FIXING THE FIX: UPDATING POLICY ON MERGER REMEDIES

BY DIANA L. MOSS[1]

1 Diana Moss is Vice President and Director of Competition Policy at the Progressive Policy Institute. My thanks to Mathew Simkovits for his research support prior to joining the State of California.

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Remedies are a critical part of merger enforcement and policy. Despite this, current policy on merger remedies lacks coherence and certain features work against the broader goal of vigorous merger enforcement that promotes competition and protects consumers. This article explains why merger remedies, especially divestitures, are in disarray. This is supported by growing evidence of failed divestitures; the unintended consequences of "litigating the fix;" a track record of experienced buyers; and new concerns around private equity buyers and buyers with past records of antitrust violations. The article closes with a number of recommendations on updating and strengthening remedies policy.

I. MERGER REMEDIES IN DISARRAY

Remedies are a critical part of merger enforcement and policy. Effective remedies fully restore competition lost by an anticompetitive merger that would otherwise be illegal. Ineffective remedies do the opposite, saddling consumers with higher prices, and less choice, quality, and innovation. Despite being a critical prong of merger enforcement, and the lasting effect of remedies on competition and markets, current policy on merger remedies lacks coherence. Moreover, troubling features of remedies policy work against the broader goal of vigorous merger enforcement that promotes competition and protects consumers.

For example, there is growing evidence that too many merger remedies fail to fully restore competition eliminated by a merger. The failure of large-scale divestitures in mergers such as Safeway-Albertsons, Hertz-Dollar Thrifty, and Sprint-T-Mobile demonstrate that consumers bear the burden of lost competition. Many of these failures can be traced directly to evidence that the buyer of divested assets could not, or would not, compete effectively.

Another uncomfortable truth about merger remedies is that the U.S. antitrust agencies have long pursued industry-specific remedy policies. In pharmaceutical markets, for example, the Federal Trade Commission (FTC) approves virtually all mergers subject to divestitures.[2] A high failure rate for those divestitures, especially for generic drugs, has accelerated market concentration and strengthened incentives to exercise market power. Yet another wrinkle in current remedies policy is the almost universal application of conduct remedies to vertical mergers. The dominant firms created through many such mergers, including Live Nation-Ticketmaster, have little incentive to abide by them and circumvent the restrictions, to the detriment of competition and consumers.[3]

Despite these problems, any reforms or updates to remedies policy appear to be on hold. There has been little effort by the agencies to reopen past merger settlements to revisit failed remedies. Existing guidance on remedies has also been withdrawn, without replacing or updating it. Currently, the DOJ has no guidance on remedies in effect, while the FTC's policy statement was issued over a decade ago. Moreover, the U.S. Department of Justice (DOJ) is pursuing a policy of declining to negotiate settlements with merging parties. While this policy is entirely consistent with bringing a swift end to harmful merger proposals, it has also incited deep-pocketed companies to push back and litigate their proposed remedies in preliminary injunction proceedings in court. "Litigating the fix," however, is likely to result in less effective remedies.[4]

This article highlights concerns resulting from a remedies policy that is increasingly disorganized, with a focus on divestiture¾the prototypical and preferred structural remedy. The article argues that remedies policy should be considered a major prong of merger enforcement. It goes on to explain why the current approach to divestitures is inadequate and offers basic principles for updating remedies policy.

II. GROWING EVIDENCE ON FAILED DIVESTITURE

The DOJ's guidance on merger remedies resides in the Remedies Manual.[5] The manual was first issued in 2004 and has been revised three times, most recently in 2020, under the Trump administration. This version was withdrawn in 2022 by the Biden administration. The FTC's guidance is contained in the Bureau of Competition's 2012 statement on Negotiating Merger Remedies.[6] While there is no unified agency guidance, individual guidelines are consistent in identifying the goal of an "effective," "acceptable," or "viable" remedy as "maintaining," "preserving," or "restoring" competition in the relevant markets affected by a merger, or "effectively redressing" competitive harm and facilitating "effective competition" post-merger.[7]

The FTC and DOJ consider structural and behavioral remedies in settling challenged mergers. Behavioral remedies prescribe or proscribe certain conduct by the merged firm. Concerns about their effectiveness are well known.[8] On the other hand, structural remedies reduce or eliminate a firm's enhanced incentive to exercise market power post-merger. The prototypical and preferred structural remedy is the divestiture

2 Diana L. Moss, *From Competition to Conspiracy: Assessing the FTC's Merger Policy in the Pharmaceutical Sector* 9 (Am. Antitrust Inst., Sept. 3, 2020).

3 Diana Moss, *The Case For Why the Department of Justice Should Break Up Live Nation-Ticketmaster*, ProMarket (Apr. 25, 2024).

4 Diana L. Moss, *Taking Stock of Merger Enforcement Under the Biden Administration* 6, 11 (Progressive Pol'y Inst., Mar. 14, 2024).

5 U.S. Dept. of Justice, Antitrust Division Policy Guide to Merger Remedies (Oct. 2004) ["2004 Remedies Manual"].

6 Fed. Trade Comm'n, Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies (Jan. 2012) ["2012 Statement"].

7 See generally, 2004 Remedies Manual; 2012 Statement.

8 See John Kwoka & Diana Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, 57(4) Antitrust Bull. 979 (2012).

of assets or entire lines of business to a buyer. The buyer's ability "compete effectively," however, is essential for an effective divestiture.[9] For example, buyers must demonstrate the ability to function independently without the help of the merging parties, to successfully maintain the assets, and to quickly re-inject the competition lost by the merger. Moreover, the agencies emphasize that competition must be maintained over the long run, backed by the buyer's proven financial capability and pro-competitive incentives.[10]

Despite the agencies' rigorous approach to merger remedies, retrospective analysis reveals a poor record of success. For example, one study found that mergers subject to divestitures resulted in price increases similar to those for mergers that were cleared without remedies.[11] The FTC's 1999 and 2017 studies of divestitures also highlight failures.[12] In its 1999 study, the FTC noted that (1) merging parties regularly selected weak buyers in the hope of maintaining market dominance post-divestiture and (2) behaved strategically "to make the divested assets less competitive."[13] In one-third of failed divestitures, "the continuing relationship was so detrimental that it prevented the buyer from operating competitively in the market."[14]

In the wake of its 1999 study, the FTC revisited its policies for assessing buyers of divested assets. The Commission gave priority to mergers where divestiture buyers were proposed up front, preferring buyers that "were familiar with the market, dealt with many of the same customers and suppliers, had developed thoughtful business plans with realistic financial expectations and sufficient backing."[15] The FTC's 2017 study on divestiture declared these policy changes a success.[16] For example, the Commission noted that about 66% of cases involving divestitures addressing horizontal overlaps to be a "full" success, 15% of cases to be a "qualified" success, but in about 18% of cases, the divested assets left the market entirely.[17]

The 2017 FTC study thus concluded that about 80% of the Commission's orders maintained or restored competition.[18]

Despite this up-beat conclusion, concerns remain. The 1999 study adopted a low bar for success, namely whether divested assets "remained in the industry in the post-merger, post-remedy period," regardless of whether competition returned to pre-merger levels.[19] The bar was even lower for the 2017 study, labelling a divestiture of pharmaceutical assets successful if assets were merely transferred.[20] And neither study considered harm to consumers while competition was gearing up post-merger. The FTC's own studies thus show that a relatively large number of divestitures fail, even under a low bar for success. These conclusions are compounded by the high-profile, failed divestitures that illustrate how highly concentrated markets and the size and complexity of "too big to fix" deals doomed them from the start.[21]

III. UNINTENDED CONSEQUENCES OF PUTTING REMEDIES POLICY ON THE BACK BURNER

There has been no official response to the increasingly disorganized state of merger remedies policy. If anything, developments have only sown more confusion. For example, the antitrust agencies introduced a new Merger Remedies Manual in 2020¾the last year of the Trump

9 2004 Remedies Manual at 9; 2012 Statement at 9.

10 2004 Remedies Manual at 9-11.

11 John E. Kwoka, Jr., *Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice* 47 (Am. Antitrust Inst., Oct. 9, 2018), https://ssrn.com/abstract=3332641.

12 See Fed. Trade Comm'n, A Study of the Commission's Divestiture Process (1999) ["1999 Study"]; Fed. Trade Comm'n, FTC's Merger Remedies 2006-2012: A Report of Competition and Economics (Jan. 2017) ["2017 Study].

13 1999 Study at 15.

14 *Id.*, at 12.

15 2017 Study at 3 and 24.

16 *Id.* at 2.

17 *Id.* at 18 Table 3.

18 *Id.* at 2.

19 *See* 1999 Study at 9-10.

20 2017 Study at 29-31.

21 See, e.g., Press Release, PPI Statement on the FTC's Lawsuit to Block Kroger-Albertsons Merger, Progressive Pol'y Inst. (Feb. 27, 2024), https://www.progressivepolicy.org/pressrelease/ppi-statement-on-the-ftcs-lawsuit-to-block-kroger-albertsons-merger/.

Administration.[22] While Biden enforcers withdrew that guidance in 2022, there has been no move to issue new guidance or any indication of when updated guidance might be forthcoming. This leaves the business community, competition and consumer advocates, and policymakers and lawmakers in a state of uncertainty.

Moreover, the Biden antitrust agencies' policy of settling fewer deals with remedies, while intended to strengthen enforcement, has had the unintended consequence of muddying remedies policy. As a result, merging parties have taken their proposed fixes¾which in many cases were rejected earlier by the agencies¾to court to be litigated before generalist judges. These "litigating the fix" episodes have grabbed antitrust headlines in numerous cases, including *Illumina-Grail, Assa-Abloy, and UnitedHealth Group-Change Health*.[23]

Transferring deliberations on remedies from the agencies to the courts has major downsides. First, the agencies, not the courts, have deeper experience with merger remedies. Indeed, some courts have relied on persuasive, but ill-conceived testimony from C-Suite executives as to their company's suitability as divestiture purchaser.[24] Second, litigating the fix shifts the burden of proof to the government by requiring that it prove its *prima facie* case against the merger, but as modified by the proposed remedy. The violates the established standard under *Baker Hughes*, which has for decades put the burden on the merging parties at the rebuttal stage to offer evidence as to why a remedy reduces the merger firm's post-merger anticompetitive incentives.[25]

Finally, litigating the fix means that merging parties have more incentive to refrain from proposing effective remedies in their original Hart Scott Rodino filings and to reject proposed consent decrees in favor of a weaker, ineffective remedy, to be litigated later.[26] Case law emerging from litigating the fix cases could further incentivize merging parties along these lines, knowing that the burden of disproving their adequacy in court will fall on the government, not on them. These unintended consequences set back the goal of strengthening remedies policy, and thus merger enforcement more generally.

IV. GROWING EVIDENCE ON INEXPERIENCED BUYERS AND STRATEGIC BEHAVIOR

Agency guidance stresses that a proposed buyer have sufficient experience and ability to compete in the market where a merger is likely to substantially lessen competition. But the more concentrated a market, the more difficult it is to find a buyer, increasing the probability that the agencies will have to look *outside* the market. In concentrated markets, potential buyers are more susceptible to the risk that the merged firm will, instead of acting in good faith, engage in strategic conduct that interferes with the buyer's ability to compete. The susceptibility of inexperienced buyers to strategic meddling is enhanced by a buyer's lack of knowledge and bargaining power, as well as insufficient infrastructure to ensure independence from the merged firm.

Recently, the FTC has settled for buyers with little to no experience operating the assets they purchased. It has also approved buyers who were not familiar with relevant markets and with business plans that relied on merging firms to succeed. The resulting failures highlight the information asymmetry between the agency and merging parties, which extends to "the technology, operations, marketing, and financial aspects of [merging firms'] businesses."[27]

In 2012, for example, rental car giant Hertz sought to acquire rival Dollar Thrifty, combining the second and fourth largest domestic car rental companies in a national market controlled by four players.[28] The FTC ordered the divestiture of the Advantage Rent a Car business to private equity-owned Franchise Services of North America (FSNA), despite the fact that the company did not operate a traditional airport rental car operation and even after FSNA's CEO, on whose experience preliminary approval had relied, was fired.[29] Less than four months later,

22 U.S. Dept. of Justice, Merger Remedies Manual (Sept. 2020) ["2020 Remedies Manual"].

23 *Illumina, Inc. v. Fed. Trade Comm'n*, 88 F.4th 1036, 1044 (5th Cir. 2023); Complaint, *U.S. v. Assa Abloy AB & Spectrum Brand Holdings Inc.*, AB No. 22-cv-02791-ACR (Nov. 3, 2022); *U.S. v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118 (D.D.C. 2022).

24 *UnitedHealth*, 630 F. Supp. 3d at 135 (relying on TPG's co-managing partner to conclude TPG had "the experience necessary to compete effectively in the claims-editing market.").

25 *United States v. Baker Hughes Inc.*, 908 F.2d 981, 991 (D.C. Cir. 1990); *see also United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 60 (D.D.C. 2017).

26 Steven C. Salop & Jennifer Sturiale, *Fixing "Litigating the Fix,"* 85 Antitrust L. J. 619, 638-39 (2024).

27 John E. Kwoka & Spencer Waller, *Fix it or Forget It: A "No-Remedies" Policy for Merger Enforcement,* 2(1) Competition Pol'y Int'l Antitrust Chron. 31, 33 (Aug. 2021).

28 Press Release, Fed. Trade Comm'n, FTC Requires Divestitures for Hertz's Proposed $2.3 Billion Acquisition of Dollar Thrifty to Preserve Competition in Airport Car Rental Markets (Nov. 15, 2012), https://www.ftc.gov/news-events/news/press-releases/2012/11/ftc-requires-divestitures-hertzs-proposed-23-billion-acquisition-dollar-thrifty-preserve-competition.

29 John Kell, *FTC Approves Hertz's Takeover of Dollar Thrifty*, Wall St. J. (Nov. 15, 2012).

Advantage filed for bankruptcy and Hertz repurchased divested assets from FSNA.[30] FSNA's inexperience meant that Advantage was not prepared to compete, and was left heavily reliant on Hertz. The FTC approved a repurchase of divested assets in 2014.[31]

Similarly, critics have attributed the failed divestitures in the 2015 merger of retail grocers, Safeway and private equity-owned Albertsons, to the purchaser's inexperience in larger geographic markets.[32] The national retail grocery chains were the second and fourth largest U.S. market players.[33] The FTC approved Haggen, a small regional grocer, as the buyer of 146 stores nationwide.[34] The divestiture left Haggen entangled with the merged parties and susceptible to alleged sabotage that undermined store conversion.[35] Within nine months, Haggen had not only divested itself of the Albertsons stores, 33 of which were repurchased, but also filed for bankruptcy.[36]

A final example is the 2016 merger of Sprint and T-Mobile. The deal combined two of the four national, facilities-based wireless carriers in the U.S. The DOJ approved the merger, subject to a divestiture to Dish TV, which had no experience in wireless telecommunications and was reliant on infrastructure operated by T-Mobile. Two years later, Dish announced that it was unable to obtain financing to purchase 800 MHz spectrum from T-Mobile, the centerpiece on which the DOJ's remedy relied.[37] Despite these leading examples of failed divestitures, remedies policy remains in limbo.

V. NEW CONCERNS AROUND PRIVATE EQUITY BUYERS AND PAST ANTITRUST VIOLATORS

Agency guidance on structural remedies requires that buyers of divestiture assets be long-term competitors. Without a long-term commitment to the market, a divestiture asset is likely to change hands again quickly, disrupting its operation and competitiveness. The DOJ's defunct 2020 Merger Remedies Manual outlines criteria for evaluating the "fitness" of a proposed purchaser, including whether the buyer has the "…sufficient acumen, experience, and financial capability to compete effectively in the market over the long term."[38] The FTC's guidance highlights the same theme, stating that the business plans of a potential buyer "should be thorough enough to persuade the staff…that it is committed to the market."[39]

Two major developments raise additional concerns about the fitness of a divestiture buyer. One is the rise of private equity buyers. The other is a record of antitrust violations by potential buyers. The 2020 Remedies Manual put in a plug for private equity buyers of divestiture assets, noting that "in some cases a private equity purchaser may be preferred."[40] However, the private equity business model appears increasingly misaligned with agency guidance on remedies. Private equity firms utilize partnerships or consortia to buy and manage companies, often through "roll-up" schemes, or a series of smaller acquisitions, before selling them at a profit. The antitrust agencies have appropriately begun to scrutinize such conduct.[41] Once in the market, managers of private equity-owned or backed firms focus on stripping out cost from the acquired firm to deliver profits quickly to shareholders, often exiting the market within five to seven years.[42]

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30 Press Release, Fed. Trade Comm'n, FTC Approves Franchise Services of North America's Application to Sell Certain Advantage Rent A Car Locations to Hertz and Avis Budget Group (May 30, 2014), https://www.ftc.gov/news-events/news/press-releases/2014/05/ftc-approves-franchise-services-north-americas-application-sell-certain-advantage-rent-car-locations.

31 David McLaughlin, *Hertz Set to Buy Advantage Locations*, Undercutting FTC, Wall St. J. (Apr. 17, 2014).

32 Hannah Madans & Nancy Luna, *Haggen Bankruptcy: Failure is the 'Fastest' in Modern Grocery History*, Orange County Reg. (Sept. 10, 2015).

33 Christopher A. Wetzel, *Stricter Scrutiny: The Impact of Failed Divestitures on U.S. Merger Remedies*, 64(3) Antitrust Bull. 295, 346 (2019).

34 Press Release, Fed. Trade Comm'n, FTC Requires Albertsons and Safeway to Sell 168 Stores as a Condition of Merger (Jan. 27, 2015), https://www.ftc.gov/news-events/news/press-releases/2015/01/ftc-requires-albertsons-safeway-sell-168-stores-condition-merger.

35 Complaint, *Haggen Holdings, LLC v. Albertson's LLC & Albertson's Holdings LLC*, No. 1:99-mc-09999, 2015 WL 5138125 (D. Del. 9 October 2015); Brent Kendall, *Haggen Struggles After Trying to Digest Albertsons Stores*, Wall St. J.

36 Brent Kendall, Albertsons to Buy Back 33 Stores It Sold as Part of Merger with Safeway, Wall St. J (Nov. 24, 2015).

37 Dan Meyer, *Dish Network Backs Out of T-Mobile Spectrum Buy, Financial Woes Continue*, SDxCentral (Mar. 4, 2024).

38 2020 Remedies Manual at 24.

39 2012 Statement at 11.

40 2020 Remedies Manual at 24.

41 See e.g. *FTC v. United States Anesthesia Partners, Inc.et al.*, 4:23-CV-03560, 2024 WL 2137649 (5th Cir. 2024).

42 Comments of Eleven Attorneys General in Response to the Feb. 29, 2024 Request for Information on Consolidation in Healthcare Markets, at 6-7 (June 5, 2024), https://oag.ca.gov/system/files/attachments/press-docs/Comments%20by%2011%20Attorneys%20General%20in%20Response%20to%20Feb.%2029%20RFI%20on%20Consolidation%20in%20Healthcare%20%281%29%5B2%5D.pdf.

Private equity is increasingly surfacing as a buyer of divestiture assets. In the merger of UnitedHealth and Change Health, for example, the court approved a divestiture of the ClaimsXten first-pass claims processing to private equity firm TPG¾a firm with no experience operating a large digital data platform or in healthcare claims.[43] Rapid market exits associated with private equity-backed buyers of divestiture assets are particularly harmful in healthcare markets.[44] Cost cutting comes at the expense of staff training and infection control while unnecessary procedure expose patients to risk. If the agencies place a high priority on buyers that are committed to the market, there should be heightened skepticism of investment models built around generating short-run profits and swift market exits.[45]

A second development that also casts a shadow on the suitability of some potential buyers is a poor track record of fair competition. The antitrust agencies require that buyers of divestiture assets possess the ability and incentive to compete. A buyer with a history of past antitrust violations, corporate culture that promotes anticompetitive practices, and recidivism (or repeat violations) fails this test. The pharmaceutical industry, for instance, features numerous firms found liable for price fixing and pay for delay schemes to keep generics out of the market. One study identifies almost 70 drugmakers as defendants in private, state, and federal antitrust litigations from 1993-2002, a significant proportion of which were purchasers of divestiture assets.[46]

Agricultural biotechnology is another example. The Dow-Dupont and Bayer-Monsanto mergers in the late 2010s were all settled with requirements to divest assets, ranging from R&D pipelines, to seeds, and herbicides. Some divestiture purchasers are past antitrust violators. For example, BASF, which purchased assets from Monsanto, was a defendant in the Vitamins Cartel in 1999.[47] More recently, there have been antitrust suits against Bayer AG, Corteva, BASF, and Syngenta alleging collusion to prevent electronic sales platforms from disrupting their market dominance.[48] In 2024, an FTC suit against Syngenta and Corteva for paying distributors to block competitors from selling cheaper generic pesticides to farmers survived a motion to dismiss.[49]

Some markets are home to a disproportionate number of antitrust violators. Data on federal criminal antitrust indictments and settlements in private antitrust class actions between 2013-2023 show that six sectors account for about 80% of total enforcement activity.[50] Four sectors appear in both groups: automotive manufacturing, electronics manufacturing, financial services, and pharmaceuticals. The construction and logistics and freight sectors featured in the top 80% of criminal incitements and chemical manufacturing and healthcare featured in the top 80% of private settlements. The past conduct of potential buyers of divesture assets in these sectors should be carefully scrutinized.

VI. POLICY RECOMMENDATIONS

The analysis above sketches out a picture of merger remedies policy in disarray. Despite growing evidence of the divestiture failures and ongoing problems caused by litigating the fix, no new guidance is on the horizon. These developments work against the goal of stronger merger enforcement. A number of policy recommendations flow from the analysis in this article:

- **DOJ and FTC should initiate a notice of inquiry to update policy on merger remedies.** The notice would seek public comment on the issues raised in this article to inform agency guidance, including the merits of a joint FTC/DOJ merger remedies policy statement.

- **Expand remedies guidance to include additional requirements for a buyer's "fitness":** Guidance should elaborate that a buyer: (1) with an investment model (e.g., private equity) that revolves around quick market exits, (2) a history of antitrust

43 Heather Landi, *TPG Capital Closes $2.2B Acquisition of Claims-editing Business ClaimsXten*, Fierce Healthcare (Oct. 7, 2022).

44 See Comments of Eleven Attorneys General, *supra* note 45.

45 See e.g. Press Release, Attorney General Bonta and Assembly Speaker pro Tempore Wood Introduce Legislation to Strengthen Review of Private Equity Healthcare Transactions and Abuses (Feb. 20, 2024); Sneha Kannan et al., *Changes in Hospital Adverse Events and Patient Outcomes Associated with Private Equity Acquisitions*, 330 J. Am. Med. Assoc. 2365 (2023).

46 Diana Moss, *From Competition to Conspiracy*, *supra* note 2.

47 Press Release, Dept. of Justice, F. Hoffman-La Roche and BASF Agree to Pay Record Criminal Fines for Participating in International Vitamin Cartel (May 20, 1999).

48 *In re Crop Prot. Prod. Loyalty Program Antitrust Litig.*, 655 F. Supp. 3d 1380, 1382 (J.P.M.L. 2023)

49 *Fed. Trade Comm'n v. Syngenta Crop Prot. AG*, No. 1:22CV828, 2024 WL 149552, at *30 (M.D.N.C. Jan. 12, 2024)

50 Data sourced from Center for Litigation and Courts, UC Law SF and Huntington, 2022 Antitrust Annual Report: Class Actions in Federal Court, Am. Antitrust Inst. (Sept. 2023), and searches on cases and proceedings at usdoj.gov/atr and ftc.gov.

violations; (3) with no track record of experience in a market; or (4) that is reliant on merging parties post-merger, have weaker incentives or less ability to compete post-merger and are disfavored.

- **Develop detailed agency guidance protecting consumers from failed merger remedies.** Guidance should clearly explain that "consumers should not bear the risk of a failed remedy" and elaborate on how the agencies intend to protect consumers from them. This includes, for example, specifying when the agencies will re-open existing consent orders in the wake of a failed remedy and the circumstances under which the agencies will bring new enforcement actions.

- **Act to quickly curb the harmful effects of "litigating the fix."** The agencies should quickly work to contain caselaw emerging from litigating the fix cases that weakens remedies. The agencies should consider adopting a mandatory "remedies" filing and waiting period for the agencies and courts to evaluate fixes during preliminary injunction litigation proceedings and an enhanced public review process under the Tunney Act, as has been suggested by other antitrust experts.[51]

51 See e.g. Salop & Sturiale, *supra* note 25, and Kwoka & Waller, *supra* note 28.