Staff Comments of the United States
Federal Trade Commission and Antitrust Division of the
Department of Justice
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We are pleased to provide comments to the Competition Commission of the United Kingdom ("CC") regarding the consultation document, "Application of Divestiture Remedies in Merger Inquiries: Competition Commission Guidelines" ("Draft Guidelines"). The Federal Trade Commission and the Antitrust Division of the Department of Justice (the "Agencies") have a longstanding interest in the negotiation and implementation of effective remedies to anticompetitive mergers, and we applaud this most recent effort by a sister agency to create a more transparent process. It is in the interest of consumers (on whose behalf the Agencies act), the business community, and counsel to have a clearly articulated framework for analyzing the goals of merger remedies and for applying that analysis to individual cases.

As you may know, both Agencies have sought to increase the public's awareness of the general approaches taken to remedying anticompetitive mergers, using speeches[1] and publications on our web sites as appropriate.[2] The Draft Guidelines comport closely with our

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[1] *See*, for example, Deborah Platt Majoras, FTC Chairman and then Deputy Assistant Attorney General, "Antitrust Remedies in the United States: Adhering to Sound Principles in a Multi-faceted Scheme," available at http://www.usdoj.gov/atr/public/speeches/200354.htm (2002); and "Houston, We Have a Competitive Problem: How Can We Remedy It?", available at http://www.usdoj.gov/atr/public/speeches/11112.htm (2002); Robert Pitofsky, then FTC Chairman, "The Nature and Limits of Restructuring in Merger Review," available at http://www.ftc.gov/speeches/pitofsky/restruct.htm (2000); and Richard G. Parker, then Bureau of Competition Director and David A. Balto, "The Evolving Approach to Merger Remedies," available at http://www.ftc.gov/speeches/other/remedies.htm (2000).

[2] In particular, the FTC's Bureau of Competition has posted a "Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies" ("Merger Settlement Statement") at http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm; and "Frequently Asked Questions About Merger Consent Order Provisions," ("Merger Consent FAQs") at http://www.ftc.gov/bc/mergerfaq.htm. These documents resulted, in part, from a series of workshops that the Bureau of Competition conducted in 2002, available generally at http://www.ftc.gov/bc/bestpractices/index.htm.

In addition, the Agencies have begun making more general use of public statements accompanying enforcement actions, and at times announcing decisions to take no action, in order to increase understanding of merger analysis. *See, e.g.,* "By Unanimous Vote, FTC Closes its Investigation Into Proposed Merger of RJR and Brown & Williamson," and accompanying statements, available at http://www.ftc.gov/opa/2004/06/batrjr.htm, June 22, 2004; "FTC Closes

approaches. As mergers become increasingly international in their scope, convergence in approach to remedies will become more important.

We agree with the CC that it is beneficial to explain the broad contours of any merger remedy analysis. We also agree with the CC's observation that particular facts will always be the fundamental factors in devising an appropriate remedy. Any guidance can only raise the questions – the answers will always depend on the facts. Therefore, we endorse the CC's commitment to apply any remedies guidelines in a flexible manner. In addition, the CC's identified risks, discussed further below, seem particularly well-defined, and should help merging parties understand what they need to do and show when they propose merger settlements.

Certain remedy issues are not always obvious at the beginning of an investigation. For example, the facts needed to determine how broad or narrow a divestiture must be in order to offer effective competition are not usually included in the core facts needed to define a market. Similarly, the pool of potential acceptable buyers for a divestiture is not usually germane to the substantive analysis of the competitive effects of a merger. Because these issues may arise only late in the investigation, full exploration of the critical facts may delay negotiation of an acceptable remedy. It would be beneficial for any guidelines to emphasize the need to consider and begin addressing remedy issues early in an investigation in order to avoid unnecessary delay at the end.

We share the general approach to remedy analysis put forth in the Draft Guidelines. The goal of every merger remedy should be to maintain or restore the competition that would be lost by the merger. This goal should lead to two related outcomes. First, any particular merger remedy should not be the result of rote application of a checklist, however detailed. Rather, the particular facts in every case should inform various decisions, including: the scope of the remedy (*e.g.*, asset package definitions or behavioral relief), whether divestiture to an incumbent would be acceptable, whether the remedy must or can be achieved "up front," and whether any particular additional provisions (*e.g.*, "operating or monitoring trustee") should be included. These decisions are driven by the competitive dynamics within the industry, and by the risks that are raised by various remedial approaches.

Cruise Line Merger Investigations," and accompanying statements, available at http://www.ftc.gov/opa/2002/10/cruiselines.htm; and "FTC Closes Investigation of Joint Venture Between Bertelsmann AG and Sony Corporation of America," and accompanying statements, available at http://www.ftc.gov/opa/2004/07/sonybmg.htm, July 28, 2004. *See also* "Statement by Assistant Attorney General R. Hewitt Pate Regarding the Closing of the Digital Music Investigation," available at http://www.usdoj.gov/atr/public/press_releases/2003/201946.htm; "Department of Justice Antitrust Division Issues Statement on the Closing of its Investigation of Unitedhealth Group's Acquisition of Oxford Health Plans," available at http://www.usdoj.gov/atr/public/press_releases/2004/204674.htm.

Second, just as a competition authority should not seek a remedy unless and until it concludes that a merger would create competitive problems, the authority must remain willing and able to prohibit a merger if it cannot obtain a remedy that adequately addresses the competitive problems and that offers a low risk of failure. In this regard, the Agencies believe the Draft Guidelines propose an excellent approach to assessing the possible risks raised by a proposed remedy.[3]

Before discussing some specific topics in the Draft Guidelines, the Agencies believe it is appropriate to mention the fundamental basis for seeking a structural remedy. Mergers are structural events – the combination of firms removes one from the competitive arena and eliminates its competitive presence in myriad ways. Accordingly, a remedy that goes furthest to maintain or restore that competitive dynamic should be greatly preferred over a remedy that seeks to check the identified ways that competition might be reduced. The preference for divestiture over conduct remedies is not, therefore, based simply on the recognition that it is "cleaner" or likely imposes lower costs on the competition authorities. Rather, divestiture goes furthest in addressing all the various ways, identified and not, that a merger can reduce competition. The Agencies remain willing, as the Draft Guidelines also indicate, to consider conduct-based remedies for unlawful mergers.[4] Nevertheless, such remedies, when offered, may involve a risk that competition will remain diminished after the remedy is imposed, even if we can assume that the remedy will be implemented as negotiated.[5] Moreover, such remedies tend to entangle competition authorities in the market and can impose costs on the government and the public that structural remedies can avoid.

Turning to more specific points made in the Draft Guidelines, the Agencies agree with the overall approach to defining the divestiture "package." The risks identified in item 2.4 of the Draft Guidelines are particularly insightful. They focus analytical attention upon the core issues that are presented in virtually every merger remedy negotiation. As discussed later, these identified risks also can effectively guide the due diligence that competition authorities must undertake when they review any proposed divestiture candidate.

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[3] The Draft Guidelines appropriately recognize that merging parties (albeit in complete good faith) have the economic incentive to create a divestiture and to seek an acquirer that will offer less competition than an alternative might. To that extent, therefore, divestiture agreements cannot be viewed as simply arms-length negotiations. That observation should underlie all merger remedy analysis.

[4] The Agencies may differ from the CC in their assessment of the appropriateness of a conduct remedy if a suitable divestiture buyer cannot be found. The Agencies, in that circumstance, would most likely block the merger entirely.

[5] The FTC staff's views are described in detail in the Merger FAQs and the Merger Settlement Statement.

Identification of the Divestiture Package

The presumptive starting point for defining a divestiture package is the entirety of the business that competes in the defined product and geographic markets, as this best captures the totality of the competitive enterprise.[6] The Agencies' experience, of course, is that settlement negotiations almost always quickly move towards a narrower asset definition, but we place the burden upon the merging parties to demonstrate that a narrower package will maintain or restore the lost competition.[7] Those negotiations should fully explore the various risks that are raised as the divestiture package is narrowed, and the competition authority should not be willing to accept unduly high risks.[8] Conversely, there also may be times when divestiture of more than a competing business entity is needed to maintain or restore competition.

Presumption against "mix and match" divestitures

Certain industries may lend themselves to variation from the assumed starting position. For example, "mix and match" divestitures will usually be disfavored because of the reasons identified in the Draft Guidelines. Nevertheless, in the grocery retailing and trash hauling industries, for example, the Agencies have accepted divestitures where the assets come from one of the parties on a region-by-region basis. That is, the divestiture is not "mix and match" *within* a geographic market, but may seem so when viewed across all markets. It is useful for any guideline to state the general preference, but to acknowledge that the authority will consider the specific facts of a case, and a market, and will be flexible as appropriate on this issue. In all cases, however, the authority must be satisfied that the "mixed" assets will create a viable entity that will maintain or restore competition.

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[6] We agree with the general notion that a divestiture should be no broader than necessary to maintain or restore competition, but the burden should be on the merging parties to demonstrate that something less than the competing business will meet that test.

[7] The Agencies have developed significant experience in certain markets through investigation of numerous mergers, *e.g.*, pharmaceuticals, petroleum refining and marketing, banking, petrochemicals, grocery retailing, defense, trash hauling, and radio broadcasting. In those cases, settlement negotiations may start at a more sophisticated level, and the parties may not need to make a threshold demonstration that something less than an entire *enterprise* needs to be divested.

[8] Item 3.2 states that the CC will generally prohibit the parties from reacquiring any divested assets or from otherwise acquiring control over those assets. As a general matter, the FTC has ceased including such a prohibition in their divestiture orders and relies instead upon the premerger reporting statute. The Department of Justice still enjoins reacquisition of the divested assets.

Crown Jewel Provisions

"Crown jewel" provisions have been used where there is a risk that no buyer will want to buy the narrowly defined asset package. The goal of a crown jewel provision is not to impose additional costs upon the merging parties, but is rather to ensure that in the event the parties find no acceptable buyer for the narrow package, either a broader package that more closely tracks the original competitive *enterprise,* or an alternative package, will be available to be divested, usually by a trustee. The Draft Guidelines note that this remedy will be used when others are not available. In the FTC's experience, identifying the divestiture buyer before settling (the "up-front buyer") generally eliminates the need for a crown jewel provision. As a result, the FTC has required crown jewel provisions in fewer matters than previously and has almost never had to divest a crown jewel asset.[9] The Division disfavors the use of crown jewel provisions because they may indicate less than acceptable relief at the outset, and because they can provide an opportunity for purchaser manipulation. The Division instead emphasizes the quick divestiture of a clearly adequate package of assets at the outset.

Up-Front Buyers and Fix-it-First Remedies

In the Agencies' experience, the use of certain remedial provisions has resulted from a committed effort to avoid accepting divestiture proposals that place too much risk on consumers. Instead, those risks are properly borne by the merging parties. Accordingly, if there are significant risks that a proposed divestiture package will be too small to attract acceptable buyers (or that the assets may quickly dissipate in value), it may be appropriate to require or permit the parties to identify an acceptable buyer before the authority accepts the settlement or allows the merger to go forward. This is the fundamental test that underlies the Agencies' consideration of the need for an up-front buyer or "fix-it-first" remedy in a particular case.

There is likely no magic touchstone for determining when a buyer should be required up front or when a fix-it-first solution is most appropriate, and it is likely that the Draft Guidelines can offer only general guidance.[10] The main test, however, is whether, on the particular facts of

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[9] The Draft Guidelines correctly observe that the crown jewel assets must be attractive because they offer competition in the market at issue, and the authorities should reject a proposed buyer who seems interested in acquiring the crown jewel *only* for the *other* opportunities it offers.

[10] The Agencies also recognize that an up-front buyer or fix-it-first remedy can impose certain risks of its own. The merging parties will likely move very quickly to find a buyer, which in itself is not necessarily troubling, The parties will, however, usually pressure the identified buyer to complete its own due diligence on an expedited basis. The identified buyer may also feel pressed to assert that no additional assets are needed, out of a concern that saying otherwise will turn the merging parties to find another buyer. It is critically important, therefore, for the competition authority to assure itself that the proposed up-front buyer has had an adequate

the merger under review, a proposed remedy can be shown to include all assets that any acceptable buyer will need and will be implemented in a timely and effective manner. As the settlement negotiations move farther away from discussion of divesting an entire enterprise, more questions will be raised about the three risks identified in item 2.4 of the Draft Guidelines: 1) whether the scope of the package will be too small to attract approvable buyers; 2) whether such buyers are readily identifiable and are interested in the package; and 3) whether the assets will deteriorate if a divestiture is not accomplished quickly.[11] The CC may want to use the Draft Guidelines to explain in more detail how its analysis of these risks may lead it to require or accept an up-front buyer or fix-it-first remedy in certain cases.

Effective Divestiture Process

Part 5 of the Draft Guidelines is a concise and thorough identification of the main risks and related remedies that exist in almost every merger remedy. The Agencies note simply that they almost routinely include these provisions in their merger remedies: asset maintenance requirements pending divestiture with management independent of the divesting company; and a divestiture trustee to be selected if the parties fail to accomplish the required divestiture by the deadline.[12] The Agencies may use operating or monitoring trustees if it is clear that certain

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opportunity to conduct, and indeed has conducted, thorough due diligence. Ultimately, the competition authority must give the same internal review to an up-front buyer or fix-it-first remedy as is given to other divestitures to ensure that the proposed relief will preserve or restore competition.

[11] The Agencies generally protect against this third risk with requirements to maintain the competitive viability and operational integrity of the assets during the divestiture period. In certain industries (grocery retailing, for example), however, where asset deterioration seems a more significant risk, the Agencies have required up-front buyers or accepted fix-it-first remedies.

[12] For example, the Agencies' remedial orders allow the Agencies to appoint a divestiture trustee, but they do not require it, and the decision to appoint is not automatic. That is, each Agency retains the authority to determine, case by case, whether to appoint a trustee if the merged firm fails to divest on time. Frequently, the Agency will allow the firm some short additional time, if it appears that a divestiture may be achieved soon. Nevertheless, the rare use of trustees attests to both the success in defining acceptable divestiture packages (and the requirement of up-front buyers, where appropriate) and the strong incentive the parties have to accomplish an acceptable divestiture before losing control over the negotiation process.

The Draft Guidelines note at item 5.5 that the CC may keep confidential the deadline for divestiture. The Agencies understand that the reason for this is a concern that potential buyers, knowing the deadline, will act strategically to extract price or non-price concessions from the

ongoing requirements involve complex engineering or other technical expertise unavailable to the Agencies, accounting procedures must be verified, or there is a real concern that the merging parties are likely to mismanage the divestiture assets and impair their value.[13]

Role of the Competition Authority

The Agencies maintain an active involvement in the entire merger remedy process: negotiating the remedy, monitoring the divestiture process, thoroughly reviewing the divestiture candidate and the agreement, monitoring any hold separate obligations, and consulting frequently with any appointed trustees. The Draft Guidelines provide a useful basis for discussing how the CC similarly will maintain close control. The three risks identified in item 2.4 provide a good starting point. To assess the composition risks, the CC, in close collaboration with any proposed buyer, should review the divestiture package to assure that all needed assets are included. To assess the purchaser risks, the CC should conduct its due diligence *of* the proposed buyer, which should include a thorough review of the buyer's business plan, financial capabilities, and sources of supply and distribution to ensure that the purchaser has both the incentive and ability to compete effectively in the market. The CC must also make sure that the divestiture to the proposed purchaser will not itself be anticompetitive. Finally, to assess asset risks, the CC should examine how assets fare in the particular industry and should be alert to important assets (*e.g.*, brand name identification and other goodwill) that may have fleeting value. In those situations, the CC should be prepared to impose measures that will protect against any loss in value. By spelling out how the CC will conduct its review, the Commission should be able to provide useful information for merging parties and proposed buyers, so they can make the factual demonstrations needed to support their proposals.

We appreciate this opportunity to comment upon the Competition Commission's Draft Guidelines, and we applaud the continuing effort to make more transparent the issues and

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merging parties. It has been the Agencies' uniform experience that potential buyers do not act this way. To the contrary, bidders, knowing the deadline, almost always move quickly to negotiate a divestiture contract, in order to prevent other potential bidders from winning the bid. The Agencies remain interested in the experience of the CC on this aspect of its remedies practice.

[13] The Agencies use operating or monitoring trustees only when necessary. The Agencies are aware that such trustees impose costs on the merging parties, and we accordingly require their use only when the technical obligations of the order support that decision. The Agencies remain committed, however, to implementing adequate controls to assure that merging parties hold and manage assets separately, supply product at a pre-determined price or cost, or fulfill other similar obligations. In those situations, therefore, where the Agencies may not have the technical expertise needed to monitor compliance with these obligations, it is appropriate to require an operating or monitoring trustee.

considerations that will inform the Competition Commission as it develops and implements remedies for anticompetitive mergers and acquisitions. As always, we remain available to consult in general or on any specific matter.