EUROPEAN COMPETITION LAWYERS FORUM

RESPONSE TO EUROPEAN COMMISSION PROPOSALS TO AMEND THE MERGER REGULATION IN RELATION TO MINORITY SHAREHOLDINGS AND CASE REFERRALS

I. INTRODUCTION

1. The European Competition Lawyers Forum (***ECLF***) welcomes the opportunity to respond to the proposals to amend the EU Merger Regulation (***EUMR***) so as to (i) give the European Commission jurisdiction to review certain non-controlling minority stakes; and (ii) alter the procedure for case referrals between the Commission and Member States, as set out in the Commission's white paper, *Towards More Effective EU Merger Control* (the ***White Paper***), and accompanying Commission staff working document (the ***Staff Working Paper***), both dated 9 July 2014.

2. This response has been compiled by the ECLF Working Group on the proposals regarding the review of minority stakes and case referrals (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 provides both comments on various aspects of the Commission's proposals with regard to the review of minority stakes and case referrals, and answers to the specific questions raised in the Staff Working Paper.

II. SUMMARY

A. Minority stakes

4. We agree with the three principles set out at para. 42 of the White Paper that a system for assessing acquisitions of non-controlling minority shareholdings should: capture potentially anti-competitive acquisitions; avoid unnecessary and disproportionate burdens; and fit with the EU and national merger regimes currently in place. However, we are concerned that the current proposals would not achieve these aims.

5. In particular, while we recognise that there may be exceptional situations where an acquisition of a minority shareholding may raise competition concerns, the extension of the Commission's powers to give it the ability to review minority shareholdings is disproportionate to the risk of potential harm to competition that such structural links can pose. We question whether there really are sufficient minority shareholding transactions giving rise to an SIEC warranting intervention, such as to justify the significant additional burden on businesses – whichever option is chosen.

6. Even assuming the existence of a "sufficient" number of such transactions, this alone would not be enough to justify the proposed extension of jurisdiction, since the possibility of using Article 101 and 102 remains largely untested.[1]

7. The theories of harm outlined are not all convincing. For example, the description of the risk of input foreclosure (may be "more likely", Staff Working Paper, para 59) disregards the fact that the minority shareholder does not have control of the target company and hence cannot control its supply decisions. The one example mentioned in the Staff Working Paper (IPIC/MAN) concerned the acquisition of a 30% stake with additional rights which created "decisive influence" according to the decision and was therefore caught by the existing regime.

8. Without prejudice to the general comments above, if the scope of EU merger control is to be extended to certain minority shareholding transactions, we are disappointed that the Commission has not opted for a voluntary, self-assessment system. We believe that such a regime would be the most appropriate approach, and in particular that it would come closer to achieving the aims set out in the White Paper and referred to above. We see no reason why a voluntary system would not have been adequate to deal with past cases where the Commission has suggested there was a need for intervention.

9. We are also particularly concerned that the current proposals would capture too large a class of acquisitions and create legal uncertainty as regards jurisdiction between the Member States and the Commission and as regards the requirement to file a notice. Should the Commission proceed with its proposals, it would (at least) be necessary to make amendments to account for these factors.

10. Our more detailed comments on the proposals are set out below.

B. Case referrals

11. We support the Commission's objective to make the current procedures for case referrals more effective in the future and agree with some of the proposals set out in the White Paper. The proposed amendments to Article 4(4), for example, should encourage parties to make referrals in appropriate cases. The abolition of the Form RS should also in principle encourage more Article 4(5) requests. However, the Commission also needs to consider and respond to the risk that parties may expend time and effort preparing the Form CO and engaging with the Commission on substance only to then have to make national filings if a request is vetoed.

---

[1] The Commission argues that there might be "conceptual difficulties" in determining "whether there is an agreement" (Staff Working Paper, para. 62). The existence of an agreement is not in doubt in this case, as there is a share purchase agreement (including where an acquisition is through a stock exchange). That is precisely how the Commission used to tackle anti-competitive mergers before the introduction of the ECMR in 1989. The statement that "the Commission would still have to determine whether such agreement would have the object or effect of restricting competition" does not explain why this basic requirement for the application of Article 101 is ill-suited to the acquisition of minority shareholdings.

12. However, we also consider that some of the proposals in relation to Article 22 and 9 need further consideration. Whilst we agree that where one Member State opposes a referral, the Commission should renounce jurisdiction and agree that only those Member States with competence under their national law to review a transaction should be able to request or veto a referral, we disagree that where the Commission accepts a referral request it should have jurisdiction over the entire EEA. We are also particularly concerned that the period during which national deadlines can be suspended may be significantly longer than is currently the case, in circumstances where the case may ultimately end up being reviewed at the national level. Finally, with respect to Article 9, we do not agree that where the Commission has initiated Phase II proceedings, the 65-working day deadline should run from the start of Phase II proceedings instead of the date of notification.

13. Our more detailed comments on the proposals are set out below.

III. ECLF'S COMMENTS ON THE COMMISSION'S PROPOSALS

A. Minority stakes

14. We discuss below the presumption of a "competitively significant link", jurisdictional issues, procedure and other matters including the suspension and limitation periods.

*Presumption of a "competitively significant link" (**CSL**)*

15. We recognise the efforts to limit the review of minority acquisitions to those which could raise competition concerns. We understand the reasoning behind the Commission's proposal to limit its jurisdiction to undertakings that are "competitors" or have "vertical" links, but we are concerned that it will create a considerable burden of work, and that it will in fact often be impossible for investors to carry out this type of assessment for all acquisitions over 5% given that investors will have little or no access to information on the activities of the companies in which they acquire minority shareholdings.

16. The proposal to target transactions which create a CSL also falls short of the kind of bright-line test which is necessary in the context of a mandatory suspensory regime or in the allocation of jurisdiction under the "one-stop-shop" principle. The current proposals include a significant element of subjective interpretation which is likely to create legal uncertainty for parties, both in respect of (a) allocation of jurisdiction as between the Commission and Member States and (b) whether an information notice has to be filed. It is important to remedy this to ensure that reliable self-assessment is possible and to avoid unnecessary precautionary filings of notices or uncertainty as to jurisdiction.

17. We therefore suggest that the concept of a "CSL" should be abandoned as a jurisdictional test and be replaced with clear objective criteria.

18. If, however, the Commission does include the concept of "competitor" in the jurisdictional criteria, it will be essential to clarify what relationship the concept covers. In particular, the Commission should clarify that it applies only to actual

and not to potential competition. Indeed, including potential competition would introduce significant legal uncertainty in the new regime, as it is difficult to assess whether a company can realistically enter a given market and, if so, whether this can be done in a sufficiently short time. Further, an acquirer of a minority interest will not typically have any insights into the intentions of the target to enter new markets – in particular for acquisitions on stock exchanges. It should also be recognised (and accounted for) that following acquisition competitive links may arise that were not reasonably foreseeable at the time of acquisition.

19. Similarly, if the Commission does include the concept of "vertical" links in the jurisdictional test, we are also concerned that this concept risks being over-inclusive. It is apparently intended that the test would be met if a shareholding is acquired in a "directly vertically-related" company (Staff Working Paper, para 88). This vertical relation criterion is also used in the traditional merger control context to determine relevant and affected markets. Although the Commission has clarified that only an "important input" to downstream products / services creates a vertical relationship,[2] its practice still shows a broad interpretation of what "important input" means. Applied to the context of the acquisition of minority shareholdings, this broad interpretation of a vertical relationship would create a significant burden for companies. Indeed, in many cases would-be investors will simply lack access to the information required to perform the analysis.

20. We also note that these issues of definition of a CSL have potentially a particularly acute impact on private equity and venture capital transactions. Ascertaining whether a particular acquisition target has any competitive overlaps with the portfolio of companies of a private equity or venture capital firm is already a major challenge. Given such investors' typical governance and incentive structures, portfolio companies held in different funds are not generally prone to coordinate their behaviour, whether they are competitors or not. Forcing firms to go through the overlap analysis not only for companies over which they propose to acquire control, but potentially also for any company in which they propose to acquire a stake of as little as 5% (in case they want some management oversight) and companies in which they already hold such stakes would create burdens that would, at a minimum, be disproportionate, and in many cases would simply be impossible to meet owing to the lack of information. Beyond the burden of assessing transactions, the proposed system would generate – equally unduly – delays and execution risks in respect of acquisitions of minority positions. The negative impact of these issues would be particularly severe in the context of venture capital transactions, where small start-up companies with very limited resources go through multiple funding rounds under very short timetables.

21. There are also potential difficulties in identifying whether "additional factors" are present (i.e., which are necessary if the acquisition of a 5-20% stake is to be defined as a CSL). The test for "decisive influence" turns (in the large majority of cases) on objective factors such as the ability to nominate a member to a board or

[2] Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (2013/C 366/04); see footnote 10.

the ability to veto strategic decisions. By contrast, the notions of ability to "exert influence" or "obtain access to sensitive information" are too subjective and not suitable as bright line filing requirement tests. Furthermore, a minority acquirer may not have access to the necessary information, such as that on previous voting patterns. It is important that these factors be both limited in number and restricted to those that can be clearly and objectively defined.

22. A further area which we believe should be reviewed is the threshold at which a shareholding is considered competitively significant, whether on its own (at around 20%) or in combination with additional factors (5%). We maintain that only an acquisition of 25% and above should constitute a CSL. Alternatively, if the Commission decides that it should be able to review an acquisition of a shareholding of less than 25% in certain circumstances, a lower threshold of 15% could be adopted instead. It will be essential for the Commission to clarify exactly what constitute "additional factors" if it decides to review acquisitions of less than 25% shareholdings.

Jurisdiction to determine a CSL

23. The proposal appears to be that the acquirer is required to self-assess (Staff Working Paper, para 102). One of the reasons that clarity as to the concept of a CSL is important is to avoid jurisdictional disputes where, for example, the acquirer self-assesses that there is no CSL but the Commission disagrees. Such disputes are unusual in the context of the EUMR as it currently applies due to the "bright line" rules that apply to the issue of jurisdiction. It is imperative that any extension of Commission jurisdiction under the EUMR maintains a similarly high level of clarity as to the boundaries of the Commission's jurisdiction.

24. The jurisdictional question is particularly critical in relation to potential penalties. It is important that bona fide mistakes should not be fined if the Commission disagrees. Otherwise there is a high risk of precautionary filings which would run counter to the aim of avoiding unnecessary burdens.

Procedure

25. We believe that the proposals should include a test for when the Commission may request parties that have provided an information notice to submit a full notification. The proposals as they stand leave it entirely at the case team and its hierarchy's discretion to decide whether a full notification is due.

26. We agree with the proposal to allow the parties to voluntarily submit a full notification to the Commission (White Paper, para 49). However, we see a risk of numerous precautionary notifications, especially if the uncertainties discussed above are not resolved. We would also like to see it made clear that voluntary pre-notification contacts, both for information notices and full filings, will be possible.

27. If there is to be a 15-working day suspension period (see below for our views on this) the Commission should be limited to issuing "simple" requests for information, as required under Article 11(2) EUMR. There should be no power to

request information by decision, as under Article 11(3) EUMR, where providing incomplete information can result in fines (Article 14(1)(c) EUMR).

28. We would also support best practices, which would provide for the Commission to inform parties in advance during the 15-day period that it wishes to open an investigation. There should be no requirement for a case team allocation request after the 15 working days. The acquirer should be directly able to send the draft notification.

Other matters

29. Turnover thresholds: We agree in principle with the proposal that the same turnover thresholds should apply when assessing the acquisition of a non-controlling minority shareholding as when assessing an acquisition of control (footnote 36 of the White Paper), as laid down in Article 1 EUMR. However, in practice it is unrealistic to expect that the acquirer of a minority interest would be able to obtain detailed information about the "target's" turnover by EU Member State, especially as the target itself may have holdings that are relevant for the calculation of its turnover, but which are not known to external parties. The target may also be prevented, as a matter of law, from sharing with the acquirer the information necessary to determine whether the EUMR thresholds are satisfied. As a result, many investors are unlikely to be in a position to make informed assessments in this regard.

30. Undertakings concerned: We also note that the definition of "undertaking concerned" should be reviewed in connection with any review of the turnover thresholds. For minority, non-controlling investments, we propose that the undertakings concerned should be limited to the investor and the target (and their respective control groups); it would typically be impossible for the would-be investor to obtain turnover information on other shareholders holding 5% or greater stakes in the target.

31. Staggered acquisitions: We agree with the Commission's favoured option (Staff Working Paper, para. 111) that an information notice will need to be submitted only the first time that a CSL is established. Subsequent increases would therefore not trigger a requirement for further information notices.

32. 15-day waiting period: In our view, no suspension period is appropriate or necessary in the case of minority shareholdings. The waiting period concept seems to have been imported from the traditional merger control regime where it is, at least in part, justified by the fact that acquisitions of control (and particularly of exclusive control) can be very difficult to unwind (for example teams may have been reshuffled, or synergies may have been implemented). Minority shareholdings, on the other hand, are considerably easier to undo, as this essentially involves sale of the holding.

33. Suspension is also not necessary to prevent anti-competitive harm during the review, since this can be dealt with through the interim measures mentioned in para. 52 of the White Paper. We also note that the requirement to suspend implementation of the transaction for 15 working days is liable to (at least be seen to) undermine firms' ability to keep their investment strategies secret. It also

means that such transactions could be suspended for longer than normal EUMR cases (i.e., 15 working days plus the usual waiting periods).

34. To the extent that a waiting period is incorporated into the system, we agree with the proposal to modify Article 7(2) EUMR (Staff Working Paper, para 107). However, this will not alleviate the burden for the many acquisitions that are not made on stock exchanges. Further, in any event, stakebuilders will still bear the burden of considering whether they need to file a notice.

35. Limitation period (proposal of 4-6 months from submission of notice): To the extent that a waiting period is incorporated into the system, we believe that there should be no further limitation period applicable to those acquisitions that have been notified. If the 15-day period is considered too short for competitors or customers to come forward with complaints, then the period could possibly be extended to one month. However, after the expiry of such period the Commission should not be allowed to review notified transactions. A limitation period of 4-6 months is wholly excessive, especially in light of the proposed powers to issue interim decisions. The Commission's comparison with the UK system is without merit since the UK system is voluntary and the authority needs a reasonable period to learn about the existence of a transaction.

36. A limitation period exceeding one month could in our view only be justified for acquisitions which are self-assessed as not giving rise to a CSL (presumably because the proposal assumes that the Commission would not have jurisdiction over such cases), and where accordingly the acquirer has not submitted an information notice. However, the proposals only cover limitation periods for notified transactions. In the absence of a limitation period for non-notified transactions, parties may tend to submit information notices in all cases (where the turnover thresholds are met) in the interests of legal certainty. To avoid this, it might be provided, for example, that: (i) if the acquisition has been made public, a limitation period of not more than 3 months from the date of publication should apply, and (ii) if the acquisition has not been made public, the limitation period could be longer; but should not exceed 1 year from the implementation of the transaction (i.e., closing).

37. Proposed powers to unwind transactions: We consider that there is a need for consistency between the rules relating to concentrations and the rules governing the acquisition of minority interests. For instance, it would appear to be inconsistent to require a divestment below the threshold of the safe harbour for the acquisition of minority interests.

38. Practical implementation: We consider it important that the EUMR reflects a clear division of jurisdiction in line with the 'one-stop-shop'. Any ambiguities in this respect (per our comments above) cannot be adequately dealt with by way of Commission implementing rules (Staff Working Paper, para 97).

Responses to the Commission's individual questions

(a) Regarding the concerns that a competence to control the acquisition of minority shareholdings should not inhibit restructuring transactions and the liquidity of equity markets, do you consider that the suggestions put

forward in the White Paper are sufficient to alleviate this concern? Please take into account that the transactions would either not be covered by the Commission's competence or not be subject to the 15 days waiting period.

39. We propose that Article 3(5) EUMR be amended so that minority stakes are excluded in the same way as concentrations (e.g., when financial institutions hold securities on a temporary basis in the normal course of business).

40. Given the very low safe harbour threshold (5%), we are concerned that the mandatory assessment (and potential notice and notification) of minority acquisitions will add regulatory burdens and uncertainty to numerous acquisitions. This may have the effect of stifling liquidity on equity markets. Equity investors with large portfolios of minority stakes may well be deterred from investing due to the need to conduct a CSL analysis. Similarly, venture capital investors would likely be deterred because the costs and potential for delay would be inconsistent with the requirements of this industry, where start-up companies with limited resources typically raise small amounts of money in multiple financing rounds, each of which would trigger the need for a new CSL review under the Commission's proposal. This is particularly disproportionate as this class of investor is amongst the least likely to give rise to competition law concerns.

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

41. While in principle we would welcome any such mechanisms, there is a clear risk that 'exceptions' would give rise to difficult issues of interpretation. We are therefore doubtful that specific mechanisms could remedy the burden associated with the need to assess all acquisitions above 5% for potential notification. It is (inter alia) for this reason that we consider it necessary to raise the safe harbour to 25% and to make it clear that, even with an investment of over 25%, an information notice would be required only where clear and objective criteria are met (i.e., not based on the existence of horizontal or vertical links).

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

42. We recognise the inherent tension that exists between the objectives of (i) limiting the administrative burden, and (ii) providing sufficient information to enable a meaningful *prima facie* review.

43. It is proposed that the information notice "would have to contain some essential market information about the parties and their main competitors or internal documents that allow for an initial competitive assessment" (Staff Working Document, para 104). While we recognise that the Commission will need sufficient information in order to decide whether a case merits further investigation, the administrative burden on companies involved should be kept to

a minimum and set out very precisely ("some essential market information" is too vague).

44. We do not agree that a requirement to provide internal documents would be appropriate or sufficient. Internal documents relating to decision-making for minority (non-controlling) stakes cannot be expected to systematically contain the kind of information which would be relevant to a review under the EUMR. We note that in practice, under the requirements of the US system, most acquirers of minority shareholdings submit no or only very few internal documents and no documents that contain information on market structure and market dynamics.

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

45. In light of the many uncertainties identified in this response, we consider that the self-assessment of cases and determination of jurisdiction would likely involve significant time and resources for companies.

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

46. As regards the role of NCAs and the application of Article 9 EUMR (referrals to Member States), we consider that there is no need for Article 9 to apply during the 15-day waiting period. It would be sufficient for Article 9 to apply if the Commission would decide to investigate a case over which it has jurisdiction.

47. In any event, referral should be possible only to Member States with competence under national law to review such minority interests.

B. Case referrals

Article 4(4): pre-notification referrals to one or more Member States

48. We support the proposal to abolish the requirement in Article 4(4) to demonstrate that a proposed concentration "may significantly affect competition in a market within a Member State" and to replace this with a requirement to demonstrate that a proposed concentration is likely primarily to impact a distinct market in the particular Member State(s) at which the request for referral is directed.

49. The current test acts as a deterrent to requesting referrals back to an NCA as it effectively puts the parties in a position where they have to admit that the case raises substantive competition issues in order to make a referral request. Amending the language in the way proposed should encourage parties to make referrals in appropriate cases (namely where the centre of gravity of a case is in a particular Member State).

Article 4(5): pre-notification referrals to the Commission

50. We agree that the current two-stage process (submission of a Form RS followed by a Form CO) is onerous and time-consuming and, in some cases, deters parties

from making requests for a referral up to the Commission where it would be appropriate to do so. We therefore welcome in principle the proposal to abolish the requirement for a Form RS so that parties would instead notify transactions directly to the Commission using a Form CO which would be forwarded to Member States who would (if competent) have a limited period in which object to the request.

51. This approach does raise the risk, however, that the notifying parties may expend time and effort preparing a Form CO and engaging with the Commission, only to then be required to make national filings if a Member State exercises its veto. Although Member States have rarely exercised their veto in the past, this could change if the number of requests increases as a result of the abolition of the Form RS.

52. In order to mitigate this risk, we would suggest shortening the period during which Member States can exercise their veto from 15 working days to 10 working days. It would also be helpful if the members of the ECN could work together, perhaps by agreeing a set of general principles, so that the right of veto is only exercised in appropriate cases (such as where the centre of gravity is in the opposing Member State and the transaction appears to give rise to material competition issues).

53. In addition to the burden of the current two-step process, there may be a number of reasons why parties decide to make three or more national filings rather than seek a 4(5) reference.

54. In some cases there may be good reasons to make multiple national filings rather than notifying the Commission, such as where the geographic scope of the relevant markets is national. The fact that multiple national filings are made for some transactions should not therefore be seen as necessarily problematic.

55. However, there may be cases that would be good candidates for a reference, but where the parties are deterred from making a request because the Commission would review the effects of the transaction across the entire EEA substantially increasing the burden on the merging parties in terms of data requirements when compared to filing in three or more Member States.

56. We would therefore recommend that the Commission's review be limited to examining the effects of a transaction in the territories of those Member States that have jurisdiction to review the transaction under national law. This would encourage more Article 4(5) referrals.

57. As an alternative, the Commission could consider adjusting the data requirements for 4(5) mergers so that notifying parties are not required to provide data on a national basis (for example on sales volumes and market shares) for Member States in which the NCAs do not have jurisdiction under national law, unless the data is specifically requested by the Commission. Requests should be limited to cases where the data is necessary to assess cross-border competition issues.

Article 22: post-notification referrals to the Commission

58. Article 22 was introduced at a time when a number of Member States did not have national merger control regimes. Its main purpose was therefore to enable those Member States to refer potentially anti-competitive mergers to the Commission for review.

59. In circumstances where all Member States have a national merger control regime, with the sole exception of Luxembourg (which has never made an Article 22 referral request or joined a request), it is not clear to the ECLF that there continues to be a rationale for allowing Member States to refer mergers under Article 22. We would therefore encourage the Commission to consider whether it is necessary to retain Article 22.

60. To the extent, however, that Article 22 is retained, we have a number of comments regarding the Commission's proposals:

    (i) We agree that where one Member State has exercised its right to oppose a referral, the Commission should renounce jurisdiction. This will avoid a patchwork approach where the Commission reviews part of a transaction alongside review by one or more NCAs;

    (ii) We also agree that only those Member States with competence under their national law to review the transaction should be able to request or veto a referral, as the current system where any Member State can request a referral causes significant uncertainty for merging parties;

    (iii) We disagree, however, that where the Commission accepts a referral request it should have jurisdiction over the entire EEA. The Commission should not be able to examine the impact of the transaction in the territories of Member States that are not competent to review the transaction under national law unless this is necessary to assess the effect of the transaction in the Member States that are competent (for example where the relevant geographic markets are EEA-wide).

61. From a procedural perspective, the Commission should ensure that Article 22 referral requests are made as early as possible after a merger is notified to an NCA and that case allocation is decided as quickly as possible once a referral request is made, given the uncertainty that Article 22 requests create for notifying parties after time and expense has been dedicated to making one or more national filings.

62. In principle, we support the Commission's objective to reduce late referrals by NCAs under Article 22. However, we are concerned that the mechanism proposed may cause significant delays and uncertainty for merging parties.

63. For example, we are concerned that the lower threshold for triggering a suspension of national deadlines (i.e. that an NCA is "considering" making a referral request because on a "preliminary basis" the Commission seems to be the more appropriate authority) will result in national deadlines being suspended more frequently in circumstances where the case ultimately ends up being reviewed by NCAs and not the Commission.

64. We are also concerned that the period during which national deadlines can be suspended may be significantly longer than is currently the case, again in circumstances where the case may ultimately end up being reviewed at the national level.

65. Under the current approach, national deadlines can be suspended for a maximum period of 25 working days from the date on which an NCA makes a referral request (i.e. for an initial 15 working day period during which other Member States must decide whether to join the request and a further 10 working day period during which the Commission must decide whether to accept the request).

66. By contrast, under the proposed approach, national deadlines could be suspended for up to 40 working days. This would include an initial 15 working day period following notification that an NCA is considering making a referral and during which competent Member States would have to decide whether to request a referral, a further 15 working day period during which competent Member States would have to decide whether to oppose the request and a final 10 working day period during which the Commission would have to decide whether to accept the request.

67. We agree that it is undesirable for NCAs to make late referral requests. However, this risk should be more manageable in circumstances where only those Member States with competence under their national law to review a transaction are able to request or veto a referral. That being the case, we consider that the current procedure is preferable to the approach that has been proposed in the White Paper.

Article 9: post-notification referrals to one or more Member States

68. We disagree with the Commission's proposal that that the 65 working day deadline should run from the start of Phase II proceedings, instead of the date of notification. The current timetable for making an Article 9 referral already causes merging parties significant uncertainty and it is unnecessary to give the Commission more time in which to reach a decision on whether to refer the case or to adopt a statement of objections.

C. Miscellaneous

69. We support the following reforms proposed by the Commission under this heading:

    (i) To take the creation of a full-function joint venture, located and operating outside of the EEA which does not have any effect on EEA markets, outside the scope of the EUMR even if the turnover thresholds in Article 1 are met. However, to ensure that this reform does not simply lead to these transactions triggering multiple national filings instead, we would encourage the Commission to work with Member States to ensure a harmonised approach (we note, for example, that full-function joint ventures, located and operating outside of the EEA may currently trigger filings under the national merger control regimes in Germany, Austria and Poland where the thresholds for an EU filing are not met). If this is not possible, it would be useful to retain the option for parties to notify joint

ventures under the EUMR where they would otherwise trigger national filing requirements;

(ii) To give the Commission the power to exempt from notification certain categories of transaction that generally do not give rise to competition concerns, such as those that do not involve any horizontal or vertical relationships between the merging undertakings;

(iii) To amend Article 4(1) to provide more flexibility for notifying mergers that are executed through share acquisitions on a stock exchange without a public takeover bid, to allow parties to notify before the level of shareholding required to exercise de facto control is acquired; and

(iv) To amend Article 5(2), which treats transactions occurring between the same undertakings and within a two-year period as a single concentration, so that only cases of "real" circumvention, where parties have deliberately sought to stagger transactions to avoid merger control scrutiny, are captured.

70. We disagree, however, with the Commission's proposal to increase the maximum number of working days by which the Phase II deadline may be extended under Article 10(3) from, for example, 20 to 30 working days. Although we recognise that such an extension would be granted either at the request of the parties or through agreement between the parties and the Commission, in practice there is a significant risk that extensions of 30 days will become routine. The maximum period for a Phase II review is already sufficiently long to enable the Commission to carry out a full review.

IV. CONCLUSION

71. Following this initial response to its proposals, we would welcome a dialogue with the Commission to further the discussion of possible amendments to the EUMR in order to determine on an appropriate and proportionate approach to minority shareholdings and to make the current procedures for case referrals more effective in the future.