3 October 2014

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European Commission
Directorate-General for Competition, Unit A-2
White Paper “Towards more effective EU merger control”
B-1049 Brussels

1. We welcome the opportunity to comment on the White Paper, and welcome in particular the view put forward by the Commission that the Merger Regulation should be extended to confer power over relevant minority shareholdings. We agree more specifically with the importance of the three principles which are stated at §42, and notably the observation that the new system should avoid “unnecessary and disproportionate administrative burden”, and that it should fit with existing merger control regimes.

2. With respect, however, we do not believe that the proposed system of “targeted transparency” is the optimal solution. While we firmly agree that there are sufficient problematic minority shareholdings to justify the extension of the Merger Regulation to them, we think the goal can be achieved in a lighter way. This paper will set out a counter-proposal for consideration.

3. Concerning the level of burden inherent in the targeted transparency concept, we share the concern being voiced by others that it is undesirable to introduce a filing requirement based on uncertain concepts of competitive impact, and backed up, presumably, by sanctions for failing to submit the required notice. The burden of work would be very significant, affecting many innocuous transactions and imposing cost and delay. We have seen for example the submission made by the European Competition Lawyers Forum and share the concerns they have set out on significant elements of subjective interpretation which are likely to create legal uncertainty with respect to the necessity to file an information notice. The default will be to file the notice, unnecessarily.

4. Our view is that the challenge of ensuring review of problematic shareholdings can be sufficiently met by a voluntary regime. In saying this we are aware that it poses a challenge in relation to the third principle, of compatibility with existing national
systems. Although the point is not explicitly stated in the White Paper, it may be useful to recognise in clear words that the problem with a voluntary regime is that it would sit uneasily with the existing German (and Austrian) system, since it would potentially remove from review a certain number of minority shareholding situations which at present require compulsory notification to the FCO. We think however that a way can be found to ensure review of those cases, through adaptation of the referral procedures which are already under discussion elsewhere in the White Paper.

5. Two important elements in this debate are, with respect, neglected in the White Paper.

6. First, a large number of potentially problematic minority shareholdings have arisen in adversarial circumstances, where the shareholding has been acquired against the wishes of the target company. This provides a simple and ultra-efficient mechanism for them to come to the attention of the Commission: the targeted company can be relied upon to come running.

7. Without seeking to present a comprehensive list, prominent recent examples would include the following;

   a) Sky/ITV – a minority stake that was built with apparent intent to frustrate ITV’s own strategic initiatives

   b) Ryanair/Aer Lingus\(^1\) – a stake that was built as part of a takeover bid but which has been retained after its failure and has served to frustrate the competitor’s strategic initiatives.

   c) Xstrata/Lonmin – a stake that was built as a prelude to a takeover but retained despite the decision not to bid.

   d) LVMH/Hermes – a stake that was built up secretively at first, as a first step in a possible consolidation move.

8. Leaving aside such adversarial situations, almost inevitably other minority shareholdings will be established by way of consent. A much fuller discussion of Art. 101 is therefore called for than appears in the White Paper. At §40 the White Paper seeks to sidestep the relevance of Art. 101 by a brief discussion of stake-building on a stock exchange where there may be no attackable agreement, but it omits any

\(^1\) For the record, and as you know, this firm represents Aer Lingus.
discussion of the (much more obvious) scenario where the stake is acquired by agreement. This is the Philip Morris situation in its simplest form. The White Paper has not therefore sought to engage with the argument put forward by many respondents to the original consultation, including ourselves\(^2\), that a statement of enforcement policy in relation to Art. 101, in the light of the Philip Morris case, would be useful.

9. Indeed, if there were a clear statement of enforcement policy in relation to Art. 101 and potentially problematic minority shareholdings, that would go a long way to ensuring the effectiveness of a voluntary notification regime under an extended Merger Regulation. We put it this way because we do not mean to suggest that consensual minority shareholdings should simply be left under a regime of Art. 101 self-assessment. Rather, we believe that a customised and rapid review process is desirable for minority shareholdings, just as it was in relation to concentrations. Undertakings would then be able to come forward voluntarily for clearance in cases potentially giving rise to a Significant Impediment to Effective Competition.

10. If they do not do so, their arrangements would in any event remain subject to Art. 101 for the lifetime of their agreement; but all agreements remain, in the nature of modernisation and self-assessment, exposed to that requirement.

11. In the nature of a voluntary notification regime there would be no suspension obligation, and there ought to be a prescription period for consideration by the European Commission post-implementation. The UK experience suggests that a four month period is likely sufficient, although six months might be considered given the diversity and scale of Europe as a whole.

12. It was recognised above that introducing a voluntary regime for minority shareholdings with a Union dimension could entail removing from mandatory notification a certain number of cases presently subject to mandatory notification, particularly in Germany. The scale of this issue should perhaps not be overstated: FCO statistics indicate that notifications of minority shareholdings in 2012 were no more than 13% of notifications received by it.\(^3\) Of course, consistent with our view that minority shareholdings are a problem meriting attention, we do not mean to suggest that these cases can simply be abandoned. Indeed, an FCO speaker is reported as having said


\(^3\) FCO Activity Report 2011/2012, p. 129. These are the most recent figures available.
recently that cases of “wettbewerblich erheblicher Einfluss”\(^4\) represent only around 1% of notifications but 10% of prohibitions.\(^5\)

13. We believe that the understandable concern of the FCO, to be sure that it has the opportunity to examine cases not brought to the European Commission, can be addressed by a mechanism requiring undertakings to make a notification to the FCO (or to the FCA in Austria), if they have not chosen the path of voluntary notification to the European Commission. This could be framed either by reference to the European Commission’s exclusive jurisdiction, and as an exception in these limited circumstances; or as an extension to existing case referral mechanisms.

14. If viewed as a matter of jurisdiction, it could be expressed in terms that undertakings may elect whether to make a notification to the European Commission, or to relevant NCAs. Exclusive jurisdiction would reside with the European Commission or the NCAs depending on the choice made, but always subject to the possibility of case referral. Undertakings would have an obvious incentive to begin with notification to the agency which is best placed\(^6\), and indeed pre-notification contacts could be used to assist in forming a view.

15. Alternatively, the revised Regulation could be put in terms that the European Commission has exclusive jurisdiction, but that where a notification obligation would otherwise exist at national level, the making of that notification is deemed to give rise to a case referral from the European Commission to the national level. Again, undertakings will in practice have the incentive to make the notification from the outset to the agency which is best placed, and to verify this in pre-notification where useful.

16. If the broad concept outlined here is of interest, we would be very glad to elaborate the ramifications at a finer level of detail. Cases falling within multiple national regimes would for example fit readily within the procedures for such situations.

17. A last point in relation to minority shareholdings is to welcome the proposal at §190 ff. of the staff working document, to extend the ambit of Art. 8 (4) of the Merger Regulation. The Commission’s lack of power under the existing Art. 8 (4) in relation to

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\(^4\) The subset of notified minority shareholdings where the holding was below 25%.

\(^5\) Andreas Bardong, quoted in *Minority acquisitions raise same competition concerns as other deals, BKartA finds*, PaRR report of 22 September 2014.

\(^6\) Applying the principles of the Referral Notice (2005/C 56/02).
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Ryanair and Aer Lingus has borne out all too clearly the reality that the 2007 prohibition decision was not effective to restore effective competition. With a revised Art. 8 (4), effective action could be taken at once, if such a case arises in future. As in any Art. 8 (4) procedure, action would have to be justified via due process with a statement of objections and an opportunity for defence arguments.

18. We welcome the indication in §194 that the power in such circumstances should extend to full divestiture of the minority shareholding, so as to restore the status-quo.

19. It appears that the White Paper addresses the question of full divestiture only in relation to Art. 8 (4), without explicitly addressing the equivalent question in the review of any stand-alone minority shareholding under the new powers: i.e., to what level can sell-down be required? That should be addressed in any future proposal.

20. Without commenting in detail, we wish to welcome broadly the proposals in the White Paper to streamline the procedures for case referrals. The point made in §68 of the White Paper about pre-notification is of a wider importance; during such contacts there is an effective opportunity for consultation between the parties and the European Commission/NCAs, to ensure that the case goes from the outset to the most appropriate agency. A mandatory Form RS consultation exercise is not needed for the purpose.

We thank you once more for the opportunity to provide these comments.

Yours sincerely,

Alec J. Burnside

Witness the findings of the UK Competition Commission that the minority shareholding has resulted in a substantial lessening of competition.