Response to European Commission White Paper

Towards more effective EU merger control

3 October 2014
This response represents the views of law firm Allen & Overy LLP on the European Commission’s (Commission’s) July 2014 public consultation on proposals to improve the EU Merger Regulation (EUMR), in particular the White Paper Towards more effective EU merger control (the White Paper), the accompanying Commission Staff Working Document (the SWD) and the accompanying Impact Assessment (the Impact Assessment) (together the Consultation). Allen & Overy LLP is a major international law firm with a busy antitrust practice. Our comments are based on our substantial expertise in merger control law and practice within the European Union and in a large number of other jurisdictions. However, the comments in this response do not necessarily represent the views of every Allen & Overy lawyer, nor do they purport to represent the views of our clients.

We confirm that this response does not contain any confidential information and we are happy for it to be published on the Commission’s website.

To summarise our overall views on the Consultation:

- We do not consider that there is a convincing case for extending the scope of the EUMR to include the acquisition of non-controlling minority shareholdings.

- We have some concerns with the scope and procedure of the Commission’s preferred system for bringing non-controlling minority shareholdings within its jurisdiction, the so-called targeted transparency system. In particular:
  - we believe the Commission has underestimated the number of cases that will be impacted by its proposed targeted transparency system;
  - we consider that the Commission’s stated objectives would be better achieved through self-assessment and voluntary notification;
  - if the Commission decides to pursue its current proposal for a targeted transparency system, we believe that a more appropriate regime to meet the Commission’s stated objectives would involve:
    - a clearer definition of when there would be a presumption of a “competitively significant link” (CSL) which, in our view, should not be below 25% (in line with German and UK rules);
    - a safe harbour for acquisitions of below 15% (given that cases where shareholdings below that level raise competition concerns are extremely rare);
  - if the Commission decides to pursue its current proposal for a targeted transparency system, it is essential that the information notice is light touch;
  - we believe an automatic standstill obligation would be a disproportionate burden on parties and not justified in cases of CSL;
  - if the Commission requires the submission of an information notice (as opposed to relying on market intelligence and third party complaints), we consider that it should not have a prescription period of any more than two months; and
  - we oppose the use of fines to sanction any failure to submit an information notice.

- However, we generally welcome both the proposals to streamline the referrals process and the Commission’s proposals for other amendments to improve the operation of the EUMR in sections 4
and 5 of the White Paper, particularly in relation to joint ventures having no conceivable impact on markets in the EEA.

A. ACQUISITION OF NON-CONTROLLING MINORITY SHAREHOLDINGS

1. There is not a convincing case for extending jurisdiction

1.1 We consider that the Commission has not made out a convincing case for expansion of the scope of the EUMR, and we do not believe there is a significant enforcement gap that needs to be plugged. The reasons for this view were set out in our 12 September 2013 response to the Commission’s June 2013 public consultation (the 2013 response). Although the Commission has identified a number of cases falling within the scope of the EUMR where competition concerns arose from the presence of non-controlling minority shareholdings, for the most part these were cases where the Commission (or a national competition authority (NCA)) did ultimately have the ability to intervene.

1.2 The Commission argues that there would have been an enforcement gap if the acquisition of the minority stake had taken place after the notified concentration, but we remain unconvinced that this justifies wholesale reform of the EUMR to bring non-controlling minority stakes within its scope. The Commission’s case for change appears to rest largely on the Ryanair/Aer Lingus episode. If the concern is that the Commission lacks the ability to compel divestments of non-controlling minority shareholdings built up in the context of a takeover bid when the concentration itself has been prohibited, the obvious answer to that problem is to amend Article 8(4) EUMR to permit this.

2. The Commission underestimates the number of cases impacted by the proposed targeted transparency system

2.1 It is the Commission’s view that the targeted transparency system set out in its White Paper will only affect a limited number of cases. In particular, the Commission estimates that roughly 20-30 minority shareholding cases each year will meet the criteria as well as the turnover thresholds of the EUMR (paragraph 85 of the SWD), and that the Commission would intervene in merely another 1-2 cases per year (paragraph 46 of the Impact Assessment), based on past intervention rates for concentrations.

2.2 However, we consider the basis of the Commission’s estimates to be flawed and that the estimate of 20-30 extra cases materially underestimates the potential number of cases that will be caught by the new system. In the Impact Assessment the Commission itself notes (see paragraph 41) that the Zephyr database is likely to underestimate the actual number of relevant acquisitions of minority stakes, given that it only covers transactions involving both a buyer and target registered in the EU and transactions between publicly listed companies.

2.3 In addition, we consider that the Commission’s focus on the number of cases that will meet the criteria fails to take into account the number of transactions that will be impacted by the new system, even if the parties ultimately conclude that there is no need to file an information notice. Our experience suggests that there are likely to be a considerable number of cases that will require a detailed assessment of the facts, before it can be safely concluded that a CSL will not be created and that the submission of an information notice is not required. Depending on how the threshold for submitting an information notice is ultimately formulated, this could include cases where the minority shareholding to be acquired falls between the 5-20% range and where it is necessary to carry out an assessment of “plus factors / additional elements”.

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3. **The Commission’s policy objectives could be achieved through self-assessment and voluntary notification**

3.1 Following the Consultation, if the Commission still believes that there is a policy need for a system for controlling acquisitions of non-controlling minority shareholdings, we consider that the Commission’s proposed targeted transparency system is not the most appropriate and proportionate solution.

3.2 The Commission’s stated objective is for a system that strikes the right balance between: (1) capturing potentially problematic cases; (2) avoiding unnecessary and disproportionate administrative burdens primarily for companies, but also for the Commission and NCAs; and (3) fitting with the existing merger control systems at EU and national level (paragraphs 67 – 72 of the SWD). We consider that the transparency system currently proposed fails to achieve these aims.

3.3 Instead, we consider that the Commission’s objectives would be more efficiently and effectively addressed under a self-assessment regime that also allows for voluntary notification. We do not consider that the Impact Assessment accurately balances the pros and cons of the two regimes. For example, we do not consider it correct that the transparency system “would not demand any additional information than what is anyway necessary to assess the transaction under the self-assessment system”.

3.4 To the extent the Commission’s concerns relate to its current inability to compel divestments of non-controlling minority shareholdings built up in the context of a takeover bid when the concentration itself has been prohibited, as we have noted above, the obvious solution is to amend Article 8(4) EUMR to permit this.

3.5 In addition to our issues of principle with the need for an expansion of the scope of the EUMR, and the Commission’s preference for a targeted transparency system, we have a number of more detailed comments on the Commission’s proposed targeted transparency system.

4. **Definition of CSL**

4.1 It is essential, and to the benefit of businesses, their advisers, the Commission and ultimately the European economy, that CSL is defined clearly. Much greater clarity is required than is currently available in the Consultation.

(a) **The CSL presumption threshold should be set at 25%**

4.2 We support the Commission’s desire for a bright-line share capital threshold over which an information notice must be submitted, whether or not additional elements are present.

4.3 However, we consider that 25% of the total share capital would be a more appropriate threshold level than “around 20%”. Such a level would be in line with the Commission’s considerations of national corporate law and financial incentives (set out at paragraph 90 of the SWD). Crucially, such a level would be a better fit with the percentage level of voting rights enabling shareholders to block special resolutions in most Member States. In particular, a 25% level would be in line with German rules and UK practice, i.e. tie-in with two merger control systems that cover the EU’s largest economies and that also already review acquisitions of minority shareholdings. Member States took into account very valid corporate law considerations when setting these 25% levels. Adopting a different presumption threshold would therefore not only be unnecessary but also cause confusion with national systems of merger control review.
4.4 We consider that the Consultation’s use of the term “around 20%” is ambiguous, liable to cause confusion and will introduce a significant measure of uncertainty as to whether an acquisition must be notified.

(b) An information notice should not be required for acquisitions of below 15% (irrespective of additional elements)

4.5 We welcome the proposal for a safe harbour, based on a bright-line share capital threshold, below which the Commission has no jurisdiction.

4.6 However, a wider safe harbour of up to 15% of share capital would be in our view the correct one to adopt rather than the 5% threshold proposed in the White Paper.

4.7 The case for intervention below 15% is extremely weak. Many acquisitions of minority stakes are in fact pro-competitive – a useful, legitimate means of obtaining finance – and a low threshold for merger control intervention would have a chilling effect on investment and unnecessarily distract both Commission and company resources. Cases where the acquisition of a shareholding of less than 15% raises competition concerns requiring a detailed merger control analysis are likely to be extremely rare and so a 5% safe harbour would impose an excessive and disproportionate administrative burden on financial investors, the Commission and NCAs.

4.8 We note from the SWD and Annex II of the 2013 public consultation that only three Commission cases have involved a shareholding of less than 15% that was required to be divested, one of which in fact amounted to de facto control of voting rights in excess of 25%. In addition we note that all the cases in which the US courts have identified an antitrust merger violation involved shareholdings of more than 15%. With respect to the UK regime, we note that the NCA guidance states that only “exceptionally” will a shareholding of less than 15% attract scrutiny where other factors indicating the ability to exercise material influence over policy are present (see paragraph 4.20 of Mergers: Guidance on the CMA’s jurisdiction and procedure). In addition, the UK is a voluntary system and this gives more flexibility to the parties.

4.9 If, following the Consultation, the Commission remains committed to the 5% safe harbour, it should only have jurisdiction over acquisitions in the 5-15% range if additional elements are present. Any such additional elements should be appropriate, i.e. take account of the very low level of shareholding being acquired.

4.10 In addition, we consider that notification should not automatically be mandatory above the proposed 5% of share capital safe harbour, even where additional rights are present. Instead, where the shareholding to be acquired is between 5 and 15% and additional rights are potentially present, parties should be free to self-assess. The submission of an information notice should be voluntary, and permissible for parties requiring legal certainty. Should the parties choose not to notify, the Commission would still potentially have jurisdiction and could ask the parties for relevant information to ascertain whether the case merits further review on the basis of an information notice.

(c) Between 15 and 25%, the Commission should only have jurisdiction if additional elements are present

4.11 Where the shareholding to be acquired is between 15 and 25% jurisdiction should be coupled with additional elements. Given that parties will be required to make a self-assessment, potentially relevant additional elements need to be well defined and should strictly relate to the ability to influence the business policy relevant to the competitive behaviour of the target. If a self-assessment reveals additional rights, an information notice would be obligatory.

1 Case M.6541 Glencore / Xstrata; Case COMP/M.1673 VEBA / VIAG; Bundeskartellamt (2008) A-Tec Industries AG / Norddeutsche Affinerie AG.
(d) “Additional elements” should be clearly defined

4.12 Given that parties will be required to exercise an element of subjective judgement as part of the self-assessment and also the novel nature of the system, it is vital in the interests of legal certainty that, whatever range of share capital settled on, the Commission develops very clear guidance on additional elements that would have to be present in order for a minority shareholding to qualify as a CSL.

4.13 The Consultation gives examples but these are sketchy, unclear and limited. As the examples currently stand, they will not help parties and case teams identify and apply the additional elements. For example, will a seat on the board of directors on its own always be sufficient for a minority shareholding to qualify as a CSL? What exactly is meant by “information rights giving access to commercially sensitive information” (paragraph 92 of the SWD)? What does the Commission envisage by the right to “exert influence” (paragraph 78 of the SWD)? Does the Commission anticipate many other factors coming into the assessment mix? We also note that the Commission does not distinguish in the Consultation between public and private companies.

4.14 The test set out in the guidance should focus on whether the acquirer is able to veto one or more of a clearly defined set of decisions that have the potential to influence the competitive conduct of the target. Relevant decisions could include decisions to: make investments or divest assets; enter into an acquisition, merger, business sale or joint venture; obtain sources of equity or debt funding if these are required and envisaged; and enter into supply agreements. The presence of one or more board seats in the target should only be relevant in so far as it confers a veto right over a relevant decision.

4.15 We also consider that, given parties often implement compliance arrangements to restrict the flow of commercially sensitive information, information rights will not always be relevant and should not be an automatic additional element that will trigger filing of an information notice. It would be essential that the Commission publish guidance on the restrictions that should be put in place on information flows to shareholders and directors with links to related undertakings (if necessary distinguishing between vertically and horizontally related companies). It is also arguable that information rights are only relevant in cases where horizontal minority shareholdings are acquired. Exchanges of information between vertically related companies only raise competition concerns if they amount to the disclosure of a competitor’s pricing intentions, but minority shareholders are very unlikely to be entitled to have sight of such information.

4.16 Given the mandatory nature of the proposed targeted transparency system, without such guidance parties will potentially be presented with the dilemma of not notifying and facing the risk that the Commission will investigate retrospectively, or notifying even the most minor acquisitions in order to avoid that uncertainty. A lack of clarity on such issues could perversely encourage parties to seek certainty through the submission of a Form CO and following the standard EUMR procedure, even where the acquisition clearly does not raise any competition concerns.

(e) The Commission must be able to modify and develop its guidance on scope and procedure

4.17 We support the use of a guidance document or implementing regulation to set out detailed guidelines on the criteria that need to be fulfilled for a non-controlling minority shareholding to fall within the Commission’s merger control competence. While the Commission builds up its experience of dealing with such cases, we believe that it needs flexibility to reassess, add to and refine its guidance.

4.18 However, it is imperative that, at the same time as any changes to the EUMR are made, the Commission publishes detailed guidance setting out the criteria for a CSL in order to provide legal certainty for parties. Leaving the publication of any guidance until the Commission has gained
practical experience in applying the new test is too late and will give rise to significant uncertainty about how the new regime is intended to apply. It will be likely to result in many informal requests for guidance by parties in individual cases, adding to the workload of case teams.

5. **Procedural aspects**

5.1 As noted above, our preference is for a self-assessment regime. The following comments are made on the assumption that the Commission decides to move forward with its proposal for a targeted transparency system.

(a) **Information notice versus full notification**

5.2 We welcome the proposed option for parties to notify their transaction voluntarily under the normal procedure.

5.3 There will be cases where the parties would prefer to notify their acquisition of a non-controlling minority shareholding by means of a Form CO. Companies may prefer the legal certainty this brings; namely that the Commission will make a decision on the transaction. Notification could also benefit the transaction timetable in cases where the Commission is likely to want to take a closer look as the additional information notice (and waiting / prescription) period would be avoided.

5.4 However, the Commission must ensure that the design of the information notice does not create perverse incentives to use the Form CO route, and thereby increase its workload. We are concerned that the ambiguity currently implicit in the targeted transparency system could create incentives for parties to submit under the normal procedure in order to gain legal certainty and clarity on timing, often when transactions do not raise any competition concerns.

(b) **Light touch transparency filing**

5.5 It is essential that the scope of the information notice is as light touch as possible in order to preserve the Commission’s policy principle of avoiding “unnecessary and disproportionate administrative burdens, primarily for companies, but also for the Commission and NCAs”. Anything more than a light touch approach and the information notice risks being as demanding as a short Form CO. The Commission will always have the power to require further information, or a full notification if appropriate, should it not itself be able to verify a lack of competition concerns from publicly-available sources.

5.6 In particular, we do not consider that there should be a requirement for market share data. Producing such information would be unduly onerous for the parties since it is frequently not available “off the shelf” but requires time-consuming research and analysis. Given the uncertainties regarding market definition and the completeness of market share data, such a requirement will inevitably end up entailing a period of pre-notification, in order that the case team can assess the completeness of the information notice.

5.7 We also do not support the option of requiring the submission of internal documents similar to the HSR 4(c) documents in the US. Such an approach would also be disproportionately onerous and increase uncertainty over the completeness of the notice. Gathering and providing internal documents of the type required under US merger filing systems, through wide-reaching file and document reviews by the parties’ employees and lawyers, can be an extremely expensive undertaking.

5.8 Instead, to keep the likelihood of pre-notification discussions with the Commission to a minimum, we would favour an obligation to provide a limited set of clearly identifiable internal documents, such as board papers. If, however, the Commission insists on the production of market share
information, we consider that the market share thresholds above which information must be supplied should be limited to 20% for horizontal overlap cases and 30% for vertical link cases.

5.9 The Commission asks at page 51 of the SWD: 1 d) Please estimate the time and cost associated with preparing a notice, taking into account also the different scopes suggested, such as a notice with market share information, or a notice with relevant internal documents.

5.10 We are unable at this stage to give an estimate for the cost of filing an information notice under either of the models suggested by the Commission. However, the average cost of making a filing along the lines of the US system would be higher than under the German system, and potentially not far off the cost of making a short Form CO filing, particularly if the procedure entails a pre-notification phase, with the Commission commenting on drafts and asking questions of the parties before it will accept the filing as complete. In addition, it is important to factor in the initial costs of determining whether the case involves a CSL.

(c) No standstill obligation

5.11 Given the minimal risks associated with acquisitions of minority shareholdings, we consider that an automatic standstill would be a disproportionate burden on the parties.

5.12 As we stated in our 2013 response, an extended standstill obligation would greatly complicate the negotiation, financing and execution of a very large number of transactions. It should be for the parties to decide whether, in a particular transaction, they are prepared to take the risk of completing or would rather wait until the Commission has concluded its investigation.

5.13 An automatic standstill obligation is not required in minority shareholding cases since the Commission will not be subject to the difficulties faced in full mergers of separating two businesses after implementation – it will rarely be the case that the acquisition of a minority shareholding will result in integration of the acquirer and target businesses. In any event, any anti-competitive effects resulting from an already implemented acquisition can easily be addressed by imposing a remedy (in the most extreme cases involving a reduction in the level of the stake or full divestment, or the imposition of information barriers).

5.14 Instead, the Commission should only have the ability to impose a stand-still obligation where it decides to open an investigation during the prescription period. This may well be necessary in some cases to ensure the effectiveness of a decision under Articles 6 and 8 of the EUMR.

(d) Waiting periods

5.15 The Commission asks at page 51 of the SWD: 1 e) Do you consider a waiting period necessary or appropriate in order to ensure that the Commission or Member States can decide which acquisitions of minority shareholdings to investigate?

5.16 Subject to the right to request a derogation under Article 7(3) of the EUMR, and the adaptation of the wording of Article 7(2) of the EUMR suggested at paragraph 107 of the SWD, we recognise the value to both the Commission and Member States of the introduction of a waiting period. The length of any such period, however, should be proportionate to the minimal risk of acquisitions of minority shareholdings requiring further investigation at either the EU or national level. We consider a waiting period of 15 working days ought to be sufficient to allow Member States to request a referral and we would have concerns if the period were to be longer than this.

5.17 With reference to the Commission’s proposed prescription period, the Commission should be subject to a maximum time/prescription period after which it can no longer investigate/intervene against a
completed minority shareholding transaction. This is important to ensure legal certainty for the parties.

5.18 In terms of the actual time period, it should be sufficiently long to allow the Commission time to gain knowledge of the transaction through market intelligence or third party complaints, but not so long as to compromise legal certainty.

5.19 We consider that a period of two months for the opening of the initial investigation would be appropriate. Given the prescription period only starts to run once the Commission has formally been put on notice of a proposed acquisition through the receipt of an information notice, and the Commission publishes notice of the transaction, we consider that a prescription period of two months would give interested parties ample opportunity to make submissions/complaints on the transaction to the Commission, and the Commission plenty of time to consider whether a case warrants further investigation.

5.20 We consider that the proposed prescription period of four or six months is unnecessarily long. And we do not consider the reference to the four months limitation period in the UK compelling. The analogy with the UK system is not helpful given that cases in the UK only need to be “made public” (‘so publicised as to be generally known or readily ascertainable’) for the four month limitation period to start to run (see paragraphs 4.3 and 4.44 of Mergers: Guidance on the CMA’s jurisdiction and procedure). In practice this means that the limitation period in the UK can start to run simply because the parties issue a press release that is then published on their website, or because the transaction is reported in the press, but without the UK Competition and Markets Authority having been made aware of the transaction by the parties. In contrast, the Commission’s proposed targeted transparency system procedure will ensure a far greater level of transparency – it will require parties to submit an information notice to the Commission, which the Commission will then be required to publish and forward to Member States.

(e) Staggered transactions

5.21 The Commission recognises in the Consultation (see paragraph 113 of the SWD) that a system whereby each increase in a minority stake and change in the underlying rights, or each step over the share capital thresholds, would trigger a new information notice, would result in a significant additional burden on companies. A requirement to submit an information notice only the first time a CSL is established would be preferable for companies, the Commission and NCAs.

(f) Consequences of a failure to notify

5.22 The Consultation does not touch on the consequences, in terms of sanctions on the parties and impact on the procedure, of a failure to notify the acquisition of a CSL in cases where an information notice is mandatory.

5.23 Given that, at least in the early stages of the new regime, there will be much uncertainty surrounding the Commission’s extended merger control competence, and in particular over the additional elements that could qualify a minority shareholding as a CSL, we consider that fines for failure to submit an information notice would be entirely inappropriate. Fines would also be disproportionate given the fact that such acquisitions are rarely likely to raise competition concerns. Indeed, we see a material risk that if parties are potentially exposed to the risk of fines for failing to submit an information notice, they are likely to err on the side of caution and approach the Commission for guidance on whether a notice needs to be submitted. The Commission will need to factor in the time and resource implications of dealing with such cases.

5.24 Instead we consider that the Commission should be sufficiently comfortable with the self-policing nature of the targeted transparency system. The fact that the start of the prescription period is not
triggered if an acquisition of a CSL remains unnotified introduces a significant element of legal uncertainty that should act as an effective deterrent to parties considering whether to not notify.

5.25 The Commission should also consider clarifying its approach to cases where the parties do not have sufficient access to detailed information on the target (notably its turnover) to establish whether a CSL with an EU dimension will be acquired. The information available to acquirers of minority interests is typically significantly less than that which is available when acquiring a controlling stake.

6. Substantive assessment

6.1 We consider that the substantive test of the EUMR is an appropriate test to assess whether acquisitions of minority shareholdings would lead to competitive harm, but this test needs to be clearly adapted to the lower degree of control that a CSL implies. We welcome the Commission’s recognition that, under the “SIEC” test, the theories of harm should be tailored to the specific circumstances of each minority shareholding case (paragraph 114 of the SWD). Indeed, case teams should be given clear guidance that when applying the test they must take into account the fact that the ability and incentives of a non-controlling minority shareholder to influence the competitive behaviour of the target are different to those of a controlling shareholder. This guidance should take the form of published guidelines which should be consulted upon prior to being finalised.

6.2 We also strongly urge the Commission to ensure that no element of the substantive test is incorporated into the jurisdictional threshold for determining whether a structural link falls within the scope of the EUMR (i.e. that substantive and jurisdictional tests are not conflated).
B. CASE REFERRALS

1. We generally welcome the Commission’s proposals to improve Articles 4(5), 22, 4(5) and 9 of the EUMR by streamlining the processes and reducing the administrative burden on parties, as set out in section 4 of the White Paper. We refer to our 2013 response, but set out our comments again below.

2. Pre-notification referral to the Commission: Article 4(5) of the EUMR

2.1 Regarding the suggestion on Article 4(5) referrals, eliminating the requirement to file a Form RS removes duplication and should result in a quicker process. We agree with the Commission that while there is a theoretical risk of duplication should a Member State oppose the referral after the Commission has completed a significant part of its investigation, in practice this risk is low, and is outweighed by the advantages in terms of speed.

3. Pre-notification referral to one or more Member States: Article 4(4) of the EUMR

3.1 In contrast, we agree that it would be difficult to abolish the requirement to file a separate notification to the Commission (paragraph 164 of the SWD). In an Article 4(4) situation, the Commission has jurisdiction, and therefore must take a decision to cede that jurisdiction before any Member States can take action under their national merger regimes. In order to be able to take that decision it must be notified of the reasons why the Member State(s) are better placed to review the merger.

3.2 We support the Commission’s proposal to remove any perceived element of self-incrimination in the Article 4(4) process by amending the substantive test in Article 4(4) so parties do not have to claim that the transaction may lead to a “significant effect in a market” in order for a case to qualify for a referral (paragraph 167 of the SWD).

4. Post-notification referral to the Commission: Article 22 of the EUMR

4.1 We agree that in order to remove the risk of an inefficient patchwork of competences which can currently arise in Article 22 cases the Commission should have jurisdiction over the whole EEA once it chooses to accept the referral. This will also decrease the administrative burden on parties in that they only have to deal with one authority and increase legal certainty by reducing the risk of diverging decisions.

4.2 We consider it appropriate that only competent Member States can refer cases to the Commission. The so-called “Dutch clause” has become largely irrelevant, and this modification will significantly improve legal certainty for the parties. The unpredictability associated with the ability of non-competent Member States to join a referral request is an issue which, in our experience, has been a source of concern for companies involved in merger transactions under the current regime.

4.3 At page 51 of the SWD the Commission asks: 2 a) Please comment on the suggestions regarding the information system amongst the Member States and the Commission. In particular, would such a system give sufficient information to the Member States to decide about a referral request? and 2 b) Would such a system reduce the risk of diverging decisions by the Member States?

4.4 We do not have strong views on the Commission’s proposed procedural measures to improve cooperation amongst NCAs and with the Commission in cross-border or multi-jurisdictional cases. However, we consider that the suggested mandatory early information system goes some way to mitigating the challenges (of timing and an information deficit of other Member States) identified by the Commission at section 4.2.2.3 of the SWD.
C. MISCELLANEOUS

1. Extra-EEA Joint Ventures: We strongly support the Commission’s proposal of amending Article 1 of the EUMR so that a full-function joint venture, located and operating outside the EEA and without any effects on EEA markets, falls outside the Commission’s competence

1.1 We reiterate the comments made in our 2013 response where we stated:

“As a more general point, it is well known that the EUMR can have wide extraterritorial effect in the case of joint ventures between global companies with no nexus whatsoever to the EEA. A requirement to notify in these circumstances is in contrast with the International Competition Network’s Recommended Practices for Merger Notification Procedures and is arguably out of line with the General Court’s ruling in Gencor2 that the application of the EUMR “is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community”.

This is also a very important point given that a number of other merger control regimes have introduced mandatory notification requirements based on the EU rules: notable examples are China and COMESA. Many EEA States also require joint ventures to be notified in circumstances where there is no nexus to that jurisdiction. Removing the requirement under the EUMR to notify joint ventures which have no nexus to the EEA would strengthen the Commission’s advocacy position, and make it less likely that developing merger control regimes will adopt a similar test.”

1.2 In our view, one of the easiest ways formally to remove the notification requirement for joint ventures with activities exclusively outside the EEA and not affecting competition within the EEA would be to include an additional provision to Article 1 of the EUMR providing that a concentration will not be deemed to have an EU dimension in such circumstances.

2. Exchange of confidential information between Commission and Member States: We would like to see safeguards on the exchange of information post referral

2.1 We support the refining of Articles 19(1) and (2) of the EUMR to provide for exchange of case-related information between NCAs and the Commission upon referral under Articles 22 and 9.

2.2 However the parties’ consent should be obtained and they should be given an opportunity to comment on the material to be exchanged. In addition, the information exchanged should be strictly limited to information on the particular transaction under review, rather than previous transactions or other investigations.

3. Extending the transparency system to certain types of simplified merger cases: We have concerns that information notice requirements under a transparency system could be more onerous

3.1 We welcome the Commission’s suggestion to exempt certain categories of mergers from the prior notification requirement, especially cases leading to no “reportable markets” due to the absence of any horizontal or vertical relationship between the parties.

3.2 However, we are concerned that the introduction of a replacement targeted transparency system could increase the burden on parties given the current proposals for the content of an information

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notice. To make any such exemption meaningful, any notification requirement under an alternative system should clearly be significantly less onerous than the current regime.

4. **Unwinding of concentrations with regard to minority shareholdings:** We have concerns with the proposed extent of the Commission’s powers to order divestment under Article 8(4) of the EUMR

4.1 As already noted under section A of this response, we support the Commission’s proposal to modify Article 8(4) of the EUMR to align the scope of the Commission’s power to require dissolution of partially implemented transactions incompatible with the internal market with the scope of the suspension obligation (section 5.2.4 of the SWD).

4.2 However, it is established practice that any merger control remedies should be targeted at solving the competition concerns identified. We consider that allowing the Commission to enforce full divestiture takes the Commission’s margin of discretion in constructing appropriate remedies too far. The Commission should be given the flexibility to require a divestment down to a level, short of full divestment, that alleviates the competition concerns. Any divestment order should not require divestment to a non-controlling minority shareholding level that would not give the Commission jurisdiction under any targeted transparency system.

5. **We would welcome Commission guidance on when the acquisition of control in a non-full function joint venture requires notification under the standard EUMR procedure**

5.1 There is currently a great deal of uncertainty over whether the acquisition of control over a non-full function joint venture requires notification to the Commission. The Consolidated Jurisdictional Notice is confusing and fails to tackle this point outright. Published decisions provide little guidance and are sometimes inconsistent, as indeed is the approach of case teams. We consider that the Consultation and the general review of the EUMR provides the Commission with an ideal opportunity to come to an agreed position and provide detailed published guidance.