Joint Comments of the American Bar Association's
Section of Antitrust Law, Section of Business Law, and Section of International Law
on
Office of Fair Trading Draft Revised Mergers Jurisdictional and Procedural Guidance

The Section of Antitrust Law, the Section of Business Law, and the Section of International Law (together, the Sections) of the American Bar Association submit these comments regarding the Office of Fair Trading's (OFT) March 2008 draft revised *Mergers Jurisdictional and Procedural Guidance* (the *Draft Guidance*). The views expressed herein are 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 considered as representing the policy of the American Bar Association.

The Sections have substantial experience in the antitrust and merger control laws in the United States and other jurisdictions, and in the practical implications of those laws. These comments draw upon that experience, and the Sections hope and intend that they will assist the OFT in its development of revised jurisdictional and procedural guidance for merger review.

The Sections applaud the OFT's efforts in preparing the *Draft Guidance* and inviting comment on it, particularly because doing so contributes to increased efficiency, consistency, and transparency of the merger review process. The OFT is to be commended for updating its jurisdictional and procedural guidance to reflect its experience in merger review under the Enterprise Act 2002 (the Act) during the past five

[*] The members of the Working Group that drafted these comments are Karen Alderman, John Clifford, Lisl Dunlop, Dorothy Fountain, Stephen Kinsella, Shuli Rodal, David Schwartz, Robert Schlossberg, and David Went. The views expressed herein do not necessarily reflect the view or opinions of the professional organizations with which the members of this Working Group are affiliated.

years, as well as for taking into account the recast EC Merger Regulation and the *Recommended Practices for Merger Notification Procedures* adopted by the International Competition Network (ICN). The Sections welcome the *Draft Guidance* as an important contribution toward providing clarity and legal certainty for the business community.

Executive Summary

In general, the Sections commend the *Draft Guidance*. In particular, the Sections applaud the introduction of a fast track procedure, although the Sections note that minor clarifications would provide additional certainty regarding the implementation of this procedure. The Sections also applaud the amendment of OFT procedures to give the OFT discretion to revert to merging parties after the submission of undertakings in lieu of reference in near miss cases. With regard to near miss cases, the Sections suggest that the OFT may wish to consider providing examples of such cases and to clarify the criteria that must be satisfied to be considered a near miss case.

The Sections also suggest that the OFT may wish to clarify the applicable considerations when it is deciding to initiate an investigation into a non-notified merger. The Sections note that the requirement to submit supporting documentation with notifications, which is somewhat broader than a similar U.S. requirement, may introduce uncertainty. The Sections submit that the OFT may wish to consider making consistent, as between the statutory prenotification procedure and informal submissions, the market share thresholds that trigger additional information requirements, as well as aligning them with those of the European Commission. Finally, with regard to the discussion in the *Draft Guidance* of the procedure for acceptance of undertakings in lieu of reference in

upfront buyer cases, the Sections suggest that the upfront buyer requirement be imposed sparingly.

Adoption of Fast Track

In paragraphs 4.72 to 4.76 of the *Draft Guidance*, the OFT proposes the introduction of a new fast track procedure to accelerate the referral of cases to the Competition Commission (CC). For a case to be a candidate for fast tracking, the OFT must have evidence in its possession at an early stage of the investigation that it believes objectively justifies a reference, and the notifying parties must have requested and consented to the fast tracking. Fast tracking would not be appropriate, however, in those cases in which there is a realistic possibility of resolution of competition concerns by the potential offer of undertakings in lieu of reference, so that candidate cases are likely to be those in which the competition concern identified by the OFT would impact on the whole (or substantially all) of the transaction, and not just one part (that could be resolved through structural undertakings in lieu).

The Sections welcome the added flexibility introduced by this procedure, which permits the prompt review of cases by the appropriate authority. However, the Sections suggest that parties that request the fast track procedure should be viewed as implicitly not interested in accepting undertakings in lieu. Therefore, even those cases in which undertakings in lieu realistically could resolve the competition concerns should not be barred from the fast track procedure. The Sections further suggest, while recognizing that the period of time needed by the OFT to reach a decision on whether to fast track a case may depend on the facts of each individual case, that the OFT may wish to indicate

the period of time it considers likely to be needed, in order to provide additional certainty for the external user community.

Finally, the *Draft Guidance* states that the fast track option will be available exceptionally; the Sections suggest that the fast track option should be available to parties that satisfy the three requirements noted above, and that no additional requirements for application of the fast track procedure should be imposed.

'Near Miss' Cases

In paragraphs 8.18 to 8.23 of the *Draft Guidance*, the OFT proposes to amend its current procedures to give the OFT the discretion to revert to merging parties after their submission of undertakings in lieu of reference in near miss cases. The *Draft Guidance* states that the OFT will be slow to reject undertakings in lieu of reference for purely technical reasons or because they might be read as falling short of a package that the OFT considers would otherwise be sufficient to remedy the concerns identified. The OFT therefore will have the right to revert to the parties to clarify their position. In such near miss cases, the parties would be offered a short second window of opportunity (typically not more than one working day) to reconsider (and potentially clarify) their original offer of undertakings in lieu of reference.

The Sections welcome this proposal, which brings additional transparency and flexibility to the process of offering undertakings in lieu of reference. Even where merging parties offer undertakings in lieu of reference genuinely aimed at resolving competition concerns identified by the OFT, it is possible that the undertakings might fall short of what the OFT considers will resolve the competition concerns. For instance, because the concerns set out in the OFT's issues letter will not necessarily be shared by

the OFT and might even be included to increase the robustness of the case for likely clearance,[1] it may not be clear, at least prior to the issues meeting, whether particular concerns ultimately may require undertakings in lieu of reference. Further, given the time pressures of the first phase of the review, there may be insufficient time for a discussion of potential remedies by the parties and the OFT, which in turn could result in the presentation of proposed remedies that fall short of what the OFT may believe to be adequate. Moreover, despite the seriousness of the parties' efforts to resolve any competition concerns, they have a clear incentive not to go beyond that which the OFT would require. Furthermore, given the reluctance of the OFT to accept undertakings that would over remedy the substantial lessening of competition, the opportunity to revert to the merging parties in near miss cases also will eliminate the risk of adopting an overbroad remedy. For these reasons, the Sections applaud the adoption of a procedure for addressing such near miss cases.

The OFT may wish to consider providing examples of cases that would represent near miss cases. Currently, the *Draft Guidance*, in paragraph 8.20, only provides three examples of undertakings in lieu of reference that would not be near miss cases. One example of a near miss case might be one in which the merging parties have the choice of divesting different combinations of a number of different assets to remedy a competitive overlap. Although the parties genuinely might believe that the competition concerns would be resolved through the combination of assets offered, the OFT might consider that a different combination of assets is necessary to provide an adequate remedy.

Similarly, paragraph 8.11 of the *Draft Guidance* states that an offer to remedy the substantial lessening of competition through divestiture of one of the overlapping

[1] *See* paragraph 6.47 and footnote 53 of the *Draft Guidance*.

businesses should make clear whether the parties are prepared to divest the overlap assets of the target, the acquirer, or either. Where the parties name only one business, the OFT will infer from this that the parties would not be prepared to sell the other overlapping business. Rather than make this inference, this may be another example of a near miss case that should be reverted to the parties with an indication that they should offer both businesses in the alternative where required.

The OFT may wish to consider clarifying the criteria that must be satisfied in near miss cases. The *Draft Guidance* sets out eligibility conditions of near miss cases in paragraph 8.21. The principal relevant eligibility criteria listed in that paragraph are that the undertakings in lieu must represent a good faith and credible offer to remedy the identified concerns. The Sections respectfully suggest that the OFT make explicit what is implicit in the first two bullet points of paragraph 8.21: that all offers of undertakings in lieu of reference that are both made in good faith and credible before the case management review meeting will be deemed to be near miss cases if they nevertheless fall short of what the OFT deems adequate.[2] This approach is appropriate, especially in light of the short period of time in which the parties must update their offered undertakings in lieu, because at most the OFT would lose one or two days, but nonetheless have the opportunity to resolve a matter more quickly than it otherwise

[2] The first bullet sets out that the undertakings in lieu must represent a good faith and credible offer. The following sentence states that a behavioral undertaking that purports to regulate the parameters of competition would not be a near miss case. Based on other statements in the *Draft Guidance*, however, it is unclear whether the OFT also envisions situations in which undertakings in lieu meet the criteria of good faith and credibility but do not fall just short of an adequate remedy and therefore are not near miss cases. See, for example, paragraph 8.20, which refers to falling just short as well as to the need for the remedies to be clear-cut, although these are not included in the eligibility criteria of paragraph 8.21. A reference to clear cut remedies also appears on page 3 of the *Draft Guidance*, in a statement that the near miss process is applicable only where, at or after the issues meeting, the parties have offered a clear-cut remedy to resolve the competition concerns identified by the OFT. Also, in paragraph 8.19, the OFT suggests both that it will use the near miss process only in "exceptional circumstances" and that it will be slow to reject undertakings in lieu for purely technical reasons or because they might be read as falling short of an adequate package.

would have done. Moreover, the Sections suggest that even when parties choose "not to offer undertakings in respect of … certain overlapping locations"[3] the offer still should be considered a near miss if the number of locations not included is small relative to the overall offer.

Finally, the Sections recommend that the OFT reconsider whether one working day is sufficient time to allow reconsideration and clarification of the offered undertakings in lieu, both to provide the OFT for sufficient time for proper consideration of such matters and to provide the party or parties involved in the proposed transaction time to clarify properly such proposed undertakings, especially in the context of international transactions, where communicating with the party or parties may itself take one working day.

Complaints Handling and Enquiry Letters

The Sections believe it would be helpful to put into one place the considerations that are applicable when the OFT is deciding whether to initiate an investigation into a non-notified merger. Currently, these considerations appear at different places in the *Draft Guidance*—under both Complaints Handling and Enquiry Letters—and it is not immediately obvious how the considerations are interrelated or how the OFT would apply these considerations in practice. Paragraph 4.13 of the *Draft Guidance* appears to contain the primary tests that the OFT will apply. The second sentence of that paragraph states that, in sending enquiry letters, the OFT will consider whether the case is one in which there is any prospect that its duty to refer may arise. The third sentence of that paragraph states that the OFT likely will commence own initiative investigations when

[3] Section 8.21 of the *Draft Guidance*.

the OFT has "reasonable grounds to believe a relevant merger situation exists and substantive competition concerns may be raised."[4]

The relationship between these two tests is not entirely clear. The latter test arguably is much the same as the test for a reference to the CC and is a higher threshold than the any prospect test contained in the previous sentence. Indeed, this latter test perhaps is too high a threshold if it is intended to be the test for whether the OFT should commence an own initiative investigation. An alternative formulation that the OFT may wish to consider is that used with respect to initial undertakings: the OFT may have reasonable grounds for suspecting that a relevant merger situation exists and substantive competition concerns may be raised.

Information Required for Notification

The *Draft Guidance* at paragraph 5.5 imposes a requirement that supporting documentation be submitted together with the notification. The documents required to be submitted by the *Draft Guidance* include not only documents prepared by or for directors or officers, but also by or for persons exercising similar functions to directors or officers, or to whom such functions have delegated or entrusted. There is a similar requirement in the United States, which qualifies the requirement that documents prepared by or for persons exercising similar functions to officers or directors by applying only where the relevant entity is unincorporated, so that it does not have officers or directors. The Sections suggest that broadening this requirement to include incorporated entities imposes an undue burden at the time of the initial notification.

[4] In addition, paragraph 4.11 states that the OFT, in deciding whether to conduct own initiative investigations, will take into account the burden on efficiency-enhancing mergers, while paragraph 4.12 mentions the OFT's Prioritisation Principles (i.e., impact, strategic significance, risk, and resources).

Information Required for Substantive Assessment

With regard to the information required by the OFT for its substantive assessment, the *Draft Guidance*, in paragraph 5.10, appears to require certain information even when the parties' activities do not overlap and there are not vertical or conglomerate links. The OFT may wish to consider setting out more clearly in paragraph 5.10 the general information required by the OFT in notifications for each relevant market, as well as the more detailed information required where certain market share thresholds are satisfied.[5]

Further, as the OFT revises its jurisdictional and procedural guidance with the benefit of five years of experience, it may wish to consider revisiting the market share thresholds that trigger additional information requirements in notifications and making them consistent as between the statutory pre-notification procedure and informal submissions. Paragraph 5.10 of the *Draft Guidance* sets forth the information that the OFT expects in submissions. That information includes "information on any vertical links between the parties and their effects where one of the merging businesses has a share of 10 per cent or more in an 'upstream' or 'downstream' market," and information on entry barriers and the cost of entry "in cases where there are horizontal overlaps or vertical links and where the combined shares of the parties in the relevant market are 10 per cent or more." The Sections query whether there is a basis for these 10 percent thresholds and submit that they may be too low, thereby placing an unnecessary burden on merging parties. Moreover, in the provisions relating to the statutory prenotification

[5] The Sections suggest that certain types of information listed in paragraph 5.10 should be required only where the additional information requirements are triggered. Such information includes: information on the relative competitive constraint posed by the parties' principal competitors, capacity data, market share data over several years, buyer power, and customer benefits.

procedure elsewhere in the *Draft Guidance*, the OFT appears to acknowledge that competition concerns would not be raised by horizontal mergers in which the merging parties' combined share is below 15 percent or by vertical or conglomerate mergers in which the parties' market shares do not exceed 25 percent in upstream or downstream markets.[6] Finally, the Sections note that these 15 and 25 percent thresholds for horizontal and vertical/conglomerate mergers, respectively, have been adopted by the European Commission[7] and similar or higher thresholds are used in several EU Member States.[8]

Upfront Buyer

In the context of considering the procedural implications caused by the requirement for an upfront buyer, the *Draft Guidance* notes that the OFT will seek an upfront buyer where the risk profile of the remedy requires it. Examples of situations in which an upfront buyer will be required are provided in the *Draft Guidance*: where the OFT has reasonable doubts with regard to the ongoing viability of the divestment package and/or the small number of candidate suitable purchasers.

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[6] Paragraph 4.55 of the *Draft Guidance*, referring to the statutory prenotification procedure as a "fast-track procedure for transactions that do not raise any anticompetitive concerns," describes such nonproblematic transactions as, inter alia, those in which "the parties' activities overlap horizontally but their combined share is below 15 per cent on any conceivable relevant market" or in which "the parties' are only active upstream or downstream or in a neighbouring market from each other and their share on each of those markets is below 25 per cent."

[7] Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:133:0001:0039:EN:PDF, at Annex I Form CO relating to the Notification of a Concentration pursuant to Regulation (EC) No 139/2004, at Section 1.6, Section 6(III).

[8] E.g., France – 25 percent for horizontal overlap and vertical links; Germany – 20 percent for horizontal overlap and vertical links; and Italy – 15 percent for horizontal overlap and 25 percent for vertical links.

The Sections previously have observed that an upfront buyer requirement potentially imposes significant costs and unfairness on the merging parties, at least where a stand-alone business unit is being divested.[9] The Sections also have acknowledged that the requirement may need to be used sparingly to address certain circumstances where there are serious questions about the divestiture.[10] As the Sections previously have suggested, upfront buyers should not be required when (a) the divested business has been operated as a stand-alone business or when the divested business is clearly sufficient to maintain competition, and (b) there is likely to be an acceptable purchaser within a reasonable period of time, taking into account the particular economic and commercial circumstances of the industry in question. The Sections read the *Draft Guidance* as consistent with this view.

The *Draft Guidance* notes that where the OFT considers that an upfront buyer will be required, the parties will be given a "relatively short, individually-determined period of time" in which to identify a buyer, obtain the OFT's approval, and enter into a sale and purchase agreement. The Sections applaud the OFT's recognition that the period of time to achieve these three tasks will vary on a case-by-case basis, so that no pre-determined deadline should be imposed. However, the Sections suggest that execution of the sale and purchase agreement should not be subject to a relatively short period of time

[9] *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 (Sept. 10, 2004), *available at* http://www.abanet.org/antitrust/at-comments/2004/09-04/divestiture.pdf, p. 8; 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 (Sept. 27, 2002), *available at* http://www.abanet.org/antitrust/at-comments/2002/09-02/0902EUDivestitureCommitments.pdf, p. 2.

[10] *Id*.

deadline, because this would significantly disadvantage the merging parties in negotiations with the upfront buyer.

Conclusion

The Sections welcome the OFT's initiative to consolidate its jurisdictional and procedural guidance within a single document and to provide new and updated guidance based on its experience since the Act entered into force. In providing these comments, the Sections have sought ways in which the *Draft Guidance* might be made even more robust, provide additional clarity and transparency, and lead to a more efficient first-phase merger review process.