RESPONSE TO THE CONSULTATION ON

DG Competition’s White Paper:

“Towards more effective EU merger control”

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COMMENTS ON THE 2014 WHITE PAPER
“TOWARDS MORE EFFECTIVE EU MERGER CONTROL”

The Simmons & Simmons LLP EU, Competition & Regulatory Group welcomes the opportunity to respond to DG Competition’s Consultation on its White Paper “Towards more effective EU merger control”.

1. General comments

We have limited our comments to the Commission’s proposal in relation to non-controlling minority stakes.

We note DG Competition’s concern that, while it is able to review the substantive impact of minority shareholdings where there is a subsequent acquisition of a controlling interest, and has on occasion found such minority stakes to be problematic, it has no jurisdiction to review a minority stake that is purchased after the acquisition of a controlling interest, even though the same substantive issue may arise.

There are diverse views around our international group as to whether the number of transactions of this type that potentially raise competition law issues justifies incorporating jurisdiction over such non-controlling minority shareholdings into the EU merger control regime. That said, however, and assuming that a proposal of this kind is nonetheless likely to be pursued over the course of the incoming Commission, we take this opportunity to set out below our key comments with regard to the proposal for a targeted transparency system as it currently stands.

These comments relate to:

- the uncertainty attaching to the concept of “a competitively significant link” and the level at which the Commission is proposing to set the relevant shareholding threshold;

- the potentially burdensome nature of the Information Notice;

- the extended uncertainty for the parties to an acquisition imposed by the prescription period;

- the global agenda – namely risk that the Commission’s respected status as a merger control enforcement agency will trigger a global grab for jurisdiction over minority shareholdings; and

- the number of transactions that will be caught and the practical implications of introducing a relatively burdensome Information Notice, with a 15 working-day standstill and a long prescription period – meaning that many parties will likely notify their acquisitions voluntary using the regular Form CO process, thereby creating significant additional burden both for the business community and for the Commission.

We set out our position in more detail below.
Specific comments and suggestions for amendment

The concept of “a competitively significant link” and responsibility for identifying it

We have some concerns about the clarity of a jurisdictional threshold which relies on a definition of a “competitively significant link”.

We agree that any further jurisdiction by the Commission in relation to non-controlling minority stakes should be linked to some sort of influence which has a competitive significance - so either a stake taken in a horizontal competitor or in a vertically related company. This appears to us to be necessary in order to comply with the first and second of the Commission’s three core principles, namely:

- (a) only capturing potentially anti-competitive acquisitions; and
- (b) avoiding unnecessary and disproportionate administrative burdens on companies, the Commission and the national competition authorities.

Nevertheless, we consider that it will not always be clear-cut that the parties to a given acquisition are either competitors or in a vertical relationship. This is because the existence of a horizontal or a vertical relationship will be dictated by what is the correct market definition to adopt. The Commission states in the Staff Working Document accompanying the White Paper (at paragraph 88) that “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 same sector and the same geographic area and, based on the self-assessment of the parties, whether the acquirer has a competitive relationship to the target”. We would submit that this is often not a straightforward exercise. Therefore, to the extent that the notion of competitor can be clearly and narrowly defined – for example, covering actual competitors only – and that clear guidance can be given on what vertical relationships would be relevant, that would be helpful. Parties will typically not want to submit Information Notices unless they are required to do so. Therefore, we consider that, at least in some cases, much detailed antitrust analysis is likely to be required in order to establish whether or not a given acquisition is caught.

Given the uncertainty inherent in such a definition, we can see the advantage of at least having a clear-cut shareholding threshold below which a competitively significant link cannot, without the existence of other factors, be identified. We note the Commission’s discussion, in paragraph 90 of its Staff Working Document, and we agree that voting rights set at 25% typically give the holder the ability to block special resolutions, which might allow that holder some influence over the target company’s strategic commercial direction. Although we accept, in general terms, that higher shareholdings may more strongly shift financial incentives, we do not accept that this broad economic principle can, by itself, justify adopting a shareholding of lower than 25% for the threshold at which a competitively significant link would apply. The strength of such incentives would depend on a potentially large number of factors, which would differ by industry and, indeed, by company. As such we do not consider that it is appropriate to pick a shareholding below 25%, to apply to all transactions, at which a competitively significant link may be assumed to exist on the basis of an incentives alignment argument. The Commission has put forward a good reason for selecting 25% as a relevant lower threshold. The Commission has not, in our view, done so for selecting any lower threshold (whether that be 20% or any other number).

We note the Commission’s reference to the OFT (now Competition and Markets Authority) having “set” a threshold of 15% above which it may examine any case. However, in the UK it will do so to establish whether or not a shareholding will confer material influence (the lowest level of control) and, as the authority goes on to point out, not “all cases in which parties obtain material influence through minority shareholdings need to be notified
to the CMA, or will be investigated by the CMA on its own initiative.”¹ This 15% threshold, then, is to be understood in the context of a voluntary notification system, backed by “own initiative” powers, not, as the Commission proposes, a mandatory preliminary notification system, potentially backed by fines, where the parties exclusively carry the responsibility for identifying the need to notify.

If there is a level of shareholding below 25% at which additional factors come into play in the Commission’s proposed targeted transparency system, then, firstly, this should be at a level much higher than 5% and, secondly, these specific additional factors must be spelled out in precise terms.

We are therefore of the view that the trigger for the proposed mandatory preliminary notification system should be a bright line threshold of 25% and that, if there is a secondary threshold linked to any “additional factors”, this must be linked to a shareholding far higher than the 5% floated in the White Paper – say 15%, as it would be in the UK - and limited to a small number of clearly-identified key veto or information rights.

2.2 The uncertainties of the prescription period and interaction with Article 9

The Commission is proposing a long prescription period (possibly 4-6 months), following submission of the Information Notice, during which the Commission may choose to investigate the transaction, irrespective of whether the transaction has closed or not. We consider that this period is far too long. In circumstances where an Information Notice has already been submitted and a standstill obligation period of 15 working days has been imposed, there is, in our view, no justification for subjecting the parties to the uncertainties of such a long prescription period. Indeed, it is arguable that there is no need for any prescription period where there is a standstill obligation during which the Commission can decide whether or not to request a full notification. The Commission plans to publish the filing of the Information Notice, inviting third parties to submit any comments, and this should be sufficient to alert any third parties who might have concerns. Therefore, if there is a prescription period, it must, in our view, be much shorter. Such a lengthy period of uncertainty inherent in the currently proposed prescription period is inconsistent with the existing EUMR framework and would be very unattractive to the business community.

We also consider that it must be the case that the scope for any request by a Member State for a referral back under Article 9 needs to be limited to the standstill period. It would be inconsistent with what the Commission is seeking to achieve – and also with the principle of a one-stop-shop for EU merger control – for the parties to such a transaction to be subject to the extended uncertainty of a potential referral request by a National Competition Authority.

2.3 The extent of the information required by the Information Notice

The benefits to the parties of using an Information Notice, as compared to a full notification by Form CO, will only exist where the level of information to be included is objectively factual and can be gathered quickly and without significant analysis or judgement call being required in order to determine how it is presented. For this reason, we consider that the Information Notice should not require any sort of market share estimates. Such estimates necessarily require the prior definition of the relevant market and, as the Commission itself recognises in the Staff Working Document, “delineating and identifying antitrust markets can be cumbersome for companies” (paragraph 104 of the Staff Working Document). Even where previous Commission decisions exist, the exercise of defining relevant markets can require significant legal and even economic analysis and the conclusions of that analysis are by no means always clear-cut, with a number of alternative market definitions potentially being relevant. Parties will understandably assume, particularly where the Information Notice provides no scope for providing

¹ Footnote 36 to paragraph 4.20 of “Mergers: Guidance on the CMA’s jurisdiction and procedure”
arguments about the competitive impact of a given acquisition, that the Commission will put considerable weight on the market shares submitted in judging the impact of that acquisition. Given the nuances around market definition, providing market share estimates, in such circumstances, with no accompanying explanation is likely to be of limited benefit to either the Commission or the parties. Conversely, any desire by the parties to ensure that market share estimates are accompanied by appropriate explanation and argument will mean that the Information Notice will come to resemble a regular Form CO notification.

The Staff Working Document also indicates that the parties may need to submit relevant internal documents, broadly along the lines of Article 5.4 documents to the Form CO or Article 4(c) documents under the US Hart-Scott Rodino filing system. In making this suggestion, the Commission seems to assume that collecting such documents is a relatively straightforward exercise. This is rarely the case, the parties not necessarily having kept in one place all documents which would fall within the potentially wide scope of the documents requested.

In light of the desired light-touch nature of regulation in relation to such minority shareholdings, it should be clear that there should be no need for prenotification for Information Notices; to do otherwise would risk creating a much longer and more burdensome procedure.

Nevertheless, this raises the question of what would be the consequences of – either deliberately or by oversight - excluding any information or accompanying internal documents from the Information Notice (or, indeed, providing inaccurate information). What impact would this have on the proposed standstill (or, applicable prescription) periods? Could fines be imposed? Once again, we consider that the desired light-touch approach militates against burdensome consequences in these circumstances.

2.4 The global impact of the European Commission expanding its jurisdiction

We also have concerns about the potential global impact of the Commission widening its jurisdiction in this way. Its status and reputation mean that other competition authorities are likely to want to emulate its acquisition of additional powers of review, also in jurisdictions where the rule of law and principles of impartiality and rigour may be less well upheld. We consider that this is almost inevitable within the EU and (given the Commission's desire for ever-greater convergence between Member States, including in terms of jurisdiction for merger control) it may well be that the Commission would welcome this. The Commission may not, however, have fully appreciated the consequences in relation to non-EEA merger control jurisdictions. We would urge the Commission to consider very carefully the messages that this set of measures could send to jurisdictions, particularly those operating with extra-territorial powers.

2.5 The number of transactions caught and the practical implications of the Targeted Transparency System

We consider that the Commission may have significantly underestimated the number of transactions which could be caught by this change in the law. The Commission at paragraph 85 of the Staff Working Document refers to an estimated figure of 20-30 additional transactions a year which may meet the criteria under their targeted transparency system as proposed. This estimate appears to be based on data relating only to publicly listed companies (footnote 66) of the Staff Working Document. We are aware of a large number of confidential investments in private companies involving non-controlling stakes. If these private investments are also taken into consideration, the number of potentially caught additional transactions will be much higher.

Moreover, any such estimate also disregards the commercial reality that, faced with the need to provide potentially extensive information (including market share data and internal
documents) in an Information Notice, combined with a 15-working day standstill obligation and, in addition, a long (potentially 6-month) prescription period during which the Commission can still intervene even after a deal has completed, many investors wanting certainty will decide to submit a full Form CO notification, thereby increasing the burden not only on the business community, but also on the Commission’s staff.

Many of the acquisitions which will be newly caught by the targeted transparency system will be private equity and investment fund-type transactions. These rely on speed, deal-certainty and confidentiality to reach completion. Multiple interests in a particular sector are possible, which may technically give rise to horizontal or vertical links to the target (especially if the term “competitor” is interpreted widely) but are essentially passive, conferring little or no influence. We have concerns that innocuous transactions of this type would be caught. Our concern is compounded because of the shareholding thresholds currently proposed. In our view, a threshold shareholding of “around 20%” (or more) or “between 5% and around 20%”, but accompanied by certain additional factors triggering jurisdiction, will generate too much uncertainty as to the need to submit an information notice, and result in a significant number of precautionary notifications – quite possibly full notifications because of the timescale and uncertainties of the prescription period - which we fear will slow the pace of such investments and potentially may have the effect of chilling the market for private investment in Europe overall.