VIA EMAIL to comp-merger-registry@ec.europa.eu

Alexander Italianer  
Director-General for Competition  
European Commission  
Tour Madou – MADO 12/76  
1049 Brussels  
Belgium

Dear Mr. Italianer:

Re: Public Consultation and White Paper: “Towards More Effective EU Merger Control”

We write on behalf of the Merger Streamlining Group (the “Group”), whose membership consists of multinational firms with a common interest in promoting the efficient and effective review of international merger transactions.\(^1\) The cornerstone of the Group’s activity has been to work with competition agencies and governments to help implement international best practices in merger control, with a particular focus on the *Recommended Practices for Merger Notification Procedures* (“Recommended Practices”) of the International Competition Network (“ICN”).\(^2\)

The Group’s work projects over the past decade have included two major surveys on compliance with the ICN *Recommended Practices*, as well as submissions to competition agencies and governments in over 20 jurisdictions to promote reforms consistent with the ICN *Recommended Practices*. Among others, the Group provided submissions to the European Commission (“Commission”) in 2003 in respect of the EC Merger Regulation (“ECMR”) amendments, in 2004 on the Draft Form RS and, most recently, in June 2013 on the proposed draft revisions to the Simplified Procedure and Merger Implementing Regulation, and in

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1 The current members of the Group include BHP Billiton, Bombardier, Chevron, Danaher, GE, Novartis, Oracle, Procter & Gamble, SAB Miller, Siemens, and United Technologies.

September 2013 on the Commission’s initial consultation on non-controlling minority shareholdings and case referrals.

The Group appreciates the opportunity to participate in this public consultation launched by the Commission aimed at more effective merger control in the European Union (“EU”). The Group is submitting this letter in a spirit of constructive engagement, based on its members’ very substantial experience in completing multinational merger transactions. In particular, the Group’s submission focuses on the Commission’s proposals with respect to non-controlling minority shareholdings, an area we believe may require further consideration, and extra-EEA joint ventures (“JVs”), a proposal which we support in principle.

I. Overview

The Group continues to believe that, should the Commission decide to proceed with amendments to the ECMR, a self-assessment system with voluntary notification would be the most appropriate approach. As noted in the Group’s September 2013 submission, the self-assessment model would strike an appropriate balance between the Commission’s interest in identifying potential competition concerns and the goal of limiting undue burdens on businesses and the Commission.

The Group appreciates the Commission’s concern that, occasionally, acquisitions of non-controlling minority interests may raise competition concerns that the Commission believes it lacks the jurisdiction to address. However, given that such cases are relatively rare, the Group does not see a need for ex ante “notification” requirements (even with a somewhat simpler information notice). Moreover, such a regime would be inconsistent with the Commission’s efforts to reduce the overall regulatory burden in the EU.

It is also unclear from the White Paper, “Towards more effective EU merger control”, and the accompanying Staff Working Document why the self-assessment system with voluntary notification would not be a preferable model, even though it may be more complex to reconcile with Member States’ current regimes and the Commission’s proposals regarding case referrals. The Group believes that under a self-assessment system, parties to a transaction with potential competition concerns would have a strong incentive to notify voluntarily, both for legal certainty and given the risk of the Commission initiating its own proceedings — including possibly after the transaction had closed.

The key benefit of self-assessment is that it will spare market participants and the Commission from having to devote substantial resources to notifying and reviewing many non-problematic transactions. While the Commission’s proposed transparency system is preferable

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3 The primary example identified has been Ryanair’s minority investment in Aer Lingus.

to the notification system contemplated in the Commission’s 2013 consultation, it nonetheless places undue burdens on parties acquiring non-controlling minority shareholdings, particularly as such transactions rarely raise competitive concerns. As discussed further below, the proposed system, although “targeted”, still raises several practical difficulties and uncertainties for transaction parties.

II. Treatment Of “Competitively Significant Links”

One of the concerns outlined in the Group’s September 2013 letter was the lack of clarity surrounding what would be considered a “prima facie” problematic structural link sufficient to trigger a filing requirement. The Group is pleased to see that the White Paper and Staff Working Document have provided further guidance on the types of transactions which would presumptively create a “competitively significant link”. However, further refinement of those criteria may be appropriate.

The White Paper and Staff Working Document provide that a “competitively significant link” would exist where:

(1) The minority shareholding acquisition is in a competitor or vertically-related company; and

(2) The acquired shareholding is: (a) above 20%; or (b) between 5% and 20%, but accompanied by additional rights, such as a seat or the board of directors, access to the target’s competitively-sensitive information, or the ability to exert influence on the target’s business conduct.5

I) Existence Of A Horizontal Or Vertical Relationship

In some cases, the existence of a horizontal or vertical relationship may not be clear to the acquiring party and it will have to undertake a market analysis to determine whether such a relationship exists. These identification problems are compounded in cases where the acquirer itself does not have a competitive relationship with the target, but holds a minority interest in another firm which does.6 This is inconsistent with four ICN Recommended Practices — that notification requirements should: (i) be clear and understandable; (ii) be based on objectively-quantifiable criteria; (iii) be based on information that is readily accessible to the merging parties; and (iv) not be unduly burdensome on notifying parties.7

7 See Recommended Practices II.A, II.B, II.C, and V.B.
The Recommended Practices state that notification thresholds should be “clear and understandable”. The existence of horizontal or vertical relationships between the acquiror and target may be unclear, and may require that complicated questions of product and geographic market definition be answered in order to determine if a filing is required. Market definition issues are often complex and may require detailed economic and other analysis to resolve — for this reason, the Commission itself often leaves the question of the appropriate market definition “open” in merger review cases where a final determination of the product or geographic market is not required to clear the transaction. Moreover, an acquiror may define product or geographic markets differently than the Commission. In addition, even where a horizontal or vertical relationship can be identified, there may be uncertainty as to whether the link between the companies is “competitively significant” (e.g., if one of the parties has only minimal presence in a potential overlapping market).

The Staff Working Document suggests that for the purpose of identifying a “competitor” (i.e., a horizontal relationship), a detailed analysis of the relevant markets is not required. Rather, parties should take into account whether companies are active in the same sector and geographic area, and self-assess whether the acquiror has a competitive relationship with the target. The Group is concerned that this interpretation of horizontal overlaps is overbroad and would mean that parties would be required to submit an information notice even though they may not be active in the same relevant market(s) under a full merger review, resulting in further resources being devoted to assessing non-problematic transactions.

Moreover, vertical relationships are far less likely to result in competition concerns than horizontal overlaps, a distinction recognized by many competition / antitrust authorities. The Group believes that requiring an ex ante information notice for an acquisition of a non-controlling minority shareholding in which there may be a vertical relationship is disproportionate to the benefits of such notice, particularly in light of the low shareholding thresholds and the proposed information requirements discussed below.

While determinations of competitive relationships may certainly be relevant to substantive merger review, they should not, in the Group’s submission, be required of parties at the early stage of merger notification, and particularly not in the case of minority shareholding acquisitions (which typically do not involve integration of businesses nor raise substantive competition concerns). As the ICN Recommended Practices make clear, “the business

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8 Recommended Practice II.A.
9 For a recent example, see, e.g., Case No COMP/M.7268 – CSAV / HGV / Kühne Maritime / Hapag-Lloyd AG, Commission decision of 25 September 2014, at para. 20.
10 Staff Working Document at para. 88.
11 See, e.g., the U.S. Department of Justice’s Non-Horizontal Merger Guidelines (“...non-horizontal mergers are less likely than horizontal mergers to create competitive problems....”); and the Canadian Competition Bureau’s Merger Enforcement Guidelines (“...[n]on-horizontal mergers are generally less likely to prevent or lessen competition substantially than are horizontal mergers”).
community, competition agencies and the efficient operation of capital markets are best served by clear, understandable, easily administrable, bright-line tests.” 12 The Group does not believe that the current approach to “competitively significant links” meets this standard.

Furthermore, the Recommended Practices state that “notification thresholds should be based on objectively quantifiable criteria”, and that “examples of criteria that are not objectively quantifiable are market share and potential transaction-related effects.” 13 In the Group’s view, an assessment of the competitive significance of links between the acquiror and target in a minority interest acquisition involves the analysis of factors relating to “potential transaction-related effects”.

The Recommended Practices also provide that notification thresholds should be “based on information that is readily accessible to the merging parties” and should “avoid imposing unnecessary burdens on parties to transactions”. 14 The level of information that may be required to assess horizontal or vertical relationships and the related questions of market definition may not be readily accessible to an acquiror in a minority interest transaction — particularly if it is not the acquiror itself that is horizontally or vertically-related, but another firm in which it also holds only a minority interest.

2) Shareholding Thresholds Greater Than 20% Or Between 5% and 20% With Additional Rights

The Group appreciates that an appropriate system “should capture the potentially problematic cases.” 15 However, the Group believes that, as currently drafted, the proposed system would not achieve the Commission’s stated objective to “avoid unnecessary and disproportionate administrative burdens, primarily for companies, but also for the Commission and NCAs.” 16

The Group recommends that the Commission consider adopting a significant minority interest “safe harbour” of at least 25% of voting securities (excluding non-voting securities that do not carry decision-making power). Such a safe harbour has the benefit of being objectively quantifiable, 17 based on readily-accessible information, 18 and would “screen out transactions that are unlikely to result in appreciable competitive effects”. 19 Doing so would

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12 Recommended Practice II.A, Comment 1 (emphasis added).
13 Recommend Practice II.B; Recommend Practice II.B, Comment 1.
14 Recommended Practice II.C and V.B.
15 Staff Working Document, at para. 68.
16 Ibid., at para. 69.
17 See, e.g., Recommended Practice II.B, Comment 1.
18 Recommended Practice II.C.
19 Recommended Practice I.B, Comment 1.
create the sort of “clear, understandable, easily administrable, bright-line test” for which the Recommended Practices advocate.

Should the Commission decide to continue with the proposed approach, the Group recommends that it clarify the types of “additional factors” (or “certain rights”) that elevate a minority shareholding between 5% and 20% to the level of a “competitively significant link.” To reduce the uncertainty regarding the types of transactions for which an information notice is required, this could be accomplished by way of a detailed enumerated list.

The White Paper provides a few examples of “additional factors” that would raise a competitive link to a significant level: a “de-facto” blocking minority, a seat on the board of directors, or access to commercially sensitive information of the target. It also discusses the Commission’s “theories of harm”, but it is unclear precisely how: (i) a minority shareholder can influence a business without having control, and (ii) the “anti-competitive effect may materialize [when] the minority shareholding is passive (giving it no influence in the target’s decisions)”.

Moreover, a single seat on the board of directors would likely be insufficient to create the requisite level of influence. In any event, a person occupying such a seat owes a fiduciary duty to act in good faith to the company on whose board he/she serves, rather than act for the benefit of the entity by whom he/she was nominated. Likewise, potential access to commercially-sensitive information alone does not result in competitive harm without corresponding disclosure and use of such information. Any such disclosure would be subject to, and could be reviewed under, Article 101 of the Treaty on the Functioning of the European Union. In addition, confidential information is customarily protected by non-disclosure obligations and restrictions which prohibit its recipients from its use for any unauthorized purpose.

Finally, the Group believes that the 5%–20% threshold does not achieve a fair balance between the goal of identifying potentially problematic transactions and minimizing burdens on transaction parties and the Commission. At the moment, the Commission estimates that only a limited number of transactions (around 20–30 per year) would be captured by the proposed regime. However, the Group understands that this estimate is based on a database that covers only minority acquisitions in public companies and does not include private company investments or immaterial transactions that were not reported. As such, the proposal contained in the White Paper risks sweeping in a multitude of filings relating to transactions that are unlikely to have any appreciable competitive effects.

III. Scope Of The Information Notice

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20 White Paper at para. 29; see also Staff Working Document at para. 50.
22 See Recommended Practice I.B, Comment 1, and I.C, Comment 4.
The White Paper and Staff Working Document contemplate that the information notice should require information about the parties, turnover of the undertakings concerned, a description of the transaction, levels of shareholdings pre- and post-transaction, any rights attached to the minority shareholding (where it is below 20%), and market information about the parties and their main competitors, or internal documents allowing for an initial competitive assessment. The Group believes that, consistent with the Recommended Practices, should the Commission adopt the (targeted) transparency system, the information notice should only require limited, high-level, information “of the type that is available to the parties in the ordinary course of business”.23 Specifically, the information requirements should be limited to a brief description of the parties and the proposed transaction, the turnover of the parties (or their annual reports), the levels of shareholdings pre- and post-transaction, and any rights attached to the shares.

If any internal documents are required, they should be limited to documents in existence and readily available. The Group also encourages the Commission to consider the time and internal resources required to gather and review even pre-existing information when determining the scope and volume of required information.

Furthermore, it is unclear what the phrase “market information about the parties and their main competitors” would entail. The Group is concerned that this may require parties to engage in detailed and burdensome activities, such as assessing markets, analyzing competitors or estimating market shares, at the notification stage. The Recommended Practices note that “[b]ecause most transactions do not raise material competitive concerns, the initial notification should elicit the minimum amount of information necessary to initiate the merger review process”.24 This concern is heightened in the case of non-controlling minority shareholdings as there is no acquisition of control, and thus the requirements of information notices should be less onerous than those required for full notifications. Notably, the Recommended Practices also caution that jurisdictions should be “particularly sensitive to any disproportionate burdens arising from the breadth of their initial filing requirements”25 where the transaction has limited value or limited local nexus. This concern is particularly compelling in the case of non-controlling minority shareholdings, as such transactions are not likely to result in appreciable competitive effects.

IV. Joint Ventures Outside the European Economic Area (EEA)

The Group supports the proposal to amend Article 1 of the Merger Regulation to exclude full function JVs located and operating outside the EEA and without any effects on EEA markets, even if the turnover thresholds are met. As noted in our prior submission, a transaction is not likely to have anti-competitive effects in a jurisdiction with which it has no material “local

23 See Recommended Practice II.C, Comment 1.
24 Recommended Practice V.A, Comment 2.
25 See Recommended Practice V.A, Comment 2.
nexus” and would instead result in unnecessary cost, delay, and burden for the parties to the JV and an inefficient use of the Commission’s resources.

The Group recommends the Commission provide further clarity on the meaning of “any effects on EEA markets” by way of a bright-line turnover threshold for sales within the EEA. The current language suggests that a JV operating outside the EEA, but which has, for example, a mere €1,000 of annual sales within the EEA, could trigger a filing. The Group encourages the Commission to adopt clear standards requiring a meaningful effect on EEA markets, such as requiring notification of a JV outside the EEA only where the JV achieves a turnover of €100 million within the EEA, as suggested in our September 2013 submission.

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The Group appreciates the Commission’s ongoing efforts to work “towards more effective EU merger control” and its willingness to consider the views of stakeholders. Nonetheless, the Group questions the necessity of some of the proposals in the current White Paper and accompanying Staff Working Document. Moreover, the Group is concerned that this expansion of the EUMR’s ex ante filing requirements to transactions that are unlikely to have appreciable effects on competition may also set a negative precedent in the international community, particularly in jurisdictions which look to the EU as a model. This would significantly increase the resource burdens for transacting parties and agencies.

Thank you for considering the Group’s views. We would be pleased to discuss this submission with you or your colleagues further at your convenience.

Yours very truly,

A. Neil Campbell  
Casey W. Halladay

Copy to: Members of the Merger Streamlining Group

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26 See Recommended Practice I.A and B.