SUBMISSION TO THE EUROPEAN COMMISSION IN RESPONSE TO ITS WHITE PAPER AND CONSULTATION: "TOWARDS MORE EFFECTIVE EU MERGER CONTROL"

3 OCTOBER 2014
INTRODUCTION AND SUMMARY

1. INTRODUCTION

1.1 This submission is made to the European Commission's Directorate General for Competition ("Commission") on behalf of a Working Group ("Working Group") of the Antitrust Committee of the International Bar Association ("IBA").

1.2 The IBA is the world's leading organisation of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to help to shape the future of the legal profession throughout the world. Bringing together practitioners and experts among the IBA's 30,000 individual lawyers from across the world and with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in the field of commercial law, including on competition law matters through its Antitrust Committee. Further information on the IBA is available at http://www.ibanet.org.

1.3 The Working Group hopes to contribute constructively to the Commission's consultation on its proposals. Its comments are in addition to, and should be read in conjunction with, the IBA Working Group's response to the Commission's previous consultation on these issues launched on 20 June 2013,2 ("2013 Response").

1.4 The Working Group's comments draw on the vast experience of the IBA's members in merger control law and practice within the EU and other major merger control jurisdictions across the globe. The contributors to the Working Group's submission are listed in Annex 1.

1.5 The Working Group appreciates the Commission's on-going efforts to review and revise the EUMR to make the EU system of merger control more effective.3

1.6 The Working Group welcomes in particular the Commission's willingness to consider the procedural challenge of effectively and efficiently allocating merger review cases to the

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1 The submission does not necessarily reflect the views of the organisations at which individual members of the Working Group are employed.
3 Including the relevant elements of the "simplification" package of 5 December 2013 (IP/13/1214) (the IBA Working Group's response to the consultation which preceded the introduction of these changes is available here).
best placed authority within the EU. The Working Group also welcomes the Commission's consideration of other improvements to the EU Merger Regulation\(^4\) ("EUMR"), and in particular the proposal to exclude joint venture transactions which can have no impact on competition within the European Economic Area ("EEA") from the scope of the EUMR.

2. SUMMARY

Overview

2.1 The Working Group appreciates the opportunity to make this submission to the Commission in relation to its White Paper "Towards more effective EU merger control" ("White Paper")\(^5\) and accompanying Staff Working Document ("SWD")\(^6\) 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 EUMR.

2.2 The Working Group applauds the Commission's initiative to consult with stakeholders on its detailed proposals in relation to non-controlling minority shareholdings. However, given the wide-ranging consequences of an amendment to the EUMR to include certain non-controlling minority shareholdings, the Working Group considers that continuing consultation in this area is of particular importance. As set out below, the Working Group believes that the proposals set out in the White Paper and SWD would significantly increase the number of transactions that would be notified to, and reviewed by, the Commission, with little corresponding benefit, creating significant additional burdens on both the Commission and business.

2.3 The Working Group believes that the resulting increase in "red tape" and administrative burdens is in conflict with the Commission's stated aims and will undermine the beneficial impact of the other proposed amendments (for example in relation to non-EEA joint ventures) and the benefits of the previous "simplification" package. The Working Group therefore urges the Commission to consider very carefully stakeholder views before deciding if and how to proceed with its changes in this area. The Working Group encourages the Commission to engage in further consultation with regard to the text of any specific legislative proposals if it decides


\(^5\) COM/2014/0449 final.

\(^6\) SWD(2014) 221 final.
to proceed with any amendments to the EUMR.

2.4 Set out below is a summary of the key points contained in the Working Group's submission. In the remainder of this submission, the Working Group has set out its views in more detail in relation to the issues raised by the Commission in the White Paper and the SWD.

Non-controlling minority shareholdings

2.5 Moving "towards more effective EU merger control" requires that scarce Commission and business resources are utilised as effectively as possible. The need for efficiency in the Commission's actions lies at the core of the principles guiding the future Commission. The future Commission's stated aim is that, when it acts, it needs to look at the most efficient and least burdensome approach. The Working Group commends the Commission for recognising that regulation of non-controlling minority stakes should avoid placing unnecessary and disproportionate administrative burdens on companies and on the Commission itself. At most, any reform to the system should be designed carefully to close any real or perceived gap but in the least burdensome manner. The Working Group is not convinced that the current proposal is necessary or that it achieves that aim.

2.6 In this respect, the Working Group does not consider that there is a sufficient "gap" in the ability of the Commission and NCAs under the current competition "toolkit" to justify the proposed extension of the EUMR to certain non-controlling minority stakes. Any gap in enforcement powers is small as it appears that there will be very few cases that could raise concerns but could not be addressed under the current EUMR system, national systems of merger control and/or Articles 101/102 of the Treaty on the Functioning of the European Union ("TFEU"). In light of this, the Working Group believes that the proposed changes – which threaten the coherency of the EUMR system, will impose material burdens on both the Commission and business, and risk deterring important investment – are not proportionate to the limited prospect of anti-competitive harm raised by such transactions. Moreover, the proposed changes would undermine other efforts of the Commission to streamline the EUMR regime, focus efforts on transactions with real potential to cause harm to competition and reduce red tape. The Working Group notes that a significant number of transactions raising no concerns whatsoever are notified

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7 See, for example, the mission letter from Jean-Claude Juncker to Margrethe Vestager dated 10 September 2014 in which he states that "[w]hen we act, we will always look for the most efficient and least burdensome approach".

8 White Paper, paragraph 42.
to the Commission every year. It does not appear effective to increase the number of notification even further by extending the EUMR to cover non-controlling minority stakes.

2.7 As outlined in the 2013 Response, the Working Group would favour more proportionate means for addressing any perceived or actual gap with regard to non-controlling minority stakes such as, for example, an expansion of enforcement under Article 101 TFEU rather than the proposed far-reaching changes to the EUMR.

2.8 If the Commission concludes that the EUMR should be extended to cover non-controlling minority stakes, the Working Group has a number of serious concerns about the regime as proposed in the White Paper and SWD. As outlined in the 2013 Response, the Working Group believes that a self-assessment, voluntary notification system is more appropriate than the proposed "targeted transparency" regime. In the Working Group's view, a voluntary notification system – like the current UK system – would be a more proportionate system that would provide the Commission with the necessary tools to address the few situations where non-controlling minority stakes may raise issues without requiring new forms and imposing significant unnecessary burdens on business to address a perceived gap that the Commission has not pointed to as creating a widespread problem under the current merger control regime.

2.9 The Working Group sets out its comments on the proposed "targeted transparency" regime below.

2.9.1 The Working Group believes that the two limbs of the concept of "competitively significant link" as set out in the White Paper and SWD (requiring first a competitive or vertical relationship and second a shareholding / rights above specified thresholds) are overly wide and ambiguous. As a result, the Working Group believes the Commission's low estimate of the number of cases falling within the scope of the new regime annually is unrealistic. The Working Group submits that, because of the uncertainties surrounding the concept of "competitively significant influence" as envisaged in the White Paper and SWD, should this concept and its two limbs be retained as such, this would generate difficulties and costs for businesses in order to determine whether a filing is required or not and would delay the investment decision.

2.9.2 In terms of the first limb, the Working Group welcomes the Commission's initiative to limit the application of the proposed regime to transactions which may give rise to anti-competitive effects rather than try to catch transactions that can clearly have no effect on competition at all. However, the Working Group believes that the current proposal that this would apply to situations where the acquirer and
target are "competitors" or are in a "vertical relationship" is overly broad. In certain circumstances, it may be difficult to ascertain whether the acquirer and the target are competitors or are in a vertical relationship. This is in particular the case for large conglomerate groups and private equity houses. This concern is highlighted in light of the proposal to take account of other minority stakes held by the acquirer. The test should focus on relationships between the acquirer's group (i.e. including companies that the acquirer controls or sister companies but excluding other minority stakes) and the target company. Overall, the triggers are insufficiently clear and, given the mandatory requirement to file an information notice and the suspension provision, this could lead to "over-notification" on a defensive basis. Such over-notification on a defensive basis would be avoided if the system were voluntary.

2.9.3 In terms of the second limb, the Working Group considers that the proposed shareholding thresholds / safe harbours are too low. The Working Group believes that:

- The presumption of significance based on a specified shareholding level alone should either be removed or increased to 25%.

- The safe harbour should be increased from 5% to 15%. In addition, the rights which could trigger jurisdiction above this 15% threshold should be clearly defined. The Commission should set out what constitutes a "competitively significant" decision, which would focus the analysis on whether an acquirer is able to veto such competitively significant decisions based on the shareholding and its other rights.

- The ability to access commercially sensitive information should not be relevant to EUMR jurisdiction (as this is in any event covered by Article 101 TFEU).

2.9.4 The Working Group believes that the "undertakings concerned" for the purposes of the application of the EUMR turnover thresholds must be limited to the acquirer and the target (and not to jointly controlling shareholders or other holders of competitively significant links). Otherwise the turnover thresholds will be more easily met (as there will be more undertakings concerned which could meet the thresholds) and this would result in overly broad notification requirements.

2.9.5 The proposal to require market share information and/or internal documents by way of a mandatory information notice appears
disproportionate given that only few cases will ever raise concerns. Such information can be provided in the rare instances where the Commission decides to require a full notification rather than by way of the proposed information notice. The Working Group believes that the contents of the notice should therefore be limited to information on the parties and the economic sectors they are active in, their turnover, a description of the transaction, details of the level of shareholding pre- and post-transaction and any rights attached to the minority shareholding. As the Commission will be aware from the current EUMR regime, provision of "market share" information is very burdensome as it requires a debate on market definition and calculation of market shares. Often, such data is simply unavailable. Similarly, a requirement to provide internal documents may necessitate a significant use of resources on the part of companies.

2.9.6 Given that non-controlling minority stakes are less likely to result in detrimental effects on competition and given that reversing the situation is normally easy (as there is no integration between the companies concerned),9 the Working Group believes that a suspensory requirement is not warranted. An ability of the Commission to order interim measures preventing the exercise of the rights being acquired only in circumstances where there are clear risks to competition would be sufficient. In this respect, the Working Group notes that there is no automatic suspensory period under the UK regime; however, the UK regime was recently changed to give the CMA more powers to issue hold separate orders where needed.

2.9.7 The Working Group believes that, if a transparency system with a suspensory requirement were introduced, the existence of a longer four to six month limitation period in which the Commission could open an investigation is unjustified and unnecessary. The transparency system would bring cases to the Commission's attention. The Commission should not require more than 15 working days at most to decide whether a more detailed investigation is warranted. If the system were voluntary, then a limitation period of four months, as in the UK system, would appear to be appropriate.

2.10 The Working Group draws the Commission's attention to the fact that any changes to the EU system of merger control can have repercussions on the national laws of the EU Member States and even of non-EU States (because a significant number of competition

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9 Minority interest acquisitions are easier to unwind than a full acquisition because the acquirer may simply divest the acquired stock and no integration will occur.
regimes world-wide are based on or tend to follow the EU competition regime). There are currently only three EU Member States that regulate non-controlling minority stakes as part of their merger control regime (Austria, Germany and the United Kingdom). If the Commission were to extend the EUMR to cover non-controlling minority stakes, it can be expected that most if not all EU Member States would follow the same approach to harmonise their systems with the EU system. In addition to Europe, many new competition regimes look to the EU for their merger control notification requirements and the implementation of the proposed changes may lead to new notification requirements in other jurisdictions throughout the world, with additional red tape and filing cost consequences for investment by European companies in those jurisdictions.

2.11 The Working Group urges the Commission to reconsider both the proposal to extend the EUMR to cover non-controlling shareholdings, and the application of the proposed design details to any extension of the regime.

Case referrals

2.12 As noted above, the Working Group welcomes the Commission’s willingness to consider the procedural challenge of effectively and efficiently allocating merger review cases to the best placed authority within the EU. As outlined in the 2013 Response, in a number of cases, finding the “right” authority poses procedural challenges, in particular as this process may have a significant impact on the timing of the review and decision-making process. Given the time-sensitive nature of many transactions, reducing the burden on the parties, especially but not exclusively from a timing point of view, can have an appreciable impact on their ability to successfully complete a transaction and realise its benefits.

2.13 The Working Group generally agrees with the Commission’s proposals and suggests additional amendments to the current referral regime, in particular as regards the time limits for the NCAs and the Commission to decide on referral requests. The Working Group is of the view that, in order to streamline the referral processes further, time limits can and should be shortened (as discussed in Part 2 below).

Miscellaneous amendments

2.14 In general, the Working Group believes that this group of the Commission’s proposals is directionally positive, and in many cases consistent with the Working Group’s 2013 Response on these issues. The Working Group welcomes in particular the Commission’s initiative to exclude certain non-EEA joint ventures from the scope of the EUMR. In some cases, however, the Working Group believes that the Commission’s proposals should be further clarified to ensure legal certainty and avoid the possible
introduction of uncertainty into the merger review process (as discussed in Part 3 below).
PART 1: NON-CONTROLLING MINORITY SHAREHOLDINGS

1. IS REFORM OF THE EUMR NEEDED?

1.1 As outlined in the 2013 Response, the Working Group acknowledges that non-controlling minority shareholdings can, in certain limited circumstances, raise anti-competitive concerns and that enforcement action to ensure effective competition may be necessary. The Working Group supports an effective but proportionate competition policy toolkit which enables the Commission and NCAs to deal with a variety of possible anti-competitive situations.

1.2 The Working Group does not, however, believe that there is compelling evidence of any sufficient "gap" in these enforcement abilities such as to justify the extension of the EUMR to cover non-controlling minority stakes. The increased burden which would arise as a result of such an extension (especially under the "targeted transparency" system proposed by the Commission in the White Paper) for both the parties to such transactions and for the Commission itself are likely to be substantial.

1.3 The number of cases in which non-controlling minority stakes would be found to lead to competition concerns is likely to be small. This is evident from experience at national level. The Working Group does not consider that the White Paper and the SWD adequately assess the proportionality of extending the EUMR to cover such transactions as against the very limited category of cases in which both a material competition concern arises and it cannot be dealt with by other tools. The Working Group believes that the proposed amendments to the EUMR would clearly increase burdens and costs on businesses and may dissuade capital market investments with seemingly limited benefit.

1.4 Moreover, amendments to the EUMR to cover certain non-controlling minority shareholdings would, in the view of the Working Group, risk undermining the clarity of the EUMR system, which is intended to cover long-lasting structural changes of control. The proposed extension of the EUMR may also result in confusion as to which agreements would fall within Article 101 TFEU (non-full function joint ventures, cooperation agreements, alliances, etc.) and which agreements with very similar features would (under the proposed regime) fall under the EUMR.10

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10 The Working Group notes that the proposals could also result in treating the same behaviour (e.g. an agreement relating to certain voting, information and other rights) differently, depending on whether it is combined with a small shareholding (in which case, the EUMR would apply) or not (in which case, Article 101 TFEU would apply).
1.5 The Working Group remains of the view that, instead of making significant changes to the EUMR regime, a combination of the current EU MR (including the Commission's practice of reviewing existing shareholdings which are part of notifiable concentrations) and increased enforcement under Article 101 TFEU in particular\(^{11}\) (and Article 102 TFEU in appropriate cases),\(^{12}\) together with NCA enforcement under relevant national merger control regimes, constitute adequate tools.

1.6 Notwithstanding its position as set out above, the Working Group provides its views below on the Commission's proposals to reform the EUMR, as set out within the White Paper and SWD, as well as potential alternative options.

2. **REGIME CHOICE/AND PROCEDURAL OPTIONS**

**Self-assessment system**

2.1 As set out in the 2013 Response, the self-assessment regime considered by the Commission in its previous consultation (but rejected in the White Paper and SWD in favour of a "targeted transparency" system) appears to the Working Group to be the most appropriate regime in terms of striking a balance between addressing the Commission's potential competition concerns and limiting the administrative burden imposed on the transaction parties (and minimizing disincentives to invest).

2.2 The Working Group understands that, under such a system – which would be similar to the existing system in the United Kingdom – acquisitions of non-controlling minority shareholdings would not be subjected to any prior notification or transparency requirement and the acquirer would be able to proceed with the transaction without the need to obtain *ex-ante* clearance by the Commission. The Commission would be able to select potentially problematic cases (but not those acquisitions below a specified "safe harbour") and investigate them relying on its own market intelligence or complaints from third parties. Parties would also have the possibility of voluntarily submitting a notification in order to achieve legal certainty.

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\(^{11}\) The Working Group notes the statement within the SWD that the Commission's ability to utilise Articles 101-102 TFEU "may" be limited and there may be some transactions, such as the acquisition of a series of shares via the stock exchange, where it may not be clear whether an agreement exists. The Working Group notes that, on the contrary, in the vast majority of cases, an agreement or concerted practice can be easily identified (*e.g.* a share sale and purchase agreement, a shareholders' agreement or a joint venture agreement, or an arrangement between the companies concerned such as information exchange).

\(^{12}\) Together with the issuance of appropriate guidelines on substantive assessment and enforcement.
2.3 In the Working Group's view, the self-assessment system appears to be the least burdensome option for both business and the Commission, as no unnecessary notification or suspension would be required in most cases. This would be consistent with the fact that the vast majority of non-controlling minority investments do not give rise to any competition concerns. Moreover, it seems most appropriate for what is essentially a system of behavioural control, keeping it in line with the self-assessment approach generally pursued in this field by the Commission (in particular with regard to Regulation 1/2003). If the Commission found anti-competitive effects stemming from an acquisition of a non-controlling minority shareholding, it would still be straightforward to remedy this by imposing behavioural obligations (e.g. not to exercise the voting rights in relation to specific subject matters or to put in place safeguards that limit the flow of competitively significant information to the shareholders); a divestment obligation might be a possibility in cases in which other measures would not effectively remedy the competition concerns. The Working Group believes that, on the basis of the self-assessment system, the Commission would be able to effectively monitor the market (including in cooperation with NCAs) and/or act upon complaints. In addition, parties are likely to make voluntary notifications in appropriate cases. This approach works well in voluntary regimes such as the UK and Australia (for both controlling and non-controlling interests).

2.4 The Working Group therefore recommends the self-assessment system (with appropriate design details, such as a safe harbour, and an appropriate limitation period, as discussed in the 2013 Response) as the most suitable option for the potential review of acquisitions of non-controlling minority shareholdings.

Notification system

2.5 The Working Group understands that a targeted notification system would consist of extending the current system of ex-ante merger control to all acquisitions of shareholdings exceeding a "safe harbour" level. Mandatory notification would have the same suspensory effect as is currently prescribed for concentrations involving the acquisition of decisive influence, and the existing EUMR procedure and timelines would apply.

2.6 The Working Group believes that a mandatory and suspensory ex-ante notification and review regime would not be appropriate. Such a system imposes large administrative burdens and costs both on the parties and on the Commission and has an impact on the timing of the transactions. Such a system would significantly increase the number of transactions subject to notification and the Commission would have to deploy additional resources in order to cope with the workload. Consequently, the Working Group appreciates the Commission's assessment that a notification system would be
disproportionate to its aim and agrees that this system is not appropriate for the potential review of acquisitions of non-controlling minority shareholdings.\textsuperscript{13}

Targeted transparency system

2.7 The targeted transparency system identified by the Commission as the preferred option would involve the parties submitting an information notice to the Commission in relation to transactions involving the acquisition of a "competitively significant link", namely:

2.7.1 The shareholding is acquired in a competitor or a vertically related company; and

2.7.2 The shareholding is: (i) 5% or more and is combined with certain rights (for example board representation, the \textit{de facto} ability to block special resolutions, or rights giving access to strategic information), or (ii) above "around" 20%.

2.8 Under the proposed system, following receipt of an information notice, the Commission would have approximately 15 working days to decide whether to initiate an investigation and require a full notification from the parties, during which period completion of the transaction would be prevented. It is, however, also envisaged in the White Paper and SWD that the Commission would be able to investigate the transaction after the lapse of the 15 working day waiting period, subject to a longer limitation period of between four to six months following the submission of an information notice. Where the Commission opens an investigation, it proposes that it should have the power to order interim measures, for example to prevent the acquirer from exercising its rights.

2.9 The Working Group considers that \textit{any ex-ante} system of review, including a more limited regime than the current EUMR regime applicable to acquisitions of decisive influence, is disproportionate because:

2.9.1 It will significantly increase the number of transactions that would be notified to, and reviewed by, the Commission, with little corresponding benefit. This would necessitate additional resources within the Commission in order to cope with the

\textsuperscript{13} The Working Group notes that, in Japan, acquisitions of non-controlling minority shareholdings are subject to a mandatory notification to the Japan Fair Trade Commission ("JFTC") where, as a result of the acquisition, the voting rights held by the acquiring group in the target company exceed either 20% or 50% (provided the turnover thresholds are met). However, the JFTC Merger Guidelines make it clear that, in certain specific cases (\textit{e.g.} where the voting rights exceed 20% but the corresponding shareholding ranks fourth or below), the transaction will not give rise to substantial antitrust concerns. This calls into question the relevance of a mandatory notification system for such minority, non-controlling, shareholdings. The substantive analysis of minority shareholdings is receiving further consideration in Japan at the moment.
significant supplementary workload. Given that most transactions where there is a "competitively significant link" are unlikely to be problematic, it is doubtful whether these resources would be optimally employed.

2.9.2 It will create additional burdens on notifying parties in terms of transaction costs and utilisation of management time.

(A) If the system is mandatory and backed by penalties for failure to notify, businesses would need to review carefully every non-controlling minority stake transaction outside any proposed shareholding safe harbour – however unproblematic – to ensure compliance with the rules and to avoid inadvertent missed notifications.

(B) In light of the uncertainties surrounding the concept of "competitively significant link" as envisaged in the White Paper and SWD (as discussed below), should this concept be retained as such, determining whether the acquisition of a minority shareholding triggers a filing would generate difficulties and costs for businesses and would delay investment decisions.

(C) In addition, while the Working Group welcomes the proposal of an information notice that is less onerous than the current simplified filing procedure, even such a lighter mandatory procedure would involve the expenditure of significant resources, both on the part of the Commission and businesses.14

(D) Finally, should the system be suspensory, this would entail delays for the closing of transactions and may act as an additional deterrent and/or add to the complexity and cost for such transactions.

14 Providing market information may turn out to be particularly burdensome if the undertakings concerned are active in a number of product markets and/or in several EU Member States. Although Short Form CO notifications are supposed to require less information than classic Form CO notifications, experience has shown that this is not necessarily the case as the Commission expects the parties to provide alternative market definitions and corresponding data. Such an exercise often results in prolonged informal guidance discussions with the case teams and intensive information gathering by the undertakings concerned. Therefore, if the targeted transparency system were to be retained, it would be crucial to ensure that minimal and simple information is required because it would otherwise be likely to result in a situation where undertakings will have to provide significant amounts of information for the purposes of the notification. If this were to be the case, the targeted transparency system could turn out not to be materially less burdensome than if the submission of a full notification was required.
2.10 The Working Group therefore does not consider the targeted transparency system to be a suitable option. As noted above, the Working Group recommends a system of "self-assessment", coupled with the possibility of voluntary reporting. However, the Working Group goes on to consider below the design details of the targeted transparency system proposed by the Commission.

2.11 As an overall comment, the Working Group emphasises that, should the Commission adopt a system of ex-ante control, such a system should be as "light touch" and as clear as possible. In particular:

2.11.1 The notification thresholds should limit the number of transactions requiring the filing of an information notice by focusing on those transactions clearly susceptible to having anti-competitive effects.

2.11.2 The rules regarding the filing of an information notice should provide as much legal certainty as possible.

2.11.3 The information requirements should be less onerous than for cases of change of control, and the notice filing should be as simple as possible to minimize unnecessary expenditures of resources by both the parties and the Commission.

2.12 The Working Group does not believe that the regime as currently proposed meets these objectives. It also notes that the questions of the jurisdictional scope of the regime and its design details / procedural features are inherently linked: the wider the jurisdictional scope and/or the less legally certain, the less appropriate it is for the regime to involve administrative burdens such as the submission of market share information, or a suspensory requirement. In this regard, the Working Group believes that a number of aspects of the proposed regime are inappropriate in light of the proposed scope of the Commission's jurisdiction.

3. JURISDICTION – COMPETITIVE LINKS

Competitively significant relationships

3.1 The White Paper indicates that the submission of an information notice would be required in respect of any transaction establishing a "competitively significant link", in the form of a significant minority shareholding (discussed below) acquired in a competitor or vertically related undertaking. This requirement is stated to be aimed at reducing the number of instances in which notices will be required. A secondary stated goal is: "[...] to provide parties with legal certainty", since, under the proposed scheme, parties would be required to determine whether a transaction creates a "competitively significant link" and, if so, submit an information notice.
3.2 While the Working Group welcomes this limitation to the type of transactions that will be subject to notification, it also considers that the Commission would need to develop these concepts further if the goals of a limitation on the number of notifications and legal certainty are to be achieved.

3.3 The criteria that the target company must be a competitor or a vertically related company, while apparently straightforward, do not, in the Working Group's view, provide sufficient legal certainty and will give rise to significant difficulties by the parties in determining whether notification is required. In a considerable number of cases, the extent of horizontal and vertical overlaps is only established some time after a deal has been agreed, when preparing the notification.

**Horizontal relationships**

3.4 It can be difficult in practice to determine whether a "target" is a competitor. If used in its technical sense, whether a target is a competitor depends on a market definition exercise, which is often resource intensive. If the question is instead simply whether the target and acquirer are present in the same "economic and geographic sectors" (as indicated in the SWD), such a concept is quite wide in scope; it is also vague and liable to give rise to disputes between parties and the Commission.

3.5 In the Working Group’s experience, the extent of competitive dynamics between an acquirer and a seller are often not immediately clear even for "concentrations" that currently qualify for review. Some overlaps may be known and obvious, but in a large number of cases it is only possible to establish overlaps after the deal has been done, and the parties can hold more open discussions with each other. This is particularly the case where companies are active in a large number of product and geographic "markets" which may be a minor part of their overall activities.

3.6 The transaction dynamics in respect of many non-controlling minority shareholdings make it even more difficult to identify the extent of any overlap. The types of information mechanisms used in the case of an acquisition of control are often not available. This means that even the seemingly straightforward notion of a competitor set out in the Commission's proposal is in reality likely to be difficult to apply in many situations.

3.7 Further difficulties are likely to arise in respect of minority investors in multiple companies (which may include private equity and other financial investors with stakes in a large number of entities). It may be very difficult to determine whether multiple investments may be potential competitors.

3.8 Given the potential consequences of failing to identify a target as a competitor (and
therefore file an information notice), the Commission is likely to receive defensive filings that will seriously increase costs for businesses and consume the Commission's resources. In order to avoid such a result:

3.8.1 The Commission would need to provide easy-to-apply guidance for investors on which companies are deemed "competitors" for these purposes.

3.8.2 It should be clear that the jurisdictional assessment is to be made at the point at which the shareholding is acquired. A filing obligation should not arise if, at some point in the future subsequent to the acquisition, the parties become competitors. (This consideration applies equally in relation to vertical relationships).

3.8.3 The Working Group believes that a mere failure to file an information notice should not lead to the automatic imposition of penalties for the following reasons: (i) even with guidance it is likely that there will be legitimate disagreements about whether a target is a competitor or not; (ii) the acquisition of a minority shareholding is unlikely to have adverse effects on competition in many cases; (iii) the amount of potential fines parties may be subject to is potentially quite high; and (iv) the Commission will still have the power to review the transaction even when the parties fail to file an information notice, penalties should only be applied if, in addition to a failure to file an information notice, some aggravating element is found (e.g. fines should only be imposed if failure to identify the target as a competitor is intentional). 15 (This consideration applies equally in relation to vertical relationships.)

**Vertical relationships**

3.9 The Working Group questions the usefulness of the concept of "vertical relationship" in this context. Even where control is acquired, competitive concerns are much more rare in vertical contexts than when horizontal competitors are involved. The consequences of minority ownership in vertical situations are even less likely to be problematic. 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. As such, the Working Group questions whether the acquisition of non-controlling minority shareholdings in vertically-related companies should be subject to control at all.

3.10 In any event, should the Commission decide to maintain this criterion, "vertical relationships" are identified in the Working Paper as a means to limit the number of

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15 An alternative option would be to create a specific, proportionate penalty regime for failures to file information notices related to the acquisition of non-controlling minority shareholdings.
transactions that will require the filing of an information notice. This concept should therefore be interpreted in a way that it will only capture those vertical relationships that may give rise to anti-competitive effects (i.e. clear upstream / input products and clear downstream / derivative products).

3.11 In the Working Group's experience, an extensive number of relationships can potentially be said to amount to vertical relationships (the supply of office material, basic utilities, etc.). As such, if this concept is to be used as a criterion to identify transactions that may require the submission of an information notice, particular care must be taken to delimit it clearly, and in such a way that the situations potentially falling within it are kept within reasonable bounds. Otherwise, the Commission risks deterring large numbers of beneficial transactions and/or being flooded with defensive filings.

**Conclusion**

3.12 If the Commission decides to adopt a system of ex-ante transparency and control for the acquisition of non-controlling minority shareholdings, it should seek to minimize the number of transactions that will need to be reviewed and ensure legal certainty in order to focus (as set out in the White Paper) on capturing the most problematic transactions while allowing those which are most likely innocuous to proceed without review. To achieve these goals:

3.12.1 The Commission would need to carefully delimit the types of horizontal and vertical relationships that will require the submission of an information notice.

3.12.2 The Commission would need to provide detailed guidance regarding the transactions that may give rise to "competitive" links and, if possible, relating to the sanctions that could be imposed (if any) and their triggers.

3.12.3 The Commission should identify which situations will fall within the definition of competitively significant link, rather than implement a system of exemptions.

3.13 The Working Group further submits that the Commission should also consider potential alternative options, such as:

3.13.1 Narrowly delimiting the horizontal and vertical links required to trigger an ex-ante filing, and couple this definition with a system of (non-suspensory) voluntary notifications for potentially problematic transactions which do not meet these strict criteria; and/or

3.13.2 Creating safe harbours for certain types of transactions, in line with what occurs in the US system (e.g. for investments of voting securities by institutional investors or solely for the purpose of investment).
Extension to situations where the acquirer is not a competitor or vertically linked entity itself but holds a minority shareholding in such an entity

3.14 In the SWD the Commission proposes that a competitively significant link would be created where the acquirer is not itself a competitor or vertically linked entity, but holds another minority shareholding in such an entity. The SWD states that “The main possible theory of harm applicable […] would be one of coordination, where, for instance, the holding company sits on the board of several competitors and has access to confidential information which it can share with the other competitors. Although the likelihood that such a case would result in competition concerns may be less than in the case of a direct link between acquirer and target, such transactions would still fall under the Commission’s competence”.

3.15 As discussed above, the identification of horizontal and vertical overlaps is already very time and resource consuming in merger control filings, particularly where one of the parties is a conglomerate, a financial institution or a private equity house. In a great number of cases, the extent of such overlaps can only be established some time after a deal has been agreed, when preparing the merger notification. As noted above, this difficulty will be compounded in the event of the acquisition of a non-controlling minority shareholding, since the acquirer will have less visibility on the target, and there are not at all the same information mechanisms available as in the case of an acquisition of control.

3.16 The requirement that an investor must identify horizontal and vertical overlaps not only in relation to the companies it controls but also in relation to those where it holds a minority shareholding in order to acquire a minority stake is liable to: (i) unduly increase administrative costs and legal risks; (ii) act as a deterrent to a significant number of transactions; and (iii) be completely disproportionate.

3.17 Given that the likelihood of competition concerns arising when the acquirer holds a minority shareholding in a competitor of the target is even lower than in the case of a direct link between acquirer and target, the Working Group does not consider that this extension is justified at all (and this is certainly not consistent with the stated objectives of creating a “light touch” regime and reducing administrative burdens). This is in particular so since the possible anti-competitive conduct identified may well amount to a breach of the director’s fiduciary duties, and in most occasions non-controlling minority shareholdings do not allow access to confidential information (or if they do, appropriate firewalls can/should be put in

16 It is also not clear whether the Commission intends this to be interpreted even more widely, for example to include overlaps between companies in which the acquirer has a minority stake and those in which the target of the minority stake acquisition has a minority stake.
Moreover, Article 101 TFEU would generally be applicable to these types of situations.

3.18 If the Commission decides to insist on this extension, however, it is the Working Group's view that there are a number of less-onerous options to address the Commission's concerns. For example:

3.18.1 For specific types of investors that acquire non-controlling minority shareholdings mainly as a financial investment (e.g. financial entities, private equity houses).\(^\text{17}\)

3.18.2 For situations where the acquirer does not have "control" for the purposes of the EUMR over a competitor or vertically related entity.

3.18.3 For the minimum shareholding that an acquirer will need to have in a horizontally or vertically related entity before a "competitive relationship" is found (e.g. 50%).

3.18.4 For those portfolio companies in which the acquirer does not have board members and/or access to confidential information.

3.18.5 For those transactions in relation to which the acquirer will not be entitled to appoint a board member and/or have access to competitively sensitive information of the target.

4. JURISDICTION—SIGNIFICANCE OF THE COMPETITIVE LINK (SHAREHOLDING LEVELS AND SAFE HARBOURS)

4.1 The White Paper and SWD propose that:

4.1.1 A competitive link would be presumed to be significant if the post-transaction minority shareholding is above a certain threshold. The Commission considers that "approximately 20%" would be "an appropriate starting point" but also suggests that a 15% threshold could be envisaged. This presumption, which would apply irrespective of the rights attached to such shareholdings, is designed to address potential anti-competitive effects arising from a pure financial interest in the profits of a horizontally – or vertically – linked undertaking.

4.1.2 Below this threshold, a competitive link would be considered if it exceeds a 5% shareholding and is combined with "special rights" such as:

\(^{17}\) In the US, for example, there is an exemption in the implementing rules for acquisitions of 15% or less of an issuer's voting securities by institutional investors made solely for the purpose of investment, which means the investor plays no management role and holds only a passive investment (16 C.F.R. § 802.64).
• a "de facto blocking minority" due to low attendance at shareholders' meetings;
• "additional rights" stemming from the shareholding itself, corporate law or a shareholders' agreement;
• information rights giving access to commercially sensitive information; and
• a seat on the board (or agreement or likelihood to be elected to the board).

4.2 The Working Group welcomes the approach of excluding filing requirements for competitive links that are not significant. It also welcomes the Commission's preliminary efforts to define the criteria that would determine whether a link is deemed to be significant.

4.3 However, the Working Group has a number of concerns regarding the criteria that are proposed within the White Paper and SWD. In particular, it considers that:

4.3.1 The shareholding thresholds are too low;
4.3.2 The "additional rights" that would trigger a filing obligation are not defined sufficiently clearly;
4.3.3 The presence of rights to commercially sensitive information should not be a determinative factor; and
4.3.4 The focus on the presence of a single board seat, irrespective of the governance rights that such a seat would bring, is unwarranted.

The shareholding thresholds are too low

4.4 Presuming that a shareholding of 20% or more is competitively significant, regardless of the rights conferred, is considered by the Working Group to be overly interventionist. The Working Group recognises the theoretical possibility for financial interests in the profits of another company to distort competition. However, such theories of harm have featured in notably few national cases to date. Where they have been subject to scrutiny and economic analysis, they generally have been dismissed as unsupported by the evidence.¹⁸

¹⁸ See, for example, in the UK, the Ryanair/Aer Lingus merger inquiry (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 (August 2013), at paragraph 7.148). Having considered this theory in some detail, the Competition Commission ("CC") (now the Competition and Markets Authority ("CMA")) dismissed it
4.5 The practical risks inherent in an acquirer adapting its own commercial strategy in the hope that it will reap higher profits from its minority shareholding may mean that such concerns are highly unlikely to arise in reality. Indeed the Working Group is not aware of any empirical evidence that they do. Accordingly, the Working Group favours either abolishing the 20% presumption, or increasing the relevant threshold to 25% (the level at which, in a number of corporate law systems, a shareholding can block a special resolution), as stated in the 2013 Response. For the same reasons, the Working Group considers the alternative 15% threshold suggested in the SWD to be even less appropriate.19

4.6 The Working Group also believes that the 5% "safe harbour" threshold where "special rights" exist is much too low. Unless accompanied by additional rights that bear directly on the competitive conduct of the target company in practice (as opposed, for example, to a single board seat), it is extremely unlikely that such a low shareholding would allow its holder to impose its will on the target irrespective of the interests of shareholders representing the remaining 95% of the target. Consequently, if utilized at all, the Working Group considers that this secondary threshold (only applying where there are clearly defined additional rights) should instead be 15%, as proposed in the 2013 Response and similar to the approach taken in the UK.20

The "additional rights" that would trigger a filing obligation must be clearly defined

4.7 The decisive influence test under the EUMR is relatively straightforward (the ability to veto strategic commercial decisions such as the budget, business plan and appointment of senior management) and leads to a reasonable degree of legal certainty after having been clarified through more than two decades of merger control enforcement. Given that misinterpreting the test can attract fines of up to 10% of group worldwide turnover, such clarity is important.

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19 The Working Group notes that 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 CMA may investigate whether material influence is present on the basis of both the 15% stake and additional factors. Moreover, the UK regime is voluntary and non-suspensory. In the Working Group’s view, a higher rather than lower threshold is appropriate in a mandatory and suspensory regime such as that being proposed by the Commission. 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 referred to in the SWD).

20 See the preceding footnote.
4.8 The Working Group is disappointed that the Commission has not taken the opportunity to provide more detail on the qualitative thresholds that it envisages for determining the significance of a competitive link and, in particular, the nature of the "additional" or "special" rights that would trigger a transparency filing obligation. The Working Group would be concerned if the Commission did not define these rights, but instead assessed the relevance of the acquired rights on a case-by-case basis.

4.9 Should the Commission adopt a notification or transparency system, it will be important to avoid a test that is complex and subjective. In particular, an approach which conflates the jurisdictional test with the substantive assessment – such that the question of whether a given right is competitively significant depends on the competitive context of the target company – is not appropriate.\(^1\)

4.10 Accordingly, the Working Group considers that the test for "additional" rights should follow a similar approach as the test for determining decisive influence. More specifically, it should focus on clearly defined categories of decisions that are liable to influence the competitive conduct of the target company (i.e. a set of "competitively significant" decisions, conceptually similar to the set of strategic commercial decisions that confer decisive influence). As is the case for the decisive influence test, whether an acquirer is able to veto a competitively significant decision would be assessed by reference to all the applicable governance arrangements (articles of association, shareholders agreement, corporate laws). Such a test would have the advantages of consistency, clarity and familiarity.

4.11 Careful consideration would of course need to be given to defining the specific types of veto rights, which should give the minority shareholder a say on matters that go beyond those simply aimed at protecting minority shareholders’ rights, but should not go as far as to confer decisive influence. There may also, for instance, need to be a distinction between veto rights in the context of public and private companies. For example, rights to veto the disapplication of pre-emption rights will confer much greater influence in public companies, where there are large numbers of small shareholders.

4.12 Some suggestions of the types of decisions of the target that may be relevant, based on UK and German cases, include decisions to:

4.12.1 Enter into a merger, a sale of a business, an acquisition, or a joint venture;

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\(^1\) This does occur in the UK, but generally does not have problematic consequences because filing is voluntary and no penalties are imposed on companies that make a subjective assessment that differs from that subsequently adopted by the authority.
4.12.2 Undertake investments or divest assets;

4.12.3 Raise funding, whether through debt or equity;

4.12.4 Enter into supply arrangements; and

4.12.5 Change the share capital of the company (only in so far as this may inhibit the
target's ability to raise new equity funding or enter into strategic M&A
transactions).22

4.13 Conversely, the power to veto matters such as the appointment of auditors, variations of
share rights, holding a meeting at short notice or normal protections for the investment of a
minority shareholder should not be treated as conferring any potential competitively
significant influence.23

The presence of rights to commercially sensitive information should not be a determinative
jurisdictional factor

4.14 The White Paper and SWD indicate that a filing obligation could be triggered by
"information rights giving access to commercially sensitive information". The Working

22 The UK and German cases have also suggested that powers to veto the commencement of legal or
regulatory proceedings and to amend the corporate governance documents of the company (such as its
articles of association) could be relevant. However, neither is normally connected to competitive matters
and the Working Group recommends that they not be included as relevant factors.

23 In addition, while the Commission has taken into account the ability to prevent other shareholders in a
public company from acquiring rights to "squeeze out" (i.e. compulsorily acquire the shares of) the
remaining shareholders when determining the level to which a purchaser should be required to sell down
its minority interest pursuant to Article 8(4) EUMR, the Working Group considers that it would be highly
inappropriate to treat this ability as a relevant "right" for the purposes of determining whether a given
competitive link is significant. In particular, the ability to resist being squeezed out does not, in itself,
confer any rights to veto decisions of potential relevance to the competitive conduct of the target.
Moreover, the level of shareholding which effectively acts to block squeeze out rights from arising is only
5% in most EU jurisdictions, so treating such a "right" as relevant would render the jurisdictional test
irrelevant for most public M&A transactions (as any shareholding of 5% or more would be deemed
competitively significant, regardless of the level of actual influence conferred). While it is common to
condition a takeover offer on obtaining the acceptances needed to exercise squeeze out rights, this
condition is normally waived because insufficient acceptances have been received by the last time for
satisfaction of the acceptance condition. This demonstrates that a minority shareholder's ability to
prevent the exercise of squeeze out rights does not, in practice, amount to an ability to block strategic
M&A transactions. This would also be consistent with the approach of the Indian Competition
Commission, which does not treat squeeze out rights as conferring a relevant degree of control,
notwithstanding that in other respects a relatively low threshold for control is applied.
Group queries the relevance of this factor, in three respects.

4.14.1 First, while the Working Group recognises that disclosure or exchange of commercially sensitive information between competitors as a result of shareholdings and board seats may be a valid concern, it is well established that such disclosures may amount to a breach of Article 101 TFEU, giving rise to heavy penalties. In particular, the disclosure of information that would serve to create or strengthen a situation of tacit coordination between competitors could have the effect of restricting actual or potential competition and could therefore be assessed under Article 101 TFEU in the same way as for other exchanges of information.

4.14.2 Second, it is the actual or likely disclosure or exchange of competitively sensitive information which is relevant, not the presence of theoretical rights to obtain commercially sensitive information. Accordingly, where the acquirer has entered into (or will enter into) appropriate compliance measures to restrict the flow of such information between it and the target (for example through firewall or clean team arrangements), no filing obligation should be triggered, notwithstanding any theoretical right of access to such information. In the Working Group's view, the Commission should publish guidelines to clarify the restrictions that should be put in place on information flows to shareholders and directors with links to horizontally related undertakings. Compliance with those guidelines should then be accepted as proof that no relevant rights of access to information arise for the purpose of determining whether there is a competitively significant link (or indeed whether this could give rise to substantive competition concerns).

4.14.3 Third, access to commercially sensitive information normally is not a basis for competitive harm and is therefore not a relevant concern in the context of vertical

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24 See the final report of the CC in the BSkyB/ITV case (Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc: Report sent to Secretary of State (BERR) (December 2007)), paragraph 3.37, where the CC dismissed concerns regarding disclosure of competitively sensitive information on the grounds that directors were unlikely to risk breaching competition and conflict of interest rules.

25 The Working Group notes that, in South Africa, disclosures of information that arise between undertakings that share a common shareholder or director, or where one undertaking has a significant interest in the other, are subject to a strengthened presumption (under Section 4(2) of the South African Competition Act) that anti-competitive horizontal practices by any combination of those undertakings is the result of an agreement between them.
links. Exchanges of information between vertically-linked companies only give rise to competition concerns if they amount to the disclosure of pricing intentions of a competitor (i.e. a hub and spoke information exchange). However, such information is not of a type that minority shareholders of a company are entitled to receive (and, even if they were, it is already covered by the Article 101 TFEU prohibition). Consequently, even if information rights are considered relevant for determining the significance of a competitive link, this should only be the case for horizontal links.

The focus on the presence of a single board seat, irrespective of the governance rights that such a seat would bring, is unwarranted

4.15 Consistent with the remarks above, the Working Group does not consider it appropriate to treat the presence of a single board seat as a factor that would trigger a filing. In most cases, a single board seat will confer no meaningful degree of influence over a target company’s competitive conduct. Instead, the question should be whether the acquirer of the competitive link will have a sufficient number of board seats to allow it to veto competitively significant decisions that are taken at the board level.

4.16 To the extent that such a seat affords a right of access to competitively sensitive information, it should be possible to avoid triggering a filing requirement by foregoing that right, through compliance with appropriate policies and procedures (as discussed above).

5. LEGISLATIVE IMPLEMENTATION OF PROPOSED EXTENSION OF EUMR REGIME

5.1 After some years of experience of reviewing acquisitions of decisive influence under the EUMR, the Commission was able to identify a number of categories of transactions that, based on experience, did not give rise to competition concerns and which therefore became subject to the simplified procedure. The Working Group expects that a similar process can and should take place in respect of non-controlling minority shareholdings.

5.2 The Working Group therefore favours a legislative mechanism that affords as much flexibility as possible to modify the scope of minority interest transactions that are caught by the new regime. It would therefore favour incorporating the relevant criteria into a

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26 See the BSkyB/ITV report of the CC, paragraph 4.109, where the CC noted that information on ITV’s commercial arrangements with third parties would not be passed on to BSkyB, as the passing of such information would require BSkyB to have influence over the day-to-day operation of ITV, which was not possible at that level of shareholding.
guidance document, such as the Consolidated Jurisdictional Notice.\textsuperscript{27} This would also have the advantage of consistency with the test for decisive influence.

6. **AMENDMENT OF THE BANKING CLAUSE**

6.1 Article 3(5)(a) EUMR allows financial institutions to acquire a controlling interest in other companies without triggering a filing obligation, provided they do not exercise voting rights with a view to determining the competitive behaviour of the target (or do so only with a view to disposing of all or part of the target or the relevant securities) and provided they dispose of the securities within one year.

6.2 The SWD proposes adapting Article 3(5)(a) EUMR to specify that restructuring transactions, carried out by financial institutions in the normal course of business and for a limited period of time, would not be treated as entailing the acquisition of a competitively significant link.

6.3 The Working Group agrees with this proposal in principle, but queries why it is limited to "restructuring transactions". In the Working Group's view, any type of transaction that would not be deemed a concentration as a result of Article 3(5)(a) EUMR should also not be deemed to be an acquisition of a competitively significant link. There is no reason to differentiate between the different levels of control for these purposes.

7. **STAGGERED ACQUISITIONS**

7.1 As noted in the SWD, the option to require an information notice each time new rights are acquired, or when there is an increase in a minority shareholding, could result in significant additional administrative burdens on companies and the Commission with negligible expected benefit. The SWD therefore proposes that, given that the Commission would only be competent if the non-controlling minority shareholding represents a competitively significant link anyway, the submission of an information notice should only be required in relation to the first acquisition of a minority shareholding where there is a competitively sensitive link, and then if and when this minority shareholding is converted to control.

7.2 The Working Group welcomes this approach. As the likelihood of anti-competitive issues is small to begin with, and the Commission will already have been notified of the transaction (and been able to conduct an assessment of the competitive situation should it consider it necessary to do so), the Working Group considers that there is no good reason why a filing should be required when new rights or additional shareholdings not amounting to control

are acquired.

8. **APPLICATION OF EUMR TURNOVER THRESHOLDS**

8.1 The Working Group agrees with the Commission that the approach of using the current EUMR thresholds is generally appropriate, provided (as set out in the 2013 Response) that the "undertakings concerned" are limited to the undertaking(s) acquiring the structural link and the target undertaking. Including the existing (controlling) shareholders (or existing holders of competitively significant links) as "undertakings concerned" would give rise to an overly wide jurisdictional scope and an unwelcome and unnecessary additional administrative burden on investors and the Commission. However, there is an inherent difficulty in obtaining information on the target's turnover data in minority stake acquisitions. It is therefore reasonable to expect that many acquirers will not in practice have the ability to obtain information to conclude as to whether the acquisition satisfies the EUMR thresholds.

8.2 The Working Group notes that, in the Commission's Impact Assessment which accompanied the White Paper and SWD, particular emphasis is placed on the German minority shareholder system to inform calculations of the number of cases that the Commission estimates would meet the EUMR turnover thresholds. The approach of using the current EUMR thresholds, but limiting them to acquirer(s) of the non-controlling minority stake and the target entity as "undertakings concerned", would be consistent with the German system.

8.3 Also, in "control" scenarios, only the controlling shareholders and the target entity should be considered the "undertakings concerned" for the purposes of meeting the EUMR turnover thresholds. If non-controlling shareholders (holding competitively significant links) were considered an "undertaking concerned" in cases where there is a change in control, this would disproportionately extend the scope of the EUMR.

9. **JOINT VENTURES**

9.1 As noted by the Commission, it would be internally consistent with the EUMR to only consider structural links in full function joint ventures. (This should be applicable both in the case of creation of a joint venture and also in the case of acquisition of a non-controlling minority stake in an existing joint venture.) As a result, acquisitions of non-controlling minority stakes in any non-full function joint venture (be it newly created or pre-existing) should not be covered.

9.2 The Working Group shares the Commission's view that acquisitions of minority shareholdings by several companies would constitute a single transaction if the
transactions are clearly interrelated (as in the case of control scenarios). However, for jurisdictional purposes, the Working Group notes that the information notice should only be submitted on behalf of the acquirer(s) which meet(s) the EUMR thresholds (and create a competitively significant link).

9.3 The Working Group agrees with the Commission's proposal that a non-controlling minority shareholder should join the "control" notification if it constitutes a single transaction. However, this should only be the case if the minority stake itself creates a "competitively significant link". For instance, if two shareholders are deemed to acquire control by each acquiring 45% and some veto rights, and a minority investor acquires the remaining 10%, it should only be required to "join" the notification if the "additional factors" are fulfilled and if the minority shareholder would itself meet (together with the target) the EUMR turnover thresholds.

9.4 The fact that the minority shareholder "joins" the EUMR investigation should not mean that the minority shareholder is required to provide detailed market share information (i.e. to complete Section 6 and possibly Section 7 of the Form CO also for the minority shareholder). The Working Group believes that the default should be that the Commission would consider whether such information would be needed and then "request" this data from the minority shareholder.

10. CONTENT OF THE PROPOSED INFORMATION NOTICE

10.1 The White Paper and SWD envisage that the proposed mandatory information notice should contain information on the parties, their turnover, a description of the transaction, details of the level of shareholding pre- and post-transaction and any rights attached to the minority shareholding, as well as market information and/or internal documents.28

10.2 If the Commission decides to adopt the targeted transparency system, the Working Group considers it essential to ensure that the information notice is kept very simple to minimize the administrative burden on businesses. The Working Group agrees that this should include information on the parties, their turnover, a description of the transaction, details of the level of shareholding pre- and post-transaction29 and any rights attached to the minority shareholding.

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28 If the Commission decides to implement the targeted transparency system, the Working Group encourages the Commission to consult on a template information notice setting out the information required.

29 On the assumption that this will be limited to information on the acquirer's level of shareholding pre- and post-transaction and will not require providing information on the participations of the remaining shareholders.
shareholding.

10.3 As regards the market information, the Working Group believes that it would be appropriate for the parties to provide basic information about the economic sectors in which the parties are active. However, the SWD proposes that much more detailed information be provided in the form of either market share information about the parties and their main competitors or internal documents that allow for an initial competitive assessment.

10.4 The Working Group notes that providing such market share information would require the acquirer to define relevant markets and assess its – and other parties’ – market power. Implementing this burdensome pre-notification exercise would mean that the targeted transparency system would not be materially less burdensome than preparing a Short Form CO.  

10.5 In the Working Group’s view, market share analysis (or the provision of internal documents – which the Working Group opposes in what is supposed to be a light touch regime31) is not proportionate to the objective of the information notice, i.e. to allow the Commission to

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30 The Working Group notes that it is difficult to estimate the time and cost of preparing such a notice as this will depend on a variety of matters, including 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 (which will depend, for example, on whether previous filings have been made). The preparation of any such notice would give rise to both direct costs, for example fees for the lawyers and other external advisers, 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. For straightforward Short Form CO notifications – which would be similar to the proposed information notice if market share and competitor information 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. The Working Group refers the Commission to the indicative estimates of average merger review costs and burdens within the November 2004 report of the International Competition Network (“ICN”) (Report on the Costs and Burdens of Multijurisdictional Merger Review prepared by the Mergers Working Group, Notification and Procedures Subgroup of the ICN, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc332.pdf) and the work carried out by PricewaterhouseCoopers referred to within the ICN report (A tax on mergers? Surveying the costs to business of multi-jurisdictional merger review, commissioned by the IBA and the American Bar Association (June 2003) (available at: http://www.globalcompetitionforum.org/PWC_Merger_Cost_Study_Report_Final_2003_Jun.pdf). The Working Group notes that, 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.

31 It can take significant time and cost to identify and collate such documents.
assess whether jurisdictional thresholds are met and whether the case merits further investigation.

10.6 The Working Group believes that an indication of the economic sectors concerned will be sufficient for the Commission's appraisal while limiting the burden imposed on the parties. In order to facilitate the Commission's assessment, the notice could also require the parties to indicate if there are any publicly available reports, studies or surveys concerning the given economic sector in the relevant Member States, and provide these if available.

11. VOLUNTARY NOTIFICATION

11.1 The Working Group welcomes the Commission's proposal to allow for voluntary notifications, whatever the form of regime adopted, in order for undertakings to have the ability to obtain legal certainty.

11.2 In the case of voluntary notifications, the Working Group believes that the normal EUMR procedure and timetable should apply. This is subject to the comments below on the standstill obligation, which the Working Group does not believe is necessary or justified in the case of non-controlling minority stakes (although in many cases if the acquirer chooses to make a voluntary notification it would in any event make clearance a condition precedent for the transaction and/or choose not to complete pending clearance).

12. SUSPENSORY OBLIGATION / WAITING PERIOD AND INTERIM MEASURES

12.1 At the outset, the Working Group emphasises that, if the acquisition of a competitively significant link were ultimately found to give rise to a significant impediment to competition ("SIEC") and prohibited (whether by the Commission or an NCA following a referral), divesting a minority non-controlling stake would normally be straightforward (see paragraph 2.9.6 above). By the nature of such transactions, no integration will occur between the acquirer and the target. Allowing completion of such transactions prior to the completion of any review by the Commission or an NCA would not therefore give rise to issues which could not be remedied.

12.2 The Working Group therefore considers that no automatic suspensory obligation / waiting period preventing closing is necessary and that such an obligation would be clearly disproportionate.32 Such a requirement is likely to have an unnecessary chilling effect,

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32 The Working Group highlights the fact that the UK regime does not contain a suspension requirement (for either controlling stakes or the acquisition of material influence). The CMA can impose "hold separate" interim measures preventing actual integration in cases where this is considered necessary. Such measures are utilised largely in relation to transactions which have already been completed. The CMA's guidance indicates that, at Phase 1, interim measures will be imposed only exceptionally in
deterring capital raising through the sale of such stakes and beneficial restructuring transactions.\(^{33}\)

12.3 The Working Group considers that it would be sufficient for the Commission to have the ability to order certain interim measures in appropriate cases.\(^{34}\) It should be sufficient for such interim measures to consist only of an order preventing the acquirer from exercising its voting and/or other rights in the target. By the very nature of the limited interest being acquired, no integration will occur, and there would be no need to prevent the act of completion itself or for intrusive "hold separate" measures like those imposed in relation to completed mergers in the UK (preventing changes to the business, for example). Similarly, the Working Group notes the reference in the SWD to the ring-fencing of assets and the use of a hold separate manager (as required by the Commission in relation to the implementation of divestiture commitments post-completion under the current EUMR regime). Such measures normally would not be necessary or proportionate in the case of non-controlling minority stakes where the target business continues to be controlled and operated by other shareholders or the board of directors.

12.4 The Working Group therefore submits that the Commission's proposed interim measures powers should be limited in this manner, and/or that it should publish a template interim measures order to be used in standard cases which is limited to these forms of restriction.

12.5 The Working Group agrees with the proposal in the SWD that if, contrary to the above, a suspensory obligation / waiting period is introduced, it would be important to amend Article 7(2) EUMR to allow acquisitions of competitively significant links via the acquisition of securities traded on a market such as a stock exchange to be acquired without any suspensory period.

13. **COMMISSION INVESTIGATION**

13.1 The Working Group agrees with the proposal that the Commission should have the power, relation to anticipated mergers. Moreover, the imposition of interim measures preventing completion, although possible, would be very rare (even in relation to acquisitions of controlling stakes) (see *CMA2 Mergers: Guidance on the CMA’s Jurisdiction and Procedure*).

\(^{33}\) As noted above, the Working Group welcomes the Commission’s proposed amendment to Article 3(5)(a) EUMR to exclude certain restructuring transactions from the concept of "competitively significant links" (although it considers that this exemption should be wider). However, this would only address a sub-set of the transactions that could be affected.

\(^{34}\) In relation to the position of NCAs following a referral, the CMA already has this power in the UK, 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.
in *prima facie* problematic cases, to request a notification from the parties.

13.2 The Working Group believes that in such cases the normal EUMR procedure and timeline should generally apply. However, in accordance with the comments above, the Working Group does not believe that an automatic suspensory obligation preventing closing (if this has not already occurred) or any further implementing steps by the parties would be necessary.

14. **LIMITATION PERIOD**

14.1 The Working Group believes that, if the Commission adopts a regime in which it is mandatory to submit an information notice, it is inappropriate and unnecessary for the Commission to have a period of four or six months in which it can open an investigation. The Commission will be aware of the transaction, have information about it, and will be able to request further information from the parties. It should therefore readily be able to decide whether to commence an investigation.\(^{35}\)

14.2 Under such a regime, leaving undertakings exposed to a potential Commission investigation for such a significant period following a transaction is unacceptable in terms of legal certainty. In addition, the Working Group believes that if such a lengthy limitation period were adopted, this would lead to "over notification", with parties voluntarily notifying non-problematic transactions in order to achieve legal certainty within an acceptable period of time. This is not a sensible use of resources either for business or for the Commission.

14.3 The Working Group therefore considers that, under such a regime, the relevant limitation period in which the Commission could open an investigation should be 15 working days (\textit{i.e.} the proposed waiting period). This is underlined 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).\(^{36}\)

15. **CASE REFERRALS**

15.1 The Working Group agrees that, if the Commission’s proposed targeted transparency system is adopted, the existing procedures and timelines of the referral system could apply

\(^{35}\) If a self-assessment rather than a transparency system were adopted, then a longer limitation period along the lines of that proposed (for example running from the date on which the transaction became public, as in the UK) would be appropriate.

\(^{36}\) If the Commission does not accept this time frame, the alternative of 25 working days should be regarded as a maximum. Since this time period is sufficient for the Commission to conduct a Phase 1 review, the Working Group believes this should be more than sufficient for the Commission to decide whether to open an investigation into an acquisition of a minority shareholding.
as from the date of submission of the information notice (or notification in the event that the
acquirer decides to notify voluntarily).

16. **SUBSTANTIVE ASSESSMENT**

16.1 The Working Group agrees that, if the EUMR were amended to cover competitively
significant links, the same test should apply to the acquisition of competitively significant
links as to acquisitions of decisive influence. The SIEC test is sufficiently flexible to deal
with various relevant theories of harm.

16.2 Nonetheless, the Working Group believes that, if the EUMR were extended to cover
competitively significant links, the Commission should issue specific guidance as to its
assessment framework. 37 Specific theories of harm apply in relation to minority
shareholding cases which warrant a clear framework for analysis.

16.3 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. 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. 38

16.4 The Working Group believes 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. The
appropriate remedies may be less intrusive than in the case of controlling stakes.

17. **ARTICLES 101-102 TFEU**

17.1 The Working Group agrees with the Commission that agreements that are related to a
minority shareholding (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.

17.2 The Working Group notes that the definition of ancillary restraints may need to be re-
assessed in this context, and the Commission Notice on restrictions directly related and
necessary to concentrations (2005/C 56/03) revised accordingly.

17.3 In terms of the jurisdictional scope of the EUMR, it should be ensured that competitively
significant links are 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

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37 As have the US agencies and the Australian Competition and Consumer Commission, for example.
38 This was recognised in the UK in the **BSkyB/ITV** case discussed above.
link itself (and NCAs could not apply their equivalent national competition rules). This would be important to avoid overlapping and potentially conflicting enforcement processes.
PART 2: CASE REFERRALS

1. OVERVIEW

1.1 Part Four of the Commission's White Paper and SWD envisages ways to streamline the rules for referring merger cases from Member States to the Commission and vice versa.

1.2 The Working Group welcomes the Commission's willingness to consider the procedural challenge of effectively and efficiently allocating merger review cases to the best placed authority within the EU.

1.3 As outlined in the 2013 Response, finding the "right" authority is a challenge in various situations, as this step may have a significant impact on the timing of the review and decision-making process. Given the time-sensitive nature of many transactions, reducing delay and the burden on the parties can have an appreciable impact on their ability to successfully complete and realize the benefits of merger transactions. Further, the Working Group believes that the referral system has now achieved a sufficient level of maturity which allows its processes to be streamlined, which would result in a more efficient use of resources both for the undertakings concerned and for the Commission.

1.4 Below the Working Group provides specific comments in respect of each of the four referral mechanisms.

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

2.1 The Working Group supports the general approach outlined in the White Paper and SWD in relation to pre-merger referrals to the Commission under Article 4(5) EUMR.

2.2 The Working Group believes that significant benefits can be obtained by abolishing the current two-step procedure and combining the referral request and the substantive notification of the transaction in a single submission to the Commission. Such submission could be based on a Form CO with an additional section setting out the reasons why a referral is appropriate. A single submission would save significant resources and time, both for the undertakings concerned and for the Commission.

2.3 The Working Group has no fundamental objections to the Commission’s proposal of sending the case allocation request to the Member State NCAs so as to give them notice of the transaction during the pre-notification stage. The Working Group considers however that the parties’ initial briefing paper, which generally contains detailed confidential information, should not be within the scope of the pre-notification contacts between the
Commission and the NCAs. In order to ensure confidentiality (which may be critically important for unannounced transactions), such pre-notification information sharing between the Commission and the NCAs should in any event only be made with the express consent of the parties. In addition, information should only be shared for the specific purpose of assessing the referral request and to the extent necessary for this purpose.

2.4 As regards the Commission's proposal to maintain the current 15 working-day time period under Article 4(5) EUMR for the NCAs to evaluate referral requests, the Working Group submits that this time period could be shortened to 10 working days without adverse effects. Shortening this time limit appears justified in light of the changes to the Article 4(5) EUMR process envisaged by the Commission. Indeed, the proposal would require that the parties put forward all the information that is necessary for the evaluation of both the referral request and the transaction within their submission. Further, the proposal would allow the Commission to provide the initial briefing paper or the case allocation request to the Member States. As a result, NCAs will have immediate and direct access to all the relevant information through a single resource, which should facilitate and thus accelerate their assessment, making a 10 working-day period adequate.

2.5 The Working Group considers in addition that, in order to accelerate the process even further, it would be appropriate for the Commission to be bound to communicate the referral request to the Member States at the latest on the working day following the day on which it receives the submission.

3. ARTICLE 22 EUMR: POST-NOTIFICATION REFERRAL TO THE COMMISSION

3.1 The Working Group generally also welcomes the Commission's proposals regarding the post-notification referral procedure under Article 22 EUMR. The Working Group considers that the following additional amendments would improve the referral system under Article 22 EUMR even further:

3.1.1 Article 22 EUMR would benefit from the same threshold as under Article 4(5) EUMR (i.e. for the referral to be possible, the transaction should be notifiable in at least three Member States). This requirement would ensure, as in the case of Article 4(5) EUMR, that only cases with more than purely local relevance can be subject to a referral from Member States to the Commission.

3.1.2 The need for the Commission to take a formal decision accepting a referral request under Article 22 EUMR should be abolished, in line with the process under Article 4(5) EUMR.

3.1.3 Time limits can and should be shortened. The Working Group believes that
decisions by the NCAs as to whether a referral pursuant to Article 22 EUMR is appropriate can be made and communicated within 10 working days from the notification of a transaction instead of the proposed 15 working days. Other NCAs can assess whether the transaction constitutes a *prima facie* case for a referral within an even shorter period of time; the Working Group suggests that five working days should be sufficient for this purpose. Keeping the associated suspension period short would ensure that the review process is not held-up for longer than is strictly necessary to effectively consider whether a referral is appropriate.

4. **ARTICLE 4(4) EUMR: PRE-NOTIFICATION REFERRAL TO ONE OR MORE MEMBER STATES**

4.1 The Working Group supports the Commission’s proposal to amend the substantive threshold for referrals under Article 4(4) EUMR in order to remove any possible actual or perceived ‘self-incrimination’ element.

4.2 The Working Group agrees with the Commission that it is not possible to abolish the Form RS with regard to Article 4(4) EUMR referral requests.

4.3 In parallel to the changes proposed in relation to Articles 4(5) and 22 EUMR, the relevant time periods could be shortened to a maximum of 10 working days for the response from the NCA and 15 working days for a final decision on jurisdiction by the Commission (instead of 25 working days under the current regime). When the undertakings concerned are seeking a referral away from the Commission, such a request is very unlikely to be made lightly. In most cases, the request will have already been discussed with the Commission and possibly the NCAs concerned before a formal submission is lodged. NCAs are unlikely to oppose a transfer of jurisdiction, resulting in a high likelihood that the referral request will be accepted.

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

5.1 The Working Group notes that referral of a case to a Member State post-notification is extremely burdensome as it results in delays in the review of the case and multiple reviews. As such, post-notification referrals should be used sparingly and re-allocation of jurisdiction in this manner should take place in the most effective and expeditious manner possible. With this aim in mind, the Working Group does not see the need for an extension of the deadline for post-notification referrals in Phase II and would in fact advocate for the abolition of this deadline and for shorter overall referral deadlines which would provide the
parties with certainty as to where their case will be reviewed (Commission and/or Member State level) at the earliest possible opportunity.
PART 3: MISCELLANEOUS AMENDMENTS

1. OVERVIEW

1.1 Part Five of the Commission's White Paper and SWD collectively propose 11 areas in which the EUMR can be improved and streamlined, divided into "Procedural Simplification" and "Other Issues". In general, the Working Group believes that the Commission's proposals are directionally positive, and notes that many are consistent with the Working Group's 2013 Response.

1.2 Although the Commission's proposed amendments are generally positive, in some areas, the Working Group believes that the Commission's proposals should be further clarified to ensure legal certainty and avoid the possible introduction of uncertainty into the merger review process. The Working Group's views are set out in greater detail below.

2. PROCEDURAL SIMPLIFICATION

"Extra-EEA" Joint Ventures

2.1 The Working Group welcomes the Commission's proposal to amend Article 1 EUMR to exclude from the Commission's competence joint ventures located and operating outside of the EEA with no impact in the EEA. As set out in the 2013 Response, the Working Group believes that the EUMR's current broad approach has created unnecessary burdens on transaction parties and has unnecessarily consumed Commission resources that could be more usefully deployed on cases where competition in the EEA could actually be impacted.

2.2 While the Commission's efforts to streamline the review of these clearly unproblematic transactions and reduce informational requirements in its "simplification" package was helpful, its current proposal to formally exclude such transactions from the EUMR is to be welcomed. The Working Group notes that this exclusion should apply both to the creation of such joint ventures and any subsequent change of control over such joint ventures.

2.3 If the EUMR is extended to cover certain non-controlling minority stakes, a similar approach should be applied. Such stakes should not be capable of meeting the EUMR turnover thresholds on the basis of the turnover of the shareholders alone if the target is not active in the EEA.

2.4 The Working Group recommends that amendments to Article 1 EUMR to exclude "extra-EEA" joint ventures should provide legal certainty and should be easy to apply. Such amendments should clearly and unequivocally exclude offshore joint ventures with no impact on the EEA, while still requiring notification of joint ventures that may have an
impact on the EEA. In this respect, the precise language of any amendment is critical. Whilst establishing whether a joint venture is or will be "located and operating outside the EEA" should generally be straightforward, the formulation and application of a threshold to test whether such a joint venture could nevertheless have "any effects on EEA markets" is less straightforward. The Working Group believes that any such threshold needs to be as clear and unambiguous as possible.

2.5 To that end, the Working Group previously proposed amendments to Article 1 EUMR to exclude "extra-EEA" joint ventures in its 2013 Response. The Working Group specifically suggested the following, and reiterates these suggestions here:

2.5.1 Article 1 could be amended by adding at the end of current Article 1(1) EUMR language along the lines of:

"except in situations where two or more persons already controlling at least one undertaking or two or more undertakings acquire joint control of a joint venture and that joint venture has no actual or foreseen activities within the territory of the European Economic Area."

2.5.2 Alternatively, the Commission could include a new Article 1(4) EUMR, providing that:

"Notwithstanding Article 1(2) and Article 1(3), a concentration does not have a Community dimension in situations where two or more persons already controlling at least one undertaking or two or more undertakings acquire joint control of a joint venture and that joint venture has no actual or foreseen activities within the territory of the European Economic Area."

2.6 The Working Group also reiterates its suggestion that, in the interests of legal certainty, the Commission should amplify in its guidance (for example in the Consolidated Jurisdictional Notice) the circumstances in which a joint venture will be deemed to have no actual or foreseen activity within the EEA. The following examples should be considered:

2.6.1 The joint venture and/or contributed activities does/do not generate turnover in the EEA;

2.6.2 The joint venture and/or contributed activities does/do not have assets in the EEA;

2.6.3 There is no intention that the joint venture will generate turnover or hold assets in
the EEA territory in the foreseeable future.\textsuperscript{39}

2.7 Finally, the Working Group presumes that joint venture transactions that would not be excluded from the EUMR through the proposed amendment to Article 1 EUMR, but which are otherwise eligible for the Simplified Procedure, would be unaffected by the amendments.

**Exchange of confidential information between the Commission and Member States**

2.8 The Commission has proposed amending Articles 19(1) and (2) EUMR to provide for the exchange of case-related information between NCAs and the Commission. The stated purpose of the proposed revision is to ensure that, in cases involving referral between the Commission and an NCA, the referring authority can transmit certain information received on the case to the authority continuing the investigation.

2.9 The Working Group reiterates its view (as set out in the 2013 Response) that, in principle, it welcomes the Commission's clarification of rules regarding the exchange of confidential information for the purpose of facilitating the case referral process. To that end, the Working Group looks forward to the Commission's specific proposed amendments to Articles 19(1) and (2) EUMR.

2.10 However, it is imperative that any amendments to Articles 19(1) and (2) EUMR specify precisely the information that is subject to exchange, and – most importantly – take account of the notifying parties' (and any third parties') confidential information, whether received in pre-notification proceedings or following notification. Exchanges of confidential information should take place only with the parties' prior written consent. In addition, the Commission should take into account that confidential information may be provided to the Commission through oral communication. Appropriate procedural mechanisms to minimise inadvertent disclosure of confidential information in the referral process will also be essential.

**Possible exemption of non-problematic transactions**

2.11 The Working Group agrees that the Commission should consider excluding transactions that do not raise competition concerns – namely, transactions that lack any "reportable markets" due to the absence of any horizontal overlaps or vertical relationship between the parties – from the scope of the EUMR. This will further reduce unnecessary administrative

\textsuperscript{39} This could be assessed, for example, by reference to the Commission's criteria for assessing the likelihood and timeliness of new entry within the Commission's Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), OJ C31 of 5 February 2004, pp. 5-18.
burdens for the parties and the Commission.

2.12 The Working Group therefore in principle welcomes the Commission's proposal to exempt certain further categories of mergers from the full prior notification requirement. The Working Group looks forward to working with the Commission in connection with specific amendments to the Implementing Regulation\(^{40}\) to exempt non-problematic transactions from notification.

2.13 The Working Group submits that the Commission could consider exempting transactions that are incapable of producing competition concerns from EUMR notification and review. This would further reduce burdens on business and would enable the Commission to concentrate its resources on cases that do create competition concerns. In other words, transactions lacking any reportable markets could be treated in the same way as "extra-EEA" joint ventures, since they are equally unlikely to result in competitive harm within the EEA.

2.14 If the Commission elects to establish a replacement procedure, such as the proposed "transparency" system, the Working Group submits that certain clarifications will be necessary. The Working Group has already highlighted in Part 1 above a number of concerns about the transparency system in the context of the acquisition of non-controlling minority stakes (for example in relation to the provision of market share information within an information notice, the application of a suspension obligation, and the appropriate length of limitation periods in relation to such a system).

2.15 Furthermore, the Working Group recommends that the Commission provide guidance (in the Consolidated Jurisdictional Notice) as to the specific criteria that should be met to demonstrate a lack of horizontal overlap or vertical relationship. While there are various types of transactions which may fall under "lack of horizontal overlap or vertical relationship", some transactions will fall into a "grey area". For instance, it is unclear whether the Commission would regard there as being an absence of a horizontal and vertical overlap in relation to a "sale and lease back" type of transaction in which a captive manufacturer (internally manufacturing and selling a product) sells its manufacturing business to an acquirer which has currently no competitive business with the seller and the acquirer will supply the product it will manufacture back to the seller post acquisition.

2.16 Finally, the Working Group presumes that the definition of "reportable markets" will not be amended. The Working Group also presumes that transactions that would not be excluded

(or subject to the "transparency" system) under this proposed provision – but would otherwise qualify for the Simplified Procedure – will be unaffected by any proposed amendments.

3. OTHER ISSUES

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

3.1 The Working Group welcomes the Commission's proposal to amend Article 4(1) EUMR to provide parties with greater flexibility in connection with transactions involving the acquisition of shares which are listed on a stock exchange but which take place without a public takeover bid. The Working Group agrees that amending Article 4(1) EUMR, and in particular the concept of "good faith intention", could address some of the difficulties that can arise in connection with such transactions. It would also be useful because this aspect of Article 4(1) EUMR has not kept pace with market realities.

3.2 The Working Group looks forward to working with the Commission in connection with specific amendments. In addition, the Working Group encourages the Commission to propose guidance (in the Consolidated Jurisdictional Notice) clarifying what would in practice demonstrate "good faith intention" to acquire control via the acquisition of shares on the stock market (outside of a public bid). The SWD suggests that acquiring parties should "demonstrate a clear commitment to carry out the acquisition by preparing everything necessary (internally and externally) to proceed immediately". This requirement appears unduly rigid and the Working Group would welcome a more practical approach for demonstrating a "good faith" intention to acquire control. In particular, the Working Group encourages the Commission to take into account that parties who proceed within an acquisition of shares outside of a public bid may not be able to take measures which give rise to a disclosure requirement.

3.3 Finally, the Working Group assumes that transactions involving public takeover bids that currently make use of Article 7(2) EUMR would be unaffected by the proposed amendment to Article 4(1) EUMR.

Clarification of methodology for calculating turnover of joint ventures

3.4 As noted in its 2013 Response, the Working Group agrees that Article 5(4) EUMR could be amended with a more explicit explanation of the rules for calculating the relevant turnover of a joint venture. The Working Group agrees that the Consolidated Jurisdictional Notice (paragraphs 186-187) provides some guidance concerning the allocation of joint venture revenue, but submits that this could usefully be clarified.

3.5 The Working Group looks forward to working with the Commission in connection with a
potential revision of Article 5(4) EUMR and submits that the Consolidated Jurisdictional Notice should be updated in line with any amendment to Article 5(4) EUMR.

Time limits

3.6 The Working Group submits that the parties to notified transactions, and the Commission, share an interest in the efficient review of merger cases. However, the Working Group agrees that, in a limited category of highly complex cases, the current time limits can prove very challenging, particularly in cases involving complex remedies.

3.7 The Working Group therefore appreciates the rationale for the Commission's proposal to introduce greater flexibility into Phase II timing by amending Article 10 EUMR. However, the Working Group emphasises that amendments to increase flexibility should not have the effect of creating longer, more protracted merger reviews in cases where such review is unwarranted.

3.8 The Working Group agrees that increasing the number of working days by which a Phase II investigation may be extended from 20 to 30 may be useful. The Working Group submits, however, that the same result could be achieved by adding a new provision to Article 10 EUMR providing for the review period to be temporarily, and exceptionally, halted by mutual agreement between the parties and the Commission. This may have the effect of allowing necessary flexibility in exceptional cases (some of which may require more than 10 additional working days), while preventing the unnecessary extension of Phase II investigations in cases that do not warrant it.

3.9 Finally, the Working Group agrees that Article 10(3)(1) EUMR could usefully be amended to clarify that the automatic 15 working-day extension for Phase II deadlines is triggered in all cases where commitments are offered following a Statement of Objections. For the sake of clarity, the Working Group further submits that Article 10(3)(1) EUMR should clarify that the automatic 15 working-day extension also applies in cases where the parties offer amended commitments following the 55th working day.

Unwinding of concentrations with regard to minority shareholdings

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

3.10 As outlined in the 2013 Response, from a conceptual perspective, it is not clear that changing the scope of Article 8(4) EUMR (in a scenario where the application of the EUMR remains limited to transactions involving the acquisition of decisive influence) to allow enforcement powers over unimplemented concentrations is warranted. If a minority stake is not subject to the jurisdiction of the EUMR in the first place, and could have been acquired lawfully without EUMR scrutiny if acquired as part of a separate concentration, or could be
acquired subsequently, there is arguably no need or rationale for the Commission to order its divestiture.

3.11 However, the Working Group does recognise that, in the interests of efficiency and from the perspective of the principle of the "one-stop shop" mechanism, there may be merit in amending Article 8(4) EUMR in the manner proposed. This could avoid the lengthy "double investigation" of a transaction by the Commission and subsequently by an NCA with the jurisdiction to review non-controlling minority stakes, which occurred in the Ryanair/Aer Lingus case (albeit that this issue will arise only very rarely).

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

3.12 If the EUMR is amended to encompass non-controlling minority shareholdings, the Working Group believes that 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.

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

3.13 The Working Group agrees that, in practice, ambiguity and unnecessary burdens can arise where an NCA requires notification of an intermediate step in a staggered transaction, where the Commission later assesses the transaction as a whole.

3.14 The Working Group welcomes the Commission's proposal to consider refining Article 5(2) EUMR to eliminate such ambiguity. However, the Working Group submits that any tailoring of Article 5(2) EUMR should – as the Commission proposes – focus only on targeting circumvention. It should not create additional notification obligations.

**Qualification of "parking transactions"**

3.15 The Working Group submits that, where a so-called "parking" transaction is only and clearly temporary in nature, it should not be considered as a concentration and should be allowed to be implemented without prior notification and clearance. The Working Group encourages the Commission to correspondingly amend the Consolidated Jurisdictional Notice and provide further guidance amplifying the amendment.

**Effective sanctions against the use of confidential information obtained during merger proceedings**

3.16 As stated in its 2013 Response, the Working Group in principle agrees that non-public commercial information made available to notifying parties and third parties and their advisers should not be used or disclosed for other purposes.

3.17 The Working Group agrees that the EUMR could be amended to allow for appropriate
sanctions against parties that improperly disclose such information. On the other hand, such sanctions should not deter counsel's discussions with his/her client(s) for development of arguments and planning purposes.

3.18 The Working Group looks forward to the Commission's specific proposals concerning amendments to the EUMR introducing such sanctions.

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

3.19 The Working Group does not agree with the Commission's proposed amendments to Articles 6(3)(a) and 8(6)(a) EUMR with regard to the Commission revoking referral decisions. The Working Group is of the view that the proposed amendments would give rise to a number of practical difficulties, such as, for example, determining what the impact on the Member State's subsequent decision would be when a decision under Article 4(4) EUMR is revoked.
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