

**JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION  
SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW**

**RESPONSE TO QUESTIONNAIRE ISSUED BY THE EUROPEAN COMMISSION IN  
CONNECTION WITH ITS REPORT ON REGULATION 139/2004**

**NOVEMBER 2008**

*The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.*

The Section of Antitrust Law and the Section of International Law of the American Bar Association (the Sections) appreciate the opportunity to provide comments to the European Commission (“Commission”) with respect to the questionnaire issued in connection with Commission’s public consultation on the operation of Article 1(2) and (3) and of Article 4(4) and (5) of Council Regulation (EC) No 139/2004 (“ECMR” or “Merger Regulation”). The Sections previously provided comments regarding these issues in response to the Commission Green Paper on the Review of Council Regulation (EEC) No 4064/89.<sup>1</sup>

The membership of the Sections has had substantial experience with the merger control practices of U.S. and non-U.S. antitrust authorities on a wide range of issues. The Sections understand the complex tradeoffs and policy judgments involved in structuring a merger control regime, not only in the European Union (“EU”) but throughout the world. In the United States (U.S.), the merger review process is governed at the federal level primarily by the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR”), and transactions also are subject to review at the state level in the U.S.. In addition, dual federal merger enforcement by the U.S. Department of Justice and Federal Trade Commission has been a staple of merger antitrust enforcement for more than 90 years in the U.S. While the dual enforcement model has worked well in many respects, other aspects of it – in particular the U.S. interagency merger review “clearance” process – have not

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<sup>1</sup> See 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 (March 2002) (“2002 Green Paper Comments”).

functioned as efficiently as they could, notwithstanding the efforts of the agencies' ongoing efforts to improve the process. Such issues have been the previous subject of Section commentary,<sup>2</sup> and the Sections' experience in dealing with these jurisdictional and clearance/referral issues informs these comments on how the turnover thresholds in Article 1 are functioning in combination with the concentration referral provisions in the ECMR.

**A. Functioning of the Turnover Thresholds in Article 1(2) and (3) ECMR**

**Question 1:**

**Do you believe that Article 1(2) and (3) of the Merger Regulation is functioning as an effective means of distinguishing between those transactions which are most appropriately the subject of merger control at the Community level from those which are not? Please explain your answer, if possible illustrating your explanation by reference to your practice experience with the provisions.**

**If you do not believe that Article 1(2) and (3) of the Merger Regulation is functioning effectively in this way, please indicate any suggestions you may have as to how any shortcomings might be remedied.**

The jurisdictional thresholds of Article 1 are a tool to ensure that mergers are reviewed by the most appropriate (Member State or EU) authority, recognizing both the benefits of a "one stop shop" review system and the need for a balance between the interests of the EU and the Member States.<sup>3</sup> The precise level at which to set that balance does not present a legal issue on which the Sections have a basis for commenting. Accordingly, the Sections take no position as to whether the thresholds should be modified to limit or expand the Commission's existing jurisdiction. That said, the Sections offer the following practical observations:

First, the Sections strongly support the Merger Regulation's goal of providing a simple and effective method for determining the competent authority<sup>4</sup> and agree that turnover typically is

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<sup>2</sup> See, e.g., Comments of the Section of Antitrust Law of the American Bar Association in Response to the Antitrust Modernization Commission's Request for Public Comment Regarding Government Enforcement Institutions (October 2005); American Bar Association Section of Antitrust Law, *The State of Federal Antitrust Enforcement 2001* (2001).

<sup>3</sup> *Id.* at 4.

<sup>4</sup> See Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ("Jurisdictional Notice"), para. 127; see also CFI, Judgment in Case T-417/05, *Endesa SA v. Commission*, 14 July 2006, para 180.

an effective proxy for the economic resources being combined in a transaction.<sup>5</sup> Though turnover calculation under Article 5 presents its own pitfalls, the Sections strongly believe turnover-based thresholds are preferable to jurisdictional rules that are not – at least in principle – readily ascertainable and objective. This is in line with ICN recommendations.<sup>6</sup> Market share tests in particular are inherently subjective and require the merging parties to speculate on the outcome of what is frequently one of the more difficult issues resolved during a full investigation.<sup>7</sup> While asset tests do not suffer from the vagaries of market share thresholds, asset tests are less reliable proxies than turnover thresholds for identifying the likely locus of competition. For these reasons, the Sections strongly support the Merger Regulation’s commitment to the relative simplicity of turnover-based thresholds.

Second, it is the Sections’ impression that Article 1(2) is generally effective in identifying transactions which, due to the size of the parties involved, merit review at the Community level. In the Sections’ experience, proposed mergers among companies whose revenues exceed the thresholds of Article 1(2) rarely make strong cases for review at the Member State level. And those Article 1(2) mergers that do predominantly have national effects can be referred back to the Member States under Articles 4(4) and 9.<sup>8</sup> The Sections submit, however, that the current thresholds for Community Dimension do not work well in the context of the formation of equity joint ventures. Given that Article 1(2) relates to the size of the parent entities and not to the size of the venture, transactions can come within the ECMR’s scope of application even if they have no nexus with the EU, or where their potential impact on competition in the EU is negligible. The Sections would welcome a derogation from the obligation to file in such situations and invite the

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<sup>5</sup> Jurisdictional Notice, para. 124.

<sup>6</sup> E.g, ICN Implementation Handbook (April 2006), at 4 (“The notification thresholds must be clear, understandable, and be based on objectively quantifiable criteria – e.g., thresholds based on assets or sales revenue data.”) (quoting Recommended Practice II(B)).

<sup>7</sup> See 2002 Green Paper Comments at 4.

<sup>8</sup> See Questions 5 and 7 below for comments on the effectiveness of these provisions.

Commission to consider this proposal either in the context of this current review or as part of future re-evaluations of the merger review process.

The Sections have considered whether *lower* Article 1(2) thresholds would increase the efficiency of the European merger review process by capturing more transactions that might appropriately be reviewed exclusively at the EU level. While the Sections generally support the objective of reducing the number of potential merger review “stops” across the European Union, we take no position as to whether such an amendment of Article 1(2) would be appropriate, for the reasons mentioned above.

Third, with respect to Article 1(3) ECMR, the Sections suggest that Commission consider whether the alternative threshold set forth in that provision has been effective in capturing the types of cases Article 1(3) was originally designed to encompass. Article 1(3) was intended to avoid multiple national notifications by establishing Community jurisdiction over transactions which – in light of the parties’ substantial presence in at least three Member States – typically would result in multiple pre-merger notifications in the EU.<sup>9</sup> Today, parties can request referral from the Member State level to the European Commission under Article 4(5) if their merger is capable of being reviewed under the merger control laws of at least three Member States. Recent Commission statistics indicate that Article 4(5) referrals have accounted for almost 10% of the Commission’s workload under the ECMR in recent years,<sup>10</sup> which could be a sign that Article 1(3) does not perform its intended role. Moreover, Article 1(3) triggers strange jurisdictional results, in particular, where control is acquired jointly by three parties, as the €25 million test of Article 1(3)(c) criteria can be satisfied by any two of the parties. The Sections encourage the Commission to consider whether a review of its thresholds has merit and/or inviting additional public comments on the issue.

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<sup>9</sup> Jurisdictional Notice, para 126.

<sup>10</sup> See European Merger Control – Council Regulation 139/2004 – Statistics (21 September 1990 to 30 September 2008), <http://ec.europa.eu/comm/competition/mergers/statistics.pdf>. For further comments on Art. 4(5), see Question 6 below.

Fourth, the thresholds of both Article 1(2) and Article 1(3) do not take into account the recent enlargements of the EU and the effect these have had on the amount of the parties' revenues that count towards the "in the EC" tests. The Sections suggest that the Commission revisit the concept of "Community Dimension".

Finally, Article 1 ECMR does not currently provide for adjustment of the turnover thresholds for inflation and/or economic growth. As the Commission is aware, the pre-merger notification thresholds in the United States under the Hart-Scott-Rodino Act are adjusted annually to reflect the percentage change in the gross national product from the previous fiscal year.<sup>11</sup> The mandatory annual indexing ensures that the thresholds reflect economic development and avoids the need for lengthy legislative intervention. The current review process provides an opportunity to consider whether automatic adjustment of the thresholds would be useful in the future.

The Sections recognize that several of the issues identified herein may merit additional public consultation before the Commission decides whether to take any action. Moreover, some of the recommendations set forth above, if implemented, could require legislative amendments to the ECMR. This can be a time consuming process and one that the Commission would not enter into without a thorough assessment. Nonetheless, the Sections have offered these comments for the Commission's consideration.

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<sup>11</sup> § 7A(a)(2) Clayton Act, 15 U.S.C. § 18a(a)(2). The Sections understand that at least one EU Member State (Italy) has implemented a similar adjustment procedure.

## **Question 2:**

**Are there any specific markets or economic sectors where, in your view, the turnover thresholds in Article 1(2) and (3) are not functioning the manner intended, namely to identify those concentrations which would most appropriately be the subject of merger control at the Community level?**

**If there are any such markets or sectors, please indicate them and explain why you believe that the turnover thresholds do not always identify those concentrations which would most appropriately be the subject of merger control at the Community level. Please also indicate any manner in which you think this shortcoming might be remedied.**

In principle, the Sections support uniform thresholds across industries and markets because they simplify the application of any merger review regime and it is rarely the case that antitrust principles should not be applied consistently across sectors. The Sections believe that the benefits of simplicity and uniformity typically outweigh any actual or perceived increase in accuracy that may result from market- or industry-specific thresholds. In particular, in relation to market-specific tests, the Sections note that the Commission tends to leave its definition of the relevant markets open, so that market-specific thresholds would necessarily be difficult to apply. Against this background, the Sections see no strong case for sector- or market-specific jurisdictional provisions beyond the existing turnover calculation rules for credit institutions and other companies in Article 5(3).

More generally, however, the Sections note that the calculation and geographic allocation of turnover under Article 5 has risen to a level of complexity that risks creating tension with the goals of Article 1. The Consolidated Jurisdictional Notice provides useful guidance, but turnover calculation and geographic allocation continues to present challenges in specific industries, such as air travel.<sup>12</sup> The Sections believe it would be useful to clarify the applicable rules in this area, either through case law, expanding the existing guidance in the Jurisdictional Notice, or (at least in the short term) providing additional guidance in individual cases.

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<sup>12</sup> See, e.g., the discussion of the appropriate geographic allocation mechanism in Case M.4439 – Ryanair/Aer Lingus, Commission Decision of June 27, 2007, paras. 13 *et seq.*

### **Question 3:**

**Some merger transactions are subject to review under the merger control laws of more than one EU Member State. If you have any specific concerns about the fact or the manner in which some transactions are reviewed under the merger control laws of multiple EU jurisdictions, please explain those concerns - if possible by reference to your practical experience - and any suggestions you may have as to how they might be remedied.**

As the Sections have previously noted, the “one stop shop” for concentrations with a Community dimension is one of the most attractive features of the ECMR from the point of view of notifying parties and the Antitrust Bar because it reduces the legal uncertainty, expense, and administrative burden imposed by multiple Member State filing requirements.<sup>13</sup> It also provides adequate protection for consumers. The Sections strongly support the objective of reducing multiple filings in several Member States. However, the Sections recognize both that National Competition Authorities (“NCAs”) in the EU have a legitimate interest in applying their domestic merger control rules to certain types of transactions, and that the Commission’s resources simply would not allow for review of all transactions that affect competition in the EU and merit some form of merger review.

While the Sections are not concerned *per se* with the fact that transactions without a Community dimension as defined in Article 1 can result in multiple national filings, the Sections believe that the lack of harmonization among the merger review laws of the Member States continues to raise serious practical difficulties, both in terms of the burden associated with identifying jurisdictions where transactions may be reportable and in terms of coordinating parallel clearance proceedings. In the Sections’ view, harmonization does not necessarily call for mandatory pre-merger filings in all Member States. The Sections’ concern is with the practical difficulties in applying vague and subjective jurisdictional standards, not with the fact that some jurisdictions (the UK in particular) do not require pre-merger filings for all transactions that meet the relevant jurisdictional tests.

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<sup>13</sup> 2002 Green Paper Comments at 1-2.

With regard to reportability requirements, the Sections continue to believe that Member States' jurisdictional thresholds should be based on objectively quantifiable information, such as sales, in line with relevant ICN recommendations.<sup>14</sup> As noted above and below in response to Question 6, market share tests in particular are inherently subjective. In addition, Member States apply market share tests inconsistently – for example, the Sections understand that Member States with market share thresholds continue to disagree as to whether these thresholds can be satisfied if there is no overlap in the relevant markets.<sup>15</sup>

The Sections also have some concerns about Member State thresholds based on aggregate shares or turnover. Such tests do not ensure that the notified transaction has sufficient nexus with the Member State to justify requiring a notification. As indicated by the ICN in other contexts, merger control thresholds should be set to ensure that at least two parties have sufficient nexus with the Member State before a filing should be required.

Another area where harmonization would, in the Sections' view, decrease the burden associated with identifying national filing requirements is the reportability of joint ventures. Under Article 3(4), the creation of “full function” joint ventures is reportable if the turnover thresholds of Article 1 are met. Partial function joint ventures are outside the scope of the Regulation. The Commission has provided ample guidance on the notion of full functionality, both in the Consolidated Jurisdictional Notice<sup>16</sup> and in a voluminous body of case law. By contrast, businesses continue to face uncertainty in determining whether partial function joint ventures (and full function joint ventures below the thresholds of Art. 1) are reportable on a national level. Though the majority of EU jurisdictions appears to have embraced full-

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<sup>14</sup> 2002 Green Paper Comments at 6; *see* also note 6 above.

<sup>15</sup> E.g., the “share of supply” test in the United Kingdom requires share accretion; the market share tests in Spain and Portugal can be met by one party alone.

<sup>16</sup> Paras 91 *et seq.*



functionality as a jurisdictional requirement, and some Member States explicitly reference the Commission’s guidance on the meaning of that term,<sup>17</sup> several notable exceptions remain.<sup>18</sup>

Finally, the Sections are concerned about the lack of convergence between the Member States’ procedural rules. The level of detail required for domestic filings, review schedules, and the ability of NCAs to “stop the clock” during the course of the review all differ widely, to name only a few examples.

The Sections recognize that the Commission has no legislative authority to impose harmonized procedures or filing requirements on the Member States. Further, the Sections recognize the efforts of many Member States to align their domestic regimes with EU principles<sup>19</sup> – efforts which greatly contribute to increasing the transparency, predictability, and ultimately efficiency of concurrent domestic reviews. The Sections nevertheless invite the Commission to continue to foster further harmonization of national merger control regimes, such as through continued consultations with the Member States and through the appropriate international fora.<sup>20</sup>

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<sup>17</sup> E.g., Denmark, Finland, and Slovenia.

<sup>18</sup> E.g., Germany, United Kingdom, Poland, Lithuania. The laws of other Member States continue to reference the pre-1998 Merger Regulation distinction between “cooperative” and “concentrative” joint ventures, adding further confusion to the interpretation of national merger review laws (e.g., Czech Republic, Italy).

<sup>19</sup> For example, the Sections understand that Spain recently replaced the “concentrative” v. “cooperative” joint venture test with the “full function” standard.

<sup>20</sup> See 2002 Green Paper Comments at 5.

#### **Question 4:**

**Please describe any specific concerns you may have about the functioning of the "two-thirds rule" in Article 1(2) and (3) of the Merger Regulation, if possible by reference to your practical experience with the provisions. Please also describe any suggestions you may have as to how these concerns might be remedied**

Because the two-thirds rule is part of the framework that defines the balance of powers between the EU and Member States, the Sections take no position as to whether it should be modified or repealed. However, the Sections wish to raise two points: first, as a practical matter, the Sections would encourage the Commission to confirm the applicability of the two-thirds rule to individual transactions in writing upon the parties' request. Second, the Sections are concerned that Member States may use the two-thirds rule to evade Commission jurisdiction where it serves their domestic industrial policy interests. The Sections are particularly worried that the two-thirds rule may, under certain circumstances, facilitate the creation or strengthening of "national champions" because it allows Member States to review mergers among large domestic companies that – but for the two-thirds rule – would be subject to Commission jurisdiction.<sup>21</sup> This concern is especially valid in formerly regulated industries such as telecommunications and energy, where Member State authorities traditionally have strong ties to domestic incumbents that now face competition on an EU—or even worldwide scale. The Sections commend the Commission for its public commitment to the virtues of competition in these industries<sup>22</sup> and encourage the Commission to continue to prevent exploitation of the two-thirds rule as a means to pursue anticompetitive Member State policy that is inconsistent with the goals of the EU Treaty.

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<sup>21</sup> E.g., António Goucha Soares, "National Champions" Rhetoric in European Law — Or the many faces of protectionism, (2008) 31 *World Competition* pp. 353-368.

<sup>22</sup> E.g., Commissioner Kroes, Building a competitive European energy market Madrid Energy conference (in homage to former Commission Vice-President De Palacio), SPEECH/07/582, October 1, 2007.

**B. The functioning of the case referral provisions in Article 4(4), 4(5), 9 and 22 of Council Regulation (EC) No 139/2004 (the EC Merger Regulation) since May 2004**

**Question 5:**

**Do you believe that Article 4(4) is functioning effectively as a means of re-allocating “original” jurisdiction from the Community level to the national level on the basis that a case is more appropriately dealt with in the national jurisdiction to which referral is requested?**

**If there are any particular concerns which you have about the functioning of Article 4(4), please describe those concerns - preferably by reference to your experience with a specific case/s and any suggestions that you may have as to how they might be remedied.**

The membership of the Sections’ have found that during the first two years of the operation of Article 4(4), both the Commission and Member States have used the full time period set out in the Article 4(4) procedure before confirming to the parties that the Commission has agreed to transfer jurisdiction to the Member State, notwithstanding the fact that parties engage in a significant period of pre-notification discussions with both the Commission and the Member State in question. In light of the considerable burden associated with parties’ completion of the Form RS and the time required before the Commission is satisfied that the Form RS is complete, the additional delay considerably reduces the attraction of using Article 4(4).

More recently, however, the Article 4(4) process appears to be functioning well. However, the Sections would welcome any reduction in the amount of information that parties must provide to the Commission under the Form RS. *Alternatively*, if Member States accepted the Form RS (or a translation thereof) as a valid notification under their national merger control procedures following the transfer to them of jurisdiction, the parties would save significant time and effort.<sup>23</sup>

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<sup>23</sup> Germany’s Art. 39(4) GWB, which waives the need to submit a separate notification in cases where the Federal Cartel Office was provided sufficient information as a result of the referral process, is a step in this direction.

### Question 6:

**Do you believe that Article 4(5) is functioning effectively as a means of reallocating "original" jurisdiction from the national level to the Community level on the basis that a case is more appropriately dealt with by the Commission? If there are any particular concerns which you have about the functioning of Article 4(5), please describe those concerns – preferably by reference to your experience with a specific cases/s – and any suggestions you may have as to how they might be remedied."**

Article 4(5) is designed to serve three goals: (i) to introduce jurisdictional flexibility; (i) to expand the "one-stop shop" principle; and (iii) to bolster legal certainty.<sup>24</sup> Based on their members' experience, the Sections believe that Article 4(5) has to a large part achieved the first two goals, albeit at the price of imposing a substantial burden on the filing parties. However, Article 4(5) appears not to have generated the level of legal certainty that the 2004 reform was meant to ensure.

According to the Commission's merger statistics, upstream pre-filing referrals are a success story. The Sections understand that the Commission has received a total of 154 requests for referral from May 2004, when the revised ECMR took effect, through September 2008. More importantly, 144 requests (or 94%) were successful, and only four requests were rejected. Interestingly, the number of successful requests has significantly increased over the years, not only in absolute figures (from 16 in the first eight months of 2004 to 50 in 2007) but also relative to the total number of EC notifications (from 6.5% to 12.4% in 2007). Clearly, the business community has made effective use of the referral mechanism set forth in Article 4(5) and this provision has served a useful purpose in adjusting EU jurisdiction beyond the generic mechanisms of Article 1(2) and (3). In line with the Commission's expectations, the Sections understand that filing parties indeed select the procedure, *inter alia*, to avoid having to prepare and coordinate multiple filings. .

Nonetheless, the success of Article 4(5) does not appear to be solely due to the EU having introduced this new option. Instead, filing parties in many cases invest significant resources and are prepared to shoulder substantial risks regarding their transaction timeline to make this

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<sup>24</sup> ECMR, recitals (11) and (12), (16); Commission Notice on Case Referral in respect of concentrations, ("Referral Notice"), para. 5 to 7.

procedural option work in practice. The Sections believe that a number of these issues can be, and they respectfully submit that they ought to be, directly addressed by the Commission.

By contrast, the Sections are aware that what are arguably the most significant shortcomings of the current system – in particular, in terms of legal certainty – cannot be remedied at the EU level alone. These concerns are only alleviated by the fact that, at least currently, Member States hardly ever reject requests for referral, but this practice may change over time. In addition, the high success rate of requests for referral conceals the efforts that filing parties often times have to undertake to comfort NCA staff.

These concerns relate, first, to the continued existence of relative or even subjective notification tests at the Member State level, which taints the Article 4(5) referral mechanism. The Sections suggest that the current system could do more if all national jurisdictional thresholds for notification in the EU were “based on readily-ascertainable, objectively-based criteria,” as discussed further above. In applying the referral mechanism to the UK (share of supply) as well as Latvia, Portugal, Slovenia and Spain (market shares), filing parties have to invest significant resources when they determine their market shares or shares of supply, and also deal with the inherent risk of defining relevant markets (under national law, as opposed to the EC criteria that will subsequently apply in the EC reporting process). Much of this information may not even be necessary for the final EU submission. The consequences of providing incorrect information are potentially dramatic. The Sections are aware that national filing criteria are for Member States to define but respectfully encourage the Commission to use its influence towards a transition to objective and ICN-compliant tests across the EC.<sup>25</sup>

Second, the three-plus referral system adds an element of arbitrariness to the EU jurisdictional system, which is otherwise geared towards clear, objective and justifiable criteria.

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<sup>25</sup> Members of the Sections reported that turnover tests can, of course, create risks as well. National rules for the calculation of the filing parties’ relevant turnover differ across Member States, *inter alia*, in relation to the geographic allocation of revenues, which may suggest a need for greater harmonization.

For veto rights by Member States, Article 4(5) relies exclusively on whether the transaction is capable of being reviewed at the national level. As a result, the veto power does not relate to the impact a transaction may have on competition in the Member State territory at issue. As a further result, Member States with all-encompassing turnover thresholds (such as Austria, Germany, and Poland) and Member States with market share tests (given the volatility of market definitions and the issues relative to market data) have a *de facto* influence over the upstream referral mechanism, which is not necessarily justified by the competitive effects the majority of transactions has on their territory. The Commission may, therefore, wish to consider whether the Article 4(5) veto right should be limited to Member States (i) that are competent to examine the transaction; and (ii) in whose territory the transaction would give rise to affected markets (which have to be reported in Section 4 of the Form RS anyway).

The Sections offer the following additional comments regarding timing and reporting issues:

**(1) Timing**

**(1.1) Veto period.** Member States have fifteen working days to decide whether they wish to agree with the referral. The veto period begins for each Member State when it receives its copy of the request, so that the full period is available for agency staff to review requests. Public holidays, the number of which varies significantly across Member States,<sup>26</sup> are discounted.

This review period is relatively long, although the great majority of referral requests do not necessitate any in-depth review. More importantly, Member States are not meant to review the antitrust merits of the transaction that could be referred (for which an even longer period may be more appropriate); they are obligated to limit their review to the merits of the referral. The ECMR expects referrals to take place where transactions would “affect competition beyond the territory of

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<sup>26</sup> See Commission communication Public Holidays in 2008, OJ EC No C 70, March 15, 2008, p. 13.

one Member States.”<sup>27</sup> This analysis is in almost all cases straightforward. The Sections understand that Member States ought to apply relatively mundane criteria, most importantly, whether the market that might possibly raise antitrust concerns is “wider than national in geographic scope.”<sup>28</sup> Notably, the Commission has 25 working days to review both jurisdictional and substantive issues. The Sections suggest that the Commission evaluate whether the review period should be shortened by five working days.

**(1.2) Double consultation.** The impact of the Member State review period on the overall transaction timetable is misleading if it were to be viewed in isolation. The Sections are under the impression that the fact that the Commission expects to be consulted on the basis of a draft Form RS before a final Form RS is filed is even more significant.

The Sections acknowledge that it is in the interest of filing parties to submit a Form RS with as much detail as reasonably possible, so that Member States do not feel the need to reject a request simply because they feel uncomfortable with the data provided. However, Commission staff expects to be consulted twice, prior to the Form RS to establish EU jurisdiction and, again, in relation to the Form CO/Short Form to obtain clearance. Members of the Sections have observed that Commission staff sometimes duplicates the consultation periods. Moreover, members of the Sections report that Commission staff apply the EC best practice periods for pre-filing consultation to Form RS as well, although the complexity of the former typically exceeds the issues raised by the latter.

Notwithstanding, the time required for completion of the referral procedure and to obtain the Commission’s clearance typically exceeds the time that would be required to prepare and process national filings. The Sections submit that this side effect of the current consultation

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<sup>27</sup> 2004 ECMR, recital (16); Commission Notice on Case Referral in respect of concentrations, OJ EC March 5, 2005, No C 56, p. 2 et seq. („Referral Notice“), para. 5. to 7.

<sup>28</sup> Referral Notice, para. 28.

practice counteracts one of the goals of the 2004 reform, *i.e.* to reduce the “efforts and cost”<sup>29</sup> for businesses. Extensive Commission consultation may have been deemed to be helpful in the early years following the introduction of the referral procedure, in an attempt to prevent abuse.

Moreover, the Sections would welcome a streamlined procedure in which Commission staff in all cases attempt to discuss the parties’ draft filing papers immediately after a request for referral is submitted. From the outset, the consultation should take into account that there will in all likelihood be two subsequent submissions, both geared towards one and the same result (*i.e.*, EU clearance), and that Form RS merely is a preparatory step (given the success story of Article 4(5)). In the Sections’ perspective, this suggests changes to how the overall consultation and reporting process is managed so that the reporting requirements of Form RS and Form CO/Short Form could be more efficiently linked as is the case today.

One alternative is to allow for a more fulsome Form RS, but to reduce the information content and pre-filing consultation period with respect to Form CO/Short Form. A second alternative is to permit filing parties to consult their case team on the basis of a draft Form CO/Short Form in conjunction with the (few) reporting items that may in addition be necessary for the referral request. The Sections are aware that the depth and breadth of the information required by Form RS versus Form CO/Short Form (in particular, in relation to affected markets at Member State level) varies significantly depending on the circumstances of the particular transaction at hand. However, it should be for the filing party to decide how it wishes to address this risk. The party may be prepared to take the risk involved in an up-front consultation of Commission staff on the basis of “Form CO/Short Form plus” (together with the limited additional information that may be required to assist Member States with their review of the transaction’s jurisdictional aspects). However, the filing party may prefer to consult the Commission on the basis of a “Form RS plus” (together with the additional information that will be required to provide the Commission with a

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<sup>29</sup> ECMR, recital (12).



complete merger application). Either way, if the Commission were to retain the information requirement of Form RS, the Sections suggest that Commission use all information made available by the parties up-front to begin its substantive review and both limit the information that would be required in the following Form CO and to shorten the review period under the Form CO that follows the submission of a Form RS. This would save considerably on time and costs for the parties to the concentration and the Commission staff.

**(1.3) Format switch.** The Sections understand that the time required to complete a Form RS may be worthwhile in that Form RS can provide a robust basis on which the filing party can build its merger submission. However, in practice this is not necessarily the case, although the Sections acknowledge that there is no simple solution to this issue. In particular, where a request for referral is rejected, the filing party has to file submissions at the Member State level in the format set forth by local law (or the NCA). While some of these templates resemble the EU templates to a certain extent, they invariably require more information regarding the territory of the relevant Member State than would be required by Form RS. Naturally, completing these national submissions adds to the timeline and/or costs of the referral process. However, it also implicates the overall timeline, for which there is little control in those instances in which a Form RS is unsuccessful (for whatever reasons).

**(1.4) Timing risks.** The ECMR and the Implementing Regulation establish precise timelines for almost all procedural scenarios and steps of the administrative process. By contrast, the ECMR is unclear regarding when the Commission has to provide Member States with the filing party's Form RS. The Commission has to accomplish this task "without undue delay." The Sections submit that the ECMR could demonstrate the Commission's commitment to timely proceedings by way of a clearly defined time period for the Commission to transmit the request documentation from Brussels, if not to ensure delivery to Member States.

Finally, the mechanism of the referral process puts all timing risks in relation to the Member State involvement on the filing party. The veto period is triggered – Member State by

Member State – upon receipt of the request. This may seem acceptable in light of the fact that the referral procedure is being made available in the filing party’s own interest. However, the Sections submit that filing parties should not have to bear all risks raised by the transmission logistics (*i.e.*, by inter-governmental communication), over which they have no influence. The Sections are aware of cases where it took over one week for copies of a Form RS to be transmitted from Brussels to certain Member States. The Sections submit that filing parties should be allowed to file their Form RS with NCAs (alternatively to a transmission by the Commission); and/or that the Commission should permit filings with the Registry in electronic format without respect to file sizes.<sup>30</sup>

**(1.5) Transparency.** Once a Form RS is submitted, the filing party has no visibility into the internal proceedings of and between the Commission and the Member States. While some case teams are prepared to keep filing parties apprised of the status (to the extent the status is available to them), others are perceived by Section members as being less receptive to the informational needs that flow from the parties’ internal and external reporting requirements (such as to financial institutions or stock markets and their supervisors).

In particular, there is currently no legal requirement for the Commission to notify the filing parties when a Member State review period elapses without disagreement. Nor does the ECMR include a mechanism for Member States to withdraw a veto (or feed a withdrawal into the referral mechanism such that the filing party can identify which type of filing it has to prepare).

To be able to deal with this and similar situations effectively and in line with their right to be heard, filing parties should be made aware of the status of the process. The Sections would welcome a tracking mechanism. At the very least, the Sections suggest that the case team ought to

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<sup>30</sup> Communication pursuant to Article 3(2) of Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ No C 251, October 17, 2006, p. 2, at 4., requires as many copies of electronic media (CD- or DVD-ROM) as are ordinarily required in paper format where any ROM file size exceeds 1 MB or total file size exceeds 5 MB.

routinely notify the filing party by way of facsimile or other comparable means that all relevant veto periods expired without disagreement at Member State level.

## **(2) Scope of reporting**

**(2.1) Commission level.** Overall, Form RS can be a useful tool to provide Member States with the information they objectively require to decide whether they agree with a referral request. However, the Sections submit that the amount of information requested exceeds in certain respects what is necessary for this purpose, in particular if the pre-filing consultation with Commission staff pushes a Form RS close to the scope of reporting in Form CO (unless the Form RS is used to conduct the competition analysis as suggested above).

First, Form RS includes technical information that is only necessary for the Commission (but not for the Member States) to process submissions, such as Section 1.3 (appointment of representatives).

Second, certain Sections of Form RS make it necessary to report instances which do not relate to whether the Article 4(5) referral criteria for a referral are satisfied, *e.g.* Section 3 (ownership and control) and Section 5.4 to 5.9 (specific information on affected markets).<sup>31</sup>

Third, there does not seem to be an objective justification to require parties to disclose in which of the 27 Member States and – since October 2008 – three EFTA States filing criteria are not satisfied. Given that Member States have a right to veto the request only where they have the power to review the transaction in the first place, this reporting requirement should be limited to jurisdictions where a filing would have to be made – or is at least arguable – in the absence of a successful referral.

Conversely, the Sections acknowledge that it might be helpful to provide filing parties with a short matrix for how their arguments in favor of an EU jurisdiction best be organized in

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<sup>31</sup> As for Article 4(4), however, if Member States accepted Form RS as a valid notification under domestic law (*see* Question 5 above), Sections 5.4 to 5.9 might serve a more useful purpose.

Form RS, given that this is the core of this innovative type of submission. Currently, Section 6.3.4 does not itself suggest any level of specificity in this regard.

**(2.2) Member State level.** The Sections understand that filing parties frequently consult with NCAs after submission of a Form RS, in particular in Member States where the antitrust authority is understood to welcome filing parties presenting their case, or where authorities have become known for their critical attitude towards upstream referrals in general.

The current level of NCA consultation reflects the overall risk situation of a party filing for an Article 4(5) referral, which effectively forces the filing party to invest all available resources to obtain a referral once it decided to go down that route. For instance, a subsequent switch from EU to Member State level may misleadingly suggest to capital markets that antitrust issues have arisen; may trigger reporting requirements to exchange commissions and related risks, *e.g.*, for shareholder litigation; may render extensive preparatory work on a Form CO futile; may make it necessary to retain outside counsel in a number of jurisdictions; may potentially put the transaction timeline into question; *etc.*

Section members reported that the total costs involved can be significant and may come close to the costs of the subsequent Form CO process. In addition, Section members have experienced Member State processes which by far exceeded the analytical framework foreseen by the ECMR, and where NCA staff requested to be provided, on an “informal” basis, with information at a level of granularity which strikingly resembled an extended reporting format under the respective national merger control law. Consultation at the Member State level may be helpful where needed but imposes too large a burden on the filing parties if it is routinely expected by NCAs (such as when a national champion is involved).

It would appear that Nos. 27 and 28 of the Referral Notice could be clearer on this issue.<sup>32</sup>

Given the risk landscape summarized above, Article 4(5) provides Member States with a powerful tool to solicit market data and analysis. The Sections encourage the Commission to refine the relevant parts of the Referral Notice and to continue to exert its influence in the ECN to convince NCA representatives that the appropriate place for in-depth substantive analysis is not the Article 4(5) procedure but the subsequent Commission review process.

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For instance, fn. 29 of the Referral Notice relates the existence of affected markets to the issue of whether the transaction has cross-border competitive effects, *i.e.* to effects *outside* of the reviewing Member State. The footnote could be (and has been) read, however, as suggesting that a referral should not be agreed on where there are affected markets *in* that Member State.

## Question 7

**Do you believe that Article 9 is functioning effectively as a means of reallocating "original" jurisdiction from the Community level to the national level on the basis that a case is more appropriately dealt with in the national jurisdiction to which referral is requested?**

As a general matter, the Sections believe that Article 9 is functioning effectively as a means of reallocating "original" EU merger control jurisdiction to Member States. However, particularly for those Member States that do not have written procedures to handle Article 9 referrals by the competent NCA, the Sections believe that the Commission should consider the following recommendations.

The Commission should provide guidance about the timing, scope and form of the "preliminary competition assessment" required by Article 9. Specifically, Article 9(6) requires, *inter alia*, the receiving NCA to issue a preliminary competition assessment within 45 working days of the Commission's Article 9 referral. Certain Member States, such as the United Kingdom, have specifically considered this requirement in the context of the Phase 1 time deadlines under national competition law. Other Member States may not have any statutory or formal/informal guidance on the interplay between the timing of the ECMR-mandated preliminary competition assessment and any statutory timelines prescribed by national law. Greater clarity should be given about this assessment.

While the Sections are also aware that Article 9(6) requires the receiving NCA to "decide upon the case without undue delay," it would appear clear that this requirement is directed at Member States that have no established merger control timelines under national law. Taken as a whole, greater clarity should be provided about the precise meaning of Article 9(6), since there is a risk of confusion at the Member State level, since each have different levels of specificity on merger control timing under their respective national laws and practices.

Sharing of certain types of document and information between the Commission and the NCA is expressly contemplated by the ECMR (*see, e.g., Article 19(1)*). The Sections are aware that there may have been instances where the Commission conducted surveys or used other investigative methods *before* the Article 9 referral and the results of these studies were not shared with the receiving NCA *after* the referral. The Commission should consider whether provisions such as Article 19(1) permit this sharing of information and documents with the receiving NCA in the interest of expediency (e.g., to avoid the receiving NCA from having to duplicate a survey, which adds uncertainty, delay, and the possibility of inconsistent results.)

On the DG Comp website, the Commission should give consideration to publishing or providing hyperlinks to the substantive decisions of the NCAs arising out of Article 9 referrals. This will increase the transparency of the Article 9 referral mechanism and greatly assist in researching issues related to such referrals.

The Referral Notice may be the appropriate vehicle to provide any contemplated additional guidance to Member State, parties, and practitioners. Consideration should be given to a revision of this guidance.

**Has the introduction of Article 4(4) had, in your opinion, any impact on the functioning/usefulness of Article 9? Please explain your answer.**

Article 9 and Article 4(4) differ in certain functional respects and serve parallel, but different, purposes. Most importantly, a referral under Article 4(4) is made at the request of the parties/undertakings concerned; by contrast, Article 9 referral requests are made by NCAs. In the Sections' view, the parallel structure of Article 4(4) and Article 9 remain important as they ultimately go to the issue of the requester, and it is important to preserve that flexibility.

The Sections believe that it may be advisable that any revised guidance on Article 9 issued by the Commission consider the desire of the parties/undertakings concerned as a factor in deciding whether to grant a discretionary referral under Article 9(2)(a) or a mandatory referral under Article 9(2)(b) given the timing implications on a notified transaction in the event of a referral.

**If there are any particular concerns which you have about the functioning of Article 9, please describe those concerns – preferably by reference to your experience with a specific cases/s – and any suggestions you may have as to how they might be remedied.**

The Sections are aware that issues may arise when public bids are wholly or partially referred to an NCA under Article 9. Specifically, some Member States may not have comparable provisions to Article 7(2), which expressly permits “the implementation of a public bid” or a series of other steps involving the acquisition of securities “by which control within the meaning of Article 3 is acquired from various sellers” provided that “the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission under paragraph 3.” However, if the receiving NCA does not have both (a) comparable provisions to Article 7(2) under national competition law and/or (b) ring-fencing mechanisms/procedures, a question may arise as to whether the public bid may be consummated worldwide to the extent that the referred portion of the transaction cannot be expressly consummated under national competition law.

The Sections believe that this issue is essentially a question of the supremacy of EU law over national competition law, particularly in light of the fact that a Concentration capable of being referred under Article 9 by definition, has Community dimensions. It may be that some Member States do not share this interpretation, even in light of Article 9(8), which provides that “[i]n applying the provisions of this Article, the Member State concerned may take only the measures *strictly necessary* to safeguard or restore effective competition on the market concerned.” (emphasis added) More specifically, if Article 9 is invoked, then there is, for all purposes, a *renvoi* from the Commission to the Member State, which enables the NCA to apply its own national competition law, but only to the extent that is “strictly necessary” having regard to the special characteristics of the market in that Member State as expressly provided for in Article 9. If there is no corresponding provision under the national legislation, the NCA is still subject to Community law, given its primacy.



NCAAs should not, as a matter of law, interpret national law so as to undermine the express terms of Article 7, even in the context of Article 9. Given this context, it is the Sections' view that a Member State cannot apply its own national competition laws to frustrate the full application of the ECMR via Article 7(2). To avoid any possible problems, the Commission should provide guidance on this issue.

**Question 8:**

**Do you believe that Article 22 is functioning effectively as a means of referring a concentration to the Commission on the basis that the case is more appropriately dealt with at the Community level?**

The Sections are concerned that Article 22 is not functioning effectively. As described in more detail below where particular concerns are highlighted, the operation of Article 22 in practice has resulted in considerable legal uncertainty relating to jurisdiction (and therefore to deal timetables) for parties to a concentration that does not have a Community dimension.

It should be recalled that Article 22 was originally known as the “Dutch clause” because it was introduced to enable the Commission to review concentrations that raised genuine competition concerns in countries which did not have national laws which would have enabled them to carry out their own merger review. The Sections note that now all Member States but one (Luxembourg) have national merger control powers and the Sections would therefore question whether there is in fact any need for a post-notification referral system from Member States to the Commission. If a post-notification referral system to the Commission is to be retained, then, as described more fully below, the Commission should accept referral requests from Member States only in the event that there are absolutely compelling reasons to change the original jurisdiction. In addition, Article 22 should be amended so that:

- (a) it is made more consistent with Article 4(5), such that the Commission can only accept a referral request where a concentration qualified for notification in at least three Member States;
- (b) the only Member States that may make or join an Article 22 referral request are those in which the concentration qualified for notification under that Member State’s national merger control legislation; and
- (c) parties should be free to implement the concentration in those jurisdictions whose authorities did not refer the concentration for review by the Commission, so long as this could be done in a way which did not impact on competition in those

Member States that made or joined an Article 22 referral request. In the event that the Commission accepts or is presumed to have accepted an Article 22 referral request, it may only assess the impact of the concentration on competition in the territories of those Member States that referred the concentration to the Commission. Correspondingly, the bar to closing pursuant to Article 7 should be limited to those Member States. It would of course remain the case that, in the rare instance where there is an effect in a Member State and no filing is required, the NCA or Commission continues to have the authority to investigate the consummated transaction under national and Community competition laws.

**Has the introduction of Article 4(5) had, in your opinion, any impact on the functioning/usefulness of Article 22? Please explain your answer.**

The Sections are not aware of any impact the introduction of Article 4(5) has had on the functioning or usefulness of Article 22. Indeed, the Commission's statistics show a rise in the number of Article 22 referrals since the introduction of Article 4(5), whereas one might have expected a reduction in the number of Article 22 referrals following the introduction of a mechanism for the pre-notification transfer of jurisdiction. The Sections also note (and this is addressed further below) that Article 22 referrals have been made where the use of Article 4(5) was not available to the parties to the concentration because the concentration qualified for notifications in fewer than three Member States. This apparent inconsistency between Articles 4(5) and 22 results in additional legal uncertainty for parties to concentrations.

**If there are any particular concerns which you have about the functioning of Article 22, please describe those concerns - preferably by reference to your experience with a specific case/s - and any suggestions you may have as to how they might be remedied.**

A number of particular concerns arise about the function of Article 22. These relate predominantly to the significant legal uncertainty that has arisen in practice from the operation of Article 22. Concerns also arise in respect of the rights of parties to a concentration to be heard during the Article 22 referral request process. Each of these concerns is addressed below:

*Legal Uncertainty*

Paragraph 13 of the Referral Notice states that “referral should normally only be made when there is a compelling reason for departing from original jurisdiction over the case in question, particular at the post-notification stage.” The Commission should interpret this guidance strictly and ensure that in all cases it critically scrutinizes a Member State’s Article 22 referral request to satisfy itself that a concentration genuinely threatens significantly to affect competition in that Member State. In this regard, case M.5109 *Danisco/Abitec*, is an example of a matter involving low value concentration that arguably ought not to have been referred to the Commission. It involved the acquisition of a company with a low worldwide and Community-wide annual turnover. In that case, concerns about the impact of the concentration on competition arose only on the basis of narrow product market definitions, all but one of which were *de minimis* markets for the purposes of German merger law. Nevertheless, Germany made an Article 22 referral request that was joined by the UK’s Office of Fair Trading, and the Commission accepted jurisdiction. This added considerably to the parties’ administrative costs in having to draft a Form CO and extended the delay in obtaining regulatory approval, leading to considerable uncertainty for the parties. Given that it is very difficult to quantify the risk of a referral request by a Member State and that the deal timetable in an Article 22 merger control procedure is unforeseeable from the outset (due in particular to the pre-notification period required with the Commission), the resulting delay, which may be considerable,<sup>33</sup> creates substantial legal uncertainty.

One way of providing more legal certainty for undertakings, in particular in respect of low value transactions involving one or more parties with low annual turnover, would be to amend Article 22 so that the Commission is only permitted to accept Article 22 referrals if a transaction is notifiable in at least three Member States. This would bring the post-notification referral system more into line with the pre-notification system under Article 4(5) and would reduce the risk that concentrations that fall short of the national merger control thresholds in the vast majority of Member States (thereby by definition not raising competition concerns in those Member States),

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<sup>33</sup> See, for example, Case M.3796 - *Omya/J.M.M. Huber PCC*

are not affected by the uncertainty as to whether they will be referred for review by the Commission. Alternatively, the Commission could introduce a presumption that concentrations qualifying for notification in fewer than three Member States cannot be referred by those Member States to the Commission unless it can be demonstrated that the concentration threatens to affect competition significantly within that Member State and the merger control authorities in that Member State do not have the legal power to protect competition under their national merger control laws. Such a presumption would be consistent with ensuring that only where there are “compelling reasons” should there be a change post-notification to the original jurisdiction.

Considerable legal uncertainty also arises in respect of which Member States may make or join an Article 22 referral request. In practice, a number of Member States that do not have jurisdiction over a concentration because their own national thresholds are not met by that concentration nevertheless make referral requests to the Commission. The Sections note in this regard that the current willingness of the Commission to accept such requests from Member States that have no jurisdiction over a concentration under their national laws appears inconsistent with recital 15 of the ECMR, which states that “*other Member States which are also competent to review the concentration should be able to join the request.*” This recital suggests that only Member States whose own national merger law thresholds were triggered in the first instance may make or join Article 22 requests. Member States make their own policy decisions as to what type of concentration should be subject to national merger controls. In doing so, they essentially decide on the types of concentration which may give rise to competition concerns. The Sections submit that it is therefore inconsistent for a Member State to argue that a concentration threatens significantly to affect competition within that Member State when its own national merger control thresholds have not even been triggered. Against this background, the Sections would propose that Member States who do not have jurisdiction under their own national laws to review a concentration should not be permitted to make or join Article 22 requests. This would provide improved legal certainty for parties to concentrations.

A further shortcoming in the functioning of Article 22 concerns instances where the Commission accepts an Article 22 referral request from one or more Member States, but other Member States decide not to join the request. Those Member States retaining jurisdiction may clear the concentration under their national laws, only for the EU to use Article 7 to prevent the parties to the concentration from implementing that concentration in those territories in which the concentration did not qualify for merger control review, where national merger regulators have cleared it, or where merger control does not foresee a bar to closing (UK, Italy). Again, this causes considerable legal uncertainty for the parties to concentrations, as does the question of whether a Member State will retain jurisdiction if the Commission accepts a referral request from one or more other Member States. This seems to be the case because the Commission appears to take the view that concentrations referred to it under Article 22 have “Community Dimension.” The Sections note in this regard that the Commission’s apparent practice is to include in its merger decisions statements<sup>34</sup> to the fact that, as a result of the decision to accept jurisdiction pursuant to Article 22, the concentration has Community Dimension (although the ECMR contains no provision which would suggest that a successful Article 22 triggers Community Dimension). The Commission did not use this wording in the first few cases it reviewed pursuant to Article 22 and indeed, the suggestion that concentrations referred to the Commission pursuant to Article 22 should thereby have Community Dimension was opposed by the Council as a “controversial” proposal in discussions that led to Regulation 139/2004.<sup>35</sup>

The result of the Commission’s approach in this regard is a form of double jeopardy: the national regulator that retained jurisdiction may clear the concentration, but the Commission then

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<sup>34</sup> See, for example, on the one hand COMP/M.3136, *GE/AGFA NDT*: “*The concentration under examination has no community dimension*” (at paragraph 13 of the Decision); and on the other hand COMP/M.4465, *Thane & Thrane/Nera*: “*The transaction is therefore deemed to have Community dimension*” (at paragraph 9 of the Decision) and COMP/M.4709, *Apax Partners/Telenor Satellite Services*: “...hence the concentration is deemed to have Community dimension” (at paragraph 7 of the Decision)

<sup>35</sup> See Council Document 8607/1/03 Rev 1 Progress Report from the Presidency to Coreper/Council on the proposal for a Council Regulation on the control of concentrations between undertakings dated 23 April 2003

prevents the parties from implementing the transaction in that Member State, pending the outcome of its own review.<sup>36</sup> A solution to this problem would be to ensure that the Commission's jurisdiction following acceptance of an Article 22 referral is limited to the territories of the Member State that referred the concentration to the Commission. So long as such territories can be shielded from the effects of any implementation of the concentration elsewhere in the Community, such implementation should be permitted.

#### *Rights of the parties to be heard*

The Sections would propose two procedural changes to Article 22 that would improve the rights of parties to a concentration to be heard by the Commission. First, once a Member State has made an Article 22 referral request to the Commission, the parties to the concentration should have an automatic right to be heard by the Commission to express their views on that request, both in writing and in person. The Sections understand that the Commission will meet with parties to a concentration in such circumstances, but only at the Commission's discretion.

Second, when a Member State makes an Article 22 referral request, a copy of that request should be made available to the parties by the Commission (or the Member State in question) without delay. Currently, delays of several days can occur while the Commission and the Member State discuss which of them will supply a copy of the referral request to the parties, if at all. Providing copies of the request should enable the parties to understand better the reasons behind an Article 22 referral request and would give them more time to make submissions to the Commission in the event that they wished either to support or oppose that request.

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<sup>36</sup> See, for example, case M.4980 - *ABF/GBI Business*

**Question 9:**

**Do you have any comments on the functioning of the Merger Regulation generally? In particular, are there any aspects of the Regulation, or of its application in practice, which you believe are not functioning effectively? If so, please explain your answer - if possible by reference to your practical experience with the functioning of the Regulation - and any suggestions you may have as to how this/these short coming/s might be remedied.**

As described more fully in response to the questions above, the Merger Regulation has functioned quite well in many respects, both in terms of its jurisdictional thresholds and the system in place for transferring jurisdiction to review concentrations between Member States and the Commission. However, the application of the referral mechanism in some circumstances has led to considerable legal uncertainty for businesses. The Form RS also imposes a large administrative burden on parties to concentrations. Any initiatives that can be implemented to reduce that burden, in particular by reducing the amount of information that needs to be provided in the Form RS and, in the case of Article 4(5), by taking measures to remove the duplication involved in pre-notification procedures (such as drafting both a Form RS and a Form CO and holding pre-notification discussions in respect of both documents with the same Commission case team) would be welcomed. More generally, the Sections encourage the Commission to provide more information about the role of the Advisory Committee of the Member States in each case, such as its meeting dates and copies of questions provided to Member States. The Sections believe that this would improve the transparency of the notification process. Finally, the Sections request that the Commission always provide electronic documents to the parties in a searchable format.