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European Commission draft Best Practices on the Conduct of EC Merger Control Proceedings

Comments prepared by the Commission on Competition, 27 February 2003

1. Introduction

ICC supports the European Commission (the "Commission") in its endeavour to modernise EC competition law and policy, as stated in ICC's comments on the Green Paper on the review of the EC Merger Control Regulation (the "ECMR") of 16 April 2002. ICC therefore welcomes the opportunity to comment on the Commission's draft Best Practices on the Conduct of EC Merger Control Proceedings, dated 19 December 2002 (the "Best Practices").

In ICC's view, the key aims in adopting best practices on the conduct of merger control proceedings include:

- minimising transaction costs for business and ensuring a speedy procedure, through the achievement of the highest possible levels of efficiency on the part of notifying parties and the Commission without compromising fundamental principles of fairness and due process;
- ensuring transparency whilst protecting the confidentiality of the business interests of the notifying parties and third parties; and
- enabling the Commission to undertake its review of transactions in a fair and non-discriminatory manner.

In formulating the following comments on the Best Practices, ICC has drawn on existing practice and has referred to its comments on the Green Paper on the review of the ECMR and the submission jointly prepared by ICC and the Business and Industry Advisory Committee to the OECD ("BIAC") dated 4 October 2001, providing a recommended framework for best practices in international merger control procedures.

2. Pre-notification

Since 1998, the Commission has encouraged notifying parties to apply the Best Practice Guidelines, which were drawn up by the European Competition Lawyers' Forum (the "ECLF") following consultation with the Merger Task Force, and which have been published by the Commission. The ECLF Best Practice Guidelines seek to ensure that declarations of incompleteness under Article 4(2) of the ECMR are kept to a minimum, by encouraging notifying parties to engage in pre-notification contact with the Commission before a formal notification. In particular, pre-notification meetings should enable the draft Form CO in a particular case to be discussed, as well as the extent to which waivers from the requirements to provide information might be granted and the identification of potentially affected markets.

The ECLF Best Practice Guidelines have helped to ensure a procedure for useful pre-notification communications between notifying parties and the Commission, and they have been effective in promoting the efficiency of proceedings by encouraging a good working relationship between the Commission and the notifying parties, and by reducing the risk of a declaration of incompleteness in respect of a notification. The Best Practices draw on the ECLF Best Practice Guidelines with regard to pre-notification procedures, but ICC would make the following points:

- **Confidentiality:** Confidentiality is of paramount importance when contacting the Commission with regard to a proposed transaction that has not been made public, even if there is public speculation or rumour about the proposed transaction. Notwithstanding the obligations on the Commission with regard to protecting the confidentiality of the business interests of the notifying parties and paragraph 42 of the Best Practices, it would be helpful if the Best

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Practices would reiterate the fact that although pre-notification discussions should be held in an open and cooperative atmosphere, the parties to a proposed transaction can approach the Commission on a confidential basis before the proposed transaction has been announced, and that confidentiality on the part of the Commission is guaranteed.

- **Briefing memorandum:** The Form CO is the basis of the Commission's investigation. Timing and other considerations on the part of the notifying parties may mean that they prefer to concentrate on drafting the Form CO, rather than on preparing a briefing memorandum. ICC would therefore suggest that the Best Practices make it clearer that a briefing memorandum is not always required, but that it may be sufficient for the notifying parties to submit a letter that provides a summary of the parties and the transaction, and a brief description of the relevant sectors and markets involved, enclosing a draft Form CO if possible.

- **Contact details and confidential electronic communications:** Once the case team has been allocated, ICC suggests that there should be an exchange of contact details between the Commission and the notifying parties, identifying for the Commission and each party the main points of contact and including direct telephone numbers and e-mail addresses that can be used for confidential communications. Where the notifying parties are represented by counsel and unless otherwise advised, communications by the Commission staff should be with counsel only. ICC has already expressed a strong wish that the possibilities of electronic filing of a notification, and of informing NCAs of a notification in the same manner, be further explored. Whether or not it is appropriate to deal with electronic filing in the Best Practices, ICC would be pleased to discuss this area with the Commission in more detail.

- **Provision of a draft Form CO**: ICC appreciates the assistance that the provision of a substantially complete draft Form CO at an early stage provides to the Commission and to the notifying parties. However, the timing of a proposed transaction may not allow the notifying parties to provide a draft Form CO five working days before seeking the Commission's comments. Where the demands of the timing of a proposed transaction do not enable this timetable to be followed, the notifying parties should be encouraged to maintain close and constant contact with the Commission's case team, in order to minimise the risk that the Form CO might be rejected for incompleteness. ICC is concerned that whereas the steps set out in paragraphs 16 and 17 of the Best Practices will be helpful in ensuring the efficiency of a merger investigation, failure to adhere to the timetable or to provide all of the information requested should not of itself lead to the rejection of a Form CO for incompleteness. It should be noted that not all of the information required might be available to the notifying parties. This might be the case in particular where a transaction relates to a hostile public bid and the target is not cooperating in the collection of the information, and/or where the transaction is confidential and the notifying parties do not wish the business people who would be able to provide the required information to know of the transaction. As ICC has previously pointed out, there has been criticism that the challenge of incompleteness is sometimes used simply to gain time.

  With respect to the suggestions in the Best Practices that the notifying parties should provide efficiencies arguments at the pre-notification stage, ICC suggests that it should be made clear that companies that do not produce such arguments at an early stage should not be prejudiced in any way.

- **Waivers:** ICC supports the Commission's view that pre-notification contacts should be used to obtain waivers from the requirements to provide information in the Form CO, where such information is not necessary to the Commission in order for it to complete its assessment of a proposed transaction. ICC reiterates its view that a simpler Form CO should be developed; as ICC has pointed out, a simpler Form CO, not just for smaller cases, is one of the wishes most often expressed by the business community, as it is felt that some of the information demanded is not always entirely relevant for the examination of a particular market situation.

- **Reference to NCAs**: Article 4(4) of the proposed revised ECMR enables the notifying parties to request the Commission at the pre-notification stage, by means of a reasoned submission, to refer the proposed transaction in question to national competition authorities. ICC is of the view that it would be helpful if the Best Practices set out in more detail the Commission's preferred procedure for the making of a reasoned submission in accordance with Article 4(4). However, as ICC has pointed out to the Commission, referrals to Member States without the consent of the parties should be avoided as much as possible.

3. Fact finding

The remaining sections of the Best Practices are not based on any specific documents in the same way in which the section on pre-notification draws on the ECLF Best Practice Guidelines. However, ICC believes that it is extremely helpful for the Commission to provide in the Best Practices practical points relating to the application of the ECMR, although the Commission should be prepared not to apply the Best Practices in appropriate cases. Some of those points arise out of the procedures laid down in the ECMR, and others are a formalisation of existing practice. Nevertheless, ICC would make the following points:

- **Requests for information**: It is essential that the Commission should guarantee the confidentiality of the business interests of notifying parties, and ICC is concerned that paragraph 19 of the Best Practices suggests that the Commission may decide that, in the interest of its investigation, market contacts should be initiated informally prior to notification, even though such pre-notification contacts/enquiries would "normally" only take place if the existence of the proposed transaction were in the public domain and if this had been agreed with the notifying parties. ICC encourages the Commission to clarify that if the notifying parties have approached the Commission on a confidential basis prior to notification then the Commission will not compromise that confidentiality. The interests of notifying parties could be severely adversely affected if the Commission were to request information from any third party or engage in any other market testing or fact finding, where this could affect the confidentiality of a proposed transaction. Moreover, any external advisers engaged by the Commission should be subject to at least the same requirements concerning confidentiality as those to which the Commission is subject.

4. Communication and meetings with the notifying parties, other involved parties and third parties

ICC welcomes the emphasis placed by the Commission on improving transparency in the day-to-day handling of merger cases and makes the following points:

- **"State of Play meetings"**: ICC notes that the first State of Play meeting will in principle take place in Phase I cases where it appears that "serious doubts" are likely to be present, and that subsequent State of Play meetings will take place during Phase II. Whereas the formalisation of State of Play meetings is welcome, ICC is keen to ensure that sufficient levels of communication are maintained throughout the review process between the Commission and the notifying parties for all transactions. This is the case even where a proposed transaction does not raise potential competition concerns and is therefore likely to be cleared in Phase I. ICC would therefore recommend that the Best Practices make it clear that notifying parties will be kept informed as to the progress of their case on a regular basis, whether or not a State of Play meeting is likely to be called. It would also be helpful if it was specifically stated that the Merger Task Force will provide the parties with information on comments and concerns raised by NCAs during State of Play meetings to allow parties to address these at an early stage.

- **"Triangular" and other meetings**: ICC believes that it is important that if a notifying party declined to attend a so-called "triangular" meeting, for whatever reason, then, in the interests of non-discrimination, no adverse influence should be drawn by the Commission from the decision not to attend. Furthermore, if non-confidential submissions from the notifying parties and the third party in question are to be circulated amongst the various parties, then this

should be done in good time for the meeting. "Triangular" meetings and full access to third party submissions or complaints are critical to maintaining transparency and minimizing opportunities for unsubstantiated strategic opposition.

On oral hearings generally, ICC is of the view that the Best Practices might usefully provide a framework for the conduct of oral hearings. ICC recognises, however, that it is likely that changes in the rules governing the conduct of oral hearings in competition cases will need to be made in the light of modernisation and the new implementing Regulation. ICC would be pleased to take part in further consultation on the conduct of oral hearings in merger and other competition cases.

- **Media contacts and press releases**: The timing of press releases and other media contacts are of great importance, especially for listed companies. It would therefore be desirable if best practices detailing how the Merger Task Force and the parties should cooperate on the timing of releases of decisions and other press releases could be developed.

- **Information on competitors**: In situations where the Commission is considering the likelihood of coordinated market behaviour, in particular, it is highly likely that the market conduct of merging parties' competitors will also be under scrutiny. ICC suggests that in such cases, such competitors should be informed of this (e.g. by receiving the Statement of Objections prior to making a decision to participate in the oral hearing), in order for such competitors to submit their own comments on the Commission's current market assessment.

5. Remedies discussions

The Commission refers to its Notice on remedies acceptable under the ECMR, but no procedural steps are covered in the Best Practices. ICC has supported the Commission's favouring of a "stop-the-clock" provision which would give more time to the notifying parties to propose remedies, and for the Commission to examine such remedies. The issue of time pressures where remedies are proposed and examined is covered in the draft revised ECMR, but ICC believes that the Commission should be prepared in due course, if necessary, to expand paragraph 36 of the Best Practices, to include more detailed procedural aspects in the case of remedies that are proposed and examined.

6. Provision of documents in the Commission's file/confidentiality

ICC welcomes the Commission's views expressed in the Best Practices but would point out the following:

- **Access to the file and increased transparency**: ICC has proposed that notifying parties should have access to the file immediately after the beginning of a Phase II proceeding, not just after the Statement of Objections has been issued. Clearly this is an issue to be covered in the light of Article 18(3) of the ECMR, but ICC would welcome any steps that the Commission might take to provide notifying parties with access to the file at the earlier stage. In addition, ICC welcomes the Commission's statement that it will offer the notifying parties the opportunity, on the initiation of a Phase II procedure, to review submissions received before then and its offer to enable the notifying parties to review, from the outset of the investigation, certain key documents. ICC notes that this is in addition to rights to access to the file under Article 18(3) of the ECMR. Confidentiality for notifying parties and third parties should in any event be protected.

7. Right to be heard and other procedural rights

ICC notes that the Commission has referred to the Hearing Officer as a person with whom any issues related to the right to be heard and other procedural issues can be raised. ICC has already stated its view that the Hearing Officer could be given a more independent role and that the powers of the Hearing Officer could be increased, although ICC has recognised that such a tentative idea would have to be worked out in fuller detail.

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8. Other issues

For the sake of continuity and to avoid unnecessary delays and other problems associated with changing teams, ICC suggests that the MTF should commit itself, to the extent possible, to maintaining the same case handling team throughout the investigation.

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