RESPONSE OF KONINKLIJKE PHILIPS N.V.¹

TO

CONSULTATION ON POSSIBLE IMPROVEMENTS OF THE MERGER REGULATION
“TOWARDS MORE EFFECTIVE MERGER CONTROL”

1. Koninklijke Philips N.V. (‘Philips’) welcomes the opportunity to submit further comments to the European Commission (‘the Commission’) consultation ‘Towards more effective merger control’.

2. These comments build on our earlier comments (Annex 1) to the Commission’s 2013 consultation ‘Towards more effective merger control’ (‘the 2013 Consultation’). As in our earlier comments, we focus our current comments on the proposed merger control review of minority shareholdings, and not on the proposal for a new referral system.

Executive summary

3. Philips respectfully submits that the 2014 Consultation gives insufficient weight to the many refutations of the anti-competitive potential of minority shareholdings submitted by respondents in the 2013 Consultation. The White Paper and the Impact Assessment continue to defend the proposed extension of merger control with hypotheticals and untested economic theories. Concrete benefits of the review of minority shareholdings are only hinted at. This is unsatisfactory in light of the very concrete and un-theoretical costs of the proposal. Philips pleads for a reconsideration of the need to review minority shareholdings (part A of this submission).

4. When comparing the current situation and the three policy options, Philips observes that the current situation scores higher on four out of the five criteria used in the Impact Assessment: legal certainty, administrative burden on businesses; enforcement costs; and consistency with the current merger control framework. Therefore Philips respectfully submits that the EU Merger Regulation (EUMR) should not be amended to include a review of minority shareholdings.

¹ Transparency Registry: 02341041540-74.
5. Only when the danger to competition from minority shareholdings would be concrete and substantial – *quod non*, see before – could one of the three policy options prevail. In Philips’ analysis, that would then be the self-assessment system though, and not the Commission’s Preferred Option – the transparency system (part B of this submission).

6. Should a transparency or notification system be chosen, Philips respectfully submits that the jurisdictional threshold should not include a substantive assessment. The currently proposed threshold for relevant shareholdings – whether the associated rights “enable the acquirer to influence materially the commercial policy of the target”\(^2\) – is substantially the same as the current threshold for control – ‘decisive influence’. Should ‘material influence’ encompass more cases than ‘decisive influence’, it is overly vague. In Philips’ view, relevant minority shareholdings should be easily identifiable by reference to a percentage of voting rights. This percentage could be lower for shareholdings in competitors and higher for shareholdings in vertically related companies (part C of this submission).

7. In the absence of clear and objective jurisdictional thresholds, the fining provisions of the EU Merger Regulation (‘EUMR’) – should they also be extended to minority shareholdings – must specifically address minority shareholdings, with fines reflecting the greater legal uncertainty and limited anticompetitive effects associated with minority shareholdings (part D of this submission).

8. The review of minority shareholdings should be evaluated after three years (part E of this submission).

A. The 2013 consultation: no appropriate response to critical questions

9. In the 2013 Consultation, forty-two respondents, or two out of every three, rejected the Commission’s assertion of an enforcement gap. These views are acknowledged in the 2014 Consultation (in an Annex to the Impact Assessment) but are otherwise passed over. Philips infers that only after a suggestion by the Impact Assessment Board, reference was made to stakeholders’ views at all.\(^3\)

10. The 2014 Consultation closely follows the 2013 Consultation in its analysis of the anticompetitive potential of minority shareholdings. It refers to (i) economic theories of harm, (ii) merger control cases and (iii) the Ryan Air/Air Lingus case, without responding to reasoned submissions on:

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\(^2\) White Paper, para. 46.

\(^3\) Impact Assessment, para. 16: “The Impact Assessment has been revised in line with the Board’s comments. In particular: (4) Stakeholders’ views are referred to [...]"
i. questionable assumptions underlying the theories of harm;\(^4\)
ii. the Commission’s options in merger control cases;\(^5\)
iii. (grave) inconsistencies in the Commission’s views on anti-competitive effects in Ryan Air/Air Lingus.\(^6\)

11. Similarly, the 2014 Consultation has disregarded the pleas to balance, on the one hand, the 3-5% increase in the public and private costs of merger control,\(^7\) and on the other hand, the limited number of ‘problematic’ transactions and the limited anti-competitive potential of these transactions.

12. Instead of a careful weighing of costs and benefits, as proposed by the majority of respondents, the current consultation obfuscates a proportionality review. The Impact Assessment reminds the reader of the billions of euros that horizontal merger control would contribute to consumer welfare, and then links this number to the review of minority shareholdings by noting that the same methodology could be used – without mentioning that this same methodology would yield wholly different (and quite possibly negative) results in the case of minority shareholdings.\(^8\)

13. In short, Philips respectfully submits that the current justification for an extension of merger control is too thin to carry the substantial change that is proposed. Philips pleads again for a careful review of the pros of the review of merger control – the cons are sufficiently clear.

B. The balancing of policy options

14. Philips has assessed the three policy options along the criteria used in the 2014 Consultation. Philips respectfully submits that after a careful weighing of the policy options against the current situation, the latter is still the best option. Of the other three options presented by the Commission, the self-assessment system is the least harmful.

15. Below, Philips will apply the criteria as used in the Impact Assessment. Our analysis is summarized in an overview with (+) and (-), similar to the approach in the Impact Assessment.

\(^4\) E.g. International Chamber of Commerce, para. 1.12; City of London Law Society, paras. 1.10-1.14.
\(^5\) E.g. Herbert Smith, para. 1.63.
\(^6\) E.g. Shearman & Sterling, para. 8, City of London Law Society, para. 1.19.
\(^7\) The Commission expects to review 20-30 cases under its new competence (Impact Assessment, p. 9); it reviewed 277 cases in 2013 (http://ec.europa.eu/competition/mergers/statistics.pdf). Philips assumes for ease of calculation that the costs of the review of minority shareholdings is half that of the review of full-fledged concentrations.
\(^8\) Impact Assessment, paras. 71-75.
1. Preventing harm to competition and consumers

16. Philips, as all private stakeholders in the 2013 consultation, observes that the presented empirical evidence of anti-competitive potential of minority shareholdings points to only limited effects; and that harmful minority shareholdings could be either remediated in merger control procedures (immediately if the minority shareholding actually confers control, or in subsequent merger control cases involving either party) or by application of 101 or 102 TFEU. As such, Philips believes that no policy option should score more than slightly positive (+) relative to the current situation on ‘1. Preventing harm to competition’.

17. Potentially anti-competitive minority shareholdings could be caught earlier (not: more often), under the notification system and the transparency system. As such, Philips scores the notification and transparency system slightly higher than the self-assessment system.

2. Legal Certainty

18. Philips agrees with the Impact Assessment that the three options score about the same on criterion ‘2. Legal certainty’. The main legal uncertainty is related to what minority shareholdings would be caught by the Commission’s jurisdiction. If more open norms are used, such as a ‘competitively significant link’ and the ability ‘to influence materially the commercial policy of the target’ as suggested in the White Paper, there will be more legal uncertainty (see also part J of this submission); more concrete norms, such as percentages of voting rights, decrease legal uncertainty. The process for reviewing such minority shareholdings is relatively unimportant in terms of legal certainty.

19. Philips disagrees with the impact assessment’s unexplained positive (++) ratings of legal certainty as compared to the current situation. In Philips view, an extension of merger review rules naturally creates more legal uncertainty when compared to the current situation. Any new rule is open to a certain degree of interpretation, will or will not be enforced etcetera. It is hard to envisage how the introduction of new rules will lead to less uncertainty, in particular when the boundaries of those rules are not accurately defined. As such, Philips scores all options slightly negative for legal certainty, compared to the current situation. Of course, this does not impact the comparison between the three options, but does change the comparison with the current situation.

3. Administrative burden on businesses

20. The Impact Assessment implies that the costs of an extension of merger review for business cannot exceed the number of potential cases (20-30) times the costs (max. EUR 500k under the notification system, or max. EUR 50k under the transparency system). Total costs to business would thus equal at most EUR 15 million under the notification system or EUR 1.5 million under the transparency system.
21. Philips experiences, however, that the costs of merger control are not limited to the costs associated with the merger filing. Each merger or acquisition, whether it will be filed with the European Commission or not, needs to be checked for merger control issues. As such, the number of transactions that are affected by the current proposal and where costs will rise, far exceeds the number of minority shareholdings that the Commission will be informed of.

4. Public authorities / enforcement costs

22. The Impact Assessment rightly notes that the enforcement costs of a transparency system are low. Indeed, the competition authority has few obligations other than to acknowledge receipt of the notification, and investigate the 1-2 cases that merit any further investigation. Under a notification system, not much more work is needed: most minority shareholdings are clearly innocuous. They would be cleared at first sight with a short form decision. As such, the additional work in a notification system is limited.

23. Philips expects the enforcement costs of a self-assessment system to be somewhere between those of the notification system and the costs of the transparency system.

24. The self-assessment system saves time compared to the transparency and notification system by limiting the number of information notices/notifications the Commission needs to review. The Commission can wait for the 1-2 less clear cases that self-assessing companies will notify. Contrary to what the Impact Assessment asserts, ‘extensive fact-finding up front’ and ‘screening many more cases’ is not necessary. Given the limited potential of anti-competitive effects of a minority shareholding, undertakings and their lawyers will prefer certainty over any modest gain they may get from a ‘problematic’ minority shareholding.

25. In this regard it should be noted that truly problematic minority shareholdings are unlikely to go unnoticed. A company acquiring such a shareholding will face the prospect of complaints from other market participants (those who are likely to suffer adverse effects from such a minority shareholding) to the Commission. Under those circumstances companies will opt for certainty by making a voluntary filing to the Commission rather than facing intervention by the Commission, possible litigation, interim measures and the need to divest after all. From this perspective a self-assessment is likely to be more targeted than any of the other options proposed in the White Paper: companies are likely to make voluntary filings only for those minority shareholdings which they anticipate to be potentially problematic and likely to trigger complaints. It should be noted such a system has been very successful in the United States where companies voluntarily approach the Department of Justice or Federal Trade Commission with non-reportable transactions that could be subject to a post-merger challenge on account of their effects.

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9 Impact Assessment, p. 22.
26. Should the Commission nonetheless decide to actively search for acquisitions of minority shareholdings, the costs of this probe should not be exaggerated. It is unclear why these costs would be very substantial for the European Commission if the OFT’s self-assessment merger control system required 27 non-administrative staff to screen and address minority shareholdings and full-fledged acquisitions in 2009.¹⁰

27. Philips points out that even if the European Commission would dedicate ten full-time employees to the review of minority shareholdings, total costs for society (business + government) would be lower than the costs of the transparency system identified in para. 19.¹¹

28. Given the limited costs for competition authorities in all three systems, Philips scores all options (-).

5. Consistency with the existing merger control system

29. Under ‘5. Consistency with EU merger control’, the Impact Assessment departs from rating options relative to the current situation. Instead, it remarks that “[...] options will score positively if they can be smoothly integrated into the existing system of EU merger control [...]”.

30. Philips submits, however, that none of the three options is fully consistent with the current merger control systems in the European Union, let alone that any option actually increases the consistency of EU merger control. As such, no option can score higher than the current situation.

31. Philips also advocates a less narrow view of ‘consistency with EU merger control’. This criterion should not, as the Impact Assessment proposes, be primarily concerned about the application of the current referral system to minority shareholdings. In Philips’ view, applying the current referral system can be a means, but not an end. ‘Consistency with EU merger control’ should ultimately aim to minimize unnecessary procedural complexities.

32. In light of the above, short of the current situation, the notification system is the most consistent with EU merger control. The transparency system is substantially less consistent. The self-assessment system can be more consistent than the transparency system.

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¹⁰ OECD, Annual report on competition policy developments in the United Kingdom, 2009, p. 24. Philips has not been able to find more recent numbers.

¹¹ One could argue that the expense to business is the turnover for lawyers, so that society is not worse off. However, the same could be said for the costs for government officials reviewing minority shareholdings. Philips does not take into account such trickle-down effects.
33. **Self-assessment**: at the European level, the self-assessment system would introduce a new enforcement system for minority shareholdings which is clearly different from the *ex ante* review of concentrations.

34. The added complexity of an *ex post* review of minority states is quite minimal, however. At the European level, the EUMR could grant Commission a long period, for instance five years, to start an investigation into minority shareholdings that have not been notified. This would also allow competitors or customers to complain about minority shareholdings they consider anticompetitive.

35. At the Member State level, the self-assessment system does not increase complexities for the 27 Member States that do not currently review minority shareholdings *ex ante*. And the complexities for the German and Austrian competition authorities are minimal, too. They may lose jurisdiction over minority shareholdings involving turnovers that give the transaction a Community dimension. To further minimize procedural complexities, Philips proposes that the referral system of the EUMR would not apply to minority shareholdings. The complexities and delays associated with the referral system are disproportional in light of the limited anti-competitive potential of minority shareholdings. Austria, Germany and Member States that may in the future review minority shareholdings, can trust the Commission to make the necessary investigations into minority shareholdings with a Community dimension.

36. The self-assessment system also adds little complexity for the business community. Undertakings would know the Commission can open investigations into problematic minority shareholdings *ex post*, just as it now often can on the basis of Article 101 TFEU; and undertaking know they can notify the Commission of minority shareholdings should they seek more certainty on their minority shareholding.

37. **Notification system**: at the European level, the notification system is quite consistent with the current system. The notification system would introduce a new, substantive, assessment of jurisdiction. However, the acquisition of minority shareholdings could be assessed, referred and processed in a similar matter as full-fledged acquisitions.

38. The notification system would not lead to new complexities at the Member State level.

39. **Transparency system**: the transparency system is the least consistent with current merger control at the European level. The transparency system not only introduces a new, substantive, assessment of jurisdiction (as in the notification system), it also introduces a new procedure (as in the self-assessment system).

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12 A carve-out for minority shareholdings can easily be included in the EUMR. Either the acquisition of a minority shareholding need not be included in the definition of concentration (instead, certain procedures in the EUMR could be made applicable to the review of minority shareholdings). Or Article 21 EUMR could allow in general the review of minority shareholdings with a Community dimension, just as sub 4 allows Member States on a case by case basis to take appropriate measures to protect public interests.
40. A benefit of the transparency system could be seen in the ease with which the two Member States that currently actively review minority shareholdings can request the Commission to refer the case. The benefit of the transparency system to these Member States is limited: the Commission can decide to refuse the referral.

41. Given the limited number of problematic minority shareholdings and the limited potential for anti-competitive effects in these cases, Member States should magnanimously let go of their powers to investigate themselves minority shareholdings with a Community dimension.

Conclusion

42. The table below summarizes Philips’ assessment of the policy options. The current situation scores higher than the three policy options the Commission presents on four out of five criteria.

43. If harm to competition from minority shareholdings would be clear and substantial, which the White Paper and the Impact Assessment do not convincingly establish, one of the three policy options could nonetheless be the Commission’s Preferred Option. But as Philips observed in Part A, the 2014 Consultation is very thin on the harm to competition from minority shareholdings, in fact too thin to convincingly score as a plus.

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C. Jurisdictional thresholds

44. For the functioning of any notification or transparency system, it is essential that the EUMR clearly defines what would qualify as a minority shareholding. The only clear and objective threshold would be the size of the minority shareholding.

45. Philips appreciates that any such threshold would be inherently arbitrary. Some types of anti-competitive harm distinguished by the Commission are not dependent on the size of the minority shareholding: the target will not relay more information to a 26% shareholder than to a 9% shareholder; the latter shareholder could hinder the operation of its shareholding about as much as the former; input or customer foreclosure could be achieved by the latter or the former. Moreover, an acquirer with an anti-competitive aim could structure his shareholding in such a way that it falls below the jurisdictional thresholds of the EUMR while still achieving the intended anti-competitive effects. Despite of this, the limited anti-competitive potential of minority shareholdings does not justify a more complicated and thus costly assessment whether ‘certain rights’ make a minority shareholding ‘competitively significant’. The German experience has shown that this latter term is a burden to business disproportionate even to the alleged anti-competitive potential of minority shareholdings.

46. The complexity and legal uncertainty that would be inherent to a more substantive threshold becomes clear when considering the statement in the White Paper that “the system would only be triggered when the minority shareholdings and the rights attached to it enable the acquirer to influence materially the commercial policy of the target and therefore its behavior in the marketplace or grant is access to commercially sensitive information”. How should this be interpreted?

47. Philips discerns no material difference between rights associated with minority shareholdings which “enable the acquirer to influence materially the commercial policy of the target”\(^{13}\) and the concept of ‘decisive influence’. The confusing similarity in terminology may be explained by the observation that a minority shareholding may only impact competition if it gives some control. This is corroborated by the White Paper where it illustrates ‘material influence’ with the situation of a >5% shareholdings plus “rights which give the acquirer a de facto blocking minority”. According to the Jurisdictional Notice, this would constitute ‘decisive influence’.\(^{14}\) The two other examples of ‘additional factors’ that would lead to ‘material influence’ – the appointment of a director and access to commercially sensitive information – raise yet more questions. Is mere involvement of a minority shareholder in the appointment of a director a relevant additional factor? Does this apply to any director or only directors with special powers? Etcetera. Arguably the second factor – access to commercially sensitive information has very little to do with the ability to materially influence the commercial policy of the target.

\(^{13}\) White Paper, para. 46.
\(^{14}\) Jurisdictional Notice, chapter 3.2 on veto rights and para. 78 on de facto control by a minority shareholder.
but deals more with concerns of coordination that are best dealt with under Article 101 TFEU (e.g. additional guidance on Chinese walls for minority shareholdings).

48. Philips submits that unclear jurisdictional criteria combined with a notification or transparency system is likely to trigger numerous precautionary filings as companies would rather file than run the risk of being fined for misinterpreting vague substantive jurisdictional thresholds. This would not only create an additional and unnecessary administrative burden of companies but also for the Commission, undermining the targeted approach that is suggested in the White Paper.

49. Should the Commission consider it necessary to fine-tune the jurisdictional thresholds, Philips proposes to have different thresholds for minority shareholdings in competitors than for minority shareholdings in vertically related companies. Philips gathers from the consultation documents that the Commission is most concerned about minority shareholdings in competitors. If so, undertakings could be required to notify the Commission of minority shareholdings conferring, for instance, 20% or more of the voting rights in a competitor. By contrast, a minority shareholding in a vertically related undertaking would only be notifiable if it would confer more than 25% of the voting rights.

50. A clear and objective jurisdictional threshold, using only the size of the minority shareholding and not involving a substantive assessment, has the additional benefit that it is easier to enforce and can be sanctioned when not respected.

D. Enforcement of the obligation to send information notices under the transparency system

51. In Philips view, fines can only be considered if the jurisdictional thresholds are sufficiently clear to undertakings. In Germany, despite many years of experience in the review of minority shareholdings, the term ‘competitively significant’ is still unclear. In light of this, should the Commission decide to include a substantive assessment as part of the jurisdictional test, Philips proposes that Article 14(2) EUMR, which sets out fines for not-filing, should carve-out filings regarding minority shareholdings.

52. At the very least, fines should be specific for not-notifying minority shareholdings. A specific fining regime should reflect both the greater legal uncertainty on the jurisdictional thresholds for minority shareholdings and the very limited anti-competitive effects associated with such shareholdings.

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15 Philips’ experience here is corroborated by submission in the 2013 Consultation of the Bundesverband der Deutschen Industrie: “Trotz langjähriger Praxis bei der Anwendung dieses Tat bestands hat der Begriff des „wettbewerblich erheblichen Einflusses“ kaum etwas von seiner Unschärfe und Unbestimmtheit verloren.”
E. Review

53. To the extent that the Commission is inclined to extend the scope of the EUMR to encompass minority shareholdings, Philips respectfully suggests that the functioning of any such amendment should be reviewed within three years after its entry into effect.

Conclusion

54. Philips respectfully submits that the case has not been made to extend the EUMR to the review of minority shareholdings. A comparison of the current situation and the three policy options reveals that the current situation beats the three policy options on all criteria except perhaps for ‘1. Preventing harm to competition’. The self-assessment system is the second-best choice. Should the Commission nonetheless pass over the arguments that will undoubtedly be raised against the transparency system, Philips proposes to have clear jurisdictional thresholds related to the vertical or horizontal nature of the minority shareholding. The extension of merger control review should be reviewed after three years.
RESPONSE OF KONINKLIJKE PHILIPS N.V.¹

TO

CONSULTATION ON POSSIBLE IMPROVEMENTS OF THE MERGER REGULATION

“TOWARDS MORE EFFECTIVE MERGER CONTROL”

I. Introduction

1. This response represents the view of Koninklijke Philips N.V. (Philips) on the European Commission’s (Commission) public consultation on possible improvements of the EU Merger Regulation (EUMR).

2. In its Working Document the Commission asks for comments on:

   (i) whether to apply merger control rules to deal with the anti-competitive effects stemming from certain acquisitions of non-controlling minority shareholdings;

   (ii) the effectiveness and smoothness of the case referral system to transfer cases from the Member States to the Commission both before and after notification.

3. Philips welcomes the envisaged modifications of the case referral system, as outlined in the working document.

4. Philips submits that the scope of application of the EUMR should not be extended so as to give the Commission the possibility to investigate and intervene against non-controlling minority shareholdings (referred to as “structural links” in the working document and as “minority shareholdings” in this response²). Therefore this response will focus only on the first issue outlined in the working document.

¹ Transparency Registry nr.: 02341041540-74.
² The Working Document uses the term “structural links” to refer to minority shareholdings. We note that the term structural links generally encompasses a wider variety of links, including but not limited to strategic alliances, interlocking directorates, etc. This is also the definition of structural links used by the Commission in its 2008 OECD-submission on structural links. Considering that the scope of the Working Document is limited to minority shareholdings, this response will refer to minority shareholdings rather than structural links.
II. Executive summary

5. In the view of Philips an amendment of the current scope of application of the EUMR should only be contemplated if there is a genuine enforcement gap; a consultation on an amendment should not be a ‘solution in search of a problem’.

6. Philips submits that the hypothesis of an enforcement gap should be rejected. In particular, an enforcement gap can only be deemed to exist if (a) there is a genuine substantive problem and (b) the existing enforcement tools are inadequate for dealing with this problem. The Working Document does not contain convincing arguments that either is the case.

7. The Working Document does not present a convincing case that there is a genuine substantive problem. The theoretical risks of minority shareholdings mentioned in the Working Document depend on rather unconvincing assumptions and have not been validated with empirical evidence. All in all, the risks associated with minority shareholdings seem unlikely to materialize in practice with a sufficient degree of frequency and harm to mandate an extension of the scope of application of the EUMR.

8. As regards the adequacy of the existing enforcement tools, there are no indications that the Commission in the past has wished to investigate certain minority shareholdings but was unable to do so. Philips is not convinced that the Commission has exhausted the possibilities offered by the existing enforcement tools. An enforcement gap with respect to minority shareholdings was not found to exist when the draft for the current Merger Regulation was subject of consultation and the Working Document and its annexes contain no new insights that would merit a different position today.

9. To the extent that there is an enforcement gap it can only be very small. An amendment to the EUMR should – in accordance with the principle of proportionality – be commensurately limited and not impose undue burdens on businesses. The burden associated with the notification system would be considerable and unjustified in comparison with the alleged competitive harm it aims to prevent. The transparency system is only likely to remedy horizontal (potential) effects, while vertical (potential) effects could only be scrutinized if the burden on companies is increased to the levels of the notification system. Only the self-assessment system does not appear to impose undue burdens because the regulatory burdens are confined to the very few minority shareholdings that may deserve further scrutiny. Having regard to the fact that also the Commission acknowledges that the number of problematic minority shareholdings seems to be rather limited, the least invasive regulatory option – i.e. the self-assessment system – would be the most proportional of the three.

10. To the extent that the notification system and the transparency system would include sanctions for non-compliance with reporting obligations, Philips considers that such sanctions would need to take into account the (very limited) potential anti-competitive
effects of minority shareholdings and be subject to a limitation period. Additionally, the risk of over-enforcement against minority shareholdings could be limited by giving more credence to pro-competitive potential effects of minority shareholdings.

11. Finally, to the extent that the Commission is inclined to extend the scope of the EUMR to encompass minority shareholdings, Philips respectfully suggests that the functioning of any such amendment should be reviewed within two years after its entry into effect.

III. Remarks on the alleged existence of enforcement gap

12. Philips notes that the present consultation revisits an old discussion. The question whether minority shareholdings should be brought within the scope of the EUMR was already considered in the 2001 consultation that preceded the introduction of the EUMR. At the time, the Commission found that only a limited number of minority shareholdings and interlocking directorships would be liable to raise competition concerns that could not be satisfactorily addressed otherwise. An overwhelming majority of the respondents (56 out of 59) concurred.

13. The Working Document does not present new insights that would justify a different conclusion today. In particular, Philips is unconvinced that there is an enforcement gap which needs to be filled by means of an extension of the current scope of the EUMR. An enforcement gap can only be deemed to exist if (a) there is a genuine substantive problem that (b) cannot be dealt with effectively by means of the existing enforcement tools at the disposal of the Commission. As will be explained below, the Working Document does not make a sufficiently strong case for either.

III.1 Lack of evidence that minority shareholdings pose a genuine substantive issue

14. Annex I identifies four categories of potentially harmful effects from minority shareholdings. We appreciate the theoretical harm the Annex describes, but we do not believe that the described theoretical effects are, by themselves, sufficient proof that minority shareholdings are a genuine substantive issue.

15. Generally, Philips deems anti-competitive effects likely only in situations involving the acquisition of control, in particular where the acquirer could “induce the target to compete less aggressively”, “coerce the target firm to significantly raise its prices”, “induce the target upstream firm to foreclose downstream rivals”, or “by help of veto rights in a joint

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4 Annex I, para. 38.
5 Annex I, para. 42; in a similar vein para. 92.
6 Annex I, para. 69.
venture, [...] could prevent [the target] from entering into the [acquirer]’s market.” In the absence of control, such anti-competitive effects are unlikely to materialize.

16. We turn now to the four categories of potential harm described in the Working Document. In the first category the Commission describes horizontal unilateral effects. In short the theory of harm is that the pay-off the acquirer could get from a minority shareholding in its competitor might take away the acquirer’s or the target’s incentive to compete.

17. In our view, such horizontal unilateral effects are an interesting but unpractical thought experiment. First, an acquirer that decides to compete less intensely with the target is unlikely to see its loss of market share and revenues compensated in the form of dividends. Instead, the target will be tempted to invest its increased profits in expanding its market share – adding to the acquirer’s loss of profits. Vice versa, the target would face similar losses if it competes less vigorously with the acquirer.

18. Second, if a firm would wish to have a financial interest in its competitor’s profits, it has more effective, less expensive and safer means than taking a minority shareholding. It could take out financial products of which the pay-out is closely correlated to its competitor’s profits, e.g. options on listed companies or contracts for difference in non-listed companies. If properly executed, the financial pay-off from such contracts far exceeds dividends from a minority shareholding.

19. Annex II to the Working Document refers to case M.1980 - Renault/Volvo and case M.3653 - Siemens/VA Tech as examples of such horizontal unilateral effects. However, in both cases the Commission’s concerns were based on access to and the exchange of competitively sensitive information. These cases therefore dealt with coordinated horizontal effects rather than unilateral horizontal effects.

20. In the second category, the Commission describes horizontal coordinated effects. In short: the minority shareholding may (i) facilitate tacit collusion or (ii) the exchange of information between competitors.

21. We observe that the ‘facilitation of tacit collusion’ theory of harm hinges on firms changing roles on the market. Firms that at first compete fiercely, later try to stabilize the market by taking a minority shareholding in their competitors. However, in the absence of a full-blown cartel, the Commission is unlikely to find a maverick firm taking a minority shareholding to reduce its incentives to compete, or a ‘punished’ firm taking a minority stake in its

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7 Annex I, para. 77.
10 As suggested in Annex I, para. 54.
punisher to share in its costs.11 Especially a highly competitive firm will normally be reluctant to disadvantage itself vis-à-vis its competitors by a minority shareholding.

22. Information exchanges between the target and the acquirer are a more plausible source of harm. However, an information flow from the target to its minority shareholder cum competitor puts the target at a competitive disadvantage vis-à-vis that competitor. Hence, the target would normally present its minority shareholder the information as aggregated as possible. In those cases that the target deems it beneficial to provide more detailed information to its competitor, it would normally create conditions of competition which do not correspond to the normal conditions of the market in question, which the Commission can pursue.12 An exchange or disclosure of information among (potential) competitors which may influence their conduct on the market is unlikely to be justified by one competitor’s capacity as minority shareholder.

23. In the third category, the Commission groups non-horizontal unilateral effects: the ability for an acquirer of a minority shareholding in an upstream of downstream firm to foreclose its competitors (input or customer foreclosure).

24. In our view, input or customer foreclosure requires having a say over strategic choices of the target. This would normally constitute control. The Commission is also likely to learn about such foreclosure. Observing input or customer foreclosure as a result of a minority shareholding, competitors have an incentive and the possibility to inform the Commission that their competitor actually acquired control with its minority shareholding, but failed to notify the merger.

25. Merger control would also be expected to apply to cases in the fourth category – the ability to veto entry of the target into a different market. Philips notes that a veto over such a strategic matter would normally require decisive influence and already falls within the current scope of the EUMR.

26. We note that Ryanair/Air Lingus, which seems to have triggered the current consultation, does not fit neatly into one of the aforementioned categories. In our view, a target that is being hampered by its minority shareholder has the incentive and the possibility to fend for itself. It may for instance organize its other shareholders into limiting the powers of the minority shareholder. Under the applicable corporate laws, it may also seek a judge and put forth arguments based on the anti-competitive intent of the minority shareholder.

27. We also note, with some concern, the Commission’s assertion that the potential efficiencies from structural links are likely to be limited.13 If the Commission believes this to be true, it

11 As suggested in Annex I, para. 56.
12 Cf. ECJ 4 June 2009, case C-8/08 (T-Mobile), para. 33. For completeness: even where the minority shareholding is created by a purchase of publicly traded shares, a relevant exchange of information between the target and the acquirer would normally constitute an agreement or concerted practice.
thinks the costs of over-enforcement are low and it will likely take a strict approach to minority shareholdings. However, the conviction that minority shareholdings do not have significant benefits does not appear to be as thoroughly researched as their theoretical drawbacks. It does not seem to be corroborated by empirical literature, nor inspired by the Commission’s experience. Philips believes minority shareholdings may also signal a long term commitment by partners to cooperation agreements. Intel for instance took a 15% minority share in ASML to secure sufficient R&D; and Schiphol and Aéroports de Paris took 8% cross-shareholdings to underscore their strategic alliance.

28. In sum, the Working Document does not present a convincing case that minority shareholdings, either in theory or reality, bring about genuine substantive issues on a sufficient scale to warrant an amendment of the EUMR. In fact, the Commission itself acknowledges in the Working Document that “the number of cases creating problematic structural links seems to be rather limited”.

III.2 The current enforcement tools have not been proven inadequate for dealing with the alleged enforcement gap

29. Philips is not convinced that the Commission’s current enforcement tools have been sufficiently tested to warrant the conclusion that there is a real enforcement gap that needs to be remedied.

30. First of all, the Commission so far has not, as far as Philips knows, dedicated resources to ex officio investigations under Article 101 or 102 TFEU into minority shareholdings. Nor has it invited companies to send complaints on that subject. The current consultation does not list actual cases that the Commission wished to pursue, but could not because of the lack of the necessary regulatory tools.

31. Second, in all but one cases that the Working Document and its annexes use as examples of potential problems, the problematic minority shareholding was remedied by subsequent merger control. It is noteworthy that the decisions in these cases do not indicate that the minority shareholdings actually caused anti-competitive effects in the period prior to their subsequent review under the EUMR. These decisions rather confirm that the current EUMR adequately enables the Commission to review potentially problematic minority shareholdings sooner or later.

15 Schiphol, Participating Contracts and Management Contracts, (http://www.schiphol.nl/SchipholGroup/Company1/Profile/Activities/ParticipatingInterestsAndManagementContracts.htm).
17 Ryanair/Aer Lingus was not investigated, although the Commission indicates in this consultation (but not so much at the General Court) that it would wish to.
18 The exception is Ryanair/Air Lingus.
32. Considering that neither the Working Document nor the Commission’s decisional practice present solid evidence that the Commission has fully explored the potential of its existing tools to address the alleged concern of minority shareholdings, Philips does not see a convincing case to introduce new tools. In particular if those tools impose any significant regulatory burden on companies.

IV. The proposed solutions to the enforcement gap

IV.1 Introduction

33. Philips observes that any amendment of the current EUMR should not go further than what is strictly necessary to remedy the (perceived) substantive concern and should not impose an inordinate burden on companies (proportionality). The Working Document describes three different options, i.e. (i) a notification system, requiring a full notification (ii) a transparency system, requiring the filing of a short information notice and (iii) a self-assessment system, where the filing of a notification is voluntary but the Commission has the discretion to open an investigation.

34. Given the limited case for the existence of a genuine enforcement gap and the substantial regulatory burden that any form of notification system (including the filing of a short information notice) would impose, Philips considers that only the least burdensome option of a self-assessment system could be justifiable. Other options should only be contemplated if substantial experience shows that such a system does not suffice. In any event, should the EUMR be amended to include minority shareholdings, Philips would applaud a review (in terms of costs and competitive harm prevented) of the amendment after two years.

35. In the following, Philips will consider each of the options proposed in the Working Document separately.

IV.2 Notification system

36. Philips is surprised that the Commission again contemplates a notification system. In the Green Book preceding the current EUMR it clearly decided against such a system. More than 90% of respondents to the consultation agreed. Philips points in particular to the reaction of the Bundeskartellamt, which itself assesses minority shareholdings (“The Commission is to be affirmed in its assessment that, if only for reasons of proportionality, a general inclusion of minority shareholdings in European merger control cannot come into consideration”), and to the American Bar Association, which rephrased the issue eloquently: “[…] we would urge the Commission not to expand the concept of concentration unless need is clearly demonstrated. We are not aware of such a showing, nor have we heard substantial call for change.”
Philips still subscribes to the Green Paper’s view on the excessive burden associated with a notification system. For every five majority shareholdings, Philips holds one 10+% minority shareholding. The notification system for minority shareholdings would thus be expected to increase notifications with 20%, with the associated costs. These costs are very substantial. Costs for a full notification of a minority shareholding might initially even be somewhat higher than for the current notifications, due to the novelty and hence lack of legal certainty. Answering questionnaires about minority shareholdings as a market participant would add to the total cost of merger control.

Considering the fact that there is no convincing evidence of a genuine enforcement gap and that less burdensome alternatives can suffice (as will be explained below), Philips is strongly opposed to extension of the current notification system to minority shareholdings.

**IV.3 Transparency system**

Philips would expect the costs associated with a transparency system to be low in comparison to a full notification. However, without more detailed information on what this limited notification would have to contain, it is difficult to estimate what the costs could be. Cost savings would also be realized by the absence of a stand-still obligation with the corresponding internal and external coordination issues and heavy management involvement.

The transparency system likely yields an overview of minority shareholdings that the Commission will be hard-pressed to get from databases, national financial markets authorities and the business press.

However, a true transparency system is not likely to achieve its aim as it will not enable the Commission to start an inquiry into all problematic minority shareholdings. In a true transparency system, the Commission would only receive a short information notice (containing information on the parties, the type of transaction and the economic sectors (not: relevant markets) concerned). This would probably suffice to start an inquiry into risky horizontal shareholdings.

The anti-competitive risks of a vertical minority shareholding depend heavily on the position of the parties on the market; the relative strength of competitors; buyer power; and other factors affecting the market dynamics. Without these factors being described in detail, the Commission’s risk scan probably results in too many leads, or excludes potentially harmful shareholdings. A remedy for these shortcomings would be to request more extensive information in the short information notice. This would, however, only be a little less

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19 This is based on the assumption that the turnover of minority and majority shareholdings is equally distributed (so that neither minority nor majority shareholdings are more often exceed the Commission’s jurisdictional thresholds). Philips has not checked this, also because it expects that national competition authorities (NCAs) will one day align their merger control with that of the Commission.

20 As the Commission puts it in its Working Document, p. 7.
burdensome for companies than the notification system. Savings would then mainly be realized by the Commission, which does not need to clear minority shareholdings.

**IV.4 Observations common to the notification and transparency systems**

43. Both the notification system and the transparency system would oblige businesses to report certain minority shareholdings to the Commission. This obligation brings about three main concerns:

(i) **Arbitrary jurisdictional thresholds.** For the functioning of any notification or transparency system, it is essential that the EUMR clearly defines what would qualify as a minority shareholding. The only clear objective threshold would be the size of the minority shareholding. Philips notes that any such threshold would be inherently arbitrary. Some types of anti-competitive harm identified by the Commission are not dependent on the size of the minority shareholding: the target will not relay more information to a 26% shareholder than to a 9% shareholder; the latter shareholder could hinder the operation of its shareholding about as much as the former; input or customer foreclosure could be achieved by the latter or the former. Moreover, an acquirer with an anti-competitive aim could structure his shareholding in such a way that it falls below the jurisdictional thresholds of the EUMR while still achieving the intended anti-competitive effects.

(ii) **Proportionate fines.** The Working Document is silent on the topic of sanctions for not-complying with reporting obligations. Philips is of the view that sanctions could only be considered if the jurisdictional thresholds would be sufficiently clear to undertakings. Moreover, sanctions should be commensurate to the very limited (if any) potential for anticompetitive effects associated with minority shareholdings.

(iii) **Limitation period for fines.** Philips thinks a limitation period should apply for sanctions relating to the non-reporting of the creation of a minority shareholding. Unfortunately, following the *Electrabel*-judgment of the General Court,\(^{21}\) non-notification of a concentration is a continuous infringement and not subject to any meaningful limitation period. The same reasoning would presumably apply to the creation of minority shareholding. *Electrabel* enables the Commission to fine an undertaking thirty or forty years after the transaction—decades after the last traces of (possibly exculpatory) evidence have vanished. It is hard to reconcile that material infringements of article 101 TFEU are subject to a limitation period, but not the usually unproblematic creation of a minority shareholding or change of control.

44. Philips also observes that the Working document refers only to notification obligations when creating a minority shareholding. Philips assumes *a contrario* that the termination of a

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\(^{21}\) Case T-332/09 (*Electrabel*), para. 212. The infringement is, more precisely, the exercise of control in breach of the obligation to suspend the concentration ex Article 7(1) MR.
minority shareholding does not need to be reported. This would be a logical outcome: a termination of a minority shareholding can only decrease market concentration. Confirmation on this point would be appreciated.

IV.5 Self-assessment system

45. A self-assessment system would be sufficient to remedy the limited harm potentially created by minority shareholdings and to address the (in the Commission’s own admission) rather limited number of cases creating problematic structural links. Such a system would give the Commission the flexibility it needs to review and remediate minority shareholdings it deems problematic, especially since minority shareholdings are, in most cases, easily dissolved. At the same time, the self-assessment system does not burden the acquirers of non-problematic minority shareholdings.

46. Nevertheless, Philips notes that the introduction of a self-assessment system should always be accompanied with detailed guidance from the Commission, explaining under what circumstances it would consider ex post intervention against minority shareholdings appropriate. In particular, how it intends to apply the current substantive test of the EUMR to minority shareholdings. In the absence of such detailed guidance – and the absence of any clear decisional practice to date – companies would be limited in their ability to conduct an effective self-assessment and the system would not live up to its name.

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