RESPONSE TO EUROPEAN COMMISSION CONSULTATION ON ITS
WHITE PAPER “TOWARDS MORE EFFECTIVE EU MERGER CONTROL”

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A. INTRODUCTION

1. This response represents the views of IMPALA, International Association of Independent Music Companies, on the European Commission’s consultation on its White Paper “Towards more effective EU Merger Control”. We deal mainly with the acquisition of non-controlling minority shareholdings in the context of this consultation and do not make observations on the proposals concerning case referrals, and then set out some other issues that are fundamental to achieving effective merger control and which we believe must be part of future action.

2. We confirm that this response does not contain any confidential information and that we are happy for it to be published on the Commission’s website.

3. In summary, we welcome the Commission’s proposals to improve merger control.

4. We do not believe the White Paper deals with all of the issues and we discuss this after dealing with the proposals concerning the acquisition of certain non-controlling minority shareholdings below.

5. We agree that jurisdiction should be extended to the acquisition of certain non-controlling minority shareholdings, subject to our detailed comments below. We would expect that:

   • The new jurisdiction would be of particular relevance in highly concentrated oligopolistic markets.
   • Acquisitions of minority shareholdings would raise competition concerns in the case of horizontal links between the target and the acquirer, as well as in the case of certain vertical links.
   • A clear-cut threshold should be set, and, below that threshold acquisitions of minority shareholdings would also be subject to the transparency procedure where certain specific conditions apply.
   • A notice should be issued in the Official Journal once the Commission receives an information notice to allow third parties from the business community to comment on the proposed acquisition.
   • The SIEC test should apply, and, as in acquisitions of control, the Commission should take into account the specific characteristics of the market e.g. in cultural and creative industries.

B. ACQUISITION OF NON-CONTROLLING MINORITY SHAREHOLDINGS

6. As the Commission explains in its White Paper, when the acquisition of a non-controlling minority shareholding is unrelated to an acquisition of control, the Commission cannot currently intervene. This means that the Commission can intervene where a company that acquires control of another company already has a minority shareholding in the competitor of that company, but cannot do so if the acquiring company acquires such
shareholding subsequent to the acquisition of control and the Commission’s investigation, although the same issues would be raised.

7. IMPALA considers that this enforcement gap is particularly relevant in highly concentrated, oligopolistic markets such as the music market in which its members operate. This is of course not the only market of this type: the hard disk drive market examined in the case of Western Digital/Hitachi is another example of such a market, which has become progressively more concentrated.

8. In such markets, the market leader may already have reached a position of such market power that further acquisitions of control are likely to lead to considerable, if not impassable, regulatory hurdles, whereas the acquisition of a non-controlling minority shareholding may not. This is because it is not clear that either Articles 101 or 102 TFEU would apply to the acquisition. Even if the market leader were already dominant, the acquisition of a minority shareholding would not necessarily constitute an abuse of that dominant position. However, the acquisition of a minority shareholding could allow the dominant company or market leader to increase its already significant market power and could lead to a form of “creeping dominance”, without acquisitions of control. This notion of “creeping dominance” is something we also raise below as regards other measures that IMPALA considers necessary to achieve effective merger control in Europe.

1. Theories of Harm

9. The Commission has set out a number of theories of harm that may justify its intervention in relation to an acquisition of a non-controlling minority shareholding. Given the comments made above, IMPALA considers that competition concerns would be likely in the case of structural links between horizontal competitors, as well as in the case of certain vertical links as discussed below.

10. Such concerns would arise in particular from a situation in which the acquisition of the minority shareholding allows the acquirer to use its position in order to limit the competitive strategies available to the target, thereby weakening it as a competitive force, although the target remains as a separate company in the market.

11. IMPALA also considers that the Commission is correct to be concerned about the possibility that such minority shareholdings could lead to tacit coordination – and again, this is a particular danger in concentrated, oligopolistic markets.

12. Vertical minority shareholdings can also provide material influence and foreclosure. For example, this is an issue as regards content industries in the media sector, particularly in the digital world, where dominant or market leading content providers may acquire minority shareholdings in a digital platform or service which licenses the content and access to the platform may be foreclosed to other competing content providers. Or the
situation may be the reverse – a digital provider or platform with a market leading position could conceivably decide to take a stake in a content provider and this could also lead to foreclosure as regards other content providers.

2. The Proposed System

13. The Consultation Paper put forward three possible options: a notification system; a transparency system; and a self-assessment system. None of these systems would be ideal and all have disadvantages. IMPALA welcomes the fact that the Commission has tried to achieve a balance between these different options through a “targeted” transparency system. However, IMPALA would like to make the following comments on this system.

“Competitively significant link”

14. This test has two elements to it: a competitive relationship or link and a threshold for deciding whether or not this link is significant.

15. As regards the competitive link, the Commission notes in its White Paper that this “would arise where there is a *prima facie* competitive relationship between the acquirer and the target’s activities”. This may be horizontal or vertical. According to the White Paper, a horizontal link may exist where the two companies are active in the same markets or sectors. Given that the Commission proposes that companies should self-assess whether or not a competitive link exists between the acquirer and the target, the reference to sectors appears a little vague. The Staff Working Paper that accompanies the White Paper sheds a little more light on how this self-assessment should be carried out at §88: it would apparently take into account whether the companies are in the same sector, the same geographic area and whether the acquirer has a competitive relationship to the target.

16. In practice, IMPALA would expect that the test would be whether or not the companies were active in the same relevant market, or market segment, in line with current EU merger control practice and that a preliminary assessment of the relevant markets be carried out. This appears to be the direction of the Commission’s thinking in any event, since, when discussing the information to be provided in the information notice in the Staff Working Paper at §104, the Commission notes that the notice would need to contain some essential market information about the parties and their main competitors.

17. The test for defining whether or not the link is significant will also require some clarification and should be a clear percentage, although it is clear that some flexibility may be required where there is an issue of, for example, influence or access to competitively sensitive information of the target, even where the threshold is not met.
18. We would favour the approach in the UK of a clear-cut threshold of 15% to determine whether the acquisition of a minority shareholding creates a competitively significant link, and, below that threshold, between 5% and 15%, subject to specific conditions. Those conditions should be clearly set out. At present, the White Paper refers to a series of examples, without further clarification of these examples and of whether they are exhaustive or not.

Procedure

19. The procedure set out by which the acquirer would then provide the Commission with an information notice appears to attempt to balance the Commission’s concerns regarding effective enforcement in relation to minority shareholdings that genuinely raise competition concerns and the desire to avoid any unnecessary or disproportionate administrative burden. One point that seems to be missing is that of timing – the exact point in time at which a company would need to provide such an information notice to the Commission.

20. Although IMPALA understands the need to ensure that the information required in the information notice is not overly onerous, we consider that there must be a clear explanation of why a competitively significant link exists in a given case. It would thus be useful if the information notice contained an explanation of why the company considers that there is a competitive link between it and the target, and on which relevant markets, or an equivalent to the affected markets information provided in Form CO, as well as the basic market share information to which the Commission refers. As noted above, this appears to be the direction of the Commission’s thinking in any event (see Staff Working Paper at §104).

21. The Commission then suggests an initial waiting period, during which the parties cannot close the transaction and during which Member States would have to decide whether to request a referral or not. This appears fair and, as the Commission notes, in line with the deadline under Article 9 for a Member State referral request.

22. The Commission then discusses the possibility of a four-six month period after filing of the information notice, during which the Commission can decide whether or not to investigate the acquisition and which would allow the business community to come forward with complaints. It thus appears that after the fifteen-day period, the parties would be able to close the deal but might still face the prospect of an investigation.

23. Given both the need to ensure legal certainty and to ensure that there is effective enforcement, it would seem important to ensure that the business community is consulted in a timely manner, and to provide for a publication of a prior information notice in the Official Journal so that the business community is made aware of the potential acquisition and can raise any potential concerns at the earliest opportunity. There is no mention of such a notice being published in the White Paper, although it is referred to in the
Staff Working Paper at §102. However, it is not clear whether such a notice would only be published in the event that the Commission were to decide that the transaction merits a Phase 1 investigation, or whether notices would be published systematically. IMPALA would argue the latter option, since the Commission may not have sufficient information to decide whether or not the transaction merits investigation without seeking information from the business community.

24. There would be two advantages to such a system: it would allow third parties in the business community the right to comment on the transaction; and for the parties to the transaction, it would speed up the Commission’s decision on whether or not to investigate a transaction. A period of four months during which the Commission investigate a transaction that has already been implemented seems reasonable, but it would clearly be preferable for the Commission to make its decision as soon as possible during that four-month period. This would also potentially lessen the need for interim measures to deal with the potential situation where an acquisition has already been partially or fully implemented.

3. **Substantive assessment**

25. In IMPALA’s view, if the Commission does introduce a system for reviewing non-controlling minority shareholdings, the substantive test for assessing concentrations, the SIEC test, should also apply. As the Commission notes, theories of harm could be tailored to the specific circumstances of each minority shareholding case.

26. And as in cases of acquisition of control, it is extremely important for the Commission, when assessing whether or not the acquisition of a minority shareholding will raise competition concerns, to consider the specific characteristics of the market in which this acquisition is taking place.

27. As mentioned above, IMPALA would expect the Commission to be vigilant in the case of highly concentrated, oligopolistic markets, where there are four or less main players in the market. This is of special concern in the creative and cultural industries. The Commission should pay attention to the impact on SMEs and the creation of barriers to entry on such highly concentrated markets. IMPALA would also expect the Commission to be particularly vigilant in relation to the online market and to ensure the acquisition of minority shareholdings and/or indeed other forms of influence or control (see below) does not result in foreclosure and thus ensure that all players in cultural/creative markets have a minimum access to all distribution channels.

C. OTHER ISSUES THAT NEED TO BE ADDRESSED TO ACHIEVE EFFECTIVE MERGER CONTROL

28. **Other forms of control or influence over competitors or companies with vertical links.** These can arise through business agreements, financing arrangements and other relationships, which create effective
control or some form of influence over the target. There should be greater clarity as regards the assessment of such arrangements.

29. **Creeping dominance.** As mentioned above, creeping dominance also needs to be investigated, and this is an issue that has been raised by IMPALA in the past. For example, we previously raised concerns about a series of separate acquisitions of key national companies which upset local competition and which taken together amounted to a significant cross-border market strengthening yet which escaped scrutiny at European level because individually the mergers are local. Such cross-border effects also escape effective scrutiny at national level because each national authority is only concerned with what goes on within its own territory.

30. Another example of such creeping dominance would be where a company with significant market power on a concentrated market has acquired a competitor, and in order to obtain merger clearance, is obliged to make very significant divestments across multiple territories and yet, subsequently acquires a vital local asset in the EEA but in a national territory that was not covered by the original merger decision to create a dominant position in that local market. In that case, it is difficult for the EC to look at the case again and it is vital that merger control prevents companies in this situation from making further acquisitions, or that at least when they do, such acquisitions are subject to merger control if they take place within a certain time frame.

31. **Incorporating a wider review of competition policy and how it applies to merger control.** This also needs to be carried out as part of effective merger control as this is a vital part of ensuring competition rules do their job and take into account the specific characteristics of different markets. In terms of market access and ensuring a level playing field more generally, the European Commission needs to make concrete progress on its recommendations in the green paper on unlocking the potential of cultural and creative industries (the “Green Paper”). As underlined in the Green Paper, “creating and maintaining the level playing field which ensures that there are no unjustified barriers to entry will require combined efforts in different policy fields, especially competition policy”. In this context, the area of competition policy still needs to catch up with political and economic recognition of the vital role of SMEs and of diversity in the economy.

32. As part of the mainstreaming exercise carried out within the Commission, there is a need for a review of competition policy with new competition guidelines adapted to SMEs and taking into account the cultural diversity dimension. The EC should also conduct an investigation into the economics of cultural markets and the competitiveness of SMEs to see whether or not there is a level playing field.

33. The need for a level playing field, and the role of competition policy, was also recognised by the study commissioned by the EC on the
“entrepreneurial dimension of Cultural and Creative Industries”: “Accessing the market remains difficult for CCI (Cultural and Creative Industries) SMEs, especially where a few large companies dominate the market. The EU should consider adapting competition policy to CCI’s characteristics to avoid excessive market concentration. This could ensure that all cultural players have a minimum access to all distribution channels, including on the online market to offer real cultural diversity and choice for consumers.” Another study commissioned by the European Commission on “the impact of culture on creativity” already highlighted “the importance of competition rules as a tool to promote a diverse cultural offering (...) as diversity is a catalyst of creativity”. And the European Parliament's resolution on cultural and creative industries also asked the European Commission to, amongst other things, consider the “best way to adapt the regulatory framework – and in particular the rules on competition policy – to the specific situation of the cultural sector to ensure cultural diversity and consumer access to a range of high-quality cultural content and services” (point 55).

34. Finally, in its strategy on intellectual property, the EC also pointed out the need to accompany “strong protection and enforcement of IPR” by “rigorous application of competition rules in order to prevent the abuse of IPR which can hamper innovation or exclude new entrants, and especially SMEs, from markets”. The digital market in particular should provide opportunities, with a real level playing field, for all actors regardless of their size. It will be essential to ensure that horizontal and vertical control issues are effectively addressed.

35. The market, if left to its own devices, should deliver diversity but it is clear in this case that a real level playing field needs to be created. It is also important for the EC to be in line with the UNESCO Convention on cultural diversity, which is part of EU law, to ensure the principle of fair and equitable access to the means of creation, promotion, production and distribution for all cultural operators.

36. The EC treaty (article 167 TFEU) also states that cultural aspects shall be taken into account when implementing European law. There is no inherent diversity and big companies have no economic interest in providing it. The EC needs to ensure that SMEs have fair and equal access to the market as they are essential to the development of an economy of diversity, and more generally to jobs and growth, and competition policy and in particular merger control plays a vital role in ensuring this fair and equal access.

37. All of the above should therefore be part of any strategy to implement more effective EU Merger Control.