Response to the European Commission's White Paper "Towards more effective EU merger control"

1. **INTRODUCTION**

1.1 Pinsent Masons LLP ("Pinsent Masons") welcomes the opportunity to respond to the European Commission's White Paper entitled "Towards more effective EU Merger Control"¹ ("the White Paper") published on 9 July 2014 in which the Commission proposes (i) to increase cooperation and convergence between the Commission and the Member States that exercise merger control; (ii) to expand its powers to review the acquisition of non-controlling minority interests ("competitively significant links"), (iii) to streamline the case referral system between the Commission and the National Competition Authorities ("NCAs") and (iv) to consider further technical improvements to the EU Merger Regulation ("the Merger Regulation").

1.2 As a firm, Pinsent Masons has substantial experience of advising on the application of the Merger Regulation. The comments made in this response are those of Pinsent Masons and do not necessarily represent the views of any of the individual clients or of individual partners of Pinsent Masons. This response does not contain any confidential information and we are content for it to be published on the Commission's website.

2. **OVERVIEW**

2.1 As a general comment, Pinsent Masons welcomes the Commission's overall ambition to foster cooperation and convergence between the Commission and the Member States that exercise merger control. As the ongoing UK review of Eurotunnel's acquisition of three ferries and certain other assets that previously belonged to the ferry operator SeaFrance (the ongoing "Eurotunnel case") shows, cross-border transactions susceptible to be reviewed by at least two jurisdictions are exposed to the real risk of inconsistent outcomes, even where the market across the two jurisdictions is the same and the underlying substantive rules are similar. Improvement in this area is therefore crucial.

2.2 Pinsent Masons also welcomes those proposals that aim to streamline the way in which cases are managed - in particular we welcome the proposed changes to the case referral systems between the Commission and the NCAs (i.e. Articles 4(5) and 22 of the Merger Regulation), by abandoning the two-stage procedure in the context of pre-notification referrals, the elimination of the Form RS and the shortening of the consultation period within which a Member State can oppose a referral. Such changes should increase the efficiency of the procedure and make it more business-friendly. However, Pinsent Masons is of the view that in order to meet the Commission's objective to increase cooperation and convergence between the Commission and the Member States, pre-notification referral of cases from the Member States to the Commission under Article 4(5) ought to be made easier by reducing the number of Member States initially capable of reviewing a concentration from three to two.

2.3 Pinsent Masons also welcomes the Commission's view that the Merger Regulation may benefit from further technical improvements. In particular, we agree it would be helpful for the jurisdictional rules to be revised so as to ensure that [full-function] joint-
ventures with activities exclusively outside the EEA and not affecting competition within the EEA do not need to be notified to the Commission. It seems to us that excluding from the Merger Regulation's scope full-function joint ventures that are very unlikely to have a potential impact on intra-EEA competition would be an appropriate way to modify the jurisdictional rules. The test for this should be straightforward so that it is clear whether a filing is required or not.

2.4 Pinsent Masons does, however, have concerns about the Commission's proposal to widen the scope of the Merger Regulation to include "competitively significant links" falling short of control as currently defined. We query the necessity and proportionality of such proposal which, if taken forward, is likely to have a significant impact on M&A activities in the EU. We have set out below the reasons for our concerns.

3. DISCUSSION ON COOPERATION AND CONVERGENCE

3.1 Pinsent Masons welcomes the Commission's ambition set forth in the White Paper to foster convergence and cooperation between the Commission and the Member States, as it is crucial to create a level playing field and avoid inconsistent outcomes. However, it is regrettable that no specific proposals were put forward and we therefore strongly encourage the Commission to pursue the debate and explore possible options in this area.

3.2 As opposed to Articles 101 and 102 TFEU that are applied by NCAs in conjunction with their national rules, merger control rules remain a matter of national law for transactions that do not have a Community dimension. Diverging rules across the 27 Member States that exercise merger control not only impose a significant administrative burden on businesses but also inevitably present the real risk of diverging outcomes for those cross-border transactions that are capable of being reviewed by at least two NCAs.

3.3 In the White Paper the Commission invites Member States "to continue to align their respective practices by increasing cooperation and sharing experience, using all available tools and forums such as the Merger Working Group" and that "NCAs should intensify their cooperation on individual cases". The White Paper further states that NCAs "can avoid inconsistent outcomes in any event by referring cases to the Commission" and that "stakeholders, including NCAs, have therefore proposed that parties should be able to request a referral if only two Member States have jurisdiction". Pinsent Masons strongly endorses this point of view and would encourage the Commission to further tailor the proposals it makes in relation to the simplification of the referral procedure under Article 4(5) in light of this suggestion.

3.4 Pinsent Masons is acting for Groupe Eurotunnel SA in relation to the Eurotunnel case mentioned above. As the Commission is aware, in the Eurotunnel case France's Autorité de la Concurrence and the UK's Competition and Markets Authority reached diverging conclusions whilst they assessed the transaction against the same market definition and whilst similar substantive rules applied. The NCAs' decisions differed notably in the application of the substantive rules to the factual elements of the case (i.e. the question as to whether the transaction constitutes a "concentration" and the counterfactuals used to assess the effects of the transaction on competition). The case also highlighted starkly the authorities' different willingness to accept behavioural undertakings, which is an area where important steps need to be taken to achieve a more consistent approach to merger enforcement across NCAs.

3.5 It is arguable, in the specific context of the Eurotunnel case, that increased cooperation between the NCAs through a better or more efficient use of the
Commission’s existing “cooperation toolkit” could have saved diverging outcomes to the parties to the transaction. It is however more certain that inconsistent outcomes could have been avoided if the parties to the transaction had had the opportunity from the outset to request pre-notification referral of the transaction from the Member States to the Commission under Article 4(5). But because the transaction was only capable of being reviewed by two jurisdictions instead of at least three as required by the Merger Regulation it could not benefit from the one-stop-shop system.

3.6 The Eurotunnel case is not unique (e.g. Pan Fish/Marine Harvest, Akzo Noble/Metlac) and such situations can have significant adverse consequences for businesses, especially where a transaction is approved by one or more NCAs but is then blocked by another NCA, in line with their respective national merger control rules – as happened in Eurotunnel. The current cooperation toolkit and referral system present obvious flaws and we strongly encourage the Commission to examine this issue in more, practical, detail.

4. DISCUSSION ON ACQUISITIONS OF NON-CONTROLLING MINORITY SHAREHOLDINGS

4.1 Pinsent Masons considers that the Commission’s proposal to subject the acquisition of “competitively significant links” to the Merger Regulation is not appropriate. Although in the White Paper the Commission has moved away from the initial three proposals put forward in its 2013 Consultation Paper, Pinsent Masons considers that the now proposed “targeted transparency system” will still impose unnecessary administrative burden on businesses, create legal uncertainty and delay transactions’ timetables.

Appropriateness of the proposal

(i) Impact on investment activity

4.2 Investment of the kind described as acquisition of non-controlling minority shareholdings in the While Paper play an important part in today's economy. They allow access to sources of capital for the companies concerned and they provide investment opportunities and risk mitigation options for investors. The importance of investment activities is even more pronounced in difficult economic times where liquidity and external funding sources are limited. Widening the scope of the Merger Regulation to include acquisitions of non-controlling minority shareholdings will unnecessarily increase the administrative burden on businesses and potentially impact on investment activity in the EU.

(ii) The Commission’s current toolkit is sufficient

4.3 Pinsent Masons is of the view that the Commission already possesses the necessary toolkit to assess and address problematic acquisitions of non-controlling minority shareholdings. With the exception of the Ryanair/Aer Lingus case, the Commission’s merger control practice demonstrates that the system, as it currently exists, works well. The Commission has had the opportunity to scrutinise such transactions under the merger control system in a number of transactions, as detailed in the White Paper. Although this is only possible when an acquisition of control is notified to the Commission, pre-existing minority shareholdings are relevant for the assessment of the competition effects of the transaction. When such minority shareholdings are found to harm competition the Commission can - and does - use its remedial powers to reduce shareholdings to a level that it considers necessary to eliminate competition concerns, including by requiring the full divestment of the structural links concerned.

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5 The Commission’s Best Practices on cooperation between EU National Competition Authorities in merger review (November 2011); the Commission’s procedure guide in the exchange of information between [ECA] members on multi-jurisdictional mergers (June 2002); the Commission’s principles on the application by NCAs with the ECA of Article 4(5) and 22 of the Merger Regulation (revised version of January 2005).

4.4 Non-controlling minority shareholdings that are not caught by the Merger Regulation can be reviewed under Articles 101 and 102 TFEU - and it is rare for such interests to remain confidential. For example, if the target company, or any third parties, are concerned about the acquisition of the relevant interest, they have the option of making a complaint to the Commission under Articles 101 and 102 TFEU. If the Commission becomes aware of coordinated practices, it may initiate an investigation at its own initiative.

4.5 Since the launch of the consultation process on this issue last year, emphasis has been given to the Ryanair/Aer Lingus case as a good example of a problematic acquisition of a minority shareholding that was not caught by the Merger Regulation. However, it must be stressed that the Ryanair/Aer Lingus case is exceptional and we consider that it would be disproportionate for the Commission to change its policy based on one exceptional case.

4.6 In Ryanair/Aer Lingus, the President of the General Court acknowledged the appropriateness of the Commission's toolkit. He ruled that "as far as the existence of a regulatory lacuna is concerned, it should be pointed out that, whilst a minority shareholding of the type in question cannot, prima facie, be regulated under the Regulation, it might be envisaged that the EC Treaty provisions on competition, and in particular Article 81 EC and Article 82 EC, can be applied by the Commission to the conduct of the undertakings involved following the acquisition of the minority shareholding. In this regard it should be recalled that under Article 7(1) of Council Regulation (EC) No 1/2003 of 16 December 2002, where it finds that an infringement of Article 81 EC or of Article 82 EC has taken place, the Commission has the power to impose 'any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end'\(^7\)."

4.7 It is worth noting that when the Commission first considered modernising the Merger Regulation over a decade ago, it sought views from stakeholders on whether to include acquisitions of minority shareholdings in the Merger Regulation. At the time, the suggestion received strong negative feedback. Supported by Member States, the Commission decided not to take the issue forward considering that (i) [Articles 101 and 102 TFEU] provided adequate tools to deal with possible anti-competitive effects of minority shareholdings and (ii) abandoning the jurisdiction criterion based on the notion of control would significantly increase the number of merger notifications, unnecessarily burdening the European Commission's services and the parties involved [emphasis added] in these types of transactions, which in most cases are pro-competitive or competitively neutral\(^8\). Pinsent Masons considers that these two justifications still apply today.

**Proposed system – A "targeted transparency system"**

4.8 Pinsent Masons welcomes the Commission's decision to move away from the three options put forward in its 2013 Consultation Paper. However, we do have concerns about the main aspects of the proposed "targeted transparency system".

(i) "Competitively significant links"

4.9 The Commission proposes to target problematic transactions from the outset, through the identification of transactions that create a "competitively significant link". Parties would be required to self-assess whether, in their view, the transaction creates a competitively significant link and only these transactions would fall under the Commission's jurisdiction.

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\(^7\) Case T-411/07, Aer Lingus v European Commission, order of the President of the General Court, 18 March 2008, para. 103.

\(^8\) OECD policy roundtable on minority shareholdings, 2008, p. 40.
4.10 The Commission specifies that a "competitively significant link" would arise where there is a prima facie competitive relationship between the acquirer's and the target's activities, either because they are active in the same markets or sectors or they are active in vertically related markets. More specifically, the Commission suggests the following cumulative criteria\(^9\) for determining whether a transaction creates a "competitively significant link":

(a) The minority shareholding must be acquired in a competitor or in a directly vertically-related company. For the purpose of establishing the Commission's competence, the concept of "competitor" would not require a detailed antitrust analysis of the relevant markets. Rather, it would take into account whether the companies are active in the \textit{same sector} and the \textit{same geographic area} and, based on the self-assessment of the parties, whether the acquirer has a competitive relationship to the target [emphasis added].

At footnote 67, the Commission specifies that "this approach would also capture an acquisition of a minority shareholding by one company which itself does not compete with the target, but which already holds a minority stake (or more) in one or more other firm(s) competing with the target [emphasis added]."

(b) The link would be considered significant if: (1) the acquired minority shareholding is above a certain thresholds (e.g. around 20\% of the total shares capital); or (2) the minority shareholding is \textit{above 5\%}, but below the 20\% threshold, provided that \textit{additional rights} are present [emphasis added].

4.11 The added footnote 67 suggests that the proposal would extend not only to acquisitions of minority shareholdings that create a "competitively significant link" between the acquirer and the target company, but also to acquisitions creating a link between two or more minority shareholding interests. Pinsent Masons is of the view that these criteria are too broad and vague and will be too easily met by a broad number of unproblematic cases. Not only could these cumulative criteria be easily met by financial buyers with a large portfolio of interest even where there are unlikely to be any competition concerns but they will mean a business is uncertain whether its transaction actually meets the criteria.

4.12 The appropriateness of the proposed self-assessment system very much rests upon the definition of "competitively significant links". As currently defined, we consider that there is a real danger that a large number of unproblematic transactions will be caught by the system if not complemented by clear, well-defined guidelines and if the proposed thresholds are not raised or clarified (e.g. the nature of the "additional rights" that would make a shareholding between 5\% and 20\% "significant"). Legal certainty is important in the commercial world. As currently presented, the system presents too much risk for business, and is simply likely to result in a material number of "fail-safe" voluntary notifications to the Commission.

(ii) Procedure

4.13 The Commission's proposed procedure can be summarised as follows:

- The parties self-assess whether, in their view, the transaction creates a competitively significant link according to the criteria described above.

- If it does, they submit an information notice to the Commission containing information on the parties, the transaction as well as \textit{essential market information about the parties and their competitors}. Alternatively, if the

\(^9\) Commission Staff Working Document accompanying the White Paper, p. 28, para. 87-89.
parties want legal certainty, they can also voluntarily notify the transaction to the Commission under the normal procedure.

- If the parties submit an information notice, the Commission decides on the basis of the notice whether the case merits a Phase I investigation. The Commission would publish a notice of the transaction in order to allow complainants to come forward and would also inform the Member States of the notice to allow them to consider a referral request.

The Commission considers imposing a waiting period of 15 working days to allow Member State to request the referral during which the parties would not be able to close the transaction. Subsequently to this waiting period, the parties would be allowed to complete the transaction. However, even after the expiration of the waiting period, the Commission would have the right to initiate an investigation at any time within four to six months after the information notice, regardless of whether or not the transaction has been completed.

- If the Commission decides that the case merits an investigation, it would request a full notification from the parties. This would initiate the Phase I procedure as applicable for concentrations. If the Commission does not request a notification, the parties can close the transaction either immediately or after a short waiting period and the Commission will not issue a decision on the case.

4.14 Pinsent Masons considers that such a system goes against the Commission's repeated efforts to make administrative procedures less burdensome for business, thereby stimulating growth and making Europe more competitive.

4.15 The scope of the information notice for example should be narrowed down so as to be lighter touch. The four to six months time period within which the Commission would be allowed to examine the transaction, regardless of whether it is completed, would unnecessarily delay transactions' timetables and should be reduced. As currently designed, the procedure would discourage time sensitive deals and/or the parties would opt for a voluntary notification to save time and ensure legal certainty. The grounds on which the Commission would decide whether further investigation of the transaction is necessary should be narrowly defined and limited to specific circumstances.

4.16 Under the proposed system the Commission is considering allowing parties to make a voluntary notification. This is likely to raise a number of practical issues that we suggest need to be assessed and addressed carefully. For example, how would a dual system (mandatory/voluntary) work in practice? How would such rules impact on, or sit alongside, national merger control systems and the certainty of a one-stop shop system? In that context, how would such a system be combined with the referral system, in particular where such transactions would fall outside the scope of national merger control rules?

4.17 While the proposed system aims to impose less of an administrative burden on the parties, we are of the view that is unlikely to be achieved. We consider the system to be too intrusive – which would be even more the case if the Commission were to envisage the notification of a short form information notice for any subsequent changes in the level of shareholding acquired (still falling below the threshold of control).

4.18 Finally, Pinsent Masons is concerned that any change at EU level is likely to prompt similar changes (or at least open the debate about possible similar changes) at national level within and outside of the EU, leaving businesses in the uncertainty.
4.19 We would therefore strongly recommend the Commission not taking the proposed option forward.

We hope that the Commission finds this contribution helpful. Please feel free to contact us if you would like to discuss any aspect of our response.

Pinsent Masons LLP

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