Dear Sir / Madam

AIMA’s response to the DG Competition’s White Paper Towards more effective EU merger control

I am writing to you on behalf of The Alternative Investment Management Association Limited (AIMA)\(^1\) in relation to the European Commission (Commission) White Paper titled ‘Towards more effective EU merger control’ and the accompanying Commission Staff Working Document (together referred to as the ‘Consultation’). I apologise for making this submission after the closing deadline of 3 October 2014, but I hope you will still take AIMA’s comments into consideration.

AIMA would like to highlight our concerns that the extension of the Council Regulation (EC) No 139/2004 of 20 January 2004 (‘EUMR’) to cover minority non-controlling investments could have serious negative consequences for our members and for the European economy generally by impeding hedge fund investment and making EU companies less attractive to investors. In particular, we consider that the proposed amendments may have negative effects on the capital markets union and impede cross-border activities resulting in a less efficient European capital market as well as less efficient utilisation of resources.

Our view is that, if it is considered necessary to review acquisitions of minority shareholdings at the EC level, then this should take place under a voluntary regime. Such an approach would be proportionate given the very rare cases in which the acquisition of a minority shareholding can lead to competitive harm. Most importantly, it would be less damaging to the European economy given the chilling effect that a mandatory (or even targeted) regime would have.

A voluntary regime under the Commission’s jurisdiction could follow the UK regime, where merging parties take a view as to whether to notify a transaction to the Competition and Markets Authority (CMA). However, if the CMA has grounds to believe that implementing the transaction would prejudice the outcome of an investigation, the CMA has the power to prevent the merging parties from completing or compel them to unwind the transaction. We consider that adopting a self-assessment and voluntary notification system, similar to the system applicable in the UK, with the Commission publishing a notice providing guidance on how to assess minority shareholdings, would achieve a good balance between allowing the Commission to examine cases it considers problematic, while minimising the burden on business and hence enhancing economic welfare.

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\(^1\) As the global hedge fund association, the Alternative Investment Management Association (AIMA) has over 1,400 corporate members (with over 7,000 individual contacts) worldwide, based in over 50 countries. Members include hedge fund managers, fund of hedge funds managers, prime brokers, legal and accounting firms, investors, fund administrators and independent fund directors. AIMA’s manager members manage a combined $1.5 trillion in assets (as of March 2014).
We note that the targeted transparency system proposed in the Consultation would require a considerable amount of time and effort in the preliminary legal analysis, coupled with the legal uncertainty that this process would create for investment in European companies. Overall, such a regime would be likely to significantly hinder investment in European companies, including SMEs and start-ups.

Hedge fund managers often acquire non-controlling interests as part of their investment strategies. They are usually not interested in acquiring large stakes in companies in order to gain operational control. Under the new proposed regime, every time a hedge fund manager wishes to acquire an equity stake in a company above 5%, it would need to undertake an in-depth assessment of its controlling shareholdings in similar and vertically related industries in order to establish whether it needs to submit an Information Notice. The burden of such an assessment should not be underestimated given the number and variety of controlling interests held by hedge funds.

In the event that the Commission decides to proceed with the targeted transparency system, we set out below some proposals to ensure that the regime is efficient and not disproportionately burdensome on business.

First, in respect of the definition of a “competitively significant link”, an exemption should be available for investment-only acquisitions of shares below 10%. This would be in line with the regime in the United States and would not risk missing any acquisitions which could lead to competitive harm. Further, there should be a bright line threshold of 25% (rather than 20%) above which acquisitions would automatically qualify for a competitively significant link (without additional factors). The Commission should publish clear guidelines as to which investments below 25% would be caught, setting out in detail which factors would need to be present.

Second, the information notice should be a simple and user-friendly form which does not require an assessment of market definition and share analysis. As well as the burden this would place on business in terms of collating information, this would also risk leading to a drawn out pre-notification type discussion with the Commission as to which shares should be provided. In our view, the purpose of the information notice should be to alert the Commission to a transaction, and thus could look similar to the current Case Allocation Request.

Finally, completion should be allowed to take place without a waiting period. Such a waiting period, even of 15 working days, would seriously hamper investments in capital markets given the timeframes within which such investment decisions are taken and the fluctuations in value of investments within a 15 day period. Acquisitions of minority shareholdings occur most frequently on capital markets and therefore a waiting period of 15 working days risks hampering market liquidity. We note that the Consultation acknowledges this to a certain extent by proposing to adapt the working of Article 7(2) EUMR which provides a derogation from the suspensory obligation for acquisitions of shares via a stock exchange. If the Commission insists on a waiting period, then we consider it vital that this derogation be expressly applied to stakes acquired also on other platforms, such as Multilateral Trading Facilities (e.g. BATS Chi-X Europe).

It is worth also highlighting that some hedge fund managers are active in the distressed strategy space. Their investments could be negatively affected by the uncertainty associated with acquisitions of shareholdings as a result of bankruptcy or other restructurings. By adding additional requirements and possible delays to investment in distressed companies, the proposals would discourage investment from hedge fund managers in European companies that may benefit from short term cash injections.

AIMA has read with interest the response of the European Private Equity & Venture Capital (EVCA) which was submitted to you on 3 October 2014 and we would also like to express our support for the more detailed points that EVCA raise in that response letter.
We hope you find our comments useful and would be more than happy to answer any questions you may have in relation to this submission.

Yours sincerely,

Jiří Król
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Head of Government & Regulatory Affairs