

**Joint Comments of the American Bar Association’s
Section of Antitrust Law and
Section of International Law on the Competition Bureau (Canada)
Draft Information Bulletin on Merger Remedies in Canada**

The Section of Antitrust Law and the Section of International Law (together, the “Sections”) of the American Bar Association welcome the opportunity to respond to the request of the Competition Bureau of Canada (“Competition Bureau”) for comments on the draft Information Bulletin on Merger Remedies in Canada, *see* Information Notice dated Oct. 19, 2005, *available at* <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1983&lg=e> (“Remedies Bulletin” or “Bulletin”). The views expressed herein are being presented jointly on behalf of the Sections.* They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

The membership of the Sections includes over 22,000 lawyers, most of whom are based in the United States, although increasingly including members of the bar of other jurisdictions, including Canada and Europe. Given the long history of competition law in the United States, the Sections have substantial familiarity with the practical implications of divestiture remedies to address concerns of antitrust enforcers. The Sections hope and intend that these comments, from the perspective of the Sections and grounded in the historical development of U.S. antitrust law and practice regarding similar issues, will assist the Competition Bureau in its development of guidelines for use in remedies in merger inquiries. In addition, these comments also draw upon the experiences of many members of the Sections practicing competition law in Europe, and elsewhere, including Canada.

The Sections previously have considered the policy questions and operational issues arising in the context of divestiture remedies in merger inquiries. The Sections submitted joint comments to the United Kingdom Competition Commission in response to its request for public comment on its Draft Guidelines on Application of Divestiture Remedies in Merger Inquiries. *See* Joint Comments of the American Bar Association’s Section of Antitrust Law and Section of International Law on the United Kingdom Competition Commission Draft Guidelines on Application of Divestiture Remedies in Merger Inquiries, *available at* <http://www.abanet.org/antitrust/comments/2004/divestiture.pdf> (“UK Joint Comments”). The Section also has provided comments to the European Commission in

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response to its request for public comment on model texts for divestiture commitments and trustee mandates. See Joint Comments of the American Bar Association's Section of Antitrust Law, and Section of International Law on the draft Model Texts for Divestiture Commitments and the Trustee Mandate under the EC Merger Regulation (September 27, 2002), available at <http://www.abanet.org/antitrust/comments/2002/reports.html> ("EC Divestiture") (EC Joint Comments). Additionally, the Antitrust Section expressed detailed views on remedies in a letter sent several years ago to the U.S. Federal Trade Commission ("FTC"). See Letter from Roxane C. Busey, Chair of the Antitrust Section, to Joseph Simons, Director of FTC Bureau of Competition, parts VI and XII (Aug. 6, 2002), available at <http://www.abanet.org/antitrust/comments/2002/reports.html> ("Merger Review Process") ("Busey Letter"). The positions expressed in the UK Joint Comments, the EC Joint Comments and Busey Letter substantially inform the comments expressed here. Although the Sections' comments reflect U.S. law and practice on merger remedies, the Sections' position does differ in some respects from U.S. enforcement practice. The Sections of course also are mindful that the underlying Canadian statute and other aspects of the Canada merger control process differs in some respects from those in the United States and that some differences in treatment of merger remedies may be appropriate for that reason, even if the Competition Bureau otherwise intends to proceed in a manner consistent with U.S. practice.

Executive Summary

Canada is the most significant trading partner of the United States, and open trade between the two countries has been facilitated through the enactment of the North American Free Trade Agreement ("NAFTA"). As a result of this close relationship, and recognizing its importance, the Sections believe that it is critical for the competition arms of both countries to continue to converge to one standard, so that the many businesses that operate extensively in both countries experience stability, uniformity, and consistency in competition law, especially as such relates to the necessary remedies in connection with mergers that affect markets in both countries.

The Sections support the Competition Bureau's efforts in preparing and circulating for comment the Remedies Bulletin as a means of increasing efficiency, consistency, and transparency in the merger review process. Most of the concepts and principles articulated in the Remedies Bulletin are familiar to practitioners,¹ are broadly consistent with our experience in merger review undertaken by the FTC and the Antitrust Division of the U.S. Department of Justice ("US DOJ"). In addition, the principles articulated in the Remedies Bulletin broadly are consistent with the European Commission's approach to remedial

¹ Many of these comments also reflect the common understanding articulated in the Merger Remedies Review Project, commissioned by the International Competition Network ("ICN"), presented in Bonn, Germany, in June 2005, available at http://www.internationalcompetitionnetwork.org/ICN_Remedies_StudyFINAL5-10.pdf (hereinafter "ICN Best Practices").

action in merger cases,² with a few exceptions highlighted below. As a broad template for approaching divestitures, the Sections believe the draft Remedies Bulletin reflects the correct balance of interests and state of the art of enforcement practices. Indeed, the Remedies Bulletin demonstrates a flexible and pragmatic approach to merger remedies policy in Canada, which the Sections welcome. In addition to the broad concepts discussed in the draft Remedies Bulletin, the Sections commend the Bureau to also consider as an overarching theme in its final draft the importance of preserving the efficiencies of the transaction when deciding whether and how to impose a remedy upon the parties. Further, the Sections urge the Bureau to contemplate adding sunset provisions to all remedial orders; for example, in the United States, virtually all remedial merger orders expire after ten years, and the parties have a mechanism to lessen that period further. Without an expiration date, remedies may impose unnecessary burdens on the parties, long after the remedies have continued relevance in the marketplace.

We have keyed our comments to specific paragraphs of the consultation document, and, accordingly, follow the organization of the draft Remedies Bulletin. These comments address five major topics: (1) the objectives of remedial action; (2) the importance of maintaining flexibility when designing remedies; (3) the factors to consider when implementing remedies; (4) the most substantial considerations when considering trustee provisions in remedial orders; and (5) the significance of confidentiality in the remedy process.

Discussion

1. Objectives of Remedial Action

In Paragraph 4 of the Remedies Bulletin, the Competition Bureau expresses a clear preference “to negotiate an agreement with the merging parties without proceeding to litigation.” The Sections commend this approach. Negotiation of remedies with the parties—in an equitable and timely context—eliminates or reduces the cost and delay associated with litigation, and enables the Competition Bureau to meet its concerns of ensuring that competition is not prevented or lessened “substantially” without the need for protracted litigation. Negotiated remedies can provide better results for both the agencies and the transaction parties.

In Paragraph 7 of the Bulletin, the Competition Bureau makes clear that the purpose of a remedial action is to “promote competition, not competitors.” The Sections wholeheartedly agree, and express support for this mandate. The Sections believe that the Competition Bureau should not be concerned with the effect of a transaction on inefficient competitors.³

² DG Comp European Commission, Merger Remedies Study (Oct. 2005), *available at* http://europa.eu.int/comm/competition/mergers/others/remedies_study.pdf.

³ *See, e.g.,* ICN Best Practices at ¶¶ 1.3-1.7, *available at*

Finally, in Part VII of the Bulletin, the Competition Bureau states “[t]he increasing number of global mergers has enhanced the need for communication, coordination, and cooperation among competition authorities.” In addition, the Bulletin provides that the Competition Bureau will work to ensure that remedies fashioned in Canada will “mirror those in other jurisdictions,” especially where the competition issues in Canada are similar to those in other jurisdictions. The Sections especially commend the Competition Bureau for its willingness to undertake efforts to streamline costs, burdens and conflicts associated with the administration of remedies that affect multiple geographic territories. The Sections believe that greater coordination among competition authorities would be beneficial in many transactions that have cross-border implications, with each considering the other’s jurisdictions and framework to the extent possible while discharging its domestic mandates.

2. Designing Remedies

Preference for Structural Remedies

Paragraph 10 of the Bulletin notes that “[c]ompetition authorities and the courts generally prefer structural remedies” to behavioral remedies, but suggests that behavioral remedies may be appropriate in certain circumstances. The U.S. experience is mixed. The federal antitrust agencies generally use behavioral remedies only to address a vertical issue, or a concern that arises from a minority interest (*e.g.*, information firewalls within a vertically integrated firm that also is supplying a competitor with an important input), or as an adjunct to a structural remedy. As we understand it, the U.S. and EU agencies’ general concerns are that behavioral remedies (1) may not create the full competitive incentives that structural remedies ensure; (2) may require costly review and monitoring by the agencies; and (3) may artificially constrain the merged firm from reacting to changing market dynamics. The state attorneys general have been more willing to consider and implement behavioral remedies to address horizontal issues (even including commitments on price levels in some cases). Paragraphs 10 and 47 may suggest that the Competition Bureau, consistent with its own past practice, will have more tolerance for carefully designed non-structural solutions than the U.S. federal agencies.⁴

The Sections are on record as supporting a broader application of non-structural remedies to address competitive concerns raised by mergers and acquisitions. Non-structural remedies, in some instances, both serve the interests of the competition authority in

http://www.internationalcompetitionnetwork.org/ICN_Remedies_StudyFINAL5-10.pdf.

⁴ For example, the Bureau accepted a behavioral remedy in connection with Cendant Corporation’s 2002 acquisition of Budget Rent A Car of Canada Limited. *See* Annual Report for the Year Ending March 31, 2003, at p. 44. More recently, in *CN/BC Rail*, the Bureau accepted a remedy consisting of a complex series of behavioral commitments designed to maintain competitive rates and service levels for shippers in affected markets, including pricing commitments. *See* http://www.ct-tc.gc.ca/CMFiles/CT-2004-008_0001a_53PXD-3142005-99.pdf?windowSize=popup.

preserving post-merger competition and of the parties in forming more efficient organizations. We commend the Competition Bureau's adoption of an approach that allows for consideration of such non-structural remedies, especially where an alternative structural remedy may result in the loss of the very efficiencies that led the parties to combine their operations in the first place.

Divestitures

Paragraph 12 of the Bulletin sets forth essential criteria for a divestiture to provide effective relief to address competition related concerns. The Bulletin provides that: (1) divested assets must be viable and sufficient to eliminate the substantial lessening of competition; (2) the divestiture must be timely; and (3) the "buyer must be independent and must have the ability, incentives and intention to be an effective competitor in the relevant market(s)." As a preliminary point, of course, the Bureau should begin any analysis of proffered remedies with a determination as to whether the proposed remedy addresses the competitive concern raised by the transaction. After that determination is made, the Sections suggest a four-step approach to address the adequacy and scope of divestiture packages and to determine whether an up-front buyer may be needed in a specific case. The Sections proffer a similar four-step approach for the Competition Bureau's consideration, consistent with the principles contained in the draft Bulletin:

(1) Establish baseline presumptions for the process. The Sections suggest that the Competition Bureau begin with the presumption that favors divestiture of a stand-alone business that both addresses the competitive problem raised by the merger and is sufficient to eliminate the substantial lessening or prevention of competition by creating a viable and effective competitor which preserves the preexisting competition. This includes the divestiture of all necessary management, key personnel, infrastructure (such as distribution, administrative functions, and marketing resources), supply arrangements, customer contracts, and other components of an autonomous business.

(2) Determine whether the proposed divestiture meets the baseline presumptions. If the proposed divestiture meets the presumptions, normally it should be deemed to be sufficient and an up-front buyer should not be required. As discussed in the Draft Bulletin, only if the baseline presumptions are not satisfied, should the merging parties be required to demonstrate the adequacy of the proposed divestiture in terms of scope (Step 3) and independence (Step 4).

(3) Determine the adequacy of the proposed divestiture to sustain a viable and effective competitor. Divestiture of less than a stand-alone business may be acceptable when some of the components for operating the ongoing business are otherwise available or already owned by potential buyers such that the creation of a viable and effective competitor does not depend on the divestiture of a stand-alone business. The merging parties might demonstrate this adequacy in any number of ways, including, but not limited to, by (i) identifying an acceptable up-front buyer, (ii) establishing that the assets and/or products are in a sector in which there is substantial investment interest, or (iii) identifying a number of acceptable parties potentially interested in the divestiture being proposed and capable of operating the divested assets in a manner which would ensure that competition is not likely to be "substantially" prevented or lessened.

(4) Determine the likelihood of independence of the proposed business to be divested. Ongoing relationships between a seller's group and a business being sold are common in private commercial transactions, but should be reviewed to determine whether, in the particular circumstances, these relationships may undermine the objectives of the divestiture. A proposed buyer must be independent, and must have the ability and incentives to be an effective competitor in the relevant market(s). In addition, the Bureau must be satisfied that the business, once separated from the merging parties, is viable post-divestiture.

Preference for a Full Divestiture

Paragraph 16 favors a divestiture of "a stand-alone functioning business," and makes clear that the "Bureau applies greater scrutiny to partial divestitures," including those instances in which "partial divestitures consist primarily of intellectual property or other limited categories of assets." The Sections are on record as favoring an analysis that begins with a presumption that the divestiture of an entire business is more likely to solve the competitive problem. The Sections commend the Competition Bureau for making clear that favoring a full divestiture is only the starting point for the analysis, and can often be rebutted. The U.S. and EU agencies have approved numerous divestitures involving the sale of only a specific product line or package of assets rather than a stand-alone business. A partial divestiture that remedies the substantial lessening of competition should be sufficient. Therefore, Paragraph 15, setting forth that partial divestitures can be appropriate if they result in the restoration of competition, is fundamentally sound and desirable.

Prohibition and Dissolution

Paragraph 11 of the Draft Bulletin states that "prohibition or dissolution will be required where less intrusive remedies that would eliminate the substantial lessening or prevention of competition are unavailable." Unfortunately, nothing more is said about these remedies or the circumstances in which they may be sought. Given the substantial risks that these remedies present for businesses contemplating a transaction (and that these remedies are often those with which the parties to the main merger transaction are most concerned), the Sections strongly encourage the Bureau to elaborate as to the circumstances in which these remedies may be considered necessary. At a minimum, the Sections encourage the Bureau to explicitly acknowledge that it only will seek these remedies in very exceptional circumstances, particularly in the context of international transactions. It would be helpful if the Bureau specified those circumstances, especially in the case of dissolution, which the Sections understand has been included as a potential remedy in several applications to the Competition Tribunal.

Quasi-Structural and Behavioral Remedies

In Paragraphs 39-43, the Bureau explains that quasi-structural remedies may be used to remedy competition concerns in certain circumstances. Examples of such remedies include mandated licensing of intellectual property, reformation of unduly restrictive contract terms, forced granting of access to networks on a non-discriminatory basis, and relaxation of entry barriers through the removal or reduction of trade or other regulatory

barriers. The Draft Bulletin provides that the Bureau will not impose such remedies without a full examination of “their effects in the context of the industry as a whole” and more importantly, that “[t]he Bureau will only accept these types of remedies if they adequately address the competitive harm arising from the merger, no other anti-competitive effects remain, and no other significant entry barrier(s) exist.”

The Sections believe the Competition Bureau is well-advised to consider quasi-structural and behavioral remedies to the extent they provide competitors a level playing field in the purchase of or access to key inputs controlled by the transaction parties to ensure the competitive status quo ante while at the same time permitting the transaction parties to achieve some of their procompetitive objectives. Although careful scrutiny is appropriate because some behavioral remedies are more complex or customized than typical divestitures, the Sections are concerned that the Bureau is holding quasi-structural remedies to a higher standard than that dictated by the Supreme Court of Canada, and as a result, that the Bureau’s approach would therefore be inconsistent with prevailing law. To the extent the language of Paragraph 39 suggests quasi-structural remedies are incompatible with divestiture (“...the Bureau may require the merging parties to take some action (other than divestiture) to remedy competitive concerns”), the Sections believe the Bureau should retain the flexibility to implement remedies that may involve quasi-structural relief in addition to or in lieu of divestiture.⁵

Similarly, the Sections believe that the Bureau must retain the flexibility to utilize behavioral (or conduct) remedies in addition to or in lieu of divestiture. Behavioral remedies may be particularly appropriate in vertical transactions, in horizontal transactions where vertical concerns arise, where the industries involved are heavily regulated, or where there are few potential buyers of divested assets. Although the draft Bulletin recognizes that behavioral terms may supplement or complement a divestiture, the Sections believe that the Bureau is imposing an inappropriately high standard by suggesting that stand-alone behavioral remedies will only be acceptable where there is no viable structural remedy. The Sections encourage the Bureau to recognize this explicitly in the final Bulletin. Although the U.S. and EU agencies disfavor conduct remedies, they often are used in these circumstances -- for example, to address concerns of possible vertical foreclosure in Silicon Graphics-Alias/Wavefront and AOL-Time Warner.⁶

Representations and Warranties

Paragraph 23 indicates that “to increase the attractiveness and viability of the divestiture package, the vendor should provide reasonable and ordinary commercial representations

⁵ The ICN Best Practices paper endorses this view as well. *See, e.g.*, ICN Best Practices at ¶ 3.24, available at http://www.internationalcompetitionnetwork.org/ICN_Remedies_StudyFINAL5-10.pdf.

⁶ *See* FTC AOL/Time-Warner Order (2000), available at <http://www.ftc.gov/opa/2000/12/aol.htm>; FTC Silicon Graphics-Alias/Wavefront Order (1995), available at <http://www.ftc.gov/opa/1995/11/sil2g.htm>.

and warranties to the buyer,” remaining in effect at least until the final divestiture. The Sections welcome this practical approach to remedies policy but recommend that the reference to “reasonable and ordinary commercial representations and warranties” be replaced with “reasonable and ordinary commercial representations and warranties, covenants, and conditions for transactions of that type” as in addition to representations and warranties, there customarily would be covenants and conditions.

Also, we recommend that the sentence beginning “While each industry...” should be deleted as the examples of representations and warranties that are not representative of the broad range of representations and warranties that might reasonably be required. The second paragraph therefore should begin “The representations...”.

Fix-it-First

Paragraphs 25 through 28 provide that the Competition Bureau “strongly prefers fix-it-first” remedies. The Bulletin sets forth that a fix-it-first remedy occurs when:

- (i) the vendor is able to divest the relevant assets to an approved buyer prior to the closing of the merger; or
- (ii) there is a purchase and sale agreement in place which identifies an approved buyer for a specific set of assets and the divestiture is executed simultaneously with the merger.

The Sections commend the Competition Bureau for clearly articulating a policy that favors fix-it-first solutions without the necessity of formalizing such contracts in a consent. Such a policy allows parties to resolve competitive concerns within normal market strictures, rather than through an unnecessarily protracted and expensive regulatory process. The Sections are on record as supporting such provisions strongly in the United States and elsewhere. Although the Sections understand that in many circumstances “fix-it-first” solutions are optimal, the Bureau also should be mindful that in some instances the burden of requiring parties to locate purchasers up-front may impose substantial demands upon the party, and may cause a fire sale of the divested assets, or delay the transaction from closing.

Short Time Periods

Paragraphs 29-31 express the Competition Bureau’s preference for timely divestitures: “The shorter the divestiture period, the less likely that factors such as the deterioration or depletion of assets or the loss of customers and/or key personnel will cause the asset package to lose value.” Generally, the “vendor will have a 3-6 month period to divest the asset package,” although the Bureau may grant extensions if clearly appropriate.

Although the 3-6 month divestiture period is consistent with the period in the United States, it is shorter than that generally imposed in Europe, where 6-9 months (and longer)

is the norm.⁷ It is important that the Competition Bureau remains flexible, particularly where foreign ownership reviews or restrictions may impose delays or limit the pool of potential buyers, as well as where the parties must conduct due diligence and ensure compliance with environmental, third-party, and other government consents. A strict adherence to a 3-6 month time frame also may discourage parties from settling with the Competition Bureau. This may in turn result in either higher merger enforcement costs or discourage transactions that are otherwise efficiency-enhancing and/or procompetitive. In any event, the Sections recommend that the Bulletin state that the divestiture period typically is triggered by the closing of the primary transaction in connection with which divestiture is being required.

No Minimum Price

Paragraph 32 sets forth the Competition Bureau's requirement that the remedy package be offered at no minimum price during the trustee period. The Bureau will reject provisions referring to minimum price including those that reference terms like "fair market value," "going concern," "liquidation price," "going out of business," or "fire sale."

The existence of such a no minimum price policy increases the risk to the seller where such policy is combined with a crown jewel provision, possibly by encouraging potential purchasers to withhold offers in an attempt to secure an unwarranted price concession or a crown jewel addition to a remedy package, and as such, the Sections recommend that the Competition Bureau carefully consider whether such a policy is warranted.⁸

Crown Jewel Provisions

Paragraphs 33 and 34 of the Bulletin provide that there are situations in which "a more marketable package of assets that could be needed to attract a buyer and is likely to be highly valued by both potential buyers and the vendor (commonly referred to as 'crown jewels'), may be required as part of the remedy." Such a requirement, the Bureau notes, is not intended to be punitive, but rather merely to provide incentives to ensure the timely completion of a remedy. In the United States, although the FTC staff has expressed a view similar to that of the Bureau,⁹ the US DOJ holds the use of crown jewels in disfavor

⁷ Cf. DG Comp European Commission, Merger Remedies Study, Section J, *available at* http://europa.eu.int/comm/competition/mergers/others/remedies_study.pdf.

⁸ United States antitrust agencies have articulated that the existence of no minimum price provisions has not encouraged potential purchasers to hold off bidding in hopes of obtaining assets at fire sale prices. Nevertheless, the Sections' concerns reflect the perspective of some business executives involved in prior transactions.

⁹ See FTC, Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies (Apr. 2, 2003), hereafter "FTC Statement," at fn. 31:

If the staff has concerns about the parties' ability to divest the original package of assets ... on time, the staff may ... accept the proposed package but require divestiture ... of an

“because they represent either acceptance of less than effective relief at the outset or more than is necessary to remedy the competitive problem.”¹⁰

It should be noted, however, that notwithstanding the support of FTC staff for crown jewel provisions, these provisions only have been invoked once by the FTC, and in that instance, with the full consent of the parties, in order to effectuate the divestiture. Beyond that one matter, the agency staff has noticed that in some circumstances the potential invocation of a crown jewel provision (and appointment of a trustee) has led potential bidders to hasten their negotiations with the parties, in order to complete a deal and avoid reopening the entire search when a trustee begins to market the crown jewel.

The Sections are on record as being against the inclusion of crown jewel provisions, and reiterate that opposition here.¹¹ Based on U.S. and EU practice, the Sections believe that where there is an up front buyer, or a requirement to divest an entire business, a crown jewel provision is disproportional and unnecessary.¹² Moreover, to the extent that the parties identify an up front buyer, it is important that the Competition Bureau exercise care to resist any tendency of potential divestiture buyers to use the antitrust authorities effectively as an agent of the divestiture buyer in “gaming” the process to extract additional assets from the merging parties that are not necessary to compete.

Where there is not an up-front buyer, the question is whether the agency can find some other means for reducing the risk of a failed divestiture effort or whether the “crown jewel” provision is the only means. The Sections believe that the agency ordinarily should limit the divestiture package to only those assets that are needed by the divestiture buyer to eliminate the substantial lessening or prevention of competition in the affected relevant market. The Sections recognize that in some instances the asset packages will need to include more than just the assets used solely in connection with the relevant product or service market. It is important, however, that asset packages not be enriched on the grounds that such assets would be “useful” to the divestiture buyer, but rather focus on what is “necessary” for the divestiture buyer to compete as effectively in the provision of the affected relevant product or service as the transaction party being eliminated as a separate competitor. It is undesirable and inappropriate from a public policy standpoint to take unrelated assets from the seller, which may have the unintended effect of weakening the seller in other areas or eliminating certain synergies that could ultimately inure to the

alternative package of assets referred to as the “crown jewel” if the parties fail to comply with the original divestiture in a timely manner.

¹⁰ US DOJ, Antitrust Division, *Policy Guide to Merger Remedies* (October 2004) (the “DOJ Guide”), at 37.

¹¹ See EC Joint Comments, available at <http://www.abanet.org/antitrust/comments/2002/reports.html>; Busey Letter, available at <http://www.abanet.org/antitrust/comments/2002/reports.html>.

¹² The FTC does not use crown jewel provisions routinely in such circumstances.

benefit of consumers. Indeed, requiring the divestiture of additional assets of one of the merging parties can eliminate some synergies from the transaction without necessarily making the divestiture buyer a more competitive entity. Accordingly, the Competition Bureau should be careful not to over-enrich divestiture packages in an attempt to guarantee the success of the divestiture at the risk of losing synergies or harming the merging parties' ability to compete post-merger.

3. Implementing Remedies

The Bulletin states at Paragraph 50 that the Bureau “will normally require the appointment of an independent third party to monitor compliance with [a] consent agreement” in order to “ensure that the vendor uses its best efforts to fulfill its obligations under the consent agreement.” The Sections believe that it would be more appropriate for the Bureau to adopt a more flexible approach to the use of monitors. While monitors may serve a useful purpose in terms of securing compliance with a consent agreement in some circumstances, the Sections believe that it overstates their usefulness to indicate they are “normally” required for this purpose. In practice, the Sections understand that Canada historically has appointed a monitor only where a hold separate is imposed. The Sections believe that this should be clarified in the Final Bulletin.

The significant extent to which the Bureau proposes to rely on monitors contrasts with the approach taken in the United States. The FTC has stated that FTC staff will “recommend that the Commission appoint an independent third party to monitor compliance with the terms of the Commission’s order” in relatively narrow circumstances, namely where “the Commission’s order imposes obligations requiring a continuing relationship between the parties and the buyer.”¹³

It is far from clear from international experience that a monitor will “normally” be required, or “normally” be desired (although the Sections acknowledge that they often are used in Europe). Indeed, the Sections believe that a monitor “normally” will be unnecessary, insofar as other less costly and less burdensome ways exist to accomplish these objectives. The Bulletin already includes a number of these mechanisms, including hold separate arrangements, representations and warranties of the vendor, a regular reporting requirement, and measures (*e.g.*, no minimum price provisions, short divestiture time tables, use of divestiture trustees, etc.) to ensure compliance with a consent agreement and the timely completion of a divestiture. Absent a specific reason to believe that such measures will not be effective, there should be no need for a monitor. Accordingly, the Sections recommend that the Bureau adopt a more flexible approach on the use of monitors, restricting their use to the situations where they truly are needed.

4. Trustee Provisions

Paragraph 57 provides that when the sale of the asset(s) to be divested is not completed in the initial sale period and in the manner contemplated by the consent agreement (or the

¹³ FTC Statement, *supra* at 6.

divestiture order in contested cases), the Bureau will require that a divestiture trustee be appointed to divest the assets. The Draft Bulletin (like the EU's Standard Model for Divestiture Commitments) states that the trustee period is normally expected to run 3 – 6 months. In the United States, in contrast to the Draft Bulletin, the trustee is provided 12 months. In both the United States and European Union, extensions will be granted as warranted, to effectuate a divestiture. The U.S. and EU agencies recognize that the trustee presents the last and often best opportunity to effectuate a divestiture, and that the trustee must be given ample time to effectuate the remedy. The Sections recommend that the Bureau adopt a more flexible time period for the trustee to implement the divestiture. The Bulletin also ought to clarify what is intended to occur after the trustee period expires and the business has not been divested, and a buyer has not been located.

Paragraph 59 provides that “[d]uring the trustee period, the trustee will have the exclusive power and authority to complete the divestiture. The trustee will sell the assets on terms and conditions that are favorable to the vendor at no minimum price.” It is unclear what is intended by “on terms and conditions that are favorable to the vendor at no minimum price.” We recommend that the Bulletin state that the Divestiture Trustee should seek to obtain the most economically advantageous terms for the parties, including price, for the divested business.

Paragraph 61 sets forth a requirement that the trustee regularly report in writing to the Bureau providing detail on steps taken to locate potential buyers and the status of negotiations therewith. The Sections believe copies of all such reports should be provided to the parties contemporaneously (with any competitively sensitive information redacted or restricted to legal counsel).

The Sections believe that the Bulletin should provide additional detail with regard to trustee provisions, specifically with regard to the appointment process and functioning of the trustee. For example, the EU Guidelines provide a substantial amount of detail regarding the trustee and his/her role in the divestiture process. Those Guidelines provide relevant information related to the trustee appointment procedure, the functions of the trustee, the duties and obligations of the parties in relation to the trustee, the replacement of the trustee, and the discharge and reappointment of the trustee. While the Bulletin addresses some of these issues in a limited manner at Paragraphs 57 - 62, many are left unaddressed. For example, the Bulletin does not provide detail regarding the independence of the trustee, the necessary qualifications to carry out its mandate, conflicts of interest considerations, and remuneration by the parties in a way that does not impede the independent and effective fulfillment of its mandate.

5. Confidential Schedules

The Sections are pleased that the Bulletin addresses the issue of confidentiality respecting the divestiture process. While cognizant of the desirability of transparency in the merger review process, including divestiture processes, the Sections are relieved that the Bureau is mindful of the need to ensure that certain aspects of consent agreements (and other negotiated settlements) remain confidential.

However, the Bulletin suggests that certain provisions may be included in consent

agreements as a matter of course, including very short (3 – 6 months) divestiture periods, no minimum prices and, possibly, requirements for the potential divestiture of “crown jewels.” The Sections recommend that the Final Bulletin state that these types of provisions ordinarily will remain confidential, to avoid putting the selling parties in the position of having to disclose sensitive terms of divestiture, which could place them at a disadvantage relative to prospective buyers (and for no good competition policy purpose). Such an approach is standard practice in Europe, although the U.S. agencies follow the opposite practice and routinely make such provisions public.

For instance, as mentioned above, the Sections believe that the mere existence of crown jewel provisions should remain confidential until such time that a crown jewel provision is triggered. Otherwise, potential acquirers of the divested assets have an incentive to “game” the process, and attempt to extract crown jewels from the parties, knowing that they are subject to short-time periods to effectuate their divestiture.

Additionally, Paragraph 65 provides that “Once the trustee period begins, most terms will be made public, including the time period in which the sale must occur, all crown jewel provisions and the fact that the asset package must be sold at no minimum price.”

This practice appears to be at odds with EU procedures and the Sections believe it is improvident to make “most terms” of the divestiture agreement public once the trustee period begins. Providing potential acquirers with information related to the terms and conditions in which a sale must occur, as well as the existence of, and details relating to, crown jewel provisions creates the same concern of “gaming” the system as discussed immediately above. The Sections recommend that the Bulletin provide flexibility and allow certain provisions to remain confidential until the sale is completed.

Internationally, there is divergence on this point. For example, in the United States, nearly all schedules of the divestiture agreement are made public, with the exception of certain highly confidential information; in Europe, on the other hand, the European Commission keeps the divestiture deadline confidential. The Sections believe, for the aforementioned reasons, that more confidentiality, rather than less, should be afforded in the process.

Finally, Paragraph 64 provides that "When such confidential schedules exist, bona fide prospective buyers who sign confidentiality agreements will have access to information about the initial asset package itself but not to provisions relating to time periods and crown jewels."

The Sections believe that the Bureau should impose limitations on the prospective buyer’s access to information about the divested assets, including, for example, limitations on who at the prospective buyer can obtain confidential information regarding the divested assets, as well as restrictions on the ability of prospective buyers—particularly competitors of the merging parties—to obtain competitively sensitive information.

The Sections also believe that the Bulletin could expand on the Bureau’s approach to confidentiality in relation to so-called “market testing” of remedies. The Sections recognize the potential importance of such market testing to the effectiveness of the merger remedy process. As the ICN Mergers Subgroup noted last year, market testing promotes

transparency of the merger review process and, moreover, “should improve the overall robustness of the outcome.”¹⁴ The Bureau needs to ensure, however, that such “market testing” procedures are not used by competitors to game the process. Both the Bureau and the ICN Subgroup also recognize that market testing should not be at the expense of confidentiality. However, the precise extent to which confidentiality applies in this context remains unclear, with the Bureau stating simply that market testing is “subject to confidentiality constraints” and the ICN Subgroup stating that it “should not imply disclosure of confidential information.” It would be helpful, therefore, for the Bureau to explain in more detail how it will go about market testing, and the types of information that will and will not be shared with third parties as part of this process.

The Bureau plans to include a “template consent agreement” with the final version of the Remedies Bulletin when it is released. According to the draft, this template would reflect the “standard guiding principles” to be applied by the Bureau in dealing with merger remedies. The Sections hope that notwithstanding the existence of its “standard guiding principles” and “templates,” the Bureau will continue to demonstrate sufficient flexibility in dealing with merger remedies. Both policy considerations and practical realities dictate that in dealing with merger remedies, the Bureau should not be rigid in its approach and any template should be used as a point of reference in remedy negotiations going forward rather than something the merging parties would effectively be expected to adopt in every case.

Conclusion

The Sections appreciate the opportunity to submit these comments and hope that they are helpful to the Competition Bureau as it finalizes its Bulletin.

February 24, 2006

¹⁴ *Merger Remedies Review Project: Report for the fourth ICN annual conference* (Bonn, June 2005), at 5, available at http://www.internationalcompetitionnetwork.org/ICN_Remedies_StudyFINAL5-10.pdf.