Litigating the Facts

David Gelfand, Leah Brannon, and Gabriel Lazarus

When two of us first wrote about "litigating the fix" in 2016,[1] there had been relatively few merger trials in which the merging parties unilaterally took actions to mitigate potential competitive harm. And, when the government did litigate against parties offering unilateral commitments, the government usually won. Much has changed in eight years.

Since 2016, there have been at least eleven trials in which the defendants litigated mergers involving unilateral divestitures or other types of commitments ("Commitments") by the parties.[2] Of those, the government lost seven cases, accepted a settlement in one, and won three.[3] These recent cases have significantly advanced the law. We therefore thought this would be a good time to provide an update to our 2016 article, revisit the basic legal framework, and provide updated guidance for practitioners.

One lesson from recent cases is that litigated Commitments are not properly viewed as "remedies." Assuming the defendants are bound to particular Commitments—such as when they have contracted to divest assets—the Commitments are simply facts of the post-merger world. Thus, a court should consider those facts when deciding whether a merger is likely to substantially lessen competition compared to the but-for world without the merger. And, in fact, courts are considering the effects of Commitments rather than assessing the impacts of mergers without them.

The enforcement agencies have repeatedly tried to persuade courts to take a different approach. The agencies have argued that Commitments should be treated in ways that would ignore real-world evidence and make it easier for the government to prevail at trial. For example, the agencies have argued that Commitments should be disregarded completely, that Commitments must preserve *exactly* the level of competition that exists before the merger, and that Commitments

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[1] David Gelfand & Leah Brannon, *A Primer on Litigating the Fix*, Antitrust Fall 2016, at 10.

[2] Although we focus on U.S. agencies and cases here, similar issues come up in other jurisdictions as well. For instance, in December 2022, the Canadian Competition Tribunal permitted the acquisition of Shaw Communications by Rogers Communications, in part based on a determination that, given the parties' divestiture of Freedom Mobile (a Shaw subsidiary) to Videotron, the merger was not likely to materially reduce competition for wireless telecommunications services. *Canada (Commissioner of Competition) v. Rogers Communications Inc and Shaw Communications Inc*, 2023 Comp. Trib. 1.

[3] The defendants won in *United States v. AT&T Inc.*, 310 F. Supp. 3d 161 (D.D.C. 2018), *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179 (S.D.N.Y. 2020), *United States v. Sabre Corp.*, 452 F. Supp. 3d 97 (D. Del. 2020), *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278 (D.D.C. 2020), *In the Matter of Illumina, Inc.*, FTC Dkt. No. 9401 (Sept. 9, 2022), *vacated and remanded by Illumina, Inc. v. FTC*, 88 F.4th 1036 (5th Cir. 2023), *United States v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118 (D.D.C. 2022), and *FTC v. Microsoft Corp.*, 2023 WL 4443412 (N.D. Cal. July 10, 2023). The DOJ settled its concerns about the merger of ASSA ABLOY and Spectrum Brands during trial. (The FTC also settled after filing a complaint but before trial in the ICE/Black Knight, and Amgen/Horizon mergers.) The government won in *United States v. Aetna Inc.*, 240 F. Supp. 3d 1 (D.D.C. 2017), *United States v. Bartelsmann SE & Co.*, 1:21-cv-02886-FYP (D.D.C. 2022), and *United States v. JetBlue Airways*, 2024 WL 162876 (D. Mass. Jan 16, 2024). The authors represented defendants in the T-Mobile/Sprint, UnitedHealth Group/Change Healthcare, ASSA ABLOY/Spectrum Brands, and JetBlue/Spirit litigations, and a third party in the Microsoft/Activision litigation.

should be considered only in a separate remedy stage of the case. None of these arguments has succeeded.

The recent horizontal merger guidelines do not acknowledge this. Instead, ignoring every court decision that has addressed how unilateral Commitments by merging parties should be analyzed, the new guidelines simply say in passing that Commitments will be considered under the "applicable law regarding remedies."[4] This is unfortunate because Commitments are an increasingly common feature of U.S. merger litigation, especially under the current administration's no-settlement policy that has caused more merger litigation involving unilateral Commitments.[5]

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Our prior article described this type of litigation as "litigating the fix" but we think a more appropriate phrase to describe this category of cases is "litigating the facts." That more aptly describes what happens in these cases and how the courts have consistently analyzed these issues.

The Legal Framework for Litigating the Facts

Courts considering merger challenges typically use a burden-shifting framework like the one set out in the D.C. Circuit's seminal decision in *Baker Hughes*.[6] There, a panel that included two future Supreme Court Justices articulated a three-step process for analyzing merger challenges: First, the plaintiff must establish a prima facie case that the challenged transaction violates the antitrust laws.[7] Second, the defendants may rebut the prima facie case by putting forward evidence that the plaintiff's case does not accurately reflect post-merger market conditions.[8] Third, if the defendants successfully rebut the prima facie case, the evidentiary burden shifts back to the plaintiff and merges with the ultimate burden of persuasion to demonstrate that the merger is likely to substantially lessen competition.[9]

Courts evaluating merger challenges under this framework are generally willing to consider Commitments made by the parties either before or during the litigation. In practice, however, the sooner a Commitment is made, the more likely it is that a court will place weight on it. For example, twenty years ago in *FTC v. Libbey*, the defendants amended their merger agreement after the

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[4] U.S. Dep't of Justice and Federal Trade Comm'n, Merger Guidelines (2023) at 2 n. 8, https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf.

[5] In remarks to the New York State Bar Association Antitrust Section, Assistant Attorney General Jonathan Kanter stated, "in my view, when the division concludes that a merger is likely to lessen competition, in most situations we should seek a simple injunction to block the transaction. It is the surest way to preserve competition." Jonathan Kanter, 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. Similarly, FTC Chair Lina Khan has explained that her approach is to "focus[] our resources on litigation, rather than on settling." Margaret Harding Mcgill, "*FTC's new stance: Litigate, don't negotiate*," Axios (Jun 8, 2022), https://www.axios.com/2022/06/09/ftcs-new-stance-litigate-dont-negotiate-lina-khan.

[6] *United States v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990). This case has been relied upon within the D.C. Circuit and in other circuits. *See, e.g., California v. Sutter Health Sys.*, 130 F. Supp. 2d 1109, 1118 (N.D. Cal. 2001); *Chi. Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008); *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 192-95 (D.D.C. 2018); *FTC v. Sanford Health*, 926 F.3d 959 (8th Cir. 2019); *United States v. United Sugar Corp.*, 73 F4th 197, 203 (3d Cir. 2023); *Illumina v. FTC*, 88 F.4th 1036, 1058 (5th Cir 2023).

[7] *Baker Hughes*, 908 F.2d at 983. In almost all horizontal cases, the government attempts to establish a prima facie case by showing horizontal concentration high enough to create a presumption of harm from the merger. In vertical merger challenges, no such presumption is available and the government must make a full fact-based showing of likely harm at the first step. *UnitedHealth*, 630 F. Supp. 3d at 130 ("[T]he government meets its prima facie burden in vertical merger cases by making a fact-specific showing that the proposed merger is likely to be anticompetitive.") (cleaned up).

[8] *Baker Hughes*, 908 F.2d at 982-83.

[9] *Id.* This burden shifting is consistent with Fed. R. Evid. 301, which explains that "the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption," but that "the burden of persuasion[…] remains on the party who had it originally."

lawsuit was filed to exclude one of the target's businesses from the acquisition. The FTC argued that this amendment was a "sham," but the court rejected that argument and took the revision into account.[10] In contrast, in the FTC's 2013 challenge to Ardagh's acquisition of a competing glass manufacturing division of Saint-Gobain, the parties waited until after discovery closed to propose a divestiture and, even then, many aspects of the divestiture remained unclear.[11] The court in that case declined to consider the divestiture.[12] In recent cases, merging parties have generally been sure to offer any Commitments earlier in the process, and typically included the timeframe for identifying a divestiture buyer or other Commitment in the pretrial order to ensure that the government can take appropriate pretrial discovery.

Courts have therefore accepted Commitments that prevent a substantial lessening of competition even if the Commitments do not preserve the exact same degree of competition that existed before the merger.

The next issue is where a Commitment fits into the *Baker Hughes* three-step analysis. Defendants have generally argued that a Commitment should be viewed as part of the transaction itself, and therefore considered at the first step. Under this approach, the government must make its prima facie case accounting for the Commitment.[13] In contrast, the agencies have argued that a Commitment should be considered at the earliest in step two,[14] or even later than that, such as at a distinct remedy phase after the court has applied the *Baker Hughes* framework without regard to a Commitment.[15]

Finally, there is the question of what a Commitment must achieve for the merger to proceed. Courts have rejected government arguments that a Commitment must preserve the exact level of competition that existed pre-merger. That standard would be at odds with Section 7 of the Clayton Act, which prohibits only transactions that "substantially" lessen competition.[16] Courts have therefore accepted Commitments that prevent a substantial lessening of competition even if the Commitments do not preserve the exact same degree of competition that existed before the merger.[17]

Update on Recent Litigation

2017

In ***United States v. Aetna Inc.***, the merging healthcare providers Aetna and Humana agreed to divest a portion of their Medicare Advantage business to Molina. The court found that the government's prima facie case presented "overwhelming" evidence of harm.[18] The court analyzed the divestiture as part of the defendants' rebuttal case—not as part of a separate remedy phase—and found that the divestiture would not eliminate the likelihood of substantial harm to competition. It

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[10] *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34 (D.D.C. 2002). The court ultimately enjoined the transaction.

[11] *FTC v. Ardagh*, No. 13-1021 (D.D.C. 2013), Transcript of Pre-Hearing Conference at 24-25 (Sep. 24, 2013).

[12] *Id.* at 29.

[13] *See, e.g., FTC v. Arch Coal*, 329 F. Supp. 2d 109, 125 (D.D.C. 2004) (analyzing post-merger market shares reflecting proposed divestiture).

[14] *See, e.g.*, *UnitedHealth Grp.*, 630 F. Supp. 3d. at 133.

[15] One recent article argued that: (1) if a Commitment is proposed during litigation the court should order a procedure similar to a second request, with mandatory time for additional government review, rather than simply using the normal discovery process; and (2) the Commitment should only be considered during the defendants' rebuttal. Steven C. Salop & Jennifer E. Sturiale, *Fixing "Litigating the Fix"*, 85 Antitrust L.J. 619 (2024).

[16] *See, e.g.*, *UnitedHealth Grp.*, 630 F. Supp. 3d. at 133; *Illumina*, 88 F.4th at 1058.

[17] *See, e.g., UnitedHealth Grp.*, 630 F. Supp. 3d at 133 ("By requiring that UHG prove that the divestiture would preserve exactly the same level of competition that existed before the merger, the Government's proposed standard would effectively erase the word 'substantially' from Section 7."); *Illumina*, 88 F.4th at 1058-59 (5th Cir 2023) (finding that it was legal error for the Commission to require that the defendants' proposed commitment maintain pre-merger levels of competition).

[18] *Aetna*, 240 F. Supp. 3d at 47 (D.D.C. 2017).

based this determination on (1) the fact that Molina had previously tried and failed to enter the Medicare Advantage market and (2) internal documents about the divestiture showing that Molina's board and senior executives doubted that they would be successful in entering the market this time even with the divestiture assets.[19]

[T]he D.C. Circuit agreed that the arbitration commitments would be effective and faulted the government for failing to account for those commitments.

2018

In ***United States v. AT&T***, the DOJ alleged that the merged entity would harm competition by threatening to withhold essential content from rival networks. The court rejected this theory at the first stage of the *Baker Hughes* framework, finding that the government failed to make out a prima facie case.[20] This holding was in part based on the defendants' commitment to use baseball-style arbitration to resolve disputes over terms, and not to withhold any content during the pendency of that arbitration.[21] The court also noted that the parties' arbitration commitment was substantially similar to commitments made by Comcast and NBC in a prior merger, which the DOJ had previously accepted as sufficient to resolve competition concerns in a Tunney Act proceeding before the same judge.[22] The court rejected the argument that AT&T could walk away from its commitments, noting that the "reputational costs of doing so . . . would imperil future negotiations in a marketplace with repeat players."[23] In affirming the decision, the D.C. Circuit agreed that the arbitration commitments would be effective and faulted the government for failing to account for those commitments.[24]

2020

In ***United States v. Sabre Corp.***, the parties offered a commitment to address the DOJ's concern that, post-merger, Sabre would shut down the target's booking product.[25] Specifically, Sabre's CEO made public commitments to maintain the product at issue. Although the court's ruling did not turn on the commitments, it found that in light of Sabre's public statements, the DOJ would have failed to make a prima facie case that the merger would harm competition by eliminating the target's booking product, thereby addressing the Commitment at the first step of the *Baker Hughes* framework.[26]

In ***FTC v. RAG-Stiftung***, after the FTC filed suit the parties agreed to divest one of their hydrogen peroxide plants, which was a standalone business, to United Initiators GMBH.[27] As in *Sabre* and *AT&T*, the court analyzed the divestiture at the first step of the *Baker Hughes* framework, finding that the Commitment would resolve competitive concerns and noting that the plant would come with "personnel, customer lists, information systems, [and] intangible assets."[28]

State of New York v. Deutsche Telekom AG, concerning the merger of T-Mobile and Sprint, involved a settlement built on an asset divestiture to DISH, which the merging parties and the DOJ

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[19] *Id.* at 74. *Aetna* was decided by Judge Bates, who also presided over *Arch Coal*, 329 F. Supp. 2d 109.

[20] *AT&T*, 310 F. Supp. 3d at 198.

[21] *Id.* at 217.

[22] *Id.*

[23] *Id.* at 241 n. 51.

[24] *United States v. AT&T, Inc.*, 916 F.3d 1029, 1041 (D.C. Cir. 2019).

[25] *Sabre*, 452 F. Supp. 3d at 131-32, 146, *vacated on other grounds* 2020 U.S. App. LEXIS 26973 (3d Cir. 2020).

[26] Much of the court's opinion was presented in the alternative, as it found that *Ohio v. American Express*, 138 S. Ct. 2274 (2018) precluded the DOJ's theory of harm as a matter of law given that Sabre was a two-sided platform while Farelogix was not.

[27] *RAG-Stiftung*, 436 F. Supp. 3d at 305.

[28] *Id.* at 306.

negotiated and agreed upon.[29] The merging parties then wound up defending the merger in a lawsuit brought by various state attorneys general who claimed that the merger violated Section 7 notwithstanding the divestiture. In analyzing the DISH divestiture, the court applied the standard for assessing entry and found that the divestiture would be sufficient, likely, and timely.[30] But the court did not rely only on the divestiture in denying the plaintiff states' request for an injunction. It analyzed the divestiture as part of the defendants' rebuttal case, which also included evidence that the merger would have substantial efficiencies (including more than doubling network capacity and creating tens of billions of dollars in savings), and that Sprint's financial and technological difficulties would diminish its competitiveness going forward.[31]

2022

In ***Illumina***, the FTC alleged that Illumina would harm competition by denying critical supplies to the target's potential competitors. To address this, Illumina made an open offer to continue providing third parties with its genetic testing supplies. The FTC's own Administrative Law Judge found that the FTC staff had failed to prove harm to competition in light of this open offer.[32] The Commission later reversed that decision,[33] and the parties appealed.[34] The Fifth circuit rejected the FTC's position that the open offer needed to preserve the same level of competition, vacated the Commission's order on those grounds, and remanded for further proceedings.[35] Illumina subsequently announced that it would divest Grail following two years of opposition from U.S. and European antitrust authorities and an activist investor.

In ***United States v. Bertelsmann SE & Co.***, the DOJ challenged Penguin Random House's proposed acquisition of Simon & Schuster as likely to substantially lessen horizontal competition for books commanding advances of $250,000 or more. To address this horizontal concern, the parties made a commitment that Penguin would maintain internal competition for bidding on book deals.[36] The court analyzed this proposal as rebuttal evidence under the *Baker Hughes* framework. Looking at the parties' incentives to adhere to this commitment, the court found that "it is not in a publisher's economic interest to allow its own imprints to drive up the price of an acquisition" and that the policy was therefore "unreliable evidence of future conduct."[37] The court enjoined the merger.[38]

In ***United States v. UnitedHealth Group***, the DOJ brought both horizontal and vertical challenges to the acquisition of Change Healthcare by UnitedHealth Group. The parties agreed to divest the horizontal overlap business (Change's first-pass claims editing business) to TPG, a private equity firm. Although the court agreed with the defendants that the divestiture should be analyzed as part of the government's prima facie case, it nonetheless gave the government the benefit

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[29] This detailed settlement, including assets and buildout deadlines, reflected not only commitments hammered out with the DOJ but also input from the Federal Communications Commission. *Deutsche Telekom*, 439 F. Supp. 3d at 224-25.

[30] *Id.* at 189, 224 *et seq.*

[31] *Id.* at 206 *et. seq.*

[32] Initial Decision, In the Matter of Illumina, Inc., FTC Dkt. No. 9401 (Sept. 9, 2022).

[33] Opinion of the Commission, In the Matter of Illumina, Inc., FTC Dkt. No. 9401 (Sept. 9, 2022).

[34] *Illumina v. FTC*, 5th Cir., No. 23-60167.

[35] *Illumina*, 88 F.4th at 1059 (5th Cir. 2023) ("Illumina was only required to show that the Open Offer sufficiently *mitigated* the merger's effect such that it was no longer likely to *substantially* lessen competition.").

[36] *Bertelsmann*, 1:21-cv-02886-FYP at 67-69.

[37] *Id.* at 14, 68.

[38] *Id.* at 60.

of the doubt and treated the divestiture as rebuttal evidence.[39] The DOJ argued that the buyer was inexperienced but the court rejected this argument, finding that the buyer had appropriate experience with carveout transactions and also had a strong incentive to make the business succeed.[40] As for the DOJ's vertical theory that the combined company's access to rival insurers' data would reduce innovation and harm competitors, the court rejected this theory for various reasons. Among other things, the court found that the merged firm's firewalls and contractual promises (including commitments made to customers in the leadup to trial) would prevent it from misusing rivals' data in the first place.[41] The court also held that the government's vertical theories were inconsistent with UnitedHealth's business model of selling technologies market-wide.[42]

2023

United States v. ASSA ABLOY AB marked the first merger settlement with the DOJ under its current leadership. There, after divestiture negotiations ended in the summer of 2022 without an agreement, the defendants moved forward with a divestiture package in the overlap "premium mechanical" and "smart lock" product areas. Two weeks into the trial, before the DOJ had rested its case in chief and following feedback from the judge, the parties agreed to a settlement based on the existing divestiture agreement and several modifications to address issues raised by the DOJ.[43]

In ***FTC v. Microsoft Corp.***, the court declined to enjoin Microsoft's acquisition of game developer Activision, based in part on the fact that Microsoft had already entered into agreements with five cloud gaming providers—some of which did not have Activision content at the time—to provide Activision content to their platforms after the merger.[44] The court addressed these Commitments at step one of the *Baker Hughes* framework, rejecting the government's contention that the Commitments should instead be assessed in a subsequent "remedy phase."[45] The FTC has appealed the ruling to the Ninth Circuit and continued an internal administrative proceeding to block the deal permanently, depending on the outcome of the Ninth Circuit decision.[46]

2024

In ***United States v. JetBlue Airways Corp.***, the defendants agreed to divest gates, slots and related ground assets at four airports to low-cost competitors Frontier and Allegiant, though this was not the central focus of the trial.[47] In its 2024 ruling, the court enjoined the merger.[48] Analyzing the divestitures at step two of the *Baker Hughes* framework, the court found that evidence of entry, assisted by the divested assets, and the benefits from the merger rebutted the presumption established at step one.[49] The court nonetheless concluded at step three that this same evidence "fail[ed] to establish that the proposed merger would not substantially lessen competition in at

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[39] *UnitedHealth Grp.*, 630 F. Supp. 3d at 134.

[40] *Id.* at 135-40.

[41] *Id.* at 145-50.

[42] *Id.* at 150-51.

[43] *United States v. ASSA ABLOY AB*, No. 1:22-cv-02791-ACR (Sept. 13, 2023).

[44] *Microsoft*, 2023 WL 4443412 at *20-21 (N.D. Cal. July 10, 2023).

[45] *Id.* at *15, *21.

[46] *FTC v. Microsoft Corp.*, No. 23-15992 (9th Cir.).

[47] *JetBlue,* 2024 WL 162876 at *13 (D. Mass. Jan 16, 2024).

[48] *Id.* at *37.

[49] *Id.* at *32, 36 ("The proposed divestitures would particularly assist in this entry.").

least some of the relevant markets."[50] The parties initially appealed that decision, but subsequently abandoned the transaction and dismissed the appeal.

Guidance for Merger Parties

The guidance in our 2016 article still generally applies. To summarize and update that advice, we make the following recommendations, though every case is fact-specific and must be carefully analyzed by experienced antitrust counsel:

First, thoroughly assess antitrust risk at the outset of any transaction to understand what if any Commitments may be advisable. Ideally, planning begins even before the transaction is signed and dovetails with negotiating the agreement, including regulatory risk allocation. Consider the need to build guardrails into the transaction, such as a maximum value of divested assets or cost of other Commitments.

Second, carefully plan your timeline, particularly the outside date. If you want to leave open the possibility of litigating Commitments, you need to allow time to both identify the steps you will take and to conduct the litigation if needed. Tasks such as finding a divestiture buyer or entering into contracts to address vertical concerns take time. A divestiture can have its own regulatory requirements, including notifications and waiting periods. A court may decline to rush to trial and a ruling just to meet the parties' business deadlines, but may be more accommodating if the shortened timeline is due to the government's dilatory tactics in bringing the challenge. At the same time, the agencies understand that delay can cause deals to fall apart and may try to use that to their advantage in an adversarial situation.

Third, you should approach your litigation plan for the Commitments as seriously and thoroughly as you approach every other aspect of the case. As soon as you know that the parties may choose to litigate Commitments, evaluate how that plan impacts potential testimony and evidence for trial. Map out how to identify and fill the requirements for a winning record early on during agency review so that you are prepared to litigate the Commitments if needed.

Fourth, recognize that not every potential antitrust concern requires that the parties offer a Commitment. You might conclude that the government has a weak case in certain respects (*e.g.*, particular product or geographic markets) and decide to litigate those without proposing any Commitment.

Fifth, if the agency is willing to engage, work with it in good faith. As in any civil litigation, courts expect the parties to have attempted to resolve issues on their own. Maintain a comprehensive record of agency interaction and, if the agency is unwilling to engage further, be ready to finish designing Commitments without its input so that you can present the Commitments in court.

Sixth, if you are agreeing to a divestiture, include as much of the overlap business as needed to prevent a substantial lessening of competition. This often includes the individuals who are closest to the divested business and who will be critical to its success. These key employees should be under the tent as soon as possible so that they are accurately informed. Incorporating their feedback on the scope of the divestiture will also help ensure that they are confident that the businesses or assets being spun off include what they need to compete successfully post-merger.

Seventh, when divesting assets, choose a buyer that plans to compete using the assets and can be shown to be capable of doing so, recognizing that a divestiture business often includes an experienced management team as noted above. Do not assume that the highest bidder is always

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[50] *Id.* at *36-37.

the most qualified from a competitive standpoint. The buyer itself will be a key participant in litigation. It must be satisfied with the assets and have a plan and resources to compete effectively. And the buyer should have as few ongoing entanglements with the merged firm as possible, though courts recognize that transition service agreements, supply agreements, and the like are often appropriate.

Eighth, lock down the terms of your Commitments as early as possible. Courts may be sympathetic to an agency's argument that it should not have to litigate against a moving target. Terms of a Commitment announced either before or soon after a complaint is filed are more likely to be considered than those announced at the eleventh hour as in *Ardagh*. In multijurisdictional transactions, promptly determining the parameters of Commitments also lessens the chance that they will throw a wrench into review and clearance by foreign agencies. If some terms are variable—such as how long a buyer will rely on a supply agreement—make it clear that the flexibility creates helpful optionality, not uncertainty.

Ninth, just because you begin litigating, you should not rule out the possibility of settling the case. For example, despite previously rejecting proffered settlements, the DOJ ultimately settled its concerns with the ASSA ABLOY/Spectrum Brands merger during trial.

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Identifying when Commitments are needed to address competitive concerns and determining how to design and defend them remain essential skills for helping clients get the deal done. This is especially true today as the agencies have become reluctant to settle and instead choose to litigate mergers. For instance, one case to watch is the challenge to the Kroger/Albertsons merger by the FTC and various state attorneys general, where the defendants have agreed to divest hundreds of supermarkets in overlap areas.[51] Structuring and, if needed, litigating these sorts of Commitments will continue to be crucial tools to advocate for merger parties. ●

[51] Compl., *Washington v. The Kroger Co.*, No. 24-2-00977-9 SEA (Wash. King Cnty. Super. Ct. filed Jan. 15, 2024); Compl., *Colorado v. The Kroger Co.*, No. 2024CV30459 (Colo. 2d Jud. Dist. filed Feb. 14, 2024); Compl., *FTC v. The Kroger Co.*, No. 3:24-cv-00347 (D. Or. filed Feb. 26, 2024).