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February 28, 2003

**Via E-Mail and Federal Express**

European Commission
Competition Directorate - General
- Best Practices on Merger Procedures -
B-1049 Brussels
BELGIUM

**Re: Best Practices on the Conduct of EC Merger Control Proceedings**

Ladies and Gentlemen:

The Section of Antitrust Law and the Section of International Law and Practice (together, the "Sections") of the American Bar Association welcome the opportunity to respond to the request of the European Commission for comments on the Draft Best Practices on the Conduct of EC Merger Control Proceedings (the "Best Practices"). 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.

In issuing the Best Practices, DG Competition has taken an important step to enhance the transparency and predictability of the merger review process. We have a number of comments on specific provisions, which are detailed in the attached table. The majority of the specific comments reflect a number of general concerns, outlined below, to which the Sections would urge DG Competition to be alert as it finalizes the Best Practices. We also attach a timeline that we have developed to aid interpretation of the Best Practices.

The Sections appreciate DG Competition's desire to clarify its procedures and to maximize the opportunities for informal contact between the case team and the notifying parties. We are, however, concerned that the Best Practices could place unnecessary additional burdens on notifying parties in certain cases. In particular, while the formalization of the pre-notification process may be appropriate for large or complicated transactions, the Sections are concerned that the proposed process may be more costly and burdensome than is appropriate for transactions that do not raise material competitive concerns, such as transactions qualifying for consideration under the simplified procedure. We would suggest clarifying, throughout the Best Practices, that the proposed procedures may not be applicable in their entirety to all merger notifications, and that the particular process to be followed at each stage of the review will be determined on a case-by-case basis.

With the above comment in mind, the Sections would also alert DG Competition to the example that these Best Practices will set for other jurisdictions, including present and potential member states, that may develop or revise their respective merger review processes. The Best Practices describe procedures that will impose a relatively onerous front-end burden on merging parties. By virtue of the jurisdictional thresholds in the Merger Control Regulation, the transactions that come before DG Competition are typically large, and many are complex. For that universe of transactions, the procedures described in the Best Practices are not necessarily disproportionate, particularly if they are administered with the considerable flexibility that characterizes the DG Competition merger review process in practice. We are concerned, however, that national competition authorities may elect to apply analogous practices in whole or in part to smaller transactions, possibly without incorporating the necessary degree of flexibility. In such instances, and particularly as to individual transactions that are subject to review before multiple competition authorities and that do not raise material competitive concerns, literal application of the procedures described in the Best Practices would be unduly burdensome and disproportionately costly. If the Best Practices are widely emulated without sensitivity to the transaction costs that they impose, we fear that capital markets for multi-jurisdictional transactions will be adversely affected. The wisdom and flexibility that DG Competition has gleaned through practical experience are not fully communicated in the draft document. We hope that the final version can be appropriately refined and qualified in view of the sensitivities flowing from the important leadership role that DG Competition plays in this field.

The Sections also wish to highlight the fine balance that necessarily exists between transparency (as it relates to the ability of the notifying parties to effectively respond to submissions or comments made by third parties) and confidentiality (as it relates to such third party submissions or comments). The Best Practices introduce several initiatives to improve the existing review process, such as permitting third parties to make observations orally. They also address the need for notifying parties to be able to respond to such comments by granting them access to the Commission's file during Phase I investigations and encouraging them to participate in triangular meetings with the Commission and third parties. The Sections respectfully submit, however, that the Best Practices ought to include further guidance with respect to the procedures for addressing confidentiality and anonymity requests made by third parties (in appropriate cases). In particular, the way in which the ability of notifying parties to respond effectively to third party comments will be protected should be addressed. We would, in general, urge DG Competition to carefully consider the appropriate balance between informality and transparency as it finalizes the Best Practices.

Finally, the Sections would make two observations with respect to matters that are not addressed in detail in the draft Best Practices. First, with respect to the proposal of remedies, the Sections would welcome further guidance than is provided in paragraph 36 of the Best Practices with respect to the timing of remedy proposals, the procedures and time frames applicable to DG Competition's market testing of remedy proposals, and the mechanisms available to notifying parties' for responding to the results of such testing. Second, we note recent public discussion of the possible inclusion of an internal 'devil's advocate' panel in DG Competition's merger review process. The Sections would encourage DG Competition to consider including within the Best Practices guidance with

respect to cases in which such a panel would be created, when and where it would meet, and how and when notifying parties would be expected or permitted to interact with it.

The Sections appreciate this opportunity to comment on the Best Practices and hope that DG Competition will find our suggestions productive and helpful as it finalizes the Best Practices.

Sincerely,

Robert T. Joseph

Chair, Section of Antitrust Law

Don S. De Amicis

Chair, Section of International Law and Practice

**BEST PRACTICES ON THE CONDUCT OF EC MERGER CONTROL PROCEEDINGS**

| EC TEXT | COMMENTS |
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| **1. SCOPE AND PURPOSE OF THE BEST PRACTICES** | |
| 1. The principal aim of this document is to set out best practices regarding the day-to-day conduct of EC merger control proceedings, both from the perspective of DG Competition and from the perspective of the companies or individuals concerned and their legal advisors. The best practices aim to increase understanding of the investigation process, and thereby to further enhance the efficiency of investigations and to increase the overall transparency and predictability of the review process. In particular, they aim at making the short time available in EC merger procedures as productive and efficient as possible by addressing procedural, legal and substantive issues at an early stage of the process. This will provide advantages for all parties involved by concentrating resources on the most relevant issues. | |
| 2. The best practices are built on the experience to date of DG Competition in the application of Council Regulation (EEC) No 4064/89[3] (the Merger Regulation). They also draw on feed-back received from discussions held with the legal and business community and from submissions received in reply to the Green Paper on the Review of the Council Regulation (EEC) No 4064/89. They are intended to foster and build upon a spirit of co-operation and better understanding between DG Competition and the legal and business community.<br>[3] Council Regulation No 4064/89, OJ L 395, 30.12.1989 p. 1; corrigendum OJ L 257 of 21.9.1990, p. 13; Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9. 7. 1997, p. 1, corrigendum OJ L 40, 13.2.1998, p. 17). | |

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| **2. RELATIONSHIP TO COMMUNITY LAW** | |
| 3. These best practices are intended to provide practical guidance as regards the conduct of EC merger control proceedings. However, the specificity of an individual case may require an adaptation of, or deviation from, the best practices depending on the case at hand. | The Sections suggest that it be clarified that DG Competition will inform notifying parties as soon as possible if it intends to deviate from the Best Practices. |
| 4. The best practices do not, indeed cannot, alter any rights or obligations as set out in the Treaty establishing the European Community, the Merger Regulation and its Implementing Regulation[4], as amended from time to time and as interpreted by the case-law and by the Commission's interpretative notices. They do not apply to proceedings under Council Regulation No 17 implementing Articles 85 and 82 [now 81 and 82] of the Treaty[5].<br>[4] Commission Regulation (EC) No 447/98, OJ L 61, 2.3.1998, p.1<br>[5] OJ P 013 , 21/02/1962 p. 204 . 211. | |
| **3. PRE-NOTIFICATION**<br>*Purpose of pre-notification contact* | |
| 5. As a general rule, DG Competition finds it useful to have pre-notification contacts with notifying parties even in seemingly non-problematic cases. DG Competition will therefore always give notifying parties and other involved parties the opportunity, if they so request, to discuss an intended concentration informally and in confidence prior to notification (cf. also Recital 10 Implementing Regulation). | With a view to assisting DG Competition to further clarify the merger review process, the Sections have created a timeline that reflects our understanding of the process as set out in the Best Practices. We would suggest including the timeline (or a similar document) in the Best Practices, to further illustrate the meeting timetables and other suggested time frames described in the Best Practices. |

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| 6. Pre-notification contacts provide DG Competition and the notifying parties with the possibility, prior to notification, to discuss jurisdictional and other legal issues. They also serve to discuss issues such as the scope of the information to be submitted and to prepare for the upcoming investigation by identifying key issues and possible competition concerns at an early stage. | The Sections appreciate DG Competition's willingness to discuss these issues with potential notifying parties prior to notification. We would suggest clarifying that the procedure for pre-notification contacts is without prejudice to DG Competition's willingness to discuss jurisdictional and/or legal issues outside that context and on a non-binding basis. |
| 7. Further, it is in the interests of DG Competition and the business and legal community to ensure that notifications are complete from the outset so that declarations of incompleteness are avoided as far as possible. It is DG Competition's experience that, in cases in which notifications have been declared incomplete, the notifications were usually not preceded by a pre-notification contact, or that such contacts were very limited. This points to the conclusion that, in the absence of any pre-notification discussions, there is a higher risk of a declaration of incompleteness. Accordingly, it is recommended that notifying parties contact DG Competition prior to notification and discuss all relevant issues in an open manner. | |
| *Initial contacts* | |
| 8. To facilitate the selection of a DG Competition case-team, the parties that intend to notify a proposed transaction ("notifying parties") should initially submit a short memorandum that includes a brief background to the transaction, together with a brief description of the relevant sector/s and market/s involved, as soon as feasible[6]. Memoranda relating to new cases should ideally arrive by Friday noon at the latest in order to allow for timely allocation of case teams by DG Competition management[7].<br>[6] It is strongly recommended that this memorandum be in the language of the eventual notification in order to allow for the appropriate allocation of case teams with regard to linguistic capabilities.<br>[7] Such management meetings normally take place on Mondays. | The Sections refer to the general comments set out in our cover letter. We are concerned that when considered together with the requirement of a second possible memorandum (paragraph 13) and/or a draft Form CO (paragraph 16), the formalization of this pre-notification memorandum requirement may unduly burden notifying parties (particularly where the transaction under review does not raise material competitive concerns). In our experience it is often not necessary for the notifying parties to prepare each of these documents. We do not understand DG Competition's intention to be that all notifying parties will be required to submit multiple pre-notification memoranda and a draft Form CO, and we would suggest that the Best Practices be clarified accordingly. |

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| 9. After initial contacts have been made between the case-team and the notifying parties it will be decided, depending on the case in question, whether a pre-notification meeting is called for or whether it will suffice for the case-team to make comments in writing, or on the phone, on the memorandum or on a draft Form CO**.** | The Sections suggest that it be clarified that the case team will be available to meet with the notifying parties, even if the case team does not believe such a meeting is necessary based on the initial contacts. |
| *Conduct of pre-notification discussions and meetings* | |
| 10. Pre-notification discussions should be held in an open and co-operative atmosphere. Information relating to all potentially affected markets and possible competition concerns should be fully and frankly disclosed by the notifying parties, even if they may ultimately take the view that some or all of those markets are not in fact affected, and notwithstanding that they may take a particular view in relation to, for example, the issue of market definition. In addition to substantive issues, the notifying parties may wish to seek DG Competition's opinion on jurisdictional questions, including the possibility of referrals to or from national EU jurisdictions, parallel proceedings in other non-EU jurisdictions and the issue of waivers on information sharing with other jurisdictions. As regards transactions likely to be reviewed in more than one jurisdiction, DG Competition may offer the notifying parties the possibility to discuss the timing of the case with a view to facilitating inter-agency co-operation. In this regard, notifying parties should have regard to the US-EU best practices on co-operation in merger investigations.[8]<br>[8] http://europa.eu.int/comm/competition/mergers/others/eu_us.pdf | The Sections appreciate DG Competition's preference for the provision of comprehensive information by the notifying parties at an early stage. We are, however, concerned that the suggestion that the parties should be in a position to discuss "all potentially affected markets and possible competition concerns" is unrealistic, especially at a pre-notification meeting. The Sections suggest re-drafting the second sentence of the paragraph as follows:<br>*"Notifying parties should feel free to discuss all potentially affected markets, the possible definitions of such markets and potential competition concerns with the case team. DG Competition recognizes however, that the notifying parties may not, at this stage, be in a position to discuss comprehensively the competition implications of the proposed transaction. DG Competition notes that such discussions, in so far as they are possible, will be held without prejudice to the notifying parties' freedom to adopt an alternative position with respect to affected markets, market definitions or competition concerns, in their Form CO filing."* |
| 11. A first pre-notification meeting should preferably be held at least one or two weeks before the expected date of notification. In more difficult cases, a more protracted pre-notification period may well be appropriate, possibly including several pre-notification meetings. | The Sections suggest that it be clarified that a pre-notification meeting may not be necessary in every case, as indicated in paragraph 9. The following alternative first sentence could be inserted at the beginning of this paragraph:<br>*"If a pre-notification meeting is to be held, it* should preferably be held at least one to two weeks before the expected date of notification." |

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| 12. It is generally preferable that both legal advisers and business representatives who have a good understanding of the relevant markets, are available for pre-notification discussions with the case-team. This normally results in more informed discussions at the pre-notification stage on the business rationale for the transaction and the functioning of the markets in question. To facilitate co-operation between the case-team and the notifying parties, it may also be appropriate for the notifying parties to provide the case-team with their relevant contact details including, where relevant, their area of responsibility, to enable both sides to address specific questions more efficiently. | The Sections appreciate the potential usefulness of including business people from the notifying parties in at least some pre-notification meetings, and also understand that DG Competition may wish to develop a working party list with contact details to be able to communicate more efficiently with such persons after the pre-notification meeting. We would, however, suggest clarifying that the exchange of contact details is only requested in circumstances where a pre-notification meeting is to be held (cf. paragraphs 9 and 11).<br><br>The Sections are also concerned that the inclusion of business people in pre-notification meetings, as a matter of course, may lead to inefficiency, especially in cases that involve multiple overlaps and/or vertical relationships involving different parts of the businesses of the notifying parties. The involvement of relevant business persons in such cases could greatly expand the number of people involved and may in some cases make pre-notification meetings less efficient. We would suggest making the attendance of business people a matter to be decided on a case-by-case basis by the notifying parties and their counsel.<br><br>The Sections would also suggest that DG Competition clarify that, if the notifying parties are represented by counsel, the case team will not contact business representatives of the notifying parties directly without making prior arrangements with such counsel. The Sections are concerned by the risk of confusion, and ultimately the reduction in efficiency, that may occur if the case team were to seek or maintain direct contact with a large number of business people from a notifying party, rather than with a small, discrete team of representatives. |
| *Information to be provided* | |
| 13. In order to prepare for the first pre-notification meeting, the notifying parties should submit either a substantive briefing memorandum that includes a brief background to the transaction and an overview of the relevant sector/s and market/s involved[9] or, alternatively, a draft Form CO, at least three working days before the meeting. In case of voluminous submissions, this time should be extended. The format and the timing should be decided together with the case-team prior to the meeting. | The Sections appreciate DG Competition's willingness to consult with notifying parties prior to the first pre-notification meeting, and appreciate the importance of adequate briefing materials to make such consultations as productive as possible. In certain cases, however, submission of a briefing memorandum or a draft Form CO may not be necessary. The Sections suggest that the final sentence of this paragraph be re-worded as follows: |

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| [9] In principle, DG Competition finds briefing memoranda useful even where a draft Form CO is provided | *"Representatives of the notifying parties are encouraged to discuss the usefulness, form and content of such submissions with the case team prior to submitting them."*<br><br>The Sections also suggest clarifying that whether a second and separate memorandum (as referred to in this paragraph) is necessary or appropriate, may depend on the comprehensiveness of the preliminary memorandum referred to in paragraph 8. See also our earlier comments with respect to paragraph 8. |
| 14. In addition, in order to allow for a fruitful discussion and preparation of the Form CO notifying parties should as early as possible in pre-notification provide DG Competition with internal documents such as board presentations, surveys, analyses, reports and studies discussing the proposed concentration, the concentration's economic rationale and competitive significance or the market context in which it takes place. Similarly, it is also recommended that notifying parties put forward, already at the pre-notification stage, any elements demonstrating that the merger leads to the development of economic and technical progress to consumers' advantage (fn 2.1.b/Form CO) ("efficiency claims") that they would like the Commission to take into account in its assessment of the transaction. | Section 5.4 of the Form CO requires notifying parties to attach copies of "analyses, reports, studies and surveys submitted to or prepared for any member(s) of the board of directors, the supervisory board or the shareholders' meeting, for the purpose of assessing or analyzing the concentration with respect to competitive conditions, competitors (actual or potential), and market conditions". The Sections note that the list in paragraph 14 of documents that the notifying parties "should" provide is much broader than the list in the Form CO: it requires submission of a wider array of documents and is not limited to affected markets.<br><br>The Sections are concerned by DG Competition's suggestion that notifying parties "should" provide the listed documents at the pre-notification stage. We believe that the provision of documents at the pre-notification stage is inconsistent with DG Competition's commitment to informality and efficiency and with its encouragement of pre-notification contacts early in the process. Many of the referenced documents are often still in preparation at this stage: requiring that they be produced would lead to unnecessary confusion and administrative work as the documents initially submitted are updated and new versions are submitted by the notifying parties. Moreover, our experience is that many cases can be and are now resolved without requiring the production of such documents. We believe that DG Competition's current treatment of supporting documents is effective and normally efficient, particularly with |

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| | respect to uncomplicated transactions. We would encourage DG Competition to reconsider this broader requirement in light of the impact that a pre-notification document production requirement could have on that process.The DG Competition could address the Sections' concerns, perhaps by amending the first sentence of paragraph 14 as follows:<br><br>"In addition, in order to allow for a fruitful discussion and preparation of the Form CO, notifying parties may, during pre-notification, provide DG Competition with *documents that are responsive to Section 5.4 of Form CO. The notifying parties may also wish to submit other documents such as market* surveys, analyses, reports and studies *to aid the case team's understanding of the* proposed concentration, the concentration's economic rationale and competitive significance or the market context in which it takes place.<br><br>*Notifying parties that submit documents during the pre-notification phase will not be considered to have made any representations with respect to the eventual scope of their Article 5.4 response, nor will parties be penalized in any way for failing to disclose a document during pre-notification that is subsequently submitted in response to Article 5.4."*<br><br>The Sections are also concerned that the recommendation that notifying parties present their "efficiency claims" at this stage in the review process may place an unrealistic burden on the notifying parties. It is our experience that at this stage of the negotiation of a potential transaction, notifying parties often have only a general sense of possible synergies, rather than precise estimates of the efficiencies to be generated by the transaction. We would suggest softening the language in this paragraph such that parties are *encouraged* to discuss possible efficiencies with the case team *to the extent feasible at this stage of the transaction*, rather than *recommended* to do so. |

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| 15. During the course of the pre-notification discussions, the parties may request that it is not necessary to provide all the information specified in Form CO. All requests to omit any part of the information specified should be discussed in detail and any waiver has to be agreed with DG Competition prior to notification. In addition**,** wherever there may be uncertainty or differences of view over market definitions, it will be more prudent to provide market shares on one or more alternative basis -e.g. on the basis of possible alternative product market definitions. | The Sections suggest creating a new sub-section of the Best Practices, including paragraphs 15 through 18 and entitled "Submission of the Draft Form CO". We would further suggest swapping the order of paragraphs 15 and 16 such that paragraph 16 appears first.<br><br>More substantively, the Sections would suggest that DG Competition consider providing notifying parties with further guidance, either within these Best Practices or in a related document, with respect to the circumstances in which it would be appropriate for notifying parties to seek a limited or partial Form CO waiver. DG Competition could perhaps, by way of example, issue a list of circumstances where they have issued waivers in the past. |
| 16. Irrespective of whether pre-notification meetings have taken place or not, the notifying parties should provide a substantially complete draft Form CO before notification. DG Competition should normally be given five working days to review the draft before being asked to comment, at a meeting or on the telephone, on the adequacy of the draft. In case of voluminous submissions, this time should be extended. | The Sections suggest re-wording the first sentence of this paragraph as follows:<br><br>*"The notifying parties should provide a substantially complete draft Form CO before notification (taking account of requests to omit part of the information required by the form), whether or not pre-notification meetings have taken place."*<br><br>The Sections also refer to their comments above in relation to paragraph 8. We are concerned about the potentially burdensome impact of the formalization of the requirements relating to the filing of pre-notification memoranda and a draft Form CO. |
| 17. Given that a notification is not considered effective until the information to be submitted in Form CO is complete in all material respects, the notifying parties and their advisers should ensure that the information contained in Form CO has been carefully prepared and verified: incorrect and misleading information is considered incomplete information[10]. In this regard, the notifying parties should take special care that the appropriate contact details are provided for customers, suppliers and competitors. If such information is not correct and provided in full it will significantly delay the investigation and therefore will normally lead to a declaration of incompleteness. | The Sections appreciate DG Competition's desire for complete and accurate contact details, but are concerned by the strength of the language regarding declarations of incompleteness in the final sentence of this paragraph. The Sections note that notifying parties often do not possess complete contact information, especially for competitors, and suggest that DG Competition consider revising its position regarding the provision of incomplete contact details, to accommodate good faith efforts by notifying parties. |

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| [10] In addition, the Commission may impose fines on the notifying parties where they supply incorrect or misleading information in a notification under Art. 14 (1) b Merger Regulation. | |
| 18. Further, to facilitate the effective and expeditious handling of their notification, notifying parties should also endeavor to provide the contact details electronically, at the latest on the day of notification, using the appropriate electronic form, which can be provided by the case team. | The Sections suggest inserting the words "of customers, suppliers and competitors" after "contact details" to remove any confusion regarding whose contact details are to be provided. More substantively, it may help to clarify the purpose of submitting such information electronically and the form in which it ought to be submitted, as many notifying parties may not have electronic contact information such as e-mail addresses for the relevant individuals. |
| **4. FACT FINDING**<br>*Requests for information* | |
| 19. In carrying out its duties the Commission may obtain all necessary information from relevant persons, undertakings, associations of undertakings and competent authorities of Member States (see Article 11(1) Merger Regulation). That investigation normally starts after the notification of a proposed concentration. However, DG Competition may exceptionally decide that, in the interest of its investigation, market contacts should be initiated informally prior to notification. Such pre-notification contacts/enquiries would normally only take place if the existence of the proposed transaction is in the public domain and if this has been agreed with the notifying parties. | The Sections appreciate that in certain cases it may be appropriate for the case team to commence its investigation prior to notification. In view of the potential confidentiality concerns raised by such 'pre-investigation' activity, however, the Sections would suggest strengthening the language in the last sentence to ensure that such activity should never take place without the consent of the notifying parties. |

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| 20. The investigation is mainly conducted in the form of Requests for Information (requests according to Article 11 Merger Regulation). The views of the notifying parties, other involved parties and third parties may also be sought orally. In the interest of an efficient investigation, DG Competition may decide to consult the notifying parties, other involved parties or third parties on methodological issues regarding data and information gathering in the relevant economic sector. In addition, it may also seek external economic and/or industrial expertise. | The Sections appreciate DG Competition's openness to informal contacts with the notifying parties and other interested parties. The Sections are, however, concerned about the ability of notifying parties to respond to oral complaints made by third parties. While informality can enhance efficiency, it may also undermine transparency. Our concerns would be minimized if DG Competition clarified the steps that it intends to take to inform the notifying parties of the substance of any complaints that it receives orally, as well as the theories of anti-competitive harm articulated.<br><br>See also our comments adjacent to paragraph 21 below, with respect to confidentiality and anonymity. |
| **5. COMMUNICATION AND MEETINGS WITH THE NOTIFYING PARTIES, OTHER INVOLVED PARTIES AND 3RD PARTIES** | |
| 21. One of the aims of these best practices is to improve transparency in the day to day handling of merger cases, and in particular to improve communication between DG Competition, the merging parties and third parties. In this regard, all parties involved in the proceedings should be given ample opportunities to have open and frank discussions with DG Competition and to make their points of view known throughout the procedure. | As noted above in relation to paragraph 20, the Sections are concerned about the need to ensure that all parties have adequate opportunities to respond to matters raised by third parties. Our concern is amplified in relation to Phase I investigations, during which the time available for response is extremely short. In particular, written submissions made by third parties in a form that does not permit the notifying parties to respond in a timely fashion can jeopardize the due process rights of the notifying parties and impair the efficiency of the review process. We therefore suggest that DG Competition consider additonal procedures to ensure that notifying parties are made aware of the substance of any third party complaints or submissions on a timely basis. One possible mechanism would be to require third parties to submit a non-confidential version of any submissions made, at the same time that their confidential version is submitted.<br><br>We recognize that in some cases a complainant may only be willing to comment on the transaction on an anonymous basis. We further recognize that there may be circumstances where the nature of the complaint may itself identify the complaining party (who has requested anonymity). DG Competition would ordinarily respect such a request for confidentiality or anonymity. We would, however, urge DG Competition to facilitate a compromise between the notifying and complaining parties, such that the former is still able to address the concerns of the latter in a timely manner. |

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| 22. These best practices will systematize practices already employed by DG Competition in order to increase transparency in the conduct of day to day case handling. Merging companies will be systematically offered the possibility to attend so-called "State-of-Play" meetings with DG Competition at decisive points in the procedure. This should guarantee that the notifying parties are updated on progress in the investigation, and that they are given an ongoing and ample opportunity to discuss the case with senior DG Competition management at key stages of the procedure. These best practices are also intended to enhance transparency by offering notifying parties the possibility of reviewing documents in the Commission's file early in the proceedings, and to confront the concerns of third parties at the earliest possible stages of the investigation. | The Sections suggest that the final sentence of this paragraph be expanded to clarify that Part 7 of the Best Practices specifically grants notifying parties access to the file at a much earlier stage than is currently required by Article 18(3). |
| **5.1 Meeting with notifying parties – "State of Play" meetings** | |
| 23. After notification, DG Competition will endeavor to maintain close contact with the notifying parties and discuss, to the extent necessary, any major legal or practical problems arising during the course of the investigation. In addition, the notifying parties are encouraged to inform DG Competition, as soon as possible, about any major developments relevant for the assessment of the proposed transaction, including e.g. remedy proposals they may be offering or considering to offer to merger control agencies in other jurisdictions, so as to facilitate co-ordination of the timing and substance of multiple remedy proposals. | The Sections suggest including a reference to the US-EU Best Practices on co-operation in merger investigations at the end of this paragraph, as appears at the end of paragraph 10. |

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| 24. To that end, DG Competition will as a rule offer the notifying parties the possibility to attend so-called "*State of Play meetings"* at key stages of its investigation. Senior DG Competition management will normally attend such meetings. | The Sections agree with DG Competition regarding the usefulness of "State of Play" meetings at key stages of its investigation. Presumably, such meetings are not intended to exclude more informal contacts between the notifying parties and the case team. The Sections would suggest clarifying that the case team remains available for informal meetings and other communications at the request of the notifying parties or other interested parties. Further, the Sections suggest clarification of the meaning of "key stages" perhaps through the inclusion of the following additional sentence (as the second to last sentence):<br><br>*"The stages at which DG Competition anticipates "State of Play" meetings will ordinarily take place are set out below in paragraphs 26 though 31 and are illustrated on the timeline attached to these Best Practices".* |
| 25. The main objective of the State of Play meetings is to improve transparency, and communication with the notifying parties. They should also serve to enhance the efficiency and quality of the investigation. The meetings are intended to provide an opportunity for the case team and the notifying parties to constructively discuss the investigation. These meetings are not intended to be overly formal; however, DG Competition will normally keep a record of the main points discussed. | As noted with respect to paragraph 24, the Sections believe that it would be useful to clarify that the State of Play meetings envisaged for key stages of the investigation do not exclude informal meetings and other communications of the types referred to above with respect to the pre-notification period.<br><br>The Sections also note that this paragraph raises similar questions to those raised by paragraph 20. Our concerns would be minimized if the Best Practices clarified the steps that will be taken by DG Competition to make notifying parties aware of factual assertions it intends to rely upon, where such facts have been made known to DG Competition orally. DG Competition may also consider clarifying the extent to which the record of main points discussed at State of Play meetings will be accessible by the notifying parties under the expanded access to the file proposed in Part 7 below. |
| 26. The *first State of Play meeting* should in principle take place in Phase I cases where it appears that "serious doubts" within the meaning of Article 6(1)(c) of the Merger Regulation are likely to be present. In those circumstances, the notifying parties will normally be offered a State of Play Meeting before the expiry of 3 weeks into Phase I. In addition to informing the | The Sections suggest clarifying that this first "State of Play" meeting will occur before the issuance of an Article 6(1)(c) decision. The second sentence could be amended as follows: |

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| notifying parties of the preliminary result of the initial investigation, this meeting provides an opportunity for the notifying parties to prepare the formulation of a possible remedy proposal in Phase I, with a view to rendering the concentration compatible with the common market, before expiry of the deadline provided in Article 18 of the Implementing Regulation. | "In those circumstances, the notifying parties will normally be offered a State of Play meeting *(before the issuance of the Article 6(1)(c) decision), within the first three weeks of the Phase I investigation."* |
| 27. If the Commission decides to initiate an in-depth investigation (Phase II) the notifying parties will be offered a *post 6(1)(c) meeting*, normally within 2 weeks following the adoption of the Article 6(1)(c) decision. In order to ensure a better preparation of this meeting, the notifying parties are invited to provide DG Competition with their comments on the 6(1)(c) decision and on any documents in the Commission's file which they have had the opportunity to review. Such comments should be provided in the form of a written memorandum sent in due time prior to the meeting. | The Sections would suggest clarifying this paragraph by re-wording the first sentence as follows:<br><br>"If the Commission decides, *by issuing an Article 6(1)(c) decision*, to initiate an in-depth investigation…".<br><br>The Sections understand that the invitation to provide comments on "any documents in the Commission's file which they have had the opportunity to review" is based on the increased transparency proposed in paragraph 39 (i.e. access to the file prior to issuance of the SO). We would suggest including a reference to paragraph 39, in order to clarify the basis for such possible review.<br><br>The Sections also suggest clarifying the purpose of the "due time" requirement referred to in the final sentence of this paragraph. The following language is suggested:<br><br>*"In order to allow the case team adequately to prepare its response to such comments, the notifying parties should ensure that a written memorandum containing their comments is provided to the case team in advance of the meeting. While this memorandum ought to be as comprehensive as possible, the notifying parties should not be limited to the comments made in the memorandum and should be free to make further comment should this become necessary in light of matters discussed at subsequent "state of play" meetings. The notifying parties should contact the case team to discuss an appropriate schedule for the filing of this memorandum."* |

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| 28. The purpose of the *post 6(1)(c) meeting* is to facilitate the notifying parties' understanding of the Commission's concerns at an early stage of the Phase II proceedings. The meeting also serves to assist DG Competition in deciding the appropriate framework for its further investigation by discussing with the notifying parties the market definition and competition concerns outlined in the 6(1)(c) decision. The meeting is also intended to serve as a forum for mutually informing each other of any planned economic or other studies and to discuss the approximate timetable of the Phase II procedure. | |
| 29. The notifying parties will typically be offered a *State of Play Meeting before the issuing of a Statement of Objections* (SO). This pre-SO meeting gives the notifying parties an opportunity to understand DG Competition's preliminary view on the outcome of the Phase II investigation and to be informed of the objections DG Competition is inclined to set out in the SO. The meeting may also be used by the case team to clarify certain issues and facts before it finalizes its proposal. | The Sections suggest further clarifying the timing of this pre-SO "State of Play" meeting, by inserting the following sentence as the second sentence:<br>*"SOs are generally issued 6-7 weeks after the Article 6(1)(c) decision. It is therefore anticipated that the pre-SO "State of Play" meeting will normally occur within 6 weeks after the Article 6(1)(c) decision."*<br>The Sections also encourage DG Competition to consider including in the Best Practices an undertaking to issue a Statement of Objections within 6 weeks of the Article 6(1)(c) decision, subject to the existence of exceptional circumstances. Furthermore the Sections would suggest that DG Competition consider providing notifying parties with a copy of the draft Statement of Objections prior to this proposed State of Play meeting. This would facilitate a more meaningful and substantive discussion at that meeting. |
| 30. Further, DG Competition will usually offer the notifying parties a *State of Play meeting following their reply to the SO and/or following the Oral Hearing*. This post-SO State of Play meeting provide the notifying parties with an opportunity to understand DG Competition's position after it has considered their reply and/or heard them at an Oral Hearing. If DG Competition indicates that it is minded to maintain some or all of its objections, the meeting may also serve as an opportunity to discuss possible remedy proposals. | |

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| 31. The notifying parties will normally be offered the possibility of attending a *final State of Play Meeting before the Advisory Committee*. The primary purpose of this meeting is to enable the notifying parties to discuss with DG Competition the latter's views on any proposed remedies and, where relevant, the results of any market testing of such remedies. It also provides the notifying parties, where necessary, with the opportunity to formulate improvements to their remedies proposal[11].<br>[11.] Modifications to remedies are only possible under those conditions set out in Article 18 of the Implementing Regulation and point 43 of the Commission's Notice on Remedies. | The Sections also suggest clarifying that this "State of Play" meeting will take place *before* the Advisory Committee meets, rather than *with* the Advisory Committee. |
| **5.2 Involvement of third parties** | |
| 32. According to Community law, third parties with a sufficient interest include customers, suppliers, competitors, members of the administration or management organs of the undertakings concerned or recognized workers' representatives of those undertakings[12]. Their important role in the Commission's procedure is stressed in particular in Article 18(4) of the Merger Regulation and Article 16 of the Implementing Regulation[13].<br>[12.] See Art. 11 of the Implementing Regulation.<br>[13.] As announced by the Commission on 11/12/2002, DG Competition will appoint a Consumer Liaison officer as a contact point for consumer organizations. | |
| 33. The primary way for third parties to contribute to the investigation is by means of replies to requests for information (Art. 11 Merger Regulation). However, DG Competition also welcomes any individual submissions apart from direct replies to questionnaires, where third parties wish to provide information and comments they consider relevant for the assessment of the given merger. DG Competition may also invite third parties for meetings to orally discuss and clarify specific issues raised. | With respect to the ability of the notifying parties to respond to comments made by third parties at meetings held pursuant to this paragraph, see our comments above in relation to paragraphs 20 and 25.<br>In relation to the submission of comments by third parties, whether unsolicited or in response to a *Request for Information*, see our comments above in relation to paragraph 21. |

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| 34. In case third parties wish to express competition concerns as regards the transaction in question or to put forward views on key market data and/or characteristics that deviate from the notifying parties' position, it is essential that they are communicated as early as possible to DG Competition, so that they can be considered, verified and taken into account properly. Any point raised should be substantiated and supported by examples, documents and other factual evidence. Furthermore, third parties should provide non-confidential versions of their submissions for the purposes of access to file, provision of documents before access to the file and triangular meetings (see further below). | See our comments above in relation to paragraph 21. |
| **5.3 "Triangular" and other meetings** | |
| 35. In addition to bilateral meetings between DG Competition and the notifying parties, other involved parties or third parties, DG Competition may decide to invite important "complainants"[14] and the notifying parties to a so-called "triangular" meeting where DG Competition believes it is desirable, in the interests of the fact-finding investigation, to hear the views of the notifying parties and complainants in a single forum to discuss the submissions made. This meeting, which will be on a voluntary basis, would take place in situations where two or more opposing views have been put forward as to key market data and characteristics and the effects of the concentration on competition in the markets concerned. Such triangular meetings should ideally be held as early in the investigation as possible in order to enable DG Competition to reach a more informed conclusion as to the relevant market characteristics and to clarify issues of substance before issuing an SO. Discussions will be held on the basis of non-confidential submissions from the notifying parties and the third party in question. | The Sections appreciate DG Competition's initiative to hold informal "triangular" meetings between the case team, third parties and the notifying parties at any early stage in the review process, before DG Competition finalizes its view as to whether a transaction raises serious doubts. The Sections hope that such triangular meetings will respond to some of the concerns that have been raised about the current oral hearing process.<br><br>The Sections note, though, that the triangular meetings proposed by DG Competition will, like the oral hearing, be fundamentally adversarial, even if less formal in nature. With this in mind, we believe that it is important to ensure that triangular meetings of the type proposed are governed by clear procedures. We also suggest that such procedures be either enunciated in the Best Practices, or referred to therein. The Sections do not envision complicated rules, but rather a set of basic principles drafted to ensure that the due process rights of attendees are not infringed.<br><br>The Sections note that the proposed triangular meetings will be voluntary. We believe that this is particularly important with respect to third party complainants and would urge DG Competition to ensure that the voluntary nature of these meetings is carefully maintained. |

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| [14.] The word, complainants, is to be understood in the non-technical sense of the term as no formal complaints procedure exists in merger cases. | With respect to the ability of the notifying parties to respond effectively to third party oral comments and written submissions, see our comments above in relation to paragraphs 20 and 21 respectively. |
| 6. **REMEDIES DISCUSSIONS** | |
| 36. As stated above, the State of Play meetings in both Phase I and Phase II, in addition to providing a forum for discussing the results of the market investigation and other issues related to the investigation, will also serve to discuss possible remedy proposals. Guidance on the requirements for such proposals are set out in the Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98[15] (the Remedies Notice). In particular, the Remedies Notice sets out the general principles applicable to remedies acceptable to the Commission, the main types of commitments that have previously been accepted by the Commission, the specific requirements which proposals of remedies need to fulfill in both phases of the procedure, and the main requirements for the implementation of remedies.<br>[15.] OJ C 68, 02.03.2001, p. 3-11, *http://europa.eu.int/comm/competition/*mergers/legislation/. | |
| **7. PROVISION OF DOCUMENTS IN THE COMMISSION'S FILE / CONFIDENTIALITY** | |
| **7.1 Access to the file** | |
| 37. According to Community law the notifying parties have a right to access the Commission's file after the Commission has set out its objections in the Statement of Objections (see Article | See comments above in relation to paragraphs 20, 25 and 33. The Sections believe it is important to clarify whether written records of factual assertions made in oral communications with notifying parties and third parties will be |

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| 18(3) of the Merger Regulation and Article 13(3) of the Implementing Regulation), subject to the legitimate interest of undertakings in the protection of their business secrets. | made, and, if so, the extent to which they will be accessible by the notifying parties pursuant to this Part 7 of the Best Practices, and the Commission's *Notice on Access to the File*. |
| 38. Following the issuing of an SO, the notifying parties will – in line with current practice – be given access to the Commission's file in accordance with Article 18(3) of the Merger Regulation. Further, the notifying parties will be given access to the file after the issuing of the SO until the consultation of the Advisory Committee. Such access will be given on a continuous basis or at predetermined intervals, as appropriate, taking into account the progress and proper running of the case. | |
| 7.2 **Increased transparency** | |
| 39. In addition to access to the file as set out in Article 18(3), DG Competition will, in the interest of the investigation and increased transparency already following the initiation of proceedings (after the Article 6(1)(c) decision), offer the notifying parties the opportunity to review submissions received during the investigation prior to the Article 6(1)(c) decision. Moreover, DG Competition will offer the notifying parties from the outset of the investigation the possibility to review on an *ad hoc* basis, at appropriate intervals, certain key documents, namely substantiated "complaints"[16] and market studies.<br>16. The word, complaints, is to be understood in the non-technical sense of the term as no formal complaints exists in merger cases. | The Sections welcome DG Competition's decision to make its file accessible to the notifying parties at an earlier stage than is currently required by Article 18(3). We understand that this paragraph proposes to give notifying parties selective access to the file prior to the issuance of an Article 6(1)(c) decision (during the Phase I investigation), and even broader access to the file after the issuance of the Article 6(1)(c) decision (during the Phase II investigation).<br><br>Given the significance of this change in DG Competition practice, the Sections suggest splitting this paragraph into two separate paragraphs, respectively addressing access to the file before and after the Article 6(1)(c) decision, and including in each paragraph a more detailed explanation of the scope of such access.<br><br>More substantively, the Sections suggest that DG Competition consider and clarify the mechanisms via which it will make notifying parties aware of factual assertions it intends to rely upon, where such facts have been made known to it through one or other of the oral consultation processes described above. |

| EC TEXT | COMMENTS |
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| 40. These measures are intended to enable DG Competition to verify earlier assertions and data received from the notifying parties, other involved parties and third parties but cannot be construed as creating any legal rights. In appropriate cases such verification could be facilitated by direct confrontation of opposing views at triangular meetings between the notifying parties, complainants, and the case-team as outlined above. | See comments with respect to triangular meetings, adjacent to paragraph 35 above. |
| 7.3 **Rules governing access to the file and provision of documents** | |
| 41. Provision or review of documents and access to the Commission's file will be conducted in accordance with the Commission's Notice on Access to file[17] and subject to the usual confidentiality restrictions as set out below.<br>[17.] OJ C 23, 23/01/97, p. 3; europa.eu.int/comm./ competition/antitrust/legislation/entente3_en.html#acces. This notice is to be revised in the course of 2003. | |
| 42. In accordance with Article 287 of the EC Treaty and Article 17(1) of the Implementing Regulation, the Commission will, throughout its investigation, protect confidential information and business secrets contained in submissions provided by all parties involved in EC merger proceedings. In accordance with Article 17(2) of the Implementing Regulation, companies should always provide the Commission with a non-confidential version of their submissions (responses to Article 11 letters, comments, complaints., etc.), from which business secrets and confidential information is deleted, at the time of submitting documents to the Commission. This is to ensure that such information is not communicated to the notifying parties when they are given the possibility to review any documents in the file. In case of uncertainty regarding such confidentiality matters, companies are encouraged to discuss immediately any queries on confidentiality with members of the case team. | See comments with respect to paragraph 21 above. |

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| **8. RIGHT TO BE HEARD AND OTHER PROCEDURAL RIGHTS** | |
| 43. The right of the parties concerned and of third parties to be heard before a final decision affecting their interests is taken is a fundamental principle of Community law. That right is also set out in the Merger Regulation (Article 18) and the Implementing Regulation (Articles 14-16). | |
| 44. These draft best practices do not alter any such rights under Community law. Any issues related to the right to be heard and other procedural issues, including disclosure of documents and access to the file, time limits for replying to the statement of objections and the objectivity of any enquiry conducted in order to assess the competition impact of commitments proposed in EC merger proceedings can be raised with the Hearing Officer, in accordance with Commission Decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings[18].<br>[18.] Official Journal L 162, 19/06/2001 P. 0021. 0024. The text can also be found at: http://europa.eu.int/ comm/competition/hearings/officers/ | |
| 9. **FUTURE REVIEW** | |
| 45. These best practices may be reviewed from time to time and, in particular, where changes are made to the legislative framework governing EC merger proceedings. DG Competition intends to engage, on a regular basis, in a dialogue with the business and legal community on the experience gained through the application of the Merger Regulation in general, and these best practices in particular. | |

# EU MERGER BEST PRACTICES TIMELINE