The views stated in this submission are presented on behalf of the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Sections of Antitrust Law and International Law of the American Bar Association (the Sections) respectfully submit these comments on the Competition Commission’s draft “Guidelines for Market Investigations.” The Sections appreciate the opportunity to comment on this important initiative. These comments reflect the experience of the Sections’ members with competition law in numerous jurisdictions, the economics underlying the analysis of competition issues, and the practices of multiple national enforcement agencies in investigating competitive behavior and applying various enforcement tools to prevent or terminate anticompetitive activities.

1. EXECUTIVE SUMMARY

These comments make the following main points:

- The Sections commend the Commission for recognizing the difficulties inherent in determining when an industry is characterized by competition problems, in particular, as the draft notes, where perfect competition is not a reasonable benchmark. We fully support the draft’s promotion of the use of multiple measures and analytical approaches in making its assessment. We encourage the Commission to emphasize that it will not consider imposing remedies absent strong evidence of competition problems. Federal Trade Commission studies of the U.S. petroleum industry demonstrate the complexity inherent in determining the cause of rising gasoline prices.

- The Sections encourage the Commission to emphasize that structural as well as behavioral remedies can have unintended consequences, and that before imposing a remedy it is critical to consider how the industry in question arrived at its prevailing structure.

- The Sections encourage the Commission to consider the role of existing competition-law enforcement as an alternative to extraordinary remedies. In our view, the Commission should impose such remedies only when traditional competition-law enforcement has been or would be ineffective in solving the perceived problem.

2. IDENTIFYING COMPETITION PROBLEMS

The draft correctly recognizes that identifying competition problems in an industry is difficult, noting the ambiguity of many types of industry features. For example, a high level of market concentration may not
necessarily indicate a lack of competition; many highly concentrated markets are characterized by vigorous competition. Similarly, an absence of recent entry might point to intense competitiveness rather than entry barriers. As the draft also correctly recognizes, identifying problems is particularly difficult when the perfect competition paradigm is not an appropriate benchmark, which is virtually always the case.

In the Sections’ view, determining when prices or profits are the product of competition problems, is an area of particular difficulty in a market investigation. Although this difficulty is acknowledged in the draft, the Sections respectfully suggest that the guidelines place additional emphasis on the need to take into account multiple factors in its assessment. The need to consider a variety of factors is well illustrated by the U.S. Federal Trade Commission’s various studies of the petroleum industry, where the agency has considered numerous possible explanations for rising prices, including fluctuations in refinery capacity, refinery outages, disruptions to major oil and gasoline pipelines, changes in the costs of other inputs such as ethanol, and changes in product formulation. By considering these many factors, the agency was able to come to a far better understanding of causes and effects than if it had looked solely at structure.

In the same study, the FTC also looked at “asymmetric pass-through,” the phenomenon of retail prices rising quickly in response to wholesale price increases and falling slowly in response to wholesale price declines. The agency noted that it is difficult to calculate the welfare consequences of asymmetric pass-through because of the need to make assumptions about the alternative symmetric speed of adjustment.

A related concept is “price cycling,” in which a relatively small number of large price increases are followed by numerous small price decreases over a period of time. The FTC noted that, while studies in some countries attributed price cycling to tacit or explicit collusion, there was no evidence that price cycling in the U.S. is caused by less competition. In fact, the FTC found that U.S. cities characterized by price cycling tend to have lower prices than cities without price cycling.

Given the difficulties of determining causation in this area, the Sections believe that such analyses should consider all relevant factors, and that remedial intervention should be considered only after a thorough and objective assessment of all available evidence and competing hypotheses.

The Sections fully endorse the draft’s focus on observing industry behavior over a longer time frame, and agree with the Commission that remedial intervention should be considered only where an industry is characterized by competition problems over a substantial period of time. Absent government-imposed

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3 Id. at p. 40.

4 Id. at p. 44.

5 Id.
barriers to entry, monopolies often erode over time as market forces and technological progress take their toll. Moreover, the Commission should avoid remedies (such as divestiture or price caps) that could undermine the incentives of firms to compete aggressively, but lawfully, to achieve a pre-eminent position in the market.

3. **APPROPRIATE REMEDIES**

The draft appropriately acknowledges that Commission-imposed remedies can result in unintended consequences and worsen industry conditions. While an imperfect market may be determined to yield a socially sub-optimal outcome, remedial interventions don’t necessarily lead to an improved outcome. The Sections encourage the Commission to emphasize that the most effective remedies are the ones that address specific, demonstrated causes of poor performance rather than those that attempt to achieve an aspirational outcome.

In assessing the benefits of structural remedies (such as divestitures and IP licensing), we think it is important to consider how the prevailing industry structure came to be. For example, there is an important difference between barriers to entry that arise from economies of scale in production and barriers created by government regulation. Structural remedies may be more appropriate in the latter case, where industry participants were government-owned or where the industry has been subject to substantial regulation. Moreover, rather than a structural remedy imposed directly on industry actors, a better remedy in such cases might be the elimination of those artificial barriers to competition.

The U.S. antitrust agencies have advocated for such remedies in numerous instances. As one example, the U.S. Department of Justice (DOJ) and the FTC jointly investigated competition in the real estate brokerage industry and concluded that competition was hindered by, among other things, regulations imposed by state legislators and real estate commissions. As a result of their investigation, the DOJ and FTC recommended the repeal of certain state laws and regulations, such as minimum service and anti-rebate provisions, which limit entry by new competitors.

Another example is the Certificate of Need (CON) system in several U.S. states in which hospitals are required to prove, in a lengthy and burdensome administrative proceeding, the need for additional capacity before being allowed to construct or expand. Those laws were designed to control costs, but, according to the U.S. antitrust agencies, they can often create anticompetitive barriers to entry, resulting in higher prices.

4. **CONSIDERATION OF EXISTING COMPETITION ENFORCEMENT MECHANISMS**

The Sections commend the Commission for acknowledging that the U.K. competition enforcement structure already impacts the competitiveness of industries. We encourage the Commission to make clear that it will

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6 See, e.g., Alfred Kahn, The Economics of Regulation: Principles and Institutions, Volumes 1-2, 1988, at the Introduction.

7 U.S. Department of Justice & Federal Trade Commission, Competition in the Real Estate Brokerage Industry, April 2007 (available at http://www.ftc.gov/reports/realestate/V050015.pdf). The report was the result of an extensive consultation with the industry, including workshops, and a review of existing literature and studies.

consider existing competition enforcement mechanisms as an alternative to a Commission-imposed remedy. In some cases, the perceived competitive problem may be better addressed through other competition-law enforcement procedures.

The Sections believe that intervention following a market investigation is best reserved for those situations in which the underlying problems cannot be solved by existing competition enforcement mechanisms. The agency with authority to impose remedies should consider whether they are in fact necessary. A good example of such an analysis is the DOJ’s review of regulation of Computer Reservation Systems. After considering the costs and benefits of such regulation, the DOJ concluded that industry issues were better addressed by case-by-case competition enforcement.9

5. CONCLUSION

The Sections appreciate the opportunity to provide comments on the draft Guidelines and hopes that the Commission finds them useful.

Respectfully submitted,

Sections of Antitrust Law and International Law
American Bar Association

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9 See recommendation of the Department of Justice (“DOJ”) to Department of Transportation (“DOT”) in the DOT rulemaking procedure considering whether to “sunset” CRS regulations, in force for 20 years since they were originally adopted by The Civil Aeronautics Board in 1984. 49 FR 32540 (August 15, 1984), aff’d, United Air Lines v. CAB, 766 F.2d 1107 (7th Cir. 1985). See, Part III, Department of Transportation 14 CFR Part 255 Computer Reservations System (CRS) Regulations; Final Rule. Federal Register / Vol. 69, No. 4 / Wednesday, January 7, 2004 / Rules and Regulations (976-1033) for the Final Rule, which does sunset most regulations and provides extensive review of the rationale for decision.