



Chambre de commerce internationale  
*L'organisation mondiale des entreprises*

**Discussion  
Paper**



Prepared by the ICC Commission on  
**Competition**

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# **ICC response to the European Commission Public Consultation: "Towards More Effective EU Merger Control"**

## **Highlights**

- Comments on minority interests
- Comments on case referrals
- Miscellaneous questions

## Executive Summary

### As regards minority interests:

- ICC does not believe that the Consultation sets out evidence and arguments that support the regulation of minority interests in the manner proposed by the Commission. Notably, the Consultation does not cite a single case in which an implemented structural link has been shown to lead to price rises and competitive harm. Further, there is little in the economic theories discussed in the Consultation that address the question of whether the relevant scenarios of harm frequently occur in commercial reality, or whether they apply to levels of influence falling short of decisive influence – for example, material influence. The experience of ICC and its members is that they do not. At the time the Merger Regulation was introduced, it was possible to draw upon a large volume of historical empirical and anecdotal evidence that price rises may result from acquisitions of “full” control. Similar empirical evidence of the harmful effects of minority shareholdings should be identified before the Commission extends the scope of the Merger Regulation in a manner which might harm incentives to invest in such minority shareholdings or introduces deadweight compliance costs that outweigh the theoretical harm to be avoided. A basis for such a study might be found in the 91 cases the Commission identifies as “potentially meriting scrutiny”.
- Any anti-competitive effects that are shown to flow from structural links can be addressed through existing enforcement tools, such as Article 101 of the Treaty on the Functioning of the European Union (“**Article 101**”), application of the existing scope of the Merger Regulation, or national merger control regimes.
- Should the Commission anyway decide to extend the scope of the Merger Regulation to structural links, we would strongly recommend adoption of the self-assessment system. This system would avoid placing a burden on notifying parties disproportionate to the competition risks they pose, and would allow the framing of jurisdictional criteria so as to ensure that only the relevant structural links (such as between competitors or vertically-related undertakings) are caught. Further, it would be unnecessary to impose filing obligations, liability for penalties and standstill obligations, as the self-assessment should ensure that potentially harmful transactions are brought to the Commission’s attention, and because structural links can be easily unwound.
- Clear jurisdictional concepts and thresholds, easy to apply and linked to the relevant theories of harm, would be required to support any extension of the Merger Regulation. The structural link would have to be defined by reference to, firstly, a material financial interest in the target’s profits, and secondly, material influence over the target, by way of the ability to veto one or more of a clearly defined set of corporate decisions falling short of decisive influence – for instance, decisions relating to major investments, mergers, acquisitions or JVs. We would also suggest introducing a jurisdictional safe harbour based on the (horizontal or vertical) competitive relationship between the acquirer and the target, requiring the acquirer to exercise decisive influence over the relevant (horizontally or vertically) related business. Any extension of the Merger Regulation should be designed to avoid any adverse effects on the existing regime for review of controlling interests, or on national merger control regimes.

### As regards case referrals:

- We consider that the proposed reform of the Article 4(5) referral system would bring timing and cost benefits. However, we are of the opinion that unauthorised pre-notification contacts and exchanges of information between the Commission and national authorities are neither necessary nor desirable, for a number of reasons.
- We agree that only Member States with jurisdiction over the notified transaction should be permitted to make or join a referral request under Article 22. However, we do not agree that the geographic scope of the Commission’s jurisdiction should be broadened after a referral. This would not avoid the potential problem of a patchwork approach of parallel proceedings, and would mean that further costs are wasted on unnecessary EEA-wide substantive analysis.

Serious concerns arise in relation to the proposal that national clearance decisions could become retroactively invalid following an Article 22 referral. In particular, such invalidation would lead to legal uncertainty, undermine national merger control regimes and lead to inefficiencies in transaction planning and risk management.

As regards the miscellaneous questions:

- We welcome the Commission’s attempt to identify ways in which redundant filing requirements currently arising for transactions with no conceivable nexus with the EU can be eliminated. Our response sets out a number of ways in which this might be realised.
- We also agree that the majority of the other proposed miscellaneous modifications would be appropriate, except that we do not believe Article 8(4) of the Merger Regulation should be extended to cover partially implemented transactions. The Merger Regulation’s internal consistency could be better achieved by expressly providing that parties may retain a non-controlling interest in a business that is to be divested, so long as this does not adversely affect competition, or the Commission’s ability to implement the remedies it deems 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 Although ICC recognises that this topic merits serious debate, we have not been persuaded that the evidence justifies the proposed changes put forward by the Commission in its consultation. We see no convincing arguments in favour of extending the scope of the Merger Regulation to cover the acquisition of non-controlling minority shareholdings (hereinafter, "**structural links**").
- 1.2 Broadly speaking, we have reached this conclusion for three reasons (discussed in more depth below):
- Intervention should be based on facts, rather than on theory;
  - The relevance to structural links of the economic theories considered by the Commission is not clear;
  - The Commission's existing enforcement tools are sufficient.
- 1.3 In addition, ICC, based on its global reach and experience, considers that the leading models of merger control regimes should remain stable while authorities in countries with more recent regimes are still improving their rules and learning how to use them.
- 1.4 ICC would also like to stress that the EU 2020 strategy has put forward as one of its main priority a "smart growth" based on knowledge and innovation that implies a freedom for companies to combine their knowhow and visions and that could be damaged if non-controlling links between them were submitted to a systematic and painful scrutiny.

#### Intervention should be based on facts, rather than on theory

- 1.5 The Commission's consultation does not provide evidence of there having been a single case in which the presence of a structural link has been shown to have had anti-competitive effects. The Commission does identify a number of cases in which the competition authorities have noted a potential risk of future anti-competitive effects; however, these examples do not convincingly establish that such effects would have occurred, in light of the fact that merger control decisions are generally subject to a light standard of review on appeal.<sup>1</sup> There is no justification for the Commission following the example of other national regulators who have determined the scope of their merger control regimes based on policy considerations, rather than based on the factual evidence at their disposal.
- 1.6 Similarly, the decisions under the Merger Regulation in which the Commission has identified concerns regarding anti-competitive effects deriving from structural links prove less than the Commission suggests. The passages of those decisions that discuss structural links lack any detailed economic analysis, and rely on a number of assumptions concerning the behaviour that would have arisen from the structural links concerned. It should also be noted that none of decisions concerned have been subject to review by the EU's courts.
- 1.7 The Consultation refers to only two cases in which the authority's decision followed the prior implementation of a structural link. In each of these cases (*BSkyB/ITC* and *Ryanair/Aer Lingus*), the UK's Competition Commission (the "**CC**") uncovered no evidence that the structural link had resulted in competitive harm at the time of the decision. This can be seen, in particular, from the *Ryanair/Aer Lingus* case, in which the structural link had been

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<sup>1</sup> A number of the other cases referred to in Annex II of the Consultation appear to concern transactions that would have amounted to an acquisition of decisive influence, and so would have anyway been reviewable under the Merger Regulation. The two US cases cited – *Primestar/ASkyB* and *Dairy Farmers/Southern Bell* – are examples of this.

implemented six and a half years prior to publication of the CC's decision. Throughout this period, the CC determined that competition between the two companies had in fact *increased*, and that Ryanair had not exercised its voting rights so as to prevent Aer Lingus from competing effectively, had not wielded any notable influence over other shareholders and was not in receipt of any competitively sensitive information in its capacity as a shareholder. Furthermore, there was no evidence that Aer Lingus had been competing less intensely to avoid friction with its largest shareholder, no evidence that as a result of its financial interest in Aer Lingus, Ryanair had raised its own prices on overlap routes, and no evidence indicating the existence of coordinated effects between Ryanair and Aer Lingus.<sup>2</sup>

- 1.8 An evidence-led approach requires that, absent clear evidence that structural links lead to competitive harm, or clear evidence as to the exact circumstances in which such harm might be expected to occur, the Commission must carry out further research before taking steps to regulate structural links. It is particularly important for the Commission to provide such evidence in relation to structural links, in light of the following:
- 1.8.1 The central role played by minority shareholders in the internal market. There are considerable benefits to the investments they make, including increased competition, increased liquidity, improving corporate governance, the sharing of technology and best practices, and demonstrably improved financial performance of the companies in which they invest. The risk of significant negative effects of unnecessary regulation or disincentives to regulation is clear.
- 1.8.2 Although Annex I of the Consultation states that "there is currently only limited empirical literature on the effects of structural links", Annex II goes on to note that the Commission has identified 91 transactions involving structural links "potentially meriting competition scrutiny". These transactions could form the basis for an empirical study of the economic effects of structural links. This study would help guide the Commission's approach to structural links.
- 1.8.3 Very little hard evidence of the need for regulation has been provided. The global proliferation of merger control regimes, including the EU's 1989 Merger Regulation, derives from clear and uncontroversial evidence that price rises can and do result from mergers and acquisitions of "full" control – and that this is particularly so when these transactions take place between competitors. This contrasts with the Commission's failure to adduce a single example of a case demonstrating a structural link leading to competitive harm.

The relevance to structural links of the economic theories considered by the Commission is not clear

- 1.9 While conceding the hypothetical validity of the theories of harm described in Annex II of the Consultation, we are not convinced that the anti-competitive harm associated with those theories frequently arises in relation to minority interests falling short of decisive influence. It is helpful to distinguish between three broad categories of scenario found in the economic literature on this topic.

*Corporate influence*

- 1.10 The first category of scenarios concerns the situation where the acquirer of a structural link is able to exert sufficient corporate influence over the target to induce that company to act in a manner contrary to its own interests (such as an unprofitable price rise) but which is to the benefit of the acquirer (customers move from the target to the acquirer). The key issue is therefore whether in reality the acquirer could exercise such influence, absent any legal or factual ability to veto the target's strategic commercial decisions.

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<sup>2</sup> *Ryanair / Aer Lingus merger inquiry*, Final Report (August 2013). See in particular paragraphs 4.31, 4.38, 4.40, 5.49, 7.86, 7.97(b), 7.109, 7.136, 7.148 and 7.159.

- 1.11 This question is best answered by reference to empirical evidence – accordingly, it is appropriate that the Consultation does not refer to any economic literature addressing the topic.<sup>3</sup> Annex I does state that material influence might be conferred "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". However, no evidence is provided to support this statement. Further, Annex I goes on to suggest that this scenario "may already be covered by the existing merger regulation to the extent that the legal criterion of "decisive influence" is met".
- 1.12 Absent supporting empirical evidence, there is no valid basis for assuming that the acquirer could induce the target to act contrary to its own interests based exclusively on minority shareholder protections in relation to the target's decision-making, or on the possibility of reaching agreement with other shareholders. We are not aware of any case where a minority shareholder has been able to dictate the commercial strategy of a company merely by exercising minority protection rights. Other shareholders are generally highly sophisticated investors, very knowledgeable about the sectors in which they operate. They are highly unlikely to be persuaded by a minority shareholder with conflicting commercial interests to support a commercial strategy that harms the target's ability to compete, thereby reducing the value of their own investments in the target.

#### *Information Exchange*

- 1.13 The second category of scenarios concerns the increased ability of a minority shareholder to access its competitor's sensitive commercial information. In our opinion, there is no justification for distinguishing between exchanges of information according to the corporate context (that is, whether or not there is a structural link), as such an approach would lead to confusion and legal uncertainty as to which set of rules are applicable to a particular situation. Experience shows that companies, shareholders, directors and their respective business advisers are capable of self-assessing whether commercially sensitive information should be provided or received, given their Article 101 obligations – and whether they should recuse themselves from the decision-making process. The Horizontal Guidelines are sufficient and already deal with information exchanges. Some practical solutions like setting up barriers of information would often suffice to address the problems.
- 1.14 There is a further risk of unintended negative consequences arising from regulating information exchange specifically in the context of structural links. Flows of competitively sensitive information between the holder of a structural link and the target would ordinarily fall under Article 101. If the Commission's investigative powers under Regulation 1/2003 were to be disapplied to acquisitions of structural links (as is the case for acquisitions of decisive influence), anti-competitive exchanges would be effectively legitimised unless and until the Commission intervened under the Merger Regulation so as to secure remedies limiting such exchanges.

#### *Passive financial interests*

- 1.15 The third category of scenarios concern the acquisition of a purely passive financial interest in a competitor might incentivise the acquirer to raise its own prices. This is because it would

<sup>3</sup> Of the various papers referred to in Section 3.2 of Annex I ("structural links that confer some degree of influence") only Salop and O'Brien touch on this question (Salop & O'Brien, "Competitive Effects of Partial Ownership: Financial Interest and Corporate Control", *Antitrust Law Journal*, Vol. 67, pp 559-614 (2000)). They conclude, however, that "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 advances their interests while conflicting with the best interests of the company." Moreover, the two scenarios described in that paper and referred to in Annex I 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 recognises that company laws and competition rules act to prevent such influence, particularly for public companies. The other – the "proportional control" scenario – is a pure assumption that is employed for the purpose of discussing its economic effects. The paper offers no evidence as to when or why such a scenario would arise, other than to note that it is more likely to be relevant for a joint venture between competitors.

then be able to benefit from a proportion of the profits that are consequently lost to the competitor in which it has acquired an interest. This possibility arises regardless of the degree of influence the acquirer exercises over the company in which it has acquired an interest. Analogous scenarios are contemplated in relation to acquisitions of a minority interest between companies with a structural linkage. Each of these scenarios presumes that the acquirer will act in a manner that is *prima facie* contrary to its own interests – such as increasing prices to an unprofitable level, or implanting an unprofitable foreclosure of customers – in the expectation that the foregone profits will be recouped by way of its minority interest in the target.

- 1.16 However, we believe that in commercial reality, this approach would very rarely be implemented due to the attendant risks. These risks include the potential inefficiency or incompetence of the target (particularly as the acquirer's management exercises no significant control), imperfect information on the target, unexpected movements in the target's share price and the possibility that the overlap between the two companies' activities concerns only a small or uncertain proportion of the target's total production.<sup>4</sup> We are unaware of any cases where a transaction has been motivated by the opportunity to pursue such a strategy. In addition, any gains accruing to the minority stake would only accrue in the future, whereas the lost sales would be felt immediately.

#### The Commission's existing enforcement tools are sufficient

- 1.17 The notions of control and decisive influence are already broadly used by the Commission, as shown by the relevant points of the Consolidated Jurisdictional Notice. The Commission is also already able to consider some structural links falling short of decisive influence under the Merger Regulation, even if the holder of the structural link is not a party to the notified concentration.<sup>5</sup> This is also possible under certain national merger control regimes, as in Austria, Germany and the UK, as well as under Article 101.<sup>6</sup> Therefore even if it were the case that structural links were to give rise to significant competition concerns, there is no need for additional enforcement tools to address those concerns.
- 1.18 The Consultation only identifies a single gap in the scope of Article 101, stating: "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". This is not a compelling reason for regulatory intervention. The difficulty of identifying whether there is an agreement arises only in a very small proportion of companies in the EU – and this small group of companies already receives significant protection against undue influence of minority shareholders. Agreements are much easier to identify in the context of acquisitions of interests in non-listed companies.<sup>7</sup>

#### It is important to take into account the influence of EU competition policies over other jurisdictions

- 1.19 In the last years, numerous countries in the world have put in place merger control regulations that are often inspired by the EU's regime. Many jurisdictions are still learning how to use their new powers. Some of those regimes are still short of complying with the best practices as recommended by the ICN. We consider that from a global perspective, it is important to

<sup>4</sup> However, we do note the existence 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)).

<sup>5</sup> *Newscorp/Telepiu*

<sup>6</sup> 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, while 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".

<sup>7</sup> As noted by the Court of Justice – see for example Cases 142/84 and 156/84, *British American Tobacco Company Limited and RJ Reynolds Industries Inc. v Commission* [1987] ECR 4487

stabilise the leading models (the EU regime being one of them) in order to let all the other jurisdictions improve and master their own regimes. Introducing a new tool at EU level would very likely incite many other countries to consider such a change in the short term, which would undermine this "improve and master" effort that ICC strongly advocates. Moreover, the EU is rightly viewed as a role model for many jurisdictions developing relatively new competition laws. To introduce a significant policy shift based on little to no empirical evidence sends completely the wrong message to the global antitrust community.

**(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 Given the flexibility of the SIEC test and the fact that it permits detailed factual analysis of the mechanisms by which a holder of a non-controlling interest may be able to exert influence over a target in a particular case, there is no good reason to apply a different substantive test in the context of structural links.
- 2.2 Should the Commission decide to extend the Merger Regulation to structural links, it must also produce accompanying guidance explaining how the SIEC assessment would be implemented in relation to these minority interests. It would be wrong to impose upon companies the risk of being subjected to onerous remedies, such as divestments, without also providing information on the circumstances in which these risks apply. It is therefore of some concern that the Consultation suggests that guidance in relation to a transparency or self-assessment system might not be issued until "a later stage".

**(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 As we have explained above, we do not believe that the competition issues related to structural links are already adequately dealt with by the existing framework. Should the Commission anyway proceed with such an extension, we consider that the self-assessment system, with no automatic standstill obligation, would be the only appropriate manner of doing so, for the following reasons:

- 3.1.1 Each of the notification and transparency systems considered would render parties to the transaction liable to penalties for failure to notify or give notice. Such penalties require very precise, objective filing criteria, possibly preventing the Commission from focussing the burden of compliance exclusively on interests that are capable of giving rise to competitive harm – including interests arising between (horizontally or vertically) related companies.
- 3.1.2 Based on the Commission's analysis of the Zephyr database, it appears that few (if any) transactions would merit scrutiny. Even amongst those few transactions,



economic theory implies that there is considerably less potential for harm than there is for full mergers. A very large number of structural links are acquired each year, due for example to acquisitions by banks in the course of restructurings, acquisition of companies by consortia, and passive investments made for the purposes of financial investment. It would be highly disproportionate to impose filing obligations and liability for penalties on such a large number of transactions in order to catch the handful of problematic deals. The notification and transparency systems would also give rise to costs for parties to the transaction – such as in determining whether filing obligations have been met and preparing the notification or notice.<sup>8</sup>

- 3.1.3 Unwinding a structural link is straightforward, as such a link does not normally involve an integration of the parties' businesses even though the parties themselves may suffer losses, such as financial loss if the value of the shares which must be sold has decreased or the breakup of a business partnership which may no longer be contractually binding if the structural link is unwound. Thus, should harm to competition result from a completed transaction, it could be eliminated by divestment or restructuring. This vitiates the need to review such transactions prior to their implementation.
- 3.1.4 It would not be necessary to impose a mandatory filing or notice requirement – self-assessment will ensure that potentially harmful transactions are brought to the Commission's attention, for the following reasons:
  - (a) The risk of being subject to costly divestments upon having bound themselves with financial commitments would provide a substantial incentive for parties to bring transactions to the Commission's notice.
  - (b) Customers and competitors would anyway be likely to bring the most harmful structural links to the Commission's attention.
  - (c) The UK's OFT and the use the Commission has made of the Zephyr database to identify potentially relevant transactions demonstrate the possibility of effective monitoring of market activity. The Commission would additionally be able to profit from the local knowledge of NCAs in the ECN network.

**(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 we have explained above, ICC does not believe that a transparency system should be adopted. Should the Commission anyway proceed to implement such a system, parties should not be required to provide information that is not publicly available. This is because acquirers of structural links will not always have access to non-public information about the target – for example, a listed target would not necessarily agree to provide detailed financial or market data to an acquirer for the purpose of a transparency notice.

4.2 The information required should therefore be restricted to the following: information describing the parties, their worldwide turnover (insofar as this can be derived from their publicly

<sup>8</sup> We do note that costs would be lower under a transparency system.

available accounts), details of the transaction and broad information about the economic sectors concerned. It would be disproportionate, and sometime unachievable, to require the parties to provide detailed information about the markets concerned.

- 4.3 In this context, it should be noted that annual financial statements are the only information required to be disclosed in all Member States and worldwide. Securities filings in respect of public limited companies would not be relevant, unless the Commission intends to restrict its assessment to such companies.

**(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 We estimate the cost of filing a full notification would likely be broadly comparable to the cost of filing a Form CO. The cost of a provision of information under the transparency system would likely be considerably less if the information required were limited to the parties, their turnover, the transaction and the economic sectors concerned – though clearly it would vary depending on the scope of information required and the proportion of cases in which the Commission asks follow-up questions.

**(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 turnover thresholds of the Merger Regulation would be of equal relevance for the purpose of determining whether the acquisition of a structural link has a Union dimension.
- 6.2 We agree with the Consultation's proposal that Member States should not be permitted to refer acquisitions of structural links to the Commission, or to request the Commission to refer such cases to them, if they lack jurisdiction to review such transactions under their national merger control regimes.<sup>9</sup>

**(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 Legal certainty requires the avoidance of jurisdictional criteria that conflate the substantive assessment of structural links with determining the applicability of the Merger Regulation. The definition of a structural link should, as discussed below, take into account the competitive relationship of the parties. However, the determination of the Merger Regulation's jurisdiction should not require a detailed substantive and factual assessment. For example, it should not be the case that assessing whether a test for "material influence" is met requires (as is sometimes the case in the UK) a detailed analysis of the importance of each of the target's corporate governance rights. Equally, a jurisdictional test based on modified HHI thresholds – requiring both a definition of the relevant markets and an assessment of markets shares in those markets – would be insufficiently objective to be feasible. Jurisdictional thresholds should be clear, easy to apply and linked to robust theories of harm.

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<sup>9</sup> "[Applying the referral system to structural links] would mean 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", Commission staff working document, p. 9.

### The definition of a structural link

- 7.2 An excessively broad or insufficiently certain definition of "structural link" bears significant risks. The definition should be linked to two of the relevant categories of structural harm described above:<sup>10</sup>
- 7.2.1 A material financial interest in the target's profits. In this context, the definition of "material" should be clearly thought-through. We acknowledge that in highly concentrated markets it is possible in theory for anti-competitive incentives to arise even with a fairly low level of financial interest. However, the legal certainty provided by a clearly defined threshold of (eg) 20%<sup>11</sup> would outweigh any possible disadvantages from scenarios with anti-competitive effects falling below such a threshold – these latter cases could be dealt with (and deterred by) action pursuant to Article 101.
- 7.2.2 The ability to exercise material influence over the target, either through voting rights or special corporate rights. Ideally, the test should focus on the acquiring company's *de facto* or *de jure* ability to block/veto certain types of decision that are deemed to have sufficient impact on the autonomy of a company's boards, but which fall short of those required for a finding of decisive influence. There are three advantages to this approach:
- (a) Consistency with the test for decisive influence, incorporating a focus on corporate decisions other than approval of the company's budget and business plan and the appointment of senior management.
  - (b) Avoidance of differing outcomes depending on the company law of the target's jurisdiction. For example, decisions that can be vetoed by a company holding a 25% interest in the UK or Germany might be markedly different to those that can be vetoed in other jurisdictions.
  - (c) Avoidance of a definition of material influence that could be triggered by subjective or vague concepts such as the possibility of forming a "coalition" with other shareholders or "influence" over other shareholders.
- Care would have to be taken in defining the specific types of veto right that may constitute a material influence. Examples might include decisions required for mergers, acquisitions, takeovers, joint ventures or supply arrangements, significant investments, and raising substantial amounts of debt or equity funding. However, rights to call meetings, propose resolutions, approve the appointment of auditors etc should not be considered competitively significant. It might also be necessary to distinguish between veto rights in public and private companies, in light of the likely differences in the make-up of their shareholders.
- 7.3 The definition of "structural link" should also focus on equity interests. As there is no evidence that corporate influence arising from debt instruments may result in competitive harm, extending the Merger Regulation to cover covenants in loan agreements would disproportionately and unjustifiably disrupt finance markets.
- 7.4 We agree that the distinction between full function and non-full function joint ventures remains appropriate in the context of structural links.

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<sup>10</sup> For the reasons set out in paragraphs 1.12-1.13 above, we do not consider that the possibility that a structural link may facilitate information exchange should be regulated under the Merger Regulation. We therefore consider that such a possibility should not be relevant for the purpose of determining Merger Regulation jurisdiction.

<sup>11</sup> It seems reasonable to choose a threshold already used by well known European national regimes, such as in Austria or Germany

### Appropriate safe harbours

- 7.5 There should be a safe harbour delineating the Commission's jurisdiction such that a structural link would be reviewable under the Merger Regulation only if the acquirer is an actual competitor<sup>12</sup> of the target or is active in a vertically linked market. The acquirer would be considered active in a related market only if its interest in the relevant activities amounts to at least decisive influence. This would be consistent with the relevant theories of harm. It is unlikely that harm would arise in circumstances where an undertaking had only material influence in two competitors. Such a safe harbour is required to avoid disruption and uncertainty for institutional investors pursuing 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 possibility of voluntary notification would be essential to any self-assessment or transparency system. It is important to avoid any uncertainty as to whether a structural link might be unwound at a later date, as such uncertainty would deter a substantial volume of pro-competitive and efficiency-enhancing investments. That view, however, is not shared by all ICC members, some of them fearing that the mere possibility of a voluntary notification may push legal counsel, as a matter of precaution, to systematically recommend a notification.
- 8.2 Voluntary notification should not trigger a standstill obligation. It should be for the parties involved to decide whether to take the risk of implementing a transaction prior to receipt of clearance. Additionally, the acquiring and target companies would remain separate undertakings for the purposes of Article 101 and so any agreement to run the two businesses as one would be subject to that Article, rendering automatic standstill unnecessary. It would be disproportionate for the Commission's investigation to automatically impose "hold separate" restrictions, though there are a small number of circumstances where these might be useful.

**(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 The Commission should be subject to a limitation period for reasons of legal certainty. For example, the limitation period of four months applicable in the UK generally works well. However, as the OFT is required to reach its Phase I decision by the end of that four month period, such investigations might be rushed if commenced late in that period, meaning that a Phase II investigation could be launched on the basis of insufficient evidence. Consequently, it would be better to implement a shorter limitation period of two months within which the Commission must commence any investigation into a structural link transaction. This period could run from the day on which completion of the transaction is appropriately publicised, analogous to the position under Article 22 of the Merger Regulation – the time period commencing when a concentration is "otherwise made known" to a Member State.
- 9.2 Since it would not be appropriate to allow investigations of structural links to last indefinitely, the Phase I deadline of 25 working days should be applied, as is the case for other notified transactions.

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<sup>12</sup> We would not favour the inclusion of "potential competitors" since this would create significant legal uncertainty for minority shareholders who often will have no way of knowing the likelihood that another will enter the relevant market.

## 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 The suggestions made by the Commission in respect of the Article 4(5) referral system may confer benefits in two areas, namely, timing and the costs faced by notifying parties. A speedier notification process would be of particular benefit to smaller undertakings with fewer financial resources at their disposal. However, we do have some concerns in relation to the proposed changes to referrals made under Article 22, as discussed in our responses to 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?**

- 1.2 The ability to directly notify the Commission without the additional burden of preparing Form RS would be extremely welcome. The benefits would be twofold. Firstly, the overall notification process would be shortened by 15 working days. Secondly, unnecessary duplication of work would be avoided, as the majority of the information currently contained in the Form RS is also included in the 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.**

- 1.3 The ability to directly notify the Commission would evidently shorten the overall notification process by 15 working days. Care must be taken to ensure that the elimination of the Form RS procedure does not result in a more time-consuming and/or cumbersome pre-notification phase. If this is achieved, then the removal of the requirement to prepare a Form RS should reduce the preparation time for a notification – whereas currently both the Form RS and the Form CO must be prepared, only a single Form CO would have to be prepared.
- 1.4 Costs vary with the size and nature of the transaction, and the specificities of the notifying parties. It is therefore hard to predict with any degree of precision the potential savings under the proposed changes. It may however be presumed that avoiding duplication of work will mean that the notifying parties are likely to face lower costs in relation to the notification process. This could be of particular benefit to smaller undertakings with fewer financial resources at their disposal.

#### **(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?**

- 1.5 The Commission's working document notes that stakeholders have previously indicated a desire for a speedier referral procedure. Mergers are often time-sensitive, such that the notifying parties may be reluctant to engage in a time-consuming referral process. The shortening of the overall notification process and the lesser amount of time required to prepare the single Form CO under the Commission's proposed change would therefore likely render the use of the Article 4(5) referral more attractive to the notifying parties.

#### **(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?**

- 1.6 The Commission's working document considers the possibility of shortening the consultation period to 10 working days. We believe that this would be a sensible approach, as it would still allow the competent NCAs sufficient time to review the relevant information, assess whether

the referral requirements are met and determine whether they have an interest in retaining jurisdiction over the notified transaction.

**(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?**

- 1.7 To compensate for the reduced time available for NCAs to decide whether to oppose the Commission's jurisdiction, the Commission contemplates that the notifying parties might inform the competent Member States during the pre-notification period. A reduced consultation period of 10 working days should still grant Member States sufficient time to decide whether to oppose the Commission's jurisdiction, such that pre-notification disclosures are unnecessary. The proposed sharing of information in the pre-notification also raises a number of other concerns.
- 1.8 Firstly, there is a risk that the earlier involvement of multiple NCAs might prolong the pre-notification period, due to the transaction's increased complexity and the additional questions likely to be asked of the parties, consequently eliminating the costs and timing benefits resulting from the reduced consultation period. We therefore suggest that the parties may specify, in any waiver they execute authorising disclosure of confidential information to competent NCAs prior to notification, how this disclosed information may be used. For example, they should be able to prohibit NCAs from intervening in the pre-notification discussions between the Commission and the notifying parties.
- 1.9 Secondly, as the Commission notes in footnote 16, the pre-notification phase is non-mandatory. It remains unclear how the Commission's proposed remedy could function in such circumstances. The alternative appears to be an increased formalisation of the pre-notification phase, which – as with its prolongation – would likely be counterproductive to the goal of rendering more attractive the use of the Article 4(5) referral.
- 1.10 Thirdly, allowing pre-notification disclosure from the Commission to NCAs in relation to transactions not yet in the public domain would lead to multiple NCAs receiving highly sensitive market information. While the ECN has a good record of maintaining the confidentiality of documents, experience suggests that information can escape from even the most secure systems. Consequently, widespread disclosures should be avoided unless absolutely necessary. As discussed above, there is in this case no such necessity.

**(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?**

- 1.11 Broader information exchange between the Commission and the Member State should be facilitated to the extent that this reduces duplication of tasks carried out by the Commission and NCAs, thereby speeding up the review process by NCAs following a veto by a Member State. This would include sharing the result of the Commission's market investigation, such that the NCA would have no need to repeat the market investigation. Further, it would help mitigate the risk of an NCA opening a Phase II review when it fears it will run out of time to address the responses provided to the NCA's Phase I market test. It would also reduce the burden placed on third parties (such as competitors, suppliers, customers, etc) that would arise from a second market test.
- 1.12 However, two points remain to be addressed:
- 1.12.1 This information should be exchanged only with the competent NCAs; and those NCAs should only be able to use the information received for the sole purpose of reviewing the transaction concerned.

- 1.12.2 Each competent NCA should only receive information relevant to competition issues within the scope of its jurisdiction. Providing competent NCAs with the results of a market test in circumstances where the notified transaction does not raise any significant competition issues in its jurisdiction would only lead to further delays.

**(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?**

- 1.13 We do not agree with the Commission's proposed modification of Article 22.
- 1.14 Most fundamentally, we wonder whether Article 22 still has a useful function. All Member States (except Luxembourg) have now introduced a merger control regime – so that there is no longer any clear need for a “Dutch” clause. In addition parties are able to request a pre-notification referral under Article 4(5) EUMR in situations where they consider the Commission to be better placed to assess a transaction. In any event, it should be noted that Article 22 has in practice been used only rarely.
- 1.15 Indeed, the complexity and uncertainty caused by Article 22 referrals may lead to substantial delays and costs for the parties concerned. Further, where a transaction is not notifiable in three or more Member States, notifying parties are unable to use the Article 4(5) mechanism to avoid the risk of an Article 22 referral.
- 1.16 Some members of ICC nevertheless support the survival of an Article 22 procedure to cope with cases that are to be reviewed by a single jurisdiction but whose effects extend to other countries. But in general, ICC considers that only fundamental reforms could address the Article 22 procedure's drawbacks.
- 1.17 However, if the Commission were to implement its proposed amendments, care should be taken to ensure that Article 22 is not used by Member States as a means of capturing transactions that would normally fall below their national thresholds for assessment. We therefore agree with the Commission's proposal 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 necessary to ensure that the notifying parties have a greater degree of legal certainty as regards the expected timeframe and to allow them to anticipate what substantive issues might arise in relation to the transaction.
- 1.18 We also have concerns regarding the proposed wider scope of the Commission's review following a referral.
- 1.19 If one goal of the amendments to Article 22 is to avoid a patchwork approach of parallel proceedings of the Commission and Member States, the regime should incorporate a mechanism for preventing any prior decisions of NCAs. However, as the Commission acknowledges, no such mechanism currently exists. Under its proposals, there could still be a scenario where a Member State has already cleared a transaction before the referral occurs. The proposed broadening of the scope of the Commission's review could therefore be counter-productive: reducing legal certainty for the parties to the transaction. Any parties seeking to implement a transaction that required filing in at least two member States, and which may present some cross-border aspects, would have to conduct an in-depth antitrust analysis of the transaction's feasibility across the EEA and of the hurdles it may face. Although the substantive criteria applicable to cases that are a candidate for referral are very useful, they may not be enough to determine such a “candidate” in advance, in light of the breadth of the Commission's discretion in deciding on referrals.

- 1.20 It is difficult to predict when an Article 22 referral request might be made. This means that, where there is a risk of such a referral, notifying parties must investigate the transaction's substantive impact in each EEA country – even where the relevant markets are of *de minimis* size and the parties have low levels of turnover. The principle of subsidiarity, requiring that national merger regimes should determine when a transaction involves sufficiently low levels of turnover to escape scrutiny, means that this would undermine national merger regimes. Although this problem already exists, it would be greatly exaggerated if the Commission's proposal were to be implemented.

**(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?**

- 1.21 As discussed in our previous response, we express doubts about the proposal to grant the Commission jurisdiction over the entire EEA. Granting such jurisdiction could be counter-productive in terms of legal certainty and predictability for the parties to an affected transaction.
- 1.22 Additionally, we do not consider it likely that the amendments proposed by the Commission will avoid the risk of a patchwork approach of parallel proceedings of the Commission and Member States:
- 1.22.1 Firstly, the Commission itself acknowledges that such a patchwork approach might still occur under its proposals.<sup>13</sup>
- 1.22.2 Secondly, we doubt whether the Commission's suggestions as to how prior decisions of NCAs might be avoided in cases where procedural safeguards prove insufficient. In particular, it would not be easy to align the timing of national notifications, without the approximation of national legislation. This is because one reason for the "clock to start ticking" at different times is that different NCAs require different amounts of information. As a result, the period for a Phase I review ranges from 20-40 working days (or more) across the Member States.
- 1.22.3 Additionally, to render the Commission competent to accept referrals and obtain jurisdiction for the whole of the EEA even where the transaction has already been cleared at a national level would be counterproductive, as it would lead to legal uncertainty for the parties. Concerns regarding legal uncertainty would similarly arise in cases where the transaction had no Community dimension at the time of the decision. It is unclear what the legal consequences would be if the parties decided to close a transaction on the basis of NCA clearance, which was later superseded by a contradictory decision of the Commission. However, this problem is not solved by granting NCAs a veto over the referral – there would still be a patchwork of competencies as the existing regime would remain unchanged
- 1.23 Although our primary recommendation is that Article 22 referrals should be abolished, should the Commission decide to retain Article 22 we would suggest the following amendments to the Commission's proposals (our amendments are underlined below):
- 1.23.1 The Commission may accept a referral of a case where at least one competent Member State requests the referral pursuant to Article 22 and no Member State competent to review the merger under national law opposes the referral.
- 1.23.2 The Commission maintains its discretion whether or not to accept a referral. However, a referral could only be accepted if the transaction is reviewable in three or more EEA Member States;

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<sup>13</sup> See p.18 of the Commission's staff working document



- 1.23.3 The Commission's decision to accept a referral gives it jurisdiction for all the territories of the competent Member States, unless one or more of those Member States has already cleared the transaction (in which case they are excluded from the jurisdictional scope of the Commission's review).
- 1.23.4 The different stages of the referral process should be shortened and the national proceedings be suspended for a short period from the day after the transmission of the first referral request by the Commission to other competent Member States (the transmission itself should take place on the day the Commission receives the referral request). This would also help prevent – but not eliminate – the risk of a prior decision of a NCA (see below). See the response to question 2(e) below for our further recommendations for modifying the timing of Article 22 referrals.
- 1.24 This proposal would offer a number of advantages, compared with the Commission's proposal:
- 1.24.1 The parties would already be in ready possession of the information required for the Commission's review, as this information would already have been gathered for the purpose of making the initial filings with competent NCAs. This would not be the case under the unamended proposal, as the Commission's review of the whole EEA would require additional information concerning territories of non-competent Member States. The amendment would therefore streamline the process and be less costly for the parties to the transaction;
- 1.24.2 The parties would have greater legal certainty as regards any antitrust concerns that might be raised by the Commission. They would also have greater certainty as regards the likely timeframe of the assessment of the transaction;
- 1.24.3 The Commission might not need to commence its review *ab initio*. Rather, it could rely on information already collected by the competent NCAs for performing their own review, insofar as this was permitted under the relevant national legislation. This would conform to the ECA cooperation principle, and should further facilitate a streamlined assessment; and,
- 1.24.4 Restricting Article 22 referrals to transactions reviewable in three or more Member States would allow the Commission to focus on transactions that it is best placed to assess and which are truly cross-border in nature. This would also bring Article 22 in line with Article 4(5), under which parties already have the right to request the referral of such transactions, thereby improving legal certainty.

**(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?**

1.25 Please see our response to the previous question.

**(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?**

1.26 Please 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?**

- 1.27 As discussed in our response to question b) above, it is not straightforward to identify procedural solutions which would either prevent or mitigate the risk that a Member State might have already cleared a transaction before another Member State seeks its referral to the Commission.
- 1.28 Further to the proposals that we have made above, we consider that the periods between each stage of the current referral process should be reduced as follows:
- 1.28.1 The period of 15 working days in which a referral may be made following notification of an NCA should be shortened to 10 working days.
- 1.28.2 The Commission should be required to transmit the request to the other competent Member States on the same day as it receives the request.
- 1.28.3 The period within which other competent Member States may join a referral request should be reduced from 15 working days to 10 working days.
- 1.28.4 There should be no change to the period in which the Commission may conduct its review.
- 1.29 This would ensure that the maximum duration of the referral process would be 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?**

- 1.30 Making national clearance decisions conditional upon no Article 22 referral taking place would not be desirable. Parties would be reluctant to close transactions in Member States where they had received clearance from the NCA, for fear that an Article 22 referral may subsequently take place. There would therefore be greater legal uncertainty, and the process would be more complex than at present. Steps would also have to be taken to deal with the consequences, at both national and European levels, for those parties who close a transaction on receipt of national clearance, prior to the deadline for a referral request, or the Commission's decision on any such referral. National clearances would otherwise be effectively rendered meaningless.
- 1.31 It would not be possible to issue clearance decisions under the condition that no Article 22 referral takes place under the national merger control regimes of a number of jurisdictions (eg the UK). Typically, this is because it would not be within the parties' power to satisfy such a condition.

**(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?**

- 1.32 Restricting referrals to NCAs with jurisdiction under their national merger control regimes would in all likelihood increase efficiencies and improve legal certainty. However, as discussed in response to the previous question, extension of the jurisdictional scope of referred cases to the whole of the EEA would lead both to decreased predictability and legal certainty (such as in respect of prior national clearances) and increased costs for notifying parties (due to the need to conduct substantive reviews across EEA markets of all sizes). The benefits of restricting the scope of NCAs entitled to request a referral would be outweighed by these costs and uncertainties.

**(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?**

- 1.33 One possible procedural amendment relating to Article 22(5) might involve providing that the Commission's invitation to a Member State to make a request commences the period during which other competent Member States are free either to join or to object to the referral

## 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 agree that it is sensible to eliminate redundant filing requirements for transactions that have absolutely no nexus with the EU. This would both save parties the significant costs incurred in making these unnecessary EU filings, and also stimulate the advocacy of similar reforms in many other jurisdictions around the world in which joint ventures must be notified even if totally lacking any nexus to the relevant territory.
- 1.2 We would recommend achieving this by providing that transactions involving the creation of a joint venture or acquisition of joint control over an existing undertaking, the applicable turnover thresholds must be satisfied by the joint venture undertaking, such that jurisdiction under the Merger Regulation does not arise solely based on the turnover of the controlling parent undertakings. Alternatively, jurisdiction could be excluded for extra-territorial JVs that currently qualify for consideration under the simplified procedure – that is, JVs with assets or turnover of less than EUR 100 million.
- 1.3 The Commission may judge this recommendation based primarily on the theories of harm that it considers applicable to JVs with minimal turnover or assets in the EEA. Since those theories are not specified in the Consultation, we advise the Commission to further engage with practitioners and academics in relation to this matter, to help establish whether the relevant theories of harms are justified, and if so whether they should be addressed through application of the Merger Regulation, rather than Article 101 or the merger regime of another jurisdiction. We set out in Annex 1 below some of the theories of harm that might be associated with JVs with minimal sales in the EEA, and the reasons why we do not consider the Merger Regulation to be the most appropriate enforcement mechanism.
- 1.4 This approach would be in line with the Commission's experience of reviewing extra-territorial JVs. The Commission has never, since the Merger Regulation was first implemented 23 years ago, identified a credible competition concern associated with an extra-territorial JV with no, or limited, sales in the EEA, including sales attributable to assets to be contributed to the JV. This might be explained by the fact that in the majority of cases where a valid theory of harm exists for a JV with minimal EEA sales, the same competitive harm (that is, concentration of market power) can also be achieved by an acquisition of sole control having no Union dimension. It is possible and more appropriate to review such acquisitions of control under Article 101, or by the jurisdiction(s) where more of the JVs customers are located. JVs should be treated in the same way.
- 1.5 A second, less preferable approach would involve the incorporation of an explicit nexus test into the Merger Regulation, such that a JV would not be deemed to have a Union dimension if its activities are exclusively (or almost exclusively) located outside the EEA and do not affect competition within the EEA. Parties could then self-assess as to whether their extra-territorial JV requires notification, subject to the risk of penalties if they incorrectly conclude that they do not need to file. A similar nexus test is used in merger control regimes in a number of other jurisdictions – though there are different approaches as to what constitutes a sufficient nexus – and generally speaking, this is a useful tool for those regimes. Any such system should be accompanied by:
  - 1.5.1 Guidance provided by the Commission to the circumstances in which an extraterritorial JV might be deemed to affect competition in the EEA; and,
  - 1.5.2 The ability for parties to obtain guidance confirming their understanding that a particular JV falls within the exception to the Commission's jurisdiction.

**(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 see our response to question 2(e) on the case referral system.

Modifying Article 4(1) EUMR to allow notification of acquisitions of listed shares without a public takeover bid.

- 2.3 We would welcome this reform. Any such acquisition of shares should be notifiable where there is "a good faith intention to make a public bid" or "a good faith intention to acquire decisive influence".

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

- 2.4 It would be appropriate to provide a formal legal basis to underpin the Commission's existing approach.

Modifying Article 8(4) EUMR in order to allow the Commission to require the dissolution of partially implemented transactions.

- 2.5 Such a modification would be relevant only if the Commission decides not to extend the scope of the Merger Regulation to acquisitions of structural links. Otherwise, we do not believe the *Ryanair/Aer Lingus* case demonstrates the need to grant the Commission further remedial powers. We consider that an undertaking's legal right to acquire a structural link as a standalone transaction should not be called into question merely due to other transactions that the undertaking proposes to enter into.

- 2.6 We also believe that even where control is acquired pursuant to a single transaction (that is, there is no prior partial implementation), undertakings should not always be required to divest their entire shareholding, regardless of whether there would be effective competition if a minority shareholding were to be retained. The existing approach of focussing on restoring "the situation prevailing prior to the implementation of the concentration" (as opposed to the pre-2004 requirement to restore "effective competition") might lead to disproportionate losses for legally-implemented transactions, which losses are unjustifiable by reference to any competitive harm caused. For instance, in *BSkyB/ITV*, the UK's CC permitted BskyB to retain a shareholding of 7.5% in ITV, this being a conservative assessment of the minimum shareholding that might possibly confer the ability to exercise material influence. As BskyB lost an estimated £350 million on its divestment of the rest of its interest, the CC's decision avoided the infliction of further unnecessary losses. As there is no evidence that non-controlling minority interests lead to significant competitive harm (as discussed in our response to question 1 relating to Minority Shareholdings), it would be preferable to achieve internal consistency of the Merger Regulation in this way.

Allowing penalties to be imposed on parties and third parties that disclose non-public commercial information of other undertakings, to which they have been given access for the purpose of an EUMR proceeding (e.g. through access to the file).

- 2.7 We would welcome this measure. However, we do not believe that such penalties should be imposed upon third parties that receive confidential information from the Commission as part of a market testing campaign, such as copies of the parties' proposed remedies, for their comments.

## Annex 1: Extra-territorial Joint Ventures: Theories of Harm

Scenario		Analysis	Enforcement tool
1.	Parties contribute IP to JV which does not (yet) generate turnover but which is likely to give the JV a dominant position in the future.	If structured as an acquisition of one party's IP by another, the equivalent competitive harm can be achieved (concentration of IP-related dominance in the hands of one party). However, such an acquisition is regulated by Article 101, not the EUMR. There is no justification for treating the two transaction structures differently.	Article 101 is the appropriate enforcement tool.
2.	Parties create a new joint venture, which will invest in new production capacity. The JV is likely to acquire a dominant position in the future as the parties will agree to (or have incentives to) close down their existing less efficient capacity outside the scope of the JV.	Scenarios 2 and 3 involve Article 2(4) spill-over effects, which are in any event considered under Article 101.	Article 101 is the appropriate enforcement tool.
3.	Parties use the JV to coordinate their activities in the EEA, outside the scope of the JV.		
4.	Parties combine in a JV productive assets that have sales only to customers outside the EEA. The combination is likely to result in dominance and price rises to non-EEA customers that may flow through to price rises for products sold into the EEA.	In scenarios 4 and 5, the jurisdictions in which the immediate customers are located are better placed to apply their national laws to protect those customers (and their export competitiveness). Also, the same competitive harm could be achieved by an outright acquisition, which would fall outside the scope of the EUMR for lack of a Union dimension. This simple way of avoiding EUMR jurisdiction may be one reason why no notified extraterritorial JVs have ever been found to give rise to competitive harm under the EUMR.  Also, query whether the "immediate, substantial, and foreseeable" test of <i>Gencor</i> is met in these circumstances?	Merger control and/or antitrust laws of other jurisdictions are best placed to address such concerns.
5.	Parties combine in a JV productive assets that have sales only to customers outside the EEA. The combination is likely to result in dominance in a market that is global (including the EEA) and will therefore cause rivals that do sell to EEA customers to increase their prices.		

# The International Chamber of Commerce (ICC)

ICC is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world.

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