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Comments Regarding Commission Issues for Study

**Submitted by the Computing Technology Industry Association (CompTIA)
to the Antitrust Modernization Commission pursuant to
the Request for Public Comment published at
69 Federal Register 43969 (July 23, 2004)**

October 28, 2004

I. EXECUTIVE SUMMARY

CompTIA fully supports the Antitrust Modernization Commission's mission of updating the nation's antitrust laws. CompTIA believes that the economy as a whole and the technology and communications industry in particular will benefit from a careful and thorough analysis of the operation of the antitrust laws.

The basis for CompTIA's submission of these Comments is its interest in the overall health, growth and prosperity of the technology sector. To that end, CompTIA recommends that the Commission study the following issues. As requested in the Federal Register notice we are suggesting areas for review only and do not suggest or imply any particular solution. We do hope that, during the course of the Commission's inquiry, that there will be opportunities for interested parties to suggest appropriate solutions. A short summary of each issue is attached to this statement.

- A. Multiple antitrust enforcement agencies with overlapping coverage (Department of Justice, Federal Trade Commission, State Attorney Generals, etc.);
- B. Inconsistencies between U.S. laws and laws in foreign jurisdictions;
- C. Overlapping requirements for pre-merger approvals in different jurisdictions;
- D. Interaction between intellectual property laws and antitrust laws;
- E. Analysis of the efficiencies created by "network effects";
- F. Definition of "separate products" in assessing tying cases that involve product integration;
- G. Class action reform;
- H. Review of the relevance of the Robinson Patman Act;

- I. Inconsistency between the various states regarding the application of the indirect purchaser rule (*Illinois Brick*);
- J. Review of foreign discovery rules that permit discovery of information held by U.S. companies for use in foreign “proceedings;”
- K. Review of the “essential facilities” doctrine.

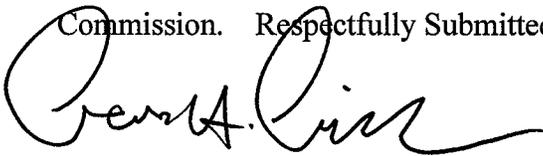
II. COMPTIA’S INTEREST IN THIS MATTER

The Computing Technology Industry Association (CompTIA) is the world’s largest industry association in the information and communications technology (ICT) sector. CompTIA represents nearly 20,000 hardware and software manufacturers, distributors, retailers, Internet, telecommunications, IT training and other service companies in nearly 100 countries.

CompTIA’s public policy committee engages in outreach, educational, grassroots, and advocacy activities designed to protect and promote the economic interests of the industry as a whole.

CompTIA is interested in antitrust laws both as they impact business relationships between the ICT sectors as well as the way companies in the ICT sector do business outside of the sector. CompTIA has been active in numerous antitrust issues at the legislative, judicial and executive branches of government and appreciates the opportunity to provide comments to the

Commission. Respectfully Submitted,



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ISSUE A

Multiple Antitrust Enforcement Agencies with Overlapping Coverage

Currently the U.S. Department of Justice, Federal Trade Commission, Federal Communications Commission, State Attorney Generals, and State Public Service Commissions have overlapping authority to address antitrust issues.

CompTIA recommends that the Commission study the consequences of overlap in domestic antitrust coverage.

ISSUE B

Inconsistencies Between U.S. Laws and Laws in Foreign Jurisdictions

There are inconsistencies between U.S. antitrust laws and antitrust laws in foreign jurisdictions with respect to both substantive law and procedural law.

CompTIA recommends that the Commission investigate the consequences of global dichotomies in the substance and enforcement of antitrust laws.

ISSUE C

Overlapping Requirements for Pre-merger Approvals in Different Jurisdictions

The issue raised here is fundamentally a subset of Issues A and B. There are different rules regarding merger approval in different jurisdictions. The process of obtaining pre-approval of a merger between companies with international activities is lengthy.

CompTIA recommends that the Commission investigate the costs, benefits, and disadvantages of the current process. The Commission should also study the possibility of making merger review faster, more efficient and should study ways in which to reduce inconsistencies in the law among the various jurisdictions.

ISSUE D

Interaction Between Intellectual Property Laws and Antitrust Laws

In many cases there is a tension between antitrust law and intellectual property laws. Because both antitrust law and intellectual property are relevant to the technology industry the relationship between antitrust law and intellectual property law should be studied by the Commission.

ISSUE E

Analysis of the Efficiencies Created by “Network Effects”

Network effects occur when the customer's value of a product increases with the number of people using that same product or a complementary product. There are many instances of network effects within the ICT sector.

CompTIA recommends that the Commission study the issue of how large market concentrations that are created in the ICT sector by network effects are treated under the antitrust laws.

ISSUE F

Definition of “Separate Products” in Assessing Tying Cases That Involve Product Integration

Technological advances in the computing and communications industry frequently are achieved by integrating new features into existing products. This phenomenon is particularly true in the software industry.

CompTIA recommends that the Commission study the issue of the standard under which product integration and tying is analyzed under the antitrust laws.

ISSUE G

Class Action Reform

CompTIA recommends that the Commission study the current state of antitrust class action jurisprudence and determine if the current state of the law has properly balanced the competing goals of encouraging meritorious cases and deterring frivolous antitrust class action suits.

ISSUE H

Review of the Relevance of the Robinson-Patman Act

The Robinson-Patman Act was enacted in 1936. The basic prohibition against price discrimination is contained in Section 2(a) of the Robinson-Patman Act.

CompTIA suggests that the Commission study the necessity for the Robinson-Patman Act and consider whether it should remain a part of antitrust law or be repealed.

ISSUE I

Inconsistency Between the Various States Regarding the Application of the Indirect Purchaser Rule (*Illinois Brick*)

Federal antitrust statutes provide a cause of action for price-fixing or monopolization allegations only to direct purchasers from the alleged wrongdoer. *See Illinois Brick v. Illinois*, 431 U.S. 720 (1977). While some states observe the rule of *Illinois Brick*, many states have enacted statutes repealing the effect of *Illinois Brick* in their state. Thus, firms engaging in interstate commerce must face inconsistencies between states on this issue.

CompTIA recommends that the Commission study this issue to determine the consequences of the lack of uniformity between jurisdictions on this issue.

ISSUE J

Review of Foreign Discovery Rules That Permit Discovery of Information Held by U.S. Companies for Use in Foreign “Proceedings.”

To what extent should private parties — including competitors — be able to obtain discovery in the United States from U.S. entities or entities subject to U.S. jurisdiction for use in, or resulting from, foreign antitrust proceedings.

The Supreme Court recently held that 28 U.S.C. §§ 1782(a) — which applies to all subject matters, including antitrust — permits a third party to seek discovery for use in European Commission (“EC”) proceedings. *See Intel v. AMD*, 124 S.Ct. 2466, 2475, 2487 (2004). The Court left the lower federal courts with broad discretion and provided minimal guidance as to what discovery assistance is appropriate in foreign antitrust proceedings. *Id.* at 2483-84. This may encourage parties urging EC enforcement action to focus their discovery efforts in U.S. courts, rather than in the foreign antitrust proceeding itself.

An important related area involves the ability of private U.S. plaintiffs to obtain through discovery leniency application submissions to the EC. The EC has appeared in several U.S. cases and argued that compelled disclosure of such submissions will have a chilling effect on parties that wish to provide valuable information about unlawful cartels. The courts have reached disparate results. *Compare In re Methionine Antitrust Litig.*, No. C-99-3491 (N.D. Cal. July 29, 2002) (discovery denied), *with In re Vitamins Antitrust Litig.*, No. 99-197, 2002 U.S. Dist. LEXIS 25815, at *31-*46 (D.D.C. Dec. 18, 2002) (discovery granted).

Because these discovery issues raise important comity and judicial efficiency concerns in antitrust proceedings and may impede effective antitrust enforcement, the Commission should consider whether and, if so, what legislation or other action would be helpful to clarify this area.

ISSUE K

Review Of The “Essential Facilities” Doctrine

The courts have made numerous attempts to define the term “essential facilities” in the context of antitrust law. Despite these many attempts there appears to be no clear definition of the term. Because the outcome of certain types of antitrust cases may be affected by the characterization of a company’s product as an “essential facility,” a clear definition of the term would provide greater certainty in the law.

CompTIA recommends that the Commission study the operation of the “essential facilities” doctrine, with particular focus on the definition of what constitutes an “essential facility.”