RESPONSE TO THE EUROPEAN COMMISSION'S CONSULTATION ON THE WHITE PAPER AND STAFF WORKING DOCUMENT ON "TOWARDS MORE EFFECTIVE EU MERGER CONTROL"

1. General Remarks

1.1 Baker & McKenzie is grateful for the opportunity to comment on the European Commission's second public consultation in relation to its proposals aimed "Towards more effective EU merger control". We refer to, and reiterate, our initial comments (see http://ec.europa.eu/competition/consultations/2013_merger_control/baker_mckenzie_en.pdf) but seek not to repeat them in detail herein.

1.2 Nevertheless, we consider it is important to restate that we consider that wholesale legislative reform of the EU Merger Regulation to address non-controlling minority shareholdings - even with the proposed "targeted transparency system" would still result in a highly disproportionate burden on European and international companies doing business in Europe, particularly during the current climate in which global M&A appears to be re-emergent.

1.3 The "targeted transparency system" proposal outlined by the public consultation invariably results in an increase in regulation (even if it is primarily self-regulation in the first instance) and potential legal uncertainty for businesses in the complex web of deal-making. Whilst it may be attractive to be able seek a European Commission view on such shareholdings in specific cases, there is a material risk that the European Commission's estimate that "roughly 20-30 minority shareholding cases per year will meet the...criteria of the targeted transparency system as well as the turnover thresholds of the Merger Regulation" is very conservative.

1.4 This is particularly so given the European Commission's intention - buried deep in a footnote in the Staff Working Document - that "this approach [to non-controlling minority shareholdings] would also capture an acquisition of a minority shareholding by one company which itself does not compete with the target, but which already holds a minority stake (or more) in one or more other firm(s) competing with the target". Therefore, the proposals would extend not only to acquisitions of minority shareholdings that create a "competitively significant link" between the acquirer and the target company, but acquisitions creating a link between two or more minority shareholding interests.

1.5 Such a proposal would appear to move away from the stated intention in Recital 6 of the EU Merger Regulation "to permit effective control of all concentrations in terms of their effect on the structure of competition..." (emphasis added). In addition, there does not appear to be any foundation for regulating two non-controlling minority shareholdings in the economic literature.

1.6 This raises not only the practical difficulties and legal uncertainties in the self-assessment regime generally, but is also likely to disproportionately impact any trade or financial buyer that has a dedicated capital arm with an active and acquisitive portfolio of interests (and whose activities cannot be slotted underneath the banking clause). Our view is that the proposal should be limited to only those acquisitions of minority shareholdings that create a "competitively significant link" between the direct acquirer's controlled activities and the target company's activities.
Accordingly, we consider that the proposals are likely to have wide-reaching commercial and economic effects that are likely to impact on the health of the European economy and its route back to recovery. We restate our position that the proposed reforms in respect of non-controlling minority shareholdings should be dropped in their entirety.

Nevertheless, we agree with the European Commission that if change to the EU Merger Regulation is made, the "targeted transparency system" would be a less egregious form of legislative reform than the notification system. It goes without saying that a self-assessment system still incurs costs and resources, even if it is less burdensome than the other proposals.

Finally, we generally welcome the European Commission's reforms set out in the public consultation on the referral system and other miscellaneous items. We support the proposal to allow direct notification to the European Commission without using the Form RS and the clarification to the Article 4(4) EU Merger Regulation substantive thresholds.

2. Specific Comments

Minority shareholdings:

a) Regarding the concerns that a competence to control the acquisition of minority shareholdings should not inhibit restructuring transactions and the liquidity of equity markets, do you consider that the suggestions put forward in the White Paper are sufficient to alleviate this concern? Please take into account that the transactions would either not be covered by the Commission's competence or not be subject to the 15 days waiting period.

Before this narrowly focused question should be answered, we consider that the European Commission has not demonstrated to the requisite degree that legislative reform is indeed needed in the area of minority shareholdings. One case - Ryanair - does not make a crisis.

Once again, we do not question that economic theory is capable of demonstrating that competitively significant links are capable of giving rise to potentially anticompetitive effects, as the public consultation documents attempt to show. On balance, our concern is that the proposals would inhibit all acquisitions of non-controlling minority shareholdings that fall into the criteria set out by the "targeted transparency system" - and not restructuring transactions.

Whilst it is true that THREE Member States have merger control laws containing definitions of "concentration" (or the equivalent notion) that include acquisitions of minority shareholdings in certain circumstances (i.e. Austria, Germany and the UK), the remaining 27 EEA national merger control regimes do not. Therefore, it is misleading to claim that the designed system "fits within the existing EU and Member State merger control regimes". In fact, it conflicts with those Member States' regimes that do not attach to non-controlling minority shareholdings - with the only implication being that all of these regimes should be subsequently amended to be brought into line with the EU Merger Regulation (more red tape).

Therefore, as stated above, our recommendation is for these reforms to be abandoned entirely. Nevertheless, to assist the European Commission and without prejudice to this view, we would make the following suggestions for the improvement of the "targeted transparency system" if the European Commission insists on proceeding.

(a) A "competitively significant link" should be re-defined so that it can ONLY arise between the controlled activities of the acquirer (on the one hand) and the activities of the target company in which the proposed acquisition of non-controlling minority shareholding is to be acquired/acquired. Links that arise between the
activities of two companies in which only non-controlling minority shareholdings are held should be explicitly excluded.

(b) In addition, "competitively significant link" should be re-defined so as to explicitly exclude indirect links between two companies (e.g. two portfolio companies which are held indirectly through various holding companies for investment purposes not falling within the banking clause of the EU Merger Regulation). Therefore, trade and financial buyers acting in good faith for the purposes of capital investment purposes should be given legal certainty and regulatory freedom to pursue such activities. Thus, the "competitively significant link" should ONLY catch Ryanair/Aer Lingus type fact patterns (i.e. a direct acquisition of a non-controlling minority shareholding in a competitor). Consideration could also be given to capturing non-controlling minority shareholdings acquired only by stock exchange transactions and not transactions made by private sale agreements.

(c) We also query whether vertical links should be included in the scope of the definition of a "competitively significant link". In German competition law, it is debatable whether vertical links are sufficient for a competitively significant influence to arise, particularly where the overlap arises in a non-core area (e.g. imagine a case in which the acquirer is a conglomerate that manufactures many products including pens, and the target manufactures missile defence systems but buys pens).

(d) A very clear safe harbour is essential. The criteria for establishing a "competitively significant link" should be broadened so as to only attach where (i) the acquired shareholding is 25% or more (so as to coincide with "the upper limit for a threshold") and (ii) between 15% and 25% if accompanied by the additional factors identified by the European Commission (so as to mirror the UK 15% threshold - but without the discretion to "dip below" so as to create at least a minimal zone of legal certainty). Any such additional factors should be clearly and precisely elaborated to ensure as much legal certainty as possible for counselling on the analysis of such factors.

(e) Access to commercially sensitive information should not be relevant to EU Merger Regulation jurisdiction here because this is covered by Article 101 TFEU.

(f) The receipt of any information notice should be publicised on the European Commission's website as per the notification of concentrations - this will allow the European Commission to content itself that "the business community" has an opportunity to "come forward".

(g) We do not think it is appropriate for the submission of an information notice to trigger a suspensory obligation on the parties (i.e. to standstill). This suggestion should be deleted because such acquisitions should be prima facie considered non-problematical (and the European Commission has the burden of overturning that presumption) and in any event such links can be easily unwound unlike full concentrations (see note on powers below). In addition, this proposal potentially result in a significantly longer proceeding for acquisitions of non-controlling minority shareholdings than in case of acquisitions of control, because of the additional 15 working days.

(h) The discretion of the European Commission to "decide whether further investigation of the transaction is warranted" should be narrowly defined and limited to circumstances to ensure that the European Commission cannot investigate if it simply wishes to do so (e.g. go on a fishing trip). The European Commission should be
required to (i) adopt a formal decision requiring the parties to formally notify (a decision that would be appealable to the European Court of Justice) and (ii) demonstrate that it has serious doubts as to the compatibility of the acquisition before adopting such a decision (in accordance with the burden of proof standard set out by the General Court in Microsoft/Skype). This will avoid wanton requests for full notifications by case teams.

(i) The waiting period of 15 working days from the date of the submission of the information notice is sufficient for the proposals in point (h) above to be given effect and for any Member State to request a referral. Following the expiry of the 15 working day after submission of the information notice without such a decision requesting a full notification, the acquisition should be deemed compatible.

(j) It should be clarified what happens if the European Commission allows the 15 working day deadline to expire - does national merger control law (e.g. in Austria, Germany and the UK) continue to apply? Our suggestion is for the legal position to be clarified, with a strong preference for national merger control to remain dis-applied (otherwise there is a risk that parties remain “on-the-hook” twice, and potentially for significantly longer as is currently the case.

(k) The European Commission should only be “free to investigate a transaction” beyond the 15 working day period if the acquisition has already been implemented and has not been notified pursuant to an information notice. Such an investigation can only arise within a limited period of time, such as four months. Following the expiry of the four months after European Commission becoming aware of/should be aware of an acquisition, it should be deemed compatible.

(l) The formal notification of an acquisition of the non-controlling minority shareholding should fall within the Simplified Procedure ab initio - to allow the parties to take advantage of the Short Form CO and the faster review period - unless the European Commission requires a full Form CO - in exceptional circumstances.

(m) We agree that if the European Commission's final decision in the investigation concludes that the acquisition of the non-controlling minority shareholding is incompatible with the (to-be-revised) EU Merger Regulation - it should have the same powers to deal with the non-controlling minority shareholding as it currently enjoys in respect of implementation of incompatible concentrations in Articles 6 and 8 of the EU Merger Regulation.

2.5 Accordingly, we consider that with these amendments, the "targeted transparency system" will appropriately be tailored to attach to those types of transactions which the European Commission has identified as being of the most concern (a la Ryanair/Aer Lingus).

b) Are there any other mechanisms that could be built into the system to exclude transactions for investment purposes from the competence?

2.6 Please see our comments above. We would encourage the European Commission to clearly exclude from the scope of these proposals those acquisitions of non-controlling minority shareholdings that are made purely for investment purposes. The current structure of the banking clause is insufficient for this purpose - particularly because it is limited in time (which does not sit with commercial reality when in fact such stakes can be held for the medium and the long-term).
2.7 The European Commission's proposed amendments to the banking clause - to make it explicit that those transactions falling within the banking clause do not create competitively significant links, is also welcome.

c) Regarding the scope of the information notice under the transparency system, would you have a preference for assimilating the information requirements to the German system, i.e. with a requirement to give market share information or to the US system which relies on internal documents to form a view on the market structure and market dynamics?

2.8 The scope of the information notice should be narrowly tailored. It should focus only on the activities giving rise to the competitively significant link - and not to extraneous and unrelated activities. In essence, we believe that to reduce the administrative burden for companies and their internal counsel, the information notice should be as "light touch" as possible.

2.9 Therefore, the information notice should only contain summary information on the parties, their turnover, a description of the transaction, the level of shareholding to be acquired or acquired, and the rights (if any) attaching to the shareholding (although this should be limited only to those additional factors identified by the European Commission if this part of the proposal is maintained). Basic market information should be provided for the competitively significant link - on the most plausible market definition only. Parties should not be required to provide reams of market share data on every conceivable split in such a notice.

2.10 The European Commission can impose the same obligations on the parties to provide correct, accurate and not misleading information in the information notice as currently exists in respect of the Short Form CO and the Form CO. This will give the European Commission comfort that parties are being "truly transparent" and that the identification of cases in which the European Commission is justified in investigating is properly made.

2.11 We do not agree with a U.S. HSR style of document disclosure in these circumstances. The retrieval, review, catalogue and production of such documents is likely to be highly burdensome for the parties. Such documents would ultimately be made available to the European Commission should it decide to request a notification (such documents are within the scope of the Short Form CO - see above).

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.

2.12 It is very difficult to provide any estimates on the cost of filing an information notice (notwithstanding any confidentiality issues related to providing such information in the context of a public consultation in which other law firms participate). In any event, the resources, costs and time involved for the informing party are inevitably not insignificant.

2.13 As we noted previously, extending the notification system to include an information notice would impose costs and burdens on the parties in those transactions (including the target companies, which may or may not have any involvement in the transaction).

2.14 Naturally, the proposed targeted transparency system does involve fewer costs and company resources than the other options. Nevertheless, as noted above, companies will still likely instruct external counsel to conduct the initial self-assessment. They will want to be advised on the potential legal implications of the law and the making of an information notice. They will want to understand a regulatory regime that previously did not apply to such investments. Handling and filing the information notice should not raise significant costs in and of itself, but
this again will depend on the specific requirements involved as well the parties' own approach to dealing with regulators. Therefore, even the targeted transparency system will involve a certain degree of additional and unforeseen legal costs for companies trying to do business in Europe. This is not to mention the important drain on internal resources (such as management and operational staff time, legal function time and efforts, etc).

2.15 In today's world, our clients are dealing with an increasing miasma of national, supra-national and international regulations that imposes a significant burden on them - this proposal simply adds to that burden and the complexity of doing business in Europe.

d) 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?

2.16 See our comments generally above. We consider that the two waiting periods identified above are sufficient (i.e. 15 working days for the European Commission to request a filing/a Member State to request a referral where an information notice is submitted to the European Commission, and a limited period of four months for the European Commission to investigate unnotified acquisitions of non-controlling minority shareholdings from the date it becomes aware or should become aware of such an acquisition). Such periods are appropriate and indeed necessary in the fast-paced world of global M&A.

2. Referrals - Article 22:

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?

2.17 We agree with the proposal for an information system between Member States and the European Commission to ensure that cases that involve prima facie wider than national or cross-border issues are alerted to all relevant competition authorities as early as possible. We would encourage greater cooperation and communication between the NCAs and the European Commission to ensure the timely, fair and consistent application of national merger control regimes in the EEA.

2.18 Divergent outcomes - as witnessed recently in the maritime sector - should be avoided.

b) Would such a system reduce the risk of diverging decisions by the Member States?

2.19 As we noted previously, we consider that Article 22 is outdated and should be abolished. However, if it is to be retained, we agree that only Member States with jurisdiction over the notified transaction should be permitted to make a referral request. We disagree that the geographic scope of the European Commission’s jurisdiction should be broadened to cover the EEA after a referral.

2.20 This would not avoid the potential problem of a patchwork approach of parallel proceedings, and would mean that resources are wasted on an unnecessary EEA-wide substantive analysis. We have concerns about the proposal that national clearance decisions could become retroactively invalid following an Article 22 referral as this would create legal uncertainty. In our view Article 22 should only be invoked where at least three competent Member States request a referral and, unless there is a veto, the European Commission should take jurisdiction over all competent Member States. However, Member States that have already cleared the transaction should be excluded from the jurisdiction of the European Commission.
Please comment on the suggestions listed in Section 5 "Miscellaneous" including the more detailed and technical suggestions in the accompanying Staff Working Document.

2.21 We fully agree with the European Commission’s proposal to exclude the creation of full-function joint ventures located and operating outside of the EEA from the scope of the EU Merger Regulation. Such concentrations are incapable of constituting an impediment to effective competition in the EEA where they do not alter the structure of, or have any effect on, any market in the EEA.

2.22 However, we would recommend that any legislative change in this area is precisely and clearly drafted. For example, the primary focus should be on determining whether or not the full-function joint venture will have, or is capable of having, any market-facing operations that will impact on any market in the EEA. The location of assets or companies contributed to the joint venture is therefore largely irrelevant if actual marketing and sales activities are conducted outside of the EEA.

2.23 In addition, we would suggest that *de minimis* full-function joint ventures should also be excluded from the scope of the EU Merger Regulation. We recently had experience of notifying the creation of a full-function joint venture to the European Commission where the sum total of the capital contributions from the parent companies (two large multinational companies with vast revenues) was less than EUR 5 million each.

2.24 In these circumstances, the cost and burden of the need to make a formal filing (even within a Simplified Procedure) is excessive.

2.25 Therefore, we would propose a "new approach" to full-function joint ventures:

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<thead>
<tr>
<th>Type of Full-Function Joint Venture</th>
<th>Proposed Treatment under the EU Merger Regulation</th>
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<tbody>
<tr>
<td>JV operating outside of the EEA</td>
<td>Excluded from the EU Merger Regulation altogether (and parties required to ensure Article 101 TFEU compliance in respect of any potential spillover)</td>
</tr>
<tr>
<td>JV with minimal operations in the EEA (assets or turnover less than EUR 25 million)</td>
<td>Excluded from the EU Merger Regulation altogether (and parties required to ensure Article 101 TFEU compliance in respect of any potential spillover)</td>
</tr>
<tr>
<td>JV operating inside the EEA (assets or turnover EUR 25 million to EUR 100 million)</td>
<td>Simplified Procedure applies</td>
</tr>
<tr>
<td>JV operating inside the EEA (assets or turnover above EUR 100 million)</td>
<td>Normal EU Merger Regulation Procedure applies</td>
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2.26 Such an approach would allow the creation of joint ventures to be treated in a more proportionate manner, as well as reducing legal and other costs for the parties in the case of small joint ventures.
2.27 To that end, we also agree that notifiable concentrations that clearly fall within paragraph 5(b) of the European Commission's Notice on a Simplified Procedure, should be wholesale excluded from the application of the EU Merger Regulation (currently they can benefit from a Super-Simplified Procedure). Such cases are inherently non-problematical, and cannot raise competition concerns under any circumstances.

2.28 Accordingly, it would be appropriate for them to be not only excluded from the scope of the EU Merger Regulation filing obligation, but also from the targeted transparency system (which is focused in any event on "the creation of competitively significant links" - which cannot arise in paragraph 5(b) cases in any event).

BAKER & MCKENZIE