The Government of the UK’s response to the European Commission’s White Paper
‘Towards more effective EU merger control’

Introduction and Summary

1. This is the response of the UK Government (the UK) to the European Commission’s (the Commission’s) proposed amendments to the European Union Merger Regulation (EUMR) as set out in the White Paper and accompanying documents. The proposals concern: (1) widening the scope of the EUMR to include acquisitions of non-controlling minority shareholdings; (2) modifications to the case referral system between Member States and the Commission; (3) removing the Commission’s jurisdiction over full-function joint ventures located and operating outside the European Economic Area (EEA); and (4) other changes.

2. To inform this response, we have engaged with a variety of stakeholders, including the Competition and Markets Authority (the CMA), businesses and law firms and their representative bodies. We are mindful of the concerns raised by business and legal stakeholders, in particular regarding the burdens that the proposal on minority shareholdings would place upon business. We do not repeat here in detail the specific objections which have been raised, with which the Commission will be familiar from the responses it has received to the White Paper, but we do find them convincingly and authoritatively argued.

3. As a Member State that currently provides for their National Competition Authority (NCA) to investigate the acquisition of non-controlling minority shareholdings, the UK accepts that they may produce anti-competitive effects, but powers to examine such shareholdings need to be set at the right governmental level and to be proportionate. In the face of the concerns of stakeholders, we do not regard widening the scope of the EUMR to include acquisitions of non-controlling minority shareholdings to be justified. We would be happy to assess with the Commission certain suggestions made below for other, more proportionate changes to the EUMR which might assist the smooth operation of cases involving minority shareholdings where either the Commission and a Member State, or several Member States, are concerned.

4. The UK supports the other proposals in the White Paper, notably the proposed modifications to the case referral system, the removal of jurisdiction over certain full-function joint ventures and exemption from notification of certain categories of transactions which do not normally raise competition concerns.

5. The White Paper also provides an opportunity to examine other changes which might be made to the way that the EUMR operates. We raise below the operation of the Advisory Committee and make suggestions as to how its role and the way that the Commission takes account of its advice could be made more transparent.

Minority shareholdings

6. The White Paper proposes that the EUMR’s scope be extended to cover certain acquisitions by a business of non-controlling minority holdings in another business where they meet existing EUMR turnover tests; at present, the EUMR gives jurisdiction only over certain mergers with an EU dimension which confer ‘decisive influence’ over another business. The basic scheme of the EUMR is that a merger with an EU dimension must (on pain of high financial penalties) be pre-notified to the Commission which then has sole competence to deal with it.²

7. This would be a significant extension to the EUMR’s scope. As such, it must be justified. The guiding considerations are that matters should be dealt with at the EU level where necessary and at Member State (or, as appropriate, at regional, local etc.) level where possible; and that EU action should comply with the principle of proportionality, that is to say EU action must be limited to what is necessary to achieve the particular objective of the Treaty.

8. There are reasons to question whether the proposal on minority holdings passes either of those tests. This is especially so in view of the strong and persuasive objections which have been raised by the business and legal communities, who regard the proposal as unnecessary, highly burdensome and disproportionate. Before accepting the basic proposition that minority shareholdings should be addressed at EU level it would be necessary to establish much more firmly that there is a need for this new jurisdiction and that any added value would outweigh the significant regulatory burden which seems inherent in the proposals. Even if the proposals were amended in some of the ways stakeholders have proposed (a number of which we have adopted, in making comments below on the details of the proposals), it is hard to see that there would not continue to be a significant burden on business, with legal advice having to be sought, markets defined and assessments of market shares made and notified to the Commission, leading to business transactions being delayed or abandoned.

² The EUMR contains provisions which allow for some concentrations with an EU dimension to be referred, or partially referred, downwards to one or more NCAs and for concentrations without an EU dimension to be referred upwards from one or more NCAs to the Commission. There are also a few exceptions to the rule that the EUMR alone applies to concentrations with an EU dimension, such as when a merger raises certain legitimate interests of a Member State e.g. national security.
9. The UK appreciates that there are credible theories of harm associated with the acquisition, in particular circumstances, by a business of certain minority holdings in another business, and in a small number of cases competition authorities have identified a risk of some anti-competitive harm resulting (although, as the Impact Assessment itself notes, the effects are likely to be ‘less pronounced’ than in acquisitions of control). But not only are these cases very few in number, they evidently form a tiny proportion of all ‘mergers’, let alone of all trading by businesses in another business’ shares. Notification of minority shareholdings under the UK merger regime is rare; and in the more than four decades that merger control in the UK has covered acquiring ‘material influence’ over another business only two cases have ever been referred for second stage investigation. We are not aware of any evidence of a UK case being missed, that is to say of harm being caused to competition by a minority holding which the competition authorities have overlooked. Yet, as other respondents to the White Paper have remarked, a system of notification (backed up by heavy sanctions against non-compliance) that seeks to capture all potentially problematic situations (even subject to the turnover thresholds in the EUMR and the efforts made to target the regime) is likely to lead to many more notifications, not least on precautionary grounds, than the Commission seems to envisage.

10. The White Paper says as a point of principle that an effective and efficient competition policy requires appropriate means to tackle all sources of harm to competition and, having identified non-controlling minority holdings as one such source, argues that the Commission therefore needs powers to tackle them. The White Paper considers the current absence of jurisdiction to be a gap in powers, and comments approvingly that a number of other notable merger regimes, both within the EU (the UK, Germany, Austria) and outside it (the US, Canada, Japan), can address anti-competitive harm resulting from minority holdings.

11. This, however, is an argument for minority holdings to be subject to some sort of control, not by itself an argument that they need to be subject to the EUMR – especially for those Member States such as the UK which have powers to deal with minority holdings. There is a good case for saying that this is a matter for Member States to decide for themselves, under their powers to legislate for their domestic merger regimes.

12. The UK recognises of course that a principal purpose of the EUMR – now widely acknowledged as successfully achieved – was to provide businesses, in some major merger cases, with a ‘one-stop shop’ – instead of having to make filings in multiple jurisdictions, they are in certain circumstances able to have a

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3 Paragraph 20.
4 Notification is voluntary under the UK merger regime.
5 BSkyB/ITV and Ryanair/Aer Lingus in both of which remedies were ultimately imposed.
6 Paragraphs 24 to 27.
case looked at by one competition authority. In principle, this could be an advantage of providing the Commission with jurisdiction over minority shareholdings. However, on the available information, and notwithstanding the arguments put forward on proportionality and ‘EU added value’\(^7\), the case for this seems weak, especially from the standpoint of a Member State in which notifications are not required and, for minority shareholdings, are very rare. We are not aware of any cases where there have been multiple filings of minority shareholdings in both the UK and in one of the other Member States in which merger control covers minority holdings. None of the responses we have seen from the business and legal community regard the one-stop shop principle as a justification for this proposal, notwithstanding their general strong support for the principle under the current EUMR\(^8\). And as we indicate below, there are more proportionate ways to address problems arising from the need for multiple filings than the extensive notification requirements proposed in the White Paper (albeit the UK recognises the steps the Commission has taken to target its proposals on particular types of transactions).

13. The Impact Assessment accompanying the White Paper cites only two previous cases – Ryanair/Aer Lingus and General Motors/PSA (a German case) – as justifying action at an EU level, on the grounds that they had dimensions beyond one Member State and so the Commission was the appropriate authority to deal with them\(^9\). In fact the UK competition authorities dealt with the minority shareholding issues in the Ryanair/Aer Lingus case. As we indicate below, we would like to explore with the Commission proposals for other, probably more efficient ways of avoiding overlapping and extended investigations of cases by the Commission and an NCA such as occurred in that case. Furthermore, it is noteworthy that the main theories of harm associated with minority holdings involve the financial interests flowing from the shareholdings and the corporate rights conferred by them. Thus, the principal concerns in the two UK cases involving minority shareholdings were around the ability to influence strategic decisions including in particular blocking or hindering alternative bidders for the company or the raising of new capital. The Commission would have been no better placed to analyse these effects than the Competition Commission in the UK was.

14. Not least in the light of the burdens which action at EU level would impose, the UK’s view is that the appropriate level for jurisdiction over minority shareholdings is the domestic merger regimes of Member States. We accept that a better case for EUMR jurisdiction over minority holdings would arise were significantly more Member States to cater for minority holdings in their regimes. But those are not the circumstances in which the White Paper makes

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\(^7\) Notably at paragraph 99ff of the Impact Assessment.

\(^8\) We do not know what their view would be were all Member States’ domestic regimes to cover minority shareholdings. In any case, those are not the circumstances in which the Commission’s proposal has been put forward.

\(^9\) Paragraphs 99 to 102 of the Impact Assessment.
this proposal. In any event, were the circumstances to change consideration would first need to be given not only to the scale and nature of any problems which would arise but also to whether there were better mechanisms to address them. The UK has two suggestions for more proportionate responses in such an eventuality. We would be willing to assess with the Commission the case for and against incorporating them in the EUMR even in advance of significantly more Member States taking jurisdiction over minority holdings. The suggestions are:

- First, to give the Commission power to order divestiture of all or part of a residual minority shareholding where it has prohibited a merger. This would eliminate the need for an NCA to undertake a separate and later investigation under national legislation, avoiding the situation that arose in the UK in the Ryanair/Aer Lingus case. A similar suggestion to this is made at paragraphs 190-194 of the Staff Working Document that accompanied the White Paper.

- Second, to allow for any acquisitions of a minority shareholding that were subject to scrutiny in several Member States to be transferred to the Commission. This would be based on the current Article 22 of the EUMR which permits Member States to refer a case to the Commission even if it does not meet the existing thresholds but does affect cross-border trade. Similarly, building upon the current provisions of Article 4(5) of the EUMR, parties might be enabled to request that the Commission examine a case. In either case, a ‘one-stop shop’ would be available as the acquisition would be examined by either an NCA or, on the referral, by the Commission.

15. Coupled with these suggestions, the UK believes that the Commission should encourage those Member States which have not made provision for non-controlling minority shareholdings in their domestic merger regimes to do so.

16. In the spirit of providing a full response to the White Paper, we briefly indicate below some changes (many of which have been suggested by stakeholders) which would improve the White Paper proposals on minority shareholdings. This should not, however, be seen as detracting from the UK’s opposition, for the reasons set out above, to the proposals. We then turn to Case Referrals and finally to miscellaneous matters including the role of the Advisory Committee.

**Evidence required and time limits involved**

17. The White Paper proposes the introduction of a ‘targeted’ transparency regime as the most appropriate system to control acquisitions of minority shareholdings.
18. The UK’s domestic merger regime covers minority holdings where they would give a business ‘material influence’ over another business, enabling any anti-competitive effects arising from such holdings to be addressed. In assessing whether material influence exists, the CMA examines whether the acquirer can materially influence the target company’s policy and how it may operate in the marketplace. A shareholding of less than 15% would only exceptionally attract scrutiny, on the basis of the presence of other factors.\(^\text{10}\)

19. The UK operates a voluntary notification system under its domestic merger control regime. The UK believes that the establishment of a voluntary system, underpinned by the definition of appropriate criteria to give greater legal certainty, would be a better approach to a notification system at EU level than the targeted transparency system suggested in the White Paper, were EU action to be justified.

20. However, the following changes to the targeted transparency system proposed would go some way towards addressing the concerns raised by stakeholders, by creating greater legal certainty and reducing burdens on business:

- **Removal of the proposed 15 day notification period and reduction of ex post review period to two months:** The proposals require a complicated filing regime, and leave the possibility of an investigation open for too long. The proposals would impose a 15 day notification period in which the parties are not permitted to do anything. This is followed by a period of 4-6 months in which the acquisition may be investigated. In addition to the waiting period, businesses are required to provide relatively detailed information on the minority shareholding. In particular, the parties will be expected to provide quite detailed market analysis. The level of detail required seems disproportionate to the problem at hand. The effect on business would be a lengthy period of uncertainty. A better approach would be to remove the 15 day notification period and reduce the ex post review to two months. This would provide ample opportunity for interested parties to comment on the acquisition.

- **Inclusion of consideration of the size of the target company:** If the target business is a start-up trying to attract venture capital, it is unreasonable for the parties involved to supply detailed market information. Additionally, as a start-up, even selling a portion of the business as a means of attracting funding would have a minimal effect on the market. It would therefore be preferable to have a de minimis threshold on the size of target companies. This would allow the minority acquisitions that would harm the market to be captured but would not prevent venture capital activity where a business looking to invest will often take several minority acquisitions in multiple businesses operating in the same market.

\(^{10}\) See the Annex to the CMA’s response to the White Paper.
Ensuring definitions for tests and thresholds are tightly defined: The White Paper proposes a broad test based on the definition of “competitively significant link”, which falls within the following cumulative criteria:

(i) A vertical or horizontal link between the parties, and;
(ii) The acquired shareholding is around 20% or between 5% and around 20% but accompanied by additional factors such as rights which give the acquirer a “de facto” blocking minority, such as a seat on the board or access to commercially sensitive information.

Given the broad scope of the proposed thresholds, any tests should be tightly defined. The currently proposed thresholds cause uncertainty: moreover, the 5% threshold is too low, and around 20% might not capture cases that may raise anticompetitive concerns. A more appropriate measure may be to have a defined minority acquisition threshold of 15%. This would capture the cases that the White Paper and accompanying documents have highlighted, and all but one case that the US courts have dealt with. (However, the US regime also contains an exemption for acquisitions of 10% or less of a company’s share capital “solely for the purpose of investment”.)

A second improvement may be the removal of a test on vertical links. Vertical links are more difficult to analyse and investigate, so it may be burdensome to require a business to examine the effect on the market. Of course, vertical links may lead to efficiencies in an industry.

Case Referrals

Revisions to Article 4(5)

21. The UK welcomes the White Paper’s proposals on Article 4(5). The abolition of the current two-step process (reasoned submission followed by notification) and its replacement with a single-step requirement (notification, which the Commission forwards to relevant Member States) would help to make the regime more efficient. The UK also agrees that if any Member State objects to the referral jurisdiction should revert to Member States.

Revisions to Article 22

22. The UK also welcomes the proposals on Article 22. In particular the UK agrees that Member States should be encouraged to circulate early information notices for cross-jurisdictional cases. However, this should not be

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11 In the BSkyB/ITV merger, BSkyB had an underlying minority shareholding of 17%.
12 Paragraphs 76-77 of Annex II to the 2013 Staff Working Document.
a mandatory requirement, as Member States may not always have access to the relevant information.

23. The UK agrees that if a case is referred to the Commission after a competent Member State has made a clearance decision then it is right that decision should remain in force and that only the remaining Member States should be able to refer the case to the Commission.

Miscellaneous

24. The White Paper’s remaining two proposals are both supported by the UK. First, that a full-function joint venture, located and operating entirely outside the EEA (and not impacting on markets within the EEA) would fall outside the scope of EUMR. This would apply even if turnover thresholds are met. Second, exempting certain categories of transactions which do not normally raise competition concerns from notification.

Advisory Committee

25. Although this topic is not covered in the White Paper, the UK believes that improvements can be made to the role of the Advisory Committee. It is of course important that final responsibility for any decision it makes rests with the Commission, but the role of the Advisory Committee is important. We note that, in its response to the White Paper, the CMA raised the procedures of the Advisory Committee and suggested discussions with the Commission and Member States.

26. Article 19(6) of the EUMR requires the EC to take the “utmost account of the opinion delivered by the [Advisory] Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.”

27. The UK believes that the current process could be improved and made more transparent. In particular the following two steps could be taken:
   • The opinion of the Advisory Committee should state whether there is a majority for or against the EC’s proposed decision out of the NCAs that have voted and those that have abstained.
   • Where, of those NCAs who vote, the majority vote against, the Commission should write to NCAs explaining how it took the views of the NCAs into account.

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