

**Joint Comments of the American Bar Association’s  
Section of Antitrust Law and  
Section of International Law on the European Commission’s Draft  
Notice on remedies acceptable under Council Regulation (EEC) No 139/2004 and  
under Commission Regulation (EC) No 802/2004**

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 European Commission (“Commission”) for comments on the draft Commission Notice on remedies acceptable under Council Regulation (EEC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the “Notice”). 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 Sections have substantial familiarity with the approaches to merger remedies adopted by U.S. and other enforcement agencies, as well as the practical implications of such remedies. The Sections have previously considered the policy questions and operational issues arising in the context of merger remedies, most recently in connection with comments to the Canadian Competition Bureau on its draft information bulletin on

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merger remedies in Canada.<sup>1</sup> The positions expressed in those comments 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 recognize that the EC Merger Regulation and other aspects of the merger review process in Europe differ in some respects from those in the United States and that some differences in approach to merger remedies may be appropriate for that reason, even if the Commission otherwise intends to proceed in a manner consistent with U.S. practice.

The Commission's efforts in preparing and circulating for comment the Notice as a means of increasing efficiency, consistency and transparency in the merger review process are commendable. Most of the concepts and principles articulated in the Notice are familiar to U.S. practitioners and broadly consistent with the approach taken by the U.S. and other jurisdictions to resolve concerns arising from transactions. As explained more fully below, we have the following suggestions for the Notice, and more broadly, the remedies policy adopted by the Commission.

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<sup>1</sup> 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 (February 24, 2006), *available at* <http://www.abanet.org/antitrust/at-comments/2006/03-06/merger-remedies-canada.shtml> ("Canadian Merger Remedies Comments"). See also Joint Comments of the American Bar Association's Section of Antitrust Law and Section of International Law on the United Kingdom Competition Commission's Draft Guidelines on Application of Divestiture Remedies in Merger Inquiries (September 10, 2004), *available at* <http://www.abanet.org/antitrust/at-comments/2004/09-04/divestiture.html> (UK Divestiture Remedies Comments); Joint Comments of the American Bar Association's Section of Antitrust Law and Section of International Law and Practice 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/at-comments/2002/09-02/0902EUDivestitureCommitments.pdf>; Letter from Roxane C. Busey, Chair of ABA Antitrust Section, to Joseph Simons, Director of FTC Bureau of Competition, Parts VI-XII (August 6, 2002), *available at* <http://www.abanet.org/antitrust/at-comments/2002/08-02/simons.pdf> (FTC Merger Review Letter).

First, the principles and procedures articulated in the Notice should be flexibly applied to reflect the unique circumstances presented by each case.

Second, we suggest the Notice expound more fully and explicitly on what would constitute an acceptable remedy, including: (1) what must be included to proffer a “stand alone” divestiture; (2) when the divestiture of assets, intellectual property rights and/or behavioral relief will be adequate; and (3) what factors determine an acceptable purchaser. Although the Notice explicitly recognizes that stand-alone business divestitures are not the only remedy that may eliminate competition concerns, adhering too strictly to a policy that presumes the divestiture of stand-alone businesses may breach the principle of proportionality and may result in economically inefficient outcomes. It may also impose disproportionate burdens on merger parties and may delay, or in some cases prevent, transactions that are on balance procompetitive and for which adequate divestitures short of a stand-alone business are feasible. The Sections, therefore, urge that, alongside the Commission’s statement that a divestiture of a stand-alone business is generally preferred, it also make clear that the Commission is open to proposals that are likely to place divestiture buyers in the competitive status quo ante position of the merger party it is replacing and yet minimize the burden and costs of the relief for the transaction parties in a variety of circumstances, including, but not limited to, where there are practical difficulties with divesting a stand-alone business or where doing so will cause the divestiture of substantial assets that do not raise competitive concerns.<sup>2</sup>

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<sup>2</sup> See Canadian Merger Remedies Comments and UK Divestiture Remedies Comments.

Third, the Sections have a number of comments concerning the identification of suitable purchasers of divestiture assets, again focusing on flexibility and the aims of any divestiture remedy.

Fourth, the Notice should clarify the standard of review of remedy proposals as well as modifications of the terms of an approved undertaking.

Finally, we make certain suggestions regarding potential improvements to the discussion in the Notice of the Commission's review and implementation procedures concerning the: (1) confidentiality of terms; (2) prohibitions on reacquisition of assets; (3) obligations during the interim period; and (4) use of monitors and trustees.

### **1. 1. Flexibility is Key**

Tailoring merger remedies to address the issues raised by a specific transaction is not a "one size fits all" exercise. The Sections recognize the need for the Commission to obtain sufficient detail on proposed commitments to avoid subsequent problems relating to insufficient scope. The presumptive requirement that detailed information is required in every case (even, for example, in the case of the proposed divestiture of a pre-existing stand-alone business where the scope of that business is already clearly defined) could, however, result in lengthy and unnecessary delays and expense. Indeed, the current requirement in paragraph 27 that all assets and personnel be described in detail is problematic particularly given that a potential consequence of a failure to include all such assets and personnel in the detailed description of the business is the revocation of conditional clearance (footnote 34). The Sections would therefore suggest that the Commission consider including a statement that, in the case of a stand-alone business, the

level of detail required to comply with the information disclosure requirements in paragraph 27 is lower than would arise in carve-out situations.

Paragraph 29 imposes an obligation on the merger parties to identify the assets to be excluded and to show that the exclusion of the assets will not affect the viability and competitiveness of the business. Although the parties usually have the best information about which assets are needed by the divested business, in many cases the need for a particular asset will not be known until the divestiture buyer is identified. In these cases, it may be appropriate either to give the divestiture buyer an option on the particular asset at issue or allow the merged entity to make a showing about the necessity of including the asset at the time the divestiture buyer is identified, as appears to be contemplated in paragraph 31 of the Notice. The Commission should consider making clear that the requirements in paragraph 29 should be read subject to the possibilities outlined in paragraph 31. Moreover, the Commission could consider adopting a mechanism for granting waivers from the detail required by Form RM depending on the nature of the commitments offered.

Paragraph 14 concerns proposals that are extensive and complex. Although complexity may suggest an underlying problem with a divestiture package (for example, because the assets proposed to be divested are spread across a number of businesses), complexity alone ought not be the basis for rejecting a divestiture proposal. The Commission could address this point by indicating that it will review proposed commitments on a case-by-case basis, taking into account the totality of circumstances, and that complexity will be a factor in considering proposals but not a dispositive one.

Paragraph 34 suggests that in the case of a hostile bid, it may be more appropriate to require divestiture of the acquiring company's operations. Such a presumption, however, may unduly disadvantage a hostile bidder and provide a target's management with an inappropriate weapon to attack a hostile bid. The Commission should allow commitments to divest assets of the target company to resolve competitive issues as long as the major assets used in that business (such as production facilities) are easily identified.

Flexibility is also potentially important for the consideration of modifications. The Commission states in paragraph 70 that commitments will usually include a review clause allowing the Commission, upon request by the parties showing "good cause," to grant an extension of deadlines or to waive, modify or substitute the commitments, which appears to be a high threshold to satisfy. For instance, the "good cause" standard in paragraph 71 for an extension of time appears to be limited to situations involving extension of the divestiture period due to circumstances "outside" the party's responsibility.<sup>3</sup> Rather, the Commission could consider a "good faith" standard (i.e., reasonable extensions should be granted provided that the acquiring party is acting in "good faith"). Similarly, the "exceptional circumstances" standard discussed in paragraphs 72 and 73 of the Notice does not give the Commission sufficient flexibility to deal with all situations in which modifications of commitments may be justified. For instance, the focus on whether a modification may be requested should not be on whether several years has lapsed but rather whether market circumstances have changed

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<sup>3</sup> Consider for example a situation where a party subject to a divestiture commitment has been engaged in negotiations with multiple parties for the sale of the business being divested and subsequently enters into a binding agreement of purchase and sale but requires a limited extension of the divestiture period.

significantly to warrant such modification on the undertaking.<sup>4</sup> The Commission's statement in paragraph 72 that "*no changes of market circumstances will have occurred in such a short time-frame*" appears to be overly categorical and risks excluding the possibility of a changing competitive dynamic in a fast-moving or innovative market.

## **2. Scope of Acceptable Remedies Packages**

We fully appreciate the potential appeal of simply requiring structural divestitures of stand-alone businesses; we believe, however, it would be useful to specify: (1) what constitutes a stand-alone business and how to deal with shared-assets and personnel; (2) the circumstances in which divestitures of fewer assets or other forms of relief would also be acceptable; and (3) what criteria will be applied in determining the acceptability of the buyer.

First, Paragraph 25 requires that the divested business include all assets "which contribute to its current operation or which are necessary to ensure its viability and competitiveness." While a divestiture of all business assets may be necessary in some cases, it is also often the case that the buyer of a divested business will neither require nor want all of the assets used in connection with that business pre-transaction. For example, a buyer might have its own warehouse capable of efficiently handling distribution of divested products; or its own sales force and prefer not to assume responsibility for

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<sup>4</sup> For example, the test in Canada for whether remedies in a consent agreement can be varied or rescinded is whether "the circumstances that led to the making of the agreement ... have changed and, in the circumstances that exist at the time the application is made, the agreement ... would not have been made or would have been ineffective in achieving its intended purpose". No specific time limit is set. In *RONA*, an application was brought by the acquiring party and the consent agreement rescinded by the Competition Tribunal just 16 months after the consent agreement was entered into; see <http://www.ct-ct.gc.ca/english/CaseDetails.asp?x=68&CaseID=180#240>. Moreover, the Tribunal criticized the Competition Bureau for its lack of flexibility in approaching the application to rescind or vary in that case (the issue being whether the prospect of new entry had crystallized sufficiently to justify rescission of a requirement to divest).

additional sales personnel. Such a principle is accepted by the Commission in paragraph 31. Therefore, for the benefit of clarity, paragraph 25 could be modified to indicate that the divestiture should include only such assets of the current operations as may be needed or desired by the divestiture buyer to maintain the current operations of the acquired business.

Similarly, the requirement in paragraph 26 to divest shared assets and personnel necessary to the viability and competitiveness of the divested business should also be applied in a flexible manner to avoid a disproportionate disruption of the businesses being retained by the merger parties. For example, a quality control lab might test many products for the company, only one of which is to be divested. An appropriate service agreement, requiring the merged entity to provide testing services until the divested business is able to make alternative arrangements, might provide sufficient relief.

Also, where intangible assets or intellectual property such as patents are needed by the divested business and the retained business, the divested business might be adequately protected with a non-exclusive license rather than an outright transfer of the asset. For example, a chemical company might have process patents that are used in the production of various chemical products. It might be disproportionate to require the company to divest itself entirely of those process patents, and thereby jeopardize the efficiency with which it can produce its retained products, simply because it is divesting a single product or a portion of the products that is produced using the process patent. In addition, the merged company may achieve synergies through utilization of this intellectual property in the merged company. Paragraph 38's requirements for accepting a license rather than a divestiture of IP rights seem unduly restrictive. In some cases, the

Commission could permit the licensing back of divested IP rights, particularly where the merger parties will utilize the IP in products other than those that are the reason for the divestiture.

Paragraph 27 requires the remedy “to include a non-solicitation commitment by the parties with regard to key personnel.” The Commission might consider amending the Notice to clarify that such clauses should, in accordance with the principles applied by the Commission more generally, be of limited duration, perhaps one or two years, rather than a lasting restriction on the ability of the parties to solicit key employees. After a transition period, the merged entity should be free to compete vigorously in all aspects with the divested business, just as it would with other competitors.

Paragraph 61 states that the Commission may accept non-divestiture commitments in circumstances where the remedy proposed is equivalent in its effects to a divestiture. To illustrate this point, however, footnote 65 cites a case in which non-divestiture commitments were accepted “where a divestiture was impossible,” thereby potentially suggesting that the Commission will only accept behavioral remedies where divestitures are impossible. Such a position would be inconsistent with both the principles expounded in earlier parts of the Notice (for example in Paragraph 15) and the European case law.<sup>5</sup> This ambiguity could be clarified by either citing a different case or deleting the footnote altogether.

Paragraph 63 states that “access remedies may be acceptable to the Commission in circumstances where it is sufficiently clear that there will be actual entry of new competitors that would eliminate any significant impediment to effective competition.”

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<sup>5</sup> See, e.g., Case T-114/02, *Babylist v. Commission* [ECR] 2003 II-1279, paragraph 170.

The same paragraph states that if access commitments “actually make the entry of sufficient new competitors timely and likely, they can be considered to have a similar effect on competition in the market as a divestiture.” The paragraph therefore appears to articulate two different standards for the acceptance of access commitments; we suggest the Commission include only the second standard to clarify that the Commission does not require proof that there will be actual entry of new competitors. Paragraph 65 appears to suggest that the Commission will routinely require in licenses or access remedies the disclosure of interoperability information to address putative foreclosure effects; such provisions should be imposed only in exceptional cases.

### **3. Permissible Purchasers**

The Sections have some observations regarding the Notice’s discussion of a suitable purchaser.

First, financial buyers can have significant resources and management expertise, and they are often able to improve the efficiency of the businesses they acquire; accordingly, we are unaware of any basis for disfavoring financial buyers.

Second, in the purchaser approval process discussion (paragraphs 99 et seq.), the Commission should indicate that it would be willing to pre-approve several potential identified purchasers before final agreement is reached with any one of them.

Third, the merger parties should not be required to ensure, by means of the purchase agreement, that the purchaser maintain the divested business as a competitive market force. There are always winners and losers in competitive markets, and the purpose of sound merger remedies, like the purpose of all antitrust enforcement, is not to assure a market place result, but to protect the competitive process. Such a contractual

commitment is not only atypical from a commercial standpoint and difficult to negotiate and enforce, but it may in itself have anticompetitive effects. It is also a change from the premerger situation (as there was previously no guarantee that the original owner would have continued to operate the target business as a competitive force).

#### **4. Standard of Review**

The Sections welcome the Commission's straightforward explanation that a divestiture should seek to maintain effective competition such that if operated by a suitable purchaser, it can compete effectively with the merged entity. A useful clarification point, however, would be to recognize expressly that the goal of a merger remedy is to preserve the competitive level of the status quo ante, not to enhance it. Thus, merger parties need not make the divestiture buyer more competitive or able to compete on a more lasting basis than would have been likely on a stand-alone basis absent the merger. Such clarification would ensure that in those cases where a competitive overlap involves a relatively weak business, the merger parties do not have the disproportionate burden of improving the competitiveness or durability of the divested business.

We also commend the Commission for routinely considering merger remedies in the initial phase of its investigation as well as in the context of an in-depth review. This clearly benefits merging parties by offering the option of obtaining Phase I clearance even where there are clear competitive issues with a transaction. Paragraph 18 describes the standards the EC Merger Regulation prescribes for considering remedies in Phase I (sufficient to rule out "serious doubts") and Phase II (sufficient to eliminate "significant impediments to effective competition"). Although the meaning of these terms is well

documented in the Commission's decisional practice and CFI judgments, the Notice's discussion could be interpreted to require commitments in Phase I proffers that would potentially not be defensible following a Phase II investigation. The Notice should state that to the extent feasible, the Commission will seek the same relief from the parties throughout the process.

The Notice also recognizes the potential use in certain undertakings for up-front buyers or fix-it-first solutions. Paragraph 36 currently contemplates that, where a carve-out is "not possible" or "particularly difficult," the parties can provide certainty as to the viability of a business by proposing an up-front buyer solution. At paragraph 31, the Commission states it may approve the divestiture to the proposed purchaser without one or more assets or some/all of the personnel if this does not affect the viability and competitiveness of the business to be divested after the sale, taking account of the resources of the proposed purchaser. In line with this policy, this option should be available regardless of whether the carve-out of a viable stand-alone business is possible or not particularly difficult if, in the up-front buyer's hands, it is adequate.

It would be helpful for the Commission to give a more detailed description of when it considers a "fix-it-first" remedy is appropriate rather than an "up-front buyer" solution. The up-front buyer requirement gives the Commission the opportunity to review the qualifications of the buyer before permitting the main transaction to close, thereby eliminating the risk that the remedy will fail for inability to identify an appropriate buyer. It remains unspecified in what particular circumstances an "up-front buyer" solution might not be sufficient, thereby necessitating the parties to consummate a

binding agreement with the identified purchaser as an aspect of the divestiture commitments before proceeding with the primary transaction.

Paragraph 74 contemplates the inclusion of a clause in the commitments allowing the Commission to trigger unilaterally a limited modification, agreed to in advance by the parties. Because all contingencies in relation to the implementation of commitments cannot be anticipated at the time of the adoption of the Commission's decision, such provisions should be rarely, if ever, imposed. If the Commission has in mind specific circumstances where such a clause may be appropriate, then it should provide in the Notice specific examples.

## **5. Suggestions for Implementation and Review Provisions**

The Notice expressly addresses the issue of confidentiality in the context of the divestiture process, balancing the desirability of transparency in the merger review process, including divestiture processes, with the need to ensure that certain aspects of consent agreements (and other negotiated settlements) remain confidential. Paragraph 78 (d) raises concerns, however, to the extent the disclosure of confidential information is deemed necessary for full third party assessment (so-called "market testing") of the commitments. Although market testing promotes transparency of the merger review process, which, "should improve the overall robustness of the outcome,"<sup>6</sup> the Commission should carefully assess the need to disclose the information so as not to permit such testing to be used by competitors to game the process. For instance, although the disclosure of the divestiture period typically should not, in itself, permit third parties

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<sup>6</sup> *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](http://www.internationalcompetitionnetwork.org/ICN_Remedies)_StudyFINAL5-10.pdf).

to undermine the process, the disclosure of unusually short (3-6 months) divestiture periods, as well as other components of many consent agreements, may have harmful implications for the long term efficacy and fairness of the divestiture process. The crown jewel provisions specified in Paragraphs 44 through 46 can similarly raise certain gaming concerns and should be required by the Commission only in extraordinary circumstances, if ever. The implementation of such provisions could even compromise the achievement of some of the synergies from the transaction, possibly with no corresponding benefit to competition.<sup>7</sup> The Commission should seek to avoid situations that allow third parties to manipulate the process and impose such costs on the merger parties. At a minimum, the 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 attempt to extract crown jewels from the parties, knowing that they are subject to short time periods to effectuate their divestiture.

Paragraph 66 provides market participants with “monitoring” commitments through the availability of a dispute resolution mechanism. Yet, paragraph 127 states that the Commission will “often” require the involvement of a trustee to oversee the implementation of non-divestiture commitments and the establishment of a fast-track arbitration procedure in order to provide for a dispute resolution mechanism and to render the commitments enforceable by the market participants themselves. For consistency, the Commission’s position regarding the involvement of a trustee in the monitoring of access commitments should be clarified.

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<sup>7</sup> Because of these concerns and others, the U.S. Department of Justice has stated in its Policy Guide to Merger Remedies (October 2004) that crown jewel provisions are “strongly disfavored.”

The Notice appears to view the appointment of a monitoring trustee as a routine requirement for divestiture commitments. The Sections would welcome a more flexible approach with a case-by-case assessment of the need for a monitoring trustee. The appointment of a monitoring trustee involves considerable burdens on the parties as well as the Commission. While a monitoring trustee may be appropriate in carve-out situations, the divestiture of a standalone business or the exit from a joint venture can be fairly straightforward. The Sections urge the Commission to consider in each individual case whether such a trustee is really necessary, or causes only additional costs for the merging parties without adding much value for them or the Commission. This is particularly the case in situations where a clearly defined business is to be sold and the Commission or the buyer can easily confirm that what is sold is the full and viable business that was to be sold under the commitments. Further, the Notice foresees a number of other safeguards, such as the appointment of a hold-separate manager, regular reporting requirements, incentive systems such as upfront-buyer and crown-jewel provisions, and the appointment of a divestiture trustee during the second divestiture period. The Commission should assess in each case whether a monitoring trustee or any of these other safeguards is truly necessary.

It is unclear why in paragraph 97 using the closing date as a trigger for the divestiture period is the exception rather than the rule. There are often substantial delays between the Commission's approval decision and closing, for example because of delays in obtaining merger clearance in other jurisdictions or shareholder approval requirements. In such situations, it is unrealistic to expect the merging parties to be focused on

implementing divestiture remedies, especially if there is uncertainty as to whether the deal will close at all.

On the issue of earn-outs as part of a sale and purchase agreement (paragraph 101), the Commission should consider a more flexible approach. While giving the seller a substantial share of the divested business' profits may raise the same incentive concerns as a substantial minority shareholding in a direct competitor, an earn-out may also create a strong incentive for the merger parties to transfer a viable business, while not burdening the purchaser with additional financing.

As regards the appointment of a hold-separate manager (paragraph 110), the Commission should consider distinguishing between the buyer and the target. As a legal matter, the buyer cannot commit to install a hold-separate manager at the target until closing, so the buyer cannot be forced to put in place a hold-separate manager "immediately after the adoption of the decision." Nor should the inclusion of a crown jewel provision require, as indicated in paragraph 45, that both the primary asset to be divested and the crown jewel asset must be held separate. Rather, competition may be preserved in the interim period if the hold separate obligation is limited to the primary assets to be divested and the parties are required to preserve the crown jewel assets.

The Commission may also consider specifying the tasks it expects the monitoring trustee to perform. For instance, it would appear unnecessary for the monitoring trustee to attend every meeting with potential buyers or to review every draft of the sales and purchase agreement. The type of remuneration scheme the Commission normally requires (hourly rates without a cap) provides an incentive for trustees to adopt the broadest possible interpretation of their mandates. Given the monitoring trustee's

important advisory role to the Commission, the merging parties are typically reluctant to complain to the Commission about situations of overreaching. Some ex-ante guidance by the Commission would help avoid abuses by monitoring trustees.

The Sections would also welcome the Commission's specifying its own role in the divestiture process, in particular its own commitment to ensuring speedy approval of trustee candidates, mandates, and work plans, as well as proposed purchasers and sale and purchase agreements. Delays during the Commission approval process result in uncertainty and potential selection of suboptimal choices by the merger parties. For example, if the merging parties are not able to close the transaction until the Commission has approved the monitoring trustee (see paragraph 120), this may cause the merger parties to propose a divestiture trustee simply because the Commission's decision on approving a proposed purchaser is still outstanding (see paragraph 120 and footnote 113). Ideally, the Commission would commit itself to a certain time frame (for example 5-7 working days) after which approval is deemed to have been granted if the Commission has not given any indication to the contrary. As a general comment, the Sections also urge the Commission to consider specifying a term to all non-divestiture commitments. Without an expiration date, remedies may impose unnecessary burdens on the parties, long after the remedies have ceased to have continued relevance in the marketplace.

The draft Notice would also benefit from an expanded discussion of the respective roles of (i) negotiations between the parties; (ii) involvement of the monitoring trustee; (iii) arbitration proceedings; and (iv) the Commission's own interpretation of the non-structural commitments. In particular, the Commission should clarify the extent and timing of its own involvement in the resolution of such disputes. For example, it would

make little sense for the parties to go through a fast-track arbitration procedure only to have the Commission overrule the arbitration panel's decision as not being a faithful interpretation of the merging parties' duties under the commitments.

**Conclusion**

The Sections appreciate the opportunity to submit these comments and hope that they are helpful to the Commission as it finalizes the Notice.