

ANNEX 2

MERGER REMEDIES: THE VIEW FROM THE UNITED STATES

1. Each of the US antitrust enforcement agencies, the Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC), have issued guidelines that govern the substantive and procedural elements of merger remedies. U.S. Dep't of Justice Antitrust Division, "Policy Guide to Merger Remedies," October 2004, *available at* <http://www.usdoj.gov/atr/public/guidelines/205108.htm> ("DOJ Guide"); Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies, April 2, 2003, *available at* <http://www.ftc.gov/bc/bestpractices/bestpractices030401.shtm> ("FTC Statement"). The US agencies' perspective on merger remedies is largely identical, but there are several areas of disagreement. In particular, the agencies are inconsistent in their approach to "crown-jewel" provisions and "fix-it-first" remedies.
2. According to the DOJ Guide, DOJ's perspective on merger remedies is predicated on six principles: (1) no remedy is needed unless there is a sound basis for believing a violation will occur; (2) any remedy must be based on "careful application of sound legal and economic principles to the particular facts of the case at hand"; (3) restoring competition, not enhancing premerger competition, is the ultimate goal of any remedy; (4) the remedy should promote competition, not competitors; (5) the remedy must be enforceable; (6) DOJ will commit the necessary time and effort to ensure full compliance. *See* DOJ Guide at 3-7. The FTC has made similar statements regarding the underlying principles of its merger remedies policy. *See, e.g.*, FTC Statement at 5 ("The Commission's remedial objective – to prevent the anticompetitive effects likely to result from a merger that the Commission has determined is unlawful – provides the framework for the staff's analysis of the scope of a proposed divestiture.").
3. Both agencies' historical practice and their policy statements regarding merger remedies reflect a strong preference for structural remedies, *i.e.*, divestiture, over conduct-based remedies. The DOJ Guide states that structural remedies are more effective because they are "relatively clean and certain, and generally avoid costly government entanglement in the market." DOJ Guide at 8 (citing *United States v. El DuPont de Nemours & Co.*, 366 U.S. 316, 331 (1961)). Similarly, the FTC Statement indicates that, while "each merger remedy must be examined in the context of the underlying antitrust case," experience demonstrates that "most orders relating to a horizontal merger will require a divestiture." FTC Statement at 5.
4. The most significant difference between the agencies' approaches to merger remedies may be DOJ's stated opposition to "crown jewel" provisions, which require the merging parties to include certain specified (and often more valuable) assets to the proposed divestiture package if a suitable and willing purchaser is not found within a certain period. DOJ has used "crown jewel" provisions in consent decrees in the past, *see, e.g.*, *United States v. Imetal*, 2000 WL 33115577, *18 (D.D.C. May 25, 2000), and prior statements in speeches by senior Division officials did not seem to share the DOJ Guide's aversion to the concept. *See, e.g.*, Deborah Platt Majoras, "Houston, We Have a Competitive Problem: How Can We Remedy It?," April 17, 2002, at 11-12 (describing the benefits of crown jewel provisions and noting that DOJ has "used crown jewels in cases in which there is a

complex divestiture process or some concern that there may be difficulty in divesting one set of assets”).

5. The DOJ Guide cites two primary reasons to avoid crown jewel provisions. First, they can result in either under-inclusive or over-inclusive remedies that ultimately harm consumers. The Guide explains that crown jewel provisions usually amount to an admission that DOJ accepted “less than effective relief at the outset” because the divestiture assets were insufficient to give a purchaser the incentive to enter the market. Where DOJ must choose between demanding (A) a smaller, less valuable package that entails more risk of competitive harm or (B) a more substantial divestiture that would be highly likely to fully preserve postmerger competition, the Guide instructs DOJ to seek the more substantial divestiture from the outset. On the other hand, in some cases a crown jewel provision can present the opposite problem, representing acceptance of more relief than is needed to remedy the competitive problem. Because the goal of merger remedies is to restore competition – not punish the merging firms – DOJ believes it should not require the possible divestiture of crown jewel assets in excess of the assets necessary to remedy the competitive problem. Second, DOJ claims that crown jewel provisions provide an opportunity for “purchaser manipulation.” If there are only a few potential purchasers and they know that the consent decree includes a crown jewel provision, the purchasers have an incentive to delay the negotiation process so they can purchase the crown jewels at a reduced price. *See* DOJ Guide at 37-38.
6. In contrast, the FTC Statement indicates that under certain conditions, the FTC may accept a proposal to divest a smaller or less complete package of assets than would be required by DOJ – but only if it is accompanied by a “crown jewel” provision. If the parties are unable to divest the originally proposed assets within the agreed upon time frame, the FTC Statement indicates that the FTC may appoint a divestiture trustee to divest the crown jewels. One former FTC official stated that the FTC is willing to include crown jewel provisions in its consent decrees because they “increase[] the incentive for the respondent to accomplish the divestiture within the time required by the Commission's order, and ... provide[] a bigger, and presumably more attractive, package for the trustee in the event the respondent is unsuccessful.” William J. Baer, “Reflections On 20 Years Of Merger Enforcement Under the Hart-Scott-Rodino Act,” 1996 WL 932058 at 17 (Oct. 29, 1996 F.T.C.). He also noted that crown jewel provisions “may be particularly valuable when there are some uncertainties about the saleability or viability of the divestiture package, or where the respondent may be able to frustrate the viability of a divestiture – for example, by not transferring all the necessary technology or know-how.” *Id.* In addition, an empirical Divestiture Study performed by the FTC in 1999 noted that a crown jewel provision may provide an incentive to maintain the originally proposed assets in the event that the parties are unable to find a buyer and the crown jewel assets must be divested instead. Federal Trade Comm’n, Bureau of Competition, “A Study of the Commission’s Divestiture Process” 30-31 (1999).
7. Another key difference between the FTC and DOJ approaches to merger remedies has been DOJ’s willingness to accept “fix-it-first” remedies, which are structural remedies – usually the sale of a subsidiary or other specific assets of the merging parties to a third party – that the parties implement and DOJ accepts before the merger is consummated. DOJ has traditionally allowed many merging parties to use fix-it-first remedies. For example, between June 2001 and July 2003, 12 of the 34 mergers challenged by DOJ as anticompetitive were resolved through fix-it-first divestitures. *See* R. Hewitt Pate,

Statement Before the Committee on the Judiciary, U.S. House of Representatives, Concerning Antitrust Enforcement Oversight, July 24, 2003, at 9.

8. While the FTC does not formally embrace “fix-it-first” remedies, it does utilize a somewhat similar practice to speed the accomplishment of the remedy. In certain cases, the FTC requires the parties to propose a specific purchaser of the proposed divestiture assets (called an “up-front buyer”). When the FTC requires an up front buyer, the respondent must (1) find an acceptable buyer for the package of assets it proposes to divest and (2) execute an acceptable purchase agreement – and all necessary ancillary agreements – with the buyer (and third parties, if required) before the FTC will accept the proposed consent order for public comment. The FTC orders an up-front buyer most frequently in cases where the parties seek to divest a package of assets comprising less than an autonomous business unit. In these cases, the requirement reduces the risk that the parties will be unable to find a buyer capable of maintaining or restoring competition and mitigates the possibility of asset deterioration pending divestiture.
9. When parties attempt to execute a “fix it first” strategy, the DOJ Guide makes clear that DOJ will refrain from filing a case only if the remedy restores the premerger level of competition and contains as much substantive relief as would be sought if a case were filed. DOJ will also refuse to accept a fix-it-first remedy if the competitive harm from the transaction requires remedial provisions, such as a supply agreement with the purchaser, that include some continuing obligations for the merging parties. The DOJ Guide cites several rationales for allowing parties to engage in fix-it-first divestitures rather than requiring a consent decree. First, the Guide states that this remedy restores competition without requiring the parties to negotiate and enter into a consent decree and enables consumers to realize the procompetitive efficiencies of the transaction more quickly. In undertaking such an approach, the Guide acknowledges that the merging parties can save time and money while allowing DOJ to use its resources more efficiently. Second, fix-it-first can provide more flexibility to the parties in creating the appropriate divestiture because the assets can be tailored to the specific proposed purchaser. Finally, on a practical level, as former Assistant Attorney General R. Hewitt Pate once noted, DOJ “cannot seek a consent decree unless we conclude that a transaction would result in a violation of the law.... If parties alter their deal in a way that resolves our competitive concerns, we cannot then file a complaint challenging a transaction that no longer violates the antitrust laws.” R. Hewitt Pate, “Antitrust Enforcement at the DOJ – Issues in Merger Investigations and Litigation,” December 10, 2002, at 12.
10. Unlike DOJ, the FTC historically has disfavoured use of “fix-it-first” remedies, and it has no formal fix-it-first policy. FTC Chairman Deborah Platt Majoras has stated that the FTC strongly prefers consent orders that (1) specify the assets to be divested and (2) designate the proposed buyer where appropriate. Perhaps the FTC’s reluctance to accept fix-it-first remedies has little to do with substantive policy differences, but rather reflects the unique structural realities of the FTC. Unlike DOJ – which is headed by one individual, the Assistant Attorney General – ultimate decision making authority at the FTC is shared by five independent commissioners. This may make it more difficult to the type of relatively informal discussions and negotiation required to implement a fix-it-first remedy.
11. Another possible reason DOJ has been willing to allow merging parties to employ fix-it-first remedies may have something to do with its obligations under the Tunney Act, 15 U.S.C. § 16, which requires judicial review of all consent decrees in civil antitrust cases

filed by DOJ to ensure that the remedy proposed in the consent is in the public interest (the FTC does not have similar obligations). Under the Tunney Act, a consent decree cannot be finalized until DOJ files it publicly, along with a Competitive Impact Statement, accepts comments from the public for a 60-day period, and receives judicial approval. Because “fix-it-first” remedies do not involve a formal consent decree, they do not implicate the Tunney Act. Therefore, they enable DOJ to alter transactions in a way that achieves the goal of maintaining competition without requiring judicial intervention, thereby providing the parties with more efficient and timely resolution of merger reviews.