HERBERT SMITH FREEHILLS

EUROPEAN COMMISSION CONSULTATION "*TOWARDS MORE EFFECTIVE EU MERGER CONTROL*"

HERBERT SMITH FREEHILLS LLP RESPONSE

PART I: INTRODUCTION AND SUMMARY

1. INTRODUCTION

1.1 Herbert Smith Freehills LLP is grateful for the opportunity to provide comments to the European Commission ("**Commission**") in relation to its consultation "*Towards more effective EU merger control*"[1] in relation to: (i) the application of the EU merger control rules to the acquisition of non-controlling minority shareholdings ("**Structural Links**"); (ii) reforming the regime for the referral of merger cases between the Commission and the national competition authorities of the EU Member States ("**NCAs**"); and (iii) other miscellaneous improvements to the EU Merger Regulation[2] ("**EUMR**").

1.2 Should any of the issues consulted upon result in proposed revisions to the text of the EUMR, we would welcome the opportunity to comment further on such specific provisions.

1.3 The comments contained in this response are those of Herbert Smith Freehills LLP, and do not represent the views of our individual clients.

2. EXECUTIVE SUMMARY

Overview

2.1 In general, we welcome the Commission's initiative to consider the current operation of the EU merger control regime and possible improvements to the EUMR. As set out in our response of 19 June 2013 to the Commission's previous consultation on *Draft Revision of Simplified Procedure and Merger Implementing Regulation*[3], we believe that any revisions to the EUMR must ensure that the administrative burdens for businesses which arise from the EUMR regime are minimised so far as possible.

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1 Commission Staff Working Document *Towards more effective EU merger control*, SWD(2013) 239 final ("**Consultation Document**").

2 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

3 http://ec.europa.eu/competition/consultations/2013_merger_regulation/index_en.html

2.2 In this context we note at the outset that for the parties to transactions triggering an EUMR notification requirement, the process involves a significant burden in terms of time and costs (both in respect of internal management time, and the costs of external legal and other advisors). It is our experience that in many cases (including in simplified cases) the notification and pre-notification process is onerous, and the data requirements are significant, even where the transaction will clearly not give rise to any significant impediment to effective competition within the EEA. In some cases, for example where the position as to the full functionality or otherwise of a joint venture is not clear, significant time and cost can also be spent on determining the prior question of whether an EUMR notification is required.

2.3 We also note that delay to the transaction timetable as a result of the EUMR pre-notification, notification and review process may be significant, and may have an adverse impact on the competitiveness of bids in an auction situation where other bids do not trigger a suspensory EUMR filing.

2.4 Against this backdrop, we welcome a number of the proposals to streamline the case referrals system, and the Commission's willingness to consider excluding from the scope of the EUMR notification regime certain joint venture transactions which cannot have any impact on competition within the EEA.

2.5 However, we have concerns that widening the scope of the EUMR to cover non-controlling Structural Links, even without a mandatory notification obligation, would increase regulatory burdens and uncertainties on business in a manner which is disproportionate to any perceived enforcement "gap" and the magnitude of any potential negative impact on competition as a result of such transactions (and therefore to any benefits resulting from such a radical change).

2.6 This is at odds with the Commission's stated objectives underlying its previous consultation on *Draft Revision of Simplified Procedure and Merger Implementing Regulation* of cutting "red tape" for business and making the EUMR "business friendly". It would also increase burdens on the Commission itself, requiring additional resources.

Structural Links

2.7 We recognise that Structural Links can, in certain relatively limited circumstances, raise competition concerns and that in such circumstances enforcement action may be warranted. We also support the Commission having available to it an effective "toolkit" which enables it to deal with a variety of possible anti-competitive situations.

2.8 However, we believe that this toolkit must be proportionate to the risk of competitive concerns, and take into account corresponding burdens on business in terms of both administrative burdens/red tape and legal uncertainty. The effectiveness of the toolkit must also be considered across both the Commission's merger control powers and its antitrust powers, and in light of enforcement powers at Member State level.

2.9 At this stage of development, we do not believe that any gap in terms of the ability of the Commission and the NCAs to scrutinise Structural Links and take enforcement action where necessary is such to justify the proposed amendments to the current EUMR regime to cover Structural Links.

2.10 Instead, we believe that a combination of existing tools is sufficient, i.e.:

2.10.1 The current EUMR and the Commission's ability to review pre-existing Structural Links in the context of notifiable concentrations.

2.10.2 Articles 101 and 102 of the Treaty on the Functioning of the European Union ("**TFEU**") and equivalent national rules.[4]

2.10.3 NCA enforcement under national merger control regimes where applicable.

2.11 In addition, we note that the number of cases in which Structural Links would be found to lead to competition concerns is likely to be small.

2.12 Moreover, amendments to the EUMR to cover Structural Links risk undermining the clarity and legitimacy of the EUMR system, and give rise to a host of complex issues, such as how the turnover thresholds would operate in these circumstances.

[4] In most situations in which a Structural Link is acquired the Commission would be able to identify an agreement (e.g. a share sale and purchase agreement, a shareholders' agreement or a joint venture agreement) creating and/or governing the Structural Link in question, and/or subsequent sharing of information amounting to an agreement or concerted practice, that could be reviewed under Article 101 TFEU.

2.13 In our view a more proportionate response (taking into account the limited enforcement gap and therefore limited benefits from changing the EUMR, and the need to minimise burdens on business and to encourage investment), would be to develop an enforcement framework under Article 101 TFEU, and Article 102 TFEU in applicable cases, induding the issuance of guidelines (incorporating appropriate safe harbours), and to increase enforcement in this area where considered necessary.

2.14 If, however, the Commission remains convinced that changes to the EUMR are necessary, then we consider that, of the three options set out in the Consultation Document, the only appropriate option would be the "Self-Assessment System".

2.15 The Self-Assessment System would give rise to legal uncertainty, however, and therefore we consider that if this system were adopted certain safeguards would need to be put in place, namely:

2.15.1 The possibility for voluntary notification (without any suspensory obligation).

2.15.2 An appropriate limitation period for Commission investigation of un-notified transactions.

2.15.3 A clear bright line definition of Structural Links focused on the level of voting rights, with a "hard" floor of 15% at the lowest.

2.15.4 Commission guidelines on its framework for assessment and enforcement priorities, including appropriate safe harbours.

2.16 In addition, as discussed below, careful consideration would need to be given to the operation of the EUMR turnover thresholds/concept of "undertakings concerned" and of the case referral regime under such a system.

Referrals

2.17 We welcome the Commission's willingness to review the current system of referral and its consideration of processes for making the referral system less time consuming and cumbersome for notifying parties. We also welcome a number of the changes suggested by the Commission in the Consultation. However, as set out below, there are a number of elements proposed by the Commission which we consider would not be desirable.

2.18 In particular, we consider that changes proposed by the Commission in respect of Article 4(5) EUMR referrals and the removal of the requirement for a separate Form RS

submission would significantly reduce the overall time taken in obtaining clearance in such procedures, with a likely resulting reduction in management time and external advisory costs. We would therefore fully support the introduction of these proposed suggestions by the Commission. By contrast we consider it would be inappropriate for procedural changes to be made to the Article 4(4) EUMR procedure.

2.19 In respect of Article 22 EUMR, we note that, as all Member States with the exception of Luxembourg now have merger control regimes, it is arguable that the retention of the Article 22 procedure is no longer warranted, in particular given that Article 22 currently generates significant uncertainties for notifying parties. If Article 22 is to be retained, we do not support the Commission's proposal that the Commission obtain jurisdiction over the whole of the EEA in the case of the referral, but consider that the following principles should apply:

2.19.1 In line with the Commission's suggestion that only competent Member States can make a referral request, the Commission should have jurisdiction only over those Member States which were competent to review the transaction; and

2.19.2 Mirroring the requirements of Article 4(5) EUMR, the Commission should only be able to take jurisdiction in cases where the transaction is reviewable by three or more Member States.

Miscellaneous

"Offshore" joint ventures

2.20 We welcome the Commission's initiative to consider excluding joint venture transactions concerning joint ventures with no actual or intended activities within the EEA from the EUMR notification obligation. Such transactions can have no impact on competition within the EEA, and therefore do not merit scrutiny under the EUMR.

2.21 Such a change would have the welcome effect of reducing burdens and costs on business, as well as on the Commission.

2.22 In terms of how to implement such a change, whilst ensuring that joint ventures which do have actual or planned activities within the EEA remain notifiable, we consider that this could be achieved by amends to Article 1 EUMR.

2.23 A revised Article 1 could provide that the EUMR applies to concentrations with a Community dimension "*except in situations where two or more persons already controlling*

at least one undertaking or two or more undertakings acquire joint control of a joint venture and that joint venture has no actual or foreseen activities within the territory of the European Economic Area". In addition, in the interests of legal certainty, the Commission should articulate in more detail when this will be deemed to be the case within guidance (for example within the Consolidated Jurisdictional Notice).[5]

2.24 As an alternative to excluding such transactions completely from the scope of the EUMR, the Commission could also consider removing the Article 7 EUMR suspension obligation from such transactions and providing for a "light touch" notification form for such transactions which requires significantly less information than the current Short Form CO.

2.25 We also believe that the Commission should consider excluding joint ventures with minimal activities and turnover within the EEA from the scope of the EUMR.

Other amendments

2.26 In relation to the other potential amendments raised by the Commission within the Consultation Document:

2.26.1 Subject to our specific comments within Part II below, we welcome the Commission's consideration of new/reinforced rules in respect of the exchange of confidential information between the Commission and NCAs in order to facilitate the case referral process. However, we consider that such exchanges should only take place with the consent of the information owner.

2.26.2 We welcome the introduction of strengthened rules to prevent the use or disclosure of information obtained throughout the EUMR process for other purposes.

2.26.3 We welcome the Commission's consideration of amendments to the EUMR in relation to acquisitions of shares of listed companies.

2.26.4 We agree that that Article 5(4) EUMR could usefully be amended to clarify the rules for calculating the turnover of a joint venture.

2.26.5 In relation to Article 8(4) EUMR, we do not consider that there is currently any need to change its scope to cover non-controlling stakes obtained though partially

[5] Commission *Consolidated Jurisdictional Notice* under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) OJ C95 of 16 April 2008.

implemented concentrations. If the Commission chooses to amend the EUMR to include Structural Links within its scope, then Article 8(4) would of course require amendment to allow the Commission to require dissolution of the Structural Link (through disposal of the relevant shareholding and removal of other forms of influence) to restore the situation prevailing prior to the implementation of the Structural Link.

2.27 In addition, in light of paragraph 91 of the Consolidated Jurisdictional Notice in particular, we believe that the Commission should clarify within the EUMR and/or the Consolidated Jurisdictional Notice whether transactions resulting in a change of control over a non-full function joint venture can constitute a concentration under the EUMR, and, if so, in what precise circumstances.

PART II: MERGER CONTROL FOR THE ACQUISITION OF NON-CONTROLLING MINORITY SHAREHOLDINGS

1. **<u>QUESTION 1:</u> IN YOUR VIEW WOULD IT BE APPROPRIATE TO COMPLEMENT THE COMMISSION'S TOOLKIT TO ENABLE IT TO INVESTIGATE THE CREATION OF STRUCTURAL LINKS UNDER THE MERGER REGULATION?**

1.1 We recognise the need for the Commission to have an effective "toolkit" which enables it to enforce the competition rules to prevent and/or sanction behaviour having significant negative effects on competition within the EEA (and ultimately detrimental effects on consumers). As noted in the Executive Summary above, however, we do not consider that the case for reform of the EUMR toolkit to cover non-controlling Structural Links has been made.

Is there an enforcement "gap"?

1.2 As demonstrated in the economic literature discussed in Annex II to the Consultation Document, we recognise that, in certain cases, Structural Links can result in negative effects on competition. This is reflected by the fact that the merger control regimes of a number of EU jurisdictions (the UK, Germany and Austria) and non-EU jurisdictions (such as the United States, Australia, Canada, New Zealand and Japan) do cover Structural Links.

1.3 However, whilst Structural Links can have such effects in theory, we do not consider that there are a significant number of cases resulting in anti-competitive effects which cannot be dealt with under existing tools such to justify expansion of the EUMR, with the significant consequences and complexities that this would entail.

1.3.1 Firstly, the Consultation Document recognises itself that the number of cases creating problematic Structural Links "*seems to be rather limited*". It also recognises that the effects of Structural Links are of a significantly lesser magnitude compared to acquisitions of controlling stakes. This is reflected by the fact that the majority of merger control regimes worldwide do not cover Structural Links, but only situations of control.

1.3.2 Secondly, the vast majority of situations of Structural Links in relation to which significant anti-competitive concerns potentially arise could be dealt with through existing tools, in particular the antitrust rules, in a manner which, we submit, would be more proportionate.

1.4 We therefore urge the Commission to give further consideration to the option of enhancing enforcement under Articles 101 and 102 TFEU (supplemented by NCA enforcement activity under national merger control rules where applicable, and review under the EUMR of pre-existing Structural Links in relevant cases) rather than making radical changes to the EUMR.

Articles 101 and 102 TFEU

1.5 Enforcement under Article 101 TFEU is particularly appropriate in respect of potential concerns about the sharing of competitively sensitive information[6]; undertakings are already alive to these issues and regularly put in place appropriate firewalls and information barriers where a Structural Link is acquired in a competitor.

1.6 Within the Consultation Document the Commission raises concerns that Articles 101 and 102 TFEU are not adequate tools.[7] In our view this analysis is not convincing.

1.6.1 Article 101 TFEU is a wide-ranging provision that catches all types of anti-competitive conduct in the form of agreements, concerted practices and decisions of associations of undertakings, all of which are very widely defined, and which can include "pure" information sharing.

1.6.2 In relation to concerns other than information sharing between competitors, Article 101 TFEU can be applied in relation to most acquisitions of Structural Links[8], as in most situations there would be an agreement such as an agreement

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6 The General Court noted in its final judgment in the *Ryanair/Aer Lingus* case that Article 101 TFEU may be relevant in relation to a simple exchange of information between competitors in the context of a Structural Link (Case T-411/07 *Aer Lingus Group plc v Commission*).

7 This is contrary to the view set out within the Commission's 2001 Green Paper (Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM(2001) 745 final, 11 December 2001), in which the Commission noted that there are only a limited number of cases which could raise competition concerns that could not be addressed satisfactorily under Articles 101 or 102 TFEU (then Articles 81 and 82 EC Treaty). The Commission concluded that it would be disproportionate to subject all Structural Links to ex-ante review (as well as being difficult to establish appropriate definitions). As set out below, we believe that these conclusions hold true today.

8 See in this context Cases 142/84 and 156/84 *British American Tobacco Company Ltd. and R.J. Reynolds Industries Inc.* v *Commission*. See also the comments of the President of the General Court in the *Ryanair/Aer Lingus* case in which he recalled that Articles 101 and 102 TFEU could be applicable to Structural Links (Order of the President of the General Court in Case T-411/07 R *Aer Lingus Group plc v Commission*).

for the sale and purchase of shares, a shareholders' agreement setting out rights attached to non-controlling shareholdings, or an agreement providing for the provision of information or the appointment of directors.

1.6.3 The cases referred to by the Commission in the Consultation Document which have arisen under its existing practice and that of NCAs demonstrate that either an agreement was in place or information sharing had occurred, and therefore that Article 101 TFEU could have been applied. For example:

(A) In *Glencore/Xstrata*[9] and *Andritz IV/Schuler*[10] the Structural Links at issue were acquired pursuant to a share sale and purchase agreement.

(B) In *IPIC/Man Ferrostaal*[11] a shareholders' agreement provided for the broad provision of information and in *Siemens/VA Tech*[12] a shareholders' agreement granted information, consultation and voting rights.

1.6.4 In terms of the substantive assessment, the cases, for example, of airline alliances which the Commission has reviewed under Article 101 TFEU demonstrate that the Commission can apply an "EUMR style" substantive analysis under the Article 101 TFEU framework.

1.6.5 If the Commission considers that Structural Links require further investigation and enforcement the Commission could therefore increase enforcement under the antitrust rules. It could (and we submit should, if this became an enforcement priority) issue specific guidelines under Article 101 TFEU covering the issue of Structural Links, theories of harm and how it would enforce Article 101 TFEU in such situations, including appropriate safe harbours.[13]

1.7 Article 101 TFEU is in our view a more appropriate tool to address any anti-competitive effects of Structural Links than the EUMR. The EUMR has been designed to cover significant and long-lasting structural changes in the market which result in the removal of an undertaking from the competitive landscape because it has come under the control of,

9 Case COMP/M.6541 *Glencore/Xstrata*.

10 Case COMP/M.6662 *Andritz IV/Schuler*.

11 Case COMP/M.5406 *IPIC/MAN Ferrostaal*.

12 Case COMP/M.3653 *Siemens/VA Tech*.

13 In order to enhance legal certainty for businesses the Commission should, in our view, also give consideration to allowing voluntary notifications or consultations under Article 101 TFEU in specific situations if enforcement in this area were to be significantly increased.

or merged with, another undertaking.[14] This is conceptually different to "looser" forms of cooperation between undertakings which are caught under Article 101 TFEU. It is not clear to us why Structural Links should be within the scope of the EUMR, and other forms of cooperation between competitors, such as the creation of non-full function joint ventures and other agreements such as commercialisation agreements or alliances, should be reviewed under Article 101 TFEU.

1.8 Article 102 TFEU could also potentially be used in situations of dominant companies increasing their dominance or collective dominance through Structural Links.[15]

1.9 We accept that there may a limited number of scenarios (for example in the case of hostile investments by non-dominant companies) where it would be difficult for the Commission to point to any agreement/concerted practice under Article 101 TFEU or any issue under Article 102 TFEU. However, these instances will be very rare in practice.

NCA merger control enforcement

1.10 As discussed above and within the Consultation Document, Structural Links are caught by the merger control rules of a number of Member States (and non-Member State jurisdictions), which of course reduces any enforcement gap further.

Application of EUMR to pre-existing Structural Links

1.11 In addition, as discussed in the Consultation Document, the Commission can of course take into account pre-existing Structural Links when analysing a separate acquisition of control (in relation to which it would be useful if substantive guidance as to the Commission's framework of assessment was issued).

If there is any enforcement gap, what is its magnitude?

1.12 In the light of the above and the information contained in the Consultation Document, any residual enforcement gap as may exist is, in our view, clearly not significant enough to warrant wholesale revisions to the established and generally well-functioning EUMR

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14 See Recital 20 of the EUMR.

15 See Case 6/72 *Europemballage and Continental Can* v *Commission*, Case No IV/33.440 *Warner-Lambert/Gillette and Others* and Case No IV/33.486 *BIC/Gillette and Others*. See also the comments of the President of the General Court in the *Ryanair/Aer Lingus* case that Article 102 TFEU could be invoked if Ryanair was abusing a dominant position by interfering with its competitor's business strategy or exploiting its Structural Links to weaken its competitor's position.

regime.

1.13 In terms of absolute numbers, it is not possible to have an accurate view, but the information and the analysis contained in Annex II of the Consultation Document indicates that the number of potentially problematic cases is likely to be small.

1.13.1 The Commission identified only 20 cases out of 5,293 cases[16] that were notified to it either under the EUMR or under the previous Regulation No 4064/89[17] where pre-existing Structural Links led to competition concerns. In the majority of these cases, any issues could have been addressed under Article 101 TFEU in any event.

1.13.2 The Commission identified within the Zephyr database only 91 transactions which could potentially have merited competition scrutiny[18], of which only 43 would have met the EUMR turnover thresholds. This represents only 1.9% of all cases reviewed in the relevant period under the EUMR.

1.13.3 In addition, in national jurisdictions where Structural Links are caught by the merger control rules, this appears to have resulted in the notification and review of a relatively small number of cases only. The Commission notes that in the 1996-2011 period only 18 US cases involved Structural Links, and in Germany only about 10-12% of notified cases involved Structural Links.

Negative effects of bringing Structural Links within the scope of the EUMR

1.14 The extension of the EUMR to cover Structural Links would result in disproportionate additional "red tape" and burdens/costs to businesses (as well as the Commission), together with significant additional legal uncertainty[19], compared to limited benefits.

1.15 Minority investments provide an important source of capital, in particular in the current economic climate when external funding sources are limited. Such transactions currently take place without the need for an EUMR assessment, pre-notification, notification and

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16 See statistics published by the Commission available at http://ec.europa.eu/competition/mergers/statistics.pdf.

17 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

18 Although this may underrepresent the situation given the methodology adopted for the assessment.

19 See in this context in particular our response to Question 7 below in respect of the need to define the concept of Structural Link tightly.

suspensory period. Extension of the EUMR regime, and the burdens this entails, may have a chilling effect on such investments.

1.16 In addition, an extension of the EUMR in this way would complicate and therefore may discourage minority investments in joint venture scenarios. Often, joint ventures are created with a number of shareholders acquiring controlling stakes (for example through veto rights) and one or more other shareholders acquiring smaller non-controlling stakes (subject only to minority investor protections). Alternatively, such non-controlling minority shareholders may enter at a later date. The acquisition of such interests would also be subject to the increased burden of an EUMR assessment and/or notification under an extension of the system to cover Structural Links (this would in particular be the case if the concept of "undertakings concerned" was extended to cover both those undertakings with controlling stakes and those with interests amounting to Structural Links under any new regime; see further our response to Question 6 below).

1.17 The EUMR system is applicable in a very large number of transactions already, including a significant number of transactions which can have no negative impact on competition within the EEA. An extension of the EUMR's jurisdictional reach could undermine the clarity and legitimacy of the EUMR regime, as well as increasing burdens on business. We note in this context that the EUMR regime has been followed as a model within new merger control regimes around the world. An extension of the EUMR to cover Structural Links, if followed by other authorities, could lead to significant unintended consequences, with a significant and global increase in red tape for benign (and potentially pro-competitive) minority stake investments.

Conclusion

1.18 We do not believe that the Commission has made the case for reform in this area. We consider that there is not an enforcement gap of any magnitude such to justify radical changes to the EUMR to cover Structural Links (some of the consequences of which are highlighted below). Significant weight is placed on the *Ryanair/Aer Lingus* case, but this type of scenario is rare, and does not in itself justify far-reaching reform.

1.19 We consider that the more proportionate method of dealing with any concerns regarding Structural Links is through enhanced enforcement under Articles 101 and 102 TFEU in appropriate cases (including the issuing of guidance and the introduction of suitable safe harbours), as well as the existing enforcement in relation to pre-existing Structural Links (which would also benefit from substantive guidance being issued) and the application of

applicable national merger control rules.[20]

1.20 If, despite the above, the Commission considers that the EUMR ought to be extended to cover Structural Links, this should be in a manner which minimises the burden on businesses, and legal uncertainty, so far as possible. We accordingly set out below our views as to the appropriate jurisdictional thresholds, substantive test and procedure, should the Commission decide to amend the EUMR in this manner.

2. **<u>QUESTION 2:</u> DO YOU AGREE THAT THE SUBSTANTIVE TEST OF THE MERGER REGULATION IS AN APPROPRIATE TEST TO ASSESS WHETHER A STRUCTURAL LINK WOULD LEAD TO COMPETITIVE HARM?**

2.1 If the EUMR were amended to cover Structural Links, then we consider that the significant impediment to effective competition ("**SIEC**") test is flexible enough to deal with a multitude of situations and theories of harm, including those which may arise in the case of Structural Links. We therefore believe that the same test should apply. This would be consistent with the position in the UK and Germany, where the same substantive tests are applied in respect of situations of both control and of Structural Links.

2.2 However, it must be recognised that the degree of control obtained is relevant to the degree to which the transaction can or will impact the activities and incentives of the undertakings involved, as recognised in the UK by the CC in the *BSkyB/ITV* case.[21]

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[20] The UK merger control rules have, of course, been applied to the Ryanair minority stake in Aer Lingus. The UK Competition Commission ("**CC**") issued its final report in respect of this matter on 28 August 2013 (*Ryanair Holdings plc and Aer Lingus Group plc: A report on the completed acquisition by Ryanair Holdings plc of a minority shareholding in Aer Lingus Group plc*), finding that Ryanair's 29.8% non-controlling minority stake in Aer Lingus gave rise to a substantial lessening of competition ("**SLC**"), due to the impact on Aer Lingus's commercial policy and strategy, in particular because it was likely to impede or prevent Aer Lingus from being acquired by, or combining with another airline (as well as by allowing Ryanair to block special resolutions, restricting Aer Lingus's ability to issue shares and raise capital and to limit Aer Lingus's ability to manage effectively its portfolio of Heathrow slots). In order to the remedy the SLC, the CC concluded that a partial divestment of Ryanair's shareholding to 5 per cent was required.

[21] Final report sent to Secretary of State (BERR) on 14 December 2007 *Acquisition by British Sky Broadcasting plc of 17.9 per cent of the shares in ITV plc*. We note in addition that in this case the CC's analysis focussed on the practical effects of BSkyB's non-controlling minority stake in ITV in terms of influencing behaviour such as investment, rather than a pure theory of unilateral effects.

2.3 In addition, the economic literature and experience from other jurisdictions demonstrate that situations of Structural Links require a particular framework for analysis. For example, in the United States, even though the substantive test of "substantial lessening of competition" applies to both acquisitions of control and Structural Links, the US agencies have promulgated specific guidance setting out the framework of analysis in relation to Structural Links, focussing on the details of the parties' post-acquisition relationship and that relationship's effect on competition. A similar analysis is carried out under the Australian regime, as set out in the Australian Competition and Consumer Commission's Merger Guidelines.

2.4 If the EUMR were extended to cover Structural Links, we consider that the Commission would need to issue specific guidance as to the framework it would apply in analysing the potential anti-competitive effects of Structural Links (and as to the type of remedy which would be appropriate in such cases should a SIEC be found, which may be different to those in the case of controlling stakes).

3. **<u>QUESTION 3:</u> WHICH OF THE THREE BASIC SYSTEMS SET OUT ABOVE DO YOU CONSIDER THE MOST APPROPRIATE WAY TO DEAL WITH THE COMPETITION ISSUES RELATED TO STRUCTURAL LINKS?**

Please take into account the following considerations: a) the need for the Commission, Member States and third parties to be informed about potentially anti-competitive transactions; b) the administrative burden on the parties to a transaction; c) the potential harm to competition resulting from structural links, both in terms of the number of potentially problematic cases and the impact of each potentially harmful transaction on competition; d) the relative ease to remove a structural link as opposed to the difficulties to separate two businesses after the implementation of full merger; e) the likelihood that anti-competitive effects resulting from an already implemented structural link can be eliminated at a later stage.

3.1 As explained in our response to Question 1 above, we do not believe that it is necessary or appropriate to extend the EUMR to Structural Links. Our preferred option is therefore not to change the EUMR regime at all, but for the Commission to review Structural Links under Article 101 TFEU and/or, where applicable, Article 102 TFEU, developing an appropriate framework for analysis and issuing guidance (including appropriate safe harbours) accordingly.

3.2 In the event that the Commission decides to proceed with amendments to the EUMR to cover Structural Links, from the three options canvassed within the Consultation Document, our preference would be the "Self-Assessment System". This appears the most likely option to be able to strike an appropriate balance between addressing the potential competition concerns raised by Structural Links and limiting the additional burden imposed on the parties concerned.

3.3 In general we note, however, that the most appropriate option and its design will depend on the definition of Structural Links and the breadth of any safe harbours; the more extensive the jurisdictional reach of the EUMR, the greater the number of entirely benign transactions that are likely to be caught, and accordingly the lower the notification burdens should be.

Notification System

3.4 As we understand it, the Notification System would involve extending the current EUMR system to Structural Links, and therefore that all Structural Links (as they would be defined in the revised EUMR) would be subject to a mandatory ex-ante notification with a suspensory effect.

3.5 We are strongly opposed to this option.

3.6 We believe that this would lead to a significant increase in the number of transactions requiring notification to and review by the Commission and the burden on businesses, with little corresponding benefit.

3.6.1 This would necessitate additional resources within the Commission to deal with the significant supplementary workload, in circumstances where most Structural Links are unlikely to be problematic.

3.6.2 This would create additional burdens on notifying parties in terms of external costs (including the fees of lawyers and other external advisers) and internal costs as a result of the utilisation of management time.

3.6.3 This is in circumstances where already more than 50% of cases notified under the EUMR result in a simplified procedure clearance but involve the expenditure of significant resource, both on the part of the Commission and for businesses (including during lengthy pre-notification processes, for even entirely straight-forward, simplified procedure transactions).

3.7 It is unclear what type of notification form the Commission envisages would be used in respect of Structural Links. We note that the Form CO imposes a very significant burden on undertakings, even in the context of the Short Form CO. The information burden is one of the most extensive in the world[22] and extending it to Structural Links would in our view be clearly disproportionate.

3.8 As regards the suspensory obligation, we note that, if prohibition were ultimately found to be required, divesting a minority non-controlling stake would be significantly easier than in cases of full integration of undertakings in the context of controlling stakes. The absence of a suspensory obligation would also not prevent other remedies being imposed, for example firewalls (which have been successfully used in the United States). Implementation of the stand-still obligation in the case of Structural Links would in our view be clearly disproportionate.[23]

3.9 Overall, as most Structural Links are unlikely to be problematic, a mandatory ex-ante Notification System (with or without suspensory effect) is clearly disproportionate to an aim of ensuring that Structural Links do not give rise to anti-competitive effects.

3.10 Whilst mandatory notification regimes for Structural Links do exist in a limited number of jurisdictions, including Germany and the United States, the notification and end-to-end review periods in those jurisdictions are materially less burdensome than at EU level.

3.11 In the UK, Structural Links are subject to a voluntary notification regime (as are other forms of transaction). The UK Government's 2011 consultation on reforms to the UK competition regime, including for merger control, recognised the inappropriateness of a mandatory regime for Structural Links. When considering whether to move generally to a mandatory merger control regime (which was not ultimately adopted) the UK Government envisaged, in the interests of certainty, mandatory notification for the acquisition of de jure or de facto control, but not for transactions giving rise to "material influence" (the UK concept of Structural Link) only, which would remain subject to the potential for voluntary notification

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22 And would in fact be increased as a result of a number of the proposals within Commission's previous consultation on *Draft Revision of Simplified Procedure and Merger Implementing Regulation* (see our response to this consultation of 19 June 2012 http://ec.europa.eu/competition/consultations/2013_merger_regulation/index_en.html).

23 It is notable that the UK regime does not contain a suspension requirement (for either controlling stake or structural links); instead the authorities can impose "hold separate" interim arrangements in cases where this is considered necessary.

or own initiative investigations.[24] The UK Office of Fair Trading ("**OFT**") when responding to the consultation on these proposals agreed that mandatory notification for non-controlling interests would not be appropriate.[25]

3.12 We note that there would be particular risks of legal uncertainty (and potential "over" notification) if there was a mandatory Notification System in circumstances in which there was any uncertainty as to the definition of Structural Links, i.e. where this definition was based on concepts such as "material influence" (as in the UK system) or "competitively significant influence" (as in the German system) which depend on a case by case assessment of a range of factors, rather than bright line rules based on percentage shareholdings. It is noteworthy that in the UK, where jurisdiction over Structural Links is based on the broad "ability to material influence"[26] concept[27], the regime remains voluntary following the recent consideration of possible reform discussed above. Many respondents to the UK Government's consultation on possible reform emphasised that if the material influence test were retained, only voluntary notification would be appropriate.

3.13 The same applies in Australia and New Zealand, which also have "soft-edged" definitions of relevant influence, and where notification remains voluntary.

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24 *A Competition Regime for Growth: A Consultation on Options For Reform*, March 2011 (see here, together with the Government's response of March 2012 https://www.gov.uk/government/consultations/a-competition-regime-for-growth-a-consultation-on-options-for-reform).

25 Noting the impact on burdens on business and the need for the "*certainty that enables business to invest and innovate with confidence*" (http://www.oft.gov.uk/shared_oft/consultations/OFT1335.pdf).

26 As the CC made clear in its decision in the *Ryanair/Aer Lingus* case (discussed above), the mere *ability* to materially influence is sufficient, it is irrelevant that material influence has not been exercised in practice.

27 In this context we note that it is often difficult to determine whether a particular interest – for example a shareholding of less than 25% (at which level material influence is presumed (a rebuttable presumption), as set out in the OFT's *Mergers - Jurisdictional and Procedural Guidance* http://www.oft.gov.uk/shared_oft/mergers_ea02/oft527.pdf) – amounts to the ability to materially influence for the purposes of the UK rules. Indeed, in many cases the OFT itself does not reach a firm conclusion on this issue in the context of a first phase review, stating that it is not necessary to form a firm view on the issue as in any event the transaction does not give rise to an SLC. One example of this type of conclusion is the OFT's decision of 28 June 2013 in *Case ME/5895/13 Completed joint venture between Daily Mail General Holdings Limited, the trustees of the Iliffe Settlement and Trinity Mirror plc.*

Self-Assessment System

3.14 We understand that the Self-Assessment System would allow parties to proceed with Structural Links without any ex-ante obligation to notify, but that the Commission would have the discretion to investigate Structural Links on its own initiative. This option appears similar to the UK regime.

3.15 If the EUMR were to be extended to cover Structural Links (which we do not consider appropriate or necessary, as explained above), then of the three options canvassed within the Consultation Document we consider that the Self-Assessment System is the only potentially appropriate option, bearing in mind the aim of allowing the Commission to review Structural Links without disproportionately increasing burden on business.

3.16 We believe that, as in the UK and a number of other jurisdictions such as Australia and New Zealand, a Self-Assessment System would be sufficient to enable the Commission to become aware of an investigate potentially problematic Structural Links, through market intelligence and complaints, as well as voluntary notifications if this were possible (see below).[28]

3.17 The main disadvantage of the Self-Assessment System is the risk of uncertainty for businesses: uncertainty as to whether a deal could be unwound following an investigation would be a significant deterrent to investment in some cases.

3.18 We consider therefore that to reduce uncertainty as far as possible it would be important that: (i) a clear definition of Structural Links be utilised (see further our response to Question 7 below); and (ii) the Commission issue clear guidelines as to its framework for assessment for Structural Links and its enforcement priorities, including appropriate safe harbours. This would enable businesses to self-assess, to the extent possible, the likelihood of Structural Links being subsequently investigated under the EUMR and the potential for an SIEC finding/remedies being imposed.

3.19 In addition, we consider that it would be important to allow for voluntary notification under a Self-Assessment System. This would allow the parties to obtain certainty, for example in cases of potentially problematic Structural Links. It would also lead to a higher level of published precedents setting out the Commission's approach in specific cases, facilitating

[28] The risk of the Commission instigating an investigation would in our view provide sufficient incentives to encourage parties to notify potentially problematic transactions voluntarily following a self-assessment.

self-assessment. It would also enable the Commission to be informed of potentially problematic Structural Links by parties concerned about a possible investigation.

3.20 Finally, in order to ensure legal certainty and reduce burdens on business so far as possible, we believe that it would be essential for there to be a limitation period for Commission investigation of a non-notified Structural Link: see further our response to Question 9 below. In parallel to this it would need to be ensured that Structural Links were covered by Article 21 EUMR such that the Commission and the NCAs could not apply Articles 101 or 102 TFEU to Structural Links as defined within the EUMR (and NCAs could not apply their equivalent national competition rules). This would not prevent the potential application of the competition rules to any subsequent sharing of competitively sensitive information between competitors.

Transparency System

3.21 We understand that the Transparency System would consist in imposing on the parties to a "prima facie problematic Structural Link" an obligation to file a short information notice which would be published on the Commission's website and/or in the Official Journal of the European Union.

3.22 We strongly oppose this proposal.

3.23 This would give rise to significant legal uncertainty resulting from the imposition of a mandatory filing obligation based upon criteria which inherently will not be capable of bright line definition, i.e. "prima facie problematic Structural Link" (in addition to the definition of Structural Link itself).

3.24 We do not consider that such an obligation would be necessary in order for the Commission to become aware of potentially problematic transactions. As outlined above in the context of a Self-Assessment System this can be sufficiently achieved through a combination of market intelligence and monitoring on the part of the Commission, complaints, and voluntary notification.

3.25 It is also difficult to envisage any system whereby the information required would be sufficiently high level in order to avoid burdens on business, but would be sufficient for the Commission to assess whether a Structural Link was prima facie problematic. It is likely that this system would ultimately result in a significant upfront information burden (and potentially even pre-notification discussions). This would be disproportionate.

4. **<u>QUESTION 4:</u> IN ORDER TO SPECIFY THE INFORMATION TO BE PROVIDED UNDER THE TRANSPARENCY SYSTEM:**

a) What information do you consider necessary to enable the Commission and Member States to assess whether a case merits further investigation or to enable a third party to make a complaint (e.g. information describing the parties, their turnover, the transaction, the economic sectors and/or markets concerned)?

b) What type of information which could be used by the Commission for the purpose of the transparency system is readily available in undertakings, e.g. because of filing requirements under securities laws in case of publicly listed companies? What type of information could be easily gathered?

4.1 As noted above, we do not consider the Transparency System to be appropriate or necessary. Compared to the Self-Assessment System, it is clear that the Transparency System would impose additional burdens and legal uncertainty. This is disproportionate given the limited nature of any enforcement gap as explained above.

4.2 If, however, the Commission were to adopt this approach, it would be essential that: (i) the triggering event for notification (i.e. "prima facie problematic Structural Link") be defined very clearly and be tightly circumscribed; and (ii) the information required be limited in scope and straightforward to proceed. Clearly the current Form CO, full form or short form, would be very much too detailed and burdensome for this purpose.

4.3 The requirement should be limited to high level information on a transaction and the parties such to enable the Commission to: (i) verify that it has jurisdiction to review the case, i.e. that the transaction constitutes a Structural Link and meets the EUMR jurisdictional thresholds; and (ii) determine the sectors in which the undertakings involved are active. It would not be appropriate in our view to require information on market definition, relevant markets, affected markets, market shares and so on, given the very significant time and cost which would be required to produce such information.

4.4 It would therefore be acceptable to require details of the parties, their turnover (to the extent necessary to determine whether the jurisdictional thresholds are met), the transaction, and the economic sectors concerned, having due regard for confidentiality concerns should publication be required. However, details of the "relevant markets" concerned should <u>not</u> be required.

5. **<u>QUESTION 5</u>: FOR THE ACQUIRER OF A STRUCTURAL LINK, PLEASE ESTIMATE THE COST OF FILING FOR A FULL NOTIFICATION (UNDER THE SELECTIVE SYSTEM IN CASE THE COMMISSION DECIDES TO INVESTIGATE A CASE, OR UNDER THE NOTIFICATION SYSTEM). PLEASE INDICATE WHETHER THE COSTS OF A PROVISION OF INFORMATION UNDER THE TRANSPARENCY SYSTEM WOULD BE CONSIDERABLY LESS IF THE INFORMATION REQUIRED WERE LIMITED TO THE PARTIES, THEIR TURNOVER, THE TRANSACTION AND THE ECONOMIC SECTORS CONCERNED.**

5.1 A full notification for Structural Links, similar to that required in a Form CO (whether full form or short form), would give rise to:

5.1.1 Direct costs, for example fees for the lawyers and other external advisers involved in preparing and making the notification.

5.1.2 Indirect costs, for example as a result of the time spent by in-house counsel, management and other staff within the acquiring undertaking and the target undertaking.

5.1.3 Administrative costs, for example potential translation costs, copying/printing costs and transport/logistics costs.

5.2 Actual costs would vary from case to case, depending on its complexity, how readily data were available (which would depend both on internal organisation and resources, and whether notification processes had been gone through recently). It is therefore not possible to give precise estimates. However, we would note that even for straightforward Short Form CO notifications external costs alone regularly run into many hundreds of thousands of Euros, and the preparation of such notifications takes many weeks of both external and internal time[29], even before commencement of the now extensive pre-notification process with the Commission.

[29] The Commission may wish to refer to the estimates prepared previously by the International Competition Network ("**ICN**") in this context, although bearing in mind the age of these estimates and the variety of cases covered. See *Report on the Costs and Burdens of Multijurisdictional Merger Review* prepared by the Mergers Working Group, Notification and Procedures Subgroup of the ICN available at http://www.internationalcompetitionnetwork.org/uploads/library/doc332.pdf.

5.3 It is clear, however, that the time and actual costs of full notification are substantial (in addition to the prior costs involved in determining whether a transaction is notifiable, which in some cases can be significant).

5.4 If the information required was limited to the parties, their turnover, the transaction and the economic sectors concerned, the internal and external costs would clearly be lower. Depending on what exactly was required in respect of the details of the "economic sectors concerned", such information should, generally, be readily available within undertakings.

6. **<u>QUESTION 6:</u> DO YOU CONSIDER THE TURNOVER THRESHOLDS OF THE MERGER REGULATION, COMBINED WITH THE POSSIBILITY OF CASE REFERRALS FROM MEMBER STATES TO THE COMMISSION AND VICE VERSA, AN APPROPRIATE AND CLEAR INSTRUMENT TO DELINEATE THE COMPETENCES OF THE MEMBER STATES AND THE COMMISSION?**

Turnover thresholds

6.1 As regards the jurisdictional test, we consider that in principle the existing EUMR turnover thresholds would be appropriate also for Structural Links.

6.1.1 Having the same jurisdictional test both for acquisitions of control/mergers and Structural Links has the merit of simplicity.

6.1.2 In jurisdictions in which Structural Links are notifiable, the jurisdictional test tends to be the same for Structural Links and acquisitions of control/mergers.

6.1.3 If it is accepted that the EUMR turnover thresholds are set at an appropriate level to delineate the competences of the Commission and the Member States, this would also be the case in respect of Structural Links.

6.2 However, we do not believe that the same approach to the definition of "undertakings concerned" in the context of Structural Links is appropriate.

6.3 If any undertaking holding or acquiring a Structural Link were treated as an undertaking concerned (as is currently the case for undertakings holding or acquiring decisive influence), then this would lead, in particular in the context of joint ventures with multiple controlling and/or non-controlling parents, to a significantly higher number of transactions being caught by the EUMR than is currently the case and potentially as is intended by the Commission (this point is not addressed within the Consultation Document in any detail).

6.4 Take for example a joint venture situation where two undertakings (A and B) acquire a 25% stake each with veto rights over strategic commercial decision and two other undertakings (C and D) acquire a 25% stake but with no control rights. Under a regime that covered Structural Links all four undertakings may be considered as "undertakings concerned". The turnover thresholds would therefore be met more easily, including in the case of a sale by C or D of their minority shareholding.

6.5 This would be of particular concern in relation to investments by companies with EU turnover in companies not active in the EU, which is already of concern in relation to the burdens this imposes in the joint venture context (see Part IV below); this would be exacerbated in the Structural Links context.

6.6 Careful consideration would therefore need to be given as to how the undertakings concerned concept should be adapted in these circumstances. For example, in relation to the acquisition of Structural Links the undertakings concerned could be limited to the undertaking acquiring control and the target undertaking.

Case referrals

6.7 In relation to the referral system, its potential application to Structural Links will depend in part what option is adopted. In the absence of a notification the current referral system deadlines could not apply. One approach could be for the referral system to apply but with the trigger point for the relevant deadlines being the date a transaction becomes public, or the date a notification is made (either voluntarily, or under the Transparency System or Notification System if either of these options were adopted).

6.8 In addition, we query whether it would be appropriate for transactions to be either referred by or to Member States which do not have the jurisdiction to investigate Structural Links under their own merger control regimes.

6.9 In relation to Member States which do have the jurisdiction to investigate Structural Links, we consider that it is particularly important for such Member States to be able to request referral back under Article 9 EUMR, given that if the EUMR were amended to cover Structural Links this would, assuming that the "one-stop shop" exclusive competency for the Commission would apply equally in relation to Structural Links, result in Austria, Germany and the UK losing jurisdiction over a material number of transactions which currently would be reviewable under their national merger control regimes.

7. **<u>QUESTION 7:</u> REGARDING THE COMMISSION'S POWERS TO EXAMINE STRUCTURAL LINKS, IN YOUR VIEW, WHAT WOULD BE AN APPROPRIATE DEFINITION OF A STRUCTURAL LINK AND WHAT WOULD CONSTITUTE APPROPRIATE SAFE HARBOURS?**

7.1 As noted above, it is essential for legal certainty that there is a bright line jurisdictional test for notification based on easily applicable thresholds focussed on shareholdings/voting rights. This is even more so the case should the regime incorporate any mandatory notification element.

7.2 Overall, in light of in particular the limited enforcement gap and the burdens a notification/review under the EUMR involves, we believe that the acquisition of voting rights of 25% or more would be an appropriate threshold. In many corporate law regimes a 25% stake enables a shareholder to block special resolutions, and this is therefore a rational level to set. Additionally, a number of regimes which cover Structural Links utilise a threshold at this or a similar level.[30]

7.3 If, however, the Commission were to consider that this test would enable problematic Structural Links at lower levels to escape scrutiny, the Commission could consider adopting an approach along the lines of the following (to be amplified within guidance, including worked examples):

7.3.1 Voting rights of 25% or more: the transaction constitutes a Structural Link and is reviewable by the Commission if the turnover thresholds are met.

7.3.2 Voting rights of between 15% and 25%: the transaction constitutes a Structural Link if and only if one or more additional factors (such as special voting rights/directorships associated with the shareholding) exist which are such to allow the acquiring undertaking to materially influence the strategic commercial behaviour of the target undertaking. In the interests of legal certainty, these additional factors should be clearly and exhaustively articulated within the EUMR itself, in particular if any mandatory notification obligations were introduced.

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30 For example in Germany and Austria the acquisition of a share of 25% or more triggers a notification requirement. In the UK this is the level at which material influence is presumed. In Canada, pre-merger notification is only required in relation to acquisitions of 20% of shares in a public company or 35% of shares in a private company. In South Korea acquisition of 20% or more triggers a notification requirement. In Japan a notification is triggered if voting rights exceed 20% or 50%.

7.3.3 Voting rights of less than 15%[31]: this would not constitute a Structural Link in any circumstances, and would therefore be an absolute "safe harbour" for the purposes of the EUMR.[32]

7.4 In order to reflect this, a possible legislative definition of Structural Link could therefore be as follows:

> "*the direct or indirect acquisition by one undertaking of voting rights in another undertaking where no control within the meaning of Article 3(2) is acquired, but as a result of the acquisition the acquiring undertaking holds voting rights of 25% or more*";
>
> or
>
> "*the direct or indirect acquisition by one undertaking of voting rights in another undertaking where no control within the meaning of Article 3(2) is acquired, but as a result of the acquisition the acquiring undertaking holds voting rights of:*
>
> *(i) 25% or more; or*
>
> *(ii) between 15% and 25%, and one or more of the additional factors listed below* [to be listed exhaustively] *is present which taken together confer the ability to materially influence the strategic commercial behaviour of the undertaking*".

7.5 As noted above in relation to the Self-Assessment System, in addition to the legal thresholds, the Commission should issue guidance on its framework for assessment and enforcement priorities listing further factors which would make an investigation likely and other factors that would make enforcement unlikely, including appropriate safe harbours. This could include a safe harbour that the Commission would not intervene in situations where the acquiring and target undertakings were not competitors in the same relevant market or active in vertically related markets.

7.6 As noted above it would need to be ensured that Structural Links were covered by Article 21 EUMR such that the Commission and the NCAs could not apply Articles 101 or 102

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31 We note that in the UK, the OFT in its *Mergers: Jurisdictional and procedural guidance* indicates that the OFT would only examine a shareholding of less than 15% "exceptionally" (and in fact it has not found material influence to exist in relation to a shareholding of less than 15% under the Enterprise Act 2002).

32 However, in principle the acquisition (and any subsequent information sharing) would be subject to the potential application of Articles 101 and 102 TFEU.

TFEU to Structural Links as defined within the EUMR (and NCAs could not apply their equivalent national competition rules).

7.7 Finally, we note that it would need to be considered whether the acquisition of Structural Links in a jointly controlled undertaking that does not constitute a "full function" joint venture would fall within the scope of the EUMR, and the impact of this for the coherency of the system as a whole. The position would need to be clarified within the EUMR and accompanying guidance. See further Part IV below more generally as to the lack of clarity as to when a change of control over a non-full function joint venture may constitute a concentration for the purposes of the EUMR.

8. **<u>QUESTION 8:</u> IN A SELF-ASSESSMENT OR A TRANSPARENCY SYSTEM, WOULD IT BE BENEFICIAL TO GIVE THE POSSIBILITY TO VOLUNTARILY NOTIFY A STRUCTURAL LINK TO THE COMMISSION? IN ANSWERING PLEASE TAKE INTO ACCOUNT THE ASPECTS OF LEGAL CERTAINTY, INCREASED TRANSACTION COSTS, POSSIBLE STAND-STILL OBLIGATION AS A CONSEQUENCE OF THE NOTIFICATION, ETC.**

8.1 As noted in our response to Question 3 above, under a Self-Assessment System we believe that it is important that undertakings should be able to make voluntary notifications of Structural Links to the Commission.

8.2 This should also be the case if the Commission were to adopt the Transparency System (which, as outlined above, we do not consider to be necessary or appropriate). Under such a system undertakings would be more inclined to voluntarily notify any transaction in order ensure that: (i) they would not be found to have infringed the mandatory notification obligation; and (ii) the Commission would not investigate the potentially problematic transaction on its own initiative at a later date.

8.3 In relation to the stand-still obligation, as indicated above, we consider that it is unnecessary for there to be a suspensory obligation as a result of notification. In the majority of cases, there would be no competition problems, and in any event unwinding a Structural Link or imposing other remedies would be relatively straightforward.

8.4 The parties should be able to proceed to close a deal quickly (which may important in a competitive bid situation for example).

9. **<u>QUESTION 9:</u> SHOULD THE COMMISSION BE SUBJECT TO A LIMITATION PERIOD (MAXIMUM TIME PERIOD) AFTER WHICH IT CAN NO LONGER**

INVESTIGATE/INTERVENE AGAINST A STRUCTURAL LINK TRANSACTION, WHICH HAS ALREADY BEEN COMPLETED? IF SO, WHAT WOULD YOU CONSIDER AN APPROPRIATE TIME PERIOD FOR BEGINNING A COMMISSION INVESTIGATION? AND SHOULD THE LENGTH OF THE TIME PERIOD DEPEND ON WHETHER THE COMMISSION HAD BEEN INFORMED BY A VOLUNTARY NOTIFICATION?

9.1 As noted in our response to Question 3 above, we believe that it is essential that there is a limitation period within which the Commission would need to investigate a Structural Link under any selective system (such as the proposed Self-Assessment or Transparency Systems).

9.2 Absent a limitation period, undertakings would perpetually remain at risk of the Structural Link being investigated and having to divest the non-controlling stake at issue. This is contrary to the principle of legal certainty and could deter undertakings from investing in such a manner. This is manifestly inappropriate.

9.3 We believe that the limitation period should run from the date on which the acquisition is made public. In terms of the length of the time period, we consider that a period of four months at the maximum would be appropriate. This reflects the position in the UK where the OFT must decide whether to investigate a transaction and conduct a first phase review within four months.[33] Four months would clearly be sufficient in our view, and a shorter period would also be adequate, in particular given that would relate to the commencement of an investigation only. The Commission should be able to determine easily within this period whether a case merits an investigation, including any appropriate preliminary discussions with the parties.

9.4 If the Commission commences an investigation, then we consider that the case should be subject to same time periods for review as are applicable in the case of concentrations under the current EUMR system.

9.5 If the Structural Link has been voluntarily notified to the Commission the Commission should be subject to the same time periods as currently applicable under the EUMR.

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[33] The limitation period relates to the time within which the OFT can refer a transaction to the Competition Commission (i.e. for a second phase review). The four month period runs from the date on which the transaction is completed or is made public, whichever is the later (unless the transaction took place without being made public or without the OFT having been informed, in which case the four month period starts from the earlier of the time that material facts are made public or the time the OFT is told of material facts).

10. AMENDMENTS TO ARTICLE 8(4) EUMR

10.1 Within the final "Miscellaneous" section of the Consultation Document the Commission seeks views on current Article 8(4) EUMR, noting that it was not able to require Ryanair to divest its already acquired non-controlling minority shareholding in Aer Lingus.

10.2 As this point is relevant to the question of Structural Links, and the consideration of this point is equally prompted by the experience of the *Ryanair/Aer Lingus* case, we address this here.

If the EUMR is not changed to cover Structural Links

10.3 We note that the intention of Article 8(4) EUMR is in essence to give the Commission the power to unwind a concentration which has been implemented but has been prohibited as incompatible within the common market (or would have been so prohibited absent a condition which has been breached) ("**Prohibited Implemented Concentration**"), by providing that the Commission can require the undertakings concerned to "*dissolve the concentration … in particular through the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration*".[34]

10.4 The concept of a Prohibited Implemented Concentration is thus the legal threshold triggering the Article 8(4) powers. The General Court has clarified that "implemented" in the context of Article 8(4) means a fully implemented concentration, i.e. a situation where the acquirer has acquired "control" over the target, and excludes partial implementation such as in *Ryanair/Aer Lingus* where control was never acquired.[35]

10.5 We do not see, however, any real need to change this position. These situations are rare and the present version of Article 8(4) EUMR is logical in allowing enforcement only in situations where a concentration has been implemented and prohibited. If the non-controlling minority stake would not fall within the scope of the EUMR taken alone and therefore could have been acquired lawfully without EUMR scrutiny (or could subsequently be obtained within EUMR scrutiny), there is not in our view the need or justification for the Commission to be able to order its divestiture.

10.6 We do not believe that the fact that such a non-controlling minority stake could subsequently be reviewed, and indeed prohibited, by an NCA with jurisdiction to do so (as

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[34] Previously, under Regulation 4084/89, the power was defined more loosely as the power to take enforcement action to "*restore effective competition*".

[35] Case T-411/07 *Aer Lingus Group plc v Commission*.

in *Ryanair/Aer Lingus*) alters this position. Such scenarios are likely to be rare.

If the EUMR is changed to cover Structural Links

10.7 If the EUMR is amended to cover Structural Links, implementation of a transaction involving Structural Links should be covered by Article 8(4) EUMR to allow the divestiture of the relevant Structural Link so as to restore the situation prevailing prior to implementation of the Structural Link.

PART III: REFERRAL OF MERGER CASES

1. **<u>QUESTION 1:</u> DO YOU CONSIDER THAT THE SUGGESTIONS WOULD MAKE THE REFERRAL SYSTEM OVERALL LESS TIME CONSUMING AND CUMBERSOME?**

1.1 We welcome the Commission's willingness to review the current system of referral and its consideration of processes for making the referral system less time consuming and cumbersome for notifying parties. We also welcome a number of the changes suggested by the Commission in this consultation, although, as set out below, there are a number of elements proposed by the Commission which we consider would be less desirable.

1.2 In particular, we consider that changes proposed by the Commission in respect of Article 4(5) EUMR referrals and the removal of the requirement for a separate Form RS submission would significantly reduce the overall time taken in obtaining clearance in such procedures, with a likely resulting reduction in management and advisors costs. We would therefore fully support the introduction of these proposed suggestions by the Commission. By contrast we have concerns about the proposals made in respect of Article 22 EUMR which we set out below.

2. **<u>QUESTION 2:</u> REGARDING THE SUGGESTION ON ARTICLE 4(5) REFERRALS:**

a) Do you support the idea to be able to directly notify to the Commission without preceding Form RS?

2.1 We support the idea of being able to notify the Commission directly in such cases without the preceding Form RS. We consider that removing the separate Form RS procedure in such cases would simplify and speed up the referral process. In particular the notifying parties would be able to commence the Phase I timetable at an earlier stage. We also consider that there may be benefits arising from removing any duplication of work which currently exists in respect of the information gathered for the Form RS and Form CO.

b) Please try to estimate savings in (a) time and (b) costs resulting from the elimination of the Form RS procedure in a typical case

2.2 Direct notification should shorten the overall notification process by at least the 15 working days envisaged by the Form RS process. In addition we would anticipate that the removal of the pre-notification phase for the Form RS could result in an additional benefit of 3-6 weeks, provided that the removal of the Form RS process does not result in a more burdensome Form CO pre-notification process.

2.3 The likely reduction in costs would depend on the precise facts of the case. However, we consider that, provided that this does not result in significant additional work in the Form CO pre-notification process, this is likely to result in a material reduction in both management and advisor costs.

c) For transactions to be notified in at least three Member States, would you consider that you will use the referral according to Article 4(5) under the suggested system more often than under the current system - or that you will advise your clients to use it more often?

2.4 Currently in cases where the Article 4(5) criteria would be satisfied we would consider with our clients whether a referral request would appropriate. The decision to submit a referral request depends on a range of factors, including but not limited to the time taken for the Commission process and the burden on the parties in preparing the Form RS and Form CO. Whilst the Commission's proposals may make it more attractive in some cases to make a referral request we believe that the decision as to whether to request a referral will depend on the individual case. We would not currently anticipate making significantly more referral requests if the proposed reforms are implemented.

d) Do you consider that the 15 working days consultation period could be shortened in order to limit the duration of uncertainty as to whether or not a case will remain in the competences of the Member States?

2.5 We believe that it should be possible to reduce the consultation period for the NCAs to 10 working days. We consider this should be sufficient time for the competent NCAs to review the relevant information and reach a view on whether they wish to retain jurisdiction over the notified transaction.

e) Do you consider it useful if contacts between the Commission and the competent Member States could take place already during a possible prenotification phase, in order to enable the Member States to assess the referral?

2.6 Whilst in principle we consider there may be practical advantages for the notifying party in the Member States being aware of the potential referral request in pre-notification, in order to minimise the risks of a subsequent rejection of the request, we would have concerns about the Member States playing a significant role in pre-notification or a pre-notification role for NCAs being formalised in the EUMR or within guidance.

2.7 In particular, we are concerned that the result would be increased administrative burdens

on the notifying parties in terms of information provision, with the result that the anticipated benefits of streamlining the system would not be realised. We note that in current cases the Member States may not be informed of any referral request until the filing of the Form RS and therefore it is not clear that they would need to receive information in advance of the filing of the Form CO in any event.

2.8 Our view is therefore that the extent of any pre-notification contact between the Commission and Member States should be discussed between the case team and the notifying parties on a case by case basis, and that there should be no presumption that information would be provided pre-notification. We note that once a decision has been taken by a notifying party to request a referral it will have every interest in ensuring that Member States do not veto this request. Accordingly, in cases where a party considers such disclosure would assist the process then the party will no doubt consent to early disclosure by the Commission to the Member State of relevant information.

f) Do you agree that a broad information exchange between the Commission and the Member State which includes the information gathered in the market investigation should be made possible? Should the results of the Commission's market investigation be accessible to NCAs also following a veto of a Member State?

2.9 We consider that broader information exchange (including the information gathered in the market investigation) between the Commission and the Member State would only be appropriate to speed up the review process of the Member State following a veto of the referral request and not otherwise.

2.10 In our view, absent the notifying party consenting to disclosure of such information, then information gathered by the Commission, including from the market investigation, should not be disclosed prior to the Member State's decision to veto the referral, as in principle the Form CO should contain sufficient information for the Member State to reach a view on referral. Information should only be disclosed to a Member State after the veto for the sole purpose of reviewing the transaction concerned (and speeding up that review process). It should also be limited to information relating to the markets in the relevant Member State only.

g) What would be in your view appropriate measures to assure that the Member States have a good understanding of the case in order to decide whether or not to ask for a referral (e.g. early information of the Member States, forwarding of a draft

notification received by the Commission)? How do you view this suggestion with regard to confidential transactions which are not yet in the public domain?

2.11 Beyond the provision of an updated Form CO incorporating relevant submissions on jurisdiction we are unclear that further measures would be required to ensure that the Member States have a good understanding of the case in order to decide whether or not to ask for a referral. We note that as a practical matter the submissions currently made in the Form RS are made at an early stage of the notification process and that the Form CO which follows a successful referral request is likely to contain significantly more detail on the relevant markets than the Form RS. Indeed we note that to the extent that market definition and market information is contained in the Form RS this currently constitutes a high-level overview of the markets in question. As such we consider that the Member States will have significantly more information on which to make a decision under the revised proposal than they are currently likely to receive through the Form RS.

2.12 We also note that the information required by the Member States is purely for the purposes of determining whether the Commission is better placed to review the transaction. This should not necessitate the production of significant submissions and consequently we believe it should be sufficient for the Member State to receive only the notified Form CO.

h) Regarding pre-notification referrals from the Commission to the Member States, <u>Article 4(4),</u> do you see similar room for improvement to streamline the process and to align it with the suggestions on Article 4(5) above, while at the same time safeguarding the interests of all Member States?

2.13 In contrast to the Article 4(5) procedure, in relation to Article 4(4) EUMR we do not consider that it would be appropriate to combine the substantive Form CO notification with the request for a referral to a Member State.

2.14 As the request is for a referral away from the Commission it would appear to constitute an unnecessary step for the notifying party to proceed through the full pre-notification phase with the Commission and to commence the substantive review of a transaction, when the ultimate outcome (the requested outcome of the notifying party) is likely to be a review of at least parts of the transaction by the Member State. It therefore appears to us to be more appropriate in this case to adopt a multi-stage process where the request is approved (or rejected) by the Member States prior to notification.

2.15 We note that as a practical matter this would still allow the notifying party to commence pre-notification discussions with the Commission in respect of those aspects of the

transaction which would be reviewed by the Commission.

3. **<u>QUESTION 3:</u> REGARDING THE SUGGESTION ON ARTICLE 22 REFERRALS:**

a) Do you agree with the underlying principle of the envisaged modification, i.e. that Article 22 should enable the Member States to refer cases to the Commission for which the Commission is the more appropriate authority due to cross-border effects? Do you also agree that the Commission should then have EEA-wide jurisdiction as for all the other cases it is dealing with?

3.1 We are not convinced of the necessity of retaining the Article 22 EUMR procedure and believe that one option the Commission should consider is for this to be removed in its entirety. We note that merger control rules have now been introduced in all Member States except Luxembourg and thus the purpose for which Article 22 was originally introduced is no longer as relevant. We also note that the Member States currently reach decisions on a wide range of cases which have effects in multiple EU jurisdictions and have not chosen to use Article 22 as a rule in such cases (Article 22 requests being exceptional).

3.2 However, we acknowledge that retention of Article 22 may be useful to cover those, relatively limited, cases in which Member States believe that the Commission is best placed to review a transaction (for example due to the existence of cross-border effects or more extensive experience on the part of the Commission).

3.3 If Article 22 is retained, we do not support the Commission suggestion that in such cases the Commission should take jurisdiction for the whole EEA. We consider that it would be disproportionate for the Commission to receive jurisdiction for the whole EEA in cases where a limited number of Member States would have had jurisdiction and requested a referral to the Commission. We consider that such a change, whilst a procedural simplification, would impose significant additional burdens on the notifying party in terms of information gathering for the Form CO.

b) Do you agree that the envisaged modification would lead to a clear delineation of which level - Commission or Member States - should deal with a case, taking account of the one stop-shop principle? Do you agree that this would avoid a patchwork approach of parallel proceedings of the Commission and Member States?

3.4 As noted above, we do not support the proposal that a pan-EEA one-stop shop principle should apply in respect of such requests. If the Article 22 process is retained we suggest that the following principles should apply:

3.4.1 In line with the Commission's suggestion that only competent Member States can make a referral request, the Commission should have jurisdiction only over those jurisdictions where the NCA was competent to review the transaction; and

3.4.2 Mirroring the requirements of Article 4(5), the Commission should only be able to take jurisdiction in cases where the transaction is reviewable by three or more Member States.

c) Do you agree that the envisaged system would make European merger control more effective and would allow it to obtain cases for which the Commission is the more appropriate authority? In particular, do you consider it appropriate that only competent Member States can refer cases to the Commission, as opposed to the current system where also non-competent Member States can refer a case?

3.5 As noted above, we have some reservations about the approach proposed by the Commission and the extent to which this will result in a more effective European merger regime. However, we agree that on the grounds of legal certainty it would be appropriate for only Member States competent to review the transaction under their national laws to be able to make a referral request.

d) Do you agree that legal certainty for undertakings would be increased if only a Member State competent under its national law could make a referral request?

3.6 As noted above, we agree that it would be appropriate to limit requests only to those Member States competent to review the transaction under their national laws.

e) Do you agree that the procedural solutions would prevent the scenario or mitigate the risk that a Member State might have already cleared the transaction before another Member State requests a referral? In your view what would be appropriate procedural solutions?

3.7 We believe that there are no obvious procedural solutions which would address the risk of a transaction being cleared by one Member State before another Member State requests a referral without the approximation of Member State procedural rules.

f) How do you see the possibility of a making national clearance decision conditional upon no Article 22 referral taking place? Under the law of your respective Member State, would it be possible to issue clearance decisions under the condition that no Article 22 referral takes place?

3.8 We consider that seeking to introduce such a mechanism into national legislation would be undesirable and would create significant and unnecessary legal uncertainty and complexity. In addition, under the UK merger control regime we do not believe that it would be possible for the OFT/CC to issue decisions which would be conditional on something that is not related to the conduct or actions of the parties to the transaction.

g) In your view, could the suggestion raise costs for undertakings or would it lead to costs savings due to a better predictability of the system?

3.9 Given that the Article 22 process is only used infrequently it is not clear to us that significant savings would be achieved from reform of the Article 22 procedure. As noted above, one further option for consideration is the removal of the Article 22 procedure altogether.

h) Regarding Article 22 (5) do you consider that the current procedure that the Commission can invite the Member States to refer a case could be improved in terms of procedure? And if so, in which ways?

3.10 We consider that it might be possible to streamline the process further if the invitation by the Commission had the effect of starting the period during which the other competent Member States would be free to join or object to the referral.

PART IV: MISCELLANEOUS

1. **<u>QUESTION 1:</u> HOW COULD THE JURISDICTIONAL RULES OF THE MERGER REGULATION BE MODIFIED IN ORDER TO ENSURE THAT JOINT VENTURES WITH ACTIVITIES EXCLUSIVELY OUTSIDE THE EEA AND NOT AFFECTING COMPETITION WITHIN THE EEA DO NOT HAVE TO BE NOTIFIED TO THE COMMISSION? PLEASE TAKE INTO ACCOUNT THE NEED FOR JURISDICTIONAL RULES TO BE CLEAR AND EASY TO APPLY.**

1.1 We welcome the Commission's consideration of this issue and proposal to exclude such joint ventures from the EUMR notification obligation.

1.2 As outlined in our response of 19 June 2013 to the Commission's previous consultation on *Draft Revision of Simplified Procedure and Merger Implementing Regulation*, we consider that the current extraterritorial application of the EUMR to joint ventures which will not be active on markets within the EEA[36] 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.

1.3 This results in a very large number of "offshore" joint venture transactions, in relation to which there is absolutely no prospect of any effect on the structure of competition in the EEA, requiring notification. This 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.*[37] It is also contrary to the principles underlying the ICN *Recommended Practices for Merger Notification Procedures*.[38]

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[36] Just a few examples are: Case No/M.6859 *Mitsubishi Corporation/Isuzu Motors/Isuzu Motors India Private Limited* relating to a joint venture active in the manufacture and supply of motor vehicles and spare parts in only India and possibly other neighbouring emerging markets; Case No COMP/M.6240 *Temasek/E Oppenheimer/Tana JV* in respect of the creation of a joint venture between a Singaporean sovereign wealth fund and a BVI company to invest in the fast moving consumer goods sector in Africa only; Case No COMP/M.6105 *Veolia/EdF/Société d'Energie et d'Eau du Gabon* involving the acquisition of joint control over a distributor of water and power active only in the Gabon; and Case No COMP/M.6335 *Abertis Infraestructuras/Goldman Sachs Group/Autopistas Metropolitanas de Puerto Rico* in relation to a joint venture for the management and operation of toll road concessions in Puerto Rico.

[37] In which the General Court stated that "*Application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in*

1.4 In terms of how the EUMR's jurisdictional rules could be amended in order to find a solution which excludes from the scope of the EUMR joint venture transactions which can have no effect on competition within the EEA, whilst retaining the Commission's ability to review joint venture transactions which genuinely could have such an effect, we recognise that this is not straightforward. However, we believe that such solutions can formulated. We agree that such solutions need to be clear and easy to apply: any amendments need to ensure legal certainty for undertakings.

1.5 This could be achieved, in our view, by amending Article 1 EUMR on the scope of application of the EUMR to exclude the creation of, or acquisition of joint control over, joint ventures with no actual or intended activities in the EEA.

1.6 This could be achieved, for example, by inserting at the end of current Article 1(1) EUMR language as follows:

"*except in situations where two or more persons already controlling at least one undertaking or two or more undertakings acquire joint control of a joint venture and that joint venture has no actual or foreseen activities within the territory of the European Economic Area*".

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the [EU]" (paragraph 90) and "*The fact that, in a world market, other parts of the world are affected by the concentration cannot prevent the Community from exercising its control over a concentration which substantially affects competition within the common market by creating a dominant position*" (paragraph 98). On the facts of the case the General Court confirmed that the transaction would have a "foreseeable" and "substantial" effect on competition within the EU. In the type of offshore joint venture transaction in question this is clearly not the case, and therefore the extra-territorial application of the EUMR cannot be reconciled with public international law on this basis.

38 http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf. In particular these state: "*Jurisdiction should be asserted only over those transactions that have an appropriate nexus with the jurisdiction concerned*" (I.A); "*Merger notification thresholds should incorporate appropriate standards of materiality as to the level of "local nexus" required for merger notification*"; "*Comment 1: In establishing merger notification thresholds, each jurisdiction should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory* […]"; "*Comment 3: The "local nexus" thresholds should also be confined to the relevant entities or businesses that will be combined in the proposed transaction* […]" (I.B); "*Determination of a transaction's nexus to the jurisdiction should be based on activity within that jurisdiction, as measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the local territory*"; "*Comment 1: Notification should not be required unless the transaction is likely to have a significant, direct and immediate economic effect within the jurisdiction concerned*" (I.C.)

1.7 Alternatively, the Commission could include a new Article 1(4) EUMR providing that:

"*Notwithstanding Article 1(2) and Article 1(3), a concentration does not have a Community dimension in situations where two or more persons already controlling at least one undertaking or two or more undertakings acquire joint control of a joint venture and that joint venture has no actual or foreseen activities within the territory of the European Economic Area*".

1.8 It would also be important, in the interests of legal certainty and the consequences which follow from falling within the scope of the EUMR, that the Commission set out within the Consolidated Jurisdictional Notice the circumstances in which a joint venture will be taken to have "*no actual or foreseen activities within the territory of the European Economic Area*". Such guidance could state, for example, that this is deemed to be the case where:

- The joint venture and/or the contributed activities does not generate turnover in the EEA territory;
- The joint venture and/or the contributed activities does not have assets in the EEA territory; and
- There is no intention that the joint venture will generate turnover or hold assets in the EEA territory in the foreseeable future.[39]

1.9 This could potentially be combined with an ability for the Commission to "call in" (within a strict limitation period) and review such transactions in individual cases on its own initiative where there is a realistic prospect of a SIEC within the EEA and the possibility of voluntary notification (as per the Commission's proposals for the Self-Assessment Regime in respect of Structural Links).

1.10 Such a carve-out would exclude the cases cited above (and many others) from the scope of the EUMR, but maintain the obligation to notify joint venture transactions where there is actual or intended activity in the EEA.

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[39] This could be assessed, for example, by reference to the Commission's criteria for assessing the likelihood and timeliness of new entry within the Commission's *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* (2004/C 31/03).

1.11 As an alternative to excluding such transactions completely from the scope of the EUMR, the Commission could also consider removing the Article 7 EUMR suspension obligation from transactions as defined above, and providing for a "light touch" notification form for such transactions which requires significantly less information than the current Short Form CO.

1.12 Finally, we note that we believe the Commission should consider excluding from the scope of the EUMR also those joint ventures which generate only minimal turnover within the EUMR, and are thus high unlikely to have any effects on competition within the EEA. This could be achieved by adjusting the proposals set out within paragraphs 1.7 and 1.8 above to refer to joint ventures with EEA turnover below a specified de minimis threshold.

2. **<u>QUESTION 2:</u> WOULD YOU RECOMMEND ANY OTHER AMENDMENTS TO THE MERGER REGULATION? PLEASE ELABORATE.**

Amendments discussed within the Consultation Document

2.1 Subject to our comments within Part II above, we welcome consideration of the issue of new/reinforced rules in respect of the exchange of confidential information between the Commission and NCAs before and after notification of a concentration in order to facilitate the case referral process. We consider such exchanges should only, however, take place with the consent of the information owner, in order to take into account the need for appropriate protection of the confidential information of the notifying parties (and any third parties).

2.2 In relation to potential revision of Article 4(1) EUMR to improve flexibility for notifying concentrations that are implemented via the acquisition of shares on a stock exchange without a public bid, we look forward to seeing the Commission's proposals and can then comment further on any amendments to Article 4(1) and/or Article 7(2) EUMR.

2.3 We agree that it would be useful if Article 5(4) EUMR were amended to provide for rules on the calculation and allocation of turnover for joint ventures between the undertakings concerned and third parties (with related revisions to the Consolidated Jurisdictional Notice).

2.4 In relation to the Commission's proposed amendments to Article 8(4) EUMR, please see our comments within Part II above.

2.5 We agree that non-confidential information made available to the notifying parties and to third parties as a result of the EUMR process should not be used or disclosed for other

purposes, and look forward to seeing the Commission's proposed amendments to the EUMR to protect against such use/disclosure.

Other amendments

2.6 In addition to the potential improvements discussed within the Consultation Document, we consider that there would be merit in the Commission clarifying the application or otherwise of the EUMR to transactions involving the change of control over an a joint venture which does not perform on a lasting basis all the functions of an autonomous economic entity, i.e. which is not "full function".

2.7 It has generally been considered that a change of control over an existing joint venture (or the creation of a joint venture through the acquisition of joint control over an existing undertaking) would only constitute a concentration within the meaning of the EUMR if the joint venture in which the change in the quality of control occurs satisfies (and continues to satisfy) the full-functionality criterion. This reflects the important distinction between cooperative joint ventures that fall outside the EUMR and those joint ventures that fall within the ECMR (originally concentrative joint ventures and now full-function joint ventures).

2.8 However, Article 3(1)(b) EUMR, which covers transactions involving changes of control over jointly controlled undertakings, does not explicitly refer to the wording within Article 3(4) EUMR on full functionality. Article 3(4) itself refers only to the creation of a joint venture, not to the change of control over an existing joint venture.

2.9 The introduction of paragraph 91 of the Consolidated Jurisdictional Notice, the precise intention and scope of which is not clear, also leads to ambiguity in this area. This paragraph might be taken to mean that, where there is a change of control over an existing undertaking (within the meaning of paragraph 24 of the Notice) leading to a position of joint control (or joint control by different parties), this could constitute a concentration regardless of whether the joint venture is full function or not[40]. However, the wording of the paragraph suggests that this is only the case if: (i) the joint venture was previously full function but following the transaction is "no longer" full function; and (ii) the transaction involves two or more wholly new shareholders acquiring joint control over the undertaking (rather than, for

[40] See the last sentence of paragraph 91: "*Thus, a transaction involving several undertakings acquiring joint control of another undertaking or parts of another undertaking, fulfilling the criteria set out in paragraph 24, from third parties will constitute a concentration according to Article 3(1) without it being necessary to consider the full-functionality criterion*."

example, one shareholder selling its jointly controlling stake and the other remaining in a position of joint control (resulting in the replacement of one shareholder), or a previously solely controlling shareholding selling part of its stake).

2.10 The position is as a result unsatisfactorily unclear, raising significant issues for parties to transactions seeking to determine whether the EUMR applies to their transaction.

2.11 It is essential that the rules on what does and does not constitute a concentration within the meaning of the EUMR are clear. We consider that the Commission should clarify within the EUMR and/or the Consolidated Jurisdictional Notice whether transactions resulting in a change of control over a non-full-function joint venture can constitute a concentration under the EUMR, and if so, in what precise circumstances.

Herbert Smith Freehills LLP

12 September 2013