UK Competition and Market Authority’s response to European Commission’s consultation on the White Paper ‘Towards more effective EU merger control’

1. The Competition and Markets Authority (CMA) welcomes the opportunity to comment on the European Commission’s (EC) proposals for specific amendments to the EU Merger Regulation (EUMR) set out in the White Paper¹ (the White Paper) and in its accompanying documents. These involve primarily: (1) proposed measures to widen the scope of the EC’s jurisdiction to include acquisitions of non-controlling minority shareholdings; (2) proposed modifications to the case referral system between Member States and the EC; (3) the removal of the EC’s jurisdiction over full-function joint ventures located and operated outside the EEA; and (4) other changes.

2. The CMA refers to the UK competition authorities’ response to the EC’s consultation on a possible reform of the EUMR (the Previous Response)². The CMA’s response follows the Previous Response and addresses the issues set out in the White Paper and its accompanying documents. It also makes some wider observations on possible enhancements of the EUMR that are not covered in these documents.

3. In preparing its response to the EC’s consultation, the CMA has engaged with a wide variety of stakeholders, for instance by conducting a roundtable on 8 September 2014³. This wider engagement, including with private practitioners, academics and other government departments, has assisted the CMA in formulating its views on the EC’s reform proposals. In particular, the CMA has taken account of concerns raised by UK stakeholders including representatives from businesses and the legal profession regarding the potential additional burden on businesses. The CMA’s recommendations for amendments to the system proposed by the EC are intended to address these concerns and provide a balance between effective enforcement and the economic benefit that certain acquisitions of minority shareholdings can bring.

4. Having said that, the CMA recognises that the proposal to widen the EC’s jurisdiction to include minority shareholdings must be seen in the context of the package of reforms proposed by the EC which are aimed at streamlining and

³ The roundtable was attended by legal and economic advisors from private practice as well as academics and representatives of other government departments.
targeting the EC merger control regime on those concentrations which are most likely to impact the common market and consumers. This package includes several measures that will reduce the burden on businesses. The CMA also considers that there are considerable benefits in ensuring that the tried and tested ‘one-stop-shop’ principle in European merger control is equally applicable to the assessment of acquisitions of minority shareholdings. This is particularly the case if further Member States were to introduce provisions in their respective merger control legislations allowing for a review of such transactions.

5. In light of these considerations, the CMA’s key observations are as follows:

- The CMA is broadly supportive of the EC’s rationale for the reform proposals put forward in the White Paper. With regard to the proposed extended scope of application of the EUMR to cover certain minority shareholdings, as set out in its Previous Response, the CMA agrees that there are several credible theories of harm associated with the acquisition of ‘material influence’ or ‘competitively significant links’ in relation to which Articles 101 or 102 TFEU are either not applicable or not the appropriate, most effective tools. In light of this ‘enforcement gap’ it is desirable for the EC to have the ability to assess such transactions where they meet the turnover thresholds under the EUMR, provided that there are functioning mechanisms for the UK and other Member States to request a referral of transactions they are better placed to review.

- While the CMA remains of the view that, procedurally, a voluntary self-assessment regime would be the most appropriate and proportionate mechanism to address the ‘enforcement gap’, it agrees that an extension of the EUMR’s scope of application would benefit from being implemented in a manner that fits well with all merger control regimes that are currently in place across the EU. The CMA also notes that a mandatory notification system for acquisitions of minority shareholdings has proved effective in jurisdictions outside of the EU, including in the USA, for many years. As such the CMA considers that several aspects of the ‘targeted transparency system’ proposed by the EC provide a good framework to progress the EC’s reform proposals with a view to reaching a solution that all Member States can support.

- The CMA also agrees with the EC’s stated aim to exclude private equity and venture capital investments and investments in start-up businesses from the scope of the targeted transparency system where such investments do not give rise to concerns and supports doing so by requiring that the target itself should in all cases be considered an
undertaking concerned for the purposes of meeting the turnover thresholds under the EUMR to qualify for review by the EC.

- The CMA is also supportive of the proposed exclusion of full-function joint ventures located outside of the EEA from any notification requirement and encourages the EC to consider whether there are any further categories of transactions that have proven competitively unproblematic and thus may also warrant being excluded from notification altogether. The EC’s proposed extension of the targeted transparency system (subject to consideration of the modifications suggested below) to other transactions likely to be unproblematic is also welcome.

- However, the ‘targeted transparency system’ as currently proposed involves the combination of a mandatory, suspensive system arising from the ‘waiting period’ following submission of an information notice with a further option to intervene during the ‘prescription period’. Given that the vast majority of transactions involving the acquisition of non-controlling minority shareholdings are likely to be competitively benign, the CMA considers that the system currently envisaged may result in a disproportionate burden on businesses.

- The CMA considers, therefore, that a number of procedural modifications are required for such a system to operate in a both effective and more proportionate manner. These include the abolition of the proposed waiting period and the introduction of a significantly reduced prescription period following submission of an information notice within which Member States would be able to request a referral where they are better placed to review a transaction giving rise to a competitively significant link. The proposed modifications are set out in more detail below.

- The CMA is supportive of the EC’s proposed changes to the referral system between the EC and Member States and suggests that the aim of creating a more efficient and effective referral system could be extended to Article 9 referrals.

6. The CMA has also taken this opportunity to outline additional reform proposals that are not covered by the White Paper but are designed to improve the proper functioning of the EUMR. It considers, for instance, that there may be a need for an enhanced procedural framework governing the functions of the Advisory Committee. These proposals are set out in more detail below and the CMA welcomes further discussion with the EC on these proposals.
MINORITY SHAREHOLDINGS

1. **Response to the EC’s questions**

   a) Regarding the concerns that a competence to control the acquisition of minority shareholdings should not inhibit restructuring transactions and the liquidity of equity markets, do you consider that the suggestions put forward in the White Paper are sufficient to alleviate this concern? Please take into account that the transactions would either not be covered by the Commission’s competence or not be subject to the 15 days waiting period.

   *The mandatory components of the targeted transparency system*

7. In line with the Previous Response, the CMA is broadly supportive of the proposal for the EC to gain the ability to assert jurisdiction over the acquisition of certain non-controlling minority interests (ie those with a competitively significant link) under the EUMR.

8. The CMA agrees with the White Paper’s observation that the EUMR’s lack of coverage of certain minority shareholdings can give rise to an ‘enforcement gap’ as there are circumstances in which merger control is likely to be a more appropriate and effective tool to address possible harm emanating from certain minority shareholdings than Article 101 or 102, even if the Treaty’s antitrust provisions were applicable in some of these circumstances.

9. The CMA also maintains that NCAs may not always be best placed to provide effective remedies, for example in cross-border cases. It welcomes the recognition in the White Paper that a competitively significant link (CSL) may lead to harm through corporate influence and financial incentives. See also Annex 1 for a summary of the theories of harm considered by UK competition authorities relating to the acquirer’s ability to limit the target company’s competitive strategies through a minority shareholding.

10. However, as set out in the Previous Response, the CMA is mindful of the need to ensure that an extension of the EC’s jurisdiction to cover acquisitions of minority shareholding does not result in a disproportionate burden on businesses. The CMA therefore continues to favour a voluntary notification system for CSLs, allowing for reviewability by the EC in a system based on self-assessment.\(^5\)

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\(^4\) See in particular, paragraph 46 of the White Paper.

\(^5\) The CMA refers to the Previous Response, as well as its guidance, CMA2 - Mergers: Guidance on the CMA’s jurisdiction and procedure, January 2014, in particular at paragraphs 4.14 ff.
11. Based on the UK’s experience, only a small proportion of cases involving minority shareholdings may give rise to competition concerns whereas the majority of such transactions are likely to be competitively benign or even pro-competitive. As such, there are features of the proposed mandatory ‘targeted transparency system’ that would appear to go beyond what is necessary to cover the currently existing ‘enforcement gap’ in an effective and proportionate manner and therefore may lead to unnecessary burdens on businesses. The CMA considers that establishing a voluntary system would go a long way to addressing this. However, the CMA also recognises the strength of certain aspects of the targeted transparency system as proposed.

12. The CMA therefore suggests the following changes to the targeted transparency system in order to create a system that meets its intended objectives without creating unintended consequences:

- **Acquisition and completion of the CSL.** As set out further in response to question (e), the CMA considers that imposing a waiting period or standstill provision is not necessary for acquisitions of minority shareholdings. The EC and NCAs should nevertheless have the ability to impose interim measures where appropriate, for instance to prevent exchange of information.

- **Notification of the EC using the transparency notice.** The prescription period should start to run as soon as possible after the EC has received the information notice. It is not clear to the CMA whether the EC will have the opportunity to query or request further information before deeming the information notice ‘complete’, however, if this were possible the CMA suggests that such requests should be limited to what is reasonable and proportionate in the circumstances in order not to prolong the process given that the majority of minority shareholding acquisitions will not give rise to concerns. The EC could then request a Form CO should it wish to commence an investigation. Under the EC’s proposal Member States have the possibility to make an Article 9 request when the EC receives the information notice. The CMA considers that Member States should also have the opportunity to make a referral request on receipt of the Form CO.

*The criteria for a competitively significant link*

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6. A voluntary system would be self-reinforcing because problematic acquisitions of CSL (for instance between competitors) ‘generate noise’ and would be unlikely to escape the attention and scrutiny of the EC.

7. The CMA notes that a reversal of possible integration steps already undertaken will generally be less problematic in cases not involving the acquisition of ‘decisive influence’.
13. The CMA notes that the criteria for a transaction to constitute a CSL are narrower than those considered by the CMA when considering material influence. In this regard, the CMA notes that based on its own experience material influence can also derive from board representation alone as well as other sources, such as financial arrangements leading to the dependence of one party on the other, as further set out in Annex 1.

14. It considers, however, that the EC should provide more clarity on the criteria for a transaction to constitute a CSL. The CMA received concerns from UK stakeholders that the definition of CSL as currently set out in the White Paper and accompanying documents is not clear enough to make an assessment as to whether a mandatory notification obligation has been triggered in any particular set of circumstances. The CMA considers that the EC needs to provide sufficient guidance for parties to have a very clear understanding of when they are acquiring a CSL, particularly in the context of a mandatory regime which imposes penalties for failing to notify. In particular, the CMA would welcome clarification of the concept of ‘competitor’.

15. In addition, the CMA urges the EC to re-consider whether it is appropriate and proportionate to include vertical links in the definition of a CSL given that, as has been recognised by the EC, the majority of competition concerns are likely to arise in transactions involving a horizontal overlap.

16. The CMA notes that the Commission Staff Working Document suggests that full function joint ventures, including those with changing majorities, would fall under the EC’s jurisdiction as regards minority shareholding acquisitions. The CMA requests that the EC clarifies how it would assess whether a CSL had been created in such circumstances involving a group of undertakings, ie whether it is possible to jointly acquire a CSL. The CMA agrees with the EC’s proposal to exclude agreements such as cooperation agreements and R&D agreements which may form part of minority shareholding acquisitions from scrutiny and also considers that the definition of full function joint venture should be explored to avoid capturing other cooperative structures that may be present in minority shareholding acquisitions. This fits with the EC’s aim of excluding benign or potentially economically beneficial transactions such as private equity investments, investments in start-up companies from review under the new regime.

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8 See paragraphs 119 and 120.
9 Paragraph 94 Commission Staff Working Document.
17. The CMA also notes that the EC should clarify what penalties would be imposed for failure to submit an information notice where a CSL has been created.

18. With respect to the level of shareholding captured by the regime:

- **Shareholdings below 5% are not covered under the targeted transparency system.** This means that the enforcement gap identified in paragraph 203 of the Commission Staff Working Document accompanying the White Paper would not be entirely resolved. The CMA is concerned that Member States would be precluded from having jurisdiction over a transaction where the shareholding is below 5% (given that Article 21(3) EUMR may continue to apply). If the EC were to proceed with the 5% threshold, the CMA is of the view that it should feature in the legislation itself and be made clear that Article 21(3) EUMR does not apply to such transactions and therefore Member States would be free to initiate their own investigations. Should acquisitions under 5% be not subject to review by either the EC or NCAs, the system would be opened up to ‘gaming’ by parties, for instance by acquiring a shareholding below 5% with other rights. An alternative to a safe harbour may be for the EC to set out rebuttable presumptions below and above certain shareholdings.

- **Shareholdings “around” 20%.** the CMA suggests referring instead to shareholdings “above 20% but below the level of decisive influence”. The CMA notes that some minority shareholdings (particularly those above 25%) may lead to the acquisition of decisive influence and proposes clarifying that transactions would only create a CSL and be reviewed under the targeted transparency system if they do not lead to the acquisition of decisive influence.

- **The CMA notes that the White Paper’s reference to shareholdings for the CMA’s test of material influence is incorrect.** As stated in its Mergers Guidance, ‘[a]lthough there is no presumption of material influence below 25%, the CMA may examine any shareholding of 15% or more in order to see whether the holder might be able materially to influence the company’s policy. Exceptionally, a shareholding of less than 15% might attract scrutiny

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10 As stated in the Previous Response, the CMA does not consider it appropriate to introduce safe harbours, given that an ability to materially influence may not only arise directly out of a shareholding, but also from other factors, such as special rights granted to the acquirer or board representation.

11 See in particular, the Commission Staff Working Document accompanying the White Paper, at paragraph 93, where the EC refers to a ‘safe harbour of 5% [being] appropriate, especially as further conditions would exist up to the 20% threshold (e.g., additional rights, acquisition of a stake in a competitor or vertically related company)’. See also paragraph 73.
where other factors indicating the ability to exercise material influence over policy are present.'

19. The CMA would welcome clarification on how to calculate turnover for acquisitions of minority shareholdings. In particular, the CMA considers that the EC should clarify which undertakings would be considered to be ‘undertakings concerned’ and therefore must meet the turnover thresholds in order to trigger an information notice requirement. The CMA understands that the EC intends that only the acquirer and target company (i.e., not groups) would be considered to be undertakings concerned. The CMA welcomes the proposal to narrow the concept of undertakings concerned and, in particular, requiring the target to be an undertaking concerned meeting the turnover thresholds as the CMA understands that this would address concerns regarding the unintended capture of investment in start-up companies and private equity transactions which the EC wishes to exclude from its review. However, clarity is needed particularly in the case of joint ventures or ‘shifting alliances’ which the EC states will fall under the new competence so long as the joint venture is full function.

b) Are there any other mechanisms that could be built into the system to exclude transactions for investment purposes from the competence?

20. The EC suggested adapting Article 3(5)(a) of the EUMR (the so-called ‘banking clause’) to specify that restructuring transactions, carried out by financial institutions in the normal course of business and for a limited period of time, would not create competitively significant links.

Under the current version of Article 3(5)(a) of the EUMR, a concentration shall not be deemed to arise where:

credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition;

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12 CMA2 - Mergers: Guidance on the CMA’s jurisdiction and procedure, January 2014, at paragraph 4.20. See also Annex 1.
13 Commission Staff Working Document paragraph 120.
that period may be extended by the Commission on request where such institutions or companies can show that the disposal was not reasonably possible within the period set.

21. The CMA notes the reference to section (c)(9) of the Hart-Scott-Rodino Act (15 U.S.C § 18a) pursuant to which an acquisition is made "solely for the purpose of investment" if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer. The exemption does not apply if the acquirer is a competitor or can nominate a candidate for the board of directors, for example.

22. The CMA does not have similar exemptions. It is for the parties to assess (or the CMA to investigate on its own initiative) whether the acquirer has the ability materially to influence policy relevant to the behaviour of the target entity in the marketplace. The CMA does not consider it appropriate to introduce safe harbours, given that an ability to materially influence may not only arise directly out of a shareholding, but also from other factors, such as special rights granted to the acquirer or board representation.

c) Regarding the scope of the information notice under the transparency system, would you have a preference for assimilating the information requirements to the German system, i.e. with a requirement to give market share information or to the US system which relies on internal documents to form a view on the market structure and market dynamics?

23. The CMA refers to its response to question 4a in the Previous Response. It is important for the EC to have sufficient information for it to determine whether to investigate further. This also applies to Member States for possible Article 9 or 22 referral requests.

24. The CMA believes that requesting market share information without conducting a robust analysis of the ‘relevant market(s)’, as suggested at paragraph 88 of the Commission Staff Working Document, would be uninformative and potentially misleading. Instead, the CMA considers that it would be useful for the EC and Member States to have information on the parties’ activities and possible overlaps as a result of the CSL, as well as the parties’ rationale for submitting an information notice (ie the parties’ self assessment).

25. The CMA considers that internal documents would be useful in the EC’s and Member States’ assessment of whether the case should be investigated further. It notes that internal documents usually provide useful insights into the rationale for a transaction and the market dynamics. Nevertheless, it notes that the request
for internal documents should be proportionate (and should not be as extensive as Article 4(c) request under the US system), particularly as the EC will have a further opportunity to conduct a more detailed review of internal documents should it proceed to initiating an investigation.

26. The CMA would welcome clarification on the possibility for the EC to decide that an information notice is not complete and to request further information. Should it be the case that the prescription period only starts when the EC considers the information notice to be complete, the CMA considers it important to take a proportionate and reasonable approach to deeming it complete.

27. In addition and as mentioned at paragraph 83 of the Commission Staff Working Document, given the necessarily limited nature of the information likely to be submitted in an information notice, the CMA would support a facilitation and lowering of the threshold for Member States to meet an Article 9 request. It would be grateful if the EC could clarify how it proposes to achieve this. The CMA would also welcome early contact from the EC regarding cases with a clear centre of gravity in one Member State. In addition, the CMA considers it appropriate that an Article 9 referral request should also be possible based on the Form CO, should the Commission request this from the parties in order for NCAs to make its referral assessment based on the full information available.

d) Please estimate the time and cost associated with preparing a notice, taking into account also the different scopes suggested, such as a notice with market share information, or a notice with relevant internal documents.

28. The CMA is not able to provide an accurate response to this question.

e) Do you consider a waiting period necessary or appropriate in order to ensure that the Commission or Member States can decide which acquisitions of minority shareholdings to investigate?

The waiting period and Member States’ ability to take jurisdiction

29. The CMA remains sceptical of the introduction of a suspensory regime to CSLs. It also considers a combination of a waiting period and a prescription period to go beyond the requirements for an effective regime addressing CSLs.

30. The CMA advocates the removal of the 15 working day waiting period. It considers it disproportionate and unnecessary to apply this to acquisitions of minority shareholdings, the vast majority of which will be benign or even advantageous. In addition, the problems associated with unwinding a merger are not applicable as acquisitions of minority shareholdings do not by their nature
involves integration that is difficult to unscramble. The closing of the transaction is therefore not prejudicial to any divestment remedy.

31. The CMA understands that the EC currently envisages that it would have exclusive jurisdiction over all CSLs which meet the turnover thresholds. Therefore, no Member State would have jurisdiction over such links unless a referral request is made under Article 9.\footnote{The EC states in the Staff Working Document at paragraph 105 that if the Commission did not request a notification within the 15 working days following the receipt of the information notice and no referral request occurs, the parties would be free to close the transaction.} This would be the case even where the EC decides not to investigate. The CMA considers that Member States should be able to take jurisdiction on a case, where appropriate, once the EC decides not to investigate a case following the review of an information notice. The CMA would welcome clarity on this. In addition, the CMA considers it important to ensure that, for Member States that currently have a regime which covers minority shareholdings, their national deadlines are suspended (including any pre-notification or initial engagement period that the parties may have with the Commission) while the EC decides whether or not to investigate the transaction so as not to bar any action by an NCA should the EC decide not to investigate.

Early information exchanges between the EC and Member States

32. To facilitate discussions relating to referrals of CSLs, the CMA would welcome early contact from the EC regarding cases with a clear centre of gravity in one Member State. This would not increase the burden on the parties, and would ensure that all discussions between authorities are conducted openly. The CMA considers that there is value in engaging with the merging parties, and possibly also with third parties by issuing a brief public consultation.

The prescription period and interim measures

33. In the Previous Response, the UK competition authorities stated that a prescription period would be appropriate for completed transactions if it proceeded with a non-suspensory regime. However, it considers that a combination of a waiting period and a prescription period is excessive.

34. If the EC opts for the ‘targeted transparency system’ instead of a voluntary system, the CMA suggests having only a prescription period of 25 working days, in line with the time period available to the EC to decide whether to grant an NCAs request under Article 9 in transactions involving concentrations. The CMA sees no reason why additional time is required in the case of acquisitions of
minority shareholdings which are less likely to raise competition concerns than concentrations. In addition, it would create increased certainty for businesses, something which has been highlighted to the CMA as a key concern (see also the risk highlighted in paragraph 37 below that a long prescription period may encourage substantial use of voluntary Form CO submission).

35. In any event, the CMA considers the prescription period need to be no longer than two months from the filing of an information notice (and no waiting period). The EC and NCAs would have to decide within this two-month period whether to investigate a CSL further. If not, the transaction would be cleared. While the CMA has a four month period within which to investigate mergers (including acquisitions of minority shareholdings) which have completed this is in the context of the CMA having decided to investigate under its own initiative rather than having been notified of the transaction as envisaged in the targeted transparency system.

36. Should the EC decide in favour of a prescription period, the CMA notes that it should clarify how interim measures would work in practice. In this regard, it notes that paragraph 110 of the Commission Staff Working Document is not clear. The EC would need to clarify the legal basis for such an order and may need to amend Article 8(5) EUMR. In addition, the CMA notes that a case-by-case basis approach would be preferable (and that measures applicable to divestiture commitments as suggested by the EC may not be appropriate for some cases). The CMA also notes that following such an order the parties should be able to make submissions to the EC to consider derogation requests or to revoke the order if they can make the case that there is no risk that pre-emptive action could take place. The CMA has extensive experience and would be happy to share best practices with the EC.

2. Other comments

37. The EC suggests in paragraph 84 of the Commission Staff Working Document that the targeted transparency system should also permit voluntary notifications in order for parties to obtain legal certainty. The CMA would welcome clarification on how this would work in practice and whether the EC would have jurisdiction in acquisitions of minority shareholdings to accept a Form CO without having first initiated an investigated based on an information notice. The CMA also wishes to highlight a potential risk that voluntarily submitting a Form CO may be considered to be more commercially attractive to businesses especially if the EC proceeds with the proposal to couple a waiting period with a long prescription period. Such use could undermine the efficient functioning of the targeted transparency system.
and may result in a large number of Form CO notifications which would appear undesirable. As mentioned above, the certainty required by businesses would be better achieved by a significantly reduced prescription period of 25 working days.

38. The CMA considers that the EC should clarify whether only one Form CO needs to be submitted for the whole transaction where both a change of control and an acquisition of a CSL take place. The information relating to the CSL would then be included in the Form CO. As regards the suggestions for legislative implementation (at paragraphs 96-97 of White Paper), the CMA notes that the second option would offer more flexibility and would therefore be preferred given the novelty of the regime for the EC.

CASE REFERRALS

Article 22

1. Questions

f) Please comment on the suggestions regarding the information system amongst the Member States and the Commission. In particular, would such a system give sufficient information to the Member States to decide about a referral request?

39. The CMA welcomes the EC’s suggestion of a mandatory early information system for multi-jurisdictional or cross-border cases or cases which concern markets which are prima facie wider than national as soon as possible after a Member State receives the notification or otherwise learns of the transaction. It also welcomes the possibility of circulating the notice earlier where Member States have pre-notification contacts with the parties.

40. The CMA considers that it would be helpful for the Member State to indicate if it is considering making a referral request. The CMA welcomes the suspension of national deadlines up to 15 working days after the Member State which sent the notice receives a formal notification, as well as enabling the EC to invite the Member State to request a referral under Article 22(5) EUMR.

41. The CMA also welcomes the suggestion that only originally competent Member States would be able to make a referral to the EC under Article 22 EUMR.
g) Would such a system reduce the risk of diverging decisions by the Member States?

42. The CMA supports the proposed amendments to Article 22 EUMR. It considers that the proposals would reduce the risk of diverging outcomes in Article 22 referral cases. It also resolves the problem whereby Member States do not have sufficient information to join an Article 22 request because they have not yet received a notification. The CMA notes the importance of having early contacts between the parties and the EC.

43. It however notes that Member States may nevertheless have different views on whether or not a case should be referred to the EC. However, this should limit the risk of one Member State referring it to the EC after it has been cleared by another Member State.

h) Please comment on the suggestions listed in Section 5 "Miscellaneous" including the more detailed and technical suggestions in the accompanying Staff Working Document. (See Annex 2)

44. The CMA welcomes proposals for non-EEA joint ventures to fall outside of the scope of the EUMR.

45. The CMA also welcomes widening application of targeted transparency system to certain transactions dealt with under the simplified procedure, where there are no reportable markets. Given the low likelihood of competition concerns, it would seem more efficient for them to be subject to the targeted transparency system or even to identify categories of transactions that are currently subject to the simplified procedure that would no longer be subject to a notification requirement. The CMA considers that this would provide a good balance with the EC’s widened jurisdiction over acquisitions of minority shareholdings. However, as noted above, the CMA notes that the time for review of these transactions should not be excessively increased through application of the prescription period.

46. The CMA welcomes the suggestion at paragraph 181 of the Commission Staff Working Document of refining Article 19(1) and (2) EUMR to clarify that the possibility for the EC to exchange case-related information with NCAs also includes information obtained by the EC during pre-notification and vice versa.

47. The CMA also welcomes the possibility for EC to require the dissolution of partially implemented transactions declared incompatible with internal market, eg Ryanair/Aer Lingus, as set out at paragraphs 190 ff. of the Commission Staff Working Document.
2. Other comments

Article 4(5)

48. The CMA welcomes the EC’s suggestion that the requirement for a Form RS be abolished. This would efficiently streamline the process, particularly given the very limited number of occasions on which an Article 4(5) request has been vetoed.

49. The CMA would nevertheless welcome early engagement from the EC in such cases. It suggests that the EC sends a copy of the draft Form CO to the Member State where there is a clear impact in that Member State. This would enable the Member State to ask questions early in the process and to ensure that questions around their jurisdictional tests (turnover and share of supply for the UK) are properly addressed. Based on the CMA’s experience, the share of supply test is not always addressed by the parties, so the CMA would want to ensure that this is accurately done in the revised Form CO.

50. Early engagement between the EC and NCAs should also be made possible at the request of a Member State when it believes that it could be competent to review the transaction.

51. The CMA also welcomes the EC’s suggestion to send the parties’ initial briefing paper or case allocation request to Member states to alert them about a transaction during pre-notification contacts. It considers that it would improve the process for Article 4(5) requests.

Article 4(4)

52. The CMA welcomes the suggestion that the substantive test in Article 4(4) EUMR be abolished so parties are not required to claim that the transaction may lead to a ‘significant effect in a market’, which involves a perceived ‘element of self-incrimination’.

Article 9

53. The CMA would welcome more information on how the EC would take into account the reduced level of information when assessing whether the criteria are met under Article 9 EUMR, at suggested at paragraph 83 of the Commission Staff Working Document.
54. The CMA suggests amending the deadline for deciding on a referral to 65 days from the start of phase 2 to ensure case is well advanced. This would align it with deadline for remedies.

55. More generally, the CMA welcomes the opportunity for a wider review of the Article 9 referral process and thresholds as it believes that there may be scope for a more effective and streamlined system.

OTHER MATTERS

Advisory Committee Process

56. The CMA considers that there may be a need for an enhanced procedural framework governing the functions of the Advisory Committee in light of the current limitations which have been discussed with the EC recently. In particular, the CMA notes that it may not always be sufficiently clear how disagreement between some Member States and the EC is taken into account by the EC in its decision, as required by Article 19(6) EUMR.

57. The EC notes, at paragraph 16 of the White Paper that "A truly functional system for the scrutiny of mergers throughout the EC requires efficient work-sharing, cooperation and convergence between the EC and the 27 Member States that exercise merger control". The CMA considers that an even more efficient and transparent process governing the Advisory Committee would make a significant contribution to making the system truly functional at every level and therefore proposes to pursue this further in discussions with the EC and the other Member States.
Annex 1: UK approach to material influence

In assessing material influence, the CMA focuses on the acquirer’s ability materially to influence policy relevant to the behaviour of the target entity in the marketplace. The CMA’s guidance states that the policy of the target in this context means the management of its business, in particular in relation to its competitive conduct, and thus includes the strategic direction of a company and its ability to define and achieve its commercial objectives.

A share of voting rights of over 25% is likely to be seen as presumptively conferring the ability materially to influence policy. This is because under UK Company Law such a shareholding allows the shareholder to block special resolutions at shareholder meetings (thereby enabling the shareholder to materially to influence the strategy of the company). A shareholding of less than 15% would only exceptionally attract scrutiny, on the basis of the presence of other factors. Such other factors may include the distribution and holders of the remaining shares (in particular whether the acquiring entity’s shareholding makes it the largest shareholder), patterns of attendance and voting at recent shareholders’ meetings, the existence of any special voting or veto rights attached to the shareholding under consideration, any other special provisions in the constitution of the company conferring an ability materially to influence policy or other contractual or economic arrangements that are material in the particular circumstances of the case.

Even if the acquirer’s shareholding is insufficient in itself to enable the acquirer to defeat a special resolution, it may still acquire material influence over the target’s policy given the acquirer’s status and expertise, presence on the board (especially where there are cross-directorships between competing businesses), and any other agreements with the company such as the provision of consultancy services or other financial arrangements.

The CMA’s predecessors have considered a number of theories of harm which could arise from the acquisition of material influence through a minority shareholding.

Case examples

- In BSkyB/ITV\textsuperscript{15} the Competition Commission found that BSkyB’s ability to block a special resolution would limit ITV’s ability to raise funds, ruling out some strategic options and affecting its ability to compete in the market. It found that BSkyB could influence ITV’s content strategy so as to reduce the competitive constraint on BSkyB as well as preventing it investing in additional spectrum or influencing

the outcome of any future transactions involving ITV, including acquisition of shares in ITV by a competitor of BSkyB.

- In Ryanair/Aer Lingus\(^{16}\) the Competition Commission found that Ryanair would have the incentive to use its influence to weaken Aer Lingus’s effectiveness as a competitor which would not exist for a shareholder which was not in competition with Aer Lingus. The Competition Commission considered whether Ryanair’s shareholding might:
  
  o affect Aer Lingus’s ability to participate in a combination with another airline;
  
  o hamper Aer Lingus’s ability to issue shares to raise capital;
  
  o influence Aer Lingus’s ability to manage effectively its portfolio of slots at London Heathrow;
  
  o influence Aer Lingus’s commercial policy and strategy by giving Ryanair the deciding vote in an ordinary resolution; and
  
  o allow Ryanair to raise Aer Lingus’s management costs or impede its management from concentrating on Aer Lingus’s commercial policy and strategy.

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