RESPONSE TO THE EUROPEAN COMMISSION’S PUBLIC
CONSULTATION OF 9 JULY 2014

WHITE PAPER: TOWARDS MORE EFFECTIVE MERGER CONTROL

SUBMISSION OF 3 OCTOBER 2014
1. INTRODUCTORY COMMENTS

(1) Freshfields Bruckhaus Deringer welcomes the opportunity to comment on the proposals to reform EU merger control as set out in the Commission’s White Paper “Towards more effective EU merger control” and the accompanying Commission Staff Working Document, both dated 9 July 2014. Our comments below are based on the firm’s considerable practical experience of merger control at EU and national level garnered over several decades of advising and representing many of Europe’s and the world’s largest companies.

(2) In respect of the proposals concerning the extension of the Commission’s jurisdiction to acquisitions of certain non-controlling minority interests, we have severe doubts as to whether such extension is justified given the infrequency with which such transactions raise serious competition concerns, and we are concerned by the chilling effect that this would have on European equity and financial investment markets. An open, active and competitive investment market, with limited regulatory burdens and legal uncertainty, is essential to European businesses of all sizes and the EU’s objectives of economic growth and limiting red tape.

(3) We strongly advocate that control of such transactions should only take place, if at all, through a system of voluntary notification. We have already expressed these views in more detail in our submission to the Commission on its 2013 consultation on this subject and we do not repeat them further here.

(4) In the event that the Commission were, nevertheless, to propose a mandatory system of control, we agree that it should (i) target only problematic anti-competitive acquisitions, (ii) avoid unnecessary and disproportionate administrative burden on companies, the Commission and national authorities, and (iii) fit with the merger control regimes currently in place at both EU and national level. We are concerned that the proposals as set out will not be fully in line with those principles. Most importantly:

- The combination of low ownership share thresholds, absence of a “bright-line” jurisdictional test, a detailed information notice requirement, a 15 working day suspension period, and an additional 4 to 6 month intervention period would:
  - Be an unnecessary administrative burden on business and
  - Create substantial and undesirable uncertainty for a very wide range of innocuous transactions.

(5) As to the proposals in respect of referrals of cases to and from the Commission, we broadly welcome these, though we think that the EEA wide jurisdiction proposed in respect of Article 22 EU Merger Regulation (EUMR) should exclude jurisdictions in which the national authorities are not competent under national law to review the transaction in question.
We have no specific comments on the remaining technical and streamlining proposals set out in the White Paper.

2. MINORITY INTERESTS

2.1 JURISDICTION: DEFINITION OF “COMPETITIVELY SIGNIFICANT LINK”

Subject to what we have said above, we support the proposed use of two cumulative criteria (and in particular the requirement of a competitively significant link as well as ownership share thresholds). We also agree that an absolute safe harbour, at a meaningful level, is essential if the Commission is to avoid significant uncertainty and additional cost for the vast majority investments that do not create competition concerns.

However, while we recognise that the proposal is designed to deal with these issues, we think that it could be further refined so as to provide a level of legal certainty appropriate to a mandatory, suspensory regime and to ensure that only those acquisitions which raise potential competition concerns are caught. In particular:

- The concepts of “competitor” and “vertically related company” need clarifying so they are limited to relationships where competition concerns could arise (see further below).

- The level at which the significance of a competitive link will be presumed, in the absence of additional factors, should be raised from 20 to 25%; under national corporate law in most Member States, at this level of shareholding a shareholder acquires certain rights which may in some circumstances influence business decisions.

- The 5% threshold for a safe harbour is unnecessarily low. We believe that 15% would be more appropriate, especially given the very low number of cases at a national level where influence has been found below that level. An assessment of the significance of competitive links can be very burdensome to conglomerate companies or financial institutions that hold a number of minority shareholdings. A safe harbour threshold of 5% would impose disproportionate costs on these companies.

- The list of additional factors which could result in a low shareholding being sufficiently significant needs to be limited and clarified regarding the type and degree of influence that will satisfy the test (see further below).

We would favour the publication by the Commission of detailed guidance on the assessment of competitively significant links.

2.1.1 Acquisitions of a shareholding in a competitor or vertically related company

The concept of “a minority shareholding in a competitor or vertically related company” needs clarifying in order to make the test as “bright line” as possible. This is essential if the tests are to be incorporated in a mandatory filing regime with penalties for failing to file. For example:
• It should be made clear that only actual, and not potential, competitors are relevant. Inclusion of potential competition would add significant uncertainty to the test, and would not be justified, given that the likelihood of harm in such situations is so remote.

• It should also be clarified that it is competition in markets, and not in sectors, that is relevant.

• Contrary to what is suggested in the Staff Working Document (footnote 67), if the acquirer does not itself compete with the target, or “control” a competing entity, but holds one or more minority stakes in other companies which do compete with the target, this should not suffice to confer Commission jurisdiction over these types of portfolio acquisitions. Systematic analysis in such cases would impose a large and disproportionate burden, given that such situations are highly unlikely to raise significant competition issues. This burden would particularly affect financial investors who hold multiple minority investments.

• As to vertical links, it will be necessary to limit this concept to cases where – as a result of the vertical link – realistic competition concerns could arise. For example, it might be provided that the link must relate to a “material/key input or component”. While such a test is not ideal, with proper guidance it could be workable, and without such a limit the test could well be satisfied by any acquisition of a minority interest in businesses such as utilities or office supplies.

• The existence or not of a competitive or vertical relationship should be assessed as at the time of the transaction; it should be clarified that if such a relationship is not foreseen at the time of the acquisition but develops later, no obligation to file a notice arises.

2.1.2 Additional factors

(10) Similarly, the “additional factors” aspect of the test will be difficult and costly to operate in practice unless it is made more “bright-line”. As a firm, we have considerable direct experience of cases involving lengthy assessments concerning whether a sufficient degree of influence is being acquired either on a de facto or legal basis.

(11) In the context of a mandatory regime, and given that the concept of “influence” is a continuum, it would be essential for the Commission to clarify both the type and degree of influence that would satisfy the test (i.e. when it enables the acquirer “to influence materially the commercial policy of the target”). Guidance should be illustrated with sufficient practical examples to make the concept clear, and to ensure that it is distinguished from the concept of “control”.

(12) In particular, the concept of information that could be “commercially sensitive” is subject to considerable uncertainty and fact-based analysis and is unsuitable as part of a bright-line jurisdictional test. But if jurisdiction is to arise on the basis of a low shareholding combined with access to “commercially sensitive information”, it is important that a high threshold be set. This is particularly so in Member States,
including Austria and Germany, where every shareholder, even in a limited liability company, has far-reaching information rights. Guidance needs to make it clear that the test will only be satisfied where the information clearly and significantly exceeds what is publicly available, and is competitively relevant. Furthermore it needs to be recognised that a right to access to information as a result of an equity investment does not necessarily translate into actual access, for example because of applicable conflict of interest rules.

2.2 ONE STOP SHOP: IMPACT ON NATIONAL JURISDICTION

(13) It is essential to clarify that companies would not be at risk of double jeopardy i.e.

- There could be no reviews by national authorities which had not requested referral within the 15 working day waiting period, even if the Commission decides not to request full notification.
- If neither the Commission nor any national authority requests full notification within the 15 working day waiting period, national authorities (unlike the Commission) should not be able to intervene for the duration of any 4 or 6 month limitation period, or beyond.

Finally, we assume that only national authorities competent to review the transaction under their national law should be able to request referral (i.e. currently only those in Austria, Germany and the UK). The question of the existence of jurisdiction for national authorities to review such transactions should be resolved solely on the basis of national law.

2.3 NOTIFICATION REQUIREMENTS

(14) While we recognise that the Commission and Member States will need sufficient information in order to decide whether a case merits further investigation, it is essential that the administrative burden on companies involved be kept to a minimum. This is particularly the case if there is to be a 4 to 6 month intervention period during which an investigation can still be opened.

(15) The Commission states in its Staff Working Document, in the context of the content of the information notice, that any notice made to the Commission “would have to contain some essential market information about the parties and their main competitors or internal documents that allow for an initial competitive assessment” (para 104). It is essential that the concept of “essential market information” be strictly limited and clearly defined, and distinguished from what is required in the context of a Form CO, such as consideration of all plausible hypothetical markets. It also refers to “information relating to the parties, their turnover, a description of the transaction, the level of shareholdings before and after the transaction, any rights attached to the minority shareholding and some limited market share information” (para 49). We assume that a standard form Notice would be provided, and would set out the information requirements, in particular in respect of market share information, in detail. It would need to be clear that much less is required in an information notice than in a Form CO. Otherwise the Commission will receive many voluntary Form CO notifications, thereby defeating the purpose of the existence of a “light touch” information notice, and resulting in a significant additional burden for the
Commission. It is noteworthy that the German system for notifying such transactions relies on the supply of very limited information.

(16) In answer to the Commission’s specific question, in our view a market information requirement is preferable to a requirement to submit documents. We think the latter is inappropriate in the context of a minority investment and in the absence of a decision to open a full investigation. Supply of documents would in some cases be unnecessarily burdensome, and in others not possible as there may not be any or many relevant documents.

2.4 WAITING AND LIMITATION PERIODS: POTENTIAL FOR SHORT TERM DISRUPTION AND LONG TERM UNCERTAINTY

(17) We question whether a 15 working day suspension period is justified in the case of acquisitions of non-controlling minority interests, given that the Commission considers it feasible to allow closing of transactions during the proposed 4 to 6 month intervention period. We are concerned that this could have a chilling effect on investment. The Commission suggests that this is necessary to allow Member States to request referral before closing, because they may “not be equipped to deal with consummated transactions”. But it is not clear why the three Member States (one of which, the UK, is very experienced in reviewing and dealing with closed transactions) which will be competent to request referral should not be able to deal with this situation, given that the Commission contemplates itself investigating transactions that have already been closed.

(18) As to the additional 4 to 6 month period during which the Commission may still open an investigation, again we question whether this is necessary in the context of minority interests, and given the amount of information that is required for the notice. If there is to be such a period, the information requirements for the notice should be even more strictly limited. In any case a 4 month limitation period would be excessive (in the UK the 4 month period applies in a system without any notice obligation), and we suggest 1 or 2 months at most. In any case it is essential to ensure that the system adopted result in a period of uncertainty that is less than that in the case of submission of a Form CO. Otherwise voluntary submission of a Form CO may become the default choice of investors, who will want to avoid both this period of uncertainty and difficult negotiations over who bears the antitrust risk.

(19) It is proposed that interim measures, including hold separate orders, may be taken when an investigation is opened into a completed acquisition. It is important that the scope of such possible measures be clearly and tightly defined, as too broad potential measures (e.g. obligation to set up information barriers/not exercise voting rights/renounce board membership/appoint monitoring trustee/hold separate) could be a serious deterrent to financial investors as well as being disproportionate in the context of minority acquisitions where business integration is unlikely to have taken place. If the Commission is to have such powers it should be clear that they should be used not as a matter of course, but only in exceptional and narrowly defined circumstances, where the risk of harm to competition is such that the interference with a closed transaction is justified and proportionate. In addition their exercise should be subject to judicial review.
We welcome the proposal to allow acquisitions via the stock exchange through an amendment to Article 7(2), although a prohibition on exercising voting rights in these cases again highlights the need for this only to apply to the small minority of problematic deals. It would be justified for this to be extended also to private purchases of shares in quoted companies outside the stock exchange.

2.5 Other key points

We believe that, as currently proposed, the system would capture many more than the 20-30 transactions estimated by the Commission. In particular, the system as currently structured will capture a significant number of innocuous financial investments. In order to limit the financial investments caught, we suggest modification of the proposed system, aimed at avoiding Commission review of deals involving SMEs and non-EEA investments. Either of the following two modifications would help ensure that many cases in which the target is small, or hardly active in Europe, are excluded from the scope of the obligation to file an information notice. This would be in line with the proposal, which also features in the White Paper, to altogether exclude non-EEA joint ventures from the scope of the EUMR:

- refrain from treating as a single transaction minority investments that occur at the same time, given that such treatment is not justified in the absence of acquisition of joint control; or
- add to the usual EUMR turnover thresholds the additional requirement that the target achieve a minimum turnover of e.g. €100 million or €250 million in the EEA.

In the case of staggered acquisitions, we agree with the Staff Working Document suggestion that notice be required only the first time a “competitively significant link” is established, with further action only being required if “control” is later acquired, when a Form CO would have to be submitted as usual.

It would need to be clear that Article 3(5) EUMR on temporary holdings of securities by financial institutions and similar issues would apply to non-controlling minority acquisitions. This is particularly important for restructuring cases, for which it is important that financial institutions can act swiftly and in private in order not to deter investors or jeopardise the successful outcome of the restructuring.

The impact that public announcement of minority investments may have on parties’ willingness to invest should not be underestimated. This could have a chilling effect on investments in European entities.

Requiring notification of minority shareholdings could also have a chilling effect on investments in the EEA by large (institutional) investors that meet the turnover thresholds and would place them at a disadvantage as compared with investors that do not meet the turnover thresholds.

It is important that any penalties provided for failure to submit a notice do not apply in the case of a bona fide assessment of the qualitative requirements that the Commission did not have jurisdiction. Otherwise there is a risk of large numbers of unnecessary precautionary filings being made.
3. REFERRALS

3.1 ABOLITION OF FORM RS FOR ARTICLE 4(5) EUMR

(27) We agree with this proposal overall but:

- The 15 working day waiting period could be reduced to 10 or even 5 working days;
- The starting point of the waiting period (receipt by Member State) lacks clarity and adds delay: it should instead run from submission of complete Form CO to Commission.

3.2 EXTENSION OF ARTICLE 22 EUMR JURISDICTION TO COVER WHOLE OF EEA

(28) We submit that Article 22 is no longer a necessary feature of the EU merger control system. It was introduced at a time when not all Member States had national merger control systems. Now that all, except Luxembourg, have their own systems, the justification for Article 22 has fallen away.

(29) If Article 22 is to be retained, we agree that referral requests should only be able to be made by Member States which are themselves competent to review under their national law and that in the case of such referral the Commission should obtain jurisdiction for the whole of the EEA, so as to remove the risk of parallel investigation by the Commission and one or more national authorities.

(30) However, such EEA-wide jurisdiction should not extend to jurisdictions in which the authority is not competent to review the transaction under its national law. Such extension is not justified, as it is not necessary to achieve the aim of ensuring a “one stop shop” and avoiding parallel investigations.

(31) In addition, Article 22 should be aligned with Article 4(5) by providing that it can apply only where the transaction is reviewable in at least three Member States.

(32) We agree that the proposed information system should be sufficient to allow Member States to make decisions on referral requests, and such a system would reduce the risk of diverging decisions. But there should be a waiver requirement to ensure that parties remain in control of any exchange of confidential information.

(33) Also under Article 22, we suggest that the 15 working day waiting period be reduced to 10 working days.

3.3 ARTICLE 4(4) EUMR “AFFECT COMPETITION” REQUIREMENT TO BE DELETED

(34) We agree with the proposal to delete the requirement, for an Article 4(4) referral, that a transaction “may significantly affect competition”, as this does sometimes deter parties from making use of this provision.