

**RESPONSE TO THE EUROPEAN COMMISSION'S PUBLIC CONSULTATION OF
7 OCTOBER 2016**

**EVALUATION OF PROCEDURAL AND JURISDICTIONAL ASPECTS OF EU
MERGER CONTROL**

SUBMISSION OF 13 JANUARY 2017



Freshfields Bruckhaus Deringer



1. Introductory comments

- (1) Freshfields Bruckhaus Deringer welcomes the opportunity to respond to the European Commission's (*the Commission*) evaluation of procedural and jurisdictional aspects of EU merger control, dated 7 October 2016.
- (2) Our comments are based on our significant expertise in merger control law and practice within the European Union and elsewhere. The comments contained in this paper are those of Freshfields Bruckhaus Deringer. They do not necessarily represent the views of any of our individual clients, or of all Freshfields Bruckhaus Deringer lawyers.
- (3) We appreciate this initiative by the Commission to consider how the EU merger control system can be further improved and how the administrative burden for merging parties can be reduced. In particular, we consider that the regime in relation to the assessment of cases that observe the requirements for simplified treatment¹ (also referred to as simple cases in this response) and to the referral system can be improved. However, we do not believe that changes to the current turnover-based jurisdictional thresholds or the introduction of complementary jurisdictional criteria are warranted at this time. These topics are addressed in more detail below.

2. Summary

2.1 Simplified procedure

- (4) We consider that the one-stop-shop principle has created significant added value by eliminating the need, in the case of qualifying transactions, for parties to submit notifications and undergo merger review processes in multiple EEA Member States.
- (5) We find that in practice the simplified procedure has not significantly reduced the administrative burden on businesses and does not always result in tangible efficiency gains. This is because the amount of information requested by the Commission in a simplified procedure case is often substantial, particularly because notifying parties are required to provide information on all plausible alternative markets. We therefore encourage the Commission to evaluate its approach, to ensure that the potential efficiency gains of the simplified procedure are fully realised. If a transaction satisfies the thresholds set by the Commission, there should be clear benefits from using the procedure.
- (6) We support the proposal for transactions that qualify for the simplified procedure to be exempted from the standstill obligation, as this will greatly enhance efficiency and reduce costs for businesses. We also support proposals for certain transactions – joint ventures with no or negligible activities in the EEA, concentrations for which there are no horizontal or vertical overlaps between the parties, and concentrations that result in a change from joint to sole control – to be eligible for notification to the Commission via a brief information notice rather than a (Short) Form CO.

2.2 Jurisdictional thresholds

¹ The categories of cases that are mentioned in point 5 and 6 of the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (*the Notice*).



- (7) We acknowledge the Commission's concerns that the current turnover-based thresholds of the Merger Regulation may mean that some transactions that may potentially impact competition on the internal market are not reviewed by the Commission. However, we believe that changes to the thresholds should be introduced only if there is clear evidence of an enforcement gap in EU merger control. In our view, this evidence is currently lacking. We consider that the current thresholds, alongside national merger control regimes and the referral mechanisms in place, are operating effectively to ensure that relevant transactions are ultimately reviewed at the appropriate level.
- (8) Not only is there insufficient evidence to warrant the introduction of supplementary jurisdictional criteria such as a deal value threshold, but we also envisage undesirable complexities in implementation and application of any such threshold. A deal value threshold would have to be accompanied by a test to ensure that only transactions with a sufficient nexus to the EEA are captured by the threshold. Such a test should be clear, and capable of being readily understood and applied by businesses. In our view, the suggestions put forward by the Commission lack clarity and raise uncertainty, and are therefore unsatisfactory. We also envisage considerable complexities when it comes to the assessment of a transaction's deal value, which in practice often depends on variable measures. Taking the US experience as a guide, we would expect that the Commission would have to dedicate considerable resources to addressing questions from businesses around the calculation of a deal's value.

2.3 Referrals

- (9) In general, we believe that the current referral system is an effective means of ensuring that relevant transactions are reviewed at the national or EU level, as appropriate. Nonetheless, we consider that certain improvements could be made to further refine the system. In particular, we recommend reducing the time periods within which national competition authorities (*NCA*s) and the Commission must decide on referral requests.

2.4 Technical aspects

- (10) We support a number of proposals outlined by the Commission in its 2013 Staff Working Document. We do not agree with the proposal to modify 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.

3. Cases that observe the requirements for simplified treatment: further simplification

3.1 One-stop-shop principle should be maintained

- (11) The one-stop-shop review at the EU level creates significant added value, as it increases efficiency by not having to submit notifications in multiple EEA Member States. We consider it important that the one-stop-shop review and jurisdiction of the Commission is maintained in relation to the categories of cases that are mentioned in points 5 and 6 of the Notice. In this response, we will suggest ways to improve efficiency in the merger control review process of these categories of cases and



amendments to limit the administrative burden for companies. However, we do not propose that the scope of the one-stop-shop review is limited.

3.2 The simplified procedure has not materially reduced the administrative burden

- (12) In practice, the introduction of the simplified procedure has not yet resulted in a substantial reduction in the administrative burden on companies. Typically, the amount of information that needs to be provided in practice in a Short Form CO is not materially less compared to a Form CO, provided that there are no affected markets. An exception is the number and scope of internal documents that are requested in Section 5.4 of the Form CO, although in case there are no affected markets, a (partial) waiver in relation to this request can be discussed and agreed with the case team in a Form CO context.
- (13) The 2013 Simplification Package introduced a useful change in relation to joint ventures, in that overlap in activities between parent companies is not viewed as a relevant vertical or horizontal relationship.
- (14) In addition, the 2013 Simplification Package usefully increased the market share threshold to 20% for markets where there is horizontal overlap and to 30% for markets where there is vertical overlap.
- (15) Moreover, the new category of transactions that can benefit from the simplified procedure, in case the HHI market share increment is below 150 and the combined market share in case of horizontal overlap is less than 50%, as introduced by the 2013 Simplification Package, is welcome. We note that the efficiency gain is reduced as a result of the additional information that needs to be provided in relation to these types of transactions in section 7.2 of the Short Form CO.
- (16) However, in practice these changes have not resulted in an overall substantial reduction of the burden on the notifying party, as the 2013 Simplification Package requires the inclusion of all “plausible alternative markets”.
- (17) Cases that observe the requirements for simplified treatment should not be subject to a review process that is comparable to a Form CO procedure. The criteria for simplified treatment should be determined and applied in a way that results in cases that observe the criteria really benefitting from a significant efficiency gain and a substantial reduction of the administrative burden.
- (18) In our experience, the amount of information that needs to be provided is substantial, as the Commission regularly requests market data and descriptions in relation to multiple (narrower or broader) alternative and hypothetical market definitions, even in situations in which it seems clear that no competition concerns can arise. Moreover, it seems that in practice case teams are very focussed on whether the (market share) thresholds for use of the Short Form CO are observed, which seems to add to the inclination of requesting market data for multiple alternative and hypothetical market definitions, which sometimes appear unduly narrow (or broad) and unlikely to be plausible. In practice, it seems that notifying parties are sometimes required to prove that there is no hypothetical market where the parties’ market shares may be over the applicable thresholds. It is suggested that in order to promote the objectives of the simplified procedure the Commission should assess more critically whether an alternative and hypothetical market really constitutes a plausible alternative market,



before additional information is requested from the notifying party. In assessing plausibility, regard should be had to past market definitions adopted by the Commission, i.e. if a particular hypothetical market segment has previously been rejected by the Commission as not constituting an appropriate product or geographic market, this is a strong indication that it should not be considered a plausible alternative market for the purpose of assessing whether the criteria for simplified treatment are observed.

- (19) Further, in view of the risk of the Commission requiring the notifying party to switch to the use of the Form CO during the process, it is not always apparent that the Short Form CO provides tangible efficiency gains. Immediate use of the Form CO, in cases where there are no affected markets, does not result in a substantial increase of the information that needs to be provided (as mentioned above) and it removes the risk of having to provide substantial additional information in order to demonstrate that the thresholds for use of the Short Form CO are observed under all hypothetical scenarios. Moreover, since the use of the Form CO does not necessarily require the application of a market test by the Commission where no competition concerns are apparent, no clear efficiency gain is provided by the Short Form CO in that respect either, further demonstrating that the advantages of the Short Form are yet to be fully realised in practice.
- (20) In practice, the number and scope of RFIs issued by the Commission during the pre-notification phase are extensive. Yet often few additional questions are raised during the review process following formal notification. This results in pre-notification phases which regularly last several weeks and causes delays to the commencement of the formal review period, while the formal review period is not (significantly) used for information gathering and its duration cannot be substantially shortened even if all the work has been done upfront, given the procedural requirements and deadlines which the Commission has to observe. This is not efficient from the perspective of a notifying party, in relation to cases that meet the criteria for simplified treatment and are therefore highly unlikely to result in competition concerns. It seems that the formal review period provides for sufficient time and opportunity to request additional information, as a result of which the duration of the pre-notification phase can be reduced.

3.3 Exemption from the standstill obligation

- (21) In relation to all types of cases for which the simplified procedure is available, we propose to exempt them from the standstill obligation contained in Article 7(1) of the Merger Regulation.²
- (22) In our experience, transactions that observe the criteria for simplified treatment are unlikely to raise competition concerns. The rationale for applying a standstill obligation – i.e. in order to prevent implementation of concentrations in view of the risk of a significant impediment to effective competition – is not evident.
- (23) An exemption from the standstill obligation provides significant benefits, as it allows the parties to implement a particular concentration much sooner. This can materially reduce costs.

² Article 7(1) of the Merger Regulation would require amendment, in order to differentiate between concentrations that meet the criteria for simplified treatment and those that do not.



- (24) An exemption would not require a decision from the Commission confirming that the criteria for simplified treatment are observed. Parties can therefore on the basis of a self-assessment of whether the criteria for simplified treatment are observed determine if they implement a concentration prior to receiving clearance.
- (25) Companies would implement concentrations at their own risk. Should the Commission within the time limits for dealing with simplified cases demonstrate and decide that the criteria for simplified treatment are not observed, the concentration is unable to benefit from an exemption from the standstill obligation and the notifying party would in such circumstances have violated the standstill obligation, if implementation had already occurred. Should competition concerns be identified during a review by the Commission which cannot be remedied, the parties may need to unwind the transaction. In our experience, companies and their advisors are well placed to assess this risk, especially in relation to simple cases. To the extent that risks are identified, they can be mitigated by the notifying party, by withholding implementation until the Commission has confirmed that a Short Form CO can be formally notified³ (mitigating the risk that the Commission would disagree that the criteria for simplified treatment are observed) and/or waiting until clearance has been obtained (mitigating the risk that a significant impediment to competition would be identified).⁴
- (26) Experience in other merger control regimes in which no standstill obligation automatically applies demonstrates that this works well in practice. Scrutiny should nevertheless remain higher in the EU compared to these jurisdictions, as it will be mandatory for parties to provide information to the Commission on all concentrations that observe the notification thresholds contained in the Merger Regulation (through an information notice as described further below or through a Short Form CO), and as an exemption to the standstill obligation will only be available to cases that meet the objective criteria for simplified treatment.

3.4 Information notice proposed for certain categories of cases

- (27) In our experience, joint ventures with no or negligible activities in the EEA⁵, concentrations involving parties whose activities do not horizontally or vertically overlap⁶, and concentrations that result in a change from joint to sole control⁷, are unlikely to raise competition concerns.
- (28) The acquisition of joint control in particular, appears to result in an excessive number of notifications with respect to concentrations that cannot raise competition concerns. This arises because the notification thresholds contained in Article 1 of the Merger Regulation can be satisfied by the undertakings concerned that acquire joint control, regardless of the size or turnover of the target and even if the target is not active in the EEA. As a result, many notifications are submitted with respect to concentrations in

³ Or until the 10 day working day period has expired, following submission of an information notice, as described in paragraph 3.4 below.

⁴ It is highly unlikely that a concentration that meets the criteria for simplified treatment is the object of a referral request by a national competition authority. However, the Merger Regulation may need to include a provision stating that in case of a referral the equivalence of the standstill obligation in national legislation would also not apply, provided that the criteria for simplified treatment are observed.

⁵ Transactions falling under point 5a of the Notice.

⁶ Transactions falling under point 5b of the Notice.

⁷ Transactions falling under point 5d of the Notice.



relation to which it is quite clear that no competition concerns can arise. This seems to result in a disproportionate administrative burden for businesses.

- (29) For the three categories of cases mentioned in paragraph (27) above, we propose to remove the requirement to submit a Short Form CO, and instead include a requirement to submit a brief information notice. The information notice could include summary information relating to the parties, the transaction, turnover and the products and services involved. While we recognise that the Commission needs sufficient information in order to decide whether a case merits further investigation, it is important that the administrative burden on companies involved be kept to a minimum. The scope of the information that needs to be provided should therefore be clearly distinguished from the information that needs to be provided in the context of a Short Form CO. To the extent that the Commission would require some market information, it is important that this is less compared to what is required for the purpose of a Short Form CO. For example, it should at least exclude the need to provide market share data in relation to plausible alternative hypothetical markets.
- (30) On the basis of the information notice, the Commission could decide within a short, fixed period of time (e.g. within 10 working days), to require the submission of a Form CO. In order not to undermine the efficiency gain that can be achieved by using an information notice, the Commission should require the submission of a Form CO only in exceptional circumstances. Such exceptional circumstances should only arise in cases where the Commission has a clear indication that the transaction described in the information notice may potentially result in a significant impediment to effective competition. If the Commission has not requested the submission of a Form CO, the concentration can be quickly cleared.
- (31) The use of a summary information notice would allow the referral system in EU merger control to continue to function in relation to all types of cases that can benefit from the simplified procedure. Following receipt of the information notice, the Commission can inform NCAs and publish a notice in the Official Journal as soon as possible.
- (32) Notifying parties should remain free to submit a (Short) Form CO instead of an information notice, with respect to all concentrations that meet the notification thresholds contained in the Merger Regulation.
- (33) We appreciate that in relation to transactions that fall under points 5(c) or 6 of the Notice, the Commission may require the type of information as set out in the Short Form CO, in order to confirm that they do not result in a significant impediment to effective competition.

4. Jurisdictional thresholds

4.1 Arguments against changes to the current jurisdictional thresholds

- (34) We do not believe that there is sufficient evidence to warrant changes to the current turnover-based jurisdictional thresholds or the introduction of complementary jurisdictional criteria at this time. In general, we consider that the current turnover-based jurisdictional thresholds, together with the case referral mechanisms in place, have operated effectively thus far to ensure that relevant transactions are reviewed respectively by the Commission and relevant NCAs.



- (35) We acknowledge the concerns raised by the Commission that the current absence in the Merger Regulation of complementary jurisdictional criteria, such as a deal value threshold, may in theory mean that some transactions which may potentially have an impact on the internal market are not reviewed by the Commission. However, to date we have not encountered nor are we aware of examples of any such transactions, either that were reviewed at the national level and failed to be referred to the Commission (when the Commission would have been best placed to review), or that failed to be reviewed at either the national or EU level. Furthermore, we consider that the potential options put forward for complementary jurisdictional criteria, namely a deal value threshold, would introduce legal and practical issues in implementation, placing an additional and unnecessary burden on businesses and Commission resources.
- (36) In our view, changes to the current thresholds should only be made where there is clear evidence that doing so would improve the effectiveness of EU merger control as a whole. We do not believe that there is sufficient evidence to warrant the addition of complementary jurisdictional criteria, and which justifies and outweighs the complexities that such changes would entail. Moreover, it is far from clear that deal value is a good proxy for competition issues, particularly as acquiring parties can later be found to have overpaid for a target business, especially in the tech sector. It is essential that the system remains flexible enough to ensure cases are reviewed by the best-placed authority. In our experience, the case referral mechanism provides this flexibility, whereas new jurisdictional thresholds may introduce unnecessary rigidity to this system.

There is no compelling evidence of an enforcement gap

- (37) Based on our experience, we do not consider that there is compelling evidence of an enforcement gap in existing EU merger control. To the best of our knowledge, we are not aware of any competitively significant transactions in the digital, pharmaceutical or other sectors in the past 5 years which have had a significant effect on competition in the EEA and which were not captured by national regimes with the ability to remedy any competition concerns if necessary.
- (38) The oft-cited case in this respect, the Facebook/WhatsApp transaction, was reviewed by the Commission following a request for referral by the parties pursuant to Article 4(5) of the Merger Regulation. As such, rather than illustrating a potential enforcement gap, we consider that the transaction is demonstrative of a system which is able to ensure, through the case referral mechanisms in place, that appropriate transactions are reviewed whether at the national or EU level.
- (39) Whilst we believe that certain improvements could be made to the case referral system (as set out in section 4 of this response), in our view the referral system is nevertheless generally an effective means of ensuring that relevant transactions are reviewed at the national or EU level as appropriate.

Substantial difficulties in establishing appropriate and adequate criteria

- (40) Not only is there insufficient evidence at this time of an enforcement gap in EU merger control, but we also anticipate that the introduction of complementary jurisdictional criteria such as a deal value threshold would bring unnecessary and undesirable complexities in implementation and application. In particular, we expect



complexities to arise in relation to the assessment of: (i) whether a transaction that meets the deal value threshold has a sufficient nexus to the EEA, such that the Commission is the authority best placed to review the transaction; and (ii) a transaction's deal value. Given such difficulties, and in the absence of compelling evidence of an enforcement gap that needs to be remedied, we would not support the introduction of a deal value jurisdictional threshold into the Merger Regulation.

(i) Establishing a local nexus to the EEA

- (41) If a deal value threshold is introduced into the Merger Regulation, certain provisions will also be required to ensure that only transactions meeting the new threshold with a clear local nexus to the EEA are notifiable to the Commission. By way of example, the existing alternative turnover-based thresholds of the Merger Regulation require parties to generate turnover in at least three Member States of the EU in order for a transaction to qualify for review by the Commission. In our view, this requirement works effectively alongside the referral mechanisms to ensure that deals with an appropriate nexus to the EEA are reviewed by the Commission. A local nexus test that is tied to a new deal value threshold should be (at least) equally effective in enabling parties to objectively assess whether the test is met.
- (42) In its consultation, the Commission has suggested that the requirement for a local nexus might be captured by 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. The Commission envisages that this general clause would be complemented by specific explanatory guidance.
- (43) In our view, even with specific explanatory guidance such a clause would be unclear, and risks catching many more transactions than those that do in fact have a potential impact on the internal market. We also note that a general clause of the formulation envisaged would not be compliant with the recommended practices of the International Competition Network (*ICN*) for merger notification procedures, which stipulate that notification thresholds should be clear and understandable, and based on objectively quantifiable criteria.⁸ In order to manage this uncertainty, both businesses and the Commission will have to devote considerable resources to determine and provide clarity on the assessment of a transaction's likely impact within the EEA.
- (44) The lack of clarity in and uncertainty arising from similar provisions being proposed for the merger control process in Germany is further justification for not introducing a supplementary deal value threshold into the Merger Regulation at this time. The current proposals in Germany for the introduction of a supplementary ‘size of transaction’ threshold to the merger control legislation include a local nexus test requiring the target entity to be active to a “considerable extent” within Germany. This wording raises the same lack of clarity as described in the paragraph above, and is already raising debate amongst practitioners in Germany about its application. Explanatory notes published alongside the proposed amendments provide only limited and subjective guidance, leaving open considerable uncertainty in application. The notes state that “marginal activities” would not trigger the threshold without explaining what activities may be considered “marginal”. The notes also state that the factors relevant to determining local nexus would vary between industry and the

⁸ We refer to the ICN's Recommended Practices for Merger Notification Procedures, available here: <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.



development and maturity of the market, without providing guidance on what this means in practice. Such uncertainty would be unsatisfactory and undesirable in the EU merger process.

- (45) It is unclear how industry specific criteria for the local nexus requirement would operate, but this approach also appears to add undue complication to the EU merger control system.
- (46) It would be open for the EU to introduce a deal value threshold along the lines of the ‘size-of-transaction’ test applicable in the United States under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (*HSR*). Alongside the size-of-transaction test, the HSR sets out certain exemption criteria for transactions that do not have a sufficient nexus to the US. The size-of-transaction test looks at the assets or voting securities that will be held by the acquiring person as a result of a proposed acquisition. It therefore applies objectively quantifiable criteria to transactions and avoids the uncertainties raised by a nebulous concept of “measurable” impact. As noted in the following paragraphs, however, the US approach also entails difficulties in its application and implementation, and as such is likely to be an unsatisfactory option in the EU context.

(ii) Deal value calculation

- (47) A deal’s value is often calculated by reference to parameters that are variable, such as the level of a company’s debt, earn-out and other performance-based measures, or fluctuating share prices. The value of a deal may also vary significantly depending on when the deal is calculated, for instance from the date of notification to the date of closing. In instances where a deal’s value is only calculated at closing or is based on future performance, significant difficulties may arise for businesses in determining whether a transaction meets the deal value threshold for notification. The value of a transaction for the purposes of assessing its notifiability in the EU would also have to be specifically calculated with reference to whatever local nexus requirements apply e.g. the value of physical assets located in the EU.
- (48) In order to manage such uncertainty, we expect that the Commission would have to devote considerable resources to assist and provide clarity on whether the threshold may be met. The US system is illustrative; the FTC dedicates considerable resources to addressing questions from businesses around such issues, and we would expect the Commission to do the same should a deal value threshold be introduced into the Merger Regulation.

Conclusion

- (49) We anticipate that the introduction of a deal value jurisdictional threshold into the Merger Regulation would bring with it considerable uncertainty that would impose an unnecessary burden on both the private and public sector. Given the absence of any compelling evidence of an enforcement gap in the current EU merger control system, we are of the view that changes to the jurisdictional thresholds of the Merger Regulation are neither necessary nor desirable at this time.

4.2 Recommendations if a deal value threshold is introduced in to the Merger Regulation



(50) Should the scope of the Merger Regulation be extended to include a deal-value threshold, we recommend the use of practical, objective and quantifiable criteria, notwithstanding the difficulties that such criteria would likely entail. We recommend that the criteria adhere to the following principles:

- A deal-value threshold should be set at a sufficiently high level which ensures that only cases with a Community dimension are captured (it would obviously need to be substantially higher than the thresholds introduced in Germany, in order to preserve a similar difference in magnitude of transactions that are captured by national regimes and the Merger Regulation as is the case with respect to turnover thresholds); and
- A clear test for establishing local nexus needs to be applied, which is based on objectively quantifiable data and can be easily determined by the parties (but as set out above, this appears challenging).

5. Referrals

5.1 Proposal relating to Article 4(5) of the Merger Regulation

(51) As regards the European Commission's first proposal to abolish 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, we agree overall. However, we further advocate the following:

- The 15 working day waiting period could be reduced to 10 or even 5 working days;
- The starting point of the waiting period (receipt by Member State) lacks clarity and adds delay: it should instead run from submission of a complete Form CO to the Commission;
- The Commission's review should be limited to examining the effects of a concentration in the territories of those Member States that have jurisdiction to review the concentration under national law. This will make use of the referral mechanism more attractive, as it would no longer result in a review of the effects of the concentration across the entire EEA.

5.2 Proposal relating to Article 22 of the Merger Regulation

(52) We agree that referral requests should only be able to be made by Member States which are themselves competent to review under their national law. However, in the case of a referral, the Commission's EEA-wide jurisdiction should not extend to jurisdictions in which the relevant NCA is not competent to review the transaction under its national law. Such extension is not justified, as it is not necessary to achieve the aim of ensuring a "one-stop-shop" and avoiding parallel investigations.

(53) In addition, Article 22 should be aligned with Article 4(5) by providing that it can apply only where the transaction is reviewable in at least three Member States.

(54) We consider that the proposed information system should be sufficient to allow Member States to make decisions on referral requests, and such a system would



reduce the risk of diverging decisions. But there should be a waiver requirement to ensure that parties remain in control of any exchange of confidential information.

- (55) Also under Article 22, we suggest that the 15 working day waiting period be reduced to 10 working days.

5.3 Proposal relating to Article 4(4) of the Merger Regulation

- (56) As regards the European Commission's proposal regarding the requirement under Article 4(4) of the Merger Regulation for the parties to assert that the transaction may "significantly affect competition" in order for the transaction to qualify for a referral, we agree with the proposal to delete the requirement. We believe that this requirement does sometimes deter parties from making use of this provision.

6. Technical aspects

- (57) We support the following proposals put forward by the Commission in the consultation under "technical aspects" and as further described in the 2014 Commission Staff Working Document accompanying the document White Paper towards more effective EU merger control (*SWD*):

- 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. An adaption of the criterion of "good faith intention" in order to allow parties to notify before the level of shareholding required to exercise (de facto) control is acquired, is welcome.
- Amending Article 5(4) of the Merger Regulation to make clearer the methodology for calculating the turnover of a joint venture, in line with the Commission's Consolidated Jurisdictional Notice (we note that this would not entail any substantive changes).
- Tailoring the scope of Article 5(2)(2) of the Merger Regulation 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 to and cleared by a national competition authority.
- 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, provided that the threshold for revoking a referral decision is aligned with the threshold for revoking a clearance decision.

- (58) We do not support 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), as described in the SWD. As follows from the SWD, citing the 2007 Ryanair/Aer Lingus case, the Commission



would like to be able to order the divestiture of an acquired minority stake if the proposed acquisition of control is declared incompatible with the Merger Regulation.

- (59) The Commission currently does not appear to have the intention to bring the acquisition of minority stakes that do not give rise to control, within the scope of the Merger Regulation. The comment made in paragraph 192 of the SWD that the proposed change to Article 8(4) would “...*align with the proposed reform extending merger control to certain acquisitions of non-controlling minority shareholdings*” is therefore no longer applicable.
- (60) Against that background, it does not appear appropriate to bring non-controlling minority stakes within the scope of the Merger Regulation indirectly, by providing the Commission with the jurisdiction to order the divestment of the minority in case the acquisition of control is held to be incompatible with the Merger Regulation.
