

**COMMENTS ON THE DRAFT COMMISSION
CONSOLIDATED JURISDICTIONAL NOTICE**

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Herbert Smith LLP and Gleiss Lutz welcome the opportunity to respond to the Commission's public consultation launched on 28 September 2006 on the draft consolidated jurisdictional notice under Council Regulation No 139/2004 on the control of concentrations between undertakings ("the Draft Notice").

For ease of reference, our comments are set out below in the order of the Draft Notice and in bullet point form. Our comments are not exhaustive but concentrate on the main issues raised by the Draft Notice. They are structured as follows:

1. General comments
2. Comments on Section B – Introduction on the notion of a concentration
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 - Insurance undertakings

1. GENERAL COMMENTS

- A consolidated Notice is generally helpful and the Draft Notice is more user-friendly in respect of style. The Draft Notice also includes more references to case law and Commission decisions than previously.
- In a number of areas, however, the approach proposed by the Commission could be improved. The failure to notify a transaction that falls under the EC Merger Regulation ("ECMR") has serious consequences. The companies must therefore be given reliable guidance on when they are under the obligation to notify. A situation of legal uncertainty, which the Draft Notice creates in respect of certain types of scenarios is unacceptable. If a company is not in a position to determine what constitutes a notifiable event, it cannot know if it is in breach of its legal obligations.
- For examples, when exactly does a notifiable event take place when a non-full function joint venture develops slowly over time into a full-function one? When is the transfer of "additional assets" from the parents to the joint venture of sufficient nature to constitute a notifiable event? When is the growth of a full-function joint venture truly organic or a result of the parent companies' influence?
- Furthermore, there appears to be an attempt here by the Commission to in fact enlarge its jurisdiction. For example, the concept that the development of a non-full function joint venture into a full function one is a concentration appears incompatible with the wording of Article 3 of the ECMR which talks about the "creation" of a joint venture in accordance with paragraph 1(b) of Article 3, i.e. in situations where there is a change of control.
- If the Commission is intent on bringing about a number of these "soft" changes, especially in relation to joint ventures, it should be prepared to give individual, case-by-case guidance to companies, at least until there is proper jurisprudence on the issues.
- We moreover wonder how the draft jurisdictional notice fits in with one of the current projects of the Merger Working Group of the International Competition Network (ICN), which has as its object the definition of potentially notifiable transactions.
- Finally, another major issue that is inherently muddled in the Draft Notice is the interrelationship between Recital 20 to the ECMR, Article 3(5) ECMR, transactions linked by conditionality and two-phase transactions where the first transaction is either not a concentration at all due to its temporary nature or a separate potentially notifiable concentration. The consistency between these various points does not hold.
- The structure of the Draft Notice could also be improved by the following:
 - Since the undertakings concerned are undertakings involved in a merger, it would have been preferable to start by dealing with the analysis of the concept of undertakings concerned in different types of operations (dealt currently in part D of the Draft Notice) before treating the section related to the calculation of turnover.
 - "Interrelated transactions" should be dealt with in a separate chapter instead of under the section related to the concept of control.
 - The relationship between the "Exceptions" chapter and "Change of control on a lasting basis" is confusing (e.g. both the situations described in points 28-32 of the Draft Notice and in the "Exceptions" chapter concern situations where no concentration is deemed to exist mainly due to the temporary nature of the transaction).

- Chapter C(II) on "Undertakings concerned" should also include what is currently in Chapter C(III)(5) on the concept of "group undertakings" in order to improve user-friendliness.

2. SECTION B – INTRODUCTION ON THE NOTION OF A CONCENTRATION

- Paragraph 6 of the Draft Notice highlights the fact that in order for there to be a concentration, the transaction in question must bring about a lasting change in the structure of the market (as per Recital 20 in the preamble to the Merger Regulation). Nowhere in the Draft Notice is it however discussed what is meant by "*a lasting change in the structure of the market*".

3. SECTION B(I) – MERGERS BETWEEN PREVIOUSLY INDEPENDENT UNDERTAKINGS

- Paragraphs 8-9 discuss mergers between previously independent undertakings. It could, however, be clarified what the Commission considers as the "change of control" in situations where the merger takes place between two independent companies that are not controlled by anyone (i.e. are listed on a stock exchange with dispersed shareholdings).
- The concept of "change of control" to the definition of a concentration was introduced by the new ECMR but does not fit neatly into the above mentioned situations.
- We understand that in such instances, the Commission will consider factors described in paragraph 9 (e.g. two independent management structures amalgamate into one board of directors and one general assembly). It would be helpful to clarify that such factors are also considered to constitute a "change of control".

4. SECTION B(II) – ACQUISITION OF CONTROL

- Paragraph 13 refers to the fact that the possibility of exercising decisive influence on an undertaking is sufficient for the purposes of determining control as long as that possibility is *effective*. There is, however, no clarification as to what is meant by the word "*effective*".

Change of Control on a lasting basis (Section B(II)(1.4)

- In order for there to be a concentration, a change of control on a lasting basis has to take place.
- In addition to a change of control of the undertakings concerned, the Draft Notice, in paragraphs 26 and 27, highlights the relevance of a lasting change in the market structure, especially when assessing several operations occurring in succession, where the first transaction is only transitory in nature. The Draft Notice examines in particular a scenario whereby several undertakings come together to acquire a company with an agreement to divide up the acquired assets immediately upon completion of the transaction. The draft also refers to cases where the first acquisition is carried out by only one undertaking, provided this undertaking acts in concert with one or more other undertakings.

- The draft Notice explains that in such a scenario, the Commission would not consider the first transaction as a concentration if two conditions are met:
 - (i) the subsequent break-up must be agreed between the different purchasers in a legally binding way;
 - (ii) there must not be any uncertainty that the second step will take place within a short time-frame after the first acquisition.
- The Draft Notice clarifies that the second condition will normally require that the first acquisition can only proceed if merger-control clearance for all concentrations resulting from the split-up of the assets has been obtained.
- If these conditions are met, the first transaction does not result in a change of control on a lasting basis and there is no effective concentration of economic power.
- The Draft Notice goes on to state (in paragraph 31) that if the conditions are not met, the first transaction would be considered a concentration and would require separate clearance were it to fall under the ECMR.
- Whilst we agree that it must be certain that the first transaction does not become permanent in order for it not to be a concentration within the meaning of the ECMR, we strongly disagree with the suggestion that the only way there is certainty is if the follow-on transaction(s) have merger-control clearance (we do, however, note the use of the word "normally" in the Draft Notice in this respect). Legally this is simply wrong. The result of the first transaction may only remain in place for a short time-frame for a number of other reasons.
- We are specifically thinking about "interim" transactions or "warehousing" solutions whereby the first transaction is as equally transitory in nature as it is in a situation where the assets will be broken up after the first transaction. For example, consider the following scenario: Company A buys Company X with the up-front agreement to sell on to Company B immediately following merger clearance for the concentration between Companies X and B. The up-front agreement also stipulates that if merger clearance is not gained for the concentration between Companies X and B, Company A will have to sell to another company. In this scenario, whilst the identity of the ultimate buyer is uncertain, what is certain is that the first transaction will not become permanent.
- The question then becomes whether the second transaction will take place in a sufficiently short time-frame. Here the Draft Notice and the ECMR are silent. A clarification of what is considered a sufficiently "short time-frame" would be helpful.
- Article 3(5)(a) ECMR provides for an exception to securities acquisitions made by credit institutions and other financial institutions when they hold those securities on a temporary basis with a view to reselling them provided they do not exercise the voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition. That period may be further extended by the Commission on request where it can be shown that the disposal was not reasonably possible within the period set.
- Implicitly, Article 3(5)(a) suggests that a year is to be considered as an appropriate timeframe within which a lasting change does not take place if it is clear that a transaction is temporary. However, paragraph 15 (and footnote 18) of the Draft Notice suggests that periods of 8, 10 or 15 years qualify as long-term contracts and paragraph 99 (and footnote 92) clearly states that in the context of full-function joint ventures, a period of 3 years does

not indicate that the joint venture has been established on a "lasting basis". This leaves a great uncertainty as to what is considered a "short time-frame" for the purposes of defining a "lasting change" in control and market structure.

- By analogy, any scenario whereby it is certain that the first transaction will not ultimately remain permanent, the parties involved should be given a minimum of one year to implement the second transaction. As such, in the scenario set out above between Companies A, B and X, the fact that merger clearance had not yet been obtained between B and X should not determine whether the first transaction is considered a concentration or not.
- The one-year period is further supported by paragraph 32 of the Draft Notice.
- Another possibility would be to consider that in an "interim" or "warehousing" structure, the first transaction is an inherent part of the second and as such, they should be viewed as one transaction. This approach would clearly mean that the first transaction cannot be implemented until the second transaction has received merger clearance (where necessary), unless a derogation for the first transaction has been received under Article 7(3), pending clearance of the ultimate transaction (i.e. a derogation from "gun jumping").
- The scenario set out in the Draft Notice in paragraphs 28 to 31 seems to contradict the position expressed in the above bullet point. The position has to be one or the other. Either the first and second transaction are considered as separate with the first transaction as not being a concentration due to its temporary nature (if the "temporary nature" condition is not met, we are then faced with two separate transactions) or the first and second transaction are considered as part of the one and same transaction. This must apply to both the scenario set out in paragraphs 28 to 31 and to other interim/warehousing structures of a temporary nature. The Notice must clarify this situation.

Interrelated transactions – transactions linked by conditionality (Section B(II)(1.5))

- Paragraphs 35 to 43 of the Draft Notice discuss transactions linked by conditionality. The treatment of a series of linked transaction as one single concentration is dependant on the transactions being structured in a way that none would take place without the others. As stated in paragraph 37, transactions which stand or fall together according to the economic objectives pursued by the parties should also be analysed in one procedure as in these circumstances, the change of the market structure is brought about by these transactions together.
- Arguably, the scenario set out in paragraphs 28 to 31 of the Draft Notice falls within this category in that the second transaction whereby a company would split up the assets acquired in the first transaction, would not take place without the first transaction. Similarly the first transaction would not take place without the second transaction as the whole point of the two transactions is to split the assets. This is clearly, however, not what the Draft Notice intends with the concept of "interrelated transactions".
- It seems that the only factor differentiating "interrelated" transactions from the scenario described in paragraphs 28-32 is the permanent nature of the transactions linked by conditionality, e.g. one undertaking acquiring the other via several legal transactions if those are inter-conditional or the acquisition of various assets which form a single business (see paragraph 40 of the Draft Notice). This view is also enforced by the examples set out in paragraph 41 of the Draft Notice.

- Paragraph 42 of the Draft Notice seems on first glance to be contradictory to paragraphs 26 to 32. Paragraph 42 states that in a transaction where (a) an undertaking first acquires sole control of a target, with a view to directly selling on parts of the acquired stake in the target to another undertaking, finally resulting in joint control of both acquirers over the target and (b) these transactions are inter-conditional, the Commission will consider such transactions as a single concentration. The Notice should make clear that the difference between this scenario and those envisaged in paragraphs 26 to 32 is that part of the first transaction becomes permanent. It is only the nature of the control that immediately changes as a result of the second transaction (i.e. from sole to joint control). Clearly in such a situation the treatment of the two transactions as a single concentration makes sense.
- The scenario in paragraph 32 of the Draft Notice discusses the situation whereby in a first step a transaction results in the acquisition of joint control by several shareholders but as a result of legally binding agreements this joint control will be converted in a second step to sole control by one of the shareholders (i.e. the two transactions are inter-conditional). In that scenario, however, the part of the first transaction whereby joint control is conferred upon the undertaking that will exit in the second transaction is only temporary in nature.
- Paragraph 43 of the Draft Notice contains yet another statement that appears slightly contradictory to paragraphs 26 to 32. Paragraph 43 states that several transactions linked by condition can only be treated as a single concentration if, from the viewpoint of the final situation, control is acquired ultimately by the same undertaking. We agree with this, however, it should be made clear in the Notice that the mere fact that two interrelated transactions ultimately end with one controlling undertaking does not automatically equate to those transactions being treated as a single concentration. For example, in an interim/warehousing structure, the first transaction is purely temporary in nature, the target acquired is sold on to another undertaking in the second transaction in a short time-frame and those transactions are linked by an agreement concluded prior to the first transaction, ultimately leading to one undertaking acquiring control of the target. These two transactions should not, however, be considered as part of one and the same transaction due to the temporary nature of the first transaction for the reasons that have been outlined above.
- In summary, the interrelationship between Recital 20 to the ECMR, paragraphs 28-32 of the Draft Notice and the concept of "interrelated transactions" needs to be clarified.

Article 5(2) subparagraph 2

- It is not at all clear what the Commission means with its last sentence in paragraph 46. We understand this to mean that in a situation whereby A and B have joint control of X, if A and B acquire joint control over Y and at the same time (or within 2 years) either A or B exits X, these two transactions should be considered as a single transaction for the purposes of calculating turnover. It is not, however, clear what effect this would have on calculation of turnover? Is the only relevance of being able to allocate some of the original joint venture's turnover to the party having exited from it? We would welcome if the Commission could insert an example to illustrate how this idea could be applied in practice.

Sole Control (Section B(II)(2))

- In paragraph 54, the draft Notice states that in specific circumstances an option can be taken into account as an additional element, in particular if the option is easily and quickly

exercisable and that in such a case, the option, together with other elements, may lead to *de facto* sole control. Footnote 62 refers to the Ford/Hertz case where the option was for a conversion of shares that could be exercised within days if not hours without any further cash disbursement and which would lead to a majority on the board. Further clarification of what is "easily and quickly exercisable" would, however, be welcome.

Joint Control – Veto Rights (Section B(II)(4.2))

- In paragraph 63, the draft Notices simply states that veto rights which confer joint control typically include decisions on issues such as the budget, the business plan, major investments or the appointment of senior management. Some of these points are clarified further in paragraphs 65 to 68 but a number of questions still remain.
- For example, does the Commission consider that a veto right to the initial annual budget/business plan, but not to subsequent ones is sufficient to confer joint control? In normal commercial situations, minority parties often wish to have a say in the initial budget and annual business plan as that may affect their investment decisions. Our view is that such a veto right should not go towards conferring joint control but clarification on this would be helpful.
- What about a veto right on the annual budget in cases where the proposed budget exceeds the previous year's budget by a certain amount (e.g. by 20%) – should this be considered as a normal minority shareholder's protection right or a veto right conferring joint control? Again, our view is that this should be considered as a normal protection right of a minority shareholder. Clarification on this point would be helpful.

5. SECTION B(III) – CHANGES IN THE QUALITY OF CONTROL

Change from negative to sole control

- The Draft Notice defines the concept of “negative control” in paragraph 56 and then goes on to state in paragraph 81 that a change from negative to sole control triggers an obligation to notify pursuant to the ECMR. According to the Draft Notice, such a change is similar to the change from joint to sole control. This argument is neither sufficiently developed nor is it fully convincing.
- First, there is some merit in the Commission’s argument that negative control may sometimes be analogous to joint control and that therefore a change from negative to sole control may be analogous to a change from joint to sole. However, we would have welcomed some further explanation on why the Commission considers that such an interpretation is compatible with the wording of the ECMR. The ECMR uses in principle a uniform concept of control, only by distinguishing between sole and joint control. Negative control is but a subdivision of control, and it is not expressly stated that changes from negative to sole control are notifiable.
- Second, the reasoning in paragraph 81 seems very general. To make this argument workable it would be necessary to distinguish between changes that are significant and changes that are not significant.

- Thirdly, we are concerned about the practical difficulties involved in delineating sole from negative control. Typically, control is determined using a variety of criteria that are likely to vary from one case to the other. It is often not obvious to the companies concerned whether there is sole control, e.g. exercised by a minority shareholder, or negative control. It is even more difficult for them to determine whether there has been a change from one to the other and at what point such a change becomes relevant from the viewpoint of the ECMR. The Draft Notice gives no guidance in this regard. We respectfully submit that given the serious consequences that are involved in a breach of the obligation to notify, both with respect to possible fines and the enforceability of the agreement concerned, the criteria determining the Commission's jurisdiction should be interpreted in a manner that is clear cut and free from any ambiguity.
- Fourthly, given the workload of DG Competition and also considering that changes from negative to sole control are hardly ever likely to give rise to competitive concerns we query the *rationale* of empowering the Commission to scrutinize such operations and to burden the companies concerned with the obligation to notify.

6. SECTION B(IV) – JOINT VENTURES – THE CONCEPT OF FULL-FUNCTIONALITY

Sufficient resources to operate independently on a market (Section B(IV)(1))

- In paragraph 90, the Commission specifies the requirements for a full-function character, in particular the concept of access to sufficient resources. We very much welcome the Draft Jurisdictional Notice's approach in that regard.

Changes in the activities of the joint venture (Section B(IV)(5))

- In paragraph 102 to 104 the Commission argues that the parent companies' decision to enlarge the activities of a joint venture in the course of the joint ventures' lifetime may trigger a notification requirement. According to the Commission, this may even be the case where a joint venture does not acquire additional assets or parts of undertakings to be able to undertake such additional activities. It is sufficient that the enlargement alone is full-function and that the parent companies are in fact the real players behind such an operation. It is difficult to follow the reasoning in the draft in this regard and it seems certainly worthwhile if the Commission were to elaborate further on this theory by explaining under what circumstances the enlargement of a joint venture can qualify as the creation of a full function joint venture "when considered in isolation". We also recommend to include practical examples.
- The argument according to which an acquisition of additional assets or parts of undertakings by the joint venture triggers an obligation to notify provided the relevant thresholds are met, is uncontroversial, cp. Article 3(1)(b) ECMR. It does not follow that the fact alone that a joint venture increases its activities without acquiring any new assets must also be notified. Neither should the sole transfer of capital from parent company to the joint venture be sufficient to trigger a mandatory merger notification.
- The underlying principle of the ECMR is to control structural changes. The ECMR is not meant to control organic growth. It seems difficult to reconcile a notification requirement for the enlargement of joint ventures without any transfer of assets with the objectives of EC merger control.

- According to the Draft Notice, an enlargement of a joint venture is notifiable if the parent companies are the real players behind the enlargement. We do not understand this criterion and query whether it is practicable. As the parents are represented in the shareholders assembly of the joint venture and may be able to nominate members of the board of directors, there will always be reason to assume that they are the “real players” behind the activities of a joint venture.
- The Draft Notice fails to explain what is meant by an “enlargement” of a joint venture. The Commission’s proposal implies that companies would have to assess permanently whether – without transfer of assets – the conditions for merger notification are fulfilled. But how should such an assessment work in practice? The statutes of joint venture companies frequently define the scope of the company concerned very generally. Under such circumstances it may be difficult to determine whether there is an enlargement within the meaning of the Draft Notice. This will lead to legal uncertainty as regards the criteria triggering an obligation to notify. For companies it is crucial that the obligation to notify is subject to clear criteria, given that failure to comply with this obligation may entail that actions become void. It seems certainly worthwhile to make a distinction between “enlargements” that are significant and “enlargements” that are not. Moreover, it is not clear whether the Commission targets only “enlargements” in terms of the products or services covered or also intends to include changes in the geographic field of activity covered by a joint venture. Suppose that a joint venture that is initially active in the US expands its activities to the EU. Would such an operation be notifiable even if no assets are transferred from the parents to the joint venture?
- Equally problematic is the argument according to which an obligation to notify arises where a joint venture, that has so far not been full-function, becomes full-function. If there are no assets transferred to the joint venture, a notification requirement for becoming full functional seems not justified.

7. SECTION B(V) - EXCEPTIONS

- The main problem with Article 3(5) ECMR is that it does not fit in neatly with Article 3(1) ECMR. Article 3(5) is in essence meant to provide an exception from the rule that a concentration does not need to be notified. However, in order for there to be a notifiable concentration, there must first be a change in control and market structure on a "lasting basis" (as discussed in length above). The exception in Article 3(5) appears, however, to be based on the principle that the transactions benefiting from the exception are temporary in nature. If that is the case then is Article 3(5) not superfluous in that the concentrations falling under Article 3(5) are not in fact concentrations at all under Article 3(1) ECMR?

8. SECTION B(VII) - CHANGES OF TRANSACTIONS AFTER A COMMISSION AUTHORISATION DECISION

- The clarification in paragraphs 116 and 117 according to which minor modifications of a transaction after an authorisation of the Commission do not trigger a new notification requirement is very helpful.

C. COMMUNITY DIMENSION

9. SECTION C(III) - TURNOVER

General comments

- In general, the part on turnover updates and substantiates the existing notice of the Commission. Paragraphs 148 to 150 e.g. elaborate on the relevant date for establishing jurisdiction of the Commission, paragraphs 156 and 157 explain the concept of “the right to manage the undertaking’s affairs” which triggers the addition of the respective turnovers.
- In respect of the latter point, under the current Commission Notice on the calculation of turnover, it is not clear whether the test to be employed under Article 5(4) of the EC Merger Regulation in determining “the undertakings over which the undertaking concerned has the right to manage the undertaking's affairs” is the same test to be applied in determining whether there is a change in control under Article 3(2) of the EC Merger Regulation.
- In particular, there has been some uncertainty as to whether the turnover of an undertaking concerned needs to include the turnover of undertakings in which the undertaking concerned exercises negative joint control by virtue of veto rights over strategic decisions. The draft Notice offers welcome clarification on this point stating that the turnover of such an undertaking will need to be included where the joint “right to manage” exercised by the undertaking concerned exists due to individual veto rights (but not where the joint control occurs on a de-facto basis due to strong common interests between different minority shareholders).
- This approach of the Commission is very welcome. However, we would like to comment on the following points.

The concept of turnover (Section C(III)(1))

- In paragraphs 131 to 133 the Draft Notice deals with the method of calculating turnover for services. The Commission states that if determining the sales value of services many different situations may arise and the underlying legal and economic relations have to be carefully analysed. That makes the rules concerning the calculation of turnover realised in service industries very complex. We query whether this does not undermine the purpose of the turnover thresholds to provide for a clear definition of the Community’s jurisdiction by reference to simple and unambiguous criteria.

Ordinary activities (Section C(III)(2))

- According to paragraph 134 of the Draft Notice, items which are listed under the headers “financial income” or “extraordinary income” in the company’s account do not qualify as turnover realised through ordinary activities within the meaning of article 5 (1) ECMR (we note that the draft qualifies this statement by saying that such income is “generally” excluded). This wording is new. We wonder whether it is not too far reaching, and would welcome if the Commission could elaborate further on this point.

10. SECTION C(IV) – GEOGRAPHIC ALLOCATION OF TURNOVER

- The Draft Notice envisages various adjustments in situations where either the domicile of the purchaser differs from the billing address or where purchasers are organised through a central purchasing organisation or finally, the turnover is realised in the area of services. We query whether such an approach is practicable, in particular in cases where an undertaking operates both in the services and non-services industry. We recommend that the Commission takes into account universally accepted accounting standards to carry out some kind of benchmarking of the principles that are developed in the Draft Notice concerning geographic allocation of turnover.

11. SECTION C(VI): PROVISIONS FOR CREDIT AND OTHER FINANCIAL INSTITUTIONS AND INSURANCE UNDERTAKINGS

Calculation of turnover of credit and financial institutions (other than financial holding companies) (Section C(VI)(2.1)

- The key change appears to be the rule for the geographic allocation of turnover in respect of credit and financial institutions other than financial holding companies.
- In paragraph 179, a distinction is drawn between turnover that is generated by customer related activity – which is to be attributed to where the customer is located -and turnover that is generated in other circumstances where the business is not carried out for a direct customer – where the turnover is to be allocated to the branch of division of the financial institution which receives this income.
- While the change to the geographic allocation of customer related turnover appears consistent with the Commission's general approach - that turnover should be allocated according to the location of the customer - the draft new rule will mean that the turnover contained in financial institutions' annual reports will no longer be a reliable guide to determining whether thresholds are met. A series of more complicated steps, undertaken on the basis of non-audited information, will need to be carried out in order to determine whether filing thresholds would be met.
- We recently worked with an investment bank to determine the geographic allocation of their turnover under the draft new rules. As the client concerned did not report turnover according to whether the activity is customer or non-customer related¹ non-audited information needed to be used. The "raw" turnover information needed to be separated into the activities that could be considered customer related and those which did not have an immediate customer, and then the location of the customer determined in respect of those which were considered "customer related activity". It took a number of days for new turnover information to be prepared.
- While the application of the draft new rules in that case did not have impact on whether or not the jurisdictional thresholds were met, there was a considerable difference in the turnover distribution when the draft new rules were applied vis-à-vis the situation that existed under the existing rules. We expect that in many cases, the jurisdictional position

¹ We understand that this is the case with most financial institutions.

determined under the application of the draft new rules would be very different to that which may be at apparent from the figures contained in the annual report.

- The Commission should be clearly aware of the downsides to the proposed rule changes, namely: the inability to rely on the information contained in the annual report; the reliance that will need to be place on un-audited information; and the additional steps that will need to be taken by financial institutions and their legal advisors to determine the geographic allocation of turnover.
- If the Commission does proceed to adopt this approach, it would be helpful if the Commission:
 - (i) clarified that the turnover information did not need to be based on the audited figures used to prepare the annual report and that it is not necessary for the parties to have the turnover figures used to determine whether the jurisdictional thresholds are met audited (of course, if the Commission does want the turnover information audited, the Commission should be aware of the additional costs and time delays that this will involve); and
 - (ii) provide an explanation as to why the rules have changed.
- For completeness, it would also be helpful if the Commission could clarify whether the categories of activities contained in paragraph 172 (indicating whether an undertaking should be considered a financial institution) is meant to materially differ from those contained in paragraph 52 of the Commission Notice on the Calculation of Turnover. There are a number of small differences, but the Commission may have intended the final category "the provision of services related to such [securities] issues" to operate as a catch-all category.

Insurance Undertakings (Section C(VI)(2.2)

- The Commission also appears to have made a substantive change to the calculation of an insurance undertaking's turnover: in paragraph 185, the Commission makes it clear that revenues obtained by an insurance undertaking from investments in shares are to be taken into account when calculating the turnover of insurance undertakings (and that the general rules for calculating turnover will apply). This compares to the guidance given in the Commission Notice on the Calculation of Turnover which provides that investments in shares, interest bearing securities, land, property and other assets that provide an annual revenue is not to be considered as turnover for insurance undertakings (paragraph 57).
- This is a substantive change and it would be beneficial if the Commission highlighted the change in approach and also set out their reasons.

We hope you find these comments helpful. If you have any questions concerning the above please contact Craig Pouncey or Hanna Anttilainen at Herbert Smith (craig.pouncey@herbertsmith.com or hanna.anttilainen@herbertsmith.com) or Simon Hirsbrunner at Gleiss Lutz (simon.hirsbrunner@gleisslutz.com).