

**Joint Comments of the American Bar Association’s
Section of Antitrust Law and
Section of International Law And Practice
on the Commission’s Green Paper
on the Review of Council Regulation (EEC) No 4064/89**

The Section of Antitrust Law and the Section of International Law and Practice of the American Bar Association (collectively, the “Sections”) welcome the opportunity to respond to the request of the European Commission for comment on the Green Paper on the Review of Council Regulation (EEC) No 4064/89 (the “Green Paper”).¹ 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 Association.

The membership of the Sections includes more than twenty thousand lawyers. Most are based in the United States of America, but a substantial number have lived and worked abroad, and some do so currently. The Sections have substantial expertise with merger control in the United States and around the world. Particularly as a source of the private sector comment over the past twenty-five years on the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR”), the Sections have developed substantial expertise with the complex tradeoffs and policy judgments involved in structuring a merger control regime.

Because the Sections are composed principally of United States lawyers, our comments here are limited in scope to two primary considerations. *First*, we note that certain sections of the Green Paper expressly refer to practices in the United States and that other sections introduce possible reforms of a type as to which the United States has prior experience. Where the Sections are well positioned to assist the Commission on the basis of the experience in the United States and our knowledge of comparative merger control regimes abroad, we endeavor to do so. *Second*, where a section of the Green Paper affects the interests of United States firms directly (although not uniquely), we offer comment.

The Sections commend the Commission for its initiative to solicit public comments on a wide range of creative proposals to increase the effectiveness, efficiency, fairness and transparency of the EC Merger Regulation (the “ECMR”). The ECMR has now been applied successfully for more than ten years, and possible modification is a matter of substantial public interest. Following an Executive Summary of our comments on the Green Paper’s proposals, we set out comments on the proposals in the order in which they are addressed in the Green Paper.

Executive Summary

Jurisdictional Issues. One of the most attractive features of the ECMR from the point of view of notifying parties and the antitrust Bar is the Commission’s “one stop shop,” reducing the legal uncertainty, expense and administrative burden imposed by multiple Member State filing

¹ COM(2001) 745/6 final.

requirements. Several years ago, the Commission added a second jurisdictional test to extend the benefits of one-stop shopping to transactions involving certain companies that would not meet the original jurisdictional threshold of the ECMR if the parties meet specified turnover thresholds in three Member States.

The Green Paper proposes to replace this second jurisdictional test with a new test, which would require an ECMR filing if the parties would otherwise have to file in three Member States. While the Sections believe that the proposed “three notification” test could ultimately decrease legal uncertainty, expense, delay and administrative burdens, the Sections are concerned that under current circumstances it will have the opposite effect by requiring analysis of widely divergent Member State notification requirements even to determine whether a particular transaction is notifiable under the ECMR and subjecting the parties to the possibility that the Commission would conclude that a filing was not required, forcing the parties to then file with the individual Member States (or the possibility that the parties might mistakenly conclude that notifications are required in fewer than three Member States and therefore infringe the ECMR by not filing notification under the ECMR). This risk is particularly acute in cases where Member State filing requirements include subjective tests such as market share tests.

The Sections believe that national jurisdictional thresholds for notification should be based on readily-ascertainable, objectively-based criteria (such as sales (or “turnover”) or assets located in the jurisdiction concerned). This requires harmonization of national merger control rules which cannot be achieved in the short-term. Accordingly, in the meantime, the Sections would encourage the Commission to explore modifications to the existing turnover-based thresholds in the ECMR to capture transactions of Community interest, while further developing the successful simplified procedure to ensure that an increase in notified cases does not waste Commission resources. In parallel, the Sections would encourage the Commission to explore means to foster harmonization of national thresholds for notification, for instance by way of an EU directive and through all appropriate international fora.

The Sections also welcome the Commission’s initiative to simplify and clarify the conditions for referrals of cases by Member State authorities to the Commission and vice versa. In general, the Sections would not support initiatives designed to unduly increase such referrals, because of the risk of legal uncertainty, expense, delay and administrative burden if a transaction is subject to two levels of review by the Commission and national authorities operating under different procedures and standards.

Finally, the Sections concur with the Commission’s doubts about extension of the ECMR to minority shareholdings, strategic alliances and partial function joint ventures. The Sections question the need for amendments to the mechanisms for evaluation of multiple transactions or venture capital transactions, and the merits of revising the group concept of Article 5(4) ECMR to harmonize it with the concept of control in Article 3(3). Concerning the latter proposal, the Sections submit that harmonization in the opposite direction might better advance the goals of efficiency and transparency.

Substantive Issues. The Sections applaud the Commission’s willingness to consider fundamental issues such as the respective merits of the “dominance test” and the “substantial lessening of competition” (“SLC”) test. The Sections believe that harmonization of merger

review is an important objective. On balance, the Sections consider that harmonization will be facilitated through adoption of similar language, and that the SLC test offers a better focus than the dominance test on potential adverse effects on competition, and therefore urge the Commission to consider possible migration to an SLC test. Although a change in the EU substantive standard may result in short-term uncertainty and disruption, the Sections believe that the transitional burdens would be justified by the long-term benefits of a uniform test. The transitional burdens, however, need to be materially reduced through reference to judicial precedent and interpretative guidelines from other jurisdictions that apply an SLC-based test, as well as through the introduction of a comprehensive statement of the Commission's analytical approach. In addition, a sharing of precedent and guidelines across jurisdictions would foster the goal of harmonization of interpretation. Finally, the Sections believe that any consideration of a change of substantive standard should be accompanied by an examination of the means by which more effective and timely judicial review, and greater procedural safeguards and accountability, can be introduced.

Concerning the treatment of efficiencies, the Sections believe that merger law should encourage transactions that are efficiency-enhancing and that reduce costs, whether the applicable standard is based on a dominance or an SLC test. The Sections are of the view that merger-generated efficiencies should not be held against merging parties. Rather they should typically be seen as a pro-competitive result of a merger which may benefit consumers and encourage competitors to become more competitive themselves.

Finally, the Sections applaud the Commission's implementation of a simplified procedure for transactions that are harmless to competition and welcome further initiatives to further remove regulatory burdens from such transactions, such as the adoption of a block exemption regulation.

Procedural Issues. The Sections support the Commission's proposals to increase the flexibility of the ECMR review procedure, including through the introduction of a "stop the clock" procedure, as well as greater flexibility in the timing of submission of notifications and the use of derogations. With respect to the proposed "stop the clock" procedure, the Sections suggest exploring appropriate safeguards to ensure that the new mechanism operates only at the request of the notifying parties.

Similarly, the Sections welcome the Commission's interest in exploring ways to further guarantee due process for interested parties in the ECMR review process. Under the current procedure, the combination of the investigative and decision-making powers in the Commission has created concerns about due process. The Sections believe that these concerns could be alleviated to some degree without a fundamental change in the procedures of the ECMR and the European Courts. Specifically, the Sections would encourage examination of ways to reinforce the role of the Hearing Officer and the effectiveness of the oral hearing, for instance by reversing the order of the Statement of Objections and the oral hearing, reinforcing the inquisitorial role of the Hearing Officer, or introducing adversarial-type procedures allowing parties to address questions directly to complainants or the Commission. Another possibility would be to eliminate the Statement of Objections and allow the parties to comment directly on the draft decision. This would give all parties involved in the procedure, including the Commission, more time to prepare the hearing and would reinforce the role of the hearing generally.

In any event, the Sections believe that meaningful and timely judicial review is essential to ensure compliance of the merger review system with due process principles. The Sections encourage the Commission to explore further improvements in the area of judicial review, in particular with respect to the timeliness and the scope of the European Courts' review.

Part I – Jurisdictional Issues

A. Community Dimension (§§ 23-68²)

- Article 1(2) ECMR

The Green Paper expresses the position that the thresholds of Article 1(2) of the ECMR as well as the 2/3 rule function satisfactorily. It asks whether interested parties agree that there is no need to modify Article 1(2).

The thresholds of Article 1(2) of the ECMR are intended to set a balance between the interests of the EU and Member States. The level at which to set that balance does not present a legal issue on which the Sections have a basis for commenting. Accordingly, we take no position on the issue.

- Article 1(3) ECMR

According to the Green Paper, the current Article 1(3) ECMR has not achieved its objective of conferring Commission competence over cases that affect three or more Member States. The Green Paper expresses the position that altering the five constituting criteria of Article 1(3) or modifying Article 22 ECMR is unlikely to provide any significant improvement in this respect. In order to address the problem of multiple national filings, it proposes to introduce automatic Community competence over cases subject to multiple filing requirements in three or more national jurisdictions. The Green Paper requests comment on this proposed system and in particular on the most suitable procedure for establishing the applicability of the merger control rules in three or more Member States (§§ 54 to 63). The Green Paper also requests views on any other technical or procedural matters, including alternative proposals for reform.

In principle, the Sections support the long-term objective of reducing multiple filings by applying the ECMR to transactions requiring notification in three or more Member States. Until there is harmonization of national merger control rules, however, the Sections see real practical difficulties with the Commission's proposal in the short-term, as the Commission itself notes in seeking comments in this area.

For instance, as the Commission is aware, certain Member States' merger control rules include criteria which are not readily ascertainable or objective. In particular, market share tests are inherently subjective in the sense that they are subject to differing views and are not readily ascertainable. Market definition is frequently one of the more difficult issues resolved during a full investigation. The subjective nature of such criteria means that it is not always possible to

² The numbers refer to the paragraphs in the Green Paper.

establish with certainty that a transaction needs to be notified to the relevant competition authority (and accordingly authorities themselves may have difficulty confirming the parties' interpretation of the national thresholds as envisioned by the Green Paper (§ 59)). In addition to the inherent difficulties associated with market definition generally, uncertainties associated with market share based tests are heightened by interpretive ambiguities and inconsistencies. In the United Kingdom, for example, the alternative 25% test is not met where there is no overlap between the parties in the market concerned. In Spain and Greece, on the other hand, the applicable 25% market share thresholds can be satisfied even if there is no horizontal overlap or vertical relationship between the parties. Accordingly, incorporating market share based criteria into the ECMR through the "three notification" test would, in the Sections' view, undermine the legal certainty that to date has led to widespread support of the ECMR.

As a practical result of adoption of the Commission's proposal, parties in complex cases (where an in-depth review of the notification requirements is required) would need to consult local counsel and perhaps the national competition authorities ("NCAs") in several Member States merely to determine whether the ECMR applies. The full-blown substantive review of a proposed transaction which would be required to satisfy a market share test would mean parties' incurring significant (and, in the Sections' view, unnecessary) transaction costs and, especially where NCAs are approached, additional delay. More fundamentally, there would be inherent uncertainty beyond what now exists. Today, merger parties in Member States with market share tests can file conditionally in the Member State in question, arguing the appropriate market definition results in the transaction being below the threshold, but precluding the imposition of fines for not filing. Under the Commission's proposal, there is no room for such conditional filings. To the contrary, the parties could file under the ECMR and then find that the Commission concludes that the appropriate market definition results in a share below the threshold, which would mean that the EU did not have jurisdiction over the filing, subjecting the parties to the need to file in various Member States. Conversely, the parties might conclude erroneously that notifications are required in fewer than three Member States and find themselves in violation of the ECMR. Industry would certainly not favor such outcomes.

Consistent with principles urged by the OECD's Business and Industry Advisory Committee and the International Chamber of Commerce,³ the Sections would subscribe to greater transparency and harmonization of national merger control laws and regulations. Accordingly, the Sections believe that the Commission should actively foster further harmonization of the national thresholds for notification, for instance through consultations with the Member States or even by means of an EU directive, and through all appropriate international fora.

³ The Business & Industry Advisory Committee of OECD and the International Chamber of Commerce on October 4, 2001 jointly submitted to OECD Competition Law and Policy Working Party No. 3 a *Recommended Framework For Best Practices in International Merger Control Procedures* (the "BIAC/ICC principles"). The Sections have endorsed certain recommendations that form part of the BIAC/ICC principles and therefore refer to some of these recommendations in their comments. See also the joint comments submitted by the Sections to the ICN Working Group on Mergers in February 2002, <http://www.abanet.org/antitrust/commentsicn.html>.

The present range of turnover, asset and market share thresholds that apply in the various Member States makes the assessment of where concentrations need to be notified unnecessarily complex and subjective in nature. In addition, Member State laws also have differing definitions of “concentration” and differing suspensory rules. Furthermore, the United Kingdom has a voluntary rather than mandatory notification requirement, so that applying a simple three-country test could require notification under the ECMR even in non-contentious cases where the parties have lawfully chosen not to notify a transaction under such a voluntary notification regime. In the Sections’ opinion, these factors would also have to be dealt with in more depth in any future amendments.

The Sections believe that Member States’ jurisdictional thresholds for notification should be harmonized and based on objectively quantifiable and readily accessible information, such as sales (or “turnover”) or assets located in the jurisdiction concerned. These thresholds should be expressed in terms of local currency values rather than by reference to other economic measures. Further, such thresholds should be periodically modified to adjust for inflation.

As a procedural point in relation to harmonization (but not one which can be dealt with by revision to the ECMR), greater harmonization of the time at which merging parties are permitted to file any required notification should be promoted to overcome current inconsistencies among Member States and the difficulties this raises with concurrent reviews by NCAs in connection with transnational mergers.

The harmonization issues mentioned above cannot be resolved in the short-term. The Sections accordingly suggest that, in the meantime, rather than moving to the “three notification” test proposed in the Green Paper, a further review of the current system of objective turnover-based thresholds would have merit.

The Sections note that the Commission’s proposal will lead to a larger number of filings which may require an increase in the Commission’s resources. Such additional cases will not, in the Sections’ view, necessarily merit scrutiny by the Commission (for example, due to lack of significant local nexus or cross-border effects). This view will be compounded once the proposed enlargement of the EU takes effect as certain Eastern European candidate countries have exceedingly low worldwide thresholds (Poland’s test is aggregate worldwide turnover of \$25 million and the Slovak Republic’s test is aggregate worldwide sales of at least approximately \$6.4 million and each of at least two parties with worldwide sales of at least \$2.1 million). Thus, in addition to reducing uncertainty and expense, basing ECMR’s filing requirements on objective Member State turnover thresholds may better indicate which transactions have a Community dimension than the widely differing national filing requirements.

- Removal of Thresholds

In the longer run, the Green Paper envisions a system where the turnover thresholds are removed from the ECMR and where Community competence would be based solely on the fact that the case is subject to multiple filing requirements in the (enlarged) EU. The Green Paper requests comment on this long-term perspective.

The Sections believe that this proposal is not practical unless and until there is harmonization of filing requirements in the Member States, as discussed above.

B. Referrals to Member States, Article 9 (§§ 69-83)

The Green Paper indicates that the referral mechanism of Article 9 ECMR should be simplified. It proposes to maintain only Article 9(2)(b), but to facilitate its use by disjoining the referral request from evidence of a threat of creation or strengthening of dominance and/or by eliminating the need to establish that the relevant market is not a substantial part of the common market. Instead, it would be sufficient that the request establishes that the alleged effect on competition does not extend to significant effects in terms of foreclosure, spill-over on related markets of greater geographic scope or similar cross-border effects (see in particular § 81(a)). The Green Paper requests comment on this proposal for reform of Article 9, and in particular on the proposed application criteria.

The Sections welcome the adoption of a simplified criterion for the application of Article 9, linked to the existence of a distinct market within a Member State,⁴ but are not persuaded of the merits of any amendments likely to have the effect of increasing the number of referrals and partial referrals to multiple NCAs.

In the context of referrals subject to Article 9 and consistent with the BIAC/OECD principles, the Sections believe that multiplicity of reviewing agencies within a single jurisdiction should be avoided. Each jurisdiction should identify the agency or agencies responsible for merger review and clearly delineate responsibilities.⁵ This approach is likely to maximize transparency and consistency in the application of competition policy, both of which are key factors for parties when a transaction is subject to an Article 9 reference.

In addition, the Green Paper mentions that as part of the proposed amendment to Article 9, it would be sufficient that a referral request establishes that the alleged effect on competition does not extend to significant effects in terms of foreclosure, spill-over or related matters of greater geographic scope or similar cross-border effects. The Sections believe care should be taken to ensure that these principles allow a referral request to be made where any such cross-border effects are insignificant (in smaller Member States, such as Belgium or the Netherlands, minor cross border effects are often present, even in markets that are local or regional in character). In this context, the Commission may also wish to assess referral requests, at least in part, by reference to objective standards relating to the proportion of Community-wide turnover within a single Member State and/or the sales figures outside the Member State seeking referral.

⁴ The Sections note that out of a total of 34 Article 9 requests, Article 9(2)(b) has only once been successfully used as a basis for a request (Govia/Conex (2001) referral to the UK authorities).

⁵ See BIAC/ICC principle 2.1.5.3, in particular principle 2.1.5.3(2), which provides that “single federal authority responsible for merger review is the preferred approach. This approach is likely to maximize transparency and consistency in the application of competition policy.” Commenting on this principle, the Sections noted that, in their view, multiplicity of authorities is acceptable so long as a single authority is responsible for the review of any particular transaction and so long as multiplicity does not result in inordinate burdens or inconsistent standards in the particular jurisdiction.

Finally, the prevailing differences in substantive national tests and procedural differences between Member States (touched on in the comments above) mean that increasing the number of referral requests by multiple NCAs and such referrals themselves may be contrary to the overriding objectives of harmonization and legal certainty. While the Commission and Member States tend to regard referral as a purely administrative step, referring a case for review to different jurisdictions with differing substantive tests could, in principle, result in differing outcomes – for which reason again the Sections recommend that the Commission actively promotes harmonization of substantive standards. Increasing the number of referrals to multiple NCAs also seems contrary to the principle of the one-stop-shop that has led to widespread support for the ECMR.

- Time Periods

The Green Paper suggests that, as a result of the proposed simplification of the criteria for referral, the period for a referral request and/or a referral at the Commission’s initiative could be shortened to two weeks. It also suggests that there may be some merit in harmonizing the timeframe in which a final decision is to be taken in case of an Article 9 referral, for example by requiring the NCAs to adopt their final decision within the same timeframe as would have applied for the Commission or even to apply the ECMR procedure (see in particular §§ 81(c) and 82). The Green Paper requests comment on these proposed procedural amendments. Any other suggestions for improving the system of work sharing between the Commission and NCAs are also invited.

The Sections support the Green Paper’s propositions that “notifying parties should not be put in a worse position by the fact that a case is subject to the referral” (§ 82) and that it is desirable to seek greater harmonization of the timeframe in which final decisions are to be taken.

Harmonizing the timeframe in which a final decision is to be taken in the case of an Article 9 referral would be beneficial to all parties involved and would allow for better planning of the notification process. The application of the ECMR procedure would ensure that concentrations that fulfill the ECMR thresholds, but that are referred to NCAs, are treated in an equivalent way in the various countries concerned.

The Sections question, however, how realistic in practice it would be for a referral determination to be made within the proposed two-week time period, given the types of criteria referred to in § 81(a) of the Green Paper (*i.e.*, determining limited effects of foreclosure, spill-over or cross-border effects).

C. Joint Referrals to the Commission, Article 22 (§§ 84-99)

The Green Paper questions whether Article 22 can actually function efficiently. In order to overcome some of the current weaknesses of Article 22(3) ECMR, the Green Paper proposes to clarify its wording and to facilitate the applicable test. The Green Paper requests comment on these proposals and the suggestion that Article 22(3) be deleted.

The Sections believe that it would be appropriate to delete Article 22(3), which has lost its original relevance following the adoption of pre-merger filing requirements by all Member

States except Luxembourg. The Sections doubt that Article 22(3) can be modified in such a way as to provide an efficient solution to the multiple filings problem. The Sections are concerned that any such referral system will be significantly longer than individual procedures before either a Member State's competition authority or the Commission (parties will be subject to NCAs first determining whether and to what extent they can agree on a request for a referral and then, if referred, the Commission deciding whether to take jurisdiction). Furthermore, the referral process is unhelpful if not all Member States involved refer the case to the Commission, since it will leave the parties with split procedures and, in the worst case, different results. In any event, any new wording regarding when a referral or joint referral should be made to the Commission should be clear and concise in order to maximize transparency and consistency (on the basis of the present wording in Article 22(3) it is unclear when a referral has to be made).

A further weakness of Article 22, of which the Commission is aware, is that the Commission may only take the measures strictly necessary to maintain/restore competition within the territory of the Member State(s) at the request of which it intervened.

D. The Concept of “Concentration” (§§ 100-158)

The Green Paper considers a number of possible amendments to the concept of concentration set out in Article 3 ECMR. It requests comment on the specified findings and proposals, as described below.

Before turning to the specific amendments addressed in the Green Paper, the Sections offer three overarching comments.

First, a number of the amendments address classes of transactions that are currently within the scope of the HSR. These include minority shareholdings, certain structural joint ventures, asset swaps, creeping acquisitions, and certain venture capital investments. In each instance inclusion of the class has required complex rulemaking by the U.S. antitrust authorities, often with need for accommodating changes in other portions of the HSR framework. The treatment of joint ventures, for example, has required regulations, formal interpretations, and informal interpretations to deal with the variations among corporate, partnership, LLC, and non-entity forms. The treatment of creeping acquisitions has posed complex problems that have delayed the final adoption of regulations initially proposed in February 2001 for more than a year. The treatment of investment transactions has required the adoption of numerous exemptions, together with interpretations of the exemptions. Accordingly, before the Commission expands the scope of the classes of transactions reached under ECMR, we caution that consideration be given to the number and complexity of accommodating changes that will be required in existing provisions that function well currently.

Second, the burden associated with the greater breadth of HSR is offset by the relatively limited information required in an initial filing. The Commission's Form CO, by contrast, requires a comprehensive submission. That approach may be tolerable (and perhaps even optimal) when limited to the classes and size of transactions currently within the scope of the ECMR. If the scope is broadened materially, however, it will be necessary for the Commission to consider whether substantial modification of Form CO is needed in order to limit the

transactions costs associated with its requirements. This could be accomplished by building upon the simplified procedure in order to create a more streamlined process.

Third, because of the considerations expressed in the two preceding paragraphs, we would urge the Commission not to expand the concept of concentration unless need is clearly demonstrated. We are not aware of such a showing, nor have we heard substantial call for change.

We now turn to the specific amendments considered in the Green Paper:

- Minority Shareholdings

The Green Paper indicates that minority shareholdings and interlocking directorates should not be dealt with under the ECMR (§§ 106-110).

The Sections agree.

- Strategic Alliances

The Green Paper indicates that Article 81, rather than the ECMR, is the most appropriate legal instrument for assessing strategic alliances (§§ 111-113).

The Sections agree.

- Article 2(4) (Full-function Cooperative JV's)

The Green Paper indicates that because Article 2(4) ECMR has been introduced only recently, more practical experience should be gathered before making any practical evaluation.

The Sections agree.

- Partial-function Production Joint Ventures

The Green Paper indicates that there is no compelling reason to extend the scope of the ECMR to partial-function production joint ventures (which today are examined in accordance with the Horizontal Guidelines and related block exemptions on R&D and on specialization agreements) (§§ 120-124).

The Sections agree, but would urge that this position be carefully reviewed in light of the Commission's proposals for the modernization of Regulation 17/62.

- Multiple Transactions

In order to better ensure coherent and effective application of the ECMR to (i) operations involving the acquisition of joint control of one part of an undertaking and sole control of another part, (ii) asset swaps and (iii) creeping take-overs through multiple share acquisitions on the stock exchange, the Green Paper proposes to amend Article 5(2) ECMR as set out in the Green Paper (§§ 125-136 and in particular § 135).

The Sections are skeptical of point (iii) above (creeping take-overs) and submit that any amendments must seek to avoid legal uncertainty (thereby, for instance, posing no threat to the legal basis of previous contracts) and double jeopardy. The Sections believe transactions should be inexorably linked before they are treated as multiple stages of a single transaction. The Sections appreciate that competition effects of minority acquisitions may differ with the level of holding and accordingly a previous review of a transaction by a Member State will not necessarily equate to double jeopardy. However, subjecting a previous transaction to de novo review under the ECMR (as opposed to the competitive effects of the subsequent transaction) may create legal uncertainty by calling into question the legal basis of previous contracts. Any amendments should therefore be limited to anti-avoidance measures, perhaps along the lines of the U.S system of aggregation rules (or other provisions), which permit the types of multiple transactions referred to in the Green Paper to be captured.⁶

- Venture Capital Investments, Article 3(5)

The Green Paper considers the possibility of enlarging the scope of Article 3(5) ECMR to cover a category of venture capital (“VC”) transactions that would not give rise to competition problems, but mentions that it may be difficult to define this category. Alternatively, it considers the possibility of extending the simplified procedure to cover VC investments (§§ 137-144).

The Sections question whether the category of “VC investments” is meaningful from a competition viewpoint. Experience with Article 3(5) of the ECMR and national equivalents shows that it is difficult to construct a meaningful definition and to provide wording which will ensure that such transactions do not have to be notified, while giving the companies concerned sufficient legal certainty. If construction of a definition is to be attempted, the current HSR exemptions for banking and institutional investor transactions (while not directly on point) may offer some guidance.

The Sections appreciate that investment funds are not necessarily immune from antitrust problems. Accordingly, the Sections suggest it is likely to be easier in practice to address issues to which VCs give rise through the continued development of the simplified procedure to cover VC investments. Regardless of the solution to be finally adopted, the definition of those VC transactions to be covered by Article 3(5) (or to benefit from the simplified procedure) should be clear enough to obviate legal uncertainty. Accordingly, the calculation of the turnover of investment funds should be clarified (especially in the case of groups of related funds). In this respect, the Commission may wish to consider the HSR provisions which are directed at VC group and leveraged buy-out acquisition vehicles, which typically do not raise competitive issues (the “newly-formed entity” size-of-person test under HSR).

- Convergence – “Control” vs. “Group”

The Green Paper invites comments with respect to the need to harmonize Articles 3(3) (definition of “control” for determining whether the transaction constitutes a “concentration”) and 5(4) (definition of “control” for turnover calculation purposes) by basing the group concept on the control principles underlying Article 3(3) (§§ 145-152).

⁶ See also BIAC/ICC principle 2.2.1.

The Sections do not agree with the proposal to use the more subjective concept of control under Article 3(3) for purposes of turnover calculation, since this would undermine the principle of basing jurisdictional thresholds on objective criteria. The function of Article 5(4) is to lay down clear rules determining jurisdiction. Article 3(3) in contrast is aimed at determining which undertakings are in a position of control and is consequently more subjective in nature. Extending the rules in Article 3(3) to cover Article 5(4) would lead to an increase in uncertainty with regard to whether the turnover thresholds for notification to the Commission are met.

Harmonization in the opposite direction might be a better approach. The HSR system is especially instructive on this issue. There is a bifurcation between (a) the percentage at which an acquisition is subject to review and (b) the definition of “control”, *i.e.*, a party can be subject to a notification obligation for a “less-than-control” acquisition. In all instances, a “bright-line” objective test is used, and that has been found to work well. In particular, the 50% test used in defining “control” has been especially helpful. The Sections would be reluctant to endorse thresholds that lead to a presumption of control at a lower level, although they recognize that filing of transactions resulting in a lower share ownership level may be appropriate in some cases. In addition, the Sections recognize that while practical influence, if not control, can occur at a lower level, the U.S. and Canadian systems have not been especially handicapped by that fact, largely because of the bifurcation referred to above. The Sections suggest considering the adoption of a presumption of lack of control if certain ownership thresholds are not met, for example, 20% in public companies and 35% in non-publicly traded companies (along the lines of the Canadian Competition Act). The Sections note that Articles 81 and 82 EC are available to address situations where conduct that does not result in control under these presumptions nonetheless results in anticompetitive effects on the market. In particular, as noted above (Section D), the Sections consider that minority shareholdings are appropriately dealt with under Article 81 EC.

Part II – Substantive Issues

A. The Substantive Test (§§ 159-169)

The Green Paper outlines various procedural and substantive reasons that have been advanced in support of re-evaluating the appropriateness of the current dominance test and the consideration of the adoption of a SLC test. In view in particular of the increasingly international scope of merger activity, the Green Paper indicates “that the time is right to initiate a thorough debate on the respective merits of the two tests for merger control.” The Green Paper asks interested parties to “submit their substantiated views on any perceived advantages or disadvantages resulting from the current wording of Article 2 [ECMR], and to also assess the effectiveness of the [dominance] test by contrast with the SLC test.”

The Sections are grateful for the willingness of the Commission to examine this issue. The Sections recognize the significance that a shift in substantive standard would represent. A possible shift would have both merits and demerits, which the Green Paper properly identifies. The fundamental question facing the Commission is how those merits and demerits should be balanced. After extensive consideration, the judgment of the Sections is to favor urging the Commission to proceed, subject to the issues identified in § 169 of the Green Paper, with considering migration to an SLC test. The Sections believe that this consideration should include the development of guidance on how to implement an SLC test and the analysis of how the test would apply to cases previously determined by the Commission under the dominance test. In reaching this judgment, we have tried to the extent possible to control for the fact that the SLC test is the one with which we, as American lawyers, are most familiar and to strive instead to identify more principled bases for resolving the question. We believe such bases exist, as follows:

First, harmonization of substantive merger standards is an important objective. If the world’s capital markets are to function efficiently in the face of the proliferation of merger control, regulatory authorities around the globe must take reasonable steps to increase the certainty and predictability of and to reduce the costs associated with multijurisdictional merger review.

Second, although harmonization of standards can be achieved even in the face of tests articulated with differing formulations, we believe that harmonization will be best facilitated through adoption of similar language. The Sections acknowledge that consistency of *outcomes* across jurisdictions with regard to transactions presenting the same facts in the various jurisdictions is an important consideration, and that outcomes in “dominance” jurisdictions and SLC jurisdictions generally have been converging, even with differing formulations of the standards. Nonetheless, if consistency of outcomes, where appropriate, is to be achieved through the current approach, it will be through interpretations of the language of different tests, which may ultimately not be upheld by the courts. A better approach in our judgment would be to harmonize the underlying *test* in the first instance.

Third, if one test is to be selected, the Sections believe, with all due respect, that the SLC test is superior to the dominance test for purposes of evaluating mergers. (A different answer might be given for purposes of evaluating other forms of conduct.) Simply put, the SLC test

directly focuses on the key question: will the merger under review have an adverse effect on competition, where the effect is sufficiently material to justify the intervention of the government to protect the marketplace?

The Sections recognize that a change in the substantive standard would result in short-term uncertainty and disruption. These effects will not necessarily be insubstantial. Nonetheless, the Sections believe that the transitional burdens would be justified by the long-term benefits to be afforded by adoption of a uniform test. The Sections also believe that the transitional burdens could be materially reduced if the Commission were to refer to judicial precedent and interpretative guidelines from other jurisdictions that apply an SLC test, as well as through the introduction of a comprehensive statement of the Commission's analytical approach (e.g., enforcement guidelines, implementing regulations, etc.). Reference to other SLC jurisdictions would serve a second, critical function as well. Harmonization of substantive tests alone will not ensure harmonization or consistence of outcomes across jurisdictions -- that objective will require harmonization of *interpretation* as well. A sharing of precedent and guidelines across jurisdictions would foster this goal.

Accordingly, the Sections submit that the adoption of an SLC test should be accompanied by the adoption of clear guidelines to resolve the legal uncertainty that would otherwise result from such a change, and significant improvements should be made to provide an enhanced system of judicial review, offering greater procedural safeguards and effective and timely rights of appeal. These objectives are discussed in Section III.J below. To the extent that a shift to an SLC test might result in an increase in the number of cases examined under Phase II review and ultimately not approved or permitted to proceed with undertakings, the existing problems arising from absence of effective and timely rights of appeal would be exacerbated.

B. Merger-Specific Efficiencies (§§ 170-172)

According to the Green Paper, “[t]he Commission is aware of and supports the ongoing debate on how, and the extent to which, efficiencies should be taken into account in competition analysis.” The Green Paper invites views on the proper role and scope of efficiency considerations in the field of merger control.

The Sections welcome the Commission's proposal to examine the proper role and scope of efficiencies considerations in the field of merger control.

The Sections believe that merger law should encourage transactions that are efficiency-enhancing and that reduce costs, whether the applicable merger review standard is one of dominance or SLC-based. Article 2(1)(b) ECMR provides that the Commission's appraisal shall take into account “the interests of the intermediate and ultimate consumers and the development of technical and economic progress provided that it is to the consumers' advantage and does not form an obstacle to competition.” The Sections are aware of concerns expressed by some notifying parties that the creation of efficiencies may reinforce a Commission belief that a transaction may create or strengthen a dominant position. The Sections take no position on whether those concerns are well founded.

The Sections are of the view that merger-generated efficiencies should not be held against merging parties. Rather, efficiencies should typically be seen as a pro-competitive result of a merger which may benefit consumers and encourage competitors to become more competitive themselves.

However, the Sections recognize that there are a number of complex issues that need to be considered in deciding whether to incorporate a consideration of efficiencies into the merger review process, including (in no particular order) the following:

- Should efficiencies be an outright “defense” which could salvage an otherwise anti-competitive merger provided that the claimed efficiencies could be shown to be sufficiently large and likely to occur, so as to outweigh and offset the likely anti-competitive effects of the merger, or should they be regarded merely as a factor to be considered in assessing the competitive effects of the merger along with other factors such as ease of entry or the effectiveness of remaining competition, etc.?
- What is the appropriate standard against which merger-specific efficiencies should be evaluated? For example, should it be sufficient that merger-specific efficiencies exceed the “dead weight loss” resulting from the merger, or should the analysis also take into account other considerations, such as whether any wealth transfers brought about by the merger are offset by the efficiencies generated by the merger, and if so, what are the appropriate considerations to be assessed and what weight or significance should be assigned to them?; and
- Should there be limits on the “quality” or types of efficiencies that will be recognized in order to permit an otherwise anti-competitive merger to proceed. For example, should it be necessary to demonstrate that any claimed efficiencies are likely to be passed on to consumers? Should efficiencies be permitted to justify a merger to monopoly or near-monopoly situation? Should there be limits on the type of efficiencies that can be taken into account (e.g., where they eliminate or reduce productive capacity)?

Although these are difficult and complex issues, we encourage the Commission to pursue its examination of efficiency considerations.

C. Simplified Procedure (§§ 173-179)

The Green Paper invites comments on measures to further streamline the simplified procedure introduced in September 2000, including consolidating the practice of the Commission in a block exemption regulation and/or introducing a de minimis threshold under which the Commission would not examine dominance concerns.

The Sections generally support the simplified procedure and would welcome the adoption of a block exemption regulation and a *de minimis* threshold. The Commission should be clear, however, that the application of the block exemption or the *de minimis* exception does not lead to the application of national regimes.

Part III – Procedural Issues

A. Notification – Triggering Event and Deadline (§§ 180-186)

The Green Paper considers the possibility of introducing greater flexibility into Article 4(1) ECMR, which specifies a point in time when a transaction should be notified. It requests comment on the proposals to allow notifications before the conclusion of a binding agreement and the removal of the one-week deadline for submission of a notification.

The Sections support the proposals for the introduction of greater flexibility into Article 4(1) ECMR, both with respect to the triggering event and the deadline for the submission of a notification.

As concerns the triggering event, the U.S. experience has shown that notifications may be made on the basis of a “good faith intention to consummate” documented by an affidavit from the parties.⁷ This flexibility has not led to frivolous or speculative filings. The Sections understand that the same observation can be made with respect to the Canadian experience. Given the time and expense involved in the preparation of an ECMR filing, the Sections believe that allowing notification prior to the conclusion of a binding agreement would not lead to an increase in the number of filings and would thus not adversely affect, contrary to the Green Paper’s suggestion (§ 185), the efficient use of the Commission’s resources. The Sections note that in practice the Commission often designates a case team and initiates substantive discussions with the parties on the basis of draft agreements.

At the same time, introducing this option would facilitate the coordination of multi-country filings and allow for earlier regulatory review and approval in a number of cases.⁸ The Green Paper’s suggestion that coordination is already possible based on the latest filing date - *i.e.*, that of a binding agreement – is not satisfactory from the point of view of the efficiency standard put forward by the Commission in the introduction to the Green Paper (§ 14).

With regard to confidentiality concerns, it should be noted that companies may decide not to contact the Commission, let alone submit a draft filing, if the transaction has not been publicly announced. Ultimately, the parties should be allowed to make their own determination of whether to accept the potential publicity risks associated with a filing. In addition, confidentiality issues are less relevant in cases under the simplified procedure where the Commission’s investigation does not involve extensive contacts with customers and competitors.

Similarly, the Sections have found that the one-week deadline after signature of a binding agreement for the filing of a Form CO is unnecessary and burdensome. In view of the ECMR’s suspensory effect on completion of notifiable transactions, the deadline could be removed without prejudice to the Commission’s interests. Such an amendment would bring the ECMR in

⁷ 16 C.F.R. § 803.5(a) (1996).

⁸ See BIAC/ICC principle 2.1.3, which notes that the “definitive agreement” requirement is unnecessary and impedes the parties from orchestrating multijurisdictional filings in the most efficient manner.

line with the Commission's practice of accepting notifications beyond the one-week deadline in many cases. The Sections believe that the benefits of a deadline, irrespective of its length, have not been demonstrated where merger rules provide for a pre-closing waiting period. The removal of the one-week deadline would therefore be preferable to its extension (as the latter would in addition raise the issue of the appropriate time period).⁹

B. Suspension of Concentrations (§§ 187-189)

Article 7(3) ECMR allows the implementation of a public bid provided the acquirer does not exercise its voting rights or only does so to maintain the value of its investment and on the basis of a derogation granted by the Commission. The Green Paper invites comments on the possible extension of the scope of Article 7(3) ECMR to acquisitions through the stock exchange other than public bids (so-called "creeping takeovers"), in line with the proposed extension of the scope of Article 5(2) to such transactions (§ 134). It also requests comment on the suggestion to extend the legal exemption under Article 7(3) ECMR to acquisitions via the stock exchange other than public bids."

In light of the possibility to request a derogation from the standstill obligation, the Sections question whether a modification of Article 7(3) ECMR is warranted. Applications to lift the standstill obligation have in practice been submitted in few cases. The Sections are not aware of instances in which a "creeping takeover" not involving a public bid required a derogation. In many jurisdictions, purchasers who acquire securities through the stock exchange must make a tender offer if certain thresholds are met, in which case Article 7(3) ECMR becomes applicable. The Sections therefore question whether a modification of the ECMR is the appropriate manner to address what appears to constitute a localized and discrete issue.

The Green Paper asks whether it would be necessary to clarify the scope of the current stand-still obligation to stock exchange acquisitions or generally.

With respect to the scope of the current standstill obligation generally, the Sections invite the Commission to consider extending the use of derogations to situations where the geographic nexus of the transaction is outside the Community, and a standstill obligation limited to the European activities or businesses of the parties concerned would be sufficient for the purposes of the Commission's investigation. The Sections note that the possibility to limit the standstill obligation to local operations is afforded on a practical basis in certain European jurisdictions. The Sections further invite the Commission to consider liberalizing the test for obtaining a derogation, particularly when the "center of gravity" of the transaction is outside the EU.

C. Calculation of Time Limits (§§ 190-193)

The Green Paper proposes to replace the current one-month and four-months periods in Article 10 ECMR with time periods calculated on the basis of working days. It requests comment.

⁹ See BIAC/ICC principle 2.1.3.3. In particular, the imposition of specific time periods increases transaction costs by obliging parties to "sort through the maze of disparate jurisdictional tests on an accelerated basis (...) and thereafter having to seek waivers (...)"

The Sections generally support initiatives to simplify the calculation of time limits in merger control regulations.¹⁰ It is questionable, however, whether switching to time periods expressed in working days in the ECMR would necessarily achieve convergence with merger rules in other jurisdictions. For example, the United States and Canada use calendar days (rolling forward to the next working day when the deadline falls on a non-working day). In addition, the Sections respectfully submit that initiatives to simplify the calculation of time limits should be neutral with respect to the time limits themselves. The Sections note that of the time periods proposed by the Green Paper for a first phase investigation (23-25 working days), the latter (25 working days) would have the effect of extending the duration of the investigations, and for some extending it by a material number of days.¹¹

In the same vein, the Sections respectfully invite the Commission to consider other ways to further simplify the calculation of time-limits under the ECMR. The calculation of time limits is currently governed by Regulation n°447/98 (the “Implementing Regulation”), the interpretation or application of which is not always straightforward (e.g., relationship between Articles 4(1) and 6(4), which state that while a notification is “effective” on its submission date, while the review period only starts on the next day, and the switch from one month to six weeks under Article 7(5)).

D. Administrative Efficiency (§§ 194-196)

- Notification to the Member States

The Green Paper invites comments on the proposal that the notifying parties submit copies of notifications directly to the competent Member State authorities. Under the current system, the Commission is responsible for the transmission of copies of a notification to the Member States.

The Sections are concerned that the change proposed by the Green Paper could create legal uncertainty, unless it is clear that the notification is considered valid solely on the basis of the submission to the Commission. For example, the fact that a copy does not reach a Member State, or reaches it only some time after the Commission filing, should not delay the start of the applicable time-period where the parties can demonstrate that the necessary precautions have been taken (e.g., by producing proof that the documents were sent to the Member States on the filing date). The Sections question whether the increased burden on the notifying parties, potential uncertainty and need for verification by the Commission would outweigh the reduction in the Commission’s administrative burden that might otherwise be anticipated from the proposed change.

¹⁰ See BIAC/ICC principle 2.2.1.2, which states that the time periods for review should be clearly ascertainable.

¹¹ For example, under the current rules, the time period for a Phase I investigation of a transaction notified on the first day of a month *without any Commission holiday* expires on the second day of the following month (for example, in 2002, the deadline for a notification filed on June 3, a Monday, will start running on June 4 and expire on July 4). Under the proposed new rules, this time period would expire on the same day - July 4 - if the 23-day deadline is selected, but only on July 8 if the 25-day deadline is selected.

- Electronic Submissions

The Green Paper invites comments on the possibility to make electronic submissions.

The Sections encourage the Commission to explore the possibility of electronic submissions, which may enhance the efficiency of merger proceedings. The Sections note, however, that technical issues created by the need for a uniform system of electronic submissions that could be used by notifying parties worldwide would need to be addressed, and notifying parties would need to have confidence with respect to the security of the system.

E. Completeness of Notification (§§ 197-202)

While rejecting the idea of introducing a legal deadline for declaring a submitted notification incomplete, the Green Paper nonetheless invites comments on this subject.

The Sections agree that the imposition of artificial deadlines for declaring a notification incomplete is impractical. Moreover, as recognized by the Commission, the use of pre-notification contacts has significantly limited, and continues to limit further, situations where the Commission has to resort to a formal declaration of incompleteness.¹²

On the other hand, as discussed in more detail below, the Sections would encourage the Commission to explore ways to reinforce the checks and balances in the ECMR procedure, including the declaration of incompleteness. The Sections consider that the Hearing Officer could, for example, play a role in resolving disagreements concerning the completeness of notifications. The Sections believe that a review mechanism in this context may be developed without leading to an “increased risk of prolonged procedures” (§ 201).

F. Commitments Procedure (§§ 203-221)

- Stop the Clock Procedure

The Green Paper proposes to introduce a “stop the clock” mechanism that could be invoked by the notifying parties (both in Phase I and Phase II), to allow for additional time for submission and discussion of commitments. It requests comment.

The Sections generally support greater flexibility as a means to facilitate the emergence of solutions acceptable to the Commission and to the notifying parties. The “stop the clock” mechanism would offer improved transparency and legal certainty compared to the practice that has evolved of parties withdrawing their filing (sometimes at the suggestion of the case team), a practice which has no legal basis and in theory exposes the parties to fines for late notification.

The Sections note that the Green Paper mentions that the “stop the clock” procedure “should operate solely at the request of the parties” (§ 214) and strongly concur with this

¹² The Sections note that in the U.S., the HSR regulations require that the agencies advise the parties of deficiencies “promptly” without imposing a strict deadline. This requirement is therefore similar to the current ECMR requirement, set out in Article 4(2) of the Implementing Regulation that the Commission inform the parties “without delay” if the notification is incomplete.

statement. In order to ensure that this remains the case, and to minimize the scope for pressure to be brought upon merging parties to invoke this procedure, the Sections would encourage the introduction of a mechanism to prevent inappropriate use of this new procedure, for example by requiring that the request be submitted to the Hearing Officer rather than to the team investigating the case in Phase II proceedings.

The Sections note that an alternative to stopping the clock may be to introduce an extra stage to Phase II proceedings (similar to the extension of the deadline in Phase I) for a fixed amount of time. This stage could provide time for market testing of proposed commitments and consultation of Member States.

- Commission's Role in the Identification of Remedies

The Green Paper invites views on whether the Commission should take a more active role in identifying remedies.

As a general rule, the Sections consider that the choice of remedies to address concerns expressed by the Commission should be left to the discretion of the parties. On the other hand, if properly applied, a greater willingness of Commission officials to participate in discussions of proposed remedies could enhance the efficiency of the review process and reduce effort and expense on the part of parties trying to structure remedies which do not address these concerns.

If the Commission does pursue more formal mechanisms for increasing the Commission's role in identifying remedies, the Sections would encourage the Commission to consider how these mechanisms might benefit from checks and balances in the procedure to protect against the potential for real or perceived abuses.

The Sections welcome the recent announcement by the Competition Commissioner that the MTF Enforcement Unit, set up in April 2001, will draft standard models for commitments and standard trustee mandates. The Sections believe that these initiatives will contribute to improving the predictability and transparency of the EC merger review process. The Sections believe that consultation with U.S. antitrust authorities on this project, through the EU/U.S. Mergers Working Group, could be of valuable assistance to the MTF Enforcement Unit in conducting this drafting exercise.¹³

G. Wording of Article 8(4) (§§ 222-224)

The Green Paper invites suggestions for improving the wording of Article 8(4) ECMR, which relates to transactions consummated without Commission blessing.

The Sections do not have specific comments on this issue.

¹³ In the U.S., the Chairman of the Federal Trade Commission (the "FTC") recently indicated that the FTC would in the future likely limit the application of the "buyer upfront" principle to situations involving "an asset package that constitutes less than an ongoing business, whose viability is somewhat uncertain, or assets that may deteriorate over time." Antitrust Enforcement at the Federal Trade Commission: In a Word - Continuity, August 7, 2001, <http://www.ftc.gov/speeches/muris/murisaba.htm>. The Department of Justice (the "DoJ") always expressed reservations on a broad application of the buyer upfront mechanism.

H. Enforcement Provisions (§§ 225-226)

- Sector Inquiries

The Green Paper invites comment on the possibility for the Commission to conduct sector inquiries, including post-merger studies.

The Sections note that the Commission already has sector inquiry powers under Regulation n°17 (Article 12) and therefore consider that a change of the ECMR on this issue is not warranted. As a general proposition, the Sections are not supportive of competition/antitrust authorities initiating sectoral inquiries for the purpose of conducting a general study.

- Correctness of Information

The Green Paper proposes to introduce a clarification in the ECMR to the effect that companies remain responsible for the correctness of information provided by their legal representatives. It requests comment.

The Sections agree with this proposed modification.

- Power to Take Statements

The Green Paper proposes allowing for oral submissions to be recorded and used as evidence. It requests comment.

The Sections do not oppose this suggestion, especially if the initiative for such use of oral submissions comes from the notifying parties, but note that this possibility should not preclude informal meetings that are not recorded to encourage full discussion.

- Inspection Visits

The Green Paper suggests increasing the potential effectiveness of inspection provisions in the ECMR (Article 13). It requests comment.

The Sections note that the Green Paper does not set out specific reasons why the existing inspection provisions are considered inappropriate. In particular in view of concerns on the current concentration of fact-finding and decision-making powers within the European institutions and the limited access to judicial review (see Section J below), the Sections consider that extending the scope of inspection provisions could raise serious due process issues.

- Investigations by NCAs

The Green Paper suggests allowing one Member State to conduct investigations on its territory on behalf of the Commission. It requests comment.

The Sections consider that investigations being conducted by different authorities in different Member States would create administrative difficulties for the Commission and uncertainties for the parties and therefore do not support this proposal.

- Fines

The Green Paper suggests introducing a percentage-based calculation of fines for breach of procedural rules (up to 1% of annual turnover). It also proposes including non-compliance with remedies imposed in first-phase proceedings in the list of breaches that may give rise to fines of up to 10% of the parties' turnover (Article 14(2)(a) ECMR). It requests comment on these proposed changes.

A system of turnover-based fines may be appropriate in certain circumstances for breach of procedural rules. In the view of the Sections, however, any such reinforcement of the coercive powers of the Commission should be accompanied by corresponding improvements in checks and balances, a point we develop more fully in Section J below. Under such a system, only the EU-derived turnover of the relevant businesses, *i.e.*, the businesses directly concerned by the transaction, should be taken into account for the purpose of establishing such fines. Concerning non-compliance with remedies imposed in first-phase proceedings, the Sections do not oppose the alignment of sanctions in case of a breach of a Phase I or a Phase II commitment.

- Periodic Penalty Payments

The Green Paper proposes introducing a percentage-based calculation of periodic penalty payments (up to 5% of average daily turnover) and including the non-compliance with an obligation imposed pursuant to Article 6(2) ECMR in the list of Article 15(2)(a) ECMR. It requests comment.

The Sections refer to the comments made above under “Fines”.

- Article 11 Requests

The Green Paper proposes introducing the possibility for the Commission to adopt a decision requiring certain information to be provided, without first having made an unsanctioned request. It requests comment.

The Sections do not oppose this proposal, provided the Commission retains the use of “unsanctioned requests” in the interest of promoting informal submissions and dialogue.

I. Filing Fees (§§ 227-231)

The Green Paper seeks comment on the appropriateness of including an enabling provision in the ECMR allowing the Commission to introduce filing fees.

The Sections have had frequent occasion to examine the use of filing fees, which have been imposed under the HSR framework since 1989. Our experience has been that filing fees are contrary to the interests of *both* merging firms *and* enforcement agencies, and we urge the Commission not to adopt them.

First, filing fees operate as a form of transaction tax. As the Commission undoubtedly recognizes, such taxes, together with other transactions costs, introduce inefficiency into the operation of capital markets. Only a small fraction of mergers raises competitive objection; and

as merger control regimes proliferate, we are fearful that the associated transactions costs will begin to cause firms not to proceed with beneficial transactions that otherwise might have occurred. In the judgment of the Sections, the leading jurisdictions of the world would find it in the public interest to work to reduce those transactions costs. One element of such reduction is the elimination of filing fees that are currently in place, rather than imposition of new ones.

Second, our experience has been that filing fees, once adopted, are generally used as a source of enforcement agency funding. Because the number of transactions and the corresponding level of fee revenue cannot be reliably predicted in advance, routine fluctuations in capital market activity have the effect of causing occasional shortfalls in agency budgets, thereby compromising enforcement activity and planning. In the judgment of the Sections, merger review is properly treated as a governmental law enforcement function funded from general revenues.

For these reasons, although recognizing the right of sovereigns to levy filing fees, the Sections have opposed their doing so. To the extent that filing fees are imposed, the Sections believe that such fees should not be imposed for consultations on the necessity to submit a filing, should not be used to fund the activities of the reviewing agency beyond the administrative costs of the agency's merger review program, should be based on the merging parties' level of activity in the relevant jurisdiction (i.e., the EC Member States), and should not create incentives for in-depth investigations.¹⁴

J. Due Process and “Checks and Balances” (§§ 232-253)

- Role of Consumer Groups and Organizations and Employees and Employee Representatives

The Green Paper invites comment on the assistance the Commission could offer to facilitate the involvement of consumer groups and organizations and employee representatives in the merger review process.

As mentioned by the Green Paper (§ 242), third parties who can show a sufficient interest already have the ability to submit views in the context of merger proceedings. This may in particular apply to consumer groups and employee representatives. In light of these existing provisions, the Sections oppose the creation of special mechanisms favoring such groups over other interested parties. Merger review should as a general rule be based on competition policy objectives, and the Sections note that employment protection issues are addressed in EU Directives independently from the ECMR.

- Promotion of Better Quality Contributions

The Green Paper invites comment on the way to promote “better quality contributions at the appropriate moment and the appropriate stage in the procedure” (§ 248).

¹⁴ See BIAC/ICC principle 2.1.5.6, which states generally that merger filing fees should not be used as “license fees”.

The Sections have identified several steps that, we believe, would further the objectives identified in § 248 of the Green Paper, as follows:

One way to promote better quality contributions would be to strengthen further the role of the Hearing Officer, following up on the improvements instituted by the new mandate issued by the Commission in 2001. The Sections would encourage the Commission to explore the possibility that the Hearing Officer could produce a reasoned opinion on both procedural and substantive issues. Similarly, the independence of the Hearing Officer could be reinforced by attaching this position to the Court of First Instance (the “CFI”) (another possibility would be to attach the Hearing Officer to the Commission’s Legal Service, although the CFI, as an independent judicial body, would seem preferable).

The Sections also invite the Commission to consider reversing the order of the issuance of the Statement of Objections and the oral hearing. The Commission may be in a better position to evaluate the submissions of interested parties and take such submissions into account in the Statement of Objections if the oral hearing occurs before the Commission is required to draft the Statement of Objections. Instead of issuing a full Statement of Objections, the Commission could be required to set out the main issues in the form of questions in a short brief addressed to the parties before the hearing.¹⁵

In a broader perspective, the Sections question the need for a Statement of Objections, which obliges the case-team to devote a substantial part of the Phase II proceedings to drafting the document and to focus on arguments opposing a transaction. Since the purpose of the Statement of Objections is to give the parties an opportunity to respond to the Commission’s objections, this could be achieved by giving the parties the possibility to comment on the draft decision instead. Eliminating the Statement of Objections would allow the parties more time to concentrate on the access to and the review of the file, the drafting of pre-hearing submissions. More significantly, this would allow more time for an extensive hearing and a more satisfying discussion of the views of the Commission and the complaining parties.

Whether or not the Statement of Objections is retained and whether or not the present order of the Statement of Objections and the oral hearing is retained, the Sections believe that the value of the oral hearing could be enhanced by reinforcing the inquisitorial role of the Hearing Officer, or introducing adversarial-type procedures allowing the parties to address questions directly to the complainants or the Commission.

Another way to improve the transparency of merger review proceedings and the possibility for notifying parties to confront, and address, comments made by third parties would be to grant notifying parties access to important documents submitted by third parties in Phase I proceedings. The Commission could for example request third parties who express concerns about a transaction to submit a non-confidential version of their comments along with these comments.

¹⁵ While under the current system the Commission’s concerns are first spelled out in the decision opening the Phase II investigation (“decision Article 6(1)(c)”), the Sections believe that a separate document would be required since some issues may have been dropped before the hearing. The written brief to be issued by the Commission would limit itself to the most important issues which can appropriately be discussed at the hearing.

Finally, the Sections encourage the Commission to strengthen the involvement of professional economists in its merger review proceedings, and to explore the possibility of assigning a staff economist to each Phase II case.

- Judicial Review

The Green Paper notes that beyond the adoption of new procedural rules by the CFI in 2001, the Commission would welcome any further reform undertaken by the European Courts to expedite appeals (§ 250). Generally, however, “the Commission does not believe that the current system of judicial review fails to provide adequate judicial protection to companies whose merger plans are challenged under the Regulation” (§ 253). The Green Paper notes that “improvements to the current merger assessment procedure must be possible but, obviously, they should fit into the limits imposed by the present Treaty system and by the Commission’s working methods” (§ 248). The Green Paper underlines the role of the Member States and the internal consultation among Commission services, which, in the Commission’s view, constitute “checks and balances” in the decision-making process. The Green Paper asks whether commenters agree with the Commission’s assessment of the current system and, if applicable, identify ways to enhance the judicial review of merger decisions.

While the Sections recognize the independence and high quality of the European Courts, it considers that timeliness as well as the limitations inherent in the Courts’ review remain problematic in the context of merger review.

The Sections note that the timing issue may be partially addressed by the recent reform of the CFI’s procedural rules, provided the CFI is able to implement the full benefit of these changes¹⁶ and is willing to order expedited interim measures in appropriate cases. In this respect, the Sections note that the introduction of the “fast track” procedure before the CFI may in practice mean that interim relief in merger cases will be even more difficult to obtain.¹⁷ The possibility to obtain interim measures is however important as there might be little point in giving a judgment quickly if, in the meantime, the parties have abandoned a prohibited transaction or have been obliged to carry out a divestiture which they believed was unnecessary and unjustifiable. Furthermore, taking into account the realities of business life, the new expedited procedure should allow applicants to obtain adequate relief within a maximum of, say, six months in order to be effective. If this cannot be realized, the Sections consider that it may be necessary seriously to re-think the appeal procedure in European merger control procedure and possibly to seek inspiration from systems that are fundamentally different from the current one. In particular, the Sections refer to their comments below on the merits of the U.S. system and note that under the Canadian system, the parties can proceed with their transaction subject to the risk that it will be undone thereafter.

¹⁶ This implies that the CFI is able to commit the appropriate resources to the treatment of appeals under the expedited procedure. An issue is also whether the CFI will allow (a) chamber(s) specializing in merger cases to develop.

¹⁷ The CFI has indicated that the expedited procedure is “designed to deal with cases of a particularly urgent nature which do not lend themselves to the adoption of interim measures of the kind which may be ordered in proceedings for interim relief”. Information note, Amendment of the Rules of Procedure of the Court of First Instance with a view to expediting proceedings (CFI).

Another limitation of the current EC judicial review, in the Sections' view, is that even if a company is successful before the CFI, the CFI cannot substitute its assessment for the Commission's but can only annul the Commission's decision for clear errors of facts or mistakes of substantive law or procedure. The merger is then reconsidered by the Commission.¹⁸

Overall, the Sections believe that in the absence of a separation between the prosecutorial/investigative and decision-making roles, a meaningful and timely judicial review is essential to ensure compliance of the review system with due process principles. Thus, the Sections consider that absent modification of the current institutional framework (*i.e.*, separating the investigative/decision-making functions), due process would be improved by providing for judicial review in a fixed time period based on the evidence in the record at the Commission.

Irrespective of the institutional framework selected (*i.e.*, separation of functions or judicial review), the Sections consider that the reviewing agency must be clearly accountable for meeting its burden of proof under the law. In the U.S., Canada and elsewhere, this is attained by the requirement that a challenge against a transaction by the agencies (DoJ, FTC, Competition Bureau) be brought before an independent tribunal. In this respect, the Sections disagree with the comments in the Green Paper on the role of judicial review in the U.S. merger control system.

The Green Paper seems to imply that because cases are settled through negotiations or because certain transactions are abandoned following the introduction of legal proceedings, judicial review plays a limited role in the U.S. The Green Paper fails to note a fundamental distinction between the U.S. and EC systems, namely that whereas in the EC the Commission has the power to block a transaction without going to court, the FTC and the DoJ must obtain a preliminary injunction in order to do so.¹⁹ The same is generally true in Canada. In the Sections' view, the necessity for the reviewing agency to prove a case based on sound and adequate evidence capable of withstanding judicial scrutiny is a serious factor in every prosecutorial decision to bring or not to bring a case, or to accept or not accept remedies offered by the parties, and thus pervades the entire U.S. merger review process. In addition, the Sections note that pressure for further improvement of the U.S. review process continues to apply, as exemplified by the introduction of internal appeal procedures²⁰ and the requirement for agency reports on progress in this direction.

¹⁸ According to Article 10(5) ECMR, if the Commission's decision is annulled by the Court, the ECMR time periods start again from the date of the judgment. However, after the *Kali+Salz/MdK/Treuhand* decision was annulled, the Commission took the view that Article 10(5) had to be read in conjunction with Article 10(1) and considered that the new investigation could only begin on receipt on a complete notification, which involved information additional to that included in the initial filing five years before.

¹⁹ It is worth noting that when the HSR was considered by the Congress in 1976, the early versions provided for an automatic stay whenever the government challenged a merger. This provision was deleted before passage.

²⁰ In addition, in 2001, the FTC introduced internal appeal procedures to enable the parties to a transaction to challenge the scope of requests for additional information (so-called "Second Requests") issued by the FTC staff. See <http://www.ftc.gov/os/2001/01/hsrscdrqtappfrn.htm>. Similar internal appeal procedures were revised by the DoJ in June 2001, see <http://www.usdoj.gov/atr/public/8430.htm>.

- Comments on the Overall Procedural System

The Green Paper seeks comment on the relative merits of the overall procedural system provided for in the ECMR as compared to merger control procedural systems employed in other jurisdictions.

Overall, the Sections believe that notifying parties appreciate the advantages of the ECMR's timetable certainty (in exchange for Commission's request for fuller information at the outset as compared to other jurisdictions, including the U.S.). However, notifying parties also express frustration with the fact that the Commission acts as both prosecutor and jury, and judicial review mechanisms are widely perceived as unsatisfactory. This is a serious problem for the present system, and the Sections urge the Commission to go further in proposing reforms to address it.