CITY OF LONDON LAW SOCIETY COMPETITION LAW COMMITTEE RESPONSE TO THE EUROPEAN COMMISSION'S CONSULTATION: "TOWARDS MORE EFFECTIVE EU MERGER CONTROL"

This response is submitted by the Competition Law Committee of the City of London Law Society ("**CLLS**") in response to the European Commission's consultation: "Towards a more Effective EU Merger Control", published on 20 June 2013 (the "**Consultation**").

The CLLS represents approximately 15,000 City solicitors through individual and corporate membership including some of the largest international law firms in the world. The Competition Law Committee comprises leading solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who act for UK and international businesses, financial institutions and regulatory and governmental bodies in relation to competition law matters.

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The CLLS is registered on the European Commission's Transparency Register, and its registration number is 24418535037-82.

In this response we refer to structural links that do not amount to decisive influence for the purposes of the EUMR as "**non-controlling interests**".

In summary:

<u>As regards minority interests</u>

- The CLLS considers that minority shareholders play an important and valuable role in the internal market and that any proposal to create regulatory obstacles and disincentives to such investments must be carefully justified.
- In our view, the evidence and arguments contained in the Consultation fall well short of adequate justification in this respect. It contains no empirical evidence of any cases in which a non-controlling interest has caused the acquirer to raise its own prices, or

allowed the acquirer to induce the target to act against its own interest, as two categories of the relevant theories of harm would require. In the only two merger control decisions referred to in the Consultation that assessed an implemented acquisition of a non-controlling interest, neither found any evidence that competitive harm had arisen at the time of the decision. One of these involved an interest that has been held for almost seven years, during which competition between the parties was found to have remained intense. We also doubt whether the economic theories described in the Consultation apply with any frequency in commercial reality, or are relevant to interests that confer no control over the strategic commercial decisions of a target.

- The CLLS therefore submits that the Commission should carry out an empirical study of the 91 past transactions that it has identified as potentially meriting scrutiny, in order to assess whether regulation in this area is justified, and if so, what form it should take. It ought, at minimum, to be able to identify at least one transaction in which a non-controlling interest has resulted in competitive harm, and an attendant price increase. Such a study would also allow the Commission to assess whether there really is a significant enforcement gap in respect of such interests. Our view is that there is unlikely to be a material gap, as all but an insignificant number of non-controlling interests are reviewable under the existing EU Merger Regulation ("**EUMR**"), Article 101 of the Treaty on the Functioning of the EU ("**Article 101**") and national merger control regimes.

- As regards the possibility that non-controlling interests may facilitate anticompetitive exchanges or disclosures of information, we see no justification for treating such practices differently – under the EUMR or Article 101 - according to the corporate context.

- If the Commission does opt to extend the scope of the EUMR to non-controlling interests, we strongly favour the self assessment system:

    - First, it would allow for jurisdictional criteria to be framed in a way that ensures that only the relevant structural links are caught (e.g. between competitors, or vertically-related undertakings), which is unfeasible under a system that renders parties liable for penalties for failure to notify.

    - Second, imposing filing obligations (and liability for penalties) on a large number of transactions, in order to catch such a small number of potentially problematic deals would be disproportionate and unjustified.

    - Third, imposing such obligations would be unnecessary, as the self assessment is capable of ensuring that potentially harmful transactions are brought to the attention of the Commission.

    - Fourth, non-controlling interests can be easily unwound, and the relevant competitive harm easily remedied, so there is no need to require them to be reviewed and cleared prior to their implementation.

- The availability of a voluntary notification possibility would be vital for the self-assessment or transparency system. Companies should not be expected to make substantial investments in non-controlling interests without the possibility of obtaining legal certainty that those investments will not be required to be unwound at a later date.

However, we disagree that that voluntary notification should trigger an automatic standstill obligation. An appropriate limitation period would also be necessary, in our view.

- Any extended regime would require jurisdictional concepts and thresholds that are clear, easy to apply – without need for a detailed substantive assessment - and linked to theories of harm which are coherent and robust. Our initial view is that this would entail defining a structural link by reference to: (i) a material financial interest in the profits of the target; and (ii) material influence over the target, through the ability to veto one or more of a defined – and carefully considered - set of decisions that have corporate significance, but which fall outside the category of strategic commercial decisions that are relevant for identifying decisive influence. We also recommend jurisdictional safe harbours based on: (i) the competitive relationship (horizontal or vertical) between purchaser and target; and (ii) a requirement that decisive influence (and not just material influence) is exercised over at least one of the competitively related businesses.

- We are concerned by the statement in the Consultation that under a self assessment or transparency system "the Commission might <u>at a later stage</u> consider issuing guidance on the types of cases it is most likely to examine" (emphasis added). Companies should not become subject to risks of onerous remedies (such as divestments) without information on the circumstances in which those risks apply.

- Any extension of the scope of the EUMR should be designed so that it will not have an adverse effect on the existing regime for review of controlling interests, or on national merger control regimes. For instance, acquisitions of controlling interests should not become notifiable purely because of the presence of a non-controlling shareholder, and national authorities should not be permitted to refer acquisitions of non-controlling interests to the Commission, or to request that such transactions be referred to them, if they cannot review such transactions under their national merger control laws.

<u>As regards case referrals</u>

- The CLLS welcomes the proposed reform of the Article 4(5) referral system, and considers that it would be beneficial both in terms of timing, costs and the attractiveness of this referral mechanism. However, we do not consider that unauthorised pre-notification contacts and exchanges of information between the Commission and national authorities are necessary or desirable, for the various reasons set out below.

- As regards the Article 22 referral system, the opinion of members of the CLLS is that it should be abolished, not modified. If it is retained, we agree with the Commission that only Member States which have jurisdiction over the notified transaction should be allowed to make a referral or join a referral request under Article 22. Various other suggestions for improving the efficiency and legal certainty of the Article 22 mechanism are set out below.

- However, we have various reservations concerning the broadening of the geographic scope of the Commission's jurisdiction after the referral. In particular, it would not avoid the potential problem of a patchwork approach of parallel proceedings and it would mean that further legal costs are wasted on unnecessary EEA-wide substantive analyses. The suggestion that national clearance decisions could become retroactively invalid in the event of an Article 22 referral would be anathema to legal certainty and would harm parties' to plan transactions and manage merger control risks.

As regards the miscellaneous questions

- We applaud the Commission's initiative to explore ways to eliminate the redundant filing requirements that presently arise for transactions having no conceivable nexus with the EU. We suggest a number of ways in which this could be achieved.

- We agree that the following proposed modifications would be sensible:

    - allowing notification of stock exchange share acquisitions without a public take-over bid, under Article 4(1) EUMR;

    - complementing Article 5(4) EUMR with explicit methodology for the calculation of a joint venture's relevant turnover; and

    - allowing for penalties to be imposed on parties and third parties that disclose non-public commercial information that they have agreed to receive exclusively for the purpose of the proceeding (e.g. through access to the file).

- If the Commission does not extend the EUMR to cover non-controlling interests, we are less persuaded that extending Article 8(4) EUMR to cover partially implemented transactions is necessary or desirable. Internal consistency of the EUMR could be better achieved by a provision that expressly allows parties to retain a non-controlling interest in a business that is to be divested, provided that does not adversely affect competition, or the Commission's ability to implement the remedies that it considers necessary.

QUESTIONS ON STRUCTURAL LINKS

1.	**In your view would it be appropriate to complement the Commission's toolkit to enable it to investigate the creation of structural links under the Merger Regulation?**

1.1 Minority shareholders play an important and valuable role in the internal market. The various benefits of their investments include the creation of new competitive offerings, increased market liquidity, dissemination of technology and best practices, improved corporate governance and superior financial performance of the undertakings in which they are held. Consequently, we consider that any proposal to create regulatory obstacles and disincentives to such investments must be carefully justified. In our view, the evidence and arguments contained in the Consultation fall well short of adequate justification in this respect, for the reasons set out below.

1.2 The observations below are informed by the experience of CLLS members of advising on the merger control regime of the UK, which is one of the few merger control regimes in the EU that applies to acquisitions of non-controlling interest, and the only one that does not prohibit implementation of such acquisitions prior to merger control clearance.

There is no empirical evidence of the need for regulation

1.3 The summary of relevant economic literature in Annex I of the Consultation is, as noted in that Annex, "based on theoretical considerations, as there is currently only limited empirical literature on the effects of structural links". In our view, good regulation should be grounded in empirical fact. It seems to us that it would be entirely possible to develop such evidence in relation to non-controlling interests. The Commission has already identified some 91 transactions over a six year period that may have merited competition scrutiny, and which could form the basis of an empirical study of their actual economic effects and, in particular, their impact on prices of the undertakings concerned.[1] The results of such a study would provide the Commission with a firm basis for deciding on the necessity of regulation in this area, and the form that such regulation should take. Before embarking on a reform of such importance, the Commission ought to be able to point to at least one instance in which a non-controlling minority interest has resulted in an SIEC and an attendant price increase.

1.4 In the absence of such empirical evidence, we do not consider that the economic theories described in Annex I are sufficient justification for the Commission's proposals. In this respect, it is important to distinguish carefully between three conceptually distinct categories of theory that are described in the Annex.

Theories of harm relating to purely passive financial interests

1.5 This theory is that the acquisition of a <u>purely passive financial interest</u> in a rival might give a purchaser an incentive to increase its own prices as, post-acquisition, it will internalise a proportion of the profits that are lost to the rival in which it now has an interest. This theory applies regardless of the degree of influence exercised over the

[1] See Annex II of the Consultation.

acquired firm. Similar theories apply in respect of minority interests in vertically linked firms:

1.5.1 a passive interest in a downstream firm may create an incentive for the upstream firm to foreclose downstream rivals (e.g. through price increases) to the firm in which it has an interest, as it will now participate in a proportion of the downstream firm's increased profits; and

1.5.2 a passive interest in an upstream firm may create an incentive for the downstream firm to increase its prices, in the expectation that it will benefit from a proportion of the increased profits upstream.

1.6 A factor that is common to all these theories of harm is that the acquiring firm must act in a way that is unprofitable - or less profitable - for its own business, in the hope that it will recoup those lost profits through the minority shareholding, whether through higher dividends or an increase in the value of the shareholding itself. Another common factor is that under these theories of harm, an acquisition of a minority interest is considerably less likely to result in competitive harm than a full merger. As noted in Annex I "an acquisition of a passive structural link creates less upward pricing pressure since the acquiring firm only partially internalises the externalities of a price increase to the target firm".

1.7 While we recognise the hypothetical validity of these theories of harm in certain circumstances, it is not clear to us that the simplified models and assumptions on which they rely hold true with any frequency in commercial reality. For example, most managers would balk at the risks inherent in implementing an unprofitable price rise for their own products in the hope that it would sufficiently inflate the value of their firm's interest in a rival, particularly when that interest confers no influence at all over the target, and when taking into account the substantial cost of acquiring that interest in the first place. Such a strategy could be thwarted by any number of factors, such as inefficiency or incompetence of the acquired firm and its managers, unrelated stock market movements, imperfect information or because the competing products make up only a small or uncertain proportion of the total production of the acquired firm.[2]

1.8 In advising our clients on corporate mergers and acquisitions in the EU, members of the CLLS have not encountered any instances in which the possibility of such a strategy has been cited as a rationale for the acquisition of a non-controlling minority interest. Moreover, we note that of the cases referred to in the Commission's Annex II,[3] this theory of harm has hardly ever been applied to identify a potential

[2] We note that there is a degree of disagreement in the economic literature on these points (see, for example, the response of Salop and O'Brien to points raised by Dubrow, "*The Economic Effects of Passive Minority Equity Interests*: Reply", Antitrust Law Journal, Vol. 69, pp 611-625 (2011)).

[3] Other relevant cases are: the 2004 *Mainova / Aschaffensburger* case (decision B8-27/04 of the Bundeskartellamt), in which Mainova's interest in the profits of its customer was found to be liable to result in customer foreclosure because it gave Mainova a potential incentive to lower its prices. This theory of harm does not appear to be supported by any of the economic theories described in Annex I and is instead described as a pro-competitive scenario in paragraph 62 of that Annex. In the 2004 *DuMont Schauberg/Bonner Zeitungsdruckerei* case (decision B6-27/04 of the Bundeskartellamt) the Court of Appeal of Dusseldorf held that an 18% share in the profits of certain of the seller's subsidiaries did not amount to a competitively significant influence. In the US *Primestar/ASkyB* case, the Department of Justice ("**DOJ**")

harm to competition. The isolated examples, which relate to vertical structural links, appear to rely on the assumption that such a link always creates foreclosure and lack supporting economic analysis.[4] In contrast, the UK Competition Commission's recent provisional findings report in *Ryanair/Aer Lingus* considered this theory in some detail, and dismissed it for lack of evidence due to "the uncertainty and indirectness by which Aer Lingus' profit will flow back to Ryanair".[5] The Office of Fair Trading has also considered and dismissed such theories of harm in previous cases.[6]

1.9 We therefore submit that the need for to the Commission to expand its "toolkit" to allow such theories to be considered under the EUMR is entirely lacking in evidence.

Theories of harm relating to corporate influence

1.10 Another category of theories relates to the corporate influence that a minority interest confers over the actions of the acquired firm. A common factor to all these theories is that the interest must allow the purchaser to "induce" the target to act in a way that benefits the acquiring firm, but is not in the target's own best interests.[7] This may be, for example, by implementing an unprofitable price rise (in the case of a minority interest in a competitor), or by engaging in unprofitable foreclosure of suppliers or customers (in the case of a vertical transaction). A key question is therefore whether it is possible to do so with a level of influence that does not confer the *de jure* or *de facto* ability to veto any strategic commercial decisions of the target. Conversely, the magnitude of the financial interest is only relevant in the sense that a smaller financial interest might cause the corporate influence to result in a greater degree of competitive harm.

1.11 Annex I of the Consultation states that: "[t]he economic literature identifies certain scenarios where the legal definition of control and "decisive influence" under the EU Merger Regulation [...] would not be met, but nevertheless the holder of a non-controlling minority shareholding [...] may still be able to exert material influence over the target firm with potentially significant anticompetitive effects." In our view,

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asserted that NewsCorp's acquisition of a 20% non-voting equity stake in Primestar would remove NewsCorp's ASkyB as a potential competitor. However, this was in the context of Primestar's acquisition of ASkyB's direct broadcast satellite broadcasting slots and other satellite assets, which would clearly have been a more important cause of ASkyB's elimination as a potential competitor, and which would in any event have amounted to a reviewable "concentration" for the purposes of the EUMR (see the DOJ's complaint http://www.justice.gov/atr/cases/f1700/1757.htm). The theory has been applied by the Commission in *Tetra/Laval* and *Schneider/Legrand* but this was in the context of assessing the effectiveness of the remedy to an anticompetitive transaction, not in the context of assessing whether a minority interest gave rise to anticompetitive harm.

4 For example, in *E.On/MOL* (Case M.3696), the Commission considered that an upstream supplier's financial interest in a customer would cause it to "naturally favour a company in which it holds shares over any other company in view of its financial interest arising from the possibility to receive dividends and to obtain capital gains on the increase in value of its shareholding resulting from [the customer's] greater profitability (even if no dividends were distributed)."

5 See paragraph 1.19 below.

6 See, for example, the decision of the Office of Fair Trading in the anticipated acquisition by Centrica of 20 per cent of Lake Acquisitions, 7 August 2009.

7 We recognise that there are certain stylised coordinated effects scenarios in which a price rise might be in the interests of the target (as described by Foros, Kind and Shaffer, "Mergers and Partial Ownership" (2010)), but consider these highly unlikely to arise in practice.

that statement is misleading. Of the various papers referred to in Section 3.2 of Annex I ("structural links that confer some degree of influence") only one touches on such non-controlling interests.[8] Moreover, the two scenarios described in that paper and referred to in Annex I[9] have only limited relevance to the question of whether the holder of a non-controlling interest in a target firm really could "induce" the management of that firm to take decisions that are not in the firm's best interests. One of those scenarios posits that company laws and competition rules act to prevent such influence,[10] particularly for public companies. The other (as implicitly acknowledged in paragraph 34 of Annex I) is a pure assumption that is employed for the purpose of modelling its economic effects, and has no bearing on the question of whether managers of the target would take into account the adverse interests of a non-controlling shareholder.[11]

1.12 The only statement in the Annex that appears to address the mechanism by which a non-controlling interest might allow its holder to induce the target firm to act against its interests is the statement that a small financial interest may confer material influence "if the minority shareholder has been given special corporate rights or if the minority owner may form a coalition with other shareholders, thereby obtaining more influence than suggested by the joint financial interest". There is no theoretical or empirical evidence offered in support of this statement, and paragraph 42 of the Annex concedes that acquisitions of significant corporate rights "may already be covered by the existing merger regulation to the extent that the legal criterion of 'decisive influence' is met".

1.13 In our view, applying corporate control theories of harm to non-controlling minority interests relies on two assumptions, both of which are invariably false in practice:

1.13.1 First, that other shareholders are too incompetent to recognise the minority shareholder's conflict of interest, or to assess for themselves what is in the best interests of the target. In our experience, however, shareholders in companies of the size that satisfy the EUMR filing thresholds tend to be highly sophisticated investors, with deep knowledge of the sectors in which they are invested and strong views on strategy that should be adopted by companies in their investment portfolios. This is particularly true of institutional investors in public companies. To the extent that a minority shareholder in a shifting alliances scenario might, on occasion, cast the decisive vote, that does not mean that it has the power to force the target to act against its own interests – it merely means that there were finely balanced views among the shareholders

8 Salop and O'Brien, "*Competitive Effects of Partial Ownership: Financial Interest and Corporate Control"*, Antitrust law Journal, Vol. 67, pp 559-614 (2000).

9 Footnote 25 of Annex 1.

10 "Thus it seems far from settled that one or more of the shareholders, even if they collectively had a majority interest, could cause a company to pursue a course of conduct that advance s their interests while conflicting with the best interests of the company." Salop and O'Brien (2000), pp 581.

11 Under the "proportional control" scenario, "the Board and managers of the acquiring firm take into account their shareholders' interests in other firms [...] in proportion to their financial interests in the acquired firm" (Salop and O'Brien (2000), pp 583). However, the paper in question contains no analysis of whether this scenario has any grounding in reality, other than to note that it is "more relevant in the joint venture context when the acquired firm is the joint venture and there are a number of competitors with financial interests in that entity".

as to the merits of the proposal in question. Moreover, if other shareholders really are consistently likely to follow the lead of the minority shareholder, this is already caught by the concept of *de facto* decisive influence under the EUMR.

1.13.2 The second assumption is that the target's management and board of directors would be so disrupted by the exercise of veto rights that amount to minority investor protections (i.e. those that fall short of decisive influence) that they would be forced to adopt sub-optimal decisions on issues of pricing and corporate strategy. Again, there is no evidence for that assumption, either in the Consultation document or in the case law (see paragraphs 1.18 to 1.20 below). In contrast, there are many examples of targets that have vigorously resisted non-controlling shareholders' attempts to influence adversely their corporate strategies. Directors with whom CLLS members have dealt would be bemused by the suggestion that a minority investor with only rights to veto decisions such as reductions of share capital or variation of class rights would be granted any say in their pricing decisions.

1.14 As explained in paragraph 1.19 below, in the two merger control cases referred to in the Consultation that have assessed the actual prior impact of a minority shareholding in a competitor, none has found any evidence that the purchaser had caused the target firm to act against its own interests, or indeed had affected their competitive conduct in any way. Moreover, where issues of corporate influence have arisen in the UK, the authorities' concerns have not been about the acquirer's ability to influence the target's pricing but have instead focused on the purchaser's ability to influence specific strategic decisions, such as entering into M&A, raising certain types of funding or the disposal of key assets. In contrast, the relevant theories of harm described in Annex I all focus on influence over pricing decisions, and are therefore inconsistent with the reality of the UK experience.

Theories of harm relating to information exchange

1.15 These theories of harm centre on the increased access that may be afforded to a minority shareholder to competitively-sensitive information concerning its rival. We do not consider there to be any justification for treating the exchange of information between rivals in this context differently to anticompetitive exchanges of information in any other context. Distinguishing between information exchanges according to the corporate context seems to us likely to result in a considerable degree of confusion and legal uncertainty as to which set of rules apply in any given situation.

1.16 In addition, it will clearly remain the case that the holder of a non-controlling interest does not form part of the same undertaking as the target, and that flows of competitively sensitive information between them may therefore amount to a concerted practice for the purpose of Article 101. Consequently, if the Commission's powers of investigation under Regulation 1/2003 were to be disapplied to this type of information exchange,[12] this would effectively legitimise anticompetitive exchanges unless and until the Commission intervened under the EUMR and secured remedies to limit such exchanges. In practice, the Commission would need to intervene in every

[12] As is the case for concentrations, under Article 21 EUMR.

single instance of a minority interest in a rival (no matter how small) in order to do so, which would impose disproportionate administrative burdens on the Commission and purchasers alike.

1.17 We therefore consider that if the Commission opts to extend the EUMR to cover non-controlling interests, Article 101 remains the most appropriate enforcement tool for exchanges and disclosures of information between the acquiring firm and target. There is no conflict, in our view, between rights of shareholders and directors to receive certain information under company laws, and the obligation under the competition rules not to accept certain information, or to recuse themselves from certain decisions. In our experience, companies, shareholders, directors and their business advisers are capable of self-assessing these matters and of recusing themselves in appropriate circumstances, particularly given the duty of directors to avoid conflicts of interest. To the extent that there is uncertainty, the Commission might consider issuing guidance on the circumstances in which flows of information in the corporate context may be prohibited by Article 101.

Case law of national competition authorities is not evidence of the need for regulation

1.18 The cases cited in Annex II of the Consultation are not evidence of a need to expand the Commission's enforcement powers in this area. With two exceptions, those cases involved subjective assessments of the likelihood of certain hypothetical scenarios arising in the future.[13] In the absence of any ex-post evaluation of these decisions, there is no evidence that their assessments were correct.

1.19 The only two cases referred to in the Consultation that have considered the actual impact non-controlling interests that had been implemented prior to the relevant decision are the decisions of the UK Competition Commission ("**CC**") in *BSkyB/ITV*[14] and *Ryanair/Aer Lingus.*[15] In both cases, the UK's Competition Commission ("**CC**") found no evidence that any anticompetitive harm had arisen by the time of its decision. In *Ryanair/Aer Lingus,* Ryanair had owned a 29.82% interest in Aer Lingus for almost seven years by the time of the CC's report. The report found that:

1.19.1 during the period of Ryanair's ownership, Aer Lingus has repositioned itself as a "value carrier", so becoming a closer competitor to Ryanair, and competition between the two airlines had "remained intense since 2006". This was supported by the Commission's own decision on Ryanair's third bid for Aer

[13] The 2003 US *Dairy Farmers / Southern Bell* case referred to in Annex II had already been implemented, but this transaction related to an acquisition of a 50% interest that amounted to decisive influence for the purpose of the EUMR, not a non-controlling interest.

[14] Final report of the Competition Commission on the completed acquisition by *British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc* (*BSkyB/ITV*), 14 December 2007. Although dealt with on the basis of a competition theory of harm, this was a case in which issues of plurality of the media were also engaged.

[15] Final report of the Competition Commission completed acquisition by *Ryanair Holdings plc of a minority shareholding in Aer Lingus Group plc (Ryanair/Aer Lingus)*, 28 August 2013.

Lingus which found that "if anything competition had increased between the parties";[16]

1.19.2 Aer Lingus "does not compete less fiercely with Ryanair in order to avoid antagonizing its largest shareholder and was unlikely to do so in the future";[17]

1.19.3 Aer Lingus's "management would be expected to act in the interests of the company as a whole, and the duty on Aer Lingus's management not to favour any particular shareholder would be likely to offset any incentives that the management might have to accommodate Ryanair";[18]

1.19.4 the value of Ryanair's interest in Aer Lingus had increased by almost 50% in the year prior to the Commission's provisional findings;[19]

1.19.5 Ryanair "historically lacked the support of other shareholders" and there was "no evidence to suggest that other shareholders would be particularly influenced in their voting patterns by Ryanair's industry expertise";[20]

1.19.6 Ryanair had no power to appoint a director and had not sought to do so;[21]

1.19.7 none of Ryanair's efforts to challenge the management of Aer Lingus (in regulatory and legal proceedings and public statements) had been successful and no commercial information had been supplied to Ryanair;[22]

1.19.8 there was no evidence that Ryanair's financial interest in Aer Lingus had caused it to raise its own prices on overlap routes;[23]

1.19.9 there was no evidence to suggest that coordinated effects had arisen between the two airlines;[24] and

1.19.10 while there were scenarios in which the CC considered that Ryanair might exercise veto rights to the detriment of Aer Lingus ability to compete effectively, it had not done so in almost seven years of Ryanair's ownership.

1.20 As is the case for all the other cases referred to in the consultation, in both the *BSkyB/ITV* and *Ryanair/Aer Lingus* remedies were imposed only on the basis of a future prospect of competitive harm (which did not relate to the acquirer's ability to influence the target's pricing). We can make no comment as regards whether the CC's

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16 *Ryanair/Aer Lingus*, paragraphs 2.14, 5.39 and 5.48

17 Paragraph 7.136

18 Paragraph 7.135

19 Paragraph 3.8.

20 Paragraphs 4.26 and 4.31.

21 Paragraph 4.28.

22 Paragraph 4.40.

23 Paragraph 7.145

24 Paragraph 7.149.

predictions were correct, as there has been no ex-post evaluation of these decisions that might provide evidence in this respect.

1.21 Another of the transactions identified in Annex II to illustrate the potential competition issues arising from minority interests is LVMH's interest in Hermès. Yet Hermes has vigorously fought against LVMH's attempts to assert influence over it, with litigation, regulatory complaints and allegations of insider trading.[25]

Existing enforcement tools suffice

1.22 The Consultation states that the Commission's ability to assess non-controlling interests under Article 101 TFEU is limited as "it is unclear under which circumstances a structural link may constitute an "agreement" [...], in particular if the structural link is built up by the acquisition of a series of shares via the stock exchange". However, even if there were a compelling case for intervention in this area (which, for the reasons described above, we consider there is not), the difficulty of identifying an agreement in the case of acquisitions of listed shares is relevant only to a small subset of the total number of companies in the EU.

1.23 In relation to non-listed companies, an agreement to which Article 101 may attach will typically be readily identifiable. In those circumstances the judgment of the Court of Justice of the EU in *Philip Morris* confirms the jurisdiction of the Commission to intervene under Article 101 in appropriate cases.[26]

1.24 Moreover, the Commission can, and does, assess non-controlling interests in the context of concentrations notified under the EUMR - although we query whether it should, given the paucity of economic evidence for doing so (see paragraphs 1.3 to 1.17 above) - and national competition authorities in the UK, Germany and Austria have been able to cover those few cases to date that have fallen outside the Commission's jurisdiction.[27]

1.25 The Commission's estimate of the number of potentially affected cases that is set out in Annex II (43 over a 6 year period) suggests that around 7 cases per year may become subject to some degree of competition scrutiny by the Commission, of which many would inevitably be cleared unconditionally.[28]

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[25] See, for example "Handbag war escalates as LVMH accuses Hermès of 'smear campaign", Financial Times, 31 May 2013, available at: http://www.ft.com/cms/s/0/d3ba0630-c9ec-11e2-8f55-00144feab7de.html#axzz2c24WDbZl

[26] Cases 142/84 and 156/84, *British American Tobacco Company Limited and RJ Reynolds Industries Inc. V Commission* [1987] ECR 4487.

[27] As noted by the President of the General Court Judge Marc Jaeger in the Order of 18 March 2008 (Case T-411/07) relating to the application for interim measures by Aer Lingus: "as far as the existence of a regulatory lacunae is concerned, it should be pointed out that, whilst a minority shareholding of the type in question cannot, prima facie, be regulated under the Regulation, it might be envisaged that the EC Treaty provisions on competition, and in particular Article 81 EC and Article 82 EC, can be applied by the Commission to the conduct of the undertakings involved following the acquisition of the minority shareholding".

[28] While the statistics for Germany suggest that non-controlling interests may be more susceptible to causing economic harm than "full" mergers, we consider that this is likely to be a feature of historic concentration

1.26 This is supported by the experience of the UK, in which non-controlling interests have been found likely to give rise to competitive harm only twice[29] since the current regime came into force in 2003,[30] one of which (*Ryanair/Aer Lingus*) would have been dealt with under the EUMR, had the Commission had the power to order divestment of non-controlling interests under Article 8(4) EUMR. It should be understood that the UK does not have a specific jurisdictional test for joint ventures (unlike the EUMR), and that the material influence threshold is often applied to deal with the creation of joint ventures, or acquisitions of minority interests in joint ventures that would have been notifiable under the EUMR, had the relevant joint venture been "full function", or had the turnover thresholds for Union dimension been satisfied.[31] Accordingly, the active use of the material influence threshold in the UK is not good evidence of a gap, as it is used primarily for cases that are equivalent to joint ventures that would be notifiable under the EUMR but for the absence of a specific jurisdictional test for joint ventures in the UK.

1.27 In light of the considerations above, we consider that the Commission's current ability to assess non-controlling interests under Article 101 and the EUMR, with additional enforcement by those Member States that have chosen to extend their national merger control regimes in this way, is already sufficient to deal with these few cases per year. The current regime leaves no significant enforcement gap in practice, and no reason to expand the scope of the EUMR further to cover such interests.

2. Do you agree that the substantive test of the Merger Regulation is an appropriate test to assess whether a structural link would lead to competitive harm?

2.1 We see no reason to apply a different substantive test for acquisitions of non-controlling interests. In particular, we consider the significant impediment to effective competition ("**SIEC**") test to be sufficiently flexible to allow for a detailed factual analysis of the mechanisms by which the holder of a non-controlling interest might, in a given case, exert anticompetitive influence over a target.

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and the prevalence of cross-shareholdings in certain markets, notably energy markets. We do not consider that this is an accurate indicator for non-controlling interests, either for the future or for outside Germany.

29 *BSkyB/ITV* (2007) and *Ryanair/Aer Lingus* (2013).

30 Under the previous merger control regime in the UK – which was governed by the Fair Trading Act 1973 – mergers were assessed against a broad public interest test. Consequently, we do not consider that decisions on acquisitions of non-controlling interests under the previous regime - such as the acquisition by the Government of Kuwait of a minority interest in British Petroleum in 1998 - to be relevant or comparable for the purposes of determining whether the EUMR should be extended to cover such interests.

31 For example, the CC identified likely competitive harm in *Thomas Cook / Co-operative Group / Midlands Co-operative Society* (2011), in which the Co-operative Group acquired material influence over the relevant joint venture. However, that joint venture combined the existing competitive assets of all the parties and would therefore have amounted to a concentration (had it satisfied the EUMR thresholds) irrespective of Thomas Cook's degree of influence post-transaction. In the *BBC Worldwide/Channel Four/ITV joint venture* (2009), the CC did not determine whether the parties' respective interests in the JV amounted to controlling or non-controlling interests. This absence of a conclusion regarding the presence of decisive influence is not uncommon, as it avoids a relatively sterile debate as the whether the purchaser has acquired de facto control (the little-used UK rough equivalent of decisive influence) by reason of its minority stake.

2.2 We are, however, concerned by the statement in the Consultation that under a self assessment or transparency system "the Commission might at a later stage consider issuing guidance on the types of cases it is most likely to examine" (emphasis added). Companies should not become subject to risks of onerous remedies (such as divestments) without information on the circumstances in which those risks apply. The cursory summary of economic literature contained in Annex I to the Consultation does not provide that information. Accordingly, the CLLS considers that any extension of the EUMR to non-controlling interests must be accompanied, at the same time, by guidance explaining how the Commission will carry out its assessments of non-controlling interests, by reference to their impact on the incentive of the purchaser to compete less aggressively with the target, and the ability of the purchaser to influence the target in a manner that produces anticompetitive effects.[32] This second factor will be of particular importance, given the low degree of influence conferred by non-controlling interests.

3. Which of the three basic systems set out above do you consider the most appropriate way to deal with the competition issues related to structural links? please take into account the following considerations:

(a) the need for the Commission, Member States and third parties to be informed about potentially anti-competitive transactions,

(b) the administrative burden on the parties to a transaction,

(c) the potential harm to competition resulting from structural links, both in terms of the number of potentially problematic cases and the impact of each potentially harmful transaction on competition;

(d) the relative ease to remove a structural link as opposed to the difficulties to separate two businesses after the implementation of full merger;

(e) the likelihood that anti-competitive effects resulting from an already implemented structural link can be eliminated at a later stage.

3.1 The CLLS agrees with the position that the Commission set out in its 2001 *Green Paper on the review of Council Regulation (EEC) No 4064/*89 that: "based on current experience, it appears likely that only a limited number of such [non-controlling interests] would be liable to raise competition concerns that could not be satisfactorily assessed under Articles [101 and 102 TFEU]. Under this assumption it would appear disproportionate to subject all acquisitions of minority shareholdings to the *ex ante* control of the Merger Regulation".[33] The data gathered by the Commission and presented in Annex II of the Consultation confirms that the Commission's earlier assumption was indeed correct and the Consultation document accepts that “the number of cases creating problematic structural links seems to be rather limited”. If,

[32] This is broadly the approach set out in paragraph 13 of the 2010 Horizontal Merger Guidelines of the US DOJ and Federal Trade Commission ("**FTC**"). The horizontal guidelines also refer to the possibility of giving the purchaser access to competitively sensitive information. However, for the reasons set out in response to Question 1 above, we consider that information disclosures of this type should continue to come within the purview of Article 101.

[33] COM(2001) 745 final, paragraph 109

notwithstanding this evidence, the Commission opts to extend the scope of the EUMR to cover non-controlling interests, we submit that it should do so in the least intrusive manner possible, i.e. the self assessment system, with no prohibition on implementing the acquisition prior to clearance.

3.2 In particular, we do not favour the notification system or transparency system, for a number of reasons.

3.3 First, both systems would render parties liable to penalties for failure to notify. This would require very clear and objective criteria so that parties can readily ascertain whether a filing obligation applies. Our concern, however, is that this would prevent the Commission from being able to frame these criteria in a way that ensured that only relevant structural links are caught. For example, if a filing obligation were to apply only to horizontal or vertical structural links (as we suggest below that it should), parties may become subject to substantial fines simply for adopting a different view to the Commission of the scope of the relevant markets. If the criteria cannot be framed in this way, very large numbers of irrelevant transactions will become subject to filing or notice requirements, creating unnecessary and unjustified costs for the Commission and the businesses involved.

3.4 Second, as noted above, the number of transactions (if any) that are likely to result in competitive harm is likely to be minimal. While the data gathered by the Commission do not indicate the total number of non-controlling interests in the Zephyr database (i.e. without filtering for transactions involving a purchaser and target in the same sector and without excluding financial investors), we consider that the number is likely to be large, given the prevalence of acquisitions by consortia where no party has strategic control (including acquisitions by banks in the course of restructurings) and of passive investments made for financial investment purposes. Imposing filing obligations (and liability for penalties) on such a large number of transactions in order to catch such a small number of potentially problematic deals would be disproportionate. In particular, both the notification and transparency systems would create costs for parties in assessing whether the filing requirements are met and preparing the relevant notification or notice (albeit with potentially lower costs under the transparency system).

3.5 Third, requiring a mandatory filing or notice would also be unnecessary, as the self assessment is capable of ensuring that potentially harmful transactions are brought to the attention of the Commission:

3.5.1 parties to such transactions will have substantial incentives to bring them to the attention of the Commission before they make the relevant financial commitments. The potential losses that may be incurred in the event of a divestment order are large. For example, BSkyB is estimated to have incurred a loss of some £350 million on the interest in ITV that it was required by the CC to divest; [34]

3.5.2 in other cases, the most pernicious of non-controlling interests may be expected to be brought to the Commission's attention by customers and

[34] See *BSkyB sells 10.4% ITV stake for £196m*, The Guardian, 9 February 2010, available at: http://www.theguardian.com/media/2010/feb/09/bskyb-sells-itv-stake

competitors (particularly given that the focus of the Commission's concerns appears be publicly listed companies, which are typically subject to significant transparency obligations); and

3.5.3 the experience of the Office of Fair Trading in the UK demonstrates that maintaining a review of key market intelligence sources is an effective and efficient way to ensure that transactions do not escape scrutiny. The Commission's own use of the Zephyr database to identify potentially relevant transactions demonstrates that it is capable of carrying out effective monitoring of market developments. Moreover, the Commission could draw on the local knowledge of national competition authorities (through the ECN network) to ensure that its market intelligence is appropriately pan-European in scope.

3.6 Fourth, non-controlling interests can be easily unwound, as they do not of themselves lead to integration of the parties' respective businesses. For the same reason, if a completed acquisition does give rise to competitive harm, divestment of the relevant link – or a reduction in the degree of influence - will eliminate that harm, as the influence and incentives that caused the harm will cease to exist. Accordingly, there is no need to require that such acquisitions be reviewed and cleared prior to their implementation.

4. In order to specify the information to be provided under the transparency system:

(a) What information do you consider necessary to enable the Commission and Member States to assess whether a case merits further investigation or to enable a third party to make a complaint (e.g. information describing the parties, their turnover, the transaction, the economic sectors and/or markets concerned)?

(b) What type of information which could be used by the Commission for the purpose of the transparency system is readily available in undertakings, e.g. because of filing requirements under securities laws in case of publicly listed companies? What type of information could be easily gathered?

4.1 For the reasons set out above, we do not favour the transparency system. Should the Commission opt to introduce it, we consider that the mandated information should be no more than is available from public sources. In particular, purchasers of non-controlling interests are much less likely to have access to detailed information about the target's turnover and market activities than a purchaser of a controlling interest. For example, there is no reason to assume that a publicly listed target would be a notifying party or would feel under any obligation to cooperate in the supply of information for a notice. Similarly, a seller of a non-controlling interest may not have access to that information about the target.

4.2 We therefore consider that the relevant information should be no more than information describing the parties, their worldwide turnover (as available in publicly available accounts), the transaction and the broad economic sectors involved. In our view it would not be appropriate to require information on the markets concerned, as that would impose a disproportionate administrative burden on the parties.

4.3 As regards readily available information, annual financial statements are the only information that is consistently required to be disclosed in jurisdictions in the EU and worldwide. Unless the Commission proposes to limit its assessment of non-controlling interests to acquisitions of shareholdings in publicly listed companies, the securities filing requirements for such companies do not appear to be relevant.

5. **For the acquirer of a structural link, please estimate the cost of filing for a full notification (under the selective system in case the commission decides to investigate a case, or under the notification system). please indicate whether the costs of a provision of information under the transparency system would be considerably less if the information required were limited to the parties, their turnover, the transaction and the economic sectors concerned.**

5.1 Members of the CLLS will respond to this question separately, on behalf of their respective firms. We therefore limit this response to an observation that the cost of filing a full notification would, in all likelihood, be broadly comparable to that of a full Form CO filing (or Short Form filing, depending on the volume of information required), but may be higher, given the additional need to assess whether a relevant structural link has been created. The cost of providing information under the transparency system would no doubt be lower (depending on the scope of the information required to be published and the proportion of cases in which follow-up questions are asked by the Commission).

6. **Do you consider the turnover thresholds of the Merger Regulation, combined with the possibility of case referrals from member states to the commission and vice versa, an appropriate and clear instrument to delineate the competences of the member states and the commission?**

6.1 The CLLS agrees that the existing EUMR turnover thresholds would be of equal relevance for the purpose of determining whether an acquisition of a non-controlling interest has a Union dimension. However, this is subject to two qualifications.

6.2 First, we consider that any changes to the EUMR should be neutral as regards the number of "concentrations" (i.e. acquisitions of decisive influence) that are subject to mandatory filing and standstill obligations. Accordingly, an acquisition of a controlling interest should not be deemed to have a Union dimension solely because of the turnover of a purchaser that is separately but simultaneously acquiring a non-controlling interest. For this to be the case, purchasers of non-controlling interests should not be treated as an "undertaking concerned" for the purposes of the EUMR, but should instead be referred by some other definition – for the sake of illustration we will call them "non-controlling undertakings".

6.3 Second, it would not be appropriate for EUMR jurisdiction over acquisitions of non-controlling interests to depend on the presence and turnover of other controlling and non-controlling undertakings. Acquirers of non-controlling interests are much less likely to have or be able to obtain access to such turnover information. For example, there is no reason to expect that one non-controlling shareholder in a public company would agree to supply of information to a third party in order to allow them to determine whether their acquisition of a separate non-controlling interest will fall within the jurisdiction of the EUMR. Consequently, we consider that, for acquisitions of non-controlling interests, the thresholds should be assessed by reference to the non-controlling undertaking and the target undertaking only.[35]

6.4 As regards referrals, we agree with the principle set out in the Consultation that "cases of structural links could be referred from the Commission to one or several Member States, or vice-versa, at the initiative of the parties or of the Member State(s) concerned, provided the Member State(s) in question is/are competent under its/their national law to examine structural links under merger control rules" (emphasis added). National authorities should not be permitted to refer acquisitions of non-controlling interests to the Commission, or to request that such transactions be referred to them, if they cannot review such transactions under their national merger control laws. See also our response below regarding the Commission's proposed reform of the Article 22 referral system.

7. **Regarding the Commission's powers to examine structural links, in your view, what would be an appropriate definition of a structural link and what would constitute appropriate safe harbours?**

7.1 In defining the Commission's jurisdiction to review structural links, it is important for legal certainty to avoid criteria that conflate the substantive assessment with the determination of whether EUMR jurisdiction applies. For instance, one failing of the UK merger control regime is that the test for material influence is assessed by reference to the importance of each specific control right for the competitive conduct of the target in question. This means that it is frequently impossible to determine whether material influence exits without having carried out an extensive analysis of the purchaser's ability to adversely affect the target's ability to compete, in light of the case-specific fact pattern. In practice, this assessment is often the same as that for determining whether the transaction may be expected to give rise to competitive harm.[36]

7.2 Any reform of the EUMR should not reproduce this feature, as this would be a very significant departure from the current principle of "bright line" jurisdictional thresholds. Jurisdictional thresholds should be clear, easy to apply and linked to theories of harm which are clear and robust. While this is an area in which significant additional analysis is required, our initial comments are below.

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35 For example, if non-controlling undertaking and the target have a combined aggregate worldwide turnover in excess of EUR 5 billion and each has an EU-wide turnover in excess of EUR 250 million.

36 So, for example, the ability to veto decisions relating to disapplication of certain pre-emption rights was considered to give rise to material influence in *ITV/BSkyB* because ITV's financial situation was such that its ability to raise funding through a non-pre-emptive issue of equity might have determined its ability to pursue certain competitive strategies. In contrast, in *Ryanair/Aer Lingus,* Aer Lingus had relatively unconstrained access to debt funding, which meant that such a veto right was not material in this respect (although it was relevant for other reasons)

Definition of a structural link

7.3 The definition of a structural link is by no means straightforward and there are significant risks associated with a definition which is overly broad or insufficiently certain. We consider that a structural link should be defined in accordance with the two relevant categories of theory of harm, i.e.:

7.3.1 a financial interest in the profits of the target; and

7.3.2 the ability to influence the target, either through voting rights or special corporate rights.

7.4 In both cases, further economic and empirical analysis is required in order to ensure that the theories (and the assumptions underpinning them) are clear and robust. At this preliminary stage, it is however evident that the relevant theories of harm envisage that the interest or influence is of a material magnitude.

Material financial interest

7.5 We recommend that a shareholding that confers a right to less than a specified minimum percentage of the target's profits should fall outside the definition of a structural link. Further analysis and evidence would be required to determine the appropriate minimum percentage. While we recognise that in very heavily concentrated markets it is theoretically possible for anticompetitive incentives to arise at low levels, we consider that the advantages of having a clear threshold greatly outweigh the potential disadvantage.[37]

Material influence

7.6 As regards what is deemed to be material influence, for the reasons described above, we favour a test that focuses on the purchaser's ability – *de jure* or *de facto* - to block or veto specific types of corporate decision which are considered to have sufficient potential to confer influence over the target's management, regardless of the specific fact pattern. This would have a number of advantages:

7.6.1 the assessment of whether a purchaser will have the ability to veto certain decisions will be the same as it is for the purposes of assessing decisive influence, but instead of focusing on the approval of the budget and business plan and appointment of senior management, it would focus on a different set of corporate decisions. It will therefore have the benefit of consistency, familiarity and clarity;

7.6.2 it would not be dependent on the specific voting thresholds that apply under the company laws of the jurisdiction in question. In the absence of EU wide harmonisation of the rights afforded to minority shareholders in public and private companies, and given that the EUMR catches also transactions involving non-EU targets, it seems to us that it would be inappropriate to set a

[37] Expressing the nature of the relevant link by reference to profits would allow the Commission to take account of financial instruments that confer an indirect interest in a competitor's profits, although the use of such instruments to create competitive constraints is, to our knowledge, a purely theoretical concern. See *Minority Interests in Competitors*, DotEcon, March 2010.

specific voting rights threshold. The decisions that could be vetoed by a holder of a 25% interest in the UK or Germany, for example, may be very different to those that can be vetoed in other countries; and

7.6.3 it avoids a test for influence that can be satisfied on the basis that a non-controlling shareholder might be able to persuade other shareholders to follow its lead, or might, on occasion, be in a position to exercise the "casting" vote in a shifting alliance. Such factors remove any element of legal certainty from the test, as they mean that it could be satisfied by any level of shareholding, no matter how small. Similarly, the presence of one or more board members should not be deemed as conferring sufficient influence over the target unless it allows those members to veto the relevant types of decision.[38]

7.7 Careful consideration would need to be given to defining the specific types of veto right. There may, for instance, need to be a distinction made between veto rights in the context of public and private companies. For example, rights to veto the dis-application of pre-emption rights will confer much greater influence in public companies, where there are large numbers of small shareholders. This will, therefore, be a complex assessment, which can only be done on the basis of clearly articulated and evidenced theories of harm.

7.8 Caution will also need to be exercised to avoid catching forms of influence that are implemented in agreements other than equity shareholdings, such as covenants in loan agreements. It would be entirely disproportionate for such agreements to be caught by the EUMR, in the absence of any evidence that such arrangements give rise to potential competition issues. Such as step would impose very significant (and unjustified) burdens on business, even in a self assessment system.

Joint ventures

7.9 For joint ventures, we agree that the distinction between full function and non-full function joint ventures is appropriate. However, interests falling below the relevant threshold of influence should also remain caught by Article 101 (even if the joint venture is full function), as is the case for interests falling below the thresholds of decisive influence under the current EUMR.[39]

Appropriate safe harbours

7.10 We recommend two additional forms of safe harbour that would act to limit the jurisdiction of the Commission to review structural links.

7.11 First, a structural link should be reviewable only if the target is an actual competitor, or an undertaking active in a vertically related market. That is consistent with the relevant theories of harm. The inclusion of "potential competitors" would create significant legal uncertainty as a minority shareholder will often not be in a position to evaluate whether a company would, on realistic grounds and not just as a mere

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38 For the reasons set out in response to Question 1 above, we do not consider that the acquisition of a right to receive certain information should be treated as conferring sufficient influence, as such information flows are better regulated under Article 101.

39 Article 21 EUMR.

theoretical possibility, in case of a small but permanent increase in relative prices be likely to undertake, within a short period of time, the necessary additional investments or other necessary switching costs to enter the relevant market. In addition, there is no evidence in the Consultation to suggest that an enforcement gap has, in fact, been identified in a case involving potential (rather than actual) competitors.

7.12 Second, there should be no jurisdiction unless the holder of the structural link also has decisive influence (and not mere material influence) in the relevant horizontally or vertically related undertaking. While we recognise the theoretical possibility that harm might arise where a single undertaking holds multiple material influence interests in different competitors, we consider it highly unlikely that this could happen in practice. Moreover, conferring powers to review such interests would cause substantial and unnecessary disruption and legal uncertainty for a wide range of institutional investors that pursue sector specific investment strategies.

8. In a self-assessment or a transparency system, would it be beneficial to give the possibility to voluntarily notify a structural link to the commission? In answering please take into account the aspects of legal certainty, increased transaction costs, possible stand-still obligation as a consequence of the notification, etc.

8.1 The availability of a voluntary notification possibility would be vital for the self-assessment or transparency system. Companies should not be expected to make substantial investments in non-controlling interests without the possibility of obtaining legal certainty that those investments will not be required to be unwound at a later date.

8.2 However, we disagree with the Commission's proposal that voluntary notification should trigger a standstill obligation. While in many cases parties will choose not to implement their transaction prior to clearance, it should nevertheless be for them to decide. Given the lack of control, non-controlling interests will not (in and of themselves) lead to the integration of the parties respective businesses. In addition, as noted above, the holder of a non-controlling interest will be a separate undertaking to the target for the purposes of Article 101, so any agreement to run the two businesses as one would be subject to this provision. Imposing a prohibition on closing a transaction would therefore be unnecessary and disproportionate.

8.3 For similar reasons, while we recognise that it may be desirable to impose certain "hold separate" restrictions in certain circumstances, these will rarely be necessary and should not, therefore, be automatically triggered by the Commission's investigation.

9. Should the Commission be subject to a limitation period (maximum time period) after which it can no longer investigate/intervene against a structural link transaction, which has already been completed? if so, what would you consider an appropriate time period for beginning a Commission investigation? and should the length of the time period depend on whether the commission had been informed by a voluntary notification?

9.1 Yes. In the UK, the four month period limitation period within which a Phase 2 referral must be made generally works well, subject to one potential caveat. In the UK, the OFT is required to have made its Phase I decision by the end of the four month period. This can result in investigations being rushed if started late in the four month period, with a decision to launch a Phase 2 investigation potentially being made on the basis of insufficient evidence.

9.2 It would therefore be preferable in our view to have a shorter limitation period (of, say, 2 months) within which a Phase 1 investigation must have been commenced. Such a limitation period could run from the date on which completion of the transaction is appropriately publicised, in same way as, for example, the time period under Article 22 EUMR commences when a concentration is "otherwise made known" to a Member State.

9.3 In cases that are notified to the Commission (and which do not therefore need to be identified by market intelligence or complainants) there would be merit in simply applying the Phase I 25 working day deadline, in the same way as for other notified transactions.

9.4

QUESTIONS ON THE CASE REFERRAL SYSTEM

1. Do you consider that the suggestions would make the referral system overall less time-consuming and cumbersome?

1.1 We generally consider that the suggestions made by the Commission in respect of the Article 4(5) referral system may be beneficial both in terms of timing and costs for the notifying parties. On the other hand, we have some reservations regarding the Commission's proposal relating to Article 22 referrals (please see our responses in section 3 below).

2. Regarding the suggestion on Article 4 (5) referrals:

(a) Do you support the idea to be able to directly notify to the Commission without preceding Form RS?

2.1 The CLLS welcomes this proposal. It would provide for a process that is:

2.1.1 faster, as parties will be able to notify and commence the Phase 1 timetable at an earlier stage, in most cases; and

2.1.2 more efficient, as it will eliminate much of the duplication of work that currently exists, with information contained in the Form RS typically being repackaged in the subsequent Form CO.

(b) Please try to estimate savings in (a) time and (b) costs resulting from the elimination of the Form RS procedure in a typical case.

2.2 Direct notification would shorten the overall notification process by at least 15 working days. It should also reduce the pre-notification preparation time required in relation to the Form RS. However, for this result to be achieved, it is important that the elimination of the Form RS procedure does not result in a lengthier and/or more cumbersome pre-notification phase, the duration of which is frequently unpredictable and a source of uncertainty for the notifying parties.

2.3 While each case is different, we consider that the cost of filing a relatively straightforward transaction would probably be reduced by somewhere in the region of [10-20%].

(c) For transactions to be notified in at least three Member States, would you consider that you will use the referral according to Article 4(5) under the suggested system more often than under the current system - or that you will advise your clients to use it more often?

2.4 Given the importance of timing in mergers and acquisitions (and, in particular, the increased financing costs that arise in the event of delays), we consider that a streamlined referral process is likely to make the use of Article 4(5) more attractive to clients of the CLLS members.

(d) Do you consider that the 15 working days consultation period could be shortened in order to limit the duration of uncertainty as to whether or not a case will remain in the competences of the Member States?

2.5 Yes, we consider it sensible to reduce the consultation period to 10 working days. In our view, this would be sufficient to allow the competent NCAs to review the relevant information, to assess whether the referral requirements are met and to determine whether they have an interest in retaining jurisdiction over the notified transaction.

2.6 However, the Commission seems to believe that this reduction might not allow sufficient time for the NCAs to review the relevant information, and should therefore be compensated by the provision of earlier information by the Commission to the NCA, during pre-notification. We are concerned that this would have certain adverse consequences, for the reasons set out below.

(e) Do you consider it useful if contacts between the Commission and the competent Member States could take place already during a possible pre-notification phase, in order to enable the Member States to assess the referral?

2.7 We consider that such contacts – unless entirely at the discretion of the parties – would give rise to a number of concerns.

2.8 First, involving several NCAs at this early stage of the process could lead to more complexity and a greater information burden for the parties, thus delaying the filing and eliminating the efficiencies and timing advantages that would otherwise arise under the proposed reform.

2.9 Second, for transactions not yet in the public domain, it would result in multiple NCAs receiving highly sensitive market (and insider) information. We recognise that the ECN has a good record of maintaining the confidentiality of documents, but as events in recent years have shown, information can escape from even the most secure of systems. Given our view that 10 working days ought to be sufficient for NCAs to review and decide upon the relevant information, we do not consider that such widespread dissemination of market-sensitive information would be justified.

2.10 Third, the disclosure of information to NCAs should be by the parties, not the Commission, and should be at the discretion of the parties. We recognise that there may be circumstances in which providing information to one or more NCAs is desirable, as it will help to ensure a smooth and predictable filing process. However, parties and their business advisers are best placed to make such assessment, and can manage the relevant contacts with NCAs themselves. If they do decide to provide pre-notification information to an NCA, parties will have every incentive to ensure that such information is accurate and complete, as those NCAs will subsequently receive a copy of the filing.

2.11 Fourth, this proposal would add to the "creeping" formalisation of the pre-notification phase. While footnote 16 rightly recalls that pre-notification discussions are not compulsory, the Commission's proposal does not seem workable without them.

(f) Do you agree that a broad information exchange between the Commission and the Member State which includes the information gathered in the market investigation should be made possible? Should the results of the Commission's market investigation be accessible to NCAs also following a veto of a Member State?

2.12 To the extent a broader information exchange (including the results of the Commission's market investigation) between the Commission and the Member States would facilitate and speed up the review process by NCAs following a veto of a Member State, they should be made possible. For instance, if NCAs could avoid repeating a market testing exercise on the basis of that which has already been carried out by the Commission, this would alleviate administrative burdens for NCAs, the parties and third party respondents to the market tests.

2.13 In our view, the following additional principles should apply:

2.13.1 in the absence of consent of the notifying parties, information from the Commission's formal or informal market testing should not be disclosed prior to the NCA's veto decision. Information contained in the Form CO ought to suffice for the purposes of deciding whether to veto the referral; and

2.13.2 only the competent NCAs should benefit from this broader information exchange and for the sole purpose of their review of the transaction concerned.

(g) What would be in your view appropriate measures to assure that the Member States have a good understanding of the case in order to decide whether or not to ask for a referral (e.g. early information of the Member States, forwarding of a draft notification received by the Commission)? How do you view this suggestion with regard to confidential transactions which are not yet in the public domain?

2.14 See our response to question 2(e) above.

(h) Regarding pre-notification referrals from the Commission to the Member States, Article 4(4), do you see similar room for improvement to streamline the process and to align it with the suggestions on Article 4(5) above, while at the same time safeguarding the interests of all Member States?

2.15 Given that there have been only 6 cases in which an Article 4(5) request has been refused, out of 259 cases in which such a request was made, we agree that there would be scope for a similar improvement to the procedure under Article 4(5).

3.	**Regarding the suggestion on Article 22 referrals:** **(a) Do you agree with the underlying principle of the envisaged modification, i.e. that Article 22 should enable the Member States to refer cases to the Commission for which the Commission is the more appropriate authority due to cross-border effects? Do you also agree that the Commission should then have EEA-wide jurisdiction as for all the other cases it is dealing with?**

3.1 The opinion of members of the CLLS is that the Article 22 referral system should be abolished, not modified.

3.2 Article 22 referrals are no longer necessary or desirable as:

3.2.1 merger control laws have now been introduced in all Member States except Luxembourg, so that there is no longer a need for a this "Dutch clause". In keeping with the principle of subsidiarity, if it is desirable for small transactions to be subject to merger control scrutiny, that is a choice for Member States to make, in the context of their national merger control regimes;

3.2.2 where the Commission is better placed to assess a transaction, there is still the possibility for the parties to request a pre-notification referral under Article 4(5) EUMR;

3.2.3 experience proves that Article 22 EUMR is seldom used;

3.2.4 where such referrals are made, they are a source of unnecessary complexity, considerable legal uncertainty and costly delays;

3.2.5 the very possibility of an Article 22 referral (which has become increasingly difficult to predict), means that parties to multi-jurisdictional mergers and acquisitions are in principle required to carry out substantive risk assessments across 27 EU Member States, notwithstanding that filings may only be required in one (or even none). Where mergers involve multiple, *de minimis*, local markets, these costs can be substantial. If no such referral is made (as is usually the case), these costs are effectively wasted;

3.2.6 where national filings are required in fewer than three Member (such that an Article 4(5) referral request cannot be made), parties have no mechanism by which they can pre-empt such an Article 22 referral, and avoid the associated costs and delays; and

3.2.7 we disagree with the Commission's assessment that the mechanism retains a useful purpose as it allows for transactions to be considered by the "best placed" authority. In our experience, in those cases where the Commission is considered "best placed" by an NCA, this is often not because of the cross-border nature of the markets in question, but because the NCA does not have the power to review the transaction under their national laws, or is too resource-constrained to do so.

3.3 Should the Commission however decide to proceed with its suggested changes to Article 22 referrals, we consider that Article 22 should not be used by Member States as a means to capture indirectly small transactions that would not be caught by their national merger control legislations. We therefore agree with the Commission that only Member States which have jurisdiction over the notified transaction should be allowed to make a referral or join a referral request under Article 22. This is a minimum requirement to give the notifying parties a degree of legal certainty with respect to the expected timeframe and to allow them to anticipate potential substantive issues related to the transaction.

3.4 We have reservations concerning the broadening of the scope of the Commission's review after the referral.

3.5 First, it does not avoid the potential problem of a patchwork approach of parallel proceedings. It would only do so if there are ideal tools capable (without a substantial reform) of preventing any prior decision of NCAs (see our response to Question 3(b) below). Yet, as recognised by the Commission, such tools do not appear to exist. Therefore despite these procedural safeguards there could still be cases where a prior clearance could be given before the referral occurs. We therefore consider the Commission's proposal relating to the broadening of the scope of its review to be potentially counter-productive and likely to lead to greater legal uncertainty for the parties.

3.6 Second, the proposal would not obviate the need for the parties to conduct an EU wide antitrust risk analysis for each cross border transaction. On the contrary, it would increase the need for such an assessment (which, as noted above, is likely to be a pointless exercise), as any referral would automatically trigger an EU-wide assessment by the Commission. The substantive criteria relating to candidate cases for referrals, although very useful, may not be sufficient to determine in advance these so-called "candidate cases" given the Commission's wide discretion when deciding on referrals.

(b) Do you agree that the envisaged modification would lead to a clear delineation of which level - Commission or Member States - should deal with a case, taking account of the one-stop-shop principle? Do you agree that this would avoid a patchwork approach of parallel proceedings of the Commission and Member States?

3.7 As mentioned in our response above to question 3(a), we do not support the idea that the Commission should gain jurisdiction for the whole of EEA: doing so could be counter-productive in terms of legal certainty and predictability for the parties.

3.8 Under the envisaged modifications, there would still be room for a patchwork of parallel proceedings, as conceded by the Commission.[40] Moreover, we are not convinced of the feasibility or desirability of the proposals of the Commission for avoiding prior NCA decisions in cases where the procedural safeguards have proven to be insufficient:

40 Page 18 of the Commission Staff Working Document.

3.8.1 aligning the timing of national notifications, without approximation of national legislation, seems difficult to achieve;

3.8.2 the level of information required by each NCA varies significantly from one merger control regime to another, and these differences frequently explain why national notifications are (deemed) complete at different times. As a result, the clock usually starts ticking at different times;

3.8.3 the Phase I review periods range from 20 working days up to 40 working days or even more, depending on the Member State; and

3.8.4 the possibility for the Commission to accept a referral and obtain jurisdiction for the whole EEA despite a prior national clearance is not desirable. In particular, if national clearance decisions could, as suggested, become retroactively invalid in the event of an Article 22 referral, that would be anathema to legal certainty and would harm parties' ability to plan transactions and manage merger control risks. Parties should be able to rely on national clearance decisions in order to close their transactions, free of any risk that remedies might subsequently be imposed in respect of that jurisdiction. On the other hand, if such a NCA could veto the referral, there would still be a patchwork of competences and the current system would remain unchanged.

3.9 Should the Commission and other stakeholders be willing to retain the proposed reform of the Article 22 system, we suggest the following amendments:

3.9.1 the Commission's decision to accept a referral should give it jurisdiction for all the territories of the Member States that are competent to review the transaction under their national merger control laws (not EEA-wide). This would address the concerns outlined above regarding legal certainty and the need for wasteful pan-European risk assessments. It would also ensure that the Commission's investigations are suitably focused on territories in which the transaction in question has a material impact;

3.9.2 A referral could only be accepted if the transaction is reviewable in three or more EEA Member States. This would refocus Article 22 on transactions that the Commission really is best placed to consider and which are truly cross-border in nature. It would also address a number of existing concerns regarding legal certainty for the parties, as they would themselves have a legal right to request such transactions to be referred under Article 4(5);

3.9.3 The different stages of the referral process should be shortened (see our response to question 3(e)) and the national proceedings be suspended from the day after the transmission of the first referral request by the Commission to other competent Member States (the transmission itself taking place on the day the Commission receives the referral request). This would also help prevent – but not eliminate – the risk of a conflicting prior decision of a NCA (see below).

(c) Do you agree that the envisaged system would make European merger control more effective and would allow it to obtain cases for which the Commission is the more appropriate authority? In particular, do you consider it appropriate that only competent Member States can refer cases to the Commission, as opposed to the current system where also non-competent Member States can refer a case?

3.10 Please see our response to question 3(b) above.

(d) Do you agree that legal certainty for undertakings would be increased if only a Member State competent under its national law could make a referral request?

3.11 We welcome and support this proposal. However, legal certainty would be even better served if the scope of the Commission's jurisdiction to review a transaction were limited to the territories of the competent Member States (see our response to question 3(b) above).

(e) Do you agree that the procedural solutions would prevent the scenario or mitigate the risk that a Member State might have already cleared the transaction before another Member State requests a referral? In your view what would be appropriate procedural solutions?

3.12 As indicated in our response to question 3(b) above, our view is that there are no simple procedural solutions that would effectively prevent the scenario or mitigate the risk that a Member State might have already cleared the transaction before another Member State requests a referral.

3.13 However, in addition to our proposal above, we consider that the periods between each stage of the current referral process could be reduced as follows:

3.13.1 the 15 working day period to make a referral after national notification of NCA could be shortened to 10 working day. This would be consistent with the proposal to reduce the corresponding period under the Article 4(5) procedure;

3.13.2 it should be clarified that the Commission transmits the request to the other competent Member States on the same day that it receives it;

3.13.3 the 15 working day period within which other competent Member States could join a referral request after having received information by the Commission should also be reduced, i.e., to 10 working days; and

3.13.4 the review period for the Commission would remain unchanged.

3.14 As a result the maximum duration of the referral process would be of 30 days, instead of 40 days.

(f) How do you see the possibility of a making national clearance decision conditional upon no Article 22 referral taking place? Under the law of your respective Member State, would it be possible to issue clearance decisions under the condition that no Article 22 referral takes place?

3.15 Regardless of whether it would be permissible or not under national legislation, making the clearance decisions conditional upon no Article 22 referral taking place does not appear desirable, as it would create legal uncertainty and complexity. If the parties are legally allowed to close the transaction in jurisdictions where clearance has been granted, they may not do so for fear a referral may subsequently be granted. For similar reasons, it would undermine the effectiveness of national regimes, such as that of the UK, in which the parties have a right to close the transaction even in the absence of a filing and/or clearance.

3.16 Under the UK merger control regime (as contained in the Enterprise Act 2002) it would not be possible for the OFT or CC to issue a decision that was conditional on something that is unrelated to the conduct or actions of the parties to the transaction.[41]

(g) In your view, could the suggestion raise costs for undertakings or would it lead to costs savings due to a better predictability of the system?

3.17 As indicated in our previous responses, we are not convinced that there is a way to satisfactorily improve Article 22 referrals (without approximation of laws). Therefore, our view is that the suggestion will still raise some issues when it comes to costs for the parties and predictability.

(h) Regarding Article 22(5) do you consider that the current procedure that the Commission can invite the Member States to refer a case could be improved in terms of procedure? And if so, in which ways?

3.18 If feasible, it would further streamline the process if the Commission's invitation to a Member State under Article 22(5) had the effect of starting the period during which the other competent Member States are free to join or object to the referral.

[41] For example, Sections 73(2) and 82 of the Enterprise Act allow the OFT or the CC (as appropriate) to accept undertakings from the parties, but only in respect of "action" that is to be taken by the parties in question. An Article 22 request would arise independently of any action or omission of the parties and could not, therefore, form the basis of an undertaking.

MISCELLANEOUS QUESTIONS

1. **How could the jurisdictional rules of the Merger Regulation be modified in order to ensure that joint ventures with activities exclusively outside the EEA and not affecting competition within the EEA do not have to be notified to the Commission? Please take into account the need for jurisdictional rules to be clear and easy to apply.**

1.1 We applaud the Commission's initiative to explore ways to eliminate the redundant filing requirements that presently arise for transactions having no conceivable nexus with the EU. Such a move would eliminate numerous unnecessary filings under the EUMR. It would also remove the obstacle that is currently posed by the EUMR's jurisdictional criteria to persuading competition authorities in other jurisdictions that they should not require filings for transactions having no conceivable nexus to the jurisdiction.

1.2 We envisage two possible mechanisms for achieving this aim.

1.3 The first would be to provide that, for full function joint ventures, the applicable turnover thresholds must be satisfied by the joint venture undertaking, so that it is not possible for EUMR jurisdiction to arise solely on the basis of the turnover of its controlling parents. This is our favoured approach, as it would have the merit of simplicity. An alternative would be to exclude jurisdiction for those extra-territorial JVs that currently qualify for treatment under the simplified procedure, i.e. those in which the JV has assets or turnover of less than EUR 100 million in the EEA.

1.4 This approach would be consistent with the Commission's experience of reviewing extra-territorial joint ventures. We note that there has never, in over 23 years of the EUMR's history, been a decision in which the Commission has identified a credible competition concern arising from an extra-territorial JV with no, or limited, sales in the EEA (including sales attributable to assets to be contributed to the JV). We recognise that the acceptability of this approach to the Commission will depend on the specific theories of harm that the Commission considers might arise in relation to such JVs. While these are not outlined in the Consultation, we consider it highly likely that these could be addressed through other antitrust enforcement tools whether in the EU, or in other jurisdictions.

1.5 The second approach would be to incorporate an explicit nexus test into the EUMR, such that a joint venture would not be treated as having a Union dimension if it has activities exclusively – or almost exclusively - outside the EEA and not affecting competition within the EEA. Moving away from a jurisdictional assessment based purely on turnover thresholds would be less desirable, in our view, than the solution described in paragraph 1.3 above, but would still be preferable to the current approach to extra-territorial joint ventures. It would allow parties to self-assess whether their extra-territorial JV requires notification, on the understanding that if their assessment is wrong they may face penalties for failure to file. A number of other jurisdictions incorporate similar nexus tests into their merger control regimes (albeit with varying approaches to what amounts to sufficient nexus) and we consider that, on the whole, this aspect of the relevant regimes is useful.[42] Such a system would need to be complemented by:

1.5.1 guidance (by way of amendment to the Commission's Consolidated Jurisdictional Notice) on the circumstances in which an extraterritorial JV might be viewed as affecting competition in the EEA; and

1.5.2 the possibility for parties to seek jurisdictional guidance to confirm their understanding that a given JV falls within the exception.

2. Would you recommend any other amendments to the Merger Regulation? Please elaborate.

2.1 We set out below our comments on the other proposals set out in the "miscellaneous" section of the Consultation.

Introduction and/or reinforcement of rules allowing the exchange of confidential information between the Commission and Member States before and after notification of a concentration

2.2 Please refer to our comments in response to question 2(e) on the case referral system.

Modification of Article 4(1) EUMR in order to improve flexibility for notifying mergers that are implemented by way of acquisition of shares via the stock exchange without a public take-over bid.

2.3 We agree that this would be a useful reform. We suggest that it could be achieved by adding to the list of circumstances set out in Article 4(1), second paragraph: "a good faith intention to make a public bid" or "a good faith intention to acquire decisive influence". This provision would require a similar amendment in the event that the Commission introduced a mandatory or voluntary filing regime for structural links.

Complementing Article 5(4) EUMR with explicit methodology for the calculation of a joint venture's relevant turnover

2.4 We agree that this would be sensible, in order to put the Commission's current approach on a sound legal basis.

Modification of Article 8(4) EUMR in order to bring the scope of the Commission’s power to require the dissolution of partially implemented transactions declared incompatible with the internal market in line with the scope of the suspension obligation (Article 7(4) of the Merger Regulation).

2.5 We note that this change would only be relevant if the Commission does not opt to amend the EUMR to encompass acquisitions of non-controlling interests as, if it does, the Commission would be able to investigate and remedy partially implemented concentrations under those powers.

[42] Examples include Argentina, Austria, Brazil, Germany, India, Norway and Taiwan.

2.6 If the EUMR is not changed to cover non-controlling interests, we are not persuaded that the *Ryanair/Aer Lingus* case demonstrates the existence of a significant enforcement gap. We take the view that if Ryanair would have been permitted to acquire a non-controlling interest as a standalone transaction, there is no compelling reason why it should be required to divest that interest as a result of the Commission's block of a subsequent takeover bid.

2.7 If it is internal consistency of the EUMR that the Commission seeks, that could be achieved by expressly allowing parties to retain a non-controlling interest in a business that is to be divested, provided that does not adversely affect the Commission's ability to implement the remedies that it considers necessary to address the identified SIEC, e.g. by reverting to a version of the pre-2004 formulation of Article 8(4), which required the Commission to seek to "restore effective competition", rather than "restore the situation prevailing prior to the implementation of the concentration". For example, if retention of a non-controlling interest would deter suitable purchasers of the divestment asset, it would not be permitted. In other circumstances, it might facilitate a sale to a suitable purchaser (e.g. because it allows for a lower purchase price, or demonstrates the seller's belief in the value of the divestment asset). Given the lack of evidence that non-controlling minority interests result in significant competitive harm (see our response to question 1 relating to Minority Shareholdings), we consider that achieving consistency in this way would be preferable. By way of example, in *BSkyB/ITV*, the CC allowed BSkyB to retain a shareholding of 7.5% in ITV, on the basis of a conservative assessment of the lowest possible shareholding that might conceivably confer the ability to exercise material influence. Given the losses that BSkyB incurred on its divestment of the remainder of its interest (estimated at around £350 million), this ruling avoided further unnecessary and disproportionate losses.

2.8 The CLLS does however recognise the potential for parallel reviews by the Commission (of a full takeover bid) and an NCA (of a previously acquired non-controlling interest) to result in conflicting decisions. For example, if the Commission had cleared Ryanair's third takeover bid, but the CC had required divestment of its non-controlling interest, that would have led to an uncomfortable conflict between legal rights and obligations under EU and national laws. To address this, the Commission might consider introducing a mechanism whereby either the Commission or the relevant NCA is required to cede jurisdiction to review the relevant acquisition in the event of such parallel reviews.

Amending the Merger Regulation so as to ensure, notably through sanctions, that parties and third parties that are given access to non-public commercial information of other undertakings exclusively for the purpose of the proceeding (e.g. through access to the file or being informed of the subject matter of the proceeding for the purpose of participating in an oral hearing) do not use or disclose such information for other purposes.

2.9 We agree that this would be appropriate. We would, however, counsel against introducing such penalties for third parties that receive unsolicited confidential information from the Commission as part of a market testing campaign, such as copies of the parties proposed remedies, for their comments.

We do not have any additional comments at this time other than the views expressed above.

The CLLS would, however, welcome the opportunity to participate further in the consultation process, including attending any public hearings, and would ask to be consulted.

CITY OF LONDON LAW SOCIETY
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