CBI Towards more effective EU merger control consultation response

1. The CBI welcomes the opportunity to respond to the public consultation on the DG Competition White Paper, Towards more effective EU merger control. The CBI is the UK’s leading business organisation, speaking for some 190,000 businesses that together employ around a third of the private sector workforce across all sectors. Our response reflects the position of our members across different sectors and of all sizes.

2. Competition policy is an important tool that aids the efficient and fair functioning of markets to the benefit of all. Merger control is a significant component in this landscape. The CBI supports a merger control regime that enables the smooth functioning of markets and encourages investment and innovation through targeted and clear regulation, while also establishing a robust framework to guard against merger activity that raises competition law concerns. In this regard, the existing EU merger control regime works well, and change must be justified in regard to the impact it could have on costs and the high degree of legal certainty offered by the current system.

3. In light of this, although the White Paper contains several suggestions that could bring benefits, the CBI strongly opposes the proposal to bring in a regime to review the acquisition of non-controlling minority shareholdings, in particular requiring the upfront notification of the acquisition of non-controlling interests.

4. This response will argue that:
   - Bringing the acquisition of non-controlling minority shareholdings under the Commission’s remit is disproportionate and damaging
   - The Commission should reconsider the proposal before taking any further action
   - Other proposals in the White Paper are welcomed

Bringing the acquisition of non-controlling minority shareholdings under the Commission’s remit is disproportionate and damaging

5. The key component of the White Paper is the proposal to allow the Commission to review the acquisition of non-controlling minority shareholdings. The Commission’s favoured approach is a targeted transparency system that would require submission of an information notice if the acquired minority shareholding qualified as a “competitively significant link”. It is possible that in the Commission’s view, using such a test would require only minority acquisitions where there is a competitive relationship between the buyer and target to be notified.

6. It is the view of the CBI that the “competitively significant link” as defined by the Commission is a very broad test which could quite easily be met by financial buyers with a diverse portfolio of interests, even where there are unlikely to be any competition concerns. To implement this would mean a major extension of the current merger control system in the EU, imposing considerable additional cost and uncertainty on business throughout the EU.
7. The CBI acknowledges that the Commission perceives there to be an enforcement gap, but if that gap exists it is small and the proposed remedy is wholly disproportionate to address the perceived problem. To address what in reality the Commission anticipates to be only 1-2 cases per year that would merit full regulatory scrutiny, the proposal would instead potentially bring in a vast number of notifications as businesses submit information notices to ensure they are adequately covered, significantly increasing costs and uncertainty for businesses, and imposing a difficult burden on the Commission directly.

8. Further regulation is also unnecessary, as the Commission already has a number of tools under its existing merger control and behavioural regimes in order to address the potential competition concerns highlighted in the White Paper and accompanying documents. The CBI notes that the primary case studies cited by the Commission in these documents are from its own merger cases, whereby existing minority shareholdings were assessed alongside the main transaction. In addition, concerns about horizontal coordination and vertical foreclosure could be assessed under Articles 101 and 102 TFEU, if such behaviour arose in practice, rather than at the time of an acquisition when concerns may be purely hypothetical. Although such regulatory tools rest on retrospective assessment, this is the right balance to strike, where the likelihood of the perceived legal risk arising is low and the adverse consequences of introducing new forward-looking regulation are significant.

9. Although there are only a very limited number of situations in which the acquisition of non-controlling minority shareholdings could conceivably harm competition, to reduce legal risks, the change will see the vast majority of acquisitions notified via information notices, in particular given inevitable uncertainty as to the scope of the “competitively significant link” combined with the very serious consequences which flow from a failure to notify a notifiable transaction to the Commission for pre-completion clearance. To ensure they are protected, businesses will most likely notify all or most acquisitions of non-controlling shareholdings, which in turn will see a significant rise in cost and uncertainty. The process of notifying itself is going to increase costs but the bigger problem comes from the uncertainty that follows notification.

10. If the notification process becomes too burdensome, the Commission may inadvertently introduce a situation in which deals that could help to stimulate growth are not contemplated in the first place or are abandoned early on. Businesses may often acquire non-controlling shareholdings on a speculative basis, anticipating longer-term benefits. However, a high regulatory burden may discourage businesses from such early-stage speculation, meaning that the longer-term benefits will not arise. This could also have a harmful impact on the deals that do go forward. With a four to six month waiting period within which the Commission can launch an investigation, deals could collapse from the additional uncertainty.

11. It is not just business that will face problems though. It may be extremely difficult for the Commission to deal with the added burden of a vast number of extra cases each year without timetables slipping, and work in other areas being delayed. In particular, by creating so much
extra bureaucracy, it will be increasingly hard to pinpoint the very small number of cases that the change was set up to deal with in the first place.

12. We are also concerned that alterations to the EU’s merger control regime could encourage copycat proposals at a Member State level, as well as outside of the EU, increasing costs and uncertainty for businesses still further. There has been no impact assessment conducted at national level to identify whether such an extension of jurisdiction is necessary and proportionate, further compounding the risk from the proposed measure.

The Commission should reconsider the proposal before taking any further action

13. There is a real risk that if the Commission is to proceed as currently suggested, the business environment in the EU will be harmed with no noticeable gains in terms of preventing harmful transactions. The CBI strongly opposes the approach as outlined and we do not feel it is necessary given the small scale (according to the Commission’s assessment) of the perceived issue it aims to remedy.

14. However, should the Commission decide to move forward, it is vital that time is taken to make changes that would establish a more proportionate and legally certain regime. Although it would not be possible to introduce the new power as envisioned without harming the business environment, steps can at least be taken to mitigate concerns.

15. For example, the Commission could consider introducing only a voluntary scheme. Like the current system in the UK, it would be more efficient for businesses to decide whether they wish to notify upfront – for most minority shareholding acquisitions, it will be obvious that the Commission is highly unlikely to have substantive concerns allowing parties not to. The Commission will retain the ability to call-in a filing, which should be exercisable within a short period of the transaction completing or being publicly announced.

16. Although there will still be a significant increase in notifications, it might help to reduce that number. It would also enable businesses to self-assess the substantive risks of enforcement action, while still putting the Commission in a position to regulate the handful of minority shareholding transactions which require merger control scrutiny. The CBI also notes that a voluntary regime was favoured by the majority of private respondents to the Commission’s 2013 consultation and the UK’s competition authority.

17. Additionally, more clarity is needed around the language used in the White Paper. As highlighted above, the term “competitively significant link” is too broad and not clear at present. There will be inevitable uncertainty around whether and to what extent one business may be said to compete with or have a vertical link to another business and absent clear guidance, businesses and their legal advisers will err on the side of caution. Similarly businesses and their advisors may be unable to determine whether a link is “significant” under the current proposals, since they will often have no access to relevant information, such as previous shareholder attendance.
and voting patterns. The Commission must set out exactly what that consists of in order to give businesses clear guidance as to when an acquisition is straying into territory that the Commission considers requires investigation.

18. The proposed thresholds should also be raised. At present, the lowest possible shareholding level has been set at 5%, below that of some of the small number of countries that have provisions to investigate the acquisition of non-minority shareholdings already. With such a low base level, the number of cases that could potentially be caught is huge. The thresholds need to be raised substantially to ensure that only potentially problematic minority shareholdings are notified and not almost all minority shareholdings. For example, the 5% threshold should be raised to somewhere in the region of 15%, a de minimis threshold for the size of the target should be introduced and the definition of a competitor in footnote 67 of the Staff Working Document that extends to companies which do not compete with the acquirer but compete with other companies in which the acquirer has a minority stake should be dropped.

19. Finally, the impact of the proposals on transaction timetables should be reduced. Given that there are so few transactions that would give rise to actual competition law concerns, it is disproportionate to automatically suspend all transactions triggering the Commission’s jurisdiction and allowing a long period for subsequent Commission intervention. A more proportionate approach would be to allow transactions to proceed without suspension, and allow a short period for the Commission to intervene thereafter. In addition, the period in which the Commission can launch investigations, currently proposed at four to six months, is too long, and may discourage transactions or cause them to collapse. This period should be reduced substantially. For example, it would be more appropriate to set such a period at 25 working days, in line with the Commission’s timetable for Phase I merger investigations.

Other proposals in the White Paper are welcomed

20. The introduction of a regime to review the acquisition of non-minority shareholdings makes up the key component in the White Paper, and as outlined above, it is a change that the CBI does not support. However, the White Paper does contain other suggestions that could help to simplify the merger system, bringing benefits to business and the Commission alike.

21. Chief among these is the welcome proposal to exempt from review full-function joint ventures located and operating outside the EEA with no effect on EEA markets; and deals leading to no “reportable markets”, i.e. where there are no horizontal or vertical overlaps from review, or at least, in some instances, only requiring an Information Notice.

22. There are also interesting proposals to make case referrals more efficient, although it is not clear how much of an impact these might have. For example, the decision to require Member States to actively object to the European Commission’s automatic seizure of sole jurisdiction in some cases may not have much of an impact but it is worth exploring further.
Conclusion

23. While there are suggestions in the White Paper that would contribute to further simplification of the merger control system in the EU (and which the CBI welcomes), the central proposal, to allow the Commission to review the acquisition of non-minority shareholdings, is likely to have severe consequences for EU businesses and the economy in general.

24. The Commission’s remedy is disproportionate to its perceived concerns and will harm both the effective functioning of the Commission’s merger regime, and the business environment that Member States have worked so hard to foster to encourage growth. For this reason, the Commission should not proceed with the proposal as currently set out in the White Paper.