"TOWARDS MORE EFFECTIVE EU MERGER CONTROL"

HERBERT SMITH FREEHILLS LLP RESPONSE

PART I: INTRODUCTION AND SUMMARY

1. INTRODUCTION

1.1 Herbert Smith Freehills LLP is grateful for the opportunity to provide comments to the European Commission ("Commission") in relation to its White Paper "Towards more effective EU merger control" ("White Paper") 1 and accompanying Staff Working Document ("SWD") 2 in relation to: (i) the application of the EU merger control rules to the acquisition of certain non-controlling minority shareholdings; (ii) the regime for the referral of merger cases between the Commission and the national competition authorities of the EU Member States ("NCAs"); and (iii) other miscellaneous improvements to the EU Merger Regulation 3 ("EUMR").

1.2 This response is in addition to, and should be read in conjunction with, our response to the Commission's previous consultation on these issues launched on 20 June 2013, and available here ("2013 Response").

1.3 Should any of the issues consulted upon result in proposed revisions to the text of the EUMR, we would welcome the opportunity to comment further on such specific legislative provisions.

1.4 The comments contained in this response are those of Herbert Smith Freehills LLP, and do not represent the views of our individual clients.

2. EXECUTIVE SUMMARY

Introduction

2.1 As noted in our 2013 Response, we welcome the Commission's initiative to consider the current operation of the EU merger control regime and possible improvements to the EUMR.

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1 COM/2014/0449 final.
2 SWD(2014) 221 final.
2.2 We believe that any revisions to the EUMR must ensure that the administrative burdens for business which arise from the EUMR regime are minimised so far as possible. When considering any reforms the Commission should take into account the time and cost burden of making an EUMR notification\(^4\), even in cases which do not raise substantive concerns, and the significant delay to the transaction timetable which results from the EUMR pre-notification, notification and review process.\(^5\) Any changes should aim to reduce these burdens so far as possible, and should avoid adding to or exacerbating such issues.

2.3 In addition, any revisions should ensure legal certainty and predictability, avoiding material ambiguities as to whether a particular transaction falls within the scope of the EUMR, so far as possible.

2.4 Against this backdrop, we welcome a number of the proposals to streamline the case referrals system, and the Commission's restated willingness to consider excluding from the scope of the EUMR notification regime certain joint venture transactions which cannot have any impact on competition within the EEA, together with a number of the other miscellaneous proposed changes to the EUMR.

**Non-controlling minority stakes**

2.5 However, we have significant concerns that widening the scope of the EUMR to cover non-controlling minority stakes, in particular in the form proposed (both in terms of the jurisdictional test and the operation of the proposed "targeted transparency" system), would increase regulatory burdens and uncertainties on business in a manner which is disproportionate to any perceived enforcement "gap" and the magnitude of any potential negative impact on competition as a result of such transactions (and therefore to any benefits resulting from such a radical change). We believe that such a change would create

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\(^4\) We note that for the parties to transactions triggering an EUMR notification requirement, the process involves a significant burden in terms of time and costs (both in respect of internal management time, and the costs of external legal and other advisors), notwithstanding those elements of the Commission's December 2013 "Simplification Package" which have reduced information burdens. It is our experience that in many cases (including in simplified cases) the notification and pre-notification process (including that of debating with case teams whether a transaction falls within the scope of the simplified procedure) is onerous, and the data requirements are significant, even where the transaction will clearly not give rise to any significant impediment to effective competition within the EEA. In some cases, for example where the position as to the full functionality or otherwise of a joint venture is not clear, significant time and cost can also be spent on determining the prior question of whether an EUMR notification is required.

\(^5\) This can have a significant adverse impact on the competitiveness of bids in an auction situation, for example, where other bids do not trigger a suspensory EUMR filing.
a new category of cases falling within the scope of the EUMR, despite a lack of material competition concerns in practice in most cases, giving rise to unnecessary costs and burdens for both business and the Commission, standing in stark contrast with the Commission's welcome proposals to remove an existing category of such cases in relation to extra-EEA joint ventures.

2.6 We do not agree with the Commission's assessment of the proposed regime as "light" and its assertion that the proposed regime would not create a significant extra regulatory burden for business. Given in fact create significant additional burdens for business, and also for the Commission. We believe that the proposed changes risk undermining the clarity and legitimacy of the EUMR system, and give rise to a host of issues, such as how the turnover thresholds would operate in these circumstances, which are not fully addressed within the White Paper or SWD and which, in our view, would be complex to resolve.

2.7 As stated in the 2013 Response, we believe that a more proportionate response to the perceived enforcement gap (taking into account that this is limited, both in terms of the scale of the issue and in light of the existing tools which the Commission has available), would be to develop an enforcement framework under Article 101 of the Treaty of the Functioning of the European Union ("TFEU"), and Article 102 TFEU in applicable cases, and to increase enforcement in this area where considered necessary.

2.8 If the Commission remains convinced that changes to the EUMR are necessary, then we consider that a self-assessment system (allowing the Commission to investigate transactions within a defined period, but not requiring any mandatory information notice or suspension period), as canvassed within the Commission's 2013 consultation, would be the most appropriate option. We do not consider the targeted transparency system proposed within the White Paper to be proportionate to the burdens this will impose on business. Moreover, we believe that the proposed jurisdictional criteria are overly wide, and that the estimate within the SWD that the regime will involve roughly 20-30 transactions only per year meeting the criteria to be unrealistically low.

Case referrals

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6 IP/14/801.

7 The number of notifications triggered will depend on exactly how the turnover thresholds are applied, which, as discussed below, is not clear. This issue is also of crucial important to the question of competence as between the Commission and the Member States.
2.9 As noted in our 2013 Response, we welcome the Commission’s initiative aimed at streamlining the current referral system in order to reduce the administrative burden on the notifying parties and to speed up the regime in general.

2.10 In respect of Article 4(5) EUMR referrals, we fully support the proposal for removing the separate Form RS procedure, allowing the parties to notify the Commission directly using Form CO. This will speed up the overall notification process, reduce duplication and thereby result in a reduction in management time and external advisory costs.

2.11 In respect of Article 22 EUMR referrals, we agree with the Commission’s proposal that only competent Member States (which have jurisdiction over the notified transaction) should be able to request a referral or oppose a referral. We do not, however, support the proposal that the Commission should have jurisdiction for the entire EEA; this is not necessarily a solution to the patchwork of parallel proceedings and may ultimately result in a more onerous, complex and more costly regime for the parties.

2.12 We support the Commission’s proposal to amend the substantive threshold for pre-notification referrals under Article 4(4) EUMR in order to remove the “self-incriminatory” aspect of the test.

2.13 In respect of Article 9 EUMR referrals, we believe that the current 65 working days deadline from notification of the Form CO provides the Commission with ample time to decide whether or not to reject referral requests in the case of Phase II proceedings and that there is therefore no need to further extend this deadline.

**Miscellaneous**

**Extra-EEA joint ventures**

2.14 We welcome the Commission’s initiative to exclude from the scope of the EUMR transactions concerning joint ventures with no activities within the EEA. Such transactions can have no impact on competition within the EEA, and therefore do not merit scrutiny under the EUMR. Such a change would have the welcome effect of reducing burdens and costs on business, as well as on the Commission. We look forward to reviewing legislative proposals from the Commission in this regard.

2.15 We also believe that the Commission should consider excluding joint ventures with minimal activities and turnover within the EEA from the scope of the EUMR.

**Other amendments**
2.16 We generally welcome a number of the other potential amendments to the EUMR proposed by the Commission, and look forward to seeing further detail on how the Commission would propose to implement these changes in practice.

2.17 We do not, however, agree with the Commission’s proposals in relation to Article 8(4) EUMR (unless the EUMR is amended to cover non-controlling minority shareholdings), “parking transactions” and the ability to revoke Article 4(4) EUMR referrals.

2.18 In addition, in light of paragraph 91 of the Consolidated Jurisdictional Notice in particular, we believe that the Commission should clarify within the EUMR and/or the Consolidated Jurisdictional Notice whether transactions resulting in a change of control over a non-full function joint venture can constitute a concentration under the EUMR, and, if so, in what precise circumstances.

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PART II: ACQUISITION OF NON-CONTROLLING MINORITY SHAREHOLDINGS

3. IS REFORM OF THE EUMR NEEDED?

Is there an enforcement "gap" and if so of what magnitude?

3.1 As outlined in our 2013 Response, we recognise the need for there to be an effective "toolkit" which enables the Commission and NCAs to enforce the competition rules to prevent and/or sanction behaviour having significant negative effects on competition within the EEA. We also recognise that, in certain limited cases, the acquisition of certain non-controlling minority stakes can result in negative effects on competition.

3.2 However, we do not consider that the case for reform of the EUMR toolkit to cover non-controlling minority shareholdings has been made, in light both of the limited number of such transactions which do actually give rise to serious competition concerns⁹ and the alternative tools which can be utilised in the majority of such cases, including national merger control and Articles 101 TFEU and Article 102 TFEU.

3.3 We do not consider that the White Paper and the SWD adequately assess the proportionality of extending the EUMR to cover such transactions (with the issues and burdens to which this gives rise) as against the very limited category of case in which a material competition concern arises and this cannot be dealt with by other tools.¹⁰

3.4 Article 101 TFEU in particular is, in our view, a more appropriate tool to address any anti-competitive effects of minority shareholdings.¹¹ The EUMR has been designed to cover

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⁹ We note in this context that, in the UK, a very limited number of cases involving the acquisition of "material influence" only have been referred for a Phase II review, and even fewer have been found to give rise to a "substantial lessening of competition" ("SLC") following such a review such to require remedial action (the high profile Ryanair/Aer Lingus and BSkyB/ITV cases being the main, and exceptional, examples).

¹⁰ See the view set out within the Commission's 2001 Green Paper (Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM(2001) 745 final, 11 December 2001), in which the Commission noted that there are only a limited number of cases which could raise competition concerns that could not be addressed satisfactorily under Articles 101 or 102 TFEU (then Articles 81 and 82 EC Treaty). The Commission concluded that it would be disproportionate to subject non-controlling minority shareholdings to ex-ante review (as well as being difficult to establish appropriate definitions). We believe that these conclusions hold true today.

¹¹ The SWD states that it is not clear that in "all" cases there would be an agreement or concerted practice for the purposes of Article 101 TFEU. This will, however, be the case in relation to the majority of transactions, such as an agreement for the sale and purchase of shares, a shareholders’ agreement setting out rights attached to non-controlling shareholdings, and/or an agreement or practice providing
significant and long-lasting structural changes in the market which result in the removal of an undertaking from the competitive landscape because it has come under the control of, or merged with, another undertaking. This is conceptually different to "looser" forms of cooperation between undertakings which are caught under Article 101 TFEU. It is not clear to us why minority shareholdings (including at a very low level according to the proposals set out within the White Paper and SWD) should be within the scope of the EUMR, and other forms of cooperation between competitors, such as the creation of non-full function joint ventures and other agreements such as commercialisation agreements or alliances (which may in some cases be entered into alongside the acquisition of a non-controlling minority stake), should be reviewed under Article 101 TFEU.

3.5 In terms of substantive assessment, the cases, for example, of airline alliances which the Commission has reviewed under Article 101 TFEU demonstrate that the Commission can apply an "EUMR style" substantive analysis and theories of harm under the Article 101 TFEU framework. We also note that enforcement under Article 101 TFEU is particularly appropriate in respect of any potential theories of harm relating to the sharing of competitively sensitive information (which appears to be of concern to the Commission given the proposed inclusion of the rights to access the target's competitively sensitive information within the proposed jurisdictional test, despite the clear potential applicability of Article 101 TFEU in these circumstances).

Negative effects of bringing non-controlling minority shareholdings within the scope of the EUMR

3.6 As noted above, the proposed extension of the EUMR would in our view result in disproportionate additional "red tape" and burdens/costs to business (as well as the Commission), together with significant additional legal uncertainty, compared to limited benefits.

3.7 Minority investments provide an important source of capital, in particular in the current economic climate when external funding sources are limited. Such transactions currently take place without the need for an EUMR assessment, pre-notification, notification and suspensory period. Extension of the EUMR regime and the burdens this entails, in particular given the very wide jurisdictional scope of the regime proposed in the White Paper and SWD, may have a chilling effect on such investments, including on equity for the provision of information or the appointment of directors. Only in a limited category of cases, potentially those in relation to the acquisition of a series of shares via a stock exchange, would it be difficult to identify such an agreement or concerted practice.
markets (notwithstanding the proposed extension of Article 7(2) EUMR).\textsuperscript{12} It would also deter such investments through joint venture structures (common for example in relation to property and other infrastructure investments) which do not currently fall within the scope of the EUMR – for example those with a floating control scenario, but where information rights or rights to nominate directors may be involved.

3.8 This could also give rise to a negative impact in the context of debt restructuring, for example those debt for equity swaps which do not give rise to control, but which do involve the acquisition of a limited shareholding and informational rights, would appear to fall within the jurisdictional test proposed by the Commission if the acquirer has any other minority investments in the same or a vertically related sector. We note that the proposed amendment to Article 3(5) EUMR to exclude certain restructuring transactions from the concept of "competitively significant links", while welcome, would need to be sufficiently certain in scope, and sufficiently wide in its definitions of "in the normal course of business" and "for a limited period of time", in order to minimise this negative impact.

3.9 The EUMR system is applicable in a very large number of transactions already, including a significant number of transactions which can have no negative impact on competition within the EEA. An extension of the EUMR's jurisdictional reach as proposed would undermine the clarity and legitimacy of the EUMR regime, as well as significantly increasing burdens on business.

3.10 We note in this context that the EUMR regime has been followed as a model within new merger control regimes around the world. An extension of the EUMR to cover non-controlling minority shareholdings, if followed by other authorities, could lead to significant unintended consequences, with a significant and global increase in red tape for benign (and potentially pro-competitive) minority stake investments.

Conclusion

3.11 We do not believe that the Commission has made the case for reform in this area. We consider that there is not an enforcement gap of any magnitude such to justify radical changes to the EUMR, with the negative consequences which would follow. Significant weight has been placed on the \textit{Ryanair/Aer Lingus} saga, but this type of scenario is rare, and does not in itself justify far-reaching reform.

\textsuperscript{12} We also note that the regime as proposed could catch arrangements such as securities underwriting arrangements, where a financial services provider (which may hold a minority interest in a competing undertaking) is left holding a shareholding which may exceed the thresholds proposed by the Commission, despite there being no intention for the holding being a permanent investment.
3.12 We therefore urge the Commission to give further consideration to the more proportionate option of enhancing enforcement under Articles 101 TFEU and Article 102 TFEU (supplemented by NCA enforcement activity under national merger control rules where applicable, and review under the EUMR of pre-existing minority stakes in relevant cases) rather than making radical, unnecessary, and burdensome changes to the EUMR.

3.13 If, despite the above, the Commission considers that the EUMR ought to be extended, this should be in a manner which minimises the burden on business, and legal uncertainty, so far as possible. We do not believe that the proposed regime set out in the White Paper and SWD does so.

4. PROPOSED JURISDICTIONAL TESTS

4.1 We note as a first point that the form of regime adopted, in particular whether this involves any form of mandatory notification or "transparency" notice (versus a self-assessment regime) and whether a suspensory requirement applies, is inextricably linked to the scope of the Commission’s jurisdiction, as acknowledged within the SWD.

4.2 The wider the jurisdictional scope of the regime, the more burdensome any notification or transparency system will be, and the more disproportionate to any theoretical negative effects on competition.

4.3 In this regard we believe that the form of regime proposed, with the mandatory submission of an information notice with significant content requirements and a suspensory obligation,

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13 For example, issuing specific guidelines, including appropriate safe harbours, and allowing voluntary consultations/notifications.

14 The UK merger control rules have, of course, been applied to the Ryanair minority stake in Aer Lingus. The UK Competition Commission ("CC") (as it then was) issued its final report in respect of this matter on 28 August 2013 (Ryanair Holdings plc and Aer Lingus Group plc: A report on the completed acquisition by Ryanair Holdings plc of a minority shareholding in Aer Lingus Group plc), finding that Ryanair’s 29.8% non-controlling minority stake in Aer Lingus (i) amounted to material influence for the purpose of the UK jurisdictional rules and (ii) gave rise to a SLC. The SLC finding was on the basis of Ryanair’s ability to impact Aer Lingus’s commercial policy and strategy, in particular because it was likely to impede or prevent Aer Lingus from being acquired by, or combining with another airline (as well as by allowing Ryanair to block special resolutions, restricting Aer Lingus’s ability to issue shares and raise capital and to limit Aer Lingus’s ability to manage effectively its portfolio of Heathrow slots). In order to the remedy the SLC, the CC concluded that a partial divestment of Ryanair’s shareholding to 5% was required. Ryanair’s appeal of the CC’s decision was dismissed by the Competition Appeal Tribunal ("CAT") on 7 March 2014. Ryanair has appealed the CAT’s decision to the Court of Appeal.
is manifestly inappropriate in light of the wide scope of the Commission's proposed jurisdiction proposed.

**Competitive significance – overlap/vertical relationship**

4.4 The White Paper and SWD appear to proceed on the assumption that the proposed jurisdictional scope of the regime is narrow due to its limitation to "competitively significant" links, i.e. where the transaction concerns the acquisition of a minority shareholding in a competitor or a vertically related company.

4.5 Whilst we welcome the Commission's proposed approach of targeting the jurisdictional scope of any new regime to types of transactions which could potentially give rise to competition concerns, we do not believe that this jurisdiction will be materially limited in practice as a result. This is due in part to the wide and uncertain definition proposed and in part to the inherent uncertainties, outside obvious cases, in assessing whether two companies compete (given the scope for differences of views in relation to the appropriate market definition) or are in a vertical relationship, in particular in a minority shareholding scenario where information about the precise scope of the target's activities may be limited (even more so in relation to "on market" transactions).

4.6 Although the White Paper states that a minority shareholding would be competitively significant where the target is a competitor of the acquirer or vertically related to it, the SWD indicates that the concept of competitor would be fulfilled merely where the parties are active in the same sector and the same geographic area (regardless of whether they would be found to be active on the same economic market when considered in detail, and it appears regardless of whether this relates to a market within the EEA or not). Whilst such an approach has the benefit of not requiring a detailed market definition exercise to be carried out in order to determine jurisdiction, it will result in a significant number of acquisitions falling within the definition of a competitively significant link, and/or transaction parties concluding that a transparency filing must be made on a cautious or defensive basis.

4.7 This is exacerbated by the inclusion of vertical relationships within the scope of targeted links.

4.8 As a first point we query whether transactions involving vertical relationships only should be included within the proposed regime. The potential competitive consequences of minority ownership in vertical situations are clearly more ambiguous than in horizontal situations. The Working Group is unaware of any material enforcement in this area in
comparable jurisdictions (e.g. in the US), and the economic literature on the issue is very limited.

4.9 If such transactions are to be included, we believe that the current proposals are not sufficiently unambiguous and will result in a significant number of unnecessary fail-safe notifications. It is not clear from the White Paper and SWD how widely the proposed test would extend. For example, would this relate only to direct vertical relationships or would it extend to any indirect relationship due to presence at any point in the supply chain upstream or downstream of the target? Would a competitively significant vertical link presuppose that the product or service of the undertaking active upstream constitutes an important input to the product or service downstream\(^\text{15}\), or would any link suffice?

4.10 Moreover, the SWD states that it is not necessary for the acquirer itself to actually compete with the target or be in a vertical relationship with it, but that it is sufficient that the acquirer has a minority stake\(^\text{16}\) in another company which does compete with (or is active in the same sector as) or is in a vertical relationship with the target. In practice this is a very wide test.\(^\text{17}\) It may also be difficult for the acquirer to assess definitively (in particular in relation to vertical links), given there may be limitations in the information it has about the detail of the target's activities and/or its investee company's activities.

4.11 In conclusion, we believe that the Commission's jurisdiction should extend only to acquisitions of a significant minority shareholding (see below for our comments on the Commission's proposals in this regard) in a direct actual competitor of the acquirer itself or its group undertakings (based on the existing Article 5(4) EUMR test) within the EEA.

4.12 If vertical relationships are to be included, contrary the position advocated above, we believe that only acquisitions of a significant minority shareholding in a target which has a direct vertical relationship with the acquirer itself or its group undertakings (based on the existing Article 5(4) EUMR test) within the EEA and where the relevant upstream product or service is an important input to the relevant downstream product/service should be subject to the regime.


\(^{16}\) We assume that this would extend only to minority stakes which would meet the "significance" test proposed under the new regime, and for example would not cover stakes of less than 5%, but this is not articulated explicitly within the SWD.

\(^{17}\) Moreover its precise width is not clear: would this cover the acquisition by an acquirer of a minority stake in a target which has a minority stake in a company which competes with a minority subsidiary of a company in which an acquirer has a minority stake?
4.13 However, even with these clarifications, due to inherent uncertainties in assessment, undertakings are likely to need to take a cautious approach to determining whether a link is competitively significant, if the regime involves a mandatory notification requirement and penalties for non-compliance. This would extend the reach of the new regime and increase burdens on business even in circumstances where the relationship between the parties is such that no negative effects on competition are likely and the transaction constitutes an innocuous investment transaction.

4.14 For this reason, together with the very low threshold proposed for shareholdings capable of constituting a sufficiently significant interest (see below), we consider that the estimate within the SWD that the regime will involve roughly only 20-30 transactions per year meeting the criteria is unrealistically low.

**Significance of link – level of shareholding and additional factors**

4.15 The Commission proposes that it be presumed that a shareholding creates a significant link between companies where it exceeds a certain level (stated to be "around 20%", but also canvassing an even lower threshold of 15% as an alternative), including where it has an equivalent de facto blocking right due to a low attendance rate at shareholder meetings etc.

4.16 The Commission also proposes that acquisitions of shareholdings between 5% and 20% could also constitute a competitively significant link if "additional elements" are present, "such as" rights to: nominate a member of the board (or the "agreement or likelihood to be elected to the board"); exert influence; or obtain access to the target's competitively sensitive information.

4.17 If the Commission does extend the EUMR to cover non-control scenarios, then we agree that a threshold based on a level of shareholding sufficient to influence the target's strategy as a result of the ability to veto special resolutions makes sense. Given, as highlighted in the SWD, the threshold for special resolutions in many Member States is 25% or higher, we believe that it would be logical to set this at 25%. This is also consistent with the level at which material influence is presumed in the UK\(^\text{18}\), the primary threshold in Germany and the threshold in Austria, as well as thresholds in other non-EU jurisdictions such as Israel.

4.18 We note the reference within the SWD to alternatively utilising a 15% threshold. We consider that this is an inappropriately low trigger, at least absent any additional factors.

\(^{18}\) See paragraph 4.19 of CMA2: Mergers: Guidance on the CMA's jurisdiction and procedure (which replaces the previous guidance of the former Office of Fair Trading ("OFT") referred to in the SWD).
The SWD refers to the UK position as support for use of a 15% threshold. However, in the UK material influence is not presumed at 15% (this presumption only applies at 25%). The 15% threshold is instead the level at which the Competition and Markets Authority ("CMA") may investigate whether material influence is present on the basis of both the 15% stake and additional factors.\(^{19}\) Moreover, the UK regime is voluntary and non-suspensory; such a low threshold is not appropriate in a mandatory and suspensory regime such as that being proposed by the Commission.

4.19 We are opposed to the Commission's proposal to introduce a further, lower, threshold, based on the inherently uncertain concept of "additional elements" combined with an extremely low 5% safe harbour.\(^{20}\) This would present significant difficulties for parties in assessing whether they fall within the scope of the EUMR regime or not, and would cover a very large category of minority investments (in particular given the vagueness of some of the additional elements proposed in the SWD, such as the "likelihood to be elected to the board" or information rights). This is not consistent with the Commission's stated aims of creating a light regime and minimising burdens on business. It would also cause significant uncertainties as to whether particular transactions would fall within the scope of the EUMR regime or the national merger control regimes of relevant Member States.

4.20 In particular if the Commission proposes to adopt a transparency regime requiring a mandatory submission of an information notice and a suspension requirement, we would urge the Commission to implement a jurisdictional test limited to a relatively bright line threshold of a 25% (or 20%) shareholding, or the de facto ability to exercise an equivalent blocking right due to patterns of shareholder attendance etc (as is the case in relation to the decisive influence test).

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\(^{19}\) See paragraphs 4.20-4.27 of CMA2: Mergers: Guidance on the CMA’s jurisdiction and procedure.

\(^{20}\) We note that while the UK regime is also based on an assessment of various potential sources of material influence, this is a voluntary regime, and therefore different considerations apply. Moreover, the de facto safe harbour under the UK regime is 15% rather than 5%. Similarly, in Australia and New Zealand, which also have "soft-edged" definitions of relevant influence, notification is voluntary. In relation to the UK, we note that it is often difficult to determine whether a particular interest of less than 25% amounts to the ability to materially influence for the purposes of the UK rules. Indeed, in many cases no firm conclusion is reached on this issue by the NCA itself in the context of a first phase review; the decision often states that it is not necessary to form a firm view as in any event the transaction does not give rise to competition issues (see for example the OFT’s decision of 28 June 2013 in Case ME/5895/13 Completed joint venture between Daily Mail General Holdings Limited, the trustees of the Iliffe Settlement and Trinity Mirror plc).
4.21 If, despite the clear issues this causes, the Commission remains minded to reject such a clear approach, we believe that the lower threshold/safe harbour needs to be significantly higher than 5% (at which level it is very difficult to see how the acquirer could influence the target's conduct sufficiently, or financial incentives would be altered sufficiently, to give rise to concerns). We would propose that this be set at 15%. 21

4.22 Moreover, the relevant additional elements would need to be articulated clearly and exhaustively within the EUMR or the Consolidated Jurisdictional Notice. This could be by reference to the ability to determine or veto defined categories of "competitively significant" decisions (akin to the approach taken to decisive influence and strategic commercial decisions currently), or by reference to a clear test such as the right to nominate two or more board members only. 22

4.23 In addition, we consider that the relevant time for assessing EUMR jurisdiction should be limited to the point at which the initial shareholding is acquired; if at a later stage (for example as a result of shareholder activism and pressure for board representation) additional rights were acquired, this later step should not itself fall within the scope of the EUMR.

4.24 If the Commission remains of the view that the jurisdictional scope of the EUMR should be wide and found jurisdiction on the basis of an uncertain "additional elements" concept, then the proposed transparency regime is manifestly inappropriate; only a self-assessment regime conferring on the Commission an ability to examine transactions on its own initiative could be appropriate.

4.25 Moreover, it would be important for the parties to have the ability to consult with the Commission as to whether a particular interest would constitute a competitively significant link on the facts prior to filing an information notice (which is also important in terms of the delineation of competence between the Commission and relevant NCAs). Of course,

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21 We note that in the UK, the CMA in CMA2: Mergers: Guidance on the CMA’s jurisdiction and procedure indicates that the CMA would only examine a shareholding of less than 15% "exceptionally" (and in fact in the UK material influence has not been found to exist in relation to a shareholding of less than 15% under the Enterprise Act 2002 to date).

22 We note with particular concern the proposal to include the right to access information as a relevant additional element, given both the vagueness of this test and the fact that Article 101 TFEU in any event applies to regulate the sharing and use of competitively sensitive information between entities which do not form part of the same undertaking/single economic entity for Article 101 TFEU purposes. We do agree, however, with the proposal within the SWD to exclude ancillary cooperation agreements from the jurisdictional assessment.
where it is necessary to do so, this will lead to an extension of the overall timetable for the potential EUMR process and thus in the time and costs for business; this supports our overarching view that it would not be desirable to extend the EUMR in the manner proposed.

**Turnover thresholds, undertakings concerned, and joint ventures**

4.26 Our concerns about the potential breadth of the proposed new regime are exacerbated by the ambiguity about the application of the EUMR's turnover thresholds. The White Paper and SWD envisage that the existing EUMR turnover thresholds would apply to the acquisition of competitively significant links as they do to concentrations involving the acquisition of decisive influence.

4.27 We agree that in principle the existing EUMR turnover thresholds would be appropriate also for competitively significant links, if the EUMR were so extended.

4.28 The White Paper and the SWD are not clear, however, how these would apply in practice, in particular which entities would constitute the relevant "undertakings concerned" for these purposes, other than to note in the context of joint ventures that in the case of the acquisitions by several acquirers of minority shareholdings in a joint venture that constitute a single inter-conditional transaction, turnover would not necessarily be calculated in the same way. This illustrates the complexity of seeking to simply extend the current EUMR regime to non-controlling minority stakes.

4.29 As noted in our 2013 Response, if any undertaking holding or acquiring a competitively significant link (or decisive influence) were treated as an undertaking concerned (as is currently the case for undertakings holding or acquiring decisive influence), then this would lead, in particular in the context of joint ventures with multiple controlling and/or non-controlling parents, to a significantly higher number of transactions being caught by the EUMR than is currently the case. In addition, in particular in relation to existing stakes, it may be very difficult for an acquirer to obtain information about the turnover of existing shareholders.

4.30 Take for example a joint venture situation where two undertakings (A and B) acquire a 25% stake each with veto rights over strategic commercial decisions and two other undertakings (C and D) acquire a 25% stake but with no control rights, or a situation where A and B hold existing controlling stakes and C holds an existing 25%, and D subsequently purchases a competitively significant link.

4.31 Careful consideration needs to be given as to how the undertakings concerned concept should be adapted in these circumstances. In our view, in relation to the acquisition of
competitively significant links the undertakings concerned should be limited to the undertaking acquiring the link and the target undertaking.

4.32 In relation to joint ventures, it would need to be very clear within the EUMR and a revised version of the Consolidated Jurisdictional Notice whether the EUMR would apply to the acquisition of competitively significant links in existing joint ventures which are not full-function (but would constitute an "undertaking") would fall within the scope of the EUMR or not.\textsuperscript{23} We submit that this should not.

4.33 Finally, we note that the White Paper and SWD are silent on the implications of the proposed extension of the EUMR regime to non-controlling minority shareholders for the calculation of turnover under Article 5(4) EUMR. In particular, it is not clear whether the intention is that the turnover of an undertaking concerned includes not only the turnover of these undertakings in which it has the rights set out in Article 5(4)(b) EUMR, but also those in which it has a competitively significant link. We submit that this should not be the case; otherwise this would lead to a considerable widening of the scope of the EUMR's jurisdictional reach.

5. \textbf{PROPOSED TARGETED TRANSPARENCY REGIME}

5.1 As indicated above, we do not believe that the proposed targeted transparency regime strikes an appropriate balance between addressing the potential competition concerns raised by non-controlling minority shareholdings and limiting the additional burdens imposed on the parties concerned, in particular in light of the wide jurisdictional scope proposed which in our view would catch a significant number of entirely benign transactions.

5.2 It is inherently difficult to design such a system whereby the information required within an information notice would be sufficiently high level in order to avoid burdens on business, but would be sufficient for the Commission to assess whether a competitively significant link was prima facie problematic requiring investigation. We do not believe that the Commission's proposals strike the correct balance (see further below on the proposed contents of the information notice), and therefore that this system will result in a significant and disproportionate upfront information burden (and potentially pre-notification discussions).

5.3 As outlined in our 2013 Response, we consider therefore that a self-assessment system (allowing parties to proceed without any ex-ante obligation to submit an information notice

\textsuperscript{23} As noted within Part IV below, this is currently not clear in relation to the acquisition of joint control over such entities.
or suspend completion, but with discretion for the Commission to investigate competitively significant links on its own initiative) would be a more appropriate and proportionate approach. This would enable the Commission to intervene in respect of problematic non-controlling minority shareholdings, and for parties to submit voluntary notifications in respect of the acquisition of competitively significant links, but avoiding placing undue burdens on business.

5.4 We do not consider that an obligation to file an information notice would be necessary in order for the Commission and NCAs to become aware of potentially problematic transactions. This can be sufficiently achieved through a combination of market intelligence and monitoring on the part of the Commission and NCAs\textsuperscript{24}, complaints, and voluntary notification\textsuperscript{25}. In particular, in relation to any transaction which raises real competition concerns, complaints are highly likely, whether from the target (for example as in the Ryanair/Aer Lingus case), customers or competitors. Such transactions (the target of the proposed regime) will therefore come to the attention of the Commission and/or NCAs.

5.5 This is sufficient within the voluntary UK regime (as well as other regimes such as Australia and New Zealand), which works well, both for non-controlling minority shareholdings and the acquisition of control.\textsuperscript{26}

5.6 The main disadvantage of a self-assessment system is the risk of legal uncertainty. However, we believe that this can be dealt with through: (i) the ability to make voluntary

\textsuperscript{24} We note in relation to listed companies this will be particularly straightforward given the transparency and disclosure requirements which apply, for example the requirement under the UK Disclosure and Transparency Rules to disclose shareholdings of 3%, with further disclosures at each incremental 1%.

\textsuperscript{25} The risk of the Commission instigating an investigation would in our view provide sufficient incentive to encourage parties to notify potentially problematic transactions voluntarily following a self-assessment, in order to obtain commercial certainty.

\textsuperscript{26} It is noteworthy that the UK Government's 2011 consultation on reforms to the UK competition regime, including in relation merger control, recognised the inappropriateness of a mandatory regime for non-controlling interests. When considering whether to move generally to a mandatory merger control regime (which was not ultimately adopted) the UK Government envisaged mandatory notification for the acquisition of de jure or de facto control, but not for transactions giving rise to material influence, which would remain subject to the potential for voluntary notification or own initiative investigations (see A Competition Regime for Growth: A Consultation on Options For Reform, March 2011, together with the Government's response of March 2012). The OFT when responding to the consultation on these proposals agreed that mandatory notification for non-controlling interests would not be appropriate, noting the impact of burdens on business.
notifications; (ii) a clear definition of competitively significant links (see above); (iii) Commission guidelines as to its framework for assessment and enforcement priorities, including appropriate safe harbours; and (iv) an appropriate limitation period (see below).

5.7 In relation to the proposed targeted transparency regime, if adopted contrary to the position advocated above, we note that while the White Paper and SWD indicate that the submission of a transparency notice is mandatory in relation to competitively significant links, they also refer to self-assessment in this context and do not specify whether a failure to file a transparency notice could be penalised by fines.

5.8 In our view this would be disproportionate, in particular given the inherent uncertainties in identifying a competitively significant link under the proposed tests and the scope for differing, reasonable, views to be reached. The risk of a Commission investigation and desire for legal certainty so far as possible would be sufficient incentive to file such a notice (or a full voluntary notification if desired).

6. **PROPOSED CONTENT OF INFORMATION NOTICE**

6.1 As outlined above, we do not believe that the proposed regime is appropriate. This is in part due to the burdens involved in preparing and submitting the proposed information notice.

6.2 Whilst the Commission refers to a "light" regime, it proposes that the information notice must contain market share information in relation to the parties and their main competitors and/or internal documents. If such information and/or documentation is required, the proposed regime becomes akin to a notification regime and in our view manifestly inappropriate (in particular in light of the wide jurisdictional tests proposed).

6.3 Providing market share information requires markets to be defined and data gathered, which in some cases will be difficult and take significant time. Where the overlap or vertical relationship is marginal (or is as a result of another existing minority shareholding) this will be particularly challenging. Similarly, depending on the precise scope of the internal documents required, this can require significant work and time (as is already the

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27 This would also lead to a higher level of published precedents setting out the Commission's approach in specific cases, facilitating self-assessment.

28 It is noteworthy that this is akin to the requirements within the Short Form CO, and therefore similar to a full notification requirement. We note the "possibility" flagged within footnote 75 of the SWD of limiting the provision of such information only for markets where combined market shares are 20% or above, which would provide some assistance, but would not materially reduce burdens for business given that similar work would need to be carried out to determine what those markets are.
case in relation to documents required under Section 5(4) of the Form CO, and in relation HSR 4(c) documents).

6.4 This will impose significant time and cost burdens on the parties, and is in our view manifestly inappropriate in relation to a prosed "light" regime. It also stands in stark contrast to the Commission's recent efforts to reduce the information required within the Form CO and Short Form CO as part of the December 2013 "simplification package". It also gives rise to the prospect of the Commission potentially requiring pre-notification discussions on the scope of the information notice, for example as to appropriate market definition and whether sufficient information has been provided on market shares and competitors.

6.5 Moreover, we note that in some circumstances the target will not necessarily co-operate in relation to the gathering of such information (which may occur in relation to acquisitions of securities via the stock exchange for example), and therefore it may be difficult to provide market share information (in particular where the competitive overlap or vertical relationship is not in core areas).

6.6 We believe that if, contrary to the position outlined above, a targeted transparency regime were adopted, the information required should be limited to high level information, within the possession of the acquirer, on the transaction and the parties, such to enable the Commission (NCAs) to: (i) verify that the Commission has jurisdiction to review the case; and (ii) determine the sectors in which the undertakings involved are active.

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29 We note that it is difficult to estimate the time and cost of preparing such a notification as this will depend on a variety of matters, including in particular whether market definitions are clear within the relevant markets, the number of markets concerned, and to what extent information is readily available within the acquirer and the target. The preparation of any such notice would give rise to both direct costs, for example fees for the lawyers and other external advisers involved in preparing and making the information notice, and indirect costs, for example as a result of the time spent by in-house counsel, management and other staff within the acquiring undertaking and the target undertaking. We would note that for straightforward Short Form CO notifications – which may be similar to the proposed information notice if market share and competitor information and/or internal documents are required - external costs alone regularly run into many hundreds of thousands of Euros, and the preparation of such notifications takes many weeks of both external and internal time, even before commencement of the pre-notification and review process with the Commission. This is in addition to the external and internal time and cost which would be involved in determining whether a transaction gives rise to a competitively significant link. If the information required by the notice was limited to the parties, their turnover, the transaction and the economic sectors concerned only, the internal and external costs would clearly be lower.
6.7 It would therefore be appropriate to require details of the parties, their turnover (to the extent necessary to determine whether the jurisdictional thresholds are met), the transaction, and the economic sectors concerned, having due regard for confidentiality concerns should publication be required.

6.8 However, details of the relevant markets, market shares and competitors should not be prima facie required, nor should internal documents. The Commission could instead have the power to request further information in appropriate cases where this is proportionate.

7. PROPOSED COMMISSION INVESTIGATION PROCESS: SUSPENSORY OBLIGATION, INTERIM MEASURES, LIMITATION PERIOD, AND CASE REFERRALS

Suspensory obligation and waiting period / interim measures

7.1 We note that, if prohibition were ultimately found to be required, divesting a minority non-controlling stake (whether required by the Commission or an NCA following a referral) would be significantly easier than in cases of integration of undertakings in the context of controlling stakes. By the nature of such transaction, no such integration will occur. Completion of such an acquisition would also not prevent other remedies being imposed, for example firewalls (which have been successfully used in the US).

7.2 Of course, some parties may choose not to implement a transaction immediately and to voluntarily notify a transaction and make Commission clearance a condition precedent to closing. Parties would be incentivised to do so for legal certainty purposes in transactions which could potentially raise issues.

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30 It is notable that the UK regime does not contain a suspension requirement (for either controlling stakes or the acquisition of material influence); instead the CMA can impose “hold separate” interim arrangements preventing integration in practice in cases where this is considered necessary, largely in relation to transactions which have already been completed. In relation to anticipated transactions, at Phase I the CMA envisages imposing interim measures only exceptionally, and that the imposition of interim measures preventing completion would be very rare (even in relation to acquisitions of controlling stakes)(see CMA2 Mergers: Guidance on the CMA’s jurisdiction and procedure and the public comments of various CMA officials).
7.3 We consider therefore that no suspension is necessary and that it would be sufficient for the Commission to have the ability to require interim measures in appropriate cases. In relation to NCAs following a referral, the UK already has this power, and the other Member States which have jurisdiction to investigate non-controlling minority stakes currently could implement such powers if considered necessary as a result of any changes to the EUMR.

7.4 In practice, we believe that in most cases such interim measures should extend only to an order preventing the acquirer from exercising its voting rights/other rights in the target. Given that as a result of the nature of the interest being acquired no integration will occur, there would be no need for intrusive “hold separate” measures akin to those imposed in relation to completed mergers in the UK (preventing changes to the business for example), or the use of a hold separate manager and arrangements to keep business/assets separate akin to that required by the Commission in relation to the implementation of divestiture commitments post-completion in relation to acquisitions of decisive influence. Similarly, we do not believe that such interim measures should operate so as to prevent closing of the transaction (if no suspensory obligation were introduced).

7.5 We therefore consider that either the Commission’s proposed interim measures powers should be so limited within the EUMR, or it should publish a template interim measures order to be used in standard cases which is limited to these forms of restriction.

7.6 We agree with the suggestion in the SWD that if, contrary to the above, a waiting period is introduced, Article 7(2) EUMR would require adaption to allow acquisitions of competitively significant links via the acquisition of securities traded on a market such as a stock exchange (whether from one or various sellers) to be acquired without any suspensory period.

**Commission investigation**

7.7 We agree that the Commission could in prima facie problematic cases request a notification from the parties, in which case the normal EUMR procedure would generally apply.

7.8 Consistent with the comments above, we do not believe that an automatic stand-still obligation preventing closing should be applicable in such circumstances. Instead, the Commission could impose interim measures preventing the acquirer from exercising its rights. The parties may of course contractually choose to provide that, if the Commission does open an investigation (within a specified period; this is a further reason why the

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31 However, the use of trustees may be required to exercise the acquirer’s voting rights in order to protect the value of its interest.
limitation period proposed by the Commission is inappropriately long – see further below),
clearance is a condition precedent to closing.

**Limitation/prescription period**

7.9 If the Commission adopts a regime in which it is mandatory to submit an information notice,
in particular if this gives rise to a standstill obligation, then the Commission having a period
of four or six months in which to open an investigation is manifestly inappropriate. The
Commission will be aware of the transaction, have information about the transaction, and
will be able to request further information. It should therefore be easily able to decide
whether to commence an investigation. In these circumstances leaving undertakings
exposed to a potential investigation for such a significant period following a transaction is in
our view unacceptable in terms of legal certainty. It would certainly lead to "over"
notification, pushing parties to voluntarily notify non-problematic transactions in order to
achieve legal certainty within an acceptable period of time. This is not a sensible use of
resources for either the Commission or business.

7.10 We therefore consider that, in the event of an information notice being submitted, the
relevant limitation period for the Commission opening an investigation should be the
proposed 15 working days, or 25 working days at the absolute maximum. If this is a
sufficient period for the Commission to conduct a Phase I review, then this is clearly an
ample period for the Commission to decide whether to open an investigation into a non-
controlling minority stake. This could be combined with a power for the Commission to
request further information in appropriate cases, and to "stop the clock" where this has not
been provided.

7.11 Where no information notice has been submitted, including if a self-assessment system as
advocated above is adopted, then a longer limitation period would be appropriate. We
consider that a four month period (running from the date on which a transaction becomes
public), as in the UK, would be a logical and sufficient period (in particular given that
would relate to the commencement of an investigation only).

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32 This is reflected by the fact that the Commission considers that 15 working days is sufficient for an NCA
to decide on the basis of an information notice whether to seek a referral (and thus open an
investigation). It is wholly unclear why this is not a sufficient period for the Commission.

33 In the UK the four month period runs from the date on which the transaction is completed or is made
public, whichever is the later.

34 In the UK, the limitation period applies to the period in which the CMA must decide whether to refer a
transaction for a second phase review.
7.12 If the Commission opens an investigation, or the transaction is voluntarily notified to the Commission, then the Commission should be subject to the same time periods as currently applicable under the EUMR (running from the date on which a complete notification is received).

Case referrals

7.13 In relation to the referral system, if the Commission’s targeted transparency system is adopted, then we agree that the existing procedures and timelines could apply as from the date of submission of the information notice (or notification in the event that the acquirer decides to voluntarily notify).

7.14 Under a self-assessment system, the referral system could apply with the trigger point for the relevant deadlines being the date a transaction becomes public, or the date on which a voluntary notification is made.

7.15 As noted in our 2013 Response, we query whether it would be appropriate for transactions to be either referred by or to Member States which do not have the jurisdiction to investigate non-controlling minority shareholdings under their own merger control regimes.

7.16 We also reiterate generally that if a "soft edged" jurisdictional test such as that currently proposed by the Commission were adopted (rather than a bright line test based on de jure or de facto voting rights above a specified level as we propose above), this makes it difficult for both the parties and the NCAs to determine definitively whether a transaction falls within the scope of the EUMR regime, and therefore whether competence to review the transaction lies with the Commission (assuming the turnover thresholds are met) or the Member States.

8. STAGGERED ACQUISITIONS

8.1 We agree that, if the Commission adopts a jurisdictional test not based on a bright line de jure or de facto acquisition of voting rights above a specified level, EUMR jurisdiction should only be triggered in relation to the first acquisition of a competitively significant link and then in relation to any move to decisive influence, rather than as a result of any changes in the level or quality of competitively significant link under the level of decisive influence.

8.2 This is consistent with the position in the UK where only a move from material influence to de facto or to de jure control will result in a reviewable relevant merger situation (not merely changes in the level of material influence).
8.3 As noted above, we consider that (should the Commission choose not to adopt a bright line jurisdictional test based only on a specified shareholding level/voting rights) the relevant time for establishing jurisdiction should be when the relevant specified shareholding is acquired; if a shareholder acquired additional rights (such as the right to nominate a board member) at a later date this should not trigger jurisdiction.

8.4 We also note that changes in the activities of an acquirer or target following the acquisition of a non-controlling minority shareholding, which create a horizontal overlap or vertical relationship, should not be such to trigger a subsequent requirement to file an information notice or provide the Commission with jurisdiction under the EUMR. This should be made clear within the EUMR.

9. **SUBSTANTIVE ASSESSMENT**

**SIEC test**

9.1 If the EUMR were amended to cover competitively significant links, then we consider that the significant impediment to effective competition ("SIEC") test is flexible enough to deal with various relevant theories of harm and therefore agree that the same test should apply.

9.2 However, specific theories of harm apply in relation to minority shareholding cases which require a particular framework for analysis. Accordingly, if the EUMR were extended to cover competitively significant links, the Commission would need to issue specific guidance as to the assessment framework it would apply.\(^{35}\) We believe that the Commission should also issue guidance as to the type of remedy which would be appropriate in such cases should a SIEC be found, and the procedure and contents of commitments, which may be different to those in the case of controlling stakes. For example, it does not appear that it would be necessary for purchaser suitability criteria to be imposed in relation to divestment remedies, as the target business will have continued and will continue to operate as a viable concern regardless of the acquisition or divestment of a minority stake.

9.3 As part of that guidance, it should be recognised that the degree of control obtained is relevant to the degree to which the transaction can or will impact the activities and incentives of the undertakings involved, and therefore the likelihood of a SIEC arising, as recognised in the UK by the CC in the *BSkyB/ITV* case.\(^{36}\)

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\(^{35}\) As have the US agencies and the Australian Competition and Consumer Commission, for example.

\(^{36}\) Final report sent to Secretary of State (BERR) on 14 December 2007 *Acquisition by British Sky Broadcasting plc of 17.9 per cent of the shares in ITV plc*. We note in addition that in this case the CC's
9.4 The guidance should also set out the Commission's enforcement priorities, outlining the factors which would make a full investigation of a competitively significant link likely and factors that would make enforcement unlikely (including appropriate safe harbours).

**Articles 101-102 TFEU**

9.5 We agree that related agreements (such as cooperation agreements) should continue to be assessed under Article 101 TFEU unless they constitute ancillary restraints directly related to and necessary for the purposes of the transaction.

9.6 However, the definition of ancillary restraints may need to be re-assessed in this context, and *Commission Notice on restrictions directly related and necessary to concentrations* (2005/C 56/03) revised accordingly. For example, would the acquisition of a competitively significant link be regarded as giving rise to a joint venture for the purposes of the Notice? If so, then the conclusion that "non-competition obligations between non-controlling parents and a joint venture are not directly related and necessary to the implementation of the concentration" (paragraph 40) would need to be reconsidered.

9.7 In terms of the jurisdictional scope of the EUMR, it would need to be ensured that competitively significant links were covered by Article 21 EUMR such that the Commission and the NCAs could not apply Articles 101 or 102 TFEU to the acquisition of a competitively significant link itself (and NCAs could not apply their equivalent national competition rules).

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analysis focussed on the practical effects of BSkyB's non-controlling minority stake in ITV in terms of influencing behaviour such as investment, rather than a pure theory of unilateral effects.
PART III: CASE REFERRALS

10. ARTICLE 4(5) EUMR: PRE-NOTIFICATION REFERRAL FROM MEMBER STATES TO COMMISSION

Abolishing the current two-step procedure of Form RS and Form CO

10.1 As noted in our 2013 Response, we fully support the proposed amendment to the Article 4(5) EUMR referral regime under which parties will be able to notify the Commission directly without the need for a preceding Form RS. This will simplify and speed up the referral process and allow the parties to start the Phase I timetable at an earlier stage. The removal of unnecessary duplication of work will only result in cost savings for the notifying parties.

10.2 A potential downside of this proposed amendment arises in the case where a Member State vetoes a referral after the parties have submitted their Form CO. In view of the limited number of cases where Member States have objected to referrals to the Commission this risk is negligible and the completed Form CO should in any case speed up any subsequent national filings which are unlikely to require more information than under the Form CO.

10.3 In addition we believe that the Article 4(5) EUMR referral regime could be further improved by reducing the current 15 working days consultation period for the Member States to 10 working days, which should be sufficient to allow them to reach a view on whether or not they wish to retain jurisdiction over the notified transaction.

Early information exchange between the Member States and the Commission

10.4 The Commission argues that one of the benefits of an early information exchange between the Member States and the Commission is to ensure that Member States are informed about a case at an early stage which in turn means that Member States may therefore not need the full 15 working days to decide whether to oppose the referral. As set out above, we believe that Article 4(5) EUMR could be improved by reducing the current 15 working days to 10 working days. Only by doing so will there be a real benefit and legal certainty of a shorter timeframe. Simply assuming that Member States may be able to reach a decision in a shorter timeframe would provide little comfort to the parties and does not really enhance the regime.

10.5 As noted in our 2013 Response, we are on the whole supportive of an early information exchange between the Commission and the Member States, provided that the extent of any pre-notification contact between the Commission and the Member States is first
discussed between the case team and the notifying parties on a case by case basis, and that there should be no automatic presumption that information would be provided at this stage. Failing to do so and involving Member States in the pre-notification stage as a matter of routine would lead to more complexity and a greater burden on the parties, and would formalise the pre-notification stage. In respect of confidential transactions this would also result in a number of Member States receiving sensitive market information, disclosure of which should be kept to a minimum.

10.6 In the context of such early information exchanges, the Commission refers to some amendments to Article 19 EUMR which might be necessary, but no further details of such proposed measures are available at this stage. We look forward to commenting on such proposals when available.

11. **ARTICLE 22 EUMR: POST-NOTIFICATION REFERRALS FROM MEMBER STATES TO THE COMMISSION**

11.1 As noted in our 2013 Response we are not convinced of the necessity of retaining the Article 22 EUMR procedure, as its original rationale of allowing Member States without a merger control regime to refer a case to the Commission has largely become irrelevant.

11.2 The Commission nevertheless considers it to be a useful mechanism to allow it to review transactions for which it is the more appropriate authority because of the cross-border effects of a transaction. The referral mechanism under Article 4(5) EUMR already allows for the parties to request that the Commission reviews a transaction for which it is the better placed authority and would, in our view, be adequate to achieve this goal.

11.3 The current Article 22 EUMR referral process is complex and can result in substantial delays, legal uncertainty and increased costs for the parties. If the regime is nevertheless retained, as suggested in the White Paper, it is therefore important that any changes to this process are designed to address these shortcomings. This is not the case in respect of a number of proposed amendments to the regime, which potentially increase the burden on parties to a transaction and reduce predictability of the current Article 22 EUMR regime even further.

**Proposed amendments to the post-notification referral procedure under Article 22 EUMR**

11.4 We support the proposed amendment that only those Member States which are competent under their national law to review a merger will be able to request a referral or oppose a referral, as this is likely to increase legal certainty for the parties to the transaction.
11.5 In addition, however, we believe that Article 22 EUMR should mirror the requirements of Article 4(5) EUMR under which the Commission should only be able to take jurisdiction in cases where the transaction is reviewable by three or more Member States, as this would reflect more accurately the Commission’s proposed rationale for maintaining the Article 22 EUMR regime, which is to ensure that the Commission is the best placed authority to consider a transaction.

11.6 We do not agree with the proposed amendment that where a referral request is made and not opposed by a competent Member State, the Commission should have EEA-wide jurisdiction, which would give it jurisdiction to assess the effects of the transaction in Member States that would themselves not have the power to review the transaction. The Commission justifies this approach on the basis that it will eliminate the current patchwork of parallel transactions, but at the same time accepts that there are no means to ensure that a Member State has not already cleared a transaction before another Member State requests a referral.

11.7 As noted in our 2013 Response, such a change will impose significant additional burdens on the notifying parties in terms of information gathering for the Form CO. It also means that parties to a transaction involving more than one national filing and which has some cross-border effects will, as a matter of course, need to consider the feasibility of the transaction throughout the whole of the EEA, which will further increase costs and affect legal certainty for the parties. On that basis we believe that the Commission should only have jurisdiction for the territories of Member States which are competent to review the transaction and which had not yet cleared the transaction prior to the referral request.

**A mandatory early information system**

11.8 In order to avoid the problem of prior clearance decisions by other Member States and to ensure that other Member States have sufficient information to establish whether they are competent and have the right to oppose a referral, the Commission proposes the replacement of the current ECA notice with a mandatory early information notice for multi-jurisdictional or cross border cases or cases which concern markets which are prima facie wider than national.

11.9 We support these proposals for greater coordination between the different NCAs and the Commission, but it is important that any suspension of the national deadlines under this process is for as short a period as possible. Under the Commission’s proposal this suspension would start on the day a Member State receives such a notice in which an NCA indicates that it is considering making a referral request, which is earlier than under the current rules, and would end at the latest 15 working days after the Member State that sent
the notice receives a formal notification, when the Member State has to decide whether or not to request a referral.

11.10 This would result in a longer suspension period than is currently the case, which is undesirable. Shortening the 15 working day period during which the Member States reach a decision on referral to a maximum of 10 working days would not only reduce the period of suspension of the national deadlines but may also contribute to reducing the risk of a prior clearance decision by other Member States.

11.11 A template early information notice which clearly sets out what type of information should be included, together with explanatory guidelines, should be made available. Detailed guidance on the Article 22 EUMR referral procedure, which is a complex process, should also be made available.

12. **ARTICLE 4(4) EUMR: PRE-NOTIFICATION REFERRALS FROM THE COMMISSION TO A MEMBER STATE**

12.1 We agree with the Commission's view set out in the SWD that it is neither possible nor desirable to reform Article 4(4) EUMR referrals in the same way as the Article 4(5) EUMR regime and abolish the Form RS stage under this provision.

12.2 We support the Commission's proposal to amend the substantive test for transactions to qualify for a referral in order to remove the "self-incriminatory" aspect of the test. Under the current test the requesting parties are in essence required to demonstrate that the transaction is liable to have a potential impact on competition on a distinct market, which may have deterred some referral requests in appropriate cases. Amending the text so that parties only have to demonstrate that the transaction is likely to primarily impact a distinct market in the Member State in question should remove this potential deterrent.

13. **ARTICLE 9 EUMR: POST-NOTIFICATION REFERRAL TO ONE OR MORE MEMBER STATES**

13.1 In respect of Article 9 EUMR referrals, we believe that the current 65 working days deadline from notification of the Form CO provides the Commission with ample time to decide whether or not to reject a referral request in the case of Phase II proceedings and that there is therefore no need to further extend this deadline.
PART IV: MISCELLANEOUS

14. EXTRA-EEA JOINT VENTURES

14.1 We welcome the Commission’s consideration of this issue and proposal to exclude joint ventures located and operating outside the EEA and without any effects on EEA markets from the scope of the EUMR.

14.2 As outlined in our 2013 Response, we consider that the current extraterritorial application of the EUMR to joint ventures which will not be active on markets within the EEA, as a result of parental turnover only, regardless of the fact that such concentrations are clearly not capable of giving rise to any actual or potential effect on competition within the EEA (and regardless of the size of the joint venture), is disproportionate and burdensome.

14.3 The inclusion of such joint ventures is clearly unnecessary to achieve the EUMR’s objective of ensuring that competition in the internal market is not distorted. It is inconsistent with the approach of the General Court in Case T-102/96 Gencor v Commission and the principles underlying the ICN Recommended Practices for Merger Notification Procedures.

14.4 We note that neither the White Paper nor the SWD contains any more detail on how in practice the EUMR’s jurisdictional rules could be amended in order to find a solution which excludes from the scope of the EUMR joint venture transactions which can have no effect on competition within the EEA, and does so in a manner which provides legal certainty for undertakings assessing whether a notification is required37, whilst retaining the Commission’s ability to review joint venture transactions which genuinely could have such an effect. Please see our 2013 Response for suggested solutions to exclude the creation of, or acquisition of joint control over, joint ventures with no actual or intended activities in the EEA.

14.5 We believe there would also be merit in the Commission excluding from the scope of the EUMR also those joint ventures which generate only minimal turnover within the EU, and are thus high unlikely to have any effects on competition within the EEA.

14.6 Finally, we note that the White Paper refers to the creation of a full function joint venture located and operating outside the EEA as being excluded from the scope of the EUMR. The subsequent change of control over a joint venture should also fall within the proposed

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37 In this regard we note that any definition which referred to unclear concepts such as the joint venture not having “any impact on markets within the EEA” would not be helpful in terms of legal certainty, unless the circumstances in which this can be presumed to be the case were articulated clearly within guidance or the EUMR itself.
exclusion. More generally, as set out below, we believe that it should be clarified whether the change of control over a joint venture which is not full function constitutes a concentration (and the scope of the proposed exclusion will need to reflect this).

15. EXCHANGE OF CONFIDENTIAL INFORMATION BETWEEN COMMISSION AND NCAS

15.1 Beyond the provision of an updated Form CO incorporating relevant submissions on jurisdiction we are unclear that further measures would be required to ensure that the Member States have a good understanding of the case in order to decide whether or not to ask for a referral.

15.2 Nonetheless, we welcome the Commission's consideration of new/reinforced rules in respect of the exchange of confidential information between the Commission and NCAs in order to facilitate the case referral process. We consider that such exchanges should only take place with the consent of the information owner in order to take into account the need for appropriate protection of the confidential information of the notifying parties (and any third parties).

16. FURTHER SIMPLIFICATION

16.1 We welcome the Commission's proposal to consider further simplifying the EUMR process by exempting certain categories of transaction (for example those which do not give rise to any reportable markets) from the prior notification procedure.

16.2 We agree that in the case of such transactions an appropriate way of achieving this would be through the use of a "targeted transparency" system.

16.3 We reiterate our comments above regarding in particular appropriate limitation periods in relation to such a system, i.e. that where an information notice is submitted the limitation period should be limited to ideally 15 working days (or 25 working days at the maximum).

17. MISCELLANEOUS AMENDMENTS

Notification of share transactions outside the stock market (Article 4(1) EUMR)

17.1 We agree with the Commission's suggested amendment of Article 4(1) EUMR to allow notification of concentrations that are implemented via the acquisition of shares on a stock exchange without a public bid where there is a "good faith intention" prior to the acquisition of control.

Clarification of methodology for turnover calculation of joint ventures

17.2 We agree that it would be useful if Article 5(4) EUMR were amended to expressly refer to the rules currently in the Consolidated Jurisdictional Notice on the calculation and
allocation of turnover for joint ventures between the undertakings concerned and third parties.

**Time limits**

17.3 Provided that the Commission does not intend to remove the requirement for agreement between the notifying parties and the Commission prior to any extension of time we agree with the proposal to extend the time limits under Article 10(3) EUMR.

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

*If the EUMR is changed to cover non-controlling minority shareholdings*

17.4 If the EUMR is so amended, implementation of a transaction involving a competitively significant link should be covered by Article 8(4) EUMR to allow the divestiture of the relevant link so as to restore the situation prevailing prior to its acquisition.

*If the EUMR is not changed to cover non-controlling minority shareholdings*

17.5 We note that the intention of Article 8(4) EUMR is in essence to give the Commission the power to unwind a concentration which has been implemented but has been prohibited as incompatible within the common market (or would have been so prohibited absent a condition which has been breached). The General Court has clarified that "implemented" in the context of Article 8(4) means a fully implemented concentration, i.e. a situation where the acquirer has acquired "control" over the target, and excludes partial implementation such as in *Ryanair/Aer Lingus* where control was never acquired.\(^{38}\)

17.6 We do not see, however, any real need to change this position. These situations are rare and the present version of Article 8(4) EUMR is logical in allowing enforcement only in situations where a concentration has been implemented and prohibited. If the non-controlling minority stake would not fall within the scope of the EUMR taken alone, and therefore could have been acquired lawfully without EUMR scrutiny (or could subsequently be obtained with EUMR scrutiny), there is not in our view the need or justification for the Commission to be able to order its divestiture.

**Staggered transactions under Article 5(2)(2) EUMR**

17.7 We agree with the Commission’s approach to ensuring that Article 5(2)(2) EUMR is tailored to ensure that it only captures cases of real circumvention. The application of Article 5(2)(2) would clearly not, by way of example, be appropriate in instances where: (i) a prior transaction had been notified to an NCA; or (ii) on the basis of self-assessment a non-

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\(^{38}\) Case T-411/07 *Aer Lingus Group plc v Commission*. 

11/22195202_2
controlling minority shareholding below the specified threshold had not been notified or an own initiative investigation conducted by the Commission.

17.8 In the interests of legal certainty, clarification on this point and guidance on the circumstances in which the Commission would expect to rely on Article 5(2)(2) should be articulated within guidance (for example within section 1.5 of the Consolidated Jurisdictional Notice).

Qualification of "parking transactions"

17.9 We do not agree with the Commission's proposals in this regard.

17.10 "Parking transactions" should not in our view be considered as the first step of a single concentration leading to the ultimate buyer’s control and should not therefore be assessed as part of the acquisition of control by the ultimate acquirer. “Parking” structures are merely temporary transactions which do not lead to a change of control on a lasting basis by either the interim buyer, or the ultimate buyer. On that basis, "parking transactions" cannot be considered to be concentrations and should therefore be able to be implemented without merger notification and clearance.

Effective sanctions against use of confidential information obtained during merger proceedings

17.11 We agree with the Commission’s proposals in this regard.

Commission's power to revoke decisions in case of referral based on incorrect or misleading information

17.12 We do not agree with the Commission's proposals in this regard.

17.13 We can identify practical difficulties in revoking Article 4(4) EUMR referral decisions, in particular where the Member State to which the case had been referred has already cleared the merger. The impact of the Article 4(4) revocation on the Member State’s decision in this scenario is unclear. We consider fines to be the more appropriate sanction (as currently provided for in Article 14(1)(a) EUMR).

18. OTHER ISSUES

Non-full function joint ventures

18.1 In addition to the potential improvements discussed within the White Paper and SWD, as per our comments within the 2013 Response we consider that there would be merit in the Commission clarifying the application or otherwise of the EUMR to transactions involving
the change of control over an existing joint venture which does not perform on a lasting basis all the functions of an autonomous economic entity, i.e. which is not “full function”.

18.2 It has generally been considered that a change of control over an existing joint venture (or the creation of a joint venture through the acquisition of joint control over an existing undertaking) would only constitute a concentration within the meaning of the EUMR if the joint venture in which the change in the quality of control occurs satisfies (and continues to satisfy) the full-functionality criterion. This reflects the important distinction between cooperative joint ventures that fall outside the EUMR and those joint ventures that fall within the EUMR (originally concentrative joint ventures and now full-function joint ventures).

18.3 However, Article 3(1)(b) EUMR, which covers transactions involving changes of control over jointly controlled undertakings, does not explicitly refer to the wording within Article 3(4) EUMR on full functionality. Article 3(4) itself refers only to the creation of a joint venture, not to the change of control over an existing joint venture.

18.4 The introduction of paragraph 91 of the Consolidated Jurisdictional Notice, the precise intention and scope of which is not clear, has also led to ambiguity in this area. This paragraph might be taken to mean that, where there is a change of control over an existing undertaking leading to a position of joint control (or joint control by different parties), this could constitute a concentration regardless of whether the joint venture is full function or not. However, the wording of the paragraph suggests that this is only the case if: (i) the joint venture was previously full function but following the transaction is "no longer" full function; and (ii) the transaction involves two or more wholly new shareholders acquiring joint control over the undertaking (rather than, for example, one shareholder selling its jointly controlling stake and the other remaining in a position of joint control (resulting in the replacement of one shareholder), or a previously solely controlling shareholding selling part of its stake).

18.5 The position is as a result unsatisfactorily unclear, raising significant issues for parties to transactions seeking to determine whether the EUMR applies to their transaction.

18.6 It is essential that the rules on what does and does not constitute a concentration within the meaning of the EUMR are clear. We urge the Commission to clarify within the EUMR

39 See the last sentence of paragraph 91: "Thus, a transaction involving several undertakings acquiring joint control of another undertaking or parts of another undertaking, fulfilling the criteria set out in paragraph 24, from third parties will constitute a concentration according to Article 3(1) without it being necessary to consider the full-functionality criterion."
and/or the Consolidated Jurisdictional Notice whether transactions resulting in a change of control over a non-full-function joint venture can constitute a concentration under the EUMR, and if so, in what precise circumstances.

Herbert Smith Freehills LLP

1 October 2014