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Evaluation of procedural and jurisdictional aspects of EU Merger Control

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Evaluation of procedural and jurisdictional aspects of EU Merger Control

I. Introduction

Preliminary Remark: The following questionnaire has been drafted by the Services of the Directorate General for Competition in order to collect views on some procedural and jurisdictional aspects of EU merger control. The questionnaire does not necessarily reflect the views of the European Commission and does not prejudge its future decisions, if any, on further action on these aspects.

A. Purpose of the consultation

The purpose of the present consultation is to gather information on particular aspects of the performance of EU merger control. This consultation invites citizens, businesses, associations, public authorities and other stakeholders to provide feedback on their experience/knowledge of issues under scrutiny and what action, if any, should be taken in this regard.

Input from stakeholders will be used in a Staff Working Document to evaluate procedural and jurisdictional aspects of EU merger control. The Commission will carefully analyse the outcome of this consultation and previous consultations as well as the findings of the evaluation as a whole before deciding whether it should take further action.

B. Background

Merger control constitutes one of the instruments of EU competition law. Its main objective is to ensure that competition in the internal market is not distorted by corporate reorganisations in the form of concentrations.

In recent years (particularly in 2009 and from 2013 onwards), the European Commission has taken stock and assessed the functioning of different aspects of EU merger control and identified possible areas for refinement, improvement and simplification.

In particular, the European Commission adopted in 2014 the White Paper "Towards More Effective EU Merger Control (the "White Paper", COM(2014) 449 final). The White Paper confirmed that EU merger control works well and that no fundamental overhaul of the system is needed, but envisaged specific amendments in order to make it more effective.

The key proposals of the White Paper were the following:

1. Introducing a light and tailor-made review of acquisitions of non-controlling minority shareholdings which could harm competition;
2. Making case referrals between Member States and the Commission more business-friendly and effective;
3. Making procedures simpler for certain categories of mergers that normally do not raise competition concerns; and
4. Fostering coherence and convergence between Member States with a view to enhance cooperation and to avoid divergent decisions in parallel merger reviews conducted by the competition authorities of several Member States.

Based on the White Paper, the Commission carried out a public consultation. Respondents mostly agreed that the EU merger control system overall works well but welcomed the White Paper's proposals in relation to the streamlining of the case referral system and simplification.

Recently, a debate has emerged among stakeholders and competition experts on a new topic, namely the effectiveness of the current turnover-based jurisdictional thresholds of EU merger control. These jurisdictional thresholds are set out in Article 1 of the Merger Regulation and determine which transactions have a Union dimension and are reviewed, in principle, by the European Commission.

Some stakeholders have raised the question of whether the turnover-based jurisdictional thresholds allow capturing, under EU merger control rules, all transactions which can potentially have an impact in the internal market. This question may be particularly significant for transactions in the digital economy, but also in other industry sectors, such as pharmaceuticals, where acquisition targets may not have always generated substantial turnover yet, but nevertheless are highly valued and constitute, or are likely to become, an important competitive force in the relevant market(s).

Moreover, recent experience in enforcing the EU merger control rules has shown that certain technical aspects of the procedural and investigative framework for the assessment of mergers may merit further evaluation. Some of these aspects had already been identified in the 2014 Commission Staff Working Document accompanying the White Paper.

Scope of the Evaluation

It therefore appears opportune to build upon the work undertaken so far in the context of the White Paper and prior consultations and complement it by evaluating the following procedural and jurisdictional aspects of EU merger control in more detail:

1. Simplification: the treatment of certain categories of cases that do not generally raise competitive concerns, as set out in the Merger Regulation,[1] the Implementing Regulation,[2] and the Commission Notice on simplified procedure;[3]
2. Functioning of the turnover-based jurisdictional thresholds set out in the Merger Regulation in light of highly valued acquisitions of target companies that have not yet generated substantial turnover;
3. Functioning of the case referral mechanisms set out in the Merger Regulation, the Implementing Regulation and the Commission Notice on case referral;
4. Certain technical aspects of the procedural and investigative framework for the assessment of mergers.

[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.01.2004, p. 1.

[2] Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004, OJ L 133, 30.04.2004, p. 1, as amended.

[3] Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) 139/2004, OJ C 366, 14 December 2013, p.5 and its Corrigendum to the Commission notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, OJ C 011, 15 January 2014, p 6 (the "Commission Notice on simplified procedure).

II. Practical Guide to fill in the questionnaire

Please respond to all questions that you have knowledge about. Feel free to skip those questions that you cannot answer or are unsure about.

Replying to the questions:

- Questions with a radio-button are "single choice": only one option can be chosen.
- Question with a check-box are "multiple choice": several answers can be chosen.
- Questions showing an empty box are free text questions.
- Depending on your answer to a given question, some additional questions may appear automatically asking you to provide further information. This, for example, is the case when the reply "Other" is chosen.
- Please use only the "Previous" and "Next" buttons to navigate through the questionnaire (do not use the backwards or forward button of the browser).

Saving your draft replies

- The questionnaire is split into several sections.
- At the end of each section you have the possibility to either continue replying to the remaining sections of the questionnaire (clicking on "Next") or saving the replies made so far as a draft (clicking on "Save as Draft").
- If you chose "Save as Draft", the system will:

  - show you a message indicating that your draft reply has been saved,
  - give you the link that you will have to use in order to continue replying at a later stage,
  - give you the possibility to send you the link by email (we encourage you to use this option).

- You can then close the application and continue replying to the questionnaire at a later stage by using the said link.

Submitting your final reply

- The submission of the final reply can only be done by clicking the "Submit" button that you will find in the last section "Conclusion and Submission".
- Once you submit your reply, the system will show you a message indicating the case identification number of your reply ("Case Id"). Please keep this Case Id. number as it could be necessary in order to identify your reply in case you want to modify it at a later stage.
- You will also be given the opportunity to either print or download your reply for your own records.

III. About you

Please provide your contact details below:

*1. Are you replying as:

- ○ a private individual
- ◉ an organisation or a company
- ○ a public authority or an international organisation

*The name of your organisation/ company/ public authority/ international organisation

Herbert Smith Freehills LLP

*Your full name

Kyriakos Fountoukakos, Molly Herron, Kristien Geeurickx

*Email address

molly.herron@hsf.com

* Organisation represented

1.1 Please indicate which type of organisation or company it is.

- ○ Academic institution
- ○ Non-governmental organisation
- ○ Company/SME/micro-enterprise/sole trader
- ○ Think tank
- ○ Media
- ○ Consumer organisation
- ○ Industry association
- ◉ Consultancy/law firm
- ○ Trade union

* 1.1.1 Is it a multinational enterprise (groups with establishments in more than one country)?

- ◉ YES
- ○ NO

*1.1.2 How many employees does your company have?

- ○ 1-9
- ○ 10-49
- ○ 50-249
- ○ 250-499
- ◉ 500 or more

*1.2 Please provide a brief description of the activities of your organisation.

Herbert Smith Freehills is one of the world's leading professional services businesses, providing legal services across 26 offices. Our Competition, Regulation & Trade team has extensive experience advising clients on the application of the EUMR and national merger control regimes, and managing the multi-jurisdictional merger control filing process.
The comments contained in this response are those of Herbert Smith Freehills LLP, and do not represent the views of our individual clients.

*1.3 Where are you based?

- ○ Austria
- ○ Belgium
- ○ Bulgaria
- ○ Croatia
- ○ Cyprus
- ○ Czech Republic
- ○ Denmark
- ○ Estonia
- ○ Finland
- ○ France
- ○ Germany
- ○ Greece
- ○ Hungary
- ○ Iceland
- ○ Ireland
- ○ Italy
- ○ Latvia
- ○ Liechtenstein
- ○ Lithuania
- ○ Luxemburg
- ○ Malta
- ○ Netherlands
- ○ Norway
- ○ Poland
- ○ Portugal
- ○ Romania
- ○ Slovak Republic
- ○ Slovenia
- ○ Spain
- ○ Sweden
- ○ United Kingdom
- ◉ Other

*Please specify.

Herbert Smith Freehills LLP has multiple offices globally, including in London and Brussels.

2. Transparency Register (Register now)

In the interests of transparency, the Commission asks organisations who wish to submit comments in the context of public consultations to provide the Commission and the public at large with information about whom and what they represent by registering in the Transparency Register and subscribing to its Code of Conduct. If an organisation decides not to provide this information, it is the Commission's stated policy to list the contribution as part of the individual contributions. (Consultation Standards, see COM (2002) 704; Better Regulation guidelines, see SWD(2015)111 final and Communication on ETI Follow-up, see COM (2007) 127).

If you are a registered organisation, please indicate below your Register ID number when replying to the online questionnaire. Your contribution will then be considered as representative of the views of your organisation.

If your organisation is not registered, you have the opportunity to register now, please click on the link in the title. Then you can return to this page, continue replying to the questionnaire and submit your contribution as a registered organisation.

It is important to read the specific privacy statement available on the public consultation website for information on how your personal data and contribution will be used.

For registered organisations: indicate your Register ID number here:

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Not applicable
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* 3.Please choose from one of the following options on the use of your contribution:

- (●) My/our contribution can be directly published with my personal/organisation information (I consent to publication of all information in my contribution in whole or in part including my name/the name of my organisation, and I declare that nothing within my response is unlawful or would infringe the rights of any third party in a manner that would prevent publication).
- ( ) My/our contribution can be directly published provided that I/my organisation remain(s) anonymous (I consent to publication of any information in my contribution in whole or in part (which may include quotes or opinions I express) provided that this is done anonymously. I declare that nothing within my response is unlawful or would infringe the rights of any third party in a manner that would prevent publication. I am aware that I am solely responsible if my answer reveals accidentally my identity.
- ( ) My/our contribution cannot be directly published but may be included within statistical data (I understand that my contribution will not be directly published, but that my anonymised responses may be included in published statistical data, for example, to show general trends in the response to this consultation) Note that your answers may be subject to a request for public access to documents under Regulation (EC) No 1049/2001.

*4. Finally, if required, can the Commission services contact you for further details on the information you have submitted?

- (●) YES
- ( ) NO

IV. Questionnaire

IV.1. Simplification

In December 2013, the Commission adopted a package of measures aimed at simplifying procedures to the fullest extent possible without amending the Merger Regulation itself (the so called "Simplification Package"). In particular, the Simplification Package:

- Widened the scope of application of the so-called simplified procedure for non-problematic cases;
- Streamlined and simplified the forms for notifying mergers to the Commission.

Through the Simplification Package, which entered into force on 1 January 2014, the number of cases dealt with under the simplified procedure has increased by 10 percentage points from an average of 59% over the period 2004-2013 to around 69% of all notified transactions over the period January 2014 to September 2016).

According to the Commission Notice on simplified procedure ("the Notice"), the Commission in principle applies the simplified procedure to each of the following categories of concentrations:

i. Transactions where two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities within the territory of the European Economic Area (EEA); such cases occur where: (i) the turnover of the joint venture and/or the turnover of the contributed activities is less than EUR 100 million in the EEA territory at the time of notification; and (ii) the total value of assets transferred to the joint venture is less than EUR 100 million in the EEA territory at the time of notification (see point 5 (a) of the Notice);

ii. Transactions where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, provided that none of the parties to the concentration are engaged in business activities in the same product and geographic market, or in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged (see point 5 (b) of the Notice);

iii. Transactions where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking and both of the following conditions are fulfilled: (i) the combined market share of all the parties to the concentration that are engaged in business activities in the same product and geographic market (horizontal relationships) is less than 20 %; (ii) the individual or combined market shares of all the parties to the concentration that are engaged in business activities in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged (vertical relationships) are less than 30 % (see point 5 (c) of the Notice);

iv. Transactions where a party is to acquire sole control of an undertaking over which it already has joint control (see point 5 (d) of the Notice)

v. Transactions where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, and both of the following conditions are fulfilled: (i) the combined market share of all the parties to the concentration that are in a horizontal relationship is less than 50 %; and (ii) the increment (delta) of the Herfindahl-Hirschman Index (HHI) resulting from the concentration is below 150 (see point 6 of the Notice).

The Notice sets out a number of safeguards and exclusions from the simplified procedure (see notably points 8 to 21). The Commission may decide not to accept a proposed concentration under the simplified procedure or revert at a later stage to a full assessment under the normal merger procedure.

The 2014 White Paper made further-reaching proposals for amendments to the Merger Regulation that would make procedures simpler:

- This could be achieved for example by excluding certain non-problematic transactions from the scope of the Commission's merger review, such as the creation of joint ventures that will operate outside the European Economic Area (EEA) and have no impact on European markets;

- Moreover, notification requirements for other non-problematic cases - currently dealt with in a 'simplified' procedure - could be further reduced, cutting costs and administrative burden for businesses.

These proposals are still being assessed. Your response to the following questions will contribute to that assessment.

1. The Merger Regulation provides for a one stop shop review of concentrations. Several categories of cases that are generally unlikely to raise competition concerns and falling under point 5 or 6 of the Notice (see above) are treated under a simplified procedure. To what extent do you consider that the one stop shop review at EU level for concentrations falling under the simplified procedure has created added value for businesses and consumers? Please rate on a scale from 1 to 7.

(1 = "did not create much added value"; 7 = "created much added value"):

	1	2	3	4	5	6	7
Your rating	○	○	○	○	○	○	○

Please explain.

1.1 We believe that, when a transaction would otherwise be notifiable to multiple NCAs, the "one stop shop" review of concentrations at EU level under the simplified procedure is, in principle, beneficial, and that this has created value for businesses and consumers (in particular due to the avoidance of multiple national filings). We also agree that the simplified procedure provides significant benefits compared to the normal review procedure by reducing the burden with respect to transactions that are unlikely to create any competitive harm, and therefore reducing time and costs for the merging parties (as well as the Commission).

1.2 We note, however, that some transactions fall within the scope of the EUMR despite their inability to materially affect competition within the EEA. This is in particular the case for extra-EEA joint ventures which do not and will not have any activities within the EEA, and which meet the EUMR turnover thresholds as a result of parental turnover only (as discussed further in our response to Questions 8-13 below). Such transactions would not necessarily fall within the jurisdictional scope of multiple EU Member State national merger control regimes in all cases. The application of the EUMR's procedures to such transactions does, despite the existence of the simplified procedure, create significant additional burdens rather than adding value. In addition to the time and cost of notification, it should be noted that significant time and cost may be expended at an earlier stage when determining whether the EUMR applies to a transaction (for example where the "full-function" or otherwise character of a joint venture is not clear).

1.3 We also note that, for straightforward and clearly unproblematic cases, notification at EU level, even under the simplified procedure, involves a greater burden in terms of data/document collection and review process than the position in many Member States. As discussed further below, this has in some respects increased as a result of the Simplification Package, and should, in our view, be revisited.

Further simplification of the treatment of certain categories of non-problematic cases

2. In your experience, and taking into account in particular the effects of the 2013 Simplification Package, has the fact that the above mentioned categories of merger cases are treated under the simplified procedure contributed to reducing the burden on companies (notably the merging parties) compared to the treatment under the normal procedure?

(i) Mergers without any horizontal and vertical overlaps within the EEA or relevant geographic markets that comprise the EEA, such as worldwide markets (transactions falling under point 5b of the Notice);

- (●) YES
- ( ) NO
- ( ) OTHER

Please explain

2.1 The treatment of such transactions under the simplified procedure is clearly beneficial compared with treatment under the normal procedure.

2.2 We note, however, that, as such transactions were previously eligible for the simplified procedure, the Simplification Package had little impact in relation to such transactions. We do note that the clarification within the Simplification Package that, in the case of an acquisition of joint control, relationships that exist only between the parents outside the field of activity of the joint venture are not considered horizontal or vertical relationships for these purposes (and for the purpose of identifying reportable markets), was beneficial, as was the confirmation that only markets within the EEA territory are relevant for these purposes.

(ii) Mergers leading only to limited combined market shares or limited increments or to vertical relationships with limited shares on the upstream and downstream markets within the EEA or relevant geographic markets that comprise the EEA (transactions falling under point 5c or point 6 of the Notice);

- ( ) YES
- ( ) NO
- (●) OTHER

Please explain

2.3 The treatment of transactions falling under point 5c of the Notice under the simplified procedure is clearly beneficial compared with treatment under the normal procedure. The increase in the market share thresholds under point 5c of the Notice as a result of the Simplification Package, and the resulting expansion in the number of transactions benefitting from the simplified procedure, has clearly reduced the burden on companies party to such transactions.

2.4 The clarification that, in the case of an acquisition of joint control, relationships that exist only between the parents outside the field of activity of the joint venture are not considered horizontal or vertical relationships for these purposes (and the purpose of identifying reportable markets), was also beneficial.

2.5 In relation to transactions falling under point 6 of the Notice, however, we believe that the Simplification Package has had very little, if any, impact. Whilst we welcome the attempt by the Commission to extend the benefit of the simplified procedure to transactions where, although combined market shares exceed the threshold in point 5c, the increment as a result of the transaction is low, we do not believe that the addition of the point 6 category has had a material impact in practice, as the HHI filter is overly restrictive. This is particularly given that this is in any event qualified by the reservation within point 18 of the Notice, i.e. the Commission's ability to decide on a case-by-case basis whether the increase in market concentration level indicated by the HHI delta is such that the case in fact should be examined under the normal procedure (over and above its general power as set out in point 9 to revert to a full procedure).

2.6 Please see further our comments in response to Question 5 below in relation to the potential expansion of the application of the simplified procedure.

(iii) Joint ventures with no or limited activities (actual or foreseen), turnover or assets in the EEA (transactions falling under point 5a of the Notice);

- (●) YES
- ( ) NO
- ( ) OTHER

Please explain

2.7 The treatment of such transactions under the simplified procedure is clearly beneficial when compared with treatment under the normal procedure. We note, however, that as such transactions were previously eligible for the simplified procedure, the Simplification Package had little impact in relation to such transactions, other than the clarification that it is only relationships between the joint venture and at least one of the acquiring parties in the EEA which are relevant for the purpose of identifying reportable markets, which was beneficial.

2.8 However, as discussed in our response to Questions 8-13 below, the fact that joint ventures with no activities in the EEA are subject to the EUMR's notification and review procedures at all gives rise to a significant and unnecessary burden on the merging parties, and should in our view be revisited.

(iv) Transactions where a company acquires sole control of a joint venture over which it already has joint control (transactions falling under point 5d of the Notice).

- (●) YES
- ( ) NO
- ( ) OTHER

Please explain

2.9 The treatment of such transactions under the simplified procedure is clearly beneficial compared with treatment under the normal procedure. We note, however, that as such transactions were previously eligible for the simplified procedure, the Simplification Package had little impact in relation to such transactions.

2.10 We believe that transactions involving the move from joint to sole control should, in principle, be subject only to a "super simplified" procedure, despite the existence of reportable markets, given that the acquirer's market position has already been assessed and cleared as part of the acquisition of joint control, and that the circumstances in which such a transaction could give rise to competition concerns are exceptional (as recognised within point 16 of the Notice). Where necessary on the facts, additional information can be requested by the Commission.

3. As indicated, the Commission may decide not to accept a proposed concentration under the simplified procedure or revert at a later stage to a full assessment under the normal merger procedure. Have you dealt with or otherwise been involved in merger cases notified to the European Commission in the last five years that changed from simplified treatment under the Notice to the normal review procedure?

(i) In the pre-notification phase:

- (●) YES
- ( ) NO

Please explain under which category of simplified cases (listed in question 2 above) it initially fell and the reasons underlying the change to the normal procedure.

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3.1        This was a case which the notifying parties considered fell within
point 5c(i) of the Notice. In the course of pre-notification discussions with
the Commission the parties also considered combined market shares on the
basis of a plausible alternative market definition, on the basis of which
narrower market definition the threshold within point 5c(i) was exceeded.
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(ii) Post notification:

- ( ) YES
- (●) NO

Please explain under which category of simplified cases (listed in question 2 above) it initially fell and the reasons underlying the change to the normal procedure.

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Not applicable
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4. Have you dealt with or otherwise been involved in any merger cases which fell under the relevant categories of cases listed in question 2 and was thus potentially eligible for notification under the simplified procedure but where, from the outset, the parties decided to follow the normal review procedure?

- ( ) YES
- (●) NO

Please explain under which category of simplified cases it fell and the reasons why the case was notified under the normal procedure.

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Not applicable
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5. Based on your experience, do you consider that, beyond the types of cases listed in question 2, there are any other categories of cases that are generally not likely to raise competition concerns but do not currently benefit from the simplified procedure?

- (●) YES
- ( ) NO
- ( ) OTHER

Please explain

5.1 We believe that there are further categories of case which are generally unlikely to raise competition concerns, and which therefore should also benefit from the simplified procedure.

5.2 Firstly, we believe that the Commission should consider increasing the horizontal overlap threshold within point 5c(i) of the Notice to 25%, reflecting the market share at which both the Commission's Horizontal Guidelines and Recital 32 of the EUMR itself recognise a transaction is unlikely to impede effective competition. This would increase the number of transactions subject to the simplified procedure, and further reduce costs and burdens on companies whose transactions are unlikely to result in harm to competition, while also conserving Commission resources. In the limited number of cases in which such a transaction might give rise to competition concerns the Commission could of course revert to the normal procedure under point 9 of the Notice.

5.3 Secondly, as we noted above, we consider that the new gateway within point 6 of the Notice has had very limited or no effect. Given that in the large majority of cases in which the increment resulting from a transaction is very low competition concerns are highly unlikely, we believe that the HHI increment within point 6 should be increased. Alternatively the Notice could simply provide that a transaction would be subject to the simplified procedure if combined market shares were below 50% and the increment resulting from the transaction were below a specified level (for example 2.5% or 5%). In addition, it could be provided that the Commission would have the discretion in appropriate cases to examine a transaction pursuant to the simplified procedure on the basis that the increment arising from the transaction is limited, notwithstanding that the increment exceeds that specified in point 6(ii).

6. The main objective of the Merger Regulation is to ensure the review of concentrations with an EU dimension in order to prevent harmful effects on competition in the EEA. Do you consider that the costs (in terms of workload and resources spent) incurred by businesses when notifying the cases that fall under the simplified procedure (listed in question 2 above) have been proportionate in order to achieve this objective of the Merger Regulation?

- ○ YES
- ○ NO
- ◉ OTHER

Please explain your answer with respect to each of the categories of cases listed in question 2 above.

- Transactions falling under point 5a of the Notice:

- ○ YES
- ○ NO

Please explain.

6.1 In general terms, the application of the simplified procedure to transactions which are unlikely to give rise to any competitive harm is a useful and efficient mechanism, reducing time and costs for the merging parties, and (we assume) the Commission, when compared to the normal procedure.

6.2 In terms of the Simplification Package, in addition to the helpful extension of the category of cases to which the simplified procedure applies (and the commensurate increase in the number of cases subject to the simplified procedure), the practice of the Commission in many cases of providing clearance prior to the 25 Working Day deadline has been helpful.

6.3 We also note our positive experience since the introduction of the Simplification Package in terms of turnaround during pre-notification for the majority of cases, i.e. the speed within which case teams have generally been able to review and provide comments on draft notifications.

6.4 However, the simplified procedure still involves significant costs to companies, both in terms of time and internal and external cost (as well as the prior cost of determining whether a transaction falls within the scope of the EUMR), which in a significant number of cases is unnecessary or disproportionate to the objective of preventing harmful effects on competition in the EEA (given that these transactions are by their nature unlikely to give rise to such effects). We therefore consider that further streamlining would be beneficial, and that this could be achieved without undermining the effectiveness of the EUMR.

6.5 Firstly, we note that the Simplification Package, contrary to its stated aim, increased burdens on the merging parties in a number of respects, in particular by adding further requirements in terms of information/document requirements. We believe that these requirements should be revisited. In particular:

6.5.1 The requirement to provide Section 5.3 documents in relation to transactions falling within the scope of the simplified procedure and notified using the Short Form CO (where reportable markets exist).
This new, default, requirement is clearly unnecessary for transactions which by their nature do not give rise to competition concerns, and is inconsistent with the objective of reducing administrative burdens on the parties.

6.5.2 The requirement for consideration of all "plausible alternative relevant product and geographic markets" in the context of assessing the market share thresholds for the application of the simplified procedure and defining reportable markets for the purposes of the Short Form CO.
We believe that the requirement to describe and provide information in relation to any alternative markets which reach the low plausibility threshold (despite, in some cases, these market definitions being commercially unrealistic) is unnecessary and disproportionate. It can lead to a time-consuming and burdensome process (in particular where market data is not readily available on such alternative market definitions) before a decision as to whether a transaction can benefit from the simplified procedure can be reached.
We consider that the obligation should be limited to any "reasonable" alternative market definitions (which would include those considered by the Commission in previous cases). The Commission can always request further information under other alternative definitions if warranted on the facts of the case.

6.6 Secondly, we highlight our practical experience of case teams frequently requesting additional information (in particular market information) to be provided in simplified cases, including in relation to transactions where there can clearly be no competition issue, for example in the case of extra-EEA joint ventures. We have therefore found that in practice it has been necessary to engage in pre-notification in even the simplest cases, adding time into the deal process. We therefore believe that case teams should consider whether information is really needed before requiring this to be provided, and a consistent approach be adopted. We also believe that there would be merit in the Commission committing to a best practice target of 15 Working Days maximum for pre-notification in simplified procedure cases and 7 Working Days maximum in the case of transactions not giving rise to any reportable markets.

6.7 Finally, please see our comments in response to Question 5 above in respect of the transactions benefitting from the simplified procedure, and our response to Questions 8-13 below in relation to the scope for further simplification of EU merger control.

- Transactions falling under point 5b of the Notice:

YES
NO

Please explain.

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See our response above.
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- Transactions falling under point 5c or point 6 of the Notice:

YES
NO

Please explain.

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See our response above.
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- Transactions falling under point 5d of the Notice:

YES
NO

Please explain.

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See our response above.
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7. To which extent have such costs (in terms of workload and resources spent) been reduced by the 2013 Simplification Package? Please explain.

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Please see our comments in response to Question 6 above.
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8. On the basis of your experience on the functioning of the Merger Regulation, particularly after the changes introduced with the 2013 Simplification Package, and your knowledge of the enforcement practice of the Commission in recent years, do you consider that there is currently scope for further simplification of EU merger control without impairing the Merger Regulation's objective of preventing harmful effects on competition through concentrations?

- (●) YES
- ( ) NO
- ( ) OTHER

If you replied yes or other, do you consider that there is scope for further simplification by, in particular:

8.1 Exempting one or several categories of the cases listed in question 2 above (and/or any other categories of cases) from the obligation of prior notification to the Commission and from the standstill obligation; in those cases, the Commission would not adopt a decision under the Merger Regulation;

- (●) YES
- ( ) NO

Please explain.

8.1 We welcome the Commission's consideration of this possibility. As outlined in our responses to the Commission's 2013 consultation on "Draft Revision of Simplified Procedure and Merger Implementing Regulation" and its 2013 and 2014 consultations on "Towards more effective EU merger control" ("Previous Responses")(see http://ec.europa.eu/competition/consultations/2013_merger_regulation/herbert_smith_freehills_en.pdf;http://ec.europa.eu/competition/consultations/2013_merger_control/herbert_smith_freehills_en.pdf; and http://ec.europa.eu/competition/consultations/2014_merger_control/herbert_smith_freehills_en.pdf), we believe that the Commission should ensure that the administrative burdens for businesses which arise from the EUMR regime are minimised so far as possible, and that this should include in particular revisiting the treatment of extra-EEA joint ventures under the EUMR.

8.2 We believe that the current extraterritorial application of the EUMR's procedures to joint ventures which will not be active on markets within the EEA, as a result of parental turnover only, regardless of the fact that such concentrations are clearly not capable of giving rise to any actual or potential effect on competition within the EEA (and regardless of the size of the joint venture), is disproportionate and burdensome for the parties (even under the simplified procedure). It also diverts Commission resources to matters that do not affect competition in the EEA.

8.3 The notification and review of such extra-EEA joint ventures is clearly unnecessary to achieve the EUMR's objective of ensuring that competition in the internal market is not distorted. Moreover, this does not appear consistent with the approach of the General Court in Case T-102/96

Gencor v Commission. It is also contrary to the principles underlying the ICN's Recommended Practices for Merger Notification Procedures (http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf).

8.4 We believe that the risks of excluding such joint ventures from the EUMR's notification and review procedures are minimal. Although theoretically such joint ventures could have an impact on competition in the EEA if their activities expanded in the future (or as a result of activities outside the EEA in the case of global markets), in practice the risk of this causing a significant impediment to competition is very low. In addition, if as part of such an expansion one or more parents transferred a business to the joint venture this could itself trigger an EU or national merger control filing. Moreover, in the case of an acquisition of sole control not meeting the EUMR thresholds due to limited target presence in the EEA, the merged entity could also in future expand its activities in the EEA, and the EUMR does not attempt to make all such transactions notifiable. Any concerns about spill-over effects between the parent companies within the EEA can be dealt with under Article 101 TFEU.

8.5 We therefore believe that the Commission should revisit the treatment of purely extra-EEA joint ventures (both their creation and subsequent changes of control) under the EUMR as a matter of priority, and to consult on appropriate amendments of the EUMR accordingly. We would propose that the Commission consider two options in this regard.

8.5.1 Firstly, which we consider the conceptually preferable and logical approach, the exclusion of such joint ventures from the scope of the EUMR in its entirety. We refer the Commission to our Previous Responses for proposals as to how the EUMR could be amended to exclude the creation of, or acquisition of joint control over, joint ventures with no actual or intended activities or turnover in the EEA.

8.5.2 Secondly, the automatic exemption from notification and clearance of such transactions through the operation of a Block Exemption or similar mechanism. This option would have the benefit of retaining the one stop shop process, whilst providing merging parties with legal certainty. As this would be time-limited, it would also allow the Commission to assess the effect of exclusion without definitively amending the EUMR.

8.6 Either option would significantly reduce burdens on companies, conserve Commission resources and would not create any material risk to competition in the EEA.

8.2 Introducing lighter information requirements for certain categories of cases listed in question 2 above (and /or any other categories of cases), notably by replacing the notification form by an initial short information notice; on the basis of this information, the Commission would decide whether or not to examine the case (if the Commission does not to examine the case, no notification would need to be filed and the Commission would not adopt a decision);

- (●) YES
- ( ) NO

Please explain.

8.7 We welcome the Commission's consideration of this possibility. We believe that there is merit in considering the replacement of a Short Form notification with an short information notice for transactions falling under points 5a (to the extent not excluded of block exempted from the application of the EUMR, which as discussed above, we consider should be the case at least where the joint venture has no current or intended turnover or activities in the EEA), 5b or 5d of the Notice. Such transactions could in our view be readily notified via a straightforward description that would enable the Commission to determine whether or not further examination is necessary. This would be a proportionate manner of dealing with such transactions.

8.8 However, it would be important to ensure legal certainty in such a scenario. We believe for example that:

8.8.1 The parties should have the option to voluntarily make a normal Short Form CO notification and receive clearance following a review under the simplified procedure.

8.8.2 To the extent that an information notice were utilised, the Commission should be subject to a strict deadline (for example 15 Working Days from submission) to decide whether further information were required (we assume by requiring a Short Form CO notification to be made, which review would then be subject to the EUMR timetable).

8.9 For such a measure to represent a real reduction in burdens the information required would need to be relatively minimal (for example information about the parties, the transactions and the industry concerned, but not detailed market information), there should be no de facto requirement for pre-notification on the information notice, and the Commission would need to take a realistic view on when further information were required. It would also be important for the Commission to publish guidance on the circumstances under which it would nevertheless open an investigation so that parties could make a decision as to whether to notify.

8.10 If designed appropriately, such a system would reduce administrative burdens on parties and conserve Commission resources, without creating risks to competition in the EEA.

8.3 Introducing a self-assessment system for certain categories of cases listed in question 2 above (and/or any other categories of cases); under such system, merging parties would decide whether or not to proceed to notify a transaction, but the Commission would have the possibility to start an investigation on its own initiative or further to a complaint in those cases where it considers it appropriate in so far as they may potentially raise competition concerns;

- ○ YES
- ◉ NO

Please explain.

8.11 Whilst a self-assessment system would reduce burdens on parties to transactions that would otherwise be notified and reviewed under the simplified procedure, we believe that such an option would give rise to real risks in terms of legal uncertainty, and how to deal with case referrals between the Commission and the NCAs in such a scenario.

8.12 Parties may be reluctant to rely on self-assessment where the Commission may dispute whether the transaction falls into the relevant category, and may in any event commence an investigation after a transaction has been completed, in particular if the time period to do so were more lengthy than the EUMR review timetable.

8.13 If the Commission were nevertheless minded to introduce self-assessment for one or more categories of transactions eligible for the simplified procedure, then measures to mitigate the reduction of legal certainty would be required, for example the ability to voluntarily notify, guidance on the circumstances under which it would open an investigation, and a clear and relatively short limitation period for intervention.

8.4 Other

- ○ YES
- ◉ NO

Please explain.

See our responses above.

When replying to question 8, please take into account the benefits and potential risks involved in each particular measure. For example, by exempting from notification all cases without horizontal or vertical overlaps [see point (8.1) above], the Commission may not be able to examine certain concentrations that could raise competition concerns, for instance because of potential competition or conglomerate aspects. Conversely, in cases where Parties file only a short information notice [see point (8.2) above], the Commission may not have sufficient information to assess whether the merger should be examined because it could potentially raise competition concerns. Similarly, in a self-assessment system [see point (8.3) above], the Commission may not become aware of mergers that could potentially raise competition concerns; moreover, under such system, the Commission may decide to intervene against a transaction which has already been implemented, which may cause some businesses to notify in any event just to obtain legal certainty.

In case you identify any risks, please explain those and indicate whether you envisage any measure to address / mitigate such risks.

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See our responses above.
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Further simplification of the treatment of extra-EEA joint ventures

9. The creation of joint ventures operating outside the EEA and having no effect on competition on markets within the EEA ("extra-EEA joint ventures") can be subject to review by the European Commission. In your experience, has this fact contributed to protecting competition and consumers in Europe?

- ○ YES
- ◉ NO
- ○ OTHER

Please explain

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See our response to Question 8 above and our Previous Responses.
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10. Has this one stop shop review at EU level of extra-EEA joint ventures created added value for businesses and consumers?

- ○ YES
- ◉ NO
- ○ OTHER

Please explain

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See our response to Question 8 above and our Previous Responses.
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11. Do you consider that the costs (in terms of workload and resources spent) incurred by businesses when notifying extra-EEA joint ventures are adequate and proportionate in order to ensure an appropriate review of concentrations with an EU dimension in order to prevent harmful effects on competition in the EEA?

- ○ YES
- ◉ NO
- ○ OTHER

Please explain

See our response to Question 8 above and our Previous Responses.

12. To which extent have such costs been reduced by the 2013 Simplification Package? Please explain.

12.1 Although the reduction in the information required by the clarifications within the Simplification Package has reduced slightly the burden when notifying an extra-EEA joint venture under the EUMR, this has not had a material effect (in particular given the practice in our experience of the case teams asking for significant additional information during pre-notification, despite the clear absence of any negative impact on competition in the EEA).

12.2 Further change is therefore in our view necessary – see our response to Question 8.1 above and our Previous Responses.

13.On the basis of your experience on the functioning of the Merger Regulation, particularly after the changes introduced with the 2013 Simplification Package, do you consider that the treatment of extra-EEA joint ventures is sufficiently simplified and proportionate in view of the Merger Regulation's objective of preventing harmful effects on competition through concentrations or is there scope for further simplification?

- ○ The treatment of extra-EEA joint ventures is sufficiently simplified.
- ◉ There is scope for further simplification.

Further simplification could be realised by:

(i) Excluding extra-EEA joint ventures from the scope of the Merger Regulation;

- ○ YES
- ○ NO

Please explain your answer taking into account both the scope for cost-savings and the potential risk that the Commission may not have the possibility to examine joint ventures that may impact competition in the EEA in the future (for instance if the scope of activity of the joint venture is expanded at a later stage). Also consider the possibility that these transactions may be subject to control in one or several EU Member States. In case you identify any risks, please indicate whether you envisage any measure to address / dispel such risks.

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See our response to Question 8 above and our Previous Responses.
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(ii) Introducing, for the treatment of extra-EEA joint ventures, an exemption from notification, or a light information system, or a self-assessment or any other system?

- YES
- NO

Please explain your answer, taking into account both the scope for cost-savings and any potential risk. In case you identify any risks, please indicate whether you envisage any measure to address/ dispel such risks.

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See our response to Question 8 above and our Previous Responses.
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(iii) Other.

Please explain.

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See our response to Question 8 above and our Previous Responses.
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IV.2. Jurisdictional thresholds

The Merger Regulation only applies to concentrations of a Union dimension, which are those where the undertakings concerned meet the different relevant turnover thresholds set out in Article 1 of the Merger Regulation.

Article 1 of the Merger Regulation

Scope

1. Without prejudice to Article 4(5) and Article 22, this Regulation shall apply to all concentrations with a Union dimension as defined in this Article.

2. A concentration has a Union dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and

(b) the aggregate Union-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Union-wide turnover within one and the same Member State.

3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Union dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate Union-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Union-wide turnover within one and the same Member State.

4. […]

5. […]

Recently, a debate has emerged on the effectiveness of these turnover-based jurisdictional thresholds, specifically on whether they allow capturing all transactions which can potentially have an impact on the internal market. This may be particularly significant in the digital economy, where services are regularly launched to build up a significant user base before a business model is determined that would result in significant revenues. With significant numbers of users, these services may play a competitive role. Moreover, relevant business models may involve collecting and analysing large inventories of data that do not yet generate significant turnover (at least in an initial period). Therefore, players in the digital economy may have considerable actual or potential market impact that may be reflected in high acquisition values, although they may not yet generate any or only little turnover. Acquisitions of such companies with no substantial turnover are likely not captured under the current turnover-based thresholds triggering a notification under the EU Merger Regulation, even in cases where the acquired company already plays a competitive role, holds commercially valuable data, or has a considerable market potential for other reasons. It has been suggested to complement the existing turnover-based jurisdictional thresholds of the EU Merger Regulation by additional notification requirements based on alternative criteria, such as the transaction value. The perceived legal gap may not only concern the digital industry, but also other industry sectors, such as the pharmaceutical industry. There have been indeed a number of highly valued acquisitions, by major pharmaceutical companies, of small biotechnology companies, which pre-dominantly research and develop new treatments that may have high commercial potential, and do not yet generate any or only little turnover.

Moreover, the question of whether there is a legal gap needs to be assessed in the context of the case referral system in EU merger control. Even in instances where a merger does not have Union dimension based on the turnover of the merging parties, the Commission may obtain jurisdiction through a referral. According to Article 4(5) of the Merger Regulation, the parties to a merger may ask for referral of a case from the level of Member States to the Commission before it is notified, if the case is notifiable under the national merger control laws in at least three Member States and if the additional criteria set out in Article 4 (5) of the Merger Regulation are met. Also, according to Article 22 of the Merger Regulation, national competition authorities may request the referral of a case to the Commission after notification, if the specific conditions of Article 22 of the Merger Regulation are met.

This section of the questionnaire gathers your views on the existence of a possible enforcement gap of EU merger control, and what would be its possible dimension and relevance. Moreover, this section also requests your views on possible policy responses, if such were to be warranted.

14. In your experience, have you encountered competitively significant transactions **in the digital economy in the past 5 years** which had a cross-border effect in the EEA but were not captured by the current turnover thresholds set out in Article 1 of the Merger Regulation and thus fell outside the Commission's jurisdiction? [1]

[1] A well-known example of these transactions is the acquisition in 2014 of WhatsApp by Facebook, which fell outside the thresholds of Article 1 of the Merger Regulation but was ultimately referred to the Commission pursuant to Article 4(5) thereof. Information on merger cases reviewed by the European Commission is accessible via the search function on DG COMP's website at http://ec.europa.eu /competition/elojade/isef/index.cfm?clear=1&policy_area_id=2.

- YES
- NO
- OTHER

- **If yes**, please describe the characteristics of such transactions.

- **If yes**, please give concrete examples.

- **If yes**, please estimate how many of those transactions take place per year.

- **If yes**, do you consider that those transactions would typically qualify for a pre-notification referral under Article 4(5) of the Merger Regulation or a post-notification referral under Article 22 of the Merger Regulation? Please explain.

- **If no or other**, please explain your answer.

14.1 It is inherently difficult to identify which transactions would be regarded as "competitively significant" and having a "cross-border effect in the EEA" in the abstract for these purposes. We are aware of transactions with a high acquisition value in various industries which have fallen outside the scope of the EUMR, but high deal value does not necessarily signify competitive significance (in the sense of an impediment to effective competition), as evidenced by the large number of transactions with high deal values which are notified under the EUMR (or to one or more NCAs) and receive unconditional clearance in Phase I. We are not aware of any evidence that there are a material number of high acquisition value transactions, in any sector, which have not been notified under the EUMR or in one or more Member States, and which would have given rise to competition concerns.

14.2 See further our Annex 1 on jurisdictional thresholds uploaded separately.

15. In your experience, have you encountered competitively significant transactions **in the pharmaceutical industry in the past 5 years** which had a cross-border effect in the EEA but were not captured by the current turnover thresholds set out in Article 1 of the Merger Regulation and thus fell outside the Commission's jurisdiction? [1]

[1] An example of such transactions is the 2015 acquisition of Pharmacyclis by AbbVie.

- YES
- NO
- OTHER

- **If yes**, please describe the characteristics of such transactions.

- **If yes**, please give concrete examples.

- **If yes**, please estimate how many of those transactions take place per year.

- **If yes**, do you consider that those transactions would typically qualify for a pre-notification referral under Article 4(5) of the Merger Regulation or a post-notification referral under Article 22 of the Merger Regulation? Please explain.

- **If no or other**, please explain your answer.

Please see our response to Question 14 above.

16. In your experience, have you encountered competitively significant transactions **in other industries than the digital and pharmaceutical sectors in the past 5 years** which had a cross-border effect in the EEA but were not captured by the current turnover thresholds set out in Article 1 of the Merger Regulation?
    - YES
    - NO
    - OTHER

- **If yes**, please describe the characteristics of such transactions.

- **If yes**, please give concrete examples.

- **If yes**, please estimate how many of those transactions take place per year.

- **If yes**, do you consider that those transactions would typically qualify for a pre-notification referral under Article 4(5) of the Merger Regulation or a post-notification referral under Article 22 of the Merger Regulation? Please explain.

- **If no or other**, please explain your answer.

Please see our response to Question 14 above.

17. In your experience and in light of your responses to the previous questions (14 to 16), are the possible shortcomings of the current turnover-based jurisdictional thresholds of Article 1 of the Merger Regulation (in terms of possibly not capturing all competitively significant transactions having a cross-border effect in the EEA) sufficiently addressed by the current case referral system (including the pre-notification referrals to the Commission under Article 4(5) of the Merger Regulation and the post-notification referral to the Commission under Article 22 of the Merger Regulation)?
    - YES
    - NO
    - OTHER

Please explain.

1.1 We do not consider that there is currently evidence that there are in fact material shortcomings in the current turnover-based threshold system. We consider that this system – which is well-established and provides relative clarity for merging parties – together with EU Member State merger control regimes and the referral system – has operated effectively to ensure that the Commission and NCAs review relevant merger cases.

1.2 See further our Annex 1 on jurisdictional thresholds uploaded separately.

18. Do you consider that the current absence, in the Merger Regulation, of complementary jurisdictional criteria (i.e. criteria not based exclusively on the turnover of the undertakings concerned) impairs the goal of ensuring that all competitively significant transactions with a cross-border effect in the EEA are subject to merger control at EU level?

- YES
- (•) NO
- OTHER

- **If yes**, please also indicate which are, in your opinion, the complementary jurisdictional criteria whose absence may impair the above-mentioned goal. Please also take into account, in your reply, the Commission's objective of not imposing undue burdens on businesses.

- **If no or other**, please explain.

See further our Annex 1 on jurisdictional thresholds uploaded separately.

19. In particular, do you consider that the current absence, in the Merger Regulation, of a complementary jurisdictional threshold based on the value of the transaction ("deal size threshold") impairs the goal of ensuring that all competitively significant transactions with a cross-border effect in the EEA are subject to merger control at EU level?

- YES
- (•) NO
- OTHER

Please explain.

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See further our Annex 1 on jurisdictional thresholds uploaded separately.
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20. If you replied yes to question 19, which level of transaction value would you consider to be appropriate for a deal size threshold? Please explain your answer.

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Not applicable
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21. If you replied yes to question 19, what solutions do you consider appropriate to ensure that only transactions that have a significant economic link with the EEA ("local nexus") would be covered by such a complementary threshold? In responding, please consider that the purpose of this deal size threshold would be to capture acquisitions of highly valued target companies that do not (yet) generate any substantial turnover.

- [ ] A general clause stipulating that concentrations which meet the deal size threshold are only notifiable if they are likely to produce a measurable impact within the EEA, complemented by specific explanatory guidance.
- [ ] Industry specific criteria to ensure a local nexus.
- [ ] Other

Please explain your response and provide examples where appropriate.

```
Not applicable.
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22. If you replied yes to question 19, would you see a need for additional criteria limiting the scope of application of this deal size threshold in order to ensure a smooth and cost-effective system of EU merger control?

- ( ) YES
- ( ) NO
- ( ) OTHER

Please explain your answer.

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Not applicable.
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IV.3. Referrals

The division of competence between the Commission and the EU Member States is based on the application of the turnover thresholds set out in Article 1 of the Merger Regulation and includes three corrective mechanisms.

The first corrective mechanism is the so-called "two-thirds rule". Pursuant to this rule, notification under the Merger Regulation is not required if each of the parties concerned realises more than two thirds of its EU-wide turnover in one and the same Member State, even if the general thresholds under Articles 1(2) and 1(3) of the Merger Regulation are met. The objective of this rule is to exclude from the Commission's jurisdiction certain cases which contain a clear national nexus to one Member State.

The second corrective mechanism is the pre-notification referral system introduced in 2004. This mechanism allows for the re-allocation of jurisdiction to the Member States under Article 4(4) of the Merger Regulation or to the Commission under Article 4(5) if certain conditions are fulfilled. The initiative for requesting such a referral prior to notification lies in the hands of the parties. However, pre-notification referrals are subject to approval by the Member States and the Commission under Article 4(4) and by the Member States under Article 4(5) of the Merger Regulation.

The third corrective mechanism is the post-notification referral system whereby one or more Member States can request that the Commission assess mergers that fall below the thresholds of the Merger Regulation under certain conditions (Article 22 of the Merger Regulation). Conversely, a Member State may, in cases that have been notified under the Merger Regulation, request the transfer of competence to the national competition authorities under certain conditions (Article 9 of the Merger Regulation).

In relation to the current case referral mechanism foreseen by the Merger Regulation, the White Paper proposals aimed at making case referrals between Member States and the Commission more business-friendly and effective.

Those proposals essentially consist of:

1. Abolishing the two step procedure under Article 4(5) of the Merger Regulation, which requires that parties first file a Form RS and then the Form CO, if they would like the Commission to deal with a case that is notifiable in at least three Member States, but does not meet the jurisdictional thresholds of the Merger Regulation;

2. Specific modifications concerning the post-notification referrals from Member States to the Commission under Article 22 of the Merger Regulation, namely

- an expansion of the Commission's jurisdiction to the entire EEA if it accepts a referral request under Article 22 of the Merger Regulation (currently the Commission only obtains jurisdiction in those Member States that join the referral request),
- and a renouncement of jurisdiction over the entire EEA, if one or several Member States oppose the referral request, and

3. The removal of the requirement under Article 4(4) of the Merger Regulation pursuant to which parties have to assert that the transaction may "significantly affect competition in a market" in order for a case to qualify for a referral. Showing that the transaction is likely to have its main impact in a distinct market in the Member State in question would suffice. Removing the perceived "element of self-incrimination" may lead to an increase in the number of Article 4(4) requests.

23. Do you consider that the current case referral mechanism (i.e. Articles 4(4), 4(5), 9, and 22 of the Merger Regulation) contributes to allocating merger cases to the more appropriate competition authority without placing unnecessary burden on businesses?

- ○ YES
- ○ NO
- ◉ OTHER

Please explain.

> The referral regime under the EUMR is designed to ensure that the best placed authority reviews a transaction. As outlined in our Previous Responses, we believe that, on the whole, the system works well in this regard, but that there is scope for improvement, in particular by reducing the burden on the parties and speeding up the process, both in respect of the pre-notification mechanisms of Articles 4(4) and 4(5) EUMR and the post-notification mechanisms of Articles 9 and 22 EUMR. We therefore welcomed the Commission's initiatives set out in its 2013 consultation and 2014 White Paper aimed at streamlining the current system in order to reduce the administrative burden on the notifying parties and to speed up the regime in general.

24. If you consider that the current system is not optimal, do you consider that the proposals made by the White Paper would contribute to better allocating merger cases to the more appropriate competition authority and/or reducing burden on businesses?

- ○ YES
- ○ NO
- ◉ OTHER

Please explain.

> See our Annex 2 on referrals uploaded separately.

25. Do you consider that there is scope to make the referral system (i.e. Articles 4(4), 4(5), 9, and 22 of the Merger Regulation) even more business friendly and effective, beyond the White Paper's proposals?

- ◉ YES
- ○ NO
- ○ OTHER

Please explain.

25.1 We do consider that there is scope to make the referral system more business friendly and effective over and above what is proposed in the White Paper. Our comments in our Annex 2 on referrals uploaded separately in response to Question 24 include a number of suggestions for improvements over and above what is proposed by the Commission.

25.2 We also consider it would be useful, in particular given the lack of published decisions under these provisions, for the Commission to issue guidance as to its approach to referral decisions under the various provisions and what factors it will take into account when exercising its discretion (where applicable).

IV.4. Technical aspects

The 2014 Commission Staff Working Document (2014 SWD) accompanying the White Paper identified additional technical aspects of the procedural and investigative framework for the assessment of mergers where experience has shown that improvement may be possible. The SWD included the following proposals:

- Modifying Article 4(1) of the Merger Regulation in order to provide more flexibility for the notification of mergers that are executed through share acquisitions on a stock exchange without a public takeover bid.
- Amending Article 5(4) of the Merger Regulation to clarify the methodology for turnover calculation of joint ventures.
- Introducing additional flexibility regarding the investigation time limits, in particular in Phase II merger cases.
- Modifying Article 8(4) of the Merger Regulation to align the scope of the Commission’s power to require dissolution of partially implemented transactions incompatible with the internal market with the scope of the suspension obligation (Article 7(4) of the Merger Regulation.
- Tailoring the scope of Article 5(2)(2) to capture only cases of real circumvention of the EU merger control rules by artificially dividing transactions and to address the situation where the first transaction was notified and cleared by a national competition authority.
- Clarification that "parking transactions" should be assessed as part of the acquisition of control by the ultimate acquirer.
- Amending the Merger Regulation to allow appropriate sanctions against parties and third parties that receive access to non-public commercial information about other undertakings for the exclusive purpose of the proceeding but disclose it or use it for other purposes.
- Amending the Merger Regulation to clarify that referral decisions based on deceit or false information, for which one of the parties is responsible, can also be revoked.

26. Do you consider that there is currently scope to improve the EU merger control system and that each of the proposals contained in the 2014 SWD would contribute to achieving this purpose?

26.1 As outlined in our Previous Responses, we do believe that there is scope to improve the EU merger control system and welcome the Commission's initiative in considering such improvements.

26.2 We set out our comments on the proposals within the 2014 Staff Working Document, together with a number of additional suggestions, in our Annex 3 on technical aspects uploaded separately.

27. Based on your experience, are there any other possible shortcomings of a technical nature in the current Merger Regulation? Do you have any suggestions to address the shortcomings you identified?

See our Annex 3 on technical aspects uploaded separately.

28. One of the proposals contained in the 2014 SWD relates to the possibility of introducing additional flexibility regarding the investigation time limits. In this regard, have you experienced any particularly significant time constraints during a Phase 2 merger investigation, in particular in those cases where a Statement of Objections had been adopted (for example, for remedy discussions following the adoption of the Statement of Objections)?

- YES
- NO
- OTHER

Please consider, inter alia, the time needed for the Commission to carry out its investigation and for the notifying parties to make legal and economic submissions, exercise their rights of defence and to propose and discuss commitments.

28.1 We have experienced time constraints during a Phase 2 merger investigation (including in relation to remedy discussions following the adoption of the Statement of Objections). However, we believe that an appropriate balance must be struck between allowing sufficient time for review and discussions, and ensuring that the proceedings do not become too lengthy or open-ended.

28.2 We agree that the maximum possible time for an agreed extension under Article 10(3) EUMR could be increased slightly (for example by 10-15 Working Days).

29. In the light of your reply to question 28 above, do you consider that the current distinction between remedies presented before or after working day 55 since the opening of phase II proceedings, on which depends the extension of the procedure by 15 additional working days, is working well in practice?

- YES
- NO
- OTHER

Please explain.

V. Submission of additional information

Please feel free to upload a concise document, such as a position paper, explaining your views in more detail or including additional information and data. The maximal file size is 1MB. Please note that the uploaded document will be published alongside your response to the questionnaire which is the essential input to this open public consultation. The document is an optional complement and serves as additional background reading to better understand your position.

8b066aa5-2d88-49df-9284-ea85dd3ad0a5/Herbert_Smith_Freehills_LLP_response_-_annexes_on_jurisdictional_thresholds__referrals_and_technical_aspects.pdf

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