Comments by European Competition Lawyers Forum on Draft Best Practices on the Conduct of EC Merger Control Proceedings dated 19th December 2002[1]

The European Competition Lawyers Forum ("ECLF") welcomes DG Competition's proposal to extend the MTF Best Practice Guidelines established jointly by the MTF and ECLF in 1999 to cover a number of new areas not covered by the 1999 Guidelines. In particular the ECLF welcomes the adoption of a number of the proposals put forward by the ECLF during its meetings with the MTF in May 2002. In particular the express recognition of the principle that in difficult cases it will be appropriate to commence market testing on the basis of a draft notification and the first phase review discussion prior to the end of the third week (now institutionalised as the first "State of Play" meetings proposed by DG Competition).

However one of the key parts of the 1999 Best Practice Guidelines was the express confirmation that, provided the Guidelines were complied with, the MTF case team will in principle be prepared to confirm informally the adequacy of a draft notification at the pre-notification stage or, if appropriate to identify in what respect it is incomplete. This statement has currently been left out; it should be included, it is suggested, after paragraph 12 or 18 in the current draft. It is incumbent on the MTF case team to provide this confirmation if the Guidelines are complied with. We recognise that it will not be possible for the Merger Task Force to exclude the possibility of declaring a notification subsequently incomplete for reasons that are not apparent on the face of the documentation, e.g. if substantially all the contact details are incorrect in a manner which delays investigation – this was expressly recognised in the 1999 Guidelines and can be dealt with by including both the penultimate and ultimate paragraphs of the 1999 Guidelines. It is an important part of current practice that the MTF case team provides this confirmation in appropriate cases to maintain the spirit of transparency and openness that has always characterised the MTF.

As for more detailed comments:

(A) Paragraph 12 - We agree that it is important for the Commission case team to be able to obtain information from those personnel best able to answer their specific questions. However, it should be recognised that in order to be able to internally manage and retain a perspective on the overall process, most parties will prefer to nominate one or two initial contacts for all enquiries rather than identify a range of direct contacts.

(B) Paragraph 14 - the requirement to provide internal documentation, which would include board papers and internal studies and analyses, at a prenotification stage, is extremely burdensome and unlikely to be necessary in straightforward cases where this request is more extensive than would be required by the Form CO. We suggest that this paragraph should be restricted to cases that are likely to involve a serious doubts inquiry.

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[1] All members of the ECLF have had an opportunity to comment on this document. However, the comments made do not necessarily reflect the views of each member.

(C) Paragraph 26 and 29 - we would welcome the inclusion of a statement that where practicable the MTF will provide parties with an indication of its concerns in advance of the State of Play meetings.

(D) Paragraph 39 – it is not clear whether DG Competition will be offering notifying parties access to certain key documents on an ad hoc basis prior to the opening of a second phase decision – this would be welcome and could usefully be clarified.

(E) Paragraph 42 – it is often impractical to submit non-confidential versions of submissions at the same time as the confidential versions since these are typically produced in very short time frames – non-confidential versions should be submitted at the time the original document is submitted or shortly thereafter.

(F) We would suggest that the best practice guidelines are extended to include references to the anticipated operation of the proposed new Article 4 procedures in particular at the pre-notification stage. For instance, will the Commission pro-actively suggest to parties cases where they may wish to consider invoking the Article 4 procedures. In addition, where a party wishes to request the Commission to take jurisdiction of a non-ECMR transaction under Article 4(5), should the matter be raised in the same way as for any other transaction i.e. by briefing paper in the first instance, or will there be a different approach? It would seem to us more likely that in these circumstances the initial round of discussion is likely to be largely confined to the jurisdictional aspects of the merger.

(G) Particularly at a pre-notification stage, the confidentiality of discussions with the Commission can be of crucial importance to the parties to a merger. As the trigger date for notification becomes more flexible this is likely to become still more important as discussions with the Commission are likely to be initiated earlier in the overall process. A description of the Commission's approach to commercial confidentiality, in particular at the pre-notification stage, would be a welcome addition to the guidelines and provide express comfort to clients.

PPC
27th February 2003

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