

EUROPEAN COMPETITION LAWYERS FORUM
RESPONSE TO EUROPEAN COMMISSION CONSULTATION ON
APPRAISAL OF MINORITY STAKES

INTRODUCTION

1. The European Competition Lawyers Forum (*ECLF*) welcomes the opportunity to respond to the proposals regarding appraisal of minority stakes under the EU Merger Regulation (*EUMR*) in the European Commission's consultation paper, *Towards More Effective EU Merger Control* (the *Consultation Paper*).
2. This response has been compiled by the ECLF Working Group on the proposals regarding appraisals of minority stakes (the *Working Group*) and does not purport to reflect the views of all ECLF Members or of their law firms. Also, while the Paper has been circulated within the Working Group for comments, its content does not necessarily reflect the views of all individual members of the Working Group or of their law firms.
3. This response deals in turn below with each of the questions raised in the Consultation Paper with regard to appraisal of minority stakes. We begin with a summary of the views of the Working Group.

SUMMARY

1. We recognise that, in principle, there may occasionally be situations in which the acquisition of a minority interest in another undertaking may lead to a substantial lessening of effective competition (SIEC) in circumstances where it is not currently captured by the EUMR.
2. We are not, however, fully persuaded that the Commission has made the case for this change, given the exceptional nature of the situations to which it applied.
3. Above all, if any change is made pursuant to these proposals, it is critical that it is proportionate to the scale of the problem identified. Such a revision must proceed with a high degree of caution and must not place an undue burden on companies.
4. Given this backdrop, it seems clear that the only model among those proposed by the Commission which would be proportionate and workable would be a system of self-assessment.
5. We believe that such a system should be accompanied by the ability to make a voluntary notification to the Commission.
6. We believe that any test adopted to establish jurisdiction must reflect considerations of workability and proportionality. It should ensure that cases where there is little or no meaningful prospect of an SIEC are excluded *ab initio*.

7. The Commission must also consider carefully the implications of its proposals for Member State merger control rules, and, indeed, how they may be viewed by governments and competition authorities throughout the world. The Commission should be cognisant of the prospect of a more generalised extension of the complexity and burden of merger control rules on a wider geographic basis as a direct consequence of its proposals.

THE COMMISSION'S QUESTIONS

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 We recognise that, in principle, there may occasionally be situations in which the acquisition of a minority interest in another undertaking may lead to an SIEC in circumstances where it is not currently captured by the EUMR, because the acquisition of that stake does not reach the standard of decisive influence. That "gap" is the basis for the argument that the Commission should be able to scrutinise mergers where that is the case.

1.2 It is also the case, of course, that certain transactions not meeting the standard of decisive influence may be caught by the lower control thresholds in the mandatory regimes of Austria and Germany, and the voluntary regime in the UK. It is sometimes argued that this inconsistency of approach may be unwelcome for parties to potential transactions.

1.3 However, as the Commission correctly notes in its Consultation Paper¹ (and correctly noted in its 2001 Green Paper²), the number of cases in which structural links are put in place (but without reaching the standard of decisive influence) which give rise to an SIEC will be small in number. This is now well-established in the economic and legal literature³. In the large majority of cases, and to a materially greater extent than transactions in which full decisive influence is obtained, there will be no risk of an SIEC.

1.4 Considerations of proportionality must also be assessed in a wider context. First, the Commission must consider carefully the implications of its proposals for Member State merger control rules. Given that the majority of Member States broadly conform their merger control regimes to that of the EUMR, there is a very real prospect that an extension of the EUMR jurisdiction to structural links short of decisive influence may directly lead to the extension of Member State regimes in the same way. With their disparity of turnover and other thresholds, which are sometimes

¹ See page 6 of the Consultation Paper.

² See paragraph 109 of the *Green Paper on the Review of Council Regulation (EEC) No 4064/89*.

³ We note in this context that the reasoning behind the UK Competition Commission's recent finding that Ryanair's minority stake in Aer Lingus gave rise to a substantial lessening of competition was very fact-specific (relating primarily to an impediment to Aer Lingus's ability to participate in airline consolidation, which is currently prevalent), and was not significantly based on any of the theories of harm canvassed by the European Commission in the Consultation Paper.

very low, this could lead to a very substantial extension of the number of cases that are brought within the ambit of merger control in Europe.

1.5 The Commission should also take account of how its proposals may be viewed by governments and competition authorities throughout the world, where the scheme and policy of the EUMR is commonly influential. The Commission should be cognisant of the prospect of a more generalised extension of the complexity and burden of merger control rules on a much wider geographic basis as a direct consequence of its proposals.

1.6 For these reasons, and in the light of the evidence set out in the Consultation Paper, we are not at this stage fully persuaded of the need for the changes proposed by the Commission or that they will overall be beneficial.

1.7 That said, and above all, any revision of the EUMR to capture circumstances in which structural links do (or may) give rise to an SIEC must therefore be proportionate: such a revision must proceed with a high degree of caution and must not place an undue burden on companies. In particular, the ability to acquire (and dispose of) a small shareholding in a company without undue delay or process contributes in an important way to the efficiency and liquidity of equity markets, and any unduly burdensome system under the EUMR would run the risk of reducing this efficiency and liquidity.

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 The SIEC test is well understood and is as appropriate for assessing the circumstances in which a structural link would lead to competitive harm as it is for assessing this in the context of an acquisition giving rise to decisive influence. For that reason, we believe that any proposed extension should adopt this test.

2.2 In the context of any such extension, it will be important that the Commission should be required, as part of its substantive assessment of whether an SIEC arises, to explain how the structural links in question generate in practice such an impediment to effective competition. That is, the Commission should not simply assume, circumstances where it takes jurisdiction, that the existence of structural links sufficient to trigger this new jurisdiction are sufficient to allow the “acquiring” company to influence the “target” in a way that gives rise to the risk of an SIEC. This issue was dealt with in detail in the UK case of *ITV/BSkyB*⁴, where the authorities properly established a link in fact between the possession of a 17.9% stake in the target and the ability to generate an outcome representing a substantial lessening of competition (the relevant substantive test under the UK Enterprise Act regime).

⁴ *ITV plc/British Sky Broadcasting plc*, Report of the Competition Commission to the Secretary of State, 14 December 2007.

2.3 The assessment of a joint venture in the context of any such extension should also meet the terms of Articles 2(4) and 2(5) EUMR, such that no residual Article 101 risk arises.

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 self-assessment system, coupled with a system of voluntary notification, is the most appropriate of the systems specified by the Commission based on the criteria set out above, and indeed is the only one that we believe is likely to be workable.

Notification system

3.2 The notification system would be unduly burdensome (even under the definition of a structural link that we propose below) and have a detrimental impact on the effective and efficient operation of equity markets.

3.3 As noted above, only a small minority of cases involving structural links (short of decisive influence) give rise to any risk of an SIEC. To require a full notification would be unduly costly for business. This would be the case even for a notification based on the Commission's "short form" merger notification.

Transparency system

3.4 The transparency system is unlikely to be effective if it required only very limited information from the parties, or unduly burdensome if it required more extensive information from the parties.

3.5 We discuss further below the information that could be provided to the Commission in the context of a transparency system, but it appears that it is unlikely that the Commission could make any useful assessment of the risk of an SIEC without the provision of a more significant level of information. It therefore seems unlikely that a transparency system based on a limited amount of information would add

materially to the self-assessment system. We thus see no case for this system from a proportionality perspective.

Self-assessment system

3.6 A self-assessment system (coupled with a voluntary notification system, which we discuss further below) is the option which is most likely to be effective and proportionate based on the criteria set out above. Specifically:

- (a) transactions meeting the EUMR thresholds are generally large and high profile transactions. The Commission should not find it difficult to make itself aware (as the UK Office of Fair Trading has done for many years) of relevant transactions. For transactions where the parties consider that there is a real risk of Commission interest or action, a voluntary notification system would permit the parties to obtain certainty and would be an effective system to ensure that the Commission was more likely to obtain details of more risky cases;
- (b) the system would be the mostly likely to be proportionate: where parties assessed that there was little or no risk of an SIEC (and therefore of Commission action) – that is, the large majority of cases involving structural links short of decisive influence – they would be able to proceed without impediment. The efficiency and liquidity of equity markets would not be unduly reduced. Where parties wished to obtain greater certainty, a voluntary notification system would allow them to do so; and
- (c) the greater ease with which a transaction giving rise only to a structural link short of decisive influence could be unwound means that the effectiveness of the merger control regime would not be reduced by a self-assessment system. Parties would, moreover, be aware of the risk of being required to unwind a transaction when embarking on it, and so would consider carefully the risks that the structural link in question could give rise to an SIEC.

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 As noted above, we consider that it would be difficult for the Commission to assess whether a transaction gave rise to the risk of an SIEC absent a greater level of information than suggested in this question.

4.2 We therefore fear that it would likely become the norm that the Commission would have to request further information in all or a large number of cases – so giving rise to an undue administrative burden given the limited number of cases in which a structural link will give rise to an SIEC. Such an approach would not be proportionate, given the evidence that the Commission has set out on the limited circumstances in which structural links short of decisive influence are likely to give rise to an SIEC.

4.3 Absent such a further request, it is not clear that the transparency system would add anything material to the self-assessment system.

4.4 To address the Commission's second question, it is likely that information which would allow the Commission to make an informed assessment of the risk of an SIEC – principally, reliable market share information – would not be readily available.

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 As the Commission will be aware, the cost to companies of completing a filing under the EUMR (including in respect of a 'short-form' notification) is nowadays substantial – although it necessarily varies from case to case.

5.2 The Commission is correct to observe that the cost of providing the information set out above would be considerably less. However, as noted above in the context of question 4, we do not consider that this information would be useful to the Commission in making an informed assessment of the risks of an SIEC, meaning that it would likely have to make a fuller follow-up request in all or a large number of cases. That would result in a disproportionate burden on companies as explained above.

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 We are not aware of any good reason to vary these thresholds or procedures in the case of the assessment of structural links short of decisive influence.

6.2 We do not consider that any referral mechanism would be appropriate for this regime. In the case of a voluntary filing, there seems to be little or no scope for case referrals from Member States to the Commission and *vice versa*. Case referrals under Articles 4(4) and 9 are linked to a mandatory filing regime. As to the referral mechanism of Article 4(5), it requires at least three Member States with a merger control regime applicable to acquisitions of non-controlling shareholder and a uniform

or coherent definition of this concept. In the hypothetical situation where a transaction were to meet the notification thresholds of Germany, Austria and the UK, the transaction would most likely meet also the EUMR thresholds. Consequently, the room for application of this provision would be entirely exceptional and thereby disproportionate.

6.3 As to referrals by Member States to the Commission on the basis of Article 22, this possibility would run counter the very aim of a voluntary regime. It should be for the undertakings concerned, and not for NCAs (or the Commission) to assess whether or not a filing should be made. Moreover, where NCAs have not been given power under national law to consider structural links short of decisive influence, it does not seem appropriate that they should be given this power “by the back door” by means of making a referral to the Commission in such circumstances.

6.4 Finally, as regards the one-stop-shop mechanism, it is worth underlining that the few NCAs that have jurisdiction over acquisitions of non-controlling shareholdings would only be withheld from exercising that jurisdiction once a voluntary filing were made to the Commission under the proposed regime.

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 As we note above, the number of cases involving the creation of structural links short of decisive influence which give rise to the risk of an SIEC will be very small (and materially smaller than in the case of the acquisition of decisive influence). Annex 1 to the Commission’s working document appears correctly to identify the economic and commercial bases upon which a theory of harm could rest in the context of structural links, and it will be apparent from their nature that only in a very limited number of cases will the circumstances necessary to give rise to a risk of an SIEC be made out.

7.2 Set against this, the Commission should consider both the risks of a disproportionate administrative burden and also the benefits of giving an appropriate degree of certainty companies considering transactions involving the creation of structural links.

7.3 Taking all of these factors into account, we propose a test with two cumulative limbs.

- (a) first, the Commission should, at the least, set a percentage-based safe harbour – at a level below which the risk that an SIEC could arise is not meaningful.

There are good arguments based on proportionality for the 25% figure that is to be found in the German regime (subject to qualification) and Austrian regimes: the number of cases where a substantive competition concern will be created where the shareholding is below this figure, based on any plausible theory of harm, will be very low.

If the Commission considers that the 25% figure is too high, we would propose that a safe harbour threshold of, at the very least, 15% should be applied.

In general, we do not consider that a workable jurisdictional threshold/safe harbour based on the nature of the links could or should additionally incorporate other factors such as board representation or other commercial links or dependencies: this would add undue complexity and uncertainty. It is difficult to see how such criteria could usefully distinguish between those cases likely to create competitive concerns and those unlikely to create such concerns, since each will depend very heavily on a wide range of contextual factors. It would be open to the Commission, of course, to consider whether and how any such additional factors contributed to the likelihood of an SIEC; and

- (b) second, we consider that the Commission should include a further criterion in order to exclude cases in which it is implausible that an SIEC could arise even above this threshold (but short of decisive influence): that is, relevant structural links should be limited to cases in which the linked companies are either competitors in the same market (i.e. horizontal structural links) or are active in markets up- or down-stream of one another (i.e. vertical structural links).

These concepts are already familiar in an EUMR context⁵ and should be no more difficult to apply in this context.

7.4 Such a dual threshold would in practice help to ensure both that the links in question were sufficiently material and sufficiently competitively significant as to make it possible that a review by the Commission under the EUMR might be merited.

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 As stated in response to Question 3, we believe that, of the three systems described in the Commission's Consultation Paper, self-assessment is the only workable system. Voluntary notification would be an essential feature of that regime. This would allow parties to bring the matter to the Commission's attention to obtain certainty.

8.2 We believe that each of the parties to a transaction– the target, seller or acquirer – should be able to make such a voluntary notification to the Commission. This would help to address situations of an “unwelcome” acquisition of a minority stake (as has been the case in *Ryanair/Aer Lingus* and was the case in *ITV/BSkyB*).

⁵ See, in particular, the criteria for the applicability of the Short Form notification at Annex 2 of Regulation 802/2004.

8.3 We consider that most parties wishing to make such a notification would be aware of the risks of undertaking integration steps in advance of clearance, and would be unlikely to take such steps. In any case, as we note above, such steps are necessarily more limited in the context of mere structural links, so will generally be significantly easier to unwind. For this reason, we do not consider that a standstill obligation would be necessary or proportionate.

8.4 The Commission should guard against any presumption that notified cases were particularly likely to give rise to substantive concerns. As the Commission will be aware, the large majority of cases voluntarily notified in the UK do not give rise to any substantive competition issue, notwithstanding the parties' desire to notify them to the OFT.

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 We believe that it is very important that the Commission should be subject to a limitation period. In the absence of such a limitation period, the parties could not obtain a sufficient degree of certainty, leading to an inappropriate inhibition on legitimate commercial action.

9.2 Under the UK's voluntary regime, the Office of Fair Trading has a period (for completed mergers) of four months in which to make a notification to the Competition Commission (i.e. both to pick up the transaction and to make its assessment). That period only starts to run in circumstances where the transaction is notified to the Office of Fair Trading or is given an appropriate level of publicity such that the Office of Fair Trading and competitors or other interested parties have the opportunity to consider its implications.

9.3 We consider that this generally indicates that an unduly long time frame for limitation periods is not necessary for the effectiveness of the system. A similar period would likely be appropriate for the regime proposed by the Commission.

9.4 Where the Commission accepts a voluntary notification, or considers following an *ex officio* investigation of structural links that it should fully assess the transaction in question, the usual time frames should apply for the Commission's assessment.

10. *Other considerations*

10.1 The Consultation Paper does not address how the case referral mechanisms in Article 4(4), 4(5), 9 and 21 of the EUMR might interact with its proposals – particularly those not based on the notification scheme⁶.

10.2 As explained above, we consider that the only proportionate and workable mechanism would be a self-assessment mechanism, combined with a voluntary notification mechanism. In such a model, we do not consider that there would be any place for any of the case referral mechanisms noted above (although they would continue, of course, to apply to cases where the decisive influence threshold was met and notification was mandatory).

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⁶ We recognise that the case referral mechanisms are themselves subject to consultation on reform as part of the same Consultation Paper.