RESPONSE TO THE EUROPEAN COMMISSION’S CONSULTATION ON EU MERGER CONTROL (“TOWARDS MORE EFFECTIVE EU MERGER CONTROL”): EXTENSION OF SCOPE OF EU MERMER TO INCLUDE MINORITY INTERESTS AND REFORM OF THE REFERRAL SYSTEM

A. Introduction

1. Dickson Minto W.S. welcomes the opportunity to respond to the European Commission’s (“the Commission”) second consultation paper regarding (i) the extension of the scope of the EUMR to include non-controlling minority shareholdings and (ii) reform of the referral system, issued on 9 July 2014. The views expressed in this response are solely ours and do not necessarily reflect those of our clients.

2. In this response, we refer to the following documents: Council Regulation (EC) No 139/2004 of 20 January 2004 (the "EUMR"), the White Paper entitled “Towards more effective EU merger control” issued on 9 July 2014 (the "White Paper") and the Commission staff working document entitled "Towards more effective EU merger control” issued on 9 July 2014 (the "Staff Document").

B. Minority shareholdings

General

3. As we noted in our response of 11 September 2013 to the Commission's first consultation paper on these issues (our 'Previous Response'), we consider that non-controlling minority shareholdings do not normally give rise to significant anticompetitive effects, other than in very limited circumstances, and that the case has not been made that the Commission's proposed reforms are genuinely necessary. The proposed extension of the Commission's powers risks, in our opinion, deterring investment in European companies, limiting growth and reducing the EU's global competitiveness. We also iterate that the proposed changes are somewhat surprising in light of the Commission's stated aim of making EU merger control more business friendly by reducing administrative burdens. It would have been helpful if the Consultation Paper had given more consideration to whether it is appropriate to extend the Commission's powers at all (instead of focusing exclusively on how they should be expanded).

4. The cases cited to justify the proposed changes such as BSkyB/ITV and Ryanair/Aer Lingus are sparse, and unconvincing evidence that there is a problem that needs addressing urgently. Bearing in mind the disruption such changes are likely to cause to European businesses, we would have expected to see more systematic evidence of the alleged deficiencies in the current system. Furthermore, the problems in BSkyB/ITV and Ryanair/Aer Lingus have been resolved by national authorities.

1 See for example the following quote from the Commission's press release dated 27 March 2013 in relation to its consultation on the revision of the simplified procedure: "This initiative is part of the Commission's overall effort to make administrative procedures less burdensome for businesses, thereby stimulating growth and making Europe more competitive." See also paragraph 76 of the White Paper and paragraph 176 of the Staff Document.
Choice of System Type

5. If (despite the issues raised above) the scope of the EUMR is to be widened to cover minority shareholdings, we consider that only a self-assessment system would be appropriate. The business integration steps associated with the acquisition of minority stakes are usually far less significant than those in mergers in which control is secured. Therefore it is unlikely that any permanent harm will be done to the competitive environment if an acquisition of a minority stake proceeds, without approval, under a self-assessment system. Unwinding the acquisition of minority stakes is also normally not particularly complicated, although it will not necessarily be straightforward in all cases and will often come at a price (i.e. the acquirer may be forced to divest the shares at a loss.

6. The other systems proposed, including the 'preferred' targeted transparency system, are likely to create an unnecessary and burdensome workload for both businesses and the Commission.

7. We would query the robustness of the Commission's estimate that 20-30 minority shareholding cases per year will meet the criteria of the targeted transparency system.\(^2\) We expect that a large number of private transactions will meet these thresholds (especially in private equity transactions as well as syndications and refinancings). It seems reasonable to expect the true figure to be considerably higher.

8. Generally the White Paper and Staff Document give the impression that insufficient thought may have been given to the effects of the proposed changes on primarily financial investors. If a targeted transparency system is to be adopted, we strongly support measures being taken to limit the scope of the 'competitively significant link,' so as not to catch minority stakes taken for investment purposes. It seems particularly inappropriate that an investment focused business with a pre-existing minority stake in one company should need to file an information notice when taking a minority stake in a competing company. The risks of anti-competitive effects in such a scenario are very low, and it is far from the fact-pattern of the cases such as Ryanair/Aer Lingus being used to justify the proposed changes.

9. A targeted transparency system is however preferable to a notification system, which would create a very heavy and unnecessary administrative burden.

'Safe Harbour'

10. We support the adoption of a safe harbour based on the percentage stake being acquired, but employing a 5% threshold seems very cautious, imposing uncertainty and an administrative burden on a large number of companies. In the UK, acquisitions of stakes below 15% are only examined by the CMA in 'exceptional circumstances' and, we understand that, in Germany stakes below 20% are examined only rarely.

'Plus Factors'

11. If a targeted transparency system is to be adopted we believe that any 'targeting' should be limited to the application of a single threshold of 15-25%, without a second limb in which 'plus factors' such as board seats are relevant. Plus factors inevitably contain case specific designs, nuances and effects, better suited to examination under a substantive, as opposed to jurisdictional, analysis.

\(^2\) Footnote 66, Staff Document
12. If a system is adopted in which plus factors play a role, we would urge that these factors should be listed in the EUMR and further explained in guidance. This is a jurisdictional matter where clarity is important, and the leeway afforded by catch-all factors is not appropriate (as it may be in substantive assessments). We would therefore suggest that, subject to the below, the plus factors be limited to a "de-facto" blocking minority as far as it affects material decisions by the company, a material presence on the board of directors or special information rights, and that no "fudge factor", such as the ability to "exert influence" mentioned in the Staff Document, be included.3

13. Furthermore, the factors listed in the White Paper could usefully be further clarified.

(i) A presence of a de-facto blocking minority is not easy to assess, as the complexity of the case law surrounding control for the purposes of calculating turnover under Article 5(4)(b) EUMR shows,4 and therefore we would ask that further thought be given to the advantages of adopting a legal standard which provides more certainty. This would involve balancing the risk of under-enforcement with considerable cost savings and improvements in legal certainty. The presence of an effective informal advice system would lessen these problems considerably (see paragraph 26 below). In any event, the de facto ability to block decisions should only be taken into account as far as this concerns decisions which are material to the target company’s business.

(ii) It would be helpful to have guidance as to whether 'Chinese Walls' and other information barriers which are put in place between the acquirer and the target company could be considered as 'minus factors' which negate the competitively significant link.

(iii) We believe that access to "commercially sensitive information" is too vague to be useful. "Access to information that would not normally be made available to a minority shareholder" could be a more precise and useful standard, though by no means perfect.

Scope of the Information Notice

14. We broadly support the suggestions as to what information is to be contained in the information notice.5 We agree it is appropriate that the parties should provide basic information about themselves, their turnover, the transaction, the level of shareholding in the target before and after the transaction and the rights attached to the shareholding. We understand the phrase 'essential market information' to mean that the information required would be more limited than that provided when describing all plausible markets in a Form CO. It would appear sufficient to provide information only for markets where there is a 'competitively significant link' and only for the most plausible definition of those markets, rather than requiring the parties to cut and re-present the data in all feasible ways. It would be helpful if this was expressly stated in the guidance.

15. Merger parties normally consider the US approach under HSR 4(c) to be burdensome and disruptive (as it effectively amounts to an additional disclosure exercise in the middle of the preparation of a transaction). The alternative German approach of only requesting market share information where the merged entity’s market shares are above 20%, is somewhat of a 'Catch-22' in that the parties will often have to conduct the full market analysis anyway, in order to

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3 Para. 78, Staff Document.
4 See Broberg, M., "Broberg on the European Commission’s Jurisdiction to Scrutinise Mergers, 4th Ed., 2013, Wolters Kluwer, Netherlands, pp. 85-93 for an exposition of the ambiguity in this area stemming from judgments such as Case IV/M 147 Eurocom/RSCG, Case IV/M 187 IFINT/EXXOR and Case IV/M 917 Valinox/Timet.
5 Para 104, Consultation Paper
determine whether this threshold is exceeded (even if they are not then obliged to disclose it to the Commission).

Guidance

16. We do not agree with the suggestion in the Consultation Paper that guidance should only be published after the Commission has gained "some experiences" as there would be no way for firms to accurately assess whether a filing was required in the meantime. We iterate the point made in our Previous Response that, in the interests of legal certainty, guidance should be published at the same time as the EUMR amendments taking effect, but only after proper consultation has been carried out. After the Commission has gained some experience of the revised EUMR and the accompanying guidance in practice, the guidance could be further updated, again after proper consultation.

Voluntary Notification Option

17. We welcome the inclusion in the proposed system of a voluntary full notification option, to cater for parties that require legal certainty.

Standstill Obligation

18. We are pleased that the proposed changes do not include the application of the standstill obligation contained in Article 7(1) EUMR to the acquisition of minority stakes. However, even the inclusion of a 15 working day standstill obligation, while Member States request whether they wish to request a referral seems a large burden, which will strain the timetables of many transactions. The acquisition of minority stakes does not lead to irreversible integration (as the acquisition of a controlling stake commonly does) and so a standstill obligation is disproportionate.

19. Though it would be preferable to have no standstill obligation at all, if there is to be one we would suggest that it should last no more than 2 or 3 working days, which should be sufficient time to assess the limited information included in the information notice. As an alternative, or complementary measure, the Commission could be empowered to make a 'hold separate' order where it is justified by the exceptional circumstances of the case.

Limitation Period

20. A limitation period of 4 to 6 months would be appropriate in a self-assessment system, as sufficient time is required for (i) the concerns or complaints of the public to be brought to the Commission's attention, and (ii) for the Commission to assess whether an investigation is required. However, in a transparency system in which an information notice is published in order to invite third party comments, a 4 to 6 month limitation period seems excessive. Instead, a 2 week limitation period would be more appropriate. Anything approaching the 4 months used in the UK, where a full self-assessment system is in effect, would be disproportionate.

21. We also echo the concerns of the European Venture Capital Association, that insufficient thought has been given to how the proposed regime will affect financing (and refinancing) transactions. As part of such transactions investors may take minority stakes, which could trigger the proposed notification requirements. In many cases investors will be unwilling to

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advance funding until it is certain the Commission will not intervene. There is a real risk that a long limitation period, as well as the publicity the proposed information notices would bring, will reduce significantly the amount of financing available to European businesses.

22. We note the statement in the White Paper that a 4-6 month limitation period "would reduce the risk of the Commission initiating an investigation on a precautionary basis". A procedure for extending the limitation period in exceptional circumstances could be introduced (for example for another 4 weeks) to allay these concerns.

Opening an Investigation

23. Upon opening an investigation, the Commission should issue a short formal decision, setting out its reasoning. This would provide the parties with an appealable decision. Given the low likelihood of anti-competitive effects, the Commission's reasoning for opening an investigation should be subject to a high standard, such as it 'having serious concerns that the proposed concentration would significantly impede effective competition'. Such a test would also discourage the Commission from opening unnecessary investigations.

24. If an investigation is opened, the concentration should fall within the ambit of the simplified procedure by default, allowing the parties to use the Short Form CO and expedited procedure. In exceptional circumstances the Commission could state in its formal decision opening an investigation that a full Form CO was required (including its reasoning).

Sanctions

25. The White Paper and Staff Document do not address what sanctions would be applicable to firms that failed to submit an information notice in the "targeted transparency system". If the Commission is considering introducing sanctions for a failure to submit an information notice, presumably a later public consultation will address this element of the proposed system. As stated above, our preference remains for a self-assessment system under which no sanctions are necessary, though it is worth noting that in the UK parties sometimes make unnecessary filings to avoid the 'sanction' of the UK's Competition and Markets Authority opening a merger enquiry in the following four months. This deterrent effect is a good basis for designing any sanction in a "targeted transparency system" as well. Under a system where the Commission has a month to decide whether to open an investigation, some parties would be incentivised to file an information notice, if not doing so would mean that the Commission might open an investigation at any time in, for example, the following four months.

Informal Advice

26. The targeted transparency system may in practice give rise to uncertainty, for example around establishing what is a de facto blocking minority and what is a vertical relationship for the purposes of determining relevant and affected markets. An informal advice system (which is more formalised than the current practice of pre-transaction engagement with DG COMP) would be useful. It would allow parties to gain comfort on matters where genuine uncertainty exists.

C. Referral system

General comment
27. We believe that enhanced clarity and ease of reference could be achieved by grouping all referral provisions together in the revised EUMR text (i.e. Article 4(4), Article 4(5), Article 9 and Article 22).

Article 4(5) (referral by parties up to Commission where notifiable in at least 3 Member States)

28. We welcome the Commission's proposal to abolish the Form RS, as it will streamline the Article 4(5) process.

29. However we do not believe that this change alone will lead to more referrals under Article 4(5). In our experience, parties often find that the mandatory 15 working day waiting period problematic. In many transactions deal timing is tight and sellers are unwilling to agree to additional suspensory periods of this magnitude. We favour a shortening of the consultation period for Article 4(5) requests to 5 working days, as this should be sufficient time for Member States to review the relevant information.

30. If a competent Member State(s) opposes the jurisdiction of the Commission, we agree that the default position should be that the Commission renounces jurisdiction in favour of the relevant Member State(s). However, it is possible to have a situation where only one Member State opposes Commission jurisdiction and where the transaction will, in the absence of Commission jurisdiction, meet filing thresholds in several different Member States. In this scenario, the notifying party would be faced with the sudden burden of having to urgently prepare a number of individual merger control filings (including in Member States which were happy for the Commission to review the merger). This is often undesirable from a practical perspective and makes it difficult for notifying parties to accurately foresee the timing of the process. We would suggest therefore that the Commission provides an exception to the default position for a notifying party that would prefer that the opposing Member State and the Commission split jurisdiction, so that the notifying party does not have to file separately in a number of Member States.

31. For example, where a competent Member State opposes Commission jurisdiction, the notifying party could be permitted, say, 2 working days in which to notify the Commission of its desire that there be split competence (i.e. that the objecting Member State has competence to review the effects of the transaction in that country and the Commission retains jurisdiction elsewhere). We respect the importance of the "one stop shop" principle, and believe that it signifies that whilst one shop is best, fewer shops are better than more shops.

32. We do not object to the principle that information exchange between the Commission and the Member States be broadened, as we recognise that this exchange is designed to assist Member States in their review of the case and may also benefit the parties. We would however request that, in order to protect the parties' sensitive information that information should only be exchanged with the consent of the notifying parties. This consent could be given on an "objection basis" i.e. where the notifying party is deemed to agree to the information being shared unless it objects to the Commission's request within, for example, 2 working days.

Article 22 (Member State requests referral up to Commission)

33. We support the introduction of the rule that only competent Member States can request a referral to the Commission under Article 22.

34. We consider that the proposal for Member States to circulate an early information notice in cross-border cases, potentially before the submission of any notification, carries practical benefits. However, there may be sensitivity issues, particularly in relation to transactions which are not
yet in the public domain. Our suggestion is therefore that Member States only circulate such
notices where they have received prior consent from the notifying parties (again this could be on
an "objection basis").

Article 4(4) (parties request referral down where transaction has a significant effect on
competition in a Member State)

35. We consider that the Article 4(4) procedure is useful since, where it is clear to a notifying party
that a Member State would otherwise make an Article 9 referral request, the notifying party is
able to use the procedure under Article 4(4) as a 'fast-track.'

36. Under the current procedure, time is lost in pre-notification and the Form RS consultation
period. We therefore support the abolition of the Form RS under Article 4(4).

37. Instead of a Form RS, we would propose the introduction of a shorter form along the lines of the
current case team allocation request (but including an additional question on how the
concentration may significantly affect competition in any distinct markets within any Member
States). This would resolve the concerns raised in paragraph 164 of the Staff Document. We
would also suggest shortening the waiting period as it is our view 25 working days is an
unnecessarily long timeframe for the Commission to decide whether or not to refer the case to
the Member State.

D. Miscellaneous

Extra-EEA Joint Ventures

38. We support the proposal to exclude full-function joint ventures, located and operating outside
the EU, from the Commission's jurisdiction, even when technically the thresholds are met. Any
changes must be clearly and sensibly drafted, so as to focus on the relevant markets in which the
joint venture operates, rather than on, for example, the location of its assets or corporate entities.
For example, a joint venture company established in France with a factory in Germany that only
markets and sells its products in Russia should be considered an extra-EEA joint venture.

Merger ‘block exemptions’

39. We agree with the proposal to grant the Commission the power to effectively create ‘block
exemptions’ for certain categories of mergers, allowing it to remove those transactions currently
subject to the simplified review procedure from merger control altogether.8

Vertical relationships for the purposes of determining relevant and affected markets

40. We welcome the Commission’s clarification in footnote 43 to the 5 December 2013 Implementing
Regulation9 of what constitutes a vertical relationship for the purposes of determining relevant
and affected markets. It states that "[a] vertical relationship normally presupposes that the
product or service of the undertaking active in the upstream market in question constitutes an
important input to the product or service of the undertaking active in the downstream market"
[emphasis added]. For guidance on what is an important input, the Implementing Regulation
directs readers to point 34 of the Non-horizontal Mergers Guidelines10, which gives examples of

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8 Paras. 1182-183 Consultation Paper
Regulation (EC) No 139/ 2004 on the control of concentrations between undertakings
10 Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between
undertakings (2008/ C 265/ 07)
inputs in downstream products that are significant cost factors, critical components, or significant sources of product differentiation. While a positive step, this clarification has not resolved all ambiguity for a number of reasons:

- The authority of a single footnote which refers to guidance seems questionable;
- The Implementing Regulation states what will normally be considered a vertical relationship, but does not explain which cases are to be considered normal, nor how to treat abnormal scenarios;
- The guidance to which the footnote refers takes the form of a number of examples of important inputs, which are not particularly useful for determining borderline cases, as it neither provides examples of things which are not important inputs, nor gives a test to apply; and
- The continued relevance of the logic the Commission used in the CVC/Schuijtema\textsuperscript{11} decision is unclear. Rather than employing the concept of an 'important input', in that case the Commission applied a test that distinguished between what did and did not form part of the ”value-creation chain.”\textsuperscript{12}

41. The adoption of a targeted transparency system would exacerbate the consequences of these uncertainties, as determining whether there is a vertical relationship may be decisive as to whether an information notice needs to be filed. We would therefore welcome clear guidance in this area.

Two further suggested amendments

42. As the Commission is proposing changes to the EUMR anyway, we would welcome the following two further amendments:

- At present, the EUMR refers to two different types of ”control”: (i) control as set out in Article 3(3) of the Merger Regulation (definition of concentrations), and (ii) control as set out in Article 5(4)(b) (calculation of turnover) (albeit without expressly referring to the notion of ”control”). We consider that this is confusing to businesses and we therefore propose using a single control concept.
- We note that, under the current EUMR, clearance decisions are not subject to an ”expiry date”. There may be circumstances in which completion of a transaction may be delayed by a substantial period of time (several months or even years) following the Commission's clearance decision. In such a case, it might be unclear to a notifying party whether the previously-obtained clearance decision remains applicable to the (what may reasonably be considered still the same) concentration. To provide as much certainty as possible to businesses, we would like to suggest that the Commission includes an automatic expiry date with each clearance decision (e.g. two or three years). Where this time period has expired, parties should engage with the Commission to discuss whether a new notification is required. There may, for example, be cases that originally required a full Form CO but for which a simplified procedure may be appropriate given the fact that the Commission has reviewed the market in question relatively recently.

\textsuperscript{11} COMP/M.5176, 26/06/08
\textsuperscript{12} Ibid, see footnote 6.
We would be happy to clarify or discuss any of the above if it would assist the Commission. If so, please contact Ajal Notowicz (t: +44 (0)20 7649 6838, e: ajal.notowicz@dmws.com) or Jago Chanter (t: +44 (0) 20 7649 6896, e: jago.chanter@dmws.com).

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