EUROPEAN COMMISSION WHITE PAPER
"TOWARDS MORE EFFECTIVE EU MERGER CONTROL"

RESPONSE OF ASHURST LLP TO THE CONSULTATION

1. **INTRODUCTION**

1.1 Ashurst LLP welcomes the opportunity to comment on the European Commission’s White Paper "Towards more effective EU merger control", published in July 2014 ("the White Paper"), accompanied by the Commission Staff Working Document of the same date ("the Working Document"). We regularly advise clients which are parties to mergers that are subject to the EU Merger Regulation ("EUMR") or who are interested third parties in relation to such mergers. This response represents our own views and is not submitted on behalf of any other party.

1.2 In this response we comment on the following aspects of the White Paper and the Working Document:

(a) in section 2, we set out our comments on the proposals concerning the control of minority interests;

(b) in section 3, we set out our comments on the proposals concerning changes to the mechanisms for the transfer of jurisdiction from the European Commission to the merger control authority of one or more Member State (and vice versa); and

(c) in section 4, we set out our comments on the "miscellaneous" proposed amendments to the EUMR.

1.3 We confirm that nothing in this response is confidential.

2. **CONTROL OF THE ACQUISITION OF NON-CONTROLLING MINORITY SHAREHOLDINGS**

The need for jurisdiction to control the acquisition of non-controlling minority shareholdings

2.1 We are disappointed that the Commission is pursuing its proposal to extend the EUMR to catch the acquisition of non-controlling minority shareholdings. Like the many other stakeholders who commented on the Commission’s earlier public consultation "Towards more effective EU merger control" ("the Consultation Paper"), we consider that the proposed extension of the Commission’s EUMR jurisdiction to encompass non-controlling minority shareholdings is not necessary.

2.2 In particular, the Commission has failed to provide adequate evidence to justify this major expansion of its powers. The burden and expense which it will impose on businesses – even taking into account the reduced scope of the proposed “targeted transparency system” – will be out of all proportion to the scale of the perceived “enforcement gap”. We do not consider that the Commission should proceed with this reform without setting out much stronger evidence that it is needed.
2.3 We are concerned, moreover, that the White Paper does not explain how the turnover thresholds set out in Article 1 of the EUMR will apply to such transactions. By definition, many of the transactions caught by the new jurisdiction will be businesses which (even if under sole control) will have more than one shareholder which can influence its decisions. Whether or not existing controlling shareholders will be considered to be undertakings concerned will make a material difference to the number of transactions which the new jurisdiction will capture. Accordingly, we do not consider that a credible estimate of the impact of this change can be made without an explanation of how the turnover thresholds will operate. Even ignoring this point, the suggestion that a mere 20 to 30 transactions per year would be caught across 28 Member States seems far too low.

2.4 The Commission also seems to be ignoring the fact that many minority stakes are purchased in connection with an injection of capital into a small business. Depending on how the turnover thresholds operate, the fact that the target business is very small may be irrelevant to whether or not the turnover thresholds are met. We consider that there is a real risk that the White Paper’s proposals could have a serious and chilling effect on venture capital investments into small businesses, particularly in the technology sector. If investing in small EU ventures became subject to regulatory burdens and delay, investors could refocus their investments outside the EU.

2.5 The Commission has claimed that Article 101 of the Treaty on the Functioning of the European Union ("TFEU") could not deal with the cases which create problems because of the absence of an "agreement". But this ignores the fact that additional rights for minority shareholders typically flow from a shareholders’ agreement. Alternatively, the shareholder’s additional influence may flow from a significant commercial agreement (in many cases, a minority stake is taken to underline the importance of the commercial relationship between the parties). The main situation where there might not be an agreement in place would be where the target is a publicly listed company. However, in such situations there is already a control on the extent to which the minority shareholder can build its influence, since the minority stake can only be built up to a certain point (typically only 30 per cent) before corporate law will oblige the shareholder to launch a full public offer for the target. At that point, normal merger control rules will apply.

2.6 If the Commission proceeds with this reform, we consider that both the scope of the new jurisdiction and the administrative burden on business must be scaled back materially from the proposals set out in the White Paper, as explained in more detail below. In the current difficult economic climate across the EU, it is essential that these reforms do not tie up businesses with red tape and regulatory hurdles.

The "targeted transparency system"

2.7 In designing the new jurisdiction it is essential to bear in mind that anti-competitive non-controlling minority shareholdings are the exception. The Commission must therefore create an ability to act against potentially harmful transactions which does not at the same time constrain businesses' ability to make legitimate investments. We consider that flexibility is key, so that businesses which need legal certainty about the validity of their transaction can obtain it, but equally businesses which cannot (or do not feel the need to) wait for the regulatory process to run its course can proceed.

2.8 Of the three procedural options proposed in the Consultation Paper, we supported the voluntary system. The White Paper has instead elected for a "targeted transparency system". We consider that a targeted system, such that the jurisdiction of the Commission only extends to cases where there could potentially be a competition concern, is an important limitation and carves out clearly innocuous transactions from the new jurisdiction. However, we consider that the jurisdictional parameters proposed in the White Paper remain too wide. Our detailed comments on the concept of a "competitively significant link" are set out below in paragraphs 2.11 to 2.27.
As regards the choice of a transparency system over a voluntary system, we are concerned that the Commission has prioritised transparency and its own convenience over minimising the burden on businesses, whilst failing to provide adequate legal certainty as regards outcomes. Given that the Commission is effectively imposing a notification obligation, there is no justification for putting parties in a situation where they have no legal certainty for the duration of the waiting period and the prescription period. Our detailed comments on the proposed procedures are set out below in paragraphs 2.28 to 2.51.

Finally, our comments on the White Paper’s proposals as regards the relationship of the new jurisdiction with Article 101 is set out in paragraphs 2.52 to 2.54.

The concept of a "competitively significant link"

In order to fall within the Commission’s jurisdiction, it is proposed that a transaction involving the acquisition of a non-controlling minority stake must meet the turnover thresholds set out in Article 1 of the EUMR, and additionally must constitute a "competitively significant link". The White Paper proposes the following definition of this concept:

(a) the transaction concerns the acquisition of a minority shareholding in a competitor or a vertically linked business; and

(b) either:

(i) the shareholding is above a certain percentage threshold (20 per cent is proposed, or a level no higher than 25 per cent); or

(ii) where the shareholding is between 5 and 20 per cent, it also carries rights which make the shareholding competitively significant, such as the right to nominate a member of the board of directors, to exert influence, or to obtain access to the target’s competitively sensitive information, or where the shareholding amounts to a de facto blocking minority (where voting patterns mean that special resolutions of the company can be blocked).

Transactions concerning shareholdings of less than 5 per cent would not be caught.

Our comments on the various elements of this approach are set out below.

The mechanics of the new jurisdiction

We consider that it is essential that the mechanics of the new jurisdiction are clear. This is important in particular to ensure clarity as regards the boundary between the Commission’s EUMR jurisdiction and the jurisdiction of the Member States under their domestic merger control legislation (and in light of the possibility of fines for failure to notify). This issue is touched upon in paragraphs 70 and 71 of the Working Document, but requires further clarification.

The Commission would only have jurisdiction to review the minority shareholding acquisition where:

(a) the undertakings concerned meet the turnover thresholds under Article 1 of the EUMR; and

(b) the transaction falls within the concept of "a competitively significant link".

The corollary of this analysis is that if either one of those elements is absent, Member States retain jurisdiction to apply domestic merger control. We raise this point because paragraph 71 of the Working Document suggests that Member States lose jurisdiction
wherever the Article 1 turnover thresholds are met. We consider that this is incorrect: the "one stop shop" principle should only apply where the Article 1 thresholds are met and the transaction creates a competitively significant link.

2.16 This point is also relevant to the issue of legislative implementation of the reforms considered in the White Paper (raised in paragraphs 95 to 97 of the Working Document). Given that the concept of "non-controlling shareholding conferring a competitively significant link" is one of two cumulative jurisdictional requirements, we consider that it should be written into Article 3 of the EUMR. We do not think it would be appropriate to simply insert a lower boundary jurisdictional threshold in the EUMR and leave all the detail to be dealt with by the Commission in delegated legislation (and certainly not through guidance).

Application of the Article 1 turnover thresholds

2.17 The acquisition of a minority shareholding will, in the vast majority of cases, occur in relation to a business which has one or more continuing shareholders which hold legal control or decisive influence. In the corresponding situation where a new shareholder takes control, the Consolidated Jurisdictional Notice\(^1\) states that "the undertakings concerned are the shareholders (both existing and new) who exercise joint control and the joint venture itself" (paragraph 143). As noted above, we consider that much more explanation is needed as to how the turnover thresholds would be applied to the acquisition of a non-controlling minority shareholding, in particular as to which businesses would be the undertakings concerned.

2.18 We consider that pre-existing controlling shareholders should not be taken into account for the Article 1 thresholds for two reasons:

(a) first, treating existing, continuing controlling shareholders as undertakings concerned would greatly increase the number of non-controlling minority shareholding transactions which meet the turnover thresholds; and

(b) if, contrary to our views (see paragraphs 2.31 to 2.34 below), the Commission retains the White Paper's proposal of requiring market share information and internal documents to be provided in completing the information notice, the purchaser of a minority shareholding in a listed public company is unlikely to receive co-operation from the existing shareholders to obtain the required data and information.

Pre-existing minority shareholdings

2.19 Paragraph 79 of the Working Document suggests that jurisdiction over a new acquisition of a non-controlling minority stake should also be able to consider the impact of a pre-existing shareholding owned by the same entity/corporate group. We acknowledge that this is appropriate. We note that in many cases where the earlier acquisition was part of a stake building strategy, the provisions of Article 5(2) should apply to give the Commission clear jurisdiction over the earlier stake. We do not however consider that the Commission should also be empowered to impose remedies encompassing the whole of the shareholding of the acquirer in the target (see further paragraph 4.8).

The requirement that the target is a competitor or active in a vertically linked market

2.20 As regards the requirement that the target is a competitor of the acquiring business, or is active in a vertically related market, we recognise that this may be an appropriate starting

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point for restricting the new jurisdiction to those minority acquisitions which could potentially give rise to competition concerns. However, we have some concerns that this approach may give rise to difficulties in practice. The White Paper comments that a "detailed antitrust analysis of the relevant markets" would not be required and that instead the assessment would consider whether the companies are active in the same sector and in the same geographic area. Whilst at first sight, this looser approach might appear to have some merit, we are not convinced that it is preferable in practice. "Sector" is a very broad term which could be very widely interpreted and could result in "links" being found between businesses where there is in fact no competitive relationship. For example, the "media sector", the "retail sector", "the energy sector" etc. each cover a huge number of properly defined markets. The concepts of "horizontal" and "vertical" links would be significantly distorted by such an approach. We consider that, in the interests of legal certainty it would be preferable to use the normal approach of identifying horizontal and vertical links by reference to relevant product/service and geographic markets, following existing precedent and practice as regards market definition.

2.21 We note that footnote 67 to the Working Document states that this test would also catch a transaction where the acquiring business is not itself a competitor of the target business but has a pre-existing minority stake in another business which is a competitor of the target. The Working Document notes that the most likely theory of harm concerns the risk of access by the parent to confidential information of the two investee businesses. We do not consider that extending the Commission's jurisdiction to "portfolios" of non-controlling minority investments in competing businesses is appropriate or necessary:

(a) first, as the Working Document itself implies (footnote 67), this raises difficulties as regards both the calculation of turnover and the definition of an undertaking;

(b) secondly, any concerns arising out of the flow of information between the two investee companies via a mutual shareholder can be addressed under Article 101 TFEU (and we note that precedents exist, certainly at Member State level, for the application of Article 101 (or mirror Member State provisions) to analogous "hub and spoke" or "triangular" arrangements).

The proposed threshold of 20 per cent for a presumption that the competitive link is "significant"

2.22 The White Paper proposes providing for, effectively, a presumption that shareholdings of over 20 per cent in a competitor or a business active in a vertically linked market are "significant". We consider that this threshold is too low.

2.23 The creation of a presumption should be based on clear and unequivocal reasoning. We consider that this threshold should be set at the level at which a special resolution of the target business can be blocked. A minority shareholding at that level may have a "significant" impact on the target business. However, due to differences in the corporate laws of the Member States, a specific percentage value cannot be given – as the Working Document itself notes (in footnote 69) the level of shareholding required to block a special resolution varies from 25 per cent in Belgium, Germany and the UK to 33.3 per cent in France and Italy. We therefore consider that the threshold should be set as "a de jure blocking minority". This definition allows for the variation between Member States' legislation while remaining clear and easily applicable, being driven by the corporate law applicable to the target business. We note also that this would correspond to the level at which the presumption of material influence is set in the UK, namely 25 per cent.

The lower limit for jurisdiction of 5 per cent

2.24 We consider that the proposed lower limit of 5 per cent, plus additional rights, is too low. The situations where a shareholding of 5 per cent might give rise to a competition concern are extremely rare. The overwhelming majority of such acquisitions will be purely for
reasons of financial investment. Indeed, in the UK, the failed acquirer in a prohibited
transaction is regularly permitted to retain a shareholding of 5 per cent (or even 7.5 per
cent in BSkyB/ITV) because it is acknowledged to be innocuous and purely for financial
investment purposes. This does not mean that there is a risk at 6 per cent or even at 10
per cent: the UK Competition and Markets Authority's guidelines indicate that it does not
expect to find material influence at shareholding levels below 15 per cent.

2.25 Accordingly we consider that the lower threshold for EUMR jurisdiction over a non-
controlling minority shareholding should be 15 per cent, plus additional rights. A lower
threshold would create a disproportionate burden on business given the very small degree
of risk of competition concerns. We acknowledge that this lower threshold would not
apply where decisive influence is acquired, for example, through the exercise of strategic
veto rights.

The concept of additional rights

2.26 As regards the jurisdictional concept of "additional rights" which could make a small
shareholding competitively significant, we note that:

(a) the analysis of "material influence" in the UK can be complex and often requires
detailed factual investigation of a wide range of factors and issues. It is often
finely balanced. Similarly in Germany, identifying whether "plus factors" exist
which could render a low shareholding competitively significant requires a complex
and detailed analysis;

(b) in a publicly listed company, it can be much more difficult to predict what level of
shareholding will confer, for example, the ability to appoint a director because this
will depend on the behaviour of the other shareholders. Moreover, it would be
unacceptable for EUMR jurisdiction to depend on the actions of others (for
example, if a minority shareholder suddenly found that EUMR jurisdiction was
triggered when it was able to appoint a representative to the target's board
because of how events unfolded at a subsequent shareholders' meeting); and

(c) we assume that there would be sanctions of some form (see paragraphs 2.50 to
2.51 below) for a failure to submit an information notice. It would be unacceptable
for a business to be penalised for failure to notify, for example, if it reached a
genuinely held view that it did not have any additional rights which would elevate a
15 per cent shareholding into a competitively significant link, but the Commission
disagreed.

2.27 Accordingly, we would urge the Commission to issue detailed guidance on the analysis of
additional rights. It is important that the jurisdictional thresholds are as clear and well
understood as possible.

The details of the proposed procedure for a targeted transparency system

2.28 The White Paper proposes a procedure involving:

(a) self-assessment of the existence of a competitively significant link;

(b) compulsory submission of an information notice for all acquisitions of a minority
shareholding which qualify as a competitively significant link;

(c) a waiting period of perhaps 15 working days, with mandatory suspension of the
transaction;

(d) option to complete a full Form CO from the outset to secure legal certainty;
(e) if the Commission does not initiate proceedings during the waiting period, transaction can complete;

(f) the Commission retains jurisdiction to initiate ex post proceedings for perhaps a 4 to 6 month period after receipt of the information notice (the "prescription period"); and

(g) where ex post proceedings are initiated, the Commission can impose interim hold separate measures to freeze integration, including appointment of a hold separate manager.

2.29 We consider that the proposed procedure is tipped too far towards the convenience of the Commission and the interests of complainants, and creates an unnecessary burden on businesses. In particular, the principles of good administration mean that, if the Commission is to create a notification obligation, then it must act promptly on the information which it receives. Moreover, minority shareholdings typically do not result in any integration between businesses. The risk that the actions of the shareholder and target might make it difficult to implement effective remedies is accordingly extremely low. This is a key difference from the acquisition of control and means that there is no justification for imposing a suspensory period. In light of these points, the new procedure should combine a notification obligation with flexibility for the parties. Moreover, the Commission cannot give itself (and complainants) a long period for reflection such that minority shareholders have to wait for longer to gain legal certainty than parties taking full control.

2.30 We consider that a more appropriate procedure would be as follows:

(a) the parties should self-assess whether the Commission's jurisdiction over a minority shareholding has been triggered;

(b) the parties then choose whether to submit an information notice or a full Form CO;

(c) if the parties have voluntarily submitted a Form CO, the Commission must launch a Phase 1 investigation and take a formal decision on the transaction;

(d) if the parties have submitted an information notice, the Commission should have a period of 25 working days during which to decide whether to require a full notification and commence a Phase 1 investigation;

(e) during this time, there is no suspensory obligation: the parties have the option whether to wait until the end of the 25 working day period or to inform the Commission that they are proceeding with the transaction; and

(f) at the end of the 25 working day period, if the Commission has not required the submission of a full notification, it loses jurisdiction to act and the transaction can proceed with legal certainty.

These proposals are developed further below.

**Submission of an information notice**

2.31 We would urge the Commission to confirm that there will be no "best practice" expectation of pre-notification discussions in relation to an information notice (although parties could consult with the case team if they wished). Indeed, we consider that the information notice requirements should be designed to ensure that they are sufficiently clear and straightforward, so that pre-notification discussions are not required to verify that the requirements have been satisfied. We consider that this is a key point, given the delay and expense which pre-notification discussions can generate (both of which are
largely outside the parties' control as the duration of the discussions are driven by the EUMR case team).

2.32 As regards the proposal that the parties submit an information notice, we consider that the contents of the notice should be simple to understand, straightforward to gather and should certainly be less detailed than the information that is required to complete a Short Form CO. In particular, it should not require any customer or competitor contact details. Nor should any detailed market share or market definition information be required; details of the parties, the activities/industries in which they are active (identified by reference to NACE codes) and the level of shareholding to be acquired should be sufficient.

2.33 We consider that the parties should always have the option of submitting a full Form CO to launch a full Phase 1 investigation from the outset and we welcome the indication in paragraph 84 of the Working Document that this will be the case.

2.34 We consider that the Commission's consideration of an information notice should respect the right of the parties to respond to any adverse points made against them, whether they come from third parties or from the case team's own analysis. In particular, the Commission should not require the submission of a full Form CO and launch Phase 1 proceedings without first telling the parties the reasons why the Commission considers this to be necessary and giving the parties an opportunity to reply.

The waiting period and prescription period

2.35 As noted above, we consider that the combination of a transparency system with the ongoing jurisdiction of the Commission to launch an ex post investigation is unfair and prioritises the convenience of the Commission and the interests of third parties over the interests of the parties to an unacceptable degree.

2.36 We do not accept that it is necessary to have a waiting period plus a prescription period.

2.37 If the Commission has information explaining the nature of the transaction and the links between the parties, then the principles of good administration require that it should proceed promptly in deciding whether there is a prima facie risk that the transaction could result in a significant impediment to effective competition such that Phase 1 should be launched. This is not a high threshold of proof for the Commission to meet and it is unclear why the Commission would need longer to decide whether to require a full Form CO notification than it would have for the Phase 1 investigation itself, much less why it should need as long as four or even six months. It seems wholly inappropriate to put a party acquiring a non-controlling minority shareholding in a much worse position than a party acquiring full control.

2.38 We note from paragraph 109 of the Working Document that the Commission has clearly been inspired by the UK system in designing the prescription period. However the balance of burdens and benefits under that regime is completely different – in particular, there is no obligation to submit an information notice or publicise the transaction in the market. As such, a merger may only come to light when customers experience the impact of the transaction and decide to complain. In this situation where intelligence about the merger may only come from third parties, the justification for a prescription period to enable ex post investigation is clear.

2.39 Accordingly, we consider that in place of the waiting period and the prescription period, the Commission should have a single review period of 25 working days from the submission of the information notice within which to decide whether to require a full Form CO notification. At the end of this period, if the Commission has taken no action, the parties should have legal certainty about the validity of the minority stake acquisition.
2.40 We consider that a 25 working day period should also be more than sufficient for any third parties to express their views about the proposed transaction to the Commission.

2.41 If the Commission decides to require a full notification on Form CO, we consider that the parties should be given a reasoned decision to that effect and the parties should be given an opportunity to answer the Commission’s concerns before Phase 1 proceedings are launched.

**Imposition of a suspensory period**

2.42 The usual justification for a suspensory period while a merger control review takes place is to ensure that competition is not distorted through business integration during the review period and that the competition authorities can impose effective remedies to remove any competition concerns which are identified. A standstill prevents the parties from divesting duplicated assets, implementing redundancy programmes for surplus staff, renegotiating contracts with common customers or suppliers of the merging businesses and so on. Such integration steps could make it difficult to reinstate the status quo ante in the event that the merger is found to be anti-competitive and is prohibited. However, these integration/remedy risks are not present in relation to the acquisition of a non-controlling minority interest. Consequently, we do not consider that there is a need for a mandatory suspension to apply during the Commission's review period. We would note, moreover, that it would be very difficult in some situations to negotiate a conditional acquisition of a non-controlling minority stake and some investors would simply walk away.

2.43 We consider that it would be an appropriate business-friendly approach, whilst in fact conceding very little from the Commission's perspective, to allow parties to proceed with a minority stake acquisition without waiting for the Commission to reach a conclusion. We note that the Italian merger control regime gives parties a similar degree of flexibility and we consider that it would be entirely appropriate in the present situation. It would also help to ensure that the new EUMR jurisdiction operates in a manner which is much more proportionate to the very limited competition risks created by this category of acquisition. We accept that, in the interests of transparency, the parties should notify the Commission if this is their intention. We believe that businesses are extremely concerned about the proposal that the acquisition of a non-controlling minority shareholding should be subject to a standstill period of any duration.

2.44 On the other hand, where the parties require legal certainty, they could elect to wait and observe a voluntary suspensory period until the end of the 25 working day review period.

2.45 We note the suggestion in paragraph 52 of the White Paper and paragraph 110 of the Working Document that the Commission would have power to impose "hold separate" undertakings and a hold separate manager in the event that a Phase 1 investigation is launched after completion of the transaction. We anticipate that the same power might be sought by the Commission in the event that it were to adopt our proposal of a non-suspensory review period. In either case, we would note that the appointment of a hold separate manager is extremely expensive and burdensome for the parties. In minority shareholding situations, it should not be done as a matter of course but only where – exceptionally – it can be shown to be necessary in the context of the case (taking into account that any integration/remedies risk is minimal).

2.46 If the Commission insists on imposing a suspensory period, we consider it essential, as indicated in paragraph 106 of the Working Document, that the parties could request a derogation to the waiting period under Article 7(3) of the EUMR. However, we consider that the threshold for granting a derogation in the context of the acquisition of a non-controlling minority interest should be low, given the negligible integration/remedy risk.
**Staggered transactions**

2.47 The Working Document proposes two options for dealing with staggered transactions:

(a) first, an information notice would be required when the first competitively significant non-controlling minority shareholding is acquired, but not for the acquisition of any subsequent minority shareholdings. Further notification would not be required until any acquisition of control occurs; and

(b) alternatively, an information notice would be required for each increase in a competitively significant non-controlling minority shareholding, or a notification for the acquisition of a sub-20 per cent shareholding and then another when the shareholding increases above the 20 per cent threshold.

2.48 We consider strongly that the first option is the only appropriate one (and welcome the indication that this would be the Commission's preference). We would draw the analogy with current practice, whereby not every change in the parents' shareholding levels in a joint venture is notifiable under the EUMR, only changes which alter the quality of control. Similarly in the UK, where there are three levels of control (material influence (a non-controlling minority stake), de facto control and de jure control), notification is only required where the shareholder's new acquisition changes the level of control which it enjoys.

2.49 We agree entirely with the comments in paragraph 113 of the Working Document that the second option above would involve a significant additional administrative burden on businesses despite the creation of minimal new competition risk. Given the very low degree of competition risk which the new jurisdiction is seeking to address, the situations where a slightly increased minority stake could materially change the competitive analysis would be very limited.

**Sanctions**

2.50 We note that there is no discussion of whether there would be any sanctions for failure to submit an information notice and/or to observe the waiting period. We would urge the Commission to address this issue as it is a key element in understanding the proposed new procedures.

2.51 As noted above, we do not consider that any suspensory period should be imposed for the acquisition of a non-controlling minority shareholding. There should therefore be no sanctions for proceeding with the transaction. In any event, any sanctions for failure to notify should also reflect the fact that there is very limited integration risk which would jeopardise the effectiveness of any ex post remedies. Accordingly, we consider that any financial penalties for a failure to notify should be much lower than for a failure to notify an acquisition of control.

**Scope of the assessment under the EUMR and relationship with Article 101 TFEU**

**The substantive test for assessment**

2.52 We agree that the standard SIEC test should be applied to the acquisition of a competitively significant non-controlling minority shareholding.

**Relationship between Article 101 and the EUMR assessment**

2.53 We agree with the proposal that the usual ancillary restraints analysis should apply. We also consider that the usual approach should apply such that wider agreements between the parties containing restrictions which are not ancillary to the minority shareholding acquisition remain subject to analysis under Article 101 in the normal way. Such
agreements and their provisions may also be relevant to the merger assessment to the extent that they have an impact on market conditions.

**Joint ventures**

2.54 We acknowledge that in some cases, the acquisition of a non-controlling minority shareholding will arise in the context of the formation, or wider changes in the control structure, of a joint venture. We note the proposal in the Working Document that where a minority stake is acquired at the same time as one or more controlling stakes by other shareholders, the minority shareholder should join the Form CO notification so that the whole transaction is not artificially carved up. Although we note that this would effectively make it compulsory in such situations for the minority shareholder to make a full notification, we recognise that it is desirable that a single transaction is reviewed as such.

3. **CASE REFERRALS**

**Article 4(5) EUMR: pre-notification referral from Member States to the Commission at the request of notifying parties**

3.1 We welcome the proposal to abolish the current two-step procedure under Article 4(5) EUMR (reasoned submission using Form RS followed by notification using Form CO). As noted in our response to the Consultation Paper, a system of direct notification to the Commission would eliminate the cumbersome process of completing a Form RS and the consultation procedure, reducing duplication and saving both time and cost for the parties.

3.2 However, we remain concerned about the scenario where one Member State opposes a referral, leading to the Commission renouncing jurisdiction entirely, after a company has gone through all the efforts of the pre-notification phase and a Form CO filing. Although the risk of a referral rejection by national authorities is likely to be extremely rare in view of the statistics highlighted in the White Paper, the potential costs in terms of both time and money cannot be ignored by the companies involved.

3.3 As set out in our response to the Consultation Paper, we believe that in principle a case notified to the Commission should remain with it, and Member State confirmation that they will not oppose this should be obtained prior to the formal filing of the Form CO, during the pre-notification process. Provided sufficient measures are put in place to ensure early exchange of information between the Commission and national authorities, it should not be necessary for the parties to go through the entire notification process and then wait a further 15 working days for confirmation that the Commission has jurisdiction to examine the transaction. Care would however need to be taken to ensure potential confidentiality concerns are addressed, particularly in relation to public bids and other transactions involving publicly listed companies.

3.4 With regard to exchange of information between the Commission and national authorities in this context, we broadly welcome the proposals set out in paragraph 68 of the White Paper and paragraphs 140-141 of the Working Document. We recognise that, in principle, it would be helpful for the Commission to send the parties’ initial briefing paper or the case allocation request to the Member States to alert them to the transaction during the pre-notification contacts. If Member States were able to exercise their veto early on in the process, this could not only reduce the time and resources spent by the Commission on a case which might ultimately be reviewed by a Member State (as suggested in the Working Document), but also reduce the time and resources spent by the parties in preparing the Form CO.

3.5 However, we note that it is unclear from the White Paper and the Working Document whether the Commission’s proposals would mean that confidential information about a transaction could be disclosed to national authorities without the parties’ consent during
the pre-notification stage. We have some concerns in this regard, particularly in relation to transactions involving publicly listed companies, where any leaks could have a significant impact on share price. Accordingly we believe that parties' consent should be required before any confidential information is disclosed to national authorities, bearing in mind that it will be in the interests of the parties to consent if this will result in quick and efficient consideration of the transaction by national authorities.

**Article 22 EUMR: post-notification referral to the Commission at the request of Member States**

3.6 We are broadly supportive of the Commission's proposed changes to Article 22. In particular we agree that:

(a) Member States should only be able to request a referral to the Commission pursuant to Article 22 when they have jurisdiction to review the transaction (save where the relevant Member State does not have a national system of merger control); and

(b) once a transaction is referred to the Commission and the Commission has accepted the referral, the Commission should have jurisdiction for the whole of the EEA.

3.7 Notwithstanding our broad support for the proposed changes to Article 22, we have a number of concerns about the process the Commission proposes to adopt, as explained below.

3.8 The Commission suggests that national competition authorities should circulate to the Commission (for onward transmission to other Member States) early information notices for multi-jurisdictional or cross-border cases as soon as possible after the national competition authority receives the notification or otherwise learns of the transaction and that the early information notice should indicate whether the national authority is considering making a referral request. The purpose of this requirement is to enable a more coordinated approach to referrals and to avoid a situation whereby a competent Member State clears a transaction before another competent Member State has the opportunity to consider whether the transaction should be referred to the Commission. There are a number of potential issues with the Commission's suggested approach:

(a) first, the Commission states that the early information notice should be circulated by Member States and forwarded by the Commission "as soon as possible" (White Paper, paragraph 70). In the interests of certainty and efficiency, we would urge the Commission to commit to circulating any early information notice within 3 working days of receipt (i.e. consistent with the Article 19 timetable for the Commission when liaising with Member States);

(b) secondly, the information notice (prepared by the national competition authority) should only contain confidential information relating to the notifying parties where those notifying parties have consented to the disclosure of that information;

(c) thirdly, it is not clear what the timetable for requesting a referral would be in circumstances where the Member State circulating the early information notice does not request that the transaction should be referred to the Commission (for example, where the transaction is of cross-border interest but the Member State considers that it is appropriate for it to be reviewed under its national merger control regime). The drafting of Article 22 should make it clear that, in these circumstances, other competent Member States should only be able to request a referral (or veto a subsequent referral request) within 15 working days from the date on which the Commission circulates the original early information notice. Without such a clarification, it might be possible for a second Member State to issue its own duplicate early information notice at a later date and trigger a new 15
working day period during which a referral to the Commission could be made. This would complicate the referral system and create significant uncertainty for merging parties and Member States;

(d) finally, the proposed 10 working day period for the Commission to consider a referral request pursuant to Article 22(5) is too long in circumstances where the Commission has invited the referral request from the Member State. In such circumstances the Commission should be able to consider and determine whether to accept or reject the referral request within a considerably shorter period (we would propose 5 working days).

Article 4(4) EUMR: pre-notification referral to one or more Member States at the request of notifying parties

3.9 We support the proposal to amend the test for a referral under Article 4(4) EUMR to require the parties to show only that the transaction is likely to "primarily impact a distinct market" in the Member State concerned, rather than requiring parties to concede that the transaction may lead to a "significant effect in a market". We welcome the removal of the element of self-incrimination which is arguably present in the current formulation.

3.10 We agree that abolishing Form RS in the context of Article 4(4) referral requests is not appropriate, as this is the only basis for the Commission and other Member States to assess whether potential competition issues exist which should be addressed at the EU level.

Article 9 EUMR: post-notification referral to one or more Member States by the Commission

3.11 The proposals relating to the reform of the procedure for referral to one of more Member States under Article 9 EUMR are not included in the Commission's White Paper, but are instead only set out in paragraphs 169-174 of the accompanying Working Document. It is unclear why these proposals are not included in section 4 of the White Paper, but assuming that the Commission does indeed propose to introduce these amendments, we have significant concerns about the proposed approach.

3.12 As summarised in paragraph 173 of the Working Document, the Commission currently has 65 working days from the date of notification to make a referral to one or more Member States under Article 9 EUMR or adopt a statement of objections. Paragraph 174 of the Working Document states that the Commission "suggests tolling the 65 working days deadline from the start of Phase II proceedings", allegedly "to ensure a proper functioning of the deadlines". It is not entirely clear what is meant by the use of the word "tolling" in this context, but it appears that the Commission is suggesting that where Phase II proceedings are initiated, the current 65 working day deadline should start to run from that date, rather than from the date of notification. If this interpretation of the Working Document is correct, the Commission's proposed reforms would mean that merging companies would face the potential scenario of engaging with the Commission for up to 100 working days (in addition to lengthy pre-notification discussions), before a decision is reached that the transaction is to be referred to one or more Member States and the notification and review process starts afresh. The wasted time, resources and costs which would result from this proposed approach would be even more significant than under the current procedure, for no real benefit.

3.13 It is unclear to us what logic underlies the Commission's proposal. The Staff Working Document argues that extending the assessment period to 65 days from the start of Phase II proceedings will "ensure that [the Commission's] investigation is well advanced at the time when it has to decide on a referral", but there is no evidence that the current
65 day period does not already ensure this. There has been only one case to date where the Commission has made an Article 9 referral after initiation of Phase 2 proceedings.²

Furthermore, the other alleged benefit of extending the assessment period claimed in the Staff Working Document – that this would bring the deadline "in line with the deadline for remedies in Phase 2" – is not a relevant consideration. The assessment of whether the Article 9 criteria are met is wholly separate from the question of Phase 2 remedies. In addition, extending the assessment period as suggested in the White Paper could result in merging parties being placed under increased pressure to submit remedies (even in cases where it is not clear that the transaction would be incompatible with the common market in the absence of remedies) due to the threat of an Article 9 referral.

4. MISCELLANEOUS

4.1 As an overarching comment on this section, we observe that there are considerably more topics discussed in the Working Document than are mentioned in the White Paper. Where the Working Document contains considerably more discussion of an issue than the White Paper – and in particular where it discusses issues not actually mentioned in the White Paper – this creates uncertainty as to what is being proposed or presented for comment.

Further streamlining and simplification of EUMR procedures

Extra-EEA joint ventures

4.2 We welcome the proposal to amend the EUMR so that the creation of a full-function joint venture located and operating totally outside the EEA, and which would not have any impact on markets within the EEA, would fall outside the scope of the EUMR (as suggested in our response to the Consultation Paper), thereby removing the current "rubber stamping" notification obligation in such circumstances. Even with the reduced burden of the Short Form CO and simplified procedure, the time and cost required for notification is disproportionate given the absence of any substantive nexus of the transaction with the EU. The proposed amendment would therefore be a very positive change.

4.3 We consider that the same approach should also be applied in the case of the acquisition of joint control over a pre-existing entity whose product(s) or service(s) are not (and will not) be sold in the EEA for the foreseeable future.

Exchange of confidential information between Commission and Member States

4.4 We support the proposals to amend Article 19 EUMR to ensure that when Member States refer cases to the Commission and vice versa, under Article 22 and Article 9 EUMR respectively, the authority that continues the investigation can use the information already obtained by the authority that referred the case, including information obtained at the pre-notification stage.

Extension of the transparency system to certain types of simplified merger cases

4.5 We broadly welcome the proposal to exempt certain categories of mergers from the prior notification requirement, including cases leading to no "reportable markets" due to the absence of any horizontal or vertical relationship between the parties. However, neither the White Paper nor the accompanying Staff Working Document includes any real detail about these proposals, noting only that the exemption's scope could be defined in the Implementing Regulation. We consider that further consultation should be undertaken in this regard once the Commission's detailed proposals have been developed.

² Case COMP/M.1628, TotalFina/ElfAcquitaine, partially referred on 26 November 1999 following initiation of proceedings under Article 6(1)(c) EUMR.
Other issues

**Notification of share transactions outside the stock market**

4.6 The Working Document proposes that Article 4(1) should be amended to provide more flexibility for notifying mergers that are executed through share acquisitions on a stock exchange without a public takeover bid, by adapting the criterion of "good faith intention" in order to allow the parties to notify before the level of shareholding required to exercise (de facto) control is acquired. We agree that this would be a sensible reform.

**Time limits**

4.7 We are surprised that the proposal to increase the possible extension of Phase 2 deadlines by a further (proposed) 10 working days is hidden in the miscellaneous section of the Working Document and not mentioned at all in the White Paper. We consider that the EUMR already provides sufficient time for a full investigation of all issues and that no further extensions of time should be permitted.

**Unwinding of concentrations with regard to minority shareholdings**

4.8 Again, we are surprised to find a significant amendment to the powers of the Commission tucked away at the back of the Working Document. If the Commission is to gain jurisdiction to review the acquisition of minority shareholdings, as the White Paper proposes, then we do not consider that any reform to Article 8(4) of the EUMR is needed.

**Staggered transactions under Article 5(2)(2) EUMR**

4.9 It is not clear what reform is being suggested in this section of the Working Document. We do not consider that it is inappropriate for the Commission to review a transaction which has already been reviewed at Member State level, but where the EUMR thresholds are subsequently triggered by an increased shareholding or other change.

"Parking" transactions

4.10 We note that the European Court of Justice has not ruled on the validity of "parking" or "warehousing" structures. The General Court has made apparently favourable comments as regards the warehousing structure used in the Lagardère/Vivendi case (see Case T-279/04, Éditions Odile Jacob v Commission [2010] ECR II 185), albeit that the European Court of Justice has emphasised that those comments were "made for the sake of completeness" and do not form part of the reasoning of the judgment (in English law terminology, the comments were obiter dicta) (see Case C-551/10P, Editions Odile Jacob v Commission (judgment of 6 November 2012, not yet reported) at para 40). This is accordingly an area where the analysis is finely balanced. The interests of business are certainly to leave open the possibility of parking or warehousing in situations where it can be achieved in conformity with the EUMR framework. The objective in such situations is not to avoid EUMR notification but to delay it, because the commercial imperatives of the situation cannot accommodate a conditional transaction or a month's delay. Since the issue here is flexibility for business, and not avoidance, we consider that it would not be appropriate to impose the Commission's own interpretation. At such time as this issue falls to be ruled on by the Court, it will become clear whether any change to the text of the EUMR is needed.

**Effective sanctions against the use of confidential information obtained during merger proceedings**

4.11 This section of the Working Document suggests introducing new sanctions for the use of confidential information belonging to another party which has been obtained through merger proceedings. Again, we are surprised that such a significant amendment is hidden
at the back of the Working Document and not mentioned in the White Paper. More information and detail is needed in order for a proper consultation to be possible.

Commission’s power to revoke decisions in case of referral based on incorrect or misleading information

4.12 The Commission wishes to introduce power to revoke an Article 4(4) referral which was based on deceit or false information for which one of the parties is responsible. This appears broadly sensible but cannot be commented on properly without a much fuller description of what is intended.