Response by Linklaters LLP to the Commission’s White Paper "Towards More Effective EU Merger Control"

We welcome the Commission’s initiative to review and, where appropriate, improve the European Merger Regulation1 ("EUMR") and the opportunity to comment on the European Commission’s White Paper "Towards More Effective EU Merger Control" ("White Paper") and the accompanying Staff Working Document ("SWD").

Our previous comments in response to the European Commission’s consultation on possible improvements to the EUMR (the “Consultation Response”)2 are still relevant for the Commission’s White Paper and we would invite the Commission to read them in conjunction with this response. Below we outline our main observations on the proposed extension of the EU merger control regime to the acquisition of minority shareholdings and amendments to the existing referral scheme, and also address a number of other issues raised in the White Paper.3

A. Merger control for the acquisition of non-controlling minority shareholdings ("structural links")

As we indicated in our Consultation Response, we do not believe that any enforcement gap is significant enough to justify an extension of the EUMR to minority shareholdings. We remain of this view having considered the White Paper. In summary, we respectfully submit that:

- The alleged enforcement gap which the White Paper aims to address is very narrow in practice. The EUMR already covers minority stakes that rise to the level of control. Only the acquisition of non-controlling minority stakes falls outside the scope of the EUMR.

- Non-controlling minority shareholdings are likely to raise concerns only in a few cases, where the market concerned has certain specific characteristics, i.e. the minority shareholding creates a link between close competitors in a highly oligopolistic market with high barriers to entry. The majority of cases where structural links may lead to competitive harm can be addressed through Article 101 TFEU or Article 102 TFEU, or as part of the Commission’s EUMR review. Indeed, all the examples cited by the Commission in the White Paper, with the exception of Ryanair/Aer Lingus, are examples of cases where the Commission successfully used the EUMR to address competitive concerns raised by non-controlling minority shareholdings. In Ryanair/Aer Lingus, the only reason why the Commission could not order Ryanair to divest its stake in Aer Lingus was that Article 8(4) of the EUMR only applied to concentrations that were implemented. A modification of Article 8(4) EUMR would have addressed this gap.

- An extension of the EUMR to non-controlling minority shareholdings, including in particular the proposed “targeted transparency” system would represent a significant cost and administrative burden for businesses. The White Paper’s estimate of the number of additional cases that would have to be notified appears to us to be unrealistically low and we see a risk that reform could result in a chilling of incentives to invest in EU businesses.

2 Response by Linklaters LLP to the Commission’s Consultation on possible improvements to the EUMR dated 20 September 2013.
3 Articles referred to with no specific source are articles of the Merger Regulation.
• The proposed system would also increase the administrative burden on the Commission and there is a real risk that this would divert the Commission’s resources away from its core enforcement priorities.

• The “targeted transparency system” does not appear to have very clear jurisdictional tests, and this could create some degree of risk and uncertainty. More specifically, the concept of a “competitively significant link” is broad and ambiguous.

• There should be no need for a suspensory period in connection with the acquisition of non-controlling minority stakes, given that acquisitions of non-controlling minority stakes do not change the market structure and are more easily reversed than outright acquisitions.

• The four to six month investigation period, during which the Commission could investigate a completed transaction appears excessive, especially when combined with a mandatory notification requirement and detailed information notice.

Against this background, we would urge the Commission to reconsider the proposal in the White Paper and we would strongly favour a self-assessment system coupled with the possibility of voluntary notification. This would give the Commission the flexibility to investigate any acquisition of a non-controlling minority stake that was not notified, but would follow the self-assessment approach that EU competition law has adopted in relation to behavioural matters since the implementation of Regulation 1/2003. We note that the 2004 modernisation involved the removal of a notification system for Articles 101 and 102 TFEU in order to allow the Commission to prioritise cases most likely to impact competition in the EU. We consider that this reform has been highly successful as demonstrated by the Commission’s enforcement record over the past decade.

If, however, the Commission does decide to introduce a transparency system, we would urge the Commission to include the following features in order to limit the adverse side-effects outlined above:

• a “bright-line” jurisdictional test to enable companies to determine with certainty whether or not they have an obligation to notify;

• an information notice requiring only a limited amount of corporate information (along the lines of a case allocation request);

• no standstill period; and

• a post-notification investigation period of no more than four months.

1 The perceived enforcement gap does not justify the proposed reform

In our Consultation Response we set out that it would be disproportionate to extend the scope of the EUMR to non-controlling minority stakes, given (i) the limited number of cases where the acquisition of a non-controlling minority stake is likely to trigger competitive concerns; and (ii) the existence of other tools to deal with any problems that do arise.

We acknowledge that the acquisition of non-controlling minority shareholdings has the potential, in certain discrete circumstances, to cause competitive harm. We agree with the Commission’s explanation of the theory of harm which it seeks to address as set out in section 3.1.1 of the White Paper. However, it is clear from the White Paper itself that competitive harm will arise only in a small number of cases with highly specific circumstances. Therefore, only a small number of cases where a non-controlling minority stake has been acquired would, even potentially, result in competitive harm.
For those small number of cases, we consider that the majority of them can be addressed within the existing framework of competition rules under Article 101 or 102 TFEU, or through the existing EUMR process.

In addition, as the Commission has recognized in its White Paper, there are many instances where the Commission took into account pre-existing non-controlling minority stakes in its EUMR review, and took enforcement action to reduce or eliminate those problematic minority stakes.

The only significant enforcement gap is that the Commission does not have the procedural tools to order a full divestment of a pre-existing minority stake in the event of a prohibition decision, in cases where the transaction has not been implemented. However, this enforcement gap could be addressed by expanding the scope of Article 8(4) EUMR.

In light of the small enforcement gap, the additional cost and legal uncertainty involved in reform (as discussed further below) would appear to be disproportionate. This would especially be the case for minority shareholdings which in most cases have very positive effects, for example, in facilitating particular research and development arrangements or in ensuring capital funding from financial investors. As set out above, we see a risk that the incentives of investors to invest would be reduced if the proposed reforms were implemented.

2 Comments on the proposed “targeted transparency” regime

The targeted transparency system identified by the Commission would involve the parties submitting an information notice to the Commission in transactions with a Union dimension where:

- there is a competitive relationship between the acquirer’s and the target’s activities, either because they are competitors or because they are active at different levels of a production/distribution chain; AND, either
  - the minority shareholding exceeds 20 per cent of the target’s voting rights; OR
  - the minority shareholding is between 5 per cent and 20 per cent of the target’s voting rights, AND
  - the acquirer has additional rights which enable it materially to influence the target’s commercial policy including:
    - rights under the shareholders’ agreement giving it a “de facto blocking minority”;
    - a seat on the board of directors; and/or
    - access to commercially sensitive information.

2.1 General

We welcome the Commission’s intention to identify the transactions that are most problematic to competition through seeking to identify acquisitions of a “competitively significant link”. However, the test as articulated in the White Paper does not appear to achieve the level of legal certainty that parties would need in order to assess whether they have a legal obligation to file an information notice. This is particularly the case if the Commission proposes sanctions for a failure to file an information notice (although we find this unclear, see Section 3.6 on penalties) and, if this were the case, we would expect to see a disproportionate number of “protective filings”.

We note that of those regimes which regulate minority shareholdings, a number, in particular Australia and the UK, have a subjective jurisdictional threshold (material influence in the UK and any share or asset acquisition that has the effect of lessening of competition in Australia).
However, we note that in those systems the subjective threshold is combined with a voluntary notification. In our experience advising on mergers in the UK, the most problematic transactions tend to be notified because the parties value the certainty on outcome and timing that is achieved by a notification followed by a decision by the CMA.

By contrast, those regimes that include mandatory notification requirements for structural links combine them with either clear jurisdictional criteria (Canada and the U.S.) or with a local effects requirement (Austria and Germany). That said, we note that even a local effects test is subject to differing views as evidenced by the significant number of decisions by the Bundeskartellamt rejecting jurisdiction to consider a transaction.\(^4\) We note that this is one of the most challenging elements of the German merger control framework, which the Bundeskartellamt has recently sought to address through its new “Guidance on domestic effects in merger control”.

We respectfully submit that the estimate that the proposed system would catch only 20 cases per year is disproportionately low. In practice, there would be many more cases that satisfy the rather vague test proposed in the White Paper. For example, venture capital or private equity funds specialising in particular sectors would likely be required to file as a matter of routine in spite of the fact that such investments are often made for financial reasons rather than with a view to influencing the market conduct of portfolio companies. In addition, given the lack of clear thresholds (see further below), a significant number of protective filings would be made in order to minimise risk.

A high number of filings would be problematic because of the burden it places on both businesses and the Commission.

In relation to businesses, additional regulatory requirements would chill incentives of certain investors to invest in EU businesses, which is clearly not the Commission’s desired result. We also consider that, in some instances, the loss of confidentiality involved in submitting an information notice would deter investors.

In relation to the Commission, in our view the Commission’s resources would be most beneficial in considering the most problematic cases as opposed to going through numerous notifications of acquisitions of non-controlling minority shareholdings that raise no issues. In a 2008 ICN survey on agency effectiveness, ICN member agencies cited resource constraints due to review of mandatory notifications as the principal reason they could not proactively determine their enforcement and advocacy priorities. In this regard, we note the significant resources used by the Bundeskartellamt on cases where ultimately it had no jurisdiction and suggest that the Commission should take care to avoid a similar situation. As set out above, we do not think that the proposed reforms are consistent with the approach of the 2004 modernisation, which was explicitly intended to reduce the number of non-problematic notifications which the Commission was required to consider.

### 2.2 A “competitively significant link”

#### 2.2.1 The concept of “competitor”

The concept of a “competitor” largely depends on a market definition exercise which can itself be complex and resource intensive. The exercise becomes more complex where (as is frequently the case) there is more than one plausible market definition.

\(^4\) During the period 2007-2013, the Bundeskartellamt issued 514 decisions rejecting jurisdiction, accounting for around 5.5% of all merger decisions in that period.
Further, the competitive dynamics between an acquirer and a target are often not immediately clear even for acquisitions of controlling minority stakes that already qualify for EUMR review. In a great number of cases, the extent of horizontal and vertical overlaps is only established when preparing a notification, and after substantial amount of work carried out by both the buyer and the target in order to identify all possible overlaps. Whilst some overlaps may be immediately obvious, in a large number of cases it is only possible to establish overlaps once the parties are able to hold more open discussions with each other, and exchange a significant amount of information.

More significantly, the target's management will not always have a duty to cooperate in the context of the acquisition of a non-controlling minority stake. In many instances, the minority stakes could be acquired through open market purchases, where the acquirer will have access to very basic information, i.e. the level of information available to a holder of common stock. As a result, in many cases, the acquirer simply would not have access to the necessary information to make a thorough assessment of all the competitive overlaps.

Additionally, we respectfully submit that the concept of “competitor” for these purposes should not include “potential competitors” as is suggested at paragraph 88 of the White Paper. We believe that this would make the test for the existence of a “competitively significant link” overly vague and unworkable in practice. Minority shareholders, particularly financial investors, will frequently find it very difficult to identify which entities may be potential competitors particularly where an investor holds a large number of minority shareholdings. Further, an acquirer will often have no visibility on whether a target company has any intention to expand its operations into a new market. This would particularly be the case in acquisitions of publicly listed companies.

We also note the reference in the SWD to considering whether the target and acquirer are present in the same “economic and geographic sectors”. We consider this test unclear and suggest that this concept should not be included in any firm proposal for reform or should, at least, be clarified.

In our view, the difficulty of coming up with any workable proposal demonstrates that a voluntary system is the most sensible way forward.

2.2.2 Inclusion of “vertical relationships”

Even if it is considered that some acquisitions of non-controlling minority shareholdings should be subject to review, we doubt that the acquisition of minority shareholdings in vertically-related companies should be included in that group. As the Commission has recognized in the Non-Horizontal Merger Guidelines, competitive harm in vertical cases will only arise in a very specific set of circumstances, and the inclusion of this group of cases would be excessive compared to the perceived enforcement gap.

Further, “vertical relationships” as identified in the White Paper is not defined and could conceivably cover an extensive number of relationships (e.g. the supply of office material, basic utilities, etc.). As such, if this concept is to be used as a criterion to limit the number of transactions that require the submission of an information notice, it must be carefully defined, for example to include only vertical relationships relating to key inputs for the target company.

2.2.3 Two minority shareholdings

The White Paper appears to leave open the possibility that the Commission could identify a competitively significant link in situations where an acquirer holds a minority (non-controlling) interest in its portfolio and then acquires a further minority (non-controlling) interest in a competitor of that portfolio company. This would be an overly wide approach and will compound the difficulty identified above in identifying if two undertakings are competitors.
The risk of competitive harm in a case where a company has minority non-controlling shareholdings in two competitors is remote. We do not view any theory of harm as sustainable where the acquirer has no ability to influence the commercial behaviour of either undertaking in which it holds a stake. In such a case, the acquirer would have no ability to increase prices or restrict output of either of its portfolio companies. We are not aware of any cases in EU Member States that currently regulate minority shareholdings where the acquisition of a non-controlling minority stake has been prohibited because the acquirer already had an overlapping non-controlling minority stake in its portfolio.

Further, there are significant practical difficulties for large funds and investors in general in identifying every interest held in their portfolio whether controlling or not. In our experience fund clients already find the identification of overlapping interests a complex and time consuming exercise even under the current EUMR regime. The extension of EUMR to non-controlling interests that would “overlap” with pre-existing non-controlling minority stakes in competing undertakings would impose unacceptable burdens on financial investors and potentially chill investment incentives.

For these reasons we strongly recommend that no notification requirement should be imposed for such transactions. In the alternative, such requirement should be limited only to instances where the acquirer already controls a competing company for EUMR purposes, and then acquires a non-controlling stake in a competitor.

2.3 Shareholding levels

2.3.1 The 20 per cent threshold
The Commission proposes that for acquisitions of non-controlling shareholdings of 20 per cent or more, an information notice should be submitted regardless of whether the acquirer has additional governance rights. We welcome the legal certainty that this test provides. However, in our view this threshold is too low.

The likelihood of a financial (non-controlling) interest of 20 per cent resulting in a distortion of competition is remote. We do not generally consider it likely that minority shareholders will find it profitable to compete less aggressively with the target company in order to reap higher profits from their minority investment in the target. This specific theory was considered by the UK Competition Commission in the Ryanair/Aer Lingus case and dismissed because there was no evidence due to “the uncertainty and indirectness by which Aer Lingus’ profit will flow back to Ryanair”, despite the fact that the UK Competition Commission ultimately concluded that Ryanair should divest its stake on other grounds.\(^5\)

To the extent that the Commission wishes to retain a threshold above which transactions involving the acquisition of a competitively significant link must be notified regardless of governance, we respectfully submit that 25 per cent would be more appropriate. This is the level at which, in a number of corporate law systems, a shareholder can block a special resolution, and is more meaningful from an economic standpoint compared to a 20 per cent stake.

2.3.2 The 5 per cent threshold
The Commission also proposes a safe harbour below which no information notice would be required. We support the inclusion of such a threshold since it provides a clear and objective test.

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\(^5\) 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 para 7.148.
below which an investor can discount the possibility of being required to submit an information notice.

However, we suggest that the 5 per cent threshold proposed by the Commission is too low. We do not see any significant risk of anti-competitive effects arising for non-controlling shareholdings up to 10 per cent even if accompanied by additional minority protection rights which fall short of control. We would, therefore, favour revising the safe harbour to 10 per cent.

2.4 “Additional factors” that would trigger a filing

We consider the “additional factors” identified by the Commission as factors which would trigger a notification in shareholdings between 5 and 20 per cent shareholdings as problematic for two reasons. First, we consider them to be over-inclusive and liable to capture transactions where no competition issues arise. Second, we consider them to be insufficiently clear, particularly given the Commission’s proposal that submission of an information notice must be mandatory.

2.4.1 Rights giving the acquirer a “de facto” blocking minority

The White Paper introduces the concept of de facto blocking minority rights, which falls short of de facto control and refers to the UK BskyB/ITV case. In our experience the assessment of whether a de facto blocking minority exists is a complex process, which is both fact specific and subjective, and could also change over time depending on factors such as shareholder attendance rates. The assessment goes, at least in part, to substantive analysis rather than jurisdiction. We respectfully submit that such a test is not appropriate for a merger control regime where submission of a notification is mandatory (as opposed to the UK, for example, where the subjective elements of the test are off-set by the fact that there is no sanction if the authority takes a different view to the parties on the existence of material influence).

We believe that, in line with ICN Guidelines, a jurisdictional test should be clear and objective. In particular, we would welcome guidance on the categories of rights that are likely to give rise to a de facto blocking minority, in the same way that the test for control identifies the types of right that confer control (ability to veto budget, business plan and the appointment of senior management). We would strongly recommend that standard minority shareholder protection rights not be determinative in establishing a “de facto” blocking minority, as they are not relevant.

2.4.2 A seat on the board of directors

We respectfully submit that a single seat on the board of directors should not trigger a requirement to notify in shareholdings between 5 and 20 per cent. In most companies where the EU turnover thresholds are exceeded, a single seat on the board cannot be said to confer any meaningful degree of influence. Further, in our experience, the right to have a single director on the board of a portfolio company is standard investor practice. This means that a significant number of transactions are likely to fall within the category of transactions requiring an information notice.

The number of directors required for a minority shareholder to exercise competitively significant influence over a company would be determined by all the circumstances of a particular transaction including the composition of the board, voting rights, veto rights, the existence of a Chairman with a casting vote and all other relevant circumstances. We suggest that a more appropriate threshold might be, for example, where a minority shareholder controls more than a certain percentage (say 25 per cent) of the votes on the board, which would be in line with the thresholds based on shareholding levels.
2.4.3 Commercially sensitive information

We respectfully submit that access to commercially sensitive information should not be sufficient to trigger a filing requirement because the exchange of commercially sensitive information that may arise as a result of structural links or board seats can, and is more appropriately, dealt with under Article 101 TFEU. In addition, in many situations an acquirer and target will have in place appropriate compliance arrangements to ensure that there can be no exchange of commercially sensitive information.

Further, if the notion of competitor includes potential competitor (see 2.2.1 above), then it will become very difficult for a minority shareholder to assess what is or may be commercially sensitive information. This may be a concept that changes over time if the acquirer expands its portfolio of minority shareholdings.

2.5 Additional questions in relation to the filing requirement

In addition to the points raised above, we see a number of other issues where we would welcome clarification by the Commission:

• We assume that the requirement to submit an information notice would apply only to full-function joint ventures and that the Commission does not seek to also regulate non-full-function joint ventures. This would maintain consistency with the existing regime. Extending the EUMR to non-full function JVs would in effect extend the scope of the EUMR to what are essentially cooperative arrangements that are in any event caught under Article 101 TFEU.

• We would welcome clarification of which undertakings would be relevant in assessing whether the acquisition of the competitively significant link has a Community dimension. We recommend that only the group turnover of the target (excluding the seller) and the acquirer should be relevant, and not of other shareholders in the target (controlling or non-controlling) since this would significantly increase the number of potentially reviewable transactions. This would align the EU approach to the approach currently taken in Germany.

• We suggest that where a group of co-investors join together to invest in a single target then the turnover thresholds should be applied to each investor and the target separately i.e. each acquisition would be treated as a separate transaction from a merger control perspective. This would ensure that transactions were not caught simply because a number of investors opt to invest by way of consortium.

• We note that in many cases it will not be possible for the acquirer of a minority shareholding to obtain detailed information about the target’s EU turnover as such information is not publicly available. Indeed, in some cases the target will itself have minority shareholdings that would need to be included in any turnover calculation but are not publicly known. Given this, we suggest that an exception should be made for situations where the acquirer could not reasonably obtain turnover information about the target.

3 Procedure

3.1 We favour a voluntary rather than a mandatory system

As set out in our prior Consultation Response, if the Commission opts to reform the existing system, we would strongly favour a voluntary system over a mandatory system. We consider that a voluntary system strikes a sufficient balance between administrative burden and ensuring that
the Commission’s enforcement powers can deal with all instances of competitive harm. The functioning of the UK regime clearly demonstrates that a voluntary notification system is capable of effectively addressing competition concerns that arise from minority shareholdings. A voluntary notification system would also be consistent with existing EU principles, since a self assessment system already exists under Articles 101 and 102 TFEU.

Additionally, we consider that the Commission and National Competition Authorities (“NCAs”) are adept at monitoring transactions via press coverage and the prospect of complaints from interested third parties mean that those cases most likely to raise competition concerns are likely to be identified by the Commission. We accept that it would be more difficult for the Commission to monitor transactions across all Member States. However, this could potentially be overcome by requiring NCAs to monitor transactions taking place within their own jurisdiction. Under a voluntary system we accept there would have to be a prescription period of, say, four months of the deal becoming public (like in the UK) within which the Commission can investigate.

If the Commission decides to proceed with a mandatory system, we would suggest that:

- information required to be submitted in the information notice should be kept to a minimum, in line with the requirements in a case allocation form;
- there should be no standstill period; and
- the period in which the Commission can investigate should be limited to four months.

3.2 The proposed information notice

The White Paper proposes that parties would submit a mandatory information notice. At the outset we would like to stress the importance of keeping the information notice as short as possible to minimise the burden on commercial parties. We would favour an information notice that provides a level of detail that is similar to a case allocation form (subject to exceptions where turnover information of the target is not publicly available). This would ensure that the Commission would be aware of transactions involving the acquisition of a competitively significant link, but would minimise the burden on the parties in preparing the notice.

We consider that it is unobjectionable for the information notice to include details of the parties, their turnover (assuming target turnover is obtainable – see above), a description of the transaction and the level of shareholding together with any rights attaching to the shares. However, we are concerned that a requirement to provide market information and internal documents will be excessively burdensome.

In relation to market information, a pre-requisite to providing such information will be a market definition exercise which can potentially be a time consuming, particularly where there are a number of ways to define the market. Additionally, in our experience, minority investors (which are frequently financial institutions) will not necessarily have detailed market information about the market size or the market shares of the target and its competitors. We would propose that instead of “market information”, it would be sufficient to identify the relevant economic sectors along the same lines as the current NACE codes operate.

We consider the proposed requirement to provide internal documents is disproportionate since we do not consider that submission of internal documents is necessary in order to enable the Commission to assess whether to investigate further. We also see this as out of line with the Short Form CO, which requires internal documents only for reportable markets and with jurisdictions such as Germany and Austria which do not require the submission of internal documents when notifying the acquisition of a minority shareholding as part of the notification form. We respectfully
submit that reviewing internal documents for any notification of a competitively significant link would not be the best use of the Commission’s resources. The requirement to provide internal documents places a significant burden on companies. In contrast to the suggestion in the SWD, HSR 4(c) and 4(d) requirements in the U.S. can be extremely burdensome, taking a very long period of time to identify the relevant documents.

Finally, we would welcome clarification from the Commission on whether it intends to publish the contents of the information notice. From a business perspective, a central feature of venture capital investments is confidentiality. A requirement to notify details of a proposed transaction is contrary to the basis on which corporate venturing is currently carried out. This issue is particularly critical for innovative targets that are developing leading edge products and want their project to remain secret. The proposed information notice will frustrate this and may result in target companies losing a potential competitive advantage. It may also be detrimental to corporate investors, since there is a risk that their investment strategies may become publicly known, including to competitors.

3.3 The suspension obligation
The White Paper currently proposes a suspension period of around 15 working days following submission of an information notice. In our view, it is inappropriate for any suspension period to apply at all, given that by definition the acquisition of non-controlling minority stakes does not involve an acquisition or change of control.

First we do not see any competition policy risk in allowing the acquisition of a structural link to proceed to completion:

- Given the nature of a structural link, there is no integration in any meaningful sense between the target and the acquirer. Integration only occurs in control scenarios.
- To the extent that the Commission is concerned about potential leakage of commercially sensitive information, we consider that there would be a risk of this happening pre- or post-acquisition of the shares and that, in any event, this would be covered by Article 101 TFEU without any of the enforcement difficulties mentioned in the White Paper.
- Finally, to the extent that a divestment was considered necessary, it would be relatively straightforward precisely because there is no integration (although we note that in most cases divestment of the structural link would not be necessary since less far-reaching (behavioural) post-closing measures could be adopted).
- A long-standing and well-functioning derogation already applies to public bids. A similar, limited standstill rule could potentially be considered, for example, to allow the acquisition of shares, but not the exercise of voting rights for 15 days.

Since the proposed standstill period would not last until the Commission has closed its investigation, the White Paper’s proposal implicitly recognises that a standstill period is not necessary to prevent the parties prejudicing the Commission’s ability to address any competition concerns that may arise following its investigation. Indeed, it appears that the purpose of the proposed standstill period is to protect the position of Member States that have their own suspensory regimes relating to minority acquisitions. Since the only two such Member States are Germany and Austria, we suggest that it is disproportionate to subject all minority acquisitions to the disruption of a standstill period for this reason.

Second, we see considerable up-side in allowing parties to complete, particularly if the test for when a structural link arises remains unclear. This is because it removes the risk of a failure to
notify in advance resulting in significant penalties, meaning that parties can acquire a structural link and then subsequently notify the Commission if there is doubt as to whether that acquisition creates a competitively significant link. The advantage of having no suspensory period will be particularly relevant in competitive buying scenarios where the requirement to submit an information notice may materially affect how attractive a bid is to the seller.

Third, we see significant disadvantages with the inclusion of a standstill period. In our view a suspension obligation will reduce the ability of EU companies rapidly to raise capital and will create significant transaction costs. It also creates doubts about the legal validity of agreements closed without notification. Given the limited competition risks, discussed above, we consider it disproportionate. The experience of sophisticated merger regimes such as the UK (voluntary) and Italy (mandatory) shows that a merger control system can operate without a standstill rule, even for transactions involving the acquisition of control. In our experience, parties to transactions that are likely to raise substantive competition issues will frequently voluntarily introduce a merger control condition precedent. Even if they do not do so, such parties voluntarily assume the risk of adverse consequences.

3.4 The period in which the Commission can investigate a transaction

The White Paper’s current proposal combines a relatively detailed information notice, with a standstill period and a further period of four to six months in which parties can close a transaction, but the Commission can open an investigation (“post-notification investigation period”). We respectfully submit that this very long period during which the Commission can investigate a transaction is unnecessary.

The White Paper currently envisages an information notice that is relatively detailed and would include market share information and internal documents. If this proposal goes ahead (which we would argue against for the reasons set out above), such a notice will give the Commission sufficient information to determine whether or not further investigation is warranted. In our view, if transaction parties are required to provide detailed information about markets, then the Commission should be able to determine within a relatively short period of time, whether further investigation is necessary. We would suggest that an appropriate time period in such circumstances would be 25 working days.

A lengthy post-notification investigation period is detrimental to legal certainty since it leaves undertakings exposed to potential investigations following the signing of a transaction. That said, it is clear from the UK experience that undertakings are able to manage this risk provided that the period is kept reasonably short. In a voluntary system, which we favour, we agree that it is appropriate for the Commission to have the option to investigate for a period of up to four months in order to identify potentially problematic transactions and to consider whether to investigate.

Similarly, even in a mandatory notification, if the Commission only has high level information about a transaction, it will not have sufficient information to decide whether or not to investigate further. In such a scenario, a post-notification investigation period of up to four months would be proportionate.

3.5 Interim measures

For the reasons set out above in relation to the suspension obligation, we do not see any substantial competition risk in allowing the acquisition of a non-controlling minority stake to proceed to completion. For that reason, we do not see a need for the Commission to have the power to order interim measures in relation to such cases. However, we accept that if a non-suspensory system were introduced then the ability to order interim measures may be a
proportionate means to ensure that there is no effect on competition in the (few) cases where the acquisition of a minority shareholding may impact competition pending the Commission’s review.

If the Commission determines that it is appropriate to have the power to impose interim measures, we would welcome detailed guidance from the Commission setting out when it would propose to do so. In particular, given the low probability of harm, we would expect the presumption to be that interim measures would not be imposed unless specific circumstances indicated that real harm to competition was likely to arise.

3.6 Penalties

We would welcome guidance from the Commission on whether it envisages imposing penalties for failure to file or for closing before the standstill period had expired (if a standstill period is introduced, which we strongly believe it should not be) and how it would calculate such penalties. In our view, it would be disproportionate to impose penalties on the same basis as parties are fined for failure to file a concentration given that:

- the test as currently proposed in the White Paper includes subjective elements, where parties could legitimately take a different view to that of the Commission; and
- the likelihood of competitive harm arising as a result of a failure to file would be significantly lower than in relation to a concentration.

We note that Sweden operates a successful mandatory filing regime for control transactions without any fines for failure to file or for implementation prior to clearance.

Further, the Commission may wish to consider introducing an exemption to any proposed power to fine where the parties can show that they had no reasonable opportunity to obtain the information that would be required to allow them to determine whether a horizontal or vertical link arose. This might apply to the situation where the acquirer could not reasonably determine that the target was active in a particular market or where the acquirer could not reasonably conclude that the transaction satisfied the turnover thresholds.

4 Substantive test

We agree with the Commission that if the EUMR were amended, the SIEC test should apply to acquisitions of structural links in a manner consistent with other notifications. We would welcome additional guidance outlining the specific theories of harm it intends to investigate and the precise nature of the circumstances in which it considers that competitive harm is likely to arise.

B. Referral of merger cases

Linklaters welcomes the Commission’s proposals in relation to referral of merger cases, in particular the move away from a two-step procedure in which notifying parties submit two extensive filings. We also welcome the Commission’s acknowledgement that the current system can be cumbersome and may incentivise parties to file in a number of Member States rather than using the referral process.

As an overall comment, we suggest that time limits could be further shortened so that the relevant time limit would be 10, rather than 15 working days. We consider that this should not be unduly burdensome for either the Commission or NCAs and would give parties certainty over the applicable process for their transaction at an earlier point.
1 Article 4(5) EUMR: Pre-notification referral

We believe that the White Paper’s proposal to streamline pre-notification referrals will result in significant efficiency benefits for businesses. Making a single submission will save significant time and resources for filing parties, the Commission and the NCAs. We would support the inclusion of an additional section to the Form CO to ensure consistency in the form of submission.

We would also welcome guidance from the Commission on how pre-notification information would be shared between the Commission and the NCAs under the proposal. In particular, a transaction at this stage may be highly confidential, and therefore it is important to ensure that all NCAs have adequate systems in place to protect confidential information. We would support a minimum standard for all NCAs to achieve given that the sharing of information between the Commission and 28 NCAs inevitably increases the chances that confidential information may be leaked.

2 Article 22 EUMR: Post-notification referral

As set out in our Consultation Response, we suggest that post-notification referrals have become obsolete given that virtually all member states now have merger control regimes in place. However, if Article 22 is to be maintained, modifications should be primarily aimed at limiting the number of referrals in the interest of legal certainty. We would, therefore, suggest that an Article 22 referral be aligned with Article 4(5) EUMR so that a referral is only possible where the transaction is notifiable in three or more Member States.

C. Other points

The White Paper and SWD also propose a number of other areas in which the EUMR can be improved. Generally, we welcome these proposals and would welcome the opportunity to work further with the Commission to develop these proposals. For the purposes of this response, we comment on two proposed amendments: (i) procedural simplification in relation to joint ventures taking place outside the EEA; and (ii) the possible exemption of non-problematic transactions from the full notification requirement.

1 Joint ventures outside the EEA

Linklaters supports the Commission’s proposal to amend Article 1 EUMR to exclude the creation of joint ventures which are located and operate entirely outside the EEA and which can have no impact on the EEA. In particular, we consider that this would set a helpful precedent for developing jurisdictions which are modelled on EU competition law. We suggest that such an exemption could be expanded to cover acquisitions of existing joint ventures rather than only their creation.

As set out in our Consultation Response this may be achieved by providing that the joint venture itself must be one of the “undertakings concerned” that meet the turnover thresholds. To ensure that “greenfield” joint ventures can be captured, the Commission could introduce an exemption where the joint venture’s forecast turnover in three years (according to a business plan) falls below a specific value threshold.

We would welcome further detail on the Commission’s proposed amendment to the EUMR.

2 Exemption for non-problematic transactions

We also welcome the proposal that the Commission may exclude transactions that do not raise competition concerns from the requirement to notify. This would be the case for transactions that do not include any “reportable markets” under the Short Form CO. In principle, we consider that
transaction parties could self-assess where a transaction does not give rise to any possible effect on competition and, in such cases, simply decide not to notify. We consider this would create significant efficiency benefits for both transaction parties and the Commission.

However, if the Commission were minded to reduce rather than remove the notification burden, we would support the submission of an information notice along the lines proposed in relation to structural links (subject to our comments on the contents of the information notice). We see such a procedure as being comparable to the current practice of the Bundeskartellamt in “no overlap cases” which we generally consider works well.

Again, we would welcome further guidance from the Commission on the exact circumstances where a transaction would be exempt and whether the Commission proposes to exempt parties of any requirement to notify at all or whether it proposes a notification with a significantly reduced information requirement.

Linklaters LLP

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