RESPONSE OF CLIFFORD CHANCE LLP TO THE EUROPEAN COMMISSION’S WHITE PAPER: "TOWARDS MORE EFFECTIVE EU MERGER CONTROL"

Clifford Chance LLP welcomes the opportunity to respond to the Consultation of the European Commission (the Commission) on the White Paper (WP) entitled "Towards a more Effective EU Merger Control", and associated Staff Working Document (SWD) and Impact Assessment (IA), published on 9 July 2014 (together, the Consultation).

Our comments are based on the substantial experience of lawyers in our Antitrust Practice of advising on mergers and merger notification procedure for a diverse range of clients, and across a large number of jurisdictions. However, the comments in this response do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

SUMMARY:

As regards minority interests

- Clifford Chance does not consider that the arguments and evidence set out in the Consultation make the case for regulation of minority interests in the manner proposed by the Commission. In particular, we note that there is not a single instance cited in this Consultation, or in the Commission's previous 2013 consultation on the same issues, of a case in which an implemented structural link has been shown to have resulted in anticompetitive harm. Moreover, the economic theories discussed in the Consultation have very little to say about whether the relevant scenarios of harm arise with any frequency in commercial reality, or whether they apply to levels of influence that fall short of decisive influence. Our own experience of advising on mergers and acquisitions in various jurisdictions suggests that they do not. When the EU Merger Regulation ("EUMR") was introduced, there was a historical wealth of empirical and anecdotal evidence that acquisitions of "full" control can and do lead to price rises. Our view is that before extending the scope of the EUMR in a way that might cause very considerable harm to incentives to invest in minority shareholdings in the EU, the Commission ought first to develop at least some similar empirical evidence of their harmful effects. The 91 cases that the Commission has previously identified as "potentially meriting scrutiny" would be good candidates for such a study.

- Even if it is established that structural links do have anticompetitive effects, our view is that such effects can be addressed through existing enforcement tools, whether under Article 101 of the Treaty on the Functioning of the EU ("Article 101"), national merger control regimes or through application of the existing scope of the EUMR. In particular, we see no justification for treating anticompetitive exchanges of information differently – under the EUMR or Article 101 - according to the corporate context. We do not consider that there is a significant enforcement gap in respect of acquisitions of shares via a stock exchange, or influence arising from amendments to the articles of association of a company and, even if there were such a gap, that would only justify an extension of the EUMR to cover those specific scenarios. In all other cases there is a clear agreement – such as a sale and purchase agreement, a shareholder agreement or a joint venture agreement – to which Article 101 can, and should, be applied.
• The Commission has actively – and very successfully - promoted the EUMR as a template for other merger control regimes, both within the EU and without. Its policymaking in this area should accordingly take into the likelihood that the proposed reforms will be replicated by those other jurisdictions that have been encouraged to look to the EUMR for their inspiration (i.e. the majority), not least because of the impact that it would have on EU businesses. That replication would be implemented with complex notifications, ambiguous thresholds, endless timetables and greater scope for political decisions, so increasing the already-substantial transactional costs of EU businesses and further affecting their ability to plan and close multi-jurisdictional transactions efficiently.

• If the Commission does opt to extend the scope of the EUMR to non-controlling interests, we continue to favour a self assessment system with no mandatory filing/notice or standstill obligations. We do not consider that the merits of such a system have been correctly weighed by the Commission in the IA. In particular, for the reasons set out in more detail below, it is not correct that the transparency system "would not demand any additional information than what is anyway necessary to assess the transaction under the self assessment system". Moreover, empirical and theoretical economic research indicates that voluntary merger notification regimes achieve objectives similar to those achieved by compulsory systems, at lower costs to the merging parties as well as to the regulator. Indeed, the experience of the UK regime contradicts the assertion that a self-assessment regime would be less effective at preventing harm to competition, and shows that it is possible for information on minority shareholdings to be gathered by a merger control authority. An effective and appropriate system of market intelligence gathering could be implemented by devolving those functions to national competition authorities (NCAs), as these would be best placed to track developments in their respective markets. In addition, customers and target companies would have incentives to identify problematic transactions to the Commission.

• Such a system would avoid a burden on notifying parties that is disproportionate to the competition risks. It would also allow for jurisdictional criteria to be framed in a way that ensures that only the relevant structural links are caught, and that there is a limited risk that NCAs would have "residual" jurisdiction over transactions with an EU dimension.

• As regard the transparency system described in the WP and SWD, the benefits for merging parties of filing a transparency notice (a slightly shorter standstill period and in most cases a marginally lower information burden) would be substantially outweighed by the disadvantage of having no binding clearance decision and the possibility that an investigation may be opened up to 4–6 months in the future. Unless incentives to use this mechanism are created, parties are therefore likely to submit Form CO filings instead, the great majority of which will relate to transactions raising no competition concerns. This will increase costs for the Commission, NCAs and merging parties, and divert resources from the assessment of other, more anticompetitive transactions. In this respect, we consider the Commission's forecast of an additional 20–30 filings per year is

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likely to substantially underestimate the true number of transactions that would be affected by these proposals.

- We have suggested below a number of features that could be built into the transparency model in order to create the necessary incentives for its use. These include, in particular:

  - **no standstill obligations**: minority interests can be easily divested or unwound, as there is no integration of the businesses of target and acquirer (in terms of infrastructure, management etc). Consequently, standstill obligations are unnecessary, and would chill investment activities of market actors (such as PE houses and sovereign wealth funds) that seek fast and efficient closing of their transactions. In appropriate cases, the Commission could have powers to impose hold-separate obligations, or an obligation on the acquirer to refrain from exercising voting rights, in order to prevent temporary harm to competition during the period of review. As noted below, the fact that German and Austrian regimes impose unjustifiable standstill obligations on acquisitions of non–controlling interests should not influence the design of the optimal model for EU–level enforcement;

  - **a very light touch transparency notice**, with no requirement for market share data or internal documents. In addition to creating incentives to file a transparency notice, this would also reflect the fact that an acquirer of a non-controlling interest will often be no better–placed than the Commission to gather and provide information on the relevant markets and the target's market positions;

  - **a shorter prescription period**. We consider this should match the Phase 1 EUMR clearance period, i.e. 25 working days. We recognise the Commission's concerns that this might result in more transactions being "called in" for a full filing, but consider this to strike a more appropriate balance between achieving an efficient review system and creating incentives to use that system.

- As regards the jurisdictional criteria, we welcome the Commission's efforts to exclude obviously unproblematic cases from its extended jurisdiction. However, we are concerned that the subjective nature of some criteria (e.g. whether parties are active in horizontally- or vertically-related markets) and the vague and undefined nature of others (e.g. the "additional rights" that would trigger jurisdiction) are ill-suited to a regime in which penalties are imposed for failure to correctly second-guess the Commission's approach to interpreting those criteria. If filing obligations are imposed, we favour:

  - A requirement that the interest confers some degree of influence (in a horizontally– or vertically–related undertaking), through "additional" blocking rights. Theories of harm relating to pure financial interests in the profits of a rival have featured in remarkably few cases to date and, where they have been subject to scrutiny and economic analysis, have been dismissed as unsupported by the evidence. Consequently, we submit that the proposed 20% shareholding threshold should not trigger jurisdiction unless accompanied by some acquisition of additional rights to veto corporate actions of the target.

  - The presence or acquisition of non–controlling interests in two horizontally– or vertically–related undertakings should not trigger jurisdiction. Such cases are
highly unlikely to raise competition concerns, and requiring them to be notified would be likely to multiply filing volumes by a considerable factor.

- A lower threshold of 15% (plus additional blocking rights) instead of the 5% threshold proposed by the Commission. This would be consistent with the prior cases under the EUMR and national merger control laws that have considered non-controlling interests.

- A clearly defined set of "additional" rights, over which an acquirer must obtain a legal or de facto veto right in order to trigger jurisdiction, such as the right to block strategic M&A transactions of the target, or the ability to veto the raising of debt or equity funding. In this context, the presence of board seats should be relevant only in so far as they confer such a veto right. For the reasons set out in the response below, rights of access to information should be irrelevant if the parties have implemented appropriate compliance policies to restrict the flow of competitively sensitive information between them.

- Turnover thresholds that are assessed exclusively by reference to the turnover of the acquirer and the target, to the exclusion of other shareholders. Not only would this be consistent with the theories of harm that the reforms seek to address, it would also keep small and greenfield (shifting alliance) joint ventures excluded from the scope of the EUMR, and retained within the scope of Article 101, which remains the most appropriate enforcement tool for such transactions for the reasons set out below.

As regards case referrals

- We agree that the proposed reform of the Article 4(5) referral system would be beneficial in terms of timing and costs. However, we do not consider that unauthorised pre-notification contacts and exchanges of information between the Commission and national authorities are necessary or desirable, for various reasons. We have also suggested below certain modifications and refinements that we consider would enhance the efficiency of the Commission's proposed referral procedure.

- As regards the Article 22 referral system, we agree with the Commission that only Member States which have jurisdiction over the notified transaction should be allowed to make a referral or join a referral request under Article 22. In contrast, we continue to believe that if a transaction does not meet the thresholds for review under the EUMR or a national jurisdiction, it should not be possible for its effects in that jurisdiction to be reviewed as a result of an Article 22 referral by another Member State, in the interests of legal certainty and efficient transaction planning. If the Commission proceeds with its plans to broaden of the geographic scope of the Commission’s jurisdiction after referral, we consider that the Commission's proposals for implementing such a system would be broadly workable, but have suggested below certain modifications and refinements that would enhance its efficiency.

Miscellaneous issues

- We applaud the Commission's initiative to explore ways to eliminate the redundant filing requirements that presently arise for transactions having no conceivable nexus with the EU. We suggest below a number of ways in which this could be achieved. We also
agree that transactions involving no reportable markets should become subject to a less intrusive regime, although we favour the removal of all notification obligations for such transactions, rather than the introduction of a transparency filing regime.

• We agree that most of the other proposed miscellaneous modifications would be sensible. However, we do not consider that Article 8(4) EUMR should be extended to cover partially implemented transactions. Internal consistency of the EUMR could be better achieved by a provision that expressly allows parties to retain a non-controlling interest in a business that is to be divested, provided that does not adversely affect competition, or the Commission's ability to implement the remedies that it considers necessary.

• We strongly disagree that the period for assessment of Article 9 referrals during Phase 2 should be extended. In our view it should be reduced, so that all Article 9 referral decisions are required to be made before the end of the Phase 1 review period.

• While not raised in the Consultation, we consider that the Commission should take the opportunity of legislative reform to clarify the circumstances in which a joint venture should satisfy the "full function" criteria before it is notifiable. After nearly 25 years of application of the EUMR it seems to us that there is little justification for the inconsistent approaches of the Commission that we have experienced on this fundamental jurisdiction point.

1. **THE ABSENCE OF JUSTIFICATION FOR EXTENDING THE EUMR TO COVER NON–CONTROLLING INTERESTS**

1.1 Clifford Chance recognises that this is an area that merits discussion and analysis and we therefore welcome the Consultation as an important contribution to the debate. However, our view remains that none of the purported justifications or economic theories described in the Consultation offer adequate evidence of a need to extend the scope of the EUMR to cover non–controlling interests. Our reasons for this view are summarised below, but are described in more detail in our response to the 2013 consultation.

1.2 First, intervention should be based on facts, not theory. Paragraph 46 of the SWD claims that "[t]he experiences of the Commission, the Member States, and third countries, as well as economic research all show that in some instances, the acquisition of a non–controlling minority shareholding, such as one firm acquiring a 20% shareholding in a competitor, can harm competition and thus consumers". However, the experiences referred to in paragraph 46 show only that the relevant competition authorities believed – often on the basis of scant economic analysis – that such harm would have arisen if the merger in question had been allowed to proceed (or to proceed without remedies). There is not a single instance cited in the Consultation of a case in which an implemented structural link has been shown to have resulted in anticompetitive harm. Similarly, as the Commission has previously noted, there is no empirical economic research that demonstrates that non–controlling minority interests give rise to anticompetitive harm, only hypothetical models positing unproven theories of harm.

1.3 Second, the principal theories of harm relating to non–controlling interests require either that: (i) an acquirer sacrifices profits in the hope that it will recoup them
through its minority shareholding, or that (ii) the acquirer is able to use minority shareholder protection rights to induce a target company to sacrifice its own profits, or to otherwise act against its own interests and those of its other shareholders. While we recognise hypothetical validity of these theories, we have serious doubts (for the reasons set out in our response to the 2013 consultation) that they arise with any significant frequency in commercial reality. As regards the theory that minority interests may result in anticompetitive disclosures of sensitive information, it seems to us that this should continue to be addressed under the Article 101 prohibition on anticompetitive agreements, as it is now.

1.4 Third, in the absence of firm and compelling evidence that structural links do result in competitive harm, or any clear information on the precise circumstances in which such harm can be expected to arise, we consider that it is incumbent on the Commission to conduct further research before making the leap to regulation. While we recognise that the Commission cannot be expected to provide empirical evidence for each and every prospective harm that it seeks to avoid, we consider that there is a compelling case for further analysis here, as:

1.4.1 minority shareholders fulfil a pivotal role in the internal market and their investments have numerous benefits, such as increased liquidity, sharing of technology and best practices, corporate governance improvements and improved financial performance of target companies. Therefore any unnecessary regulatory barriers or disincentives to such investments risks having substantial adverse effects. Imposing filing requirements and additional filing costs will deter some investments – at particular risk are those of private equity funds, venture capital (VC) investors, sovereign wealth funds and other institutional investors with portfolio companies in the same industry. Imposing publicity requirements will deter yet more: confidentiality is a key concern of many these investors and investees – investee companies that are developing leading edge products want their development to remain secret and investor companies want to avoid disclosing their investment strategies to competitors. Promoting investments in small start-up companies and nurturing new market entrants is vital to the development and protection of a competitive internal market, fostering innovation, growth and employment in Europe.2 The Commission should therefore avoid inadvertently chilling such investments at all costs. If it does not, the cost of capital for investee companies may increase and/or their access to capital may be limited. And for public companies, the same large investors may be less inclined to buy in the secondary market;

1.4.2 this potential chilling of incentives to invest is of particular importance in the current economic climate. Inward investment into the EU by foreign investors,

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2 If turnover thresholds for acquisitions of competitively significant links are assessed by reference to all investors in a target company, the - contrary to the Commission’s view (in the Executive Summary Sheet of the “Commission Staff Working Paper: Impact Assessment”) - the proposal will adversely affect SMEs and micro-enterprises. This is because it is common that several co-investors participate in a venture capital transaction and thus it will frequently be the case that at least two of them (in particular corporate venture units) would meet the turnover thresholds for a Union dimension, regardless of the target’s turnover. As we have noted in 4.13 below, a solution would be to assess turnover thresholds exclusively by reference to the turnover of the acquirer and target, and treating interests of other investors as separate transactions.
including sovereign wealth funds and private equity purchasers, is often structured in the form of acquisitions of minority interests. Deterring such investments so that they are displaced to other regions would have a chilling effect on economic growth and, ultimately, competition in the EU;

1.4.3 the Commission has already identified some 91 structural links "potentially meriting competition scrutiny" that could form the basis for an empirical study of the economic effects of structural links which would appropriately inform the Commission's policy-making in this area; and

1.4.4 there is so little hard evidence of the need for regulation. The spread of merger control regimes throughout the world – including the introduction of the EUMR in 1989 – has been based on undeniable and overwhelming evidence that mergers and acquisitions of "full" control can and do lead to price rises, particularly when carried out between competitors. In the present case, the Commission cannot point to even one example of a case in which a structural link has been shown to have resulted in competitive harm.

1.5 Fourth, existing enforcement tools are sufficient. The Commission indicates in the SWD that Article 101 would not be an appropriate enforcement tool in cases involving acquisitions of series of shares on a stock exchange, as it would be unclear whether there was an agreement, and if so which agreement had affected competition. We disagree with this reasoning. There is nothing in the case law of the Union Courts to suggest that a binding offer to acquire shares and acceptance of that offer would not amount to an agreement, and there are various precedents that allow the Commission to consider the competitive effects of networks of similar or related agreements under Article 101.3 Moreover, even if such acquisitions of listed securities could not be considered under Article 101, that would justify only an extension of the EUMR to cover that specific type of transaction, not all other acquisitions of non–controlling interests. Where an acquisition is made in relation to a non-listed company, an "agreement" may be much more easily identifiable – a position confirmed in the case law of the Court of Justice.4

1.6 Finally, and perhaps most importantly, the Commission should have regard to the impact of these reforms on the merger control regimes of other countries. We recognise that Commission might consider it inappropriate to formulate policy by reference to what other jurisdictions may or may not do. We might agree with that position if the Commission had not actively – and very successfully - promoted the EUMR as a template for other merger control regimes, both within the EU and without. As it stands, however, a decision by the Commission to implement these complex and costly reforms would, in time, inevitably be followed by most other worldwide jurisdictions that have been encouraged to look to the EUMR for their inspiration, i.e. the majority. And they will do it with complex notifications, ambiguous thresholds, endless timetables and greater scope for political decisions. With over 100 mandatory filing regimes already in existence, and that number growing every year, EU businesses already face substantial transactional costs

considerable drag on their ability to plan and close transactions efficiently. Those costs and complexities would increase by an order of magnitude if the merger control of non-controlling interests becomes the norm. That is a valid and compelling consideration that ought to be taken into account by an EU policy-maker.

2. **PRINCIPLES FOR A SYSTEM OF CONTROL OF NON-CONTROLLING INTERESTS**

2.1 We broadly welcome the three guiding principles set out in paragraphs 67–72 of the SWD, in particular recognition of the need to avoid administrative burdens and confirmation that the Commission would (subject to possibilities of referral) have sole competence to review acquisitions of minority interests that exceed the relevant turnover thresholds.

2.2 However, we consider that consistency with NCA merger regimes should not be a fundamental principle. Not only is it impossible to achieve consistency of the EU regime with both the mandatory filing and suspensory regimes of Austria and Germany and the self-assessment regime of the UK, it is also unnecessary, given the primacy of EU legislation. Indeed, we consider that seeking such consistency risks resulting in compromises that result in sub-optimal regulation. We recognise that amendments to the EUMR will require a degree of political consensus from Member States, but consider that it is incumbent on the Commission to produce draft legislation that it considers to be the most effective and efficient option. In particular, we consider that imposing standstill obligations on acquisitions of non-controlling interests, in order to align the EUMR regime with those of Germany and Austria, would have adverse implications for the effectiveness or efficiency of the regime, for the reasons set out in 3.8 to 3.10 below.

2.3 On a similar note, we understand that another key concern of the Commission is to limit possibilities for Member States to have "residual" jurisdiction over a transaction that is reviewable under the EUMR, in order to avoid a repeat of the Ryanair/Aer Lingus scenario in which a transaction becomes subject to review by the Commission and is followed by a further review by an NCA of a previously-acquired minority interest that falls below the thresholds for EUMR jurisdiction. In our view, that should not be a guiding concern of the Commission:

2.3.1 First, the UK test for material influence is vague and widely-drawn, taking into account highly subjective factors such as the likelihood that an acquirer will be able to persuade other shareholders to back its plans for the target. Accordingly, any attempt to ensure that the EUMR test for a competitively significant link (CSL) is wider than that for material influence (such that no residual jurisdiction can arise) would result in a test that is wholly unworkable in the context of filing obligations and penalties for failure to file (e.g. fines for incorrectly assessing an acquirer's powers of persuasion).

2.3.2 Second, if the Commission proceeds with its proposed amendment of Article 8(4), residual jurisdiction of the type that arose in Ryanair/Aer Lingus would not be possible in any event.

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5 Described in paragraphs 190–194 of the SWD. See our comments in 6.7 and 6.8 below on this proposal.
2.3.3 Third, difficulties arising from residual jurisdiction have arisen only once in 25 years, and that was as a result of the difference between the EUMR decisive influence test and the UK material influence test. The likelihood that such issues would arise from the much smaller difference between competitively significant links and interests conferring material influence therefore appears likely to be very small indeed.

2.4 Accordingly, possibilities for residual jurisdiction should not be taken into account by the Commission as a reason to draw the jurisdictional test for CSLs more widely than is necessary.

3. THE PROCEDURAL OPTIONS

3.1 The design of the procedural options for extending EUMR jurisdiction to non-controlling interests should take into account a realistic assessment of the number of additional filings that such an extension will generate, and the corresponding burden for the business community, the Commission and NCAs. In this respect, we consider that the Commission’s estimate of 20–30 transparency notices per year under the transparency system is much too low. The Zephyr database on which the Commission relies covers only acquisitions of interests in public companies. In our experience, there are many more minority shareholdings by volume in private companies than in public ones. Moreover, the proposed thresholds (e.g. 5% plus a single board seat) appear to catch a greater proportion of transactions than in Germany, so the proportion of minority interest filings in that jurisdiction is not an accurate indicator of the number of additional EUMR filings that would be required.

3.2 A particular concern is VC investments, which are often structured as minority shareholdings. For reasons of efficiency, VC investors focus their investments on particular sectors in which they have expertise, and therefore often have small stakes in a number of start-up rivals in the same sector. Other types of transaction that could become subject to voluminous filing requirements are real estate transactions – which are commonly structured as consortium investments – and the creation of business-to-business or business-to-consumer trading platforms, in which industry participants often take small stakes.

3.3 For the reasons set out in 4.13, some (but not all) of the potentially excessive filing volumes could be avoided by providing that the turnover thresholds must be assessed by reference to the acquirer and target only, to the exclusion of other shareholders. That would have the effect of excluding filing burdens for investments in start-ups, greenfield joint ventures and small and medium sized enterprises (SMEs). However, even with that approach to the turnover thresholds, we consider that the volume of additional filings is likely to be much higher than 20–30 per year. In our view, this makes it imperative that the procedural design of the proposed reforms result in as light a burden as possible for businesses and enforcers alike.
Self assessment

3.4 We continue to view the self assessment regime as the most effective and efficient option for implementation. In this respect, the IA does not accurately weigh the benefits of self assessment against the drawbacks of a transparency filing regime. In particular:

3.4.1 The table at paragraph 3.4.2.3 of the IA states that the transparency system "would not demand any additional information than what is anyway necessary to assess the transaction under the self assessment system". We disagree. Parties often do not need to research market share data on various different "plausible" permutations of the market in order to conclude that a transaction will not give rise to competitive harm - their market expertise suffices. In addition, gathering and providing internal documents of the type required under EU and US merger filing systems can be a costly exercise, involving staff or external counsel spending significant amounts of time reviewing files to locate the required documents.

3.4.2 The table at 3.4.2.1 states that a self assessment system scores lower for "preventing harm to competition" as "it is not ensured that the Commission or the NCAs become aware of problematic transactions". However, that is also true for a transparency system. There will always be some transactions that escape review, and the Commission has presented no evidence that the number would be significantly higher under a self assessment regime with an effective monitoring and market intelligence system in place, such as that which exists in the UK. We also note that such concerns have not impeded the Commission's successful operation, for over a decade, of a self-assessment regime under Article 101.

3.4.3 Contrary to the Commission's assertions, empirical and theoretical economic research indicates that voluntary merger notification regimes achieve objectives similar to those achieved by compulsory systems at lower costs to the merging parties as well as to the regulator.6

3.4.4 The experience of the UK shows that it is possible for information on minority shareholdings to be gathered by a merger control authority. Even if it would be "very difficult for the Commission to keep track of all minority shareholdings in the internal market", it would be much less difficult for NCAs to do so in their respective jurisdictions, and to share that information with each other and the Commission. The administrative burden for the Commission and NCAs in implementing such a devolved system would be less than the administrative burden for companies in complying with a transparency filing regime. In addition, customers and target companies would have incentives to identify problematic transactions to the Commission.

As regards the design of a self-assessment system, we favour a prescription period that runs (as it does in the UK) from the time that details of an acquisition are published in the national business press or trade journals. The Commission might consider, in the alternative, having no automatically-triggered prescription period, and instead giving the parties the option to trigger such a period by submitting a transparency filing to the Commission.

**The transparency system**

Our particular concern with the transparency system described by the Commission is that it will not be used, and that merging parties will prefer instead to file Form COs. This is because:

3.6.1 for transactions that are unlikely to raise competition concerns (i.e. deals which are the principal focus of the transparency regime) the proposed information burden appears to be substantially the same as that which is required for a short-form filing (i.e. parties, transaction description, turnover information, market definition and market shares). Moreover, it seems to us inevitable that merging parties will be required to engage in pre-notification discussions with the Commission, in order to ensure that they face no risk of fines, or rejection of their notice, for supplying incorrect or incomplete market share information; and

3.6.2 the benefit of a slightly shorter standstill period (15 working days instead of 25 working days) is outweighed by the absence of a clearance and the possibility of an investigation in 6 months time.

The resulting increase in the volume of Form CO filings will create considerable and unnecessary administrative burdens for the Commission and NCAs. If the Commission wishes to provide for a filing option that will reduce unnecessary burdens on its resources, greater incentives to use it should be incorporated. Our suggestions for appropriate incentives are as follows.

**No standstill obligations**

The absence of automatic standstill obligations would be an important incentive for merging parties to use the transparency filing route. Moreover, allowing completion of acquisitions of non-controlling interests would not affect the ability of the Commission to review such transactions and to impose remedies, where appropriate. We do not agree with the view that unwinding minority interests raises the same difficulties as dissolving a concentration resulting from an acquisition of control,7 as – unlike an acquisition of sole control – purchasers of minority interests will not have integrated their respective businesses (EU antitrust prohibitions prevent this). Moreover, there will always be other shareholders to assume governance of the target, regardless of whether a suitable third party purchaser can be found for the shareholding to be divested. In the worst case, purchasers could be required to simply surrender or cancel their shareholding. As for the concern that competitive harm may

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7 See, for example the response of the German Federal Ministry of Economics and Technology and the Bundeskartellamt to the 2013 consultation, available at:

arise during the review process, that can be addressed by affording the Commission appropriate powers to impose hold-separate obligations. It might also (as is now the case in the UK) reserve the right to impose a prohibition on closing in certain defined and exceptional circumstances, e.g. for a minority participation in a consortium that purchases assets which do not amount to a viable standalone business.

3.9 The UK system shows that absence of standstill obligations does not inhibit cooperation with the reviewing authority (contrary to the statement in paragraph 3.4.2.1 of the IA). Information gathering powers and binding timetables achieve this.

3.10 It is common for private equity purchasers, sovereign wealth finds and other financial investors to structure acquisitions as consortia with shifting alliances in order that they can be closed immediately. Moreover, sellers using an auction process also typically require immediate closing or favour those bidders that are able to do so. Consequently, imposing a standstill obligation will make the EU a less attractive destination for the capital of these investors.

A light touch transparency filing

3.11 There should be no requirement for market share data or for internal documents – simply a description of the transaction, a confirmation that the parties consider the EU turnover jurisdictional criteria to be satisfied and an indication of the markets in which the horizontal or vertical overlaps that trigger jurisdiction exist. Anything more than this and the filing will become comparable to a short Form CO, with a risk that pre-notification discussions with the Commission regarding market definition and the completeness of market share data will become necessary.

3.12 In most cases, the Commission would be able easily and quickly to verify from public sources that no concerns are likely to arise. For the remaining cases, it would have powers to require information from the parties, and to require a full notification where appropriate.

3.13 If the Commission considers that some form of market information is necessary, we favour a requirement for the provision of internal documents, rather than a requirement for market share data, as that would be marginally less costly. If the Commission instead pursues the option or requiring market share data, we submit that the market share thresholds above which information must be supplied should mirror those that apply for the purposes of Form CO, i.e. 20% for horizontal overlaps and 30% for vertical links.

A shorter prescription period

3.14 To minimise the period of legal uncertainty (and the resulting disincentives to submit transparency filings), the prescription period should match the Phase 1 EUMR clearance period, i.e. 25 working days. We recognise the Commission's concerns that this might result in more transactions being "called in" for a full filing, but consider that this would strike a more appropriate balance between achieving an efficient review system and creating incentives to use that system.

3.15 At minimum, the Commission should be aware that in the UK, the Competition and Markets Authority has 4 months within which to decide whether to open a Phase 2
investigation, not (as is the case for the prescription period proposed in the Consultation) 4 months within which to open a Phase 1 investigation. If the prescription period is to run only until the decision to open a Phase 1 investigation, 2 months would be a more accurate approximation of the UK prescription period (i.e. 4 months minus the 40 working days within which a Phase 1 decision must be made).

4. DESIGN OF THE TRANSPARENCY SYSTEM

Criteria for determining a competitively significant link (CSL)

Horizontal and vertical links

4.1 We welcome the Commission's efforts to exclude obviously unproblematic minority interest cases from EUMR jurisdiction and agree with the approach of limiting jurisdiction to cases involving horizontal or vertical links between the parties.

4.2 However, focusing jurisdiction in this way is incompatible with the existence of mandatory filing obligations. Imposing fines for failure to accurately second-guess the Commission's approach to market definition (or what amounts to the same "sector" of activity) would be inconsistent with legal certainty and would result in large numbers of transparency notices based on precautionary but implausible market definitions.

4.3 If the Commission does introduce penalties for failure to submit a transparency filing and failure to submit accurate and complete information:

4.3.1 It should clarify that (as is implied in paragraph 46 of the White Paper (WP) and paragraph 88 of the SWD) jurisdiction cannot be triggered if the parties are merely potential competitors.

4.3.2 The Commission would also need to distinguish between "direct" and indirect vertical links, as indicated in paragraph 88 of the SWD. We suggest that the decisive criterion should be whether the product or service of the upstream undertaking is an "important input", in line with the definition in footnote 10 of the Simplified Procedure Notice. The Commission should also provide guidance on what would amount to an important input for these purposes, perhaps by reference to the proportion of costs of producing the downstream product for which the input accounts (the factors discussed in paragraph 34 of the Non-Horizontal Merger Guidelines are insufficient in this respect).

4.3.3 We suggest applying a much lower maximum penalty for failure to file for cases involving product markets for which there is no published EUMR decision describing the Commission's approach to identifying potentially relevant market definitions.

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4.3.4 The information available to acquirers of minority interests is typically much less than that which is available when acquiring a controlling stake. Accordingly, the Commission's powers to impose fines should be subject to an exception for cases where the parties can show that they had no reasonable opportunity to obtain the requisite information to allow them to assess whether a horizontal or vertical link arose.

4.4 We are particularly concerned by the suggestion in footnote 67 of the SWD that jurisdiction would be triggered if an acquirer also holds a non-controlling interest in another undertaking with a vertical or horizontal link to the target. That would impose very onerous obligations on financial investors to track all such interests and would multiply the number of transparency filings required by an order of magnitude. The likelihood of anticompetitive effects arising from such weak competitive links seems to us to be far too remote to justify such a burden. We therefore urge the Commission to specify that only existing links amounting to decisive influence will be taken into account.

4.5 If existing CSLs not amounting to decisive influence are taken into account, then at minimum:

4.5.1 such links should only be relevant where at least one of the relevant links confers some degree of influence (through "additional" rights). Theories of harm relating to financial incentives to coordinate are not sustainable where an acquirer has minority financial interests in two competitors or vertically-related undertakings, but no ability to influence the market conduct of either undertaking. We recognise that such issues are theoretically valid where a purely passive interest in the target is being acquired, but this is only the case (as discussed in paragraph 50 of the SWD) where the acquirer has the incentive and ability to unilaterally increase prices or restrict output of the rival business in which it has an existing interest. If its existing interest in that rival is also passive, it will have no ability to cause it to increase prices or restrict output; and

4.5.2 jurisdiction should not arise where a shareholder with a non-controlling interest in the purchaser has a horizontal or vertical link with the target. If a shareholder in the purchaser cannot exercise decisive influence over the purchaser, it is inconceivable that it could determine the way in which that purchaser exercises rights attaching to its minority interest in the target.

The significance threshold

4.6 We welcome the approach of excluding filing requirement for competitive links that are not significant. We also welcome the Commission's preliminary efforts to define the criteria that would determine whether a link is deemed to be significant. However, we consider that the thresholds proposed by the Commission are too low and that the qualitative tests set out in the SWD are too broad and too vague.

4.7 As regards the shareholding thresholds, we recognise the theoretical possibility for financial interests in the profits of another company to distort competition. However, such theories of harm have featured in remarkably few cases to date and, where they have been subject to scrutiny and economic analysis, have been dismissed as
unsupported by the evidence. Consequently, we submit that the proposed 20% shareholding threshold should not trigger jurisdiction unless accompanied by some acquisition of additional rights to veto corporate actions of the target that are relevant to its competitive conduct.

4.8 We also consider the 5% threshold to be much too low. Unless accompanied by additional control rights that bear directly on the competitive conduct of the target company (as opposed, for example, to a single board seat), it is extremely unlikely that such a low shareholding would allow its holder to impose its will on the target irrespective of the interests of shareholders representing the remaining 95% of the target. In addition, levels of shareholder influence are self-policing to a degree: other shareholders have no incentives to allow one shareholder a degree of influence that is substantially disproportionate to its financial interest in the target company. Consequently, it is highly unlikely that an acquirer of a 5% shareholding would be granted additional rights that allow it to affect the market conduct of the target. This is also consistent with the decisions of the Commission and NCAs cited in the SWD and Annex II of the 2013 consultation, in which remedies have been imposed in respect of CSLs:

4.8.1 Almost all the cases cited by the Commission have involved shareholdings of more than 20%.

4.8.2 Only three cases involved a shareholding of less than 15% that was required to be divested. These involved either additional structural links (such as a long-term exclusivity agreement in Glencore/Xstrata or indirect shareholdings through other minority investments in VEBA/VIAG), or in fact amounted to de facto control of voting rights in excess of 25% (due to low shareholder turnout, in A–Tec Industries). They are also notable for their absence of any economic analysis of why such low shareholdings might give rise to concerns.

4.8.3 All the cases in which the US courts have identified an antitrust merger violation involved shareholdings of more than 15%.

4.9 As regards the "additional rights" that would (in combination with a shareholding of 15% or more) trigger a filing obligation:

4.9.1 The test should be consistent with the simplicity, clarity and legal certainty of the "decisive influence" test under the EUMR. It should therefore focus on whether the acquirer is able to veto one or more of a clearly defined set of decisions that have the potential to influence the competitive conduct of the target company. Such an ability would assessed by reference to all the applicable governance arrangements (articles of association, shareholders

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10 See, for example, Ryanair / Aer Lingus merger inquiry, Final Report of the CC (August 2013), paragraph 7.148, where having considered this theory in some detail, the CC dismissed it for lack of evidence, in part because of "the uncertainty and indirectness by which Aer Lingus' profit will flow back to Ryanair."


12 See paragraph 76 of Annex II of the 2013 consultation.
agreement, corporate laws) and the test would be satisfied if there is a de facto ability to veto such decisions due to low turnout at shareholder meetings.

4.9.2 Careful consideration would need to be given to defining the specific types of veto right. There may, for instance, need to be a distinction made between veto rights in the context of public and private companies. For example, rights to veto the dis-application of pre-emption rights will confer much greater influence in public companies, where there are large numbers of small shareholders.

4.10 We recognise that disclosures of competitively sensitive information between actual or potential competitors (whether directly or via a vertically-related undertaking) can raise competition concerns. However, given that such disclosures are regulated by Article 101 – and will presumably continue to fall within the scope of Article 101 if the proposed reforms are implemented – we disagree that they are relevant for the purpose of determining jurisdiction. Moreover, the Commission's approach to enforcement of Article 101 in this area has resulted in a high degree of compliance and caution in this area. In our experience, board members and shareholders treat the prohibition on anticompetitive disclosures of information as a form of strict liability offence. In that context, there seems to us to be little justification for basing jurisdiction on an assumption or possibility that parties to acquisitions of a CSL would break the law. As the Court of Justice noted in Tetra Laval, the illegality of the conduct in question is a consideration that the Commission must take into account, and – in line with the approach of the Commission in RWE / Essent – the strong legal constraints on anticompetitive disclosures mean that they should not be a relevant consideration.

4.11 If, however, access to information is included as a jurisdictional determinant, we make the following observations:

4.11.1 it should be recognised that acquirers may forego access to information, even if they have a theoretical right to it. Accordingly, where the acquirer has entered into (or will enter into) appropriate compliance arrangements to restrict the flow of competitively sensitive information between it (and its board nominees) and the target, no filing obligation should be triggered. In this regard, the Commission should publish guidelines to clarify the restrictions that should be put in place on information flows to shareholders and directors with links to vertically- or horizontally-related undertakings;

4.11.2 the Commission should carefully define the precise categories of information that would be relevant for the purpose of assessing jurisdiction. Commercially or competitively "sensitive" information is too vague and subjective a term to form the basis of a mandatory filing requirement without further elaboration; and

4.11.3 access to information is irrelevant in the context of vertical links. Exchanges of information between vertically-linked companies only give rise to

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13 Case C-12/03 - Commission v Tetra Laval, para 159, Case T-210/01 - General Electric v Commission, para 70.

14 Case No COMP/M.5467 - RWE / Essent, Commission decision of 23 June 2009, paras 185-230.
competition concerns if they amount to the disclosure of pricing intentions of a competitor (i.e. a hub and spoke information exchange). However, such information is not of a type that minority shareholders of a company are entitled to receive (and, even if they were, it is already covered by the Article 101 prohibition). Consequently, even if information rights are considered relevant for determining the significance of a competitive link, this should only be the case for horizontal links.

4.12 We do not consider it appropriate to treat the presence of a single board seat as a factor that would trigger a filing. Instead, the question should be whether the acquirer of a competitive link will have a sufficient number of board seats to allow it to veto competitively significant decisions that are taken at board level.

**Turnover thresholds**

4.13 The SWP indicates that the current thresholds for Union dimension would apply for acquisitions of CSLs, but does not provide details of how this would be implemented. We make the following suggestions:

4.13.1 As indicated in our previous response, any new regime should be neutral as regards its impact on notifiability of acquisitions of decisive influence. Acquisitions of decisive influence that are not currently notifiable should not become notifiable as a result of the implementation of the Commission's proposals.

4.13.2 Article 5(4) EUMR should apply in the same way for calculating group turnover of acquirers of CSLs and their targets as they do for calculating turnover of undertakings concerned in an acquisition of decisive influence.

4.13.3 For acquisitions of CSLs, we continue to believe that turnover thresholds should be assessed by reference to the acquirer and target alone, without taking into account turnover of other undertakings which have decisive influence or a CSL in the target, or will have such an interest as a result of the transaction. This would be appropriate, as the theories of harm that have prompted the Commission's current proposals all relate to the competitive relationship between acquirer and target. This also appears to correspond with the (albeit ambiguous) suggestion put forward by the Commission in footnote 82 of the SWP.

4.13.4 A further benefit of that approach would be the avoidance of filing burdens for investments in start-up businesses, small and medium sized enterprises and greenfield joint ventures, and the associated chilling of incentives to make such investments (see our comments in 3.2 above).

4.13.5 The Commission will need to consider how to address situations in which an acquiring consortium is comprised of some acquirers of CSLs that meet the turnover thresholds (e.g. because the acquirer and target each have turnover of

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15 Alternatively, the Commission might consider taking turnover of other investors into account in circumstances where their acquisitions of shareholdings in the target joint venture are contractually interdependent.
more than €250 million in the EU) and some that do not (because the acquirer has turnover of less than €250 million in the EU). The implication of the above approach is that the Commission would have jurisdiction to review only acquisitions by the former set of acquirers, leaving acquisitions by the latter set to be reviewed under national merger control regimes, or referred upwards for review by the Commission. We consider that this approach would be appropriate. In particular, it would not risk the "artificial division" of transaction assessments (which the Commission identifies as a potential concern in the context of acquisitions of decisive influence),\(^\text{16}\) as the competitive assessment of each CSL would be standalone, with no relationship between the substantive competition issues raised by different acquirers. It would, however, be important to afford acquirers that do not meet the turnover thresholds the right to request that their related acquisitions are referred upwards for review by the Commission, so that they can ensure consistency of timing and procedure for the consortium acquisition as a whole, where desired.

**Interaction with the referral system**

4.14 We consider that the right of a Member State to request a referral following a (full) notification of an acquisition of a CSL should be curtailed in circumstances where the NCA has already received information on that CSL in the form of an earlier transparency filing, and did not request a referral at that stage. See also our comments in 4.13.5 above.

**Interaction with Regulation 1/2003**

4.15 Careful consideration will need to be given to how to amend Article 21(1) EUMR, i.e. the circumstances in which the Commission's powers of enforcement under Regulation 1/2003 are disapplied in respect of transactions involving acquisitions of CSLs. It seems to us that there is a distinction to be made between an acquisition of a CSL in a joint venture and the formation of joint venture, and that this distinction remains valid even where a CSL is acquired in the context of the formation of a joint venture. If that is the case, then a decision by the Commission to block or order the unwinding of a CSL would not affect the validity of the underlying joint venture, which would remain to be assessed separately under Article 101, in line with the *Guidelines on the applicability of Article 101 to horizontal co-operation agreements*,\(^\text{17}\) or (if other shareholders will exercise decisive influence) as a concentration under the EUMR.

4.16 The corollary of that principle would be that the clearance (or deemed clearance) of a CSL would not result in the disapplication of the Commission's enforcement powers under Regulation 1/2003 in respect of the underlying JV – although Article 21(1) would clearly need to be amended to prevent the Commission from acting against the acquisition of the CSL itself under Regulation 1/2003.

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\(^\text{16}\) Paragraph 122 of the SWP

\(^\text{17}\) OJ 2011 C11/1.
Substantive Assessment

4.17 Subject to our comments above regarding staggered acquisitions, we agree that the SIEC test is sufficiently flexible and appropriate for the assessment of non-controlling interests. However, non-controlling interests raise many different issues to acquisitions of full control. For example, instead of applying a blanket assumption of full control over all competitive conduct of the target (as happens for assessments of acquisitions of decisive influence) it will typically be necessary to undertake an analysis of the specific mechanisms of influence available to the purchaser, the specific corporate actions of the target that may be affected, and the scenarios in which this may result in competitive harm.

4.18 We therefore consider that guidance on the Commission's approach to the substantive assessment of non-controlling interests will be necessary. These guidelines should also make it clear that any decision to prohibit or unwind a particular acquisition of a CSL will not affect the validity of the underlying joint venture in which the investment is made (see 4.15 above).

4.19 We also agree with the Commission's proposed approach to ancillary restraints.

Amendment of the Banking Clause

4.20 We query why the Commission is proposing to limit the extension of the banking clause to "restructuring transactions" (including debt–for–equity swaps). Any transaction that would not be deemed a concentration as a result of Article 3(5)(a) should also not be deemed to be an acquisition of a competitively significant link.

Staggered Acquisitions

4.21 We agree with the proposal contained in the SWP that a transparency filing should be required only when a significant competitive link is acquired, and that a new filing should not be required every time that the relevant shareholding is increased and/or the accompanying rights are strengthened (unless this amounts to an acquisition of decisive influence).

4.22 There are certain implications of this approach that the Commission will need to address. In particular, in clearing (or opting not to investigate) an acquisition, the Commission will be implicitly authorising the acquirer to increase its stake to a level that falls just shy of decisive influence. In many cases, it will therefore need to assess the transaction as if some higher, hypothetical degree of control or financial interest has been acquired, than is actually the case. What must be avoided is a situation in which the Commission identifies competition concerns arising from that higher, hypothetical interest and prohibits the transaction (or orders it to be fully unwound, as implied by the proposed reform of Article 8(4) described in paragraphs 190-194 of the SWD), notwithstanding that the actual acquisition does not itself raise competition concerns. For example:

4.22.1 The Commission might conclude that an acquisition of a 20% financial interest with no control rights will not give rise to an incentive and ability to raise prices, but that if the stake were increased in the future to 49% (falling short of decisive influence) such concerns would arise; or
4.22.2 The Commission might conclude that an interest of 5% plus a single board seat would not confer any meaningful degree of competitive influence over decisions that are relevant to the target's competitive conduct, but that concerns would arise if the acquirer were to increase its level of influence to three board members and a right to veto major investments (again, falling short of decisive influence).

4.23 The Commission will therefore need to be prepared, when issuing clearance decisions, to identify the threshold at which any further increases in the magnitude of the CSL might give rise to concerns, and to require the acquirer, as a condition of clearance, to notify to the Commission any further increases that exceed that threshold.

5. CASE REFERRALS

Article 4(5)

5.1 We broadly support the proposed reforms of Article 4(5) referrals, subject to the following comments:

5.1.1 In cases where an NCA has vetoed an Article 4(5) referral following submission of a Form CO by the parties, our view is that the NCA should be required to accept that Form CO as a complete notification for the purpose of its national merger control rules, and that its review period should therefore start to run on the date on which it exercises its veto. Requiring the notifying parties to engage in a second set of pre-notification discussions in order to verify completeness of the filing under the applicable national regime would be inefficient, unnecessary and harmful to the predictability of transaction timing.

5.1.2 Paragraphs 140 and 141 of the SWP indicate that the Commission intends to introduce some form of information exchange between the Commission and NCAs during pre-notification, and that amendments to Article 19 EUMR might be necessary to "encourage" parties who intend to notify under Article 4(5) to engage in contact with the relevant NCAs. While unclear, this implies that confidential information about a transaction may be disclosed to NCAs without the parties' consent. While we agree that it would be sensible for NCAs to have access to information received by the Commission after a notification has been made in order to assess whether to veto a referral, we see no justification for removing control over the dissemination of such information from merging parties during pre-notification:

(a) First, involving several NCAs at this early stage of the process could lead to more complexity and a greater information burden for the parties, thus delaying the filing and eliminating the efficiencies and timing advantages that would otherwise arise under the proposed reform.

(b) Second, for transactions not yet in the public domain, it would result in multiple NCAs receiving highly sensitive market (and insider) information. We recognise that the ECN has a good record of
maintaining the confidentiality of documents, but as events in recent years have shown, information can escape from even the most secure systems.

(c) Third, the disclosure of information to NCAs should be by the parties, not the Commission, and should be at the discretion of the parties. We recognise that there may be circumstances in which providing information to one or more NCAs is desirable, as it will help to ensure a smooth and predictable filing process. However, parties and their business advisers are best placed to make such assessment, and can manage the relevant contacts with NCAs themselves. If they do decide to provide pre-notification information to an NCA, parties will have every incentive to ensure that such information is accurate and complete, as those NCAs will subsequently receive a copy of the filing.

Article 22

5.2 We welcome the proposal to remove the possibility for Member States to request an Article 22 referral even when they have no jurisdiction to review a transaction under their national merger control laws. We consider this to be a very positive development.

5.3 As regards implementation of this reform, we consider the system described in paragraphs 148–159 of the SWP to be broadly workable, subject to the following comments:

5.3.1 As stated in our response to the 2013 consultation, we favour a rule that would allow for an Article 22 referral to be made only if the transaction would otherwise be reviewable in three or more Member States. This would be consistent with both the Article 4(5) referral mechanism, and with the aim of limiting EU jurisdiction to transactions having an appropriate degree of cross-border impact.

5.3.2 Paragraph 153 suggests that NCAs might be under an obligation to circulate information regarding a transaction to other NCAs during pre-notification discussions. For the reasons outlined above in relation to Article 4(5) referrals, we consider that pre-notification dissemination of confidential information about a transaction should be at the option of the merging parties, and should take place only with their consent. In many cases, it will be advantageous to the parties to allow an information notice to be circulated during pre-notification, as that will mean that the risk of a referral can be resolved at an earlier stage, but that should be a strategic decision for the parties, not an obligation.

5.3.3 Paragraph 154 of the SWP indicates that NCAs would be required to circulate an information notice with an indication of whether they intend to request a referral "without delay". The vagueness of that requirement will adversely impact the predictability of timing for reviews and, ultimately, closing of transactions, with attendant financing costs. We suggest a limit of 3 working days, in line with the Commission's obligations under Article 19 EUMR.
5.3.4 The description of the envisaged referral system in paragraphs 153-158 of the SWD is unclear on what would happen if the MS that circulates an information notice in relation to a transaction decides not to request an Article 22 referral, but another Member State is minded to make such a request. We submit that the second Member State should be required to make any such referral within the suspension period that is triggered by the information notice, i.e. no later than 15 working days after notification to the first Member State. That should be the case even if the second Member State has not, at that time, received a full notification, or has received its notification after the first Member State. This could be implemented by providing that any Member State that has decided not to request a referral within 15 working days of a notification is deemed to have implicitly decided to veto any subsequent request for a referral by another Member State. If Member States are allowed a second opportunity to request a referral (once after receiving an information notice and again after receiving a notification) that would imply that the information notice does not contain sufficient information to allow other Member States to assess whether they should request or veto a referral and that it therefore serves no purpose. Moreover, allowing NCAs multiple opportunities to request a referral would result in a referral system that is even more complex and unpredictable for notifying parties that the current system.

5.3.5 We also query why the applicable suspension obligation would end "at the latest 15 working days after the Member State which sent the notice receives a formal notification". If information notices are circulated during pre-notification, we query why the suspension period should be longer when that takes place. Instead, we consider that the 15 working day suspension period should run from the date on which the notice is circulated.

5.3.6 While we welcome the proposal that Member States with no competence to review a transaction should not be able to request a referral, we have concerns that the possibility for the Commission to "invite" a Member State to make a request will operate as a "backdoor" referral mechanism for non-competent Member States, i.e. by asking the Commission to exercise its right to invite a referral. Accordingly, we favour the removal of the Commission's right to invite under Article 22(5).

5.3.7 Finally, we consider that, in cases where the Commission has exercised its right to invite under Article 22(5), there is little justification for the Commission then taking 10 working days to decide whether to accept the request that it has invited. Accordingly, where there has been an invitation under Article 22(5), the referral should take place (deemed acceptance by the Commission) on the same date that the MS requests it.

Article 4(4)

5.4 We agree with the proposal that the test for an Article 4(4) referral should require the parties to show only that the concentration is likely to "primarily impact a distinct market" in the Member State concerned, instead of having to concede (as they do at present) that it would have a "significant effect in a market".

Article 9
5.5 It is deeply disconcerting that merging parties face the prospect under the current Article 9 EUMR of wasting 65 working days (in addition to the pre-notification period) engaging with the Commission before having their transaction referred to a Member State, whereupon they are required to prepare and submit a new notification and their review timetable starts afresh. The Commission is now proposing to allow for the possibility of up to 100 working days (plus the pre-notification period) being wasted in this way.

5.6 In our view, the current possibility for a referral after initiation of Phase 2 proceedings is unjustified. The intensity of review that is required in order to assess whether the Article 9 criteria are met (e.g. whether the concentration "threatens to affect significantly competition" in a "distinct market") is broadly comparable to that required to assess whether a concentration raises "serious doubts as to its compatibility" with the internal market for the purposes of Article 6(1)(c), and ought therefore to be carried out within the same timeframe, and should not vary according to whether Phase 2 proceedings are initiated. There has only been one case in the history of the EUMR in which the Commission has referred a case after initiation of Phase 2 proceedings. In all other Phase 2 cases, the Commission has been able either to decide on the referral at the same time as initiating Phase 2 proceedings, or has rejected the referral request during its Phase 2 review. We therefore favour the abolition of the extended period for assessment of referral requests under Article 9(4)(b).

5.7 For the same reasons, the proposal to extend the assessment period outlined in the SWD is without merit. One of the justifications put forward by the Commission ("to ensure that its investigation is well advanced at the time when it has to decide on a referral") seems to us to be more of a justification for abrogating the period of potentially wasted engagement with the Commission. The other – bringing the deadline "in line with the deadline for remedies in Phase 2" – has no bearing on the Commission's assessment of whether the Article 9 criteria are met. Moreover, extending the period in this way would allow the Commission to put pressure on parties to submit remedies by threatening to refer the transaction, even in cases in which it is not confident that it has robust evidence that the concentration would be incompatible with the internal market in the absence of those remedies.

6. MISCELLANEOUS

Extra-EEA joint ventures

6.1 We welcome the proposal to eliminate the redundant filing requirements that presently arise for transactions having no conceivable nexus with the EU. Not only would this save parties substantial unnecessary costs in respect of EU filings, it would also finally open the door to advocating the implementation of similar reforms in the numerous other jurisdictions around the world that require notification of joint ventures with no conceivable nexus to the territory in question.

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18 Case COMP/M.1628, TotalFinaElf/Elf Acquitaine, partially referred on 26 November 1999 following initiation of proceedings under Article 6(1)(c) EUMR on 5 October 1999.

19 Most recently in Case COM/M.7009, Holcim/Cemex West, Case COMP/M.7000 Liberty Global/Ziggo and Case COMP/M.7018, Telefonica/Deutschland/E-Plus.
6.2 Our favoured approach to achieving this aim would be to provide that, for transactions involving the creation of a joint venture, or acquisition of joint control over an existing undertaking, the applicable turnover thresholds must be satisfied by the joint venture undertaking, so that it is not possible for EUMR jurisdiction to arise solely on the basis of the turnover of its controlling parents. An alternative would be to exclude jurisdiction for those extra-territorial JVs that currently qualify for treatment under the simplified procedure, i.e. those in which the JV has assets or turnover of less than EUR 100 million.

6.3 We recognise that the acceptability of this approach to the Commission will be largely dependent on the particular theories of harm that it considers might apply to joint ventures with minimal turnover or assets in the EEA, and to the creation of "green field" joint ventures with assets that are not yet generating sales in the EEA. As the Consultation does not elaborate on what those theories are, we recommend that the Commission engages in further debate on this matter with the practitioner and academic community, in order to establish whether the relevant theories of harm are credible and if so, whether addressing them through the application of the EUMR (as opposed to the merger regime of another jurisdiction, or Article 101) is justified. As an initial contribution to that discussion, we have set out in Annex 1 some of the possible theories of harm associated with JVs with minimal sales in the EEA, and the reasons why we do not consider that the EUMR is the most appropriate enforcement tool.

6.4 This approach would also be consistent with the Commission's experience of reviewing extra-territorial joint ventures. We note that there has never, in over 25 years of the EUMR's history, been a decision in which the Commission has imposed remedies on a JV (including a greenfield JV) with no, or limited, sales in the EEA, including sales attributable to assets to be contributed to the JV. One reason for this may be that, in almost all the situations in which a valid theory of harm exists for a JV with minimal EEA sales, the same competitive harm (i.e. concentration of market power) can be achieved by an acquisition of sole control, having no Union dimension. Such acquisitions of sole control can be, and are more appropriately, reviewed either under Article 101, or by competition authorities of the jurisdictions in which the relevant customers are located. We consider that joint ventures should be treated in the same way.

6.5 We consider that the alternative that is proposed in the WP – of excluding full function JVs that are "located and operating outside the EEA and without any effects on EEA markets" – is an inferior solution. If the Commission does opt to adapt the jurisdictional scope of the EUMR in this way, this would need to be complemented by:

6.5.1 guidance on the circumstances in which an extraterritorial JV might be viewed as affecting competition in the EEA; and

6.5.2 the possibility for parties to seek jurisdictional guidance to confirm their understanding that a given JV falls within the exception.

Extending the transparency regime to certain simplified procedure cases
6.6 We agree with this proposal, subject to our comments in Section 4 of this response regarding design of the transparency system. An even more effective way to remove unnecessary regulatory burden would be to remove all filing obligations from transactions involving no reportable markets, i.e. to exclude them from the scope of the EUMR entirely.

**Unwinding of concentrations with regard to minority shareholdings (Article 8(4) EUMR)**

6.7 Paragraph 192 of the SWD indicates that the Commission's intended reform of Article 8(4) would be cumulative with the proposed extension of the EUMR to non-controlling interests. In our view, they are alternative measures, as reform of Article 8(4) is unnecessary if the Commission acquires new powers to review non-controlling interests. If both reforms are implemented, the implication would be that a purchaser that acquires a non-controlling interest, which is then either cleared or not subject to challenge within the relevant prescription period, could nonetheless become subject to an obligation to divest that interest if, some years later, the acquirer decides to attempt an acquisition of full control of the target that is blocked by the Commission. If that is the Commission's intention, it would substantially undermine the legal certainty that is created within the design of the regime for review of non-controlling interests. In our view, it would also offend against principles of fairness and legitimate expectations. Purchasers should be able to assume that an acquisition of a non-controlling interest is safe from regulatory intervention if it has been expressly or implicitly cleared by the Commission. For the same reasons, any such legislative amendment should not affect acquisitions of non-controlling interests that were acquired prior to the entry into force of that amendment.

6.8 For the reasons set out in our response to the 2013 consultation, we consider that the Commission should not have the power to require, purely for its own administrative convenience, the divestment of interests that do not give rise to competitive harm. Accordingly, Article 8(4) should not be extended in the way that the Commission proposes, but should instead be modified to revert to the previous position whereby a purchaser was permitted to retain a non-harmful minority stake in the target. If the Commission does proceed with an extension of the scope of Article 8(4), we therefore favour the solution put forward in paragraph 193 of the SWD, i.e. that following the complete dissolution of a prohibited concentration under Article 8(4), the divestment should be limited to the shareholding that exceeds the threshold of what is permissible under the rules on non-controlling minority shareholdings. The avoidance of "a potentially complex assessment" does not seem to us to be a sufficiently robust justification for imposing costly divestment obligations in respect of interests that do not give rise to competition harm.

**Consistent application of the "full function" criteria**

6.9 While not covered in the WP, we consider that the Commission should take the opportunity of legislative amendments to clarify the circumstances in which a joint venture must satisfy the full function criteria in order to be notifiable under the EUMR, i.e. the relationship between Article 3(1)(b) and Article 3(4) EUMR. We have experienced differing approaches in this respect from Commission case teams – an inconsistency that has been a source of frustration for clients, and which seems to us to be unjustifiable after nearly 25 years of application of the EUMR. These
inconsistencies arise most frequently in relation to cases involving changes from sole control to joint control over a pre-existing undertaking, and cases involving the entry of a new shareholder in a pre-existing joint venture.

6.10 In our view, and consistent with Recital 20 EUMR, the full-function test is best viewed as the jurisdictional dividing line between cases that are more akin to cooperation between competitors and therefore more suitable for Article 101 assessment, and those that result in structural market changes and should therefore be treated as concentrations. In that light, it seems to us that any change in the structure of control of a pre-existing undertaking should be deemed to be a concentration, regardless of whether it satisfies the full function criteria. This clarification could be achieved by amending the EUMR to provide that Articles 3(1)(b) and 3(4) EUMR are alternative bases on which EUMR jurisdiction may arise for joint ventures, and that it is not necessary for them to apply cumulatively.

Clifford Chance LLP
October 2014

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20 This lack of clarification has been recognised by Commission officials. See J Lubking and D Dittert, in EU Competition Law, Volume II: Mergers and Acquisitions (Claeys & Casteels, 2012), paragraph 2.140.
### ANNEX 1: JOINT VENTURES WITH MINIMAL TURNOVER IN THE EEA

<table>
<thead>
<tr>
<th>Scenario</th>
<th>Analysis</th>
<th>Enforcement tool</th>
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<tbody>
<tr>
<td>1. Parties contribute IP to JV which does not (yet) generate turnover but which is likely to give the JV a dominant position in the future.</td>
<td>The equivalent competitive harm can be achieved (concentration of IP-related dominance in the hands of one party) by an acquisition of one party's IP by the other. However, such an acquisition is regulated by Article 101, not the EUMR. There is no justification for treating the two transaction structures differently.</td>
<td>Article 101 is the appropriate enforcement tool.</td>
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<td>2. Parties create a new joint venture, which will invest in new production capacity. The JV is likely to acquire a dominant position in the future as the parties will agree to (or have incentives to) close down their existing less efficient capacity outside the scope of the JV.</td>
<td>Scenarios 2 and 3 involve Article 2(4) spill-over effects, which are in any event considered under Article 101.</td>
<td>Article 101 is the appropriate enforcement tool.</td>
</tr>
<tr>
<td>3. Parties use the JV to coordinate their activities in the EEA, outside the scope of the JV.</td>
<td>In scenarios 4 and 5, the jurisdictions in which the immediate customers are located are better placed to apply their national laws to protect those customers (and their export competitiveness). Also, the same competitive harm could be achieved by an outright acquisition, which would fall outside the scope of the EUMR for lack of a Union dimension. This simple way of avoiding EUMR jurisdiction may be one reason why no notified extraterritorial JVs have ever been found to give rise to competitive harm under the EUMR. Also, query whether the &quot;immediate, substantial, and foreseeable&quot; test of Gencor is met in these circumstances?</td>
<td>Merger control and/or antitrust laws of other jurisdictions are best placed to address such concerns.</td>
</tr>
<tr>
<td>4. Parties combine in a JV productive assets that have sales only to customers outside the EEA. The combination is likely to result in dominance and price rises to non-EEA customers that may flow through to price rises for products sold into the EEA.</td>
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<tr>
<td>5. Parties combine in a JV productive assets that have sales only to customers outside the EEA. The combination is likely to result in dominance in a market that is global (or otherwise includes the EEA) and will therefore cause rivals that do sell to EEA customers also to increase their prices.</td>
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