and put the firms in a position to abuse their market power.[64]

Similarly, a conduct remedy incentivizes a weak fix. The firm will be agreeing to regulate its post-consummation conduct and hinder its ability to take full advantage of future market conditions.[65] Like a structural fix, a conduct fix incentivizes a firm to propose a weak fix,[66] or refuse to adhere to the fix's terms.[67]

The foreclosure of future opportunities incentivizes the firm to fashion a fix that outwardly appears to ameliorate the anticompetitive potential of the transaction—thus passing judicial scrutiny—but that would be ineffective at preserving competitive vigor. This "faux fix" is ideal for firms, and the firm is in a position to fashion one. The firms are

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59. FTC v. Sysco Corp., 113 F. Supp. 3d 1, 73 (D.D.C. 2015).

60. *Id.* at 15.

61. *Id.* at 73, 76.

62. *Id.* at 75.

63. *Id.* (alteration in original).

64. In the FTC's most recent study on the success of divestitures in consent decrees show almost 20% of accepted divestitures fail to maintain competitive intensity. FED. TRADE COMM'N, THE FTC'S MERGER REMEDIES 2006–2012: A REPORT OF THE BUREAUS OF COMPETITION AND ECONOMICS 18 (2017); *see also* Pretrial Brief of Plaintiff United States of America at 1 & n.1, United States v. ASSA ABLOY AB, No. 22-cv-02791 (D.D.C. Jan. 13, 2023) (arguing that fixes often fail to restore competition and citing two anecdotal instances when a divestiture failed); Danielle Kaye, *Kroger-Albertsons Competition Fix Rejected by Skeptical FTC*, BLOOMBERG L. (Feb. 27, 2024), https://news.bloomberglaw.com/antitrust/kroger-albertsons-competition-fix-rejected-by-skeptical-ftc (on file with the *Journal of Corporation Law*) (discussing the "flawed track record" of the agencies approving anticompetitive divestiture settlements). If consent decrees have staff approval, and still almost 20% fail, then a fix lacking the same agency approval presumably is less likely to maintain competition.

65. An example would be a firm committing to work with its competitors. Normally, a firm has no duty to deal with or help a competitor. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 600 (1985). However, a conduct fix may create that duty.

66. *See* FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26, 57, 59 (rejecting a fix that the transacting parties "rel[ied] heavily on" which would "remove virtually all of the restrictions on [its competitors] rights" to utilize a license because the competitor "cannot be considered a truly independent actor").

67. *See* Motion to Modify Final Judgment and Enter Amended Final Judgment at 6, United States v. Ticketmaster Ent., Inc., No. 10-cv-00139 (D.D.C. Jan. 8, 2020) (investigating failed consent decree); Complaint at 48, United States v. Live Nation Ent., Inc., No. 24-cv-003973 (S.D.N.Y. May 23, 2024) (noting an example of how Live Nation sidestepped the terms of the consent decree). While the Ticketmaster Entertainment/Live Nation Entertainment merger did not include the parties litigating the fix, a similar incentive structure is present when parties negotiate the consent decree and serves as an example of what a failed conduct fix may look like.

at an "informational []advantage with respect to the technology, operations, marketing, and financial aspects of the businesses."[68] Conversely, as some commentors note, the FTC and DOJ are not experienced in negotiating a fix with the parties.[69] The firm has the superior information, not to mention an incentive, to fashion a faux fix.

#### 2. *The Agency Bears the Burden*

Some courts see the fix as being incorporated into the HSR filings pre-trial. This can be framed as either the merging firms proposing a new merger in lieu of the HSR transaction,[70] or a simple revision to the original terms.[71] Either scenario will cause the court to treat the fix as if it were the HSR transaction proposed in the firm's initial filings.

Naturally, treating the fix as if it were always in the terms of the agreement will see the court follow the burden-shifting framework without any deviation. Therefore, the agency will bear the burden as it typically would when litigating a section 7 case.

And of the dueling incentives of the firm to propose a fix? The court will see the fix as a good-faith effort by the firm to satisfy the agency's anticompetitive concerns. While a firm will ultimately prefer a weak fix if it passes scrutiny, a firm may not want to take the chance. Instead of risking trying to slip an anticompetitive fix by a court, risk-sensitive firms will see the fix as a chance to ensure its resources spent negotiating for the merger are not wasted. The fix decreases the chance of a court enjoining the merger and it will save the firm time and money by not requiring the firm to pull its original merger and refile to incorporate the fix. Especially if a drop-dead date is approaching, the saved time may be essential.

#### 3. *The Firm Bears the Burden*

Other courts see the HSR transaction and fix as separate proposals more akin to a defense rather than the fix replacing the originally proposed merger. When the fix is analyzed as a defense, the court must determine whether the firm has sufficiently proven that the fix has redressed the agency's anticompetitive concerns.[72] In this regard, the fix is no different from any other defense utilized by the firm to rebut the government's prima facie case.[73]

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68. John Kwoka & Spencer Weber Waller, *Fix It or Forget It: A "No-Remedies" Policy for Merger Enforcement*, CPI ANTITRUST CHRON., Aug. 2021, at 1, 4.

69. *See Transcript of Merger Remedies Call*, *supra* note 58 ("[D]ivestiture remedies are not necessarily easy to get right. . . . So the agencies . . . spend a lot of time negotiating with the parties. . . . That's not part of the agency's expertise.").

70. *E.g.*, FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 46 (D.D.C. 2002) ("[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.").

71. *E.g.*, FTC v. Arch Coal, Inc., No. 04-0534, 2004 WL 7389952, at *3 (D.D.C. July 7, 2004) (stating that a court must "review the entire transaction in question"; both the HSR transaction and its fix).

72. FTC v. Sysco Corp., 113 F. Supp. 3d 1, 71–78 (D.D.C. 2015).

73. *See, e.g.*, Chi. Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410, 427–30 (5th Cir. 2008) (considering potential entry as a defense during rebuttal); FTC v. H.J. Heinz Co., 246 F.3d 708, 720–22 (D.C. Cir. 2001) (considering post-merger efficiencies as a defense during rebuttal); Citizen Publ'g Co. v. United States, 394 U.S. 131, 138–39 (1969) (considering whether the failing firm defense justified the merger during rebuttal).

Courts that place the burden on the firm require that the firm justify its fix. Since the firm has the informational advantage on the market and are masters of the merger (and fix), the court is intuitively using the firm's superior position to justify how the fix will maintain competitive vigor in the market. Consequently, a court that places the burden on the firm may temper the firm's incentive for crafting a faux fix because it will ultimately be the party justifying the fix.

### *B. When Will a Court Consider the Fix in the Burden-Shifting Framework?*

The question of when the fix will be considered suffers from the same issues as the critiques of the *Baker Hughes* framework itself. As some courts have recognized, evidence is often considered all at once and the burdens are often analyzed together.[74] Despite being divorced from practice, how the court answers the question consequently determines whether market statistics from the originally proposed HSR transaction may be included at trial. Courts have three options for when they consider the fix: (1) at the outset of the case,[75] (2) after the agency has already proven its prima facie case,[76] or (3) in a remedy hearing after the court has already adjudicated a section 7 violation.[77]

#### *1. Consideration at the Outset*

If the fix is considered at the outset of the case, the agency must prove its prima facie case against post-fix market statistics. As discussed in Part III.A.2., when an agency argues against the fix in its prima facie case, the court has effectively replaced the originally proposed merger with the terms of the fix and carried on the analysis as usual. There is judicial efficiency in doing so, a proposed fix is only permitted by the court after it has determined the fix is sufficiently likely to occur if the merger is allowed to consummate.[78] Therefore, the court has already decided that the originally proposed merger will not be effectuated, and the agency's HSR transaction market statistics will be irrelevant to the post-fix market realities.[79] But if the agency is permitted to use its HSR market statistics to establish its prima facie case, it likely will mix HSR transaction market statistics with post-fix market statistics.[80]

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74. Chi. Bridge & Iron Co. v. FTC, 534 F.3d 410, 424–25 (5th Cir. 2008); United States v. AT&T, 310 F. Supp. 3d 161, 191 n.17 (D.D.C. 2018), *aff'd* 916 F.3d 1029 (D.C. Cir. 2019).

75. *E.g.*, FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 125 (D.D.C. 2004) (evaluating post-fix market statistics at the start of the court's analysis).

76. *E.g.*, *Sysco*, 113 F. Supp. 3d at 58–59, 58 n.27 (utilizing "pre-divestiture share calculations" as part of the prima facie case).

77. *E.g.*, Pretrial Brief of Plaintiff United States of America, *supra* note 64, at 9–10.

78. United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017) ("[T]he divestiture need not be iron clad for a court to consider it. Rather, once 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.").

79. *See* United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 134 n.5 (D.D.C. 2022) ("[T]reating the acquisition and the divestiture as separate transactions that must be analyzed in separate steps allows the government to meet its *prima facie* burden based on a fictional transaction and fictional market shares.").

80. *Sysco*, 113 F. Supp. 3d at 55–58, 58 n.27 (noting how the FTC's expert witness testified to both pre-fix and post-fix market statistics).

If the fix does happen, then the HSR transaction statistics will have minimal predictive value of the anticompetitive effects. Introducing those statistics then would be a waste of time, if not irrelevant. By eliminating HSR transaction statistics from trial, the court would save some time and may prevent a court from accidentally conflating the market statistics of the HSR transaction and post-fix introduced in the agency's case-in-chief.[81] Particularly in a close case, the HSR transaction market statistics may subconsciously prejudice the court against the merger. Considering only the post-fix statistics at the start would save some time and avoid any risk of a court confusing statistics or prejudicing the firm.

### 2. *Consideration at the Firm's Rebuttal*

Alternatively, courts have allowed the agency to establish its prima facie case using HSR transaction statistics before incorporating the fix into the firm's rebuttal. Considering the fix at the firm's rebuttal treats the fix as if it were any other typical defense.[82] Satisfying the agency's prima facie burden with HSR transaction market statistics offers the court context as to why the agency was concerned about the merger at the outset of the HSR filings and a backdrop to whether the fix has addressed those concerns. And possibly importantly, considering the fix at rebuttal allows the agency to introduce the HSR transaction market statistics it spent its initial investigation compiling.

Contextualizing the fix as to how it alters the HSR transaction could provide valuable insight for the court into whether the agency's most significant concerns in the HSR filing process were met by the fix. It would allow the court to take a piecemeal approach to assessing the anticompetitive concerns of the merger by first observing the HSR transaction's anticompetitive potential before questioning whether the fix engaged with those concerns.[83] Further, as the agencies have recently argued, considering the HSR transaction market statistics will give the court insight into the consequences on the market if the fix fails to maintain competitive vigor.[84] The HSR transaction market statistics may give the court the context it needs to breakdown a complex economic issue into its component parts, making the fix better understood when the court analyzes the firm's rebuttal.

Finally, while the HSR transaction market statistics will have minimal predictive value if the fix does occur, its introduction affords a small safety net to the court in the case

81. It is unlikely that Judge Mehta confused statistics or unduly prejudiced the defendant's fix with pre-fix statistics that were introduced at trial. In fact, specifying which statistics were being used at what time likely reduced the possibility of confusion or unconscious bias. However, the case provides an example of how pre-fix and post-fix market statistics may become interwoven into an opinion where both market statistics are presented at trial.

82. *See* cases cited *supra* note 73.

83. *See* Complaint at 4, United States v. Halliburton Co., No. 16-cv-00233 (D. Del. dismissed May 5, 2016) (describing Halliburton's proposed divestment package as "among the most complex and riskiest remedies ever contemplated in an antitrust case"); *accord* Gelfand & Brannon, *supra* note 12, at 12 (describing the proposed divestment package in *Halliburton*, as a "hodgepodge of assets that lacked key elements and would not allow a buyer to compete effectively in the relevant business").

84. Pretrial Brief of Plaintiff United States of America, *supra* note 64, at 1; Supplemental Pretrial Brief of Plaintiff United States of America at 14–15, United States v. ASSA ABLOY AB, No. 22-cv-02791 (D.D.C. Mar. 27, 2023) (arguing the HSR transaction statistics are necessary because "there is always risk that the unremedied world will 'come to be'").

it erroneously admits the fix.[85] An example is seen in *Libbey* after the court admitted the fix without giving the FTC sufficient time to recalculate its market statistics.[86] The court's opinion noted that the FTC had failed to present post-fix market statistics;[87] yet the issue did not prove fatal to the agency. Despite the court permitting the firm to "abandon [the HSR transaction] and propose a new [transaction],"[88] it still relied on the HSR transaction market statistics to enjoin the merger.[89] Had the court limited the trial to solely post-fix market statistics, the agency's failure to include post-fix market statistics would have meant the agency would have failed to meet its prima facie burden. Thus, an otherwise illegal merger would have been consummated. However, because the trial included the HSR transaction statistics, the court could fall back on pre-fix market statistics to infer the post-fix effects on the market.[90] Ultimately, the decision to include the HSR transaction statistics at trial allowed the court to analyze the HSR transaction as if the fix had never been admitted.

### 3. *Consideration at a Remedy Hearing*

While the Author has not found any cases that have considered the fix only at a remedy hearing, the DOJ has argued that courts should begin considering the fix much later than it traditionally has.[91] If considered at a remedy hearing, then the parties will have litigated against the HSR transaction to a verdict for the agency. At that time, after the court has already adjudged a section 7 violation, the firm will be permitted to introduce the fix and argue how it has remedied the merger's significantly anticompetitive potential.

Considering the fix at a subsequent hearing post-trial gives the agency the entirety of its time afforded by the HSR wait periods to investigate the original transaction, an equitable consideration in line with congressional intent when passing the HSR Act. Similar to considering the fix at the outset, focusing the trial on a single set of market statistics will prevent the intermixing of separate market statistics possible when considering the fix at the firm's rebuttal. But unlike the judicial efficiency promoted from considering the fix at the outset, considering the fix at a remedy hearing will practically require two trials. First, the parties will litigate whether the HSR transaction may be to substantially lessen competition. Second, if the agency triumphs, the parties will again have to argue whether a fix will obviate the anticompetitive concerns.

85. The term "erroneously admits the fix" refers to the court admitting a fix when one of the factors (i.e., good-faith, likelihood, or timeliness) had not been sufficiently established. *See* Part II.C. For example, if the court miscalculated the time needed for the agency to reinvestigate the transaction and admits the fix without giving the agency that time, it will have erroneously admitted the fix.

86. FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 47 (D.D.C. 2002).

87. *Id.* at 50 ("Although no statistics were presented regarding what effect the amended agreement might have on the market . . . .").

88. *Id.* at 46.

89. *Id.* at 50 ("[T]he best evidence of [the post-fix transaction's] potential effect is the impact of the original agreement because the post-merger landscape could quite possibly be similar to the terrain that would have been created if Libbey had acquired all of Anchor's business . . . .").

90. *Id.*

91. Pretrial Brief of Plaintiff United States of America, *supra* note 64, at 9 ("Accordingly, courts should assess the sufficiency of a divestiture remedy only after concluding that the challenged acquisition is illegal.").

### *C. What Standard Must the Party with the Burden Prove?*

Finally comes the question of what standard should the party with the burden be held to when engaging with a fix. Some courts have required a fix to ensure the merger as a whole does not violate section 7 by having the potential to substantially lessen competition (section 7 standard).[92] Other courts have required that a fix completely restore the market from any anticompetitive consequences resulting from the merger (restoration standard).[93]

#### *1. Section 7 Standard*

A court that adopts the section 7 standard intuitively relies on the language of section 7.[94] The rationale is straightforward: section 7 is the basis for the action, so the merits of the case must be based on its language. Holding otherwise "cannot be squared with the text of section 7."[95] A court adopting the section 7 standard could have previously placed the burden on either party. If the court assigned the burden to the agency at the outset of trial, then the agency must show the post-fix transaction may substantially lessen competition. If the court assigned the burden to the firm, then the agency must prove post-rebuttal that the post-fix statistics may be to substantially lessen competition.

#### *2. Restoration Standard*

Conversely, courts adopting the restoration standard adopt a standard universal to remedies. Predicated on the assumptions that the HSR transaction was illegal and that its proposal caused an injury, then the fundamental purpose of an injunction is to maintain or restore a plaintiff to their rightful position.[96] In the section 7 litigation context, if the HSR transaction violated section 7—causing an injury to the market—then it is the province of the court to restore the market to its prior competitive vigor pre-proposed transaction.[97]

The restoration standard operates under two assumptions. First, the HSR transaction is the foundation for the court's analysis. Second, the agency can prove the transaction

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92. *See, e.g.*, *Libbey*, 211 F. Supp. 2d at 51 ("[T]he Court concludes that the FTC has established a prima facie case that the amended agreement may substantially lessen competition . . . .").

93. United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017) (stating that the fix must "'restore [the] competition lost' by the merger counteracting the anticompetitive effects of the merger" (alteration in original)); FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 304 (D.D.C. 2020) ("Defendants have the burden to show that a proposed divestiture will replace the merging firm's competitive intensity.").

94. *See, e.g.*, United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 133 (D.D.C. 2022) ("The Government's proposed standard [that the fix must replace the competitive intensity lost by the merger] . . . contradicts the text of Section 7 and the *Baker Hughes* framework. As the Government would have it, UHG must prove that the divestiture will maintain the *same* level of competition that existed in the pre-merger market. But the text of Section 7 is concerned only with the mergers that '*substantially* . . . lessen competition.'").

95. *Id.*

96. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 209, 231 (Concise 4th ed. 2012).

97. *See* United States v. Crescent Amusement Co., 323 U.S. 173, 186 (1944) (determining that the proposed remedy "does not restore the competition which has been eliminated"); United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 326–27 (1961) (holding that antitrust remedies such as divestitures must "effective[ly] restore competition"); Ford Motor Co. v. United States, 405 U.S. 562, 573 (1971) (quoting *du Pont* that antitrust relief must restore competition); FTC v. Sysco Corp., 113 F. Supp. 3d 1, 72 (D.D.C. 2015); *Aetna*, 240 F. Supp. 3d at 60 (quoting *Sysco*); *RAG-Stiftung*, 436 F. Supp. 3d at 304 (fix must "replace the merging firm's competitive intensity"); *see also* 2020 MERGER REMEDIES MANUAL, *supra* note 6, at 17–19.

violated section 7 based on its prima facie case. The need to restore the market's competitive vigor first requires a violation if the fix is being considered for whether it rectifies the initial violation. Therefore, naturally, the anticompetitive consequences must have been found before the fix could be considered. Consequently, the court must perceive the fix as a defense to the agency's prima facie showing (which is how the anticompetitive consequences are found) and consider the fix at rebuttal. Finding that the post-fix transaction violated section 7 would otherwise be adjudging the merits of the case on the section 7 standard.

The restoration standard is not satisfied if a fix sufficiently ameliorates enough competitive concerns that the transaction will not *substantially* lessen competition. The proposed (anticompetitive) merger is an injury in itself; the fix must restore the market to its pre-merger competitive vitality, or the plaintiff would not be made whole. However, despite its apparent inflexibility, some courts adopting the model have indicated that there is some flexibility to the harms.[98]

## IV. RECOMMENDATION

Injunctions granted in section 7 relief are predicated on equitable considerations. While equitable remedies are flexible, "relying on the chancellor's conscious as a measure of justice is like relying on the chancellor's foot as a measure of length."[99] Equitable discretion still requires "the principled application of standards consistent with those purposes and not 'equity [which] varies like the Chancellor's foot.'"[100] Courts should adopt a "principled application of standards" for applying burdens to the parties when a fix is being litigated.[101] Otherwise, different results may arise in cases that cannot be differentiated in policy.[102]

98. Judge Mehta's opinion in *Sysco* used rhetoric consistent with the restoration standard. *E.g.*, *Sysco*, 113 F. Supp. 3d at 72 (quoting *Ford Motor Co.* and *du Pont*, saying "relief . . . must be 'effective to redress the violations' and 'to restore competition'"). Subsequent cases have pointed to that language to indicate that *Sysco* follows the restoration standard. *See Aetna*, 240 F. Supp. 3d at 60 (focusing on the "restore" and "replac[e]" language in *Sysco*); *RAG-Stiftung*, 436 F. Supp. 3d at 306 (citing Sysco to discuss whether the fix will "'replace the competitive intensity lost'"); *UnitedHealth*, 630 F. Supp. 3d at 132 (describing *Sysco* as standing for the principle that the fix must restore the prior level of competition). However, other language in *Sysco* shows some flexibility in Judge Mehta's opinion. *Sysco*, 113 F. Supp. 3d at 73–74 ("[T]he divestiture does not have to replicate pre-merger HHI levels."); *see also* Lisa C. Wood, *Views from the Bench on Merger Issues*, ANTITRUST, Fall 2016, at 59, 63 (quoting Judge Mehta: "[u]ltimately, what I looked at is whether the divestiture would in fact have restored the competition, perhaps not precisely, but certainly in a way that would have satisfied me that the market would have remained competitive and vigorous and within a reasonable amount of time").

99. *See* LAYCOCK, *supra* note 96, at 243 (synthesizing the English jurist, John Selden's, quip). The quip goes: "[e]quity is a roguish thing . . . equity is according to the conscience of him that is Chancellor—and, as that is larger or narrower, so is equity. 'Tis all one, as if they should make his foot the standard for the measure we call a foot a Chancellor's foot—what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot: 'tis the same thing in the Chancellor's conscience." John Selden, *Equity*, *in* THE TABLE-TALK OF JOHN SELDEN 125, 125 (W.S.W. Anson ed., rev. ed. 1900).

100. Albemarle Paper Co. v. Moody, 422 U.S. 405, 416–17 (1975); *see also* LAYCOCK, *supra* note 96, at 243 ("[E]quitable discretion is discretion to consider all the relevant facts, not discretion for the [court] to do whatever he wants.").

101. *Albemarle Paper Co.*, 422 U.S. at 416–17.

102. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 405 (1970).

District courts have answered the threshold questions differently by invoking any number of policy rationales to justify any course of action. This Note weighs the policy rationales related to who, when, and what standard a fix should be incorporated before arguing how a court should answer the threshold questions. Considering the equities, along with the purpose of the Clayton and HSR Act and the essence of the fix, the proper allocation of evidentiary burdens should be: (1) the merging firm should be called upon to defend its proposed fix; (2) the fix should be considered at rebuttal; and (3) the fix must conform to the section 7 standard.

The merging firm should be the party burdened with defending its proposed fix. The burden merely requires the firm to prove, by the preponderance of the evidence, that the fix—or more accurately, the merger including the fix—will not violate the text of section 7. Placing the burden on the firm to justify its fix properly utilizes the firm's informational advantage and further could have the prophylactic effect of disincentivizing a firm from proposing weak fixes. If the firm cannot convince the court that its fix will not substantially lessen competition post-consummation, then the tie goes to the agency.[103]

Consequently, the fix should be regarded as a defense to the HSR transaction rather than an outgrowth of the HSR transaction. The HSR Act imposes a duty on the transacting firm to notify both agencies with information regarding its proposed transaction. The information provided during that initial notification is what the agency bases its initial investigation on; the equities should permit the agency to establish its prima facie case against the HSR transaction before the firm brings the fix in as a defense.

While some courts have correctly noted that the HSR transaction market statistics have little predictive value in assessing the anticompetitive consequences of a post-fix transaction, the argument contravenes the intent of the HSR Act to give the agency the necessary time to review the economic implications of a merger. Precisely because pre- and post-fix market statistics have little bearing on one another, a court cannot claim the agency has been given the time allotted by the HSR Act to review a merger while simultaneously admitting the original HSR filing hardly bears on the proposed fixed transaction. It would be a strange fiction to believe that the agency had the necessary time to review the transaction after the merging party unilaterally changed its terms.

Further, while treating the post-fix transaction as a new transaction may promote some judicial efficiency by removing HSR transaction statistics from trial, the benefits would be nominal, and the costs could be substantial. Pre-fix market statistics may not be valuable predictors of post-fix market statistics, but the statistics are not worthless. The HSR transaction statistics are what a court must resort to should the fix fail to close,[104] or if the fix has been erroneously admitted.[105] Perceiving the fix as a defense permits the court to

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103. *Cf.* Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 2024 (2018) (noting structural presumptions are "strongly supported by economic theory and evidence, as well as the experience gained in merger enforcement over the past fifty years").

104. A fix "need not be iron clad for a court to consider it. Rather, once [the fix] is sufficiently non-speculative" it may be admitted to trial. United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017). If the wording is to be given effect, it is possible that a fix that is likely enough to be admitted to trial ultimately fails to close, requiring the litigants to fall back to the HSR transaction.

105. *E.g.*, FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 50 (D.D.C. 2002).

incorporate the HSR transaction when necessary or provide context to the post-fix market statistics when helpful.[106]

Finally, the firm should be expected to prove its fix based on the section 7 standard rather than the restoration standard. The restoration standard is based on the concept that, when the plaintiff has been harmed, the court is meant to put the plaintiff in the position it would be but for the harm. Where the harm is incipient and the injunction is prophylactic rather than reparative, the restoration concept is misplaced.[107] The restoration standard's faults further crack after recognizing that the agency's prima facie case is only *presumptive* of anticompetitive consequences and not proof in itself.[108] Applying the restoration standard would render the agency's prima facie case as standalone proof of harm when that conclusion is divorced from precedent. Requiring that the fix put the post-fix transaction within the permissible limits of section 7 is intuitive and grounded in logic.

In the hypothetical scenario where the firm proposed a fix with sufficient time for the agency to review the fix and where the agency would find it preferable to focus all of its efforts on the new transaction, there could be some mechanism to permit the parties to stipulate to limit the scope of the trial to the post-fix transaction. However, doing so would not change the allocated burdens as they are proposed; rather, it would function as a shortcut that presumes the agency had met its prima facie case. Because the burden-shifting framework largely fails to follow the process of trial and instead sees the agency present all its evidence to the court and preemptively attack the firm's defenses before the firm presents, stipulating to the agency's prima facie case would not significantly change the course of trial. However, it could promote a more efficient apportionment of resources for the parties while simultaneously promoting judicial efficiency by cutting some of the fat of trial. But the decision must be stipulated rather than decided by the court. Otherwise, the benefits of including the HSR transaction market statistics would be lost.

## V. CONCLUSION

As the FTC and DOJ begin to litigate more and settle less, antitrust cases are primed for more opportunities to litigate the fix. Currently, the sole consistency in considering the fix is that courts and jurisdictions have been reliably inconsistent in applying such burdens. Courts have the opportunity, and the incentive, to adopt a consistent method of allocating evidentiary burdens for when a fix is introduced. Doing so will build both parties' confidence in how the fix will be considered and permit them to apportion their time and resources to other issues in the case. Further, it would ensure that courts do not burden parties with inconsistent standards where there is no policy justification for doing so. Balancing the equities of the issue, the threshold answers should be: (1) the merging firm

106. Attempts to expedite judicial review by simplifying the merger to solely consider the fix may ultimately undermine the strength of the ultimate opinion. *See* Sean P. Sullivan, *Against Efforts to Simplify Antitrust*, 49 J. CORP. L. 419, 430 (2024) (discussing various ways that simplifications can undermine antitrust law).

107. There are instances when an agency brings an action post-consummation. *E.g.*, United States v. Dairy Farmers of Am., Inc., 426 F.3d 850, 855 (6th Cir. 2005). In such instances when a fix is introduced post-consummation, the standard would plausibly be different as there would be a traditional injury that would make the remedy reparative rather than prophylactic.

108. *See supra* note 47 and accompanying text.

bears the burden of defending the fix, (2) the fix will be considered at the firm's rebuttal, and (3) the fix must pass the section 7 standard.