Shearman & Sterling LLP’s Comments on the Commission’s White Paper
“Towards More Effective EU Merger Control”

1. On 9 July 2014, the European Commission launched a public consultation on proposals to improve EU merger control. In its White Paper “Towards More Effective EU Merger Control”, the Commission proposes to: (i) amend the current regime to allow the Commission to examine and, where necessary, intervene against potentially anti-competitive acquisitions of non-controlling minority shareholdings; and (ii) improve the referral system between the Commission and national competition authorities (“NCAs”) to make it easier and faster to refer cases from Member States to the Commission under on Article 4(5) and Article 22 of the EUMR, and vice versa (Article 4(4) and Article 9 of the EUMR). The Commission is also proposing a number of changes which aim at further streamlining and simplifying the EUMR procedures, including eliminating the need to notify: (i) full-function joint ventures located and operating totally outside the EEA (and which would not have any impact on markets within the EEA); and (ii) transactions with no horizontal or vertical relationships between the parties.

2. Shearman & Sterling welcomes the Commission’s proposals to make the referral system more effective and to simplify the filing requirements for certain full-function joint ventures and transactions that do not give rise to any horizontal or vertical overlaps. These initiatives will contribute to the removal of unnecessary administrative burdens on businesses. However, we strongly disagree that the Commission’s powers of review should be extended to cover minority shareholdings. Targeting the new system at only certain types of minority shareholdings compared to the original proposals is not sufficient to address our concerns.1

   Extending the Commission’s jurisdiction to cover minority shareholdings would create a disproportionate burden on business

3. Despite the results of the public consultation, which indicate that most companies, industry associations and law firms are not in favor of the extension of the Commission’s powers at all but that if the latter are extended, they would prefer a self-assessment system with a possibility of voluntary notifications without a standstill obligation2, the Commission opted for a “targeted transparency system”. This new system would require the parties to conduct a potentially complex self-assessment as to whether a transaction creates a “competitively significant link”. If it does, the parties would need to provide the Commission with an information notice, which would detail, inter alia, the level of shareholding before and after the transaction, any rights attached to the minority shareholding and some market share information. Following the submission of the information notice, a waiting period of 15 working days would then prevent the parties from closing the transaction. Further, the Commission would have the power during a window of four-to-six months to investigate a transaction. If the transaction was already

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1 For more details, see Shearman & Sterling’s response to the Commission’s consultation “Towards more effective EU merger control”, Commission Staff Working Document, 25 June 2013.

2 See Impact Assessment accompanying the White Paper, para. 53.
(partially) implemented, the Commission would validate all steps already taken and not have the power to unwind the already implemented (parts of the) transaction. However, the regular stand-still obligation would apply for any further implementing measures. To ensure the effectiveness of a decision under Articles 6 or 8 of the EUMR, the Commission would have the power to issue interim measures, such as a hold separate order.

4. Such a system will inevitably create additional barriers to investments in the EEA, which can hardly be reconciled with the mission letter of Jean-Claude Juncker, President-elect of the European Commission, to the Commissioner for Competition: “Competition policy [...] should contribute to steering innovation and making markets deliver clear benefits to consumers, businesses and society as a whole. Every effort should be made to maximize the positive contribution of our competition policy in support of our overall priorities”. We expect very few minority shareholdings be considered as leading to competitive harm3 and note that the theories of harm detailed in the various documents published by the Commission remain largely theoretical and remote. Expanding the scope of the current EUMR would be disproportionate: it will be burdensome for companies and will unnecessarily divert the Commission’s focus and resources from its enforcement priorities.

The existence of a two-fold threshold would unnecessarily complicate the proposed system

5. The Commission proposes that only transactions creating a “competitively significant link” between the parties fall within its jurisdiction. Only transactions meeting the two cumulative criteria described below would fall within this definition.

6. The transaction must first concern the acquisition of a minority shareholding in a competitor or vertically related company.

7. Second, a notice would have to be submitted when a “competitively significant link” would be created between the acquirer and the target company. Such a link would exist if: (i) the post-transaction minority shareholding is above a certain threshold (e.g., 20%); or (ii) the minority shareholding is between, e.g., 5% and 20%, and certain rights are attached to the shareholding.4 In the latter scenario, the targeted transparency system would be triggered when the minority shareholding 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.5 Such rights might include the right to nominate a member of the board, exert influence, or obtain access to the target’s competitively sensitive information.

8. As indicated above, we strongly oppose any system through which the Commission’s powers of review under the EUMR should be extended to cover minority shareholdings.

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3 The Commission admitted that only a limited number of cases of structural links were problematic, see Commission Staff Working Document “Towards more effective EU merger control”, 25 June 2013, p. 3.

4 See Commission Staff Working Document accompanying the White Paper, para. 78.

5 See White Paper, para. 46.
9. In case the Commission was to proceed with the proposed reforms, we invite the Commission to consider the following elements.

10. The existence of a two-fold threshold would unnecessarily complicate the proposed system. We invite the Commission to consider putting into place a “safe harbor” threshold, under which acquisitions of a minority shareholding of less than 20% would not imply the submission of an information notice. The concept of “certain rights” attached to the shareholding is a nebulous one, which may trigger numerous unwanted precautionary filings and will create legal uncertainty, whereas the EU system requires mandatory notification of qualifying transactions, contrary to the UK system.

11. Also, for the assessment of whether there exists a competitive relationship, minority shareholdings should not be taken into account. Financial investors who are investing in a large number of sectors would otherwise be subject to a disproportionate administrative burden. This would likely stifle liquidity and distort competition on equity markets.

*The burden and practicalities of any information notice must be carefully considered*

12. In case the transaction creates a “competitively significant link”, the parties would be required to submit an information notice. The information notice would contain information relating to the parties, their turnover, a description of the transaction, the level of shareholding before and after the transaction, any rights attached to the minority shareholding if it is below 20% and some market share information.

13. It remains unclear who should submit the information. The White Paper and the Commission Staff Working Document accompanying the White Paper provide that “the parties” would submit the information notice to the Commission. This approach is not directly in line with the principles set out in the Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004, which provides that in case of the acquisition of a controlling interest in one undertaking by another, the acquirer must complete the notification. Consistent with the EUMR, we suggest the Commission provides clarification by specifying that the acquirer is responsible for the submission of the information notice.

14. The fact that the acquirer is responsible for the submission of the information notice will have an impact on the amount of information it will be able to provide. Indeed, the acquirer will not always be in a position to provide detailed information about the target and will not have the ability to require the target to provide such information. It should be determined whether the Commission could not request this information only when deemed strictly indispensable.

15. The submission of market share information raises a series of issues as this information is not always readily available. The Commission proposes two alternative solutions for the submission of market share information. Either the parties submit market share information for the markets where the combined market shares are 20% or above, similar to what is required under the German Act against Restraints of Competition. Or the parties submit internal documents similar to the HSR 4(c) documents in the US, covering any studies, analyses, etc. prepared for the purpose of evaluating or analyzing the
acquisition with respect to market shares, competition, markets, potential for sales growth or expansion into product or geographic markets.\(^6\)

16. An obligation on the parties to provide market share information raises a number of concerns. Submitting market share information would require delineating and identifying putative antitrust markets. This exercise is burdensome, time consuming and costly and the information is not always readily available. In the vast majority of industries, companies have no way by which to verify such information. If the Commission was not considering putting into place a safe harbor threshold at 20%, as suggested above, we propose the acquirer only be required to provide such information for the markets where the combined market shares are 20% or above, based on the acquirer’s best estimates. No market share information should be required for the other markets in which the parties are active. Moreover, information to be provided should be limited to readily available information.

17. Providing estimates regarding the time and cost associated with the preparation of an information notice is a difficult exercise.\(^7\) No doubt that they will be lower than for a Form CO filing, however, these requirements will vary significantly depending on a number of factors such as:

- The size of the shareholding;
- Whether rights are attached to the shareholding;
- The number of product / geographic markets;
- Whether similar information was previously required in other jurisdictions;
- The Commission’s requirements in terms of market share information;
- Whether the Commission asks for additional information.

18. As indicated above, providing market share information is time consuming and costly. We estimate satisfying this information requirement alone could represent the majority of the time and cost associated with the preparation of a notice if the Commission was to require market share information be provided for markets where the combined market shares of the parties are 20% or above.

*Adding a prescription period would affect legal certainty and delay transactions*

19. The Commission is proposing a waiting period of 15 working days once an information notice has been submitted, during which the parties would not be able to close the transaction and during which competent NCAs would have to decide whether to request a referral.

20. The Commission’s proposal to add a prescription period of four-to-six months following the waiting period would lead to unnecessary uncertainty, which could significantly reduce businesses’ incentives to invest in the EEA. This should be avoided at all costs,

\(^{6}\) See question 1(c), page 51 of Commission Staff Working Document accompanying the White Paper.

\(^{7}\) See question 1(d), page 51 of Commission Staff Working Document accompanying the White Paper.
particularly in today’s challenging economic environment. In addition, a prescription period would be at odds with the key principles underpinning the EU merger control regime, i.e., the notification and the standstill obligations. While it is correct that the UK regime has a prescription period, this is explained by the fact that the regime is voluntary.

21. We are of the firm view that if 15 working days are considered sufficient for the Member States to decide upon a referral request, this period should also suffice for the Commission to decide whether to request a notification from the parties. Allowing the Commission to open an investigation, at a later stage, in the middle of an implementation process, would affect legal certainty and delay the transaction.

22. We urge the Commission to abandon the idea of a prescription period and instead provide for a mechanism through which investigations could only be opened in case the information notice contains incorrect or misleading information.

23. If the 15 working days period is considered too short for competitors or customers to come forward with complaints, then the 15 working days period should be extended to 20 working days, for example. However, after the expiry of such period, the Commission should not be allowed to take up a case.

Sanctions

24. The White Paper and the Commission Staff Working Document accompanying the White Paper do not address the issue of sanctions. In case the Commission decided to pursue its proposal of a “targeted transparency system”, what would happen in case of failure to submit an information notice or submission of incorrect or misleading information?

25. If sanctions are to accompany the Commission’s new “targeted transparency system”, we insist the “targeted transparency system” envisaged by the Commission be based on clear and objective standards to allow companies to properly assess whether to submit an information notice and what to include in this notice.

26. Also, we are of the view that the fine calculation applying to a failure to notify a reportable concentration\(^8\) should not be applied *mutatis mutandis* in case of a failure to submit an information notice. Such fines would create a disproportionate burden on businesses.

Improvements with respect to referrals from Member States to the Commission

27. The Commission proposes simplifying Article 4(5) referrals by abolishing the current two-step procedure and improving Article 22 referrals by avoiding a patchwork of competences.

Article 4(5) referral

28. We welcome the Commission’s proposal to abolish the requirement that the parties file a Form RS to the Commission and the possibility for the parties to notify their transaction

\(^8\) Article 14.2(a) of the EUMR.
directly to the Commission, which would then forward the notification to NCAs so that
the competent NCAs can examine the transaction and possibly oppose the referral within
the prescribed time period.

29. We consider a veto period of 10 working days to be sufficient for Member States to
review the transaction and make the referral request.

30. We note the Commission’s proposal to send the parties’ initial briefing paper or the case
allocation request to the Member States to alert them about the transaction (para. 68 of
the White Paper). We suggest this only happens with the notifying parties’ consent and
at an “agreed” time. Indeed, often, the parties also intend to reach out to NCAs
themselves and to manage the referral process properly as best they can.

31. Before considering the details of the Commission’s proposal in relation to Article 22 of
the EUMR, we would like to question whether this provision should be retained at all
given that its original purpose is now obsolete: all Member States have merger control
(but for Luxembourg⁹). The possibility of an Article 22 referral results in considerable
uncertainty for the notifying parties after considerable time and expenses have been
dedicated to preparing a filing in a particular jurisdiction.

32. Under the new system proposed by the Commission, only Member States that are
originally competent could request referrals. As with Articles 4(4) and 9, if the
Commission decided to maintain the possibility for Article 22 referrals, this change
would be welcomed.

33. In order to ascertain whether Member States are competent and therefore have the right
to oppose the referral, the Commission suggests creating a mandatory early information
system for multijurisdictional or cross-border cases or cases which concern markets
which are prima facie wider than national.

34. We invite the Commission to stress that such referrals should only be used in
“exceptional circumstances” as specified in the Commission Notice on Case Referral.
Indeed, if the new mandatory early information system is intended to cover
multijurisdictional or cross-border cases or cases which concern markets which are
prima facie wider than national, NCAs may be tempted to make a referral request in all
these cases. By stressing that such referrals should only be made in “exceptional
circumstances”, when serious competition concerns arise in these supra-national markets
for instance, the Commission would reduce the risk of being overloaded with
transactions which do not pose a risk to effective competition.

35. The Commission envisages a notice would be sent to the Commission by a NCA, as soon
as the NCA receives a notification or learns about a transaction. The notice would then
be circulated by the Commission to the other NCAs.

36. The notice would include the following information:

⁹ We note that Luxembourg never made either a referral request or an application to join a referral request.
• Likely scope of the geographic markets concerned, particularly if they are supranational;
• List of other competent Member States; and
• Information on markets that cover the territory of other competent Member States.

37. In its notice, the NCA would also indicate whether it is considering making a referral request because, on a preliminary basis, the Commission seems to be the “more appropriate authority”.

38. We suggest the Commission impose a stringent deadline for the NCA to send the notice (e.g., 2 working days). The words “as soon as possible” do not provide certainty as to when the notice would be sent. Moreover, we are concerned that NCAs could delay the issuance of the notice and use it as a way to introduce additional information requirements (e.g., turnover information for foreign jurisdictions, definition of geographic markets), which could increase the risk of impacting the entire process.

39. The Commission seeks comments as to whether the information system would give sufficient information to the Member States to decide about a referral request.

40. We first note that in the majority of cases, the parties would have prepared notifications for all the competent Member States. As a result, it is unlikely that competent Member States would decide whether to refer the transaction solely on the basis of a notice received from the Commission.

41. Whether or not the system would give sufficient information will depend on the details provided in relation to the “markets that cover the territory of other competent Member States”. Again, the objective underpinning Article 22 of the EUMR is not to refer all cross-border transactions to the Commission but only those limited cases that have a cross-border element and appear to pose a risk to effective competition.

42. The Commission suggests national deadlines be suspended in all Member States investigating the case. The starting point and the duration of the suspension are not entirely clear. Paragraph 71 of the White Paper and paragraph 154 of the Commission Staff Working Document accompanying the White Paper both provide that the notice would trigger the suspension of all national deadlines. Paragraph 155 goes on stating that the suspension would end at the latest 15 working days after the Member State which sent the notice receives a formal notification, whereas paragraph 69 of the White Paper indicates that the competent Member States could request a referral to the Commission within 15 working days of the date it was notified to them or made known to them. Given that the notice would be sent a few days after receiving the notification or otherwise learning of the transaction\(^{10}\), clarification is required in relation to both the starting point and the duration of the suspension.

43. We suggest the following:

• The suspension would start on the day the NCA receives the notification or otherwise learns of the transaction.

\(^{10}\) Paragraph 153 of the Commission Staff Working Document accompanying the White Paper.
• In the 2 working days following the receipt of the notification or otherwise learning of the transaction, the NCA would send the notice to the Commission.

• The Commission would then forward the notice to the other NCAs.

• Competent NCAs would then decide whether or not to request a referral. They would have to take a decision within a 15 working days period starting on the day the NCA which initially sent the notice, received the notification or otherwise learnt of the transaction.

44. The system proposed by the Commission by which once an Article 22 request has been accepted, the Commission has jurisdiction for the entire EEA, will likely reduce the risk of diverging decisions.

45. We invite the Commission to remove another area of uncertainty and inefficiency. We suggest that if an Article 4(5) request has been made by the notifying parties to up-refer jurisdiction to the Commission and a Member State has vetoed that request, the other Member States should be prohibited from making an Article 22 request. This currently causes undue delay and inefficiency. The Commission must address this problem and should seriously consider this option or any alternative which would lead to the same result.

**Improvements with respect to referrals from the Commission to the Member States**

46. The Commission proposes clarifying the language used in Article 4(4) of the EUMR so that the parties do not have to claim that the transaction may lead to a “significant effect in a market” (emphasis added) in order for a case to qualify for a referral.

47. We are not in a position to assess whether Article 4(4) of the EUMR will be used more frequently by parties to a transaction following the implementation of the suggested change. However, if the purpose of this change is to encourage the parties to rely more frequently on this provision to request referrals to a Member State, we support this change.

**Miscellaneous**

*Extra-EEA joint ventures*

48. We welcome the Commission’s decision that “full-function joint ventures located and operating outside the EEA and without any effects on EEA markets” would fall outside the Commission’s competence, even when turnover thresholds are met. We recommend further clarity with regard to the concept “without any effects on EEA markets”. The Commission should instead refer, e.g., to the absence of production facilities in the EEA or sales in the EEA. Furthermore, we would suggest the wording be revised to also cover the joint ventures with limited activities in the EEA. To determine the threshold for exclusion, one could rely on the turnover and asset transfer tests of less than EUR 100 million at the time of notification pursuant to paragraph 5 of the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) 139/2004, which was part of the package of reforms adopted in December 2013.
49. In addition, we encourage the Commission to invite Member States to review and if necessary harmonize their national regimes in this respect, in order to ensure that such transactions do not trigger (in the worst case multiple) national filing requirements, resulting in a high administrative burden for the parties.

Exchange of confidential information between Commission and Member States

50. We view the suggested refinements of Article 19 of the EUMR as a positive development. Allowing, in cases of referrals, the authority that continues the investigation to use the information already obtained by the authority that referred the case will result in a more efficient allocation of time and resources for the Commission, the NCAs and the parties.

Extending the transparency system to certain types of simplified merger cases

51. Replacing the simplified procedure with the targeted transparency system in relation to transactions leading to no reportable markets would allow the Commission to make a better and more targeted use of its resources and reduce the burden on businesses.

52. However, as with the case of minority shareholdings, companies should not be left with a period of uncertainty about a possible subsequent investigation by the Commission. We urge the Commission to abandon the idea of a prescription period.

Time limits

53. Article 10(3)(2) of the EUMR allows the notifying parties to request a Phase II extension of 20 working days. The Commission with the agreement of the notifying parties may also extend this period.

54. The Commission suggests increasing the number of days granted under these extensions, from 20 to 30 working days. We agree that time-limits are sometimes challenging, especially in cases involving complex economic data analysis or a large number of internal documents. In case the Commission decides to increase the number of working days from 20 to 30, the notifying parties should maintain their freedom not to agree to an extension proposed by the Commission. We are however concerned that the Commission could exercise pressure on the parties to agree the timetable’s extension.

Effective sanctions against the use of confidential information obtained during merger proceedings

55. We welcome the intention of the Commission to amend the EUMR to allow appropriate sanctions be taken against parties and third parties that receive access to confidential information during merger proceedings but disclose it or use it for other purposes.