

## **RESPONSE OF THE CITY OF LONDON LAW SOCIETY COMPETITION LAW COMMITTEE TO THE EUROPEAN COMMISSION'S WHITE PAPER "TOWARDS MORE EFFECTIVE EU MERGER CONTROL"**

This response is submitted by the Competition Law Committee of the City of London Law Society (**CLLS**) in response to the consultation of the European Commission (**EC**): "Towards a more Effective EU Merger Control", published on 9 July 2014 (the **Consultation**).

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

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

### **1. INTRODUCTION AND SUMMARY**

- 1.1 The CLLS broadly welcomes the reform proposals contained in the White Paper (**WP**), the Staff Working Document (**SWD**) and the Impact Assessment (**IA**). Many of the proposals are well-designed, positive and efficient reforms, which reflect the substantial and careful consideration that the EC has given to the relevant issues, and to the views of stakeholders that were expressed in response to the 2013 consultation.
- 1.2 In particular, members of the CLLS are unanimous in their support for the EC's proposal to remove joint ventures with no effect in the EEA from the jurisdictional scope of the EU Merger Regulation (**EUMR**), the proposal to allow Article 22 referral requests to be made only by Member States with jurisdiction to review a transaction under their national merger control laws, and the EC's willingness to explore options to further minimise the filing burden for transactions involving no reportable markets.

For the most part, our comments below focus on suggested ways in which these reforms could be modified to create even greater benefits and efficiencies for merging parties and for the reviewing authorities.

- 1.3 As regards the EC's proposals for extension of the EU Merger Regulation (**EUMR**) to cover non-controlling minority interests, our response below is predicated on the assumption that the EC has decided to proceed with these reforms, and is primarily interested in hearing views of how that reform should be implemented. However, we remain firmly opposed to any such extension. The reasons for our opposition are set out in detail in our response<sup>1</sup> to the EC's 2013 consultation, but are summarised below for convenience.

### **Minority interests**

- 1.4 In our view, the evidence and arguments fall well short of adequate justification for extending the EUMR to cover non-controlling interests. Paragraph 46 of the SWD claims that "*[t]he experiences of the Commission, the Member States, and third countries, as well as economic research all show that in some instances, the acquisition of a non-controlling minority shareholding, such as one firm acquiring a 20% shareholding in a competitor, can harm competition and thus consumers*". However, the experiences referred to in paragraph 46 show only that the relevant competition authorities believed – often on the basis of scant economic analysis – that such harm would have arisen if the merger in question had been allowed to proceed (or to proceed without remedies). There is not a single instance cited in the Consultation of a case in which an implemented structural link has been shown to have resulted in anticompetitive harm and price rises. Similarly, as the EC has previously noted, there is no empirical economic research that demonstrates that non-controlling minority interests give rise to anticompetitive harm,<sup>2</sup> only hypothetical models positing unproven theories of harm.
- 1.5 Accordingly, we reiterate our submission that the EC should carry out an empirical study of past transactions that it has identified as potentially meriting scrutiny, in order to assess whether regulation in this area is justified, and if so, what form it should take. It ought, at minimum, to be able to identify at least one transaction in which a non-controlling interest has resulted in competitive harm, and an attendant price increase. Such a study would also allow the EC to assess whether there really is a significant enforcement gap in respect of such interests.
- 1.6 Our view is that there is unlikely to be a material gap, as all but an insignificant number of non-controlling interests are reviewable under the existing EU Merger Regulation (**EUMR**), Article 101 of the Treaty on the Functioning of the EU (**Article 101**) and national merger control regimes. Moreover, even if there were to be a significant enforcement gap in respect of acquisitions of shares via a stock exchange, it would be largely addressed by the EC's proposed amendments to Article 8(4), which would allow it to compel divestments of minority stakes built in the context of a takeover bid that is subsequently prohibited. Even if that is not accepted, concerns relating to acquisitions of interests in public companies or influence arising from

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<sup>1</sup> See [http://ec.europa.eu/competition/consultations/2013\\_merger\\_control/city\\_of\\_london\\_law\\_society\\_en.pdf](http://ec.europa.eu/competition/consultations/2013_merger_control/city_of_london_law_society_en.pdf)

<sup>2</sup> Paragraph 42 of Annex 1 to the 2013 consultation.

amendments to the articles of association of a company would only justify an extension of the EUMR to cover those specific scenarios. In all other cases there is a clear agreement – such as a sale and purchase agreement, a shareholder agreement or a joint venture agreement – to which Article 101 can, and should, be applied.

- 1.7 Should the EC decide to extend the EUMR to cover non-controlling interests, our response below describes a number of enhancements and refinements to the EC's proposals that would, in our view, render them more efficient and effective.
- 1.8 As regards the jurisdictional criteria, we welcome the EC's efforts to exclude obviously unproblematic cases from its extended jurisdiction. We also welcome the EC's confirmation that acquisitions of interests in non-full function joint ventures would not be caught. However, we are concerned that the subjective nature of some criteria (e.g. whether parties are active in horizontally- or vertically-related markets) and the vague and undefined nature of others (e.g. the "additional rights" that would trigger jurisdiction) are ill-suited to a regime in which penalties are imposed for failure to correctly second-guess the EC's approach to interpreting those criteria.
- 1.9 Moreover, the EUMR is one of a small number of merger control regimes in the world that is frequently referred to as a global standard, and is regarded by jurisdictions developing their own systems of merger control as an important reference point. Its application to the entirety of the EEA trading block also ensures that it is focused on by business as a key gating item to the successful progress of corporate transactions. One of its hitherto defining characteristics was its relative clarity and lack of overly subjective factors as the initial basis of jurisdiction. Accordingly, market share tests have been eschewed, and the application of the decisive influence test to minority shareholders with veto rights has by and large been applied by the EC in a manner that promotes predictability. The introduction of a filter for reviewability based on "additional factors" risks considerably magnifying the uncertainties in the system if adopted in the manner proposed in the WP – these factors should be clear and unambiguous, particularly given their purpose to bring "non-controlling" interests within the ambit of the EUMR.
- 1.10 If filing obligations are imposed, we therefore favour:
  - 1.10.1 the legal certainty of a "bright line" 15% shareholding threshold (in a horizontally- or vertically-related target), as this would be consistent with the prior EUMR cases and the considerable majority of those of national competition authorities (NCAs) that have considered non-controlling interests;
  - 1.10.2 the requirement for "additional rights" to be present as a jurisdictional trigger at this level of shareholding. However, these should be a clearly defined set of rights, short of decisive influence, but over which an acquirer must obtain a legal or de facto veto right in order to trigger jurisdiction, such as the right to block strategic M&A transactions of the target, or the ability to veto the raising of debt or equity funding. In this context, the presence of board seats should be relevant only on so far as they confer such a veto right. For the reasons set out in the response below, rights of access to information should be irrelevant if the parties have implemented appropriate compliance policies to restrict the flow of competitively sensitive information between them. Moreover, reference to a vague standard of "competitively sensitive

information” would be unwise; given the very low threshold and considerable uncertainty which arises from the developing treatment of information exchange as a breach of Article 101, it is questionable whether this would amount to any meaningful type of filter; and

- 1.10.3 if there is to be a level beyond which a competitively significant link is to be presumed (i.e. the “additional rights” are not to be required to found jurisdiction), this level should be increased to 25%. Under the national laws in most Member States, this level of shareholding introduces certain rights which may in some circumstances influence business decisions. However, we would question the need for a presumption in circumstances where decisive influence is not being acquired. There is a good case for “additional rights” to be necessary at all levels of interest below decisive influence.
- 1.11 As regard the transparency system described in the WP and SWD, we consider that merging parties would have insufficient incentives to make use of such a system. The benefits of filing a transparency notice (a slightly shorter standstill period and in some cases a marginally lower information burden) would be substantially outweighed by the disadvantage of having no binding clearance decision and the possibility that an investigation may be opened up to 4–6 months in the future. Unless such incentives can be created, the EC would be likely to face a large increase in the number of Form CO filings that it is required to process, the great majority of which will relate to transactions raising no competition concerns. (In this respect, we consider the EC’s forecast of an additional 20–30 filings per year is likely to substantially underestimate the true number of transactions that would be affected by these proposals.)
- 1.12 We have suggested below a number of features that could be built into the transparency model in order to create the necessary incentives for its use. These include, in particular:
  - 1.12.1 no standstill obligations: minority interests can be easily divested or unwound, as there is no integration of the businesses of target and acquirer (in terms of infrastructure, management etc). Consequently, standstill obligations are unnecessary, and would chill investment activities of market actors (such as PE houses and sovereign wealth funds) that seek fast and efficient closing of their transactions. In appropriate cases, the Commission could have powers to impose hold-separate obligations, or an obligation on the acquirer to refrain from exercising voting rights, in order to prevent temporary harm to competition during the period of review. As noted below, the fact that German and Austrian regimes impose unjustifiable standstill obligations on acquisitions of non–controlling interests should not influence the design of the optimal model for EU–level enforcement;
  - 1.12.2 a very light touch transparency notice, with no requirement for market share data or internal documents, given the costs and in some cases difficulties of collating this information; and
  - 1.12.3 a prescription period of no more than 2 months, in order to minimise the period of legal uncertainty, and resulting disincentives to use the transparency filing route. Alternatively, if market share data or internal documents are required to be provided, the EC should be able, and required, to decide

whether to call a transaction in for review within a shorter prescription period than envisaged in the WP (e.g. 25 working days, in line with the Phase 1 EUMR clearance timetable).

- 1.13 We continue to believe that, of the procedural models under consideration, a self-assessment regime would be more efficient and effective. In our view, the IA does not accurately weigh the benefits of such a regime against the drawbacks of a transparency regime. In particular:
- 1.13.1 for the reasons explained below, it is not correct that the transparency system "would not demand any additional information than what is anyway necessary to assess the transaction under the self assessment system";<sup>3</sup> and
- 1.13.2 the experience of the UK regime contradicts the assertion that a self-assessment regime would be less effective at preventing harm to competition. It also shows that it is possible for information on minority shareholdings to be gathered by a merger control authority. The EC's concern that it would be "very difficult for the Commission to keep track of all minority shareholdings in the internal market"<sup>4</sup> could be addressed by devolving market intelligence gathering to NCAs. In addition, customers and target companies would have incentives to identify problematic transactions to the EC.

### **Referrals**

- 1.14 We broadly support the EC's proposals for reform of Articles 4(5) and 22, and have made a number of suggestions below for improving and refining the proposed implementation of these reforms.

### **Miscellaneous reforms**

- 1.15 We also agree with the EC's proposal to remove jurisdiction for joint ventures having no effects in the EEA, and to extend the transparency regime to transactions involving no reportable markets (subject to our comments below regarding design of the transparency system).

## **2. PRINCIPLES FOR A SYSTEM OF CONTROL OF NON-CONTROLLING INTERESTS**

- 2.1 If there is to be such a system, we broadly welcome the three guiding principles set out in paragraphs 67–72 of the SWD, in particular recognition of the need to avoid administrative burden and confirmation that the EC would (subject to possibilities of referral) have sole competence to review acquisitions of minority interests that exceed the relevant turnover thresholds.
- 2.2 However, we query whether consistency with NCA merger regimes ought to be a fundamental principle:

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<sup>3</sup> Table at paragraph 3.4.2.3 of the IA.

<sup>4</sup> Table at paragraph 3.4.2.1 of the IA.

- 2.2.1 Given that Germany and Austria have mandatory filing and standstill obligations and the UK has self assessment, consistency is not possible.
- 2.2.2 The statements in the table at paragraph 3.4.2.1 of the IA - that under a self assessment regime Austria and Germany would not, further to a referral of the transaction, "be able to investigate [a completed] transaction under their legal framework" - are incorrect. There is no legal obstacle under German or Austrian merger control laws that prevents authorities from investigating and imposing remedies on completed transactions that are referred to them, whether they are implemented public bids, or transactions that have been implemented in breach of the applicable national standstill obligations.
- 2.2.3 As explained in 3.7 to 3.10 below, the imposition of standstill obligations cannot be justified on the grounds of effectiveness or efficiency of the regime. Given that concentrations with a Union dimension are already excluded from the scope of national filing regimes and standstill obligations, it seems to us that the EUMR could implement a non-suspensory regime without necessitating amendments to national legislation. Even if amendments to national legislation were considered necessary, that would be no obstacle, given the primacy of EU legislation.
- 2.2.4 We recognise that amendments to the EUMR will require a degree of political consensus from Member States, but consider that it is incumbent on the EC to produce draft legislation that it considers to be the most effective and efficient option, and to have regard to burdens on business in relation to what are overwhelmingly non-problematic transactions. Extension of the EUMR would involve an unavoidable loss of jurisdiction for NCAs. That should be accepted, without leading to inferior or unworkable compromises.
- 2.3 In our view, effectiveness, efficiency and legal certainty are more important guiding principles and, indeed, fundamental pillars of the EUMR in its current form. It is these principles that have informed our comments below on the procedural options for amending the EUMR.

### **3. THE PROCEDURAL OPTIONS**

- 3.1 The design of the procedural options for extending EUMR jurisdiction to non-controlling interests should take into account a realistic assessment of the number of additional filings that such an extension will generate, and the corresponding burden for the business community, the EC and NCAs. In this respect, we consider that the EC's estimate of 20-30 transparency notices per year under the transparency system is much too low. The Zephyr database on which the EC relies covers only acquisitions of interests in public companies. In our experience, there are many more minority shareholdings by volume in private companies than in public ones. Property transactions, for instance, are routinely structured as consortium investments with multiple minority shareholders. As these are often large insurance companies, pension funds and sovereign wealth funds, the chances are that a high proportion of these property investments would meet the EUMR turnover thresholds. These investment stakes change hands reasonable frequently, so multiple cases would qualify. This sector alone might produce substantially more than 30 filings per year, none of which are likely to raise competition concerns. Moreover, the proposed

thresholds (e.g. 5% plus a single board seat) appear to catch a greater proportion of transactions than in Germany, so the proportion of minority interest filings in that jurisdiction is not an accurate indicator of the number of additional EUMR filings that would be required.

- 3.2 We therefore consider that the volume of additional filings is likely to be much higher. In our view, this makes it imperative that the procedural design of the proposed reforms result in as light a burden as possible for businesses and enforcers alike.
- 3.3 A secondary consideration is that, in time, NCAs are highly likely to follow the lead of the EC and to extend their national regimes to catch non-controlling interests. In doing so, they may be expected to implement the same procedural options as those chosen by the EC. Even if the procedures chosen by the EC create inefficiencies which are considered to be manageable in the context of EUMR filing volumes, those inefficiencies are likely to be magnified when replicated across multiple national merger control regimes with much lower turnover thresholds. Overall, this will chill investment into the EU and encourage investment by EU businesses outside the EU.

### **The transparency system**

- 3.4 The position of the CLLS is that the transparency system – as a hybrid of a notification regime and self assessment regime – combines the worst features of both:
  - 3.4.1 It reflects the worst features of a notification regime, in that a transparency notice is a filing in all but name. Parties will be subject to penalties on the basis of criteria which appear likely to involve highly subjective assessments. It also (in the form proposed by the EC) includes standstill obligations for 15 working days – only 10 working days fewer than for a full Form CO filing.
  - 3.4.2 It reflects the worst features of a self assessment regime, in that submission of a "transparency notice" confers no binding clearance, and therefore no legal certainty. It also creates timing uncertainty, as (under the EC's proposals) the investigation can be opened for up to 4–6 months after publication of the notice.
- 3.5 Our particular concern is that the transparency system described by the EC will simply not be used, as merging parties will not have incentives to make transparency filings. This is because:
  - 3.5.1 for transactions that are unlikely to raise competition concerns (i.e. deals which are the principal focus of the transparency regime) the proposed information burden appears to be substantially the same as that which is required for a short-form filing (i.e., parties, transaction description, turnover information, market definition and market shares). Moreover, it seems to us inevitable that merging parties will be required to engage in pre-notification discussions with the EC, in order to ensure that they face no risk of fines, or rejection of their notice, for supplying incorrect or incomplete market share information; and

- 3.5.2 the benefit of a slightly shorter standstill period (15 working days instead of 25 working days) is outweighed by the absence of a clearance and the possibility of an investigation in 6 months time.
- 3.6 Parties are therefore likely to submit Form CO notifications instead, which will create considerable and unnecessary administrative burdens for the EC and NCAs. If the EC insists on implementing some form of notification obligation, greater incentives to use it should be incorporated. Our suggestions for appropriate incentives are as follows.

*No standstill obligations*

- 3.7 The absence of automatic standstill obligations would be an important incentive for merging parties to use the transparency filing route rather than a full filing. Moreover, allowing completion of acquisitions of non-controlling interests would not affect the ability of the EC to review such transactions and to impose remedies, where appropriate. Minority interests can be easily divested - e.g. to other shareholders – as purchasers of minority interests will not have integrated their respective businesses (EU antitrust prohibitions prevent this). In the worst case, where no suitable purchaser can be found and the alternative is for the transaction to be blocked, purchasers could be required simply to surrender or cancel their shareholding.
- 3.8 It is common for private equity purchasers, sovereign wealth funds and other financial investors to structure acquisitions as consortia with shifting alliances in order that they can be closed immediately. Moreover, sellers using an auction process also typically require immediate closing or favour those bidders that are able to do so. Consequently, imposing a standstill obligation will make the EU a less attractive destination for the capital of these investors.
- 3.9 The UK system shows that absence of standstill obligation does not inhibit cooperation with the reviewing authority (contrary to the statement in paragraph 3.4.2.1 of the IA). Information gathering powers and binding timetables achieve this.
- 3.10 In appropriate cases, the Commission could have powers to impose hold-separate obligations in order to prevent temporary harm to competition during the period of review. It might also (as is now the case in the UK) reserve the right to suspend integration for anticipated transactions in certain defined and exceptional circumstances.

*A light touch transparency filing*

- 3.11 There should be no requirement for market share data or for internal documents – simply a description of the transaction, a confirmation that the parties consider the EU turnover jurisdictional criteria to be satisfied and an indication of the markets in which the horizontal or vertical overlaps that trigger jurisdiction exist. Anything more than this and the filing will become comparable to a short Form CO, with a risk that pre-notification discussions with the EC regarding market definition and the completeness of market share data will become necessary.
- 3.12 In most cases, the EC would be able easily and quickly to verify from public sources that no concerns are likely to arise. For the remaining cases, it would have powers to

require information from the parties, and to require a full notification where appropriate.

- 3.13 We disagree with the EC's view that requiring market shares or internal documents would not be onerous for merging parties. Contrary to the Commission's statements in the IA, parties often do not need to research market share data on various different "plausible" permutations of the market in order to conclude that a transaction will not give rise to competitive harm - their market expertise suffices. Moreover, it will frequently not be the case that the acquirer of a minority stake in a business will have sufficient access to the target's activities to enable it to have a detailed understanding of its market position. Indeed, insisting on this level of disclosure may force acquirers to seek more information from the target than that to which they would ordinarily have access, which would be an outcome of questionable benefit in light of the nature of the EC's concerns about minority interests. In addition, gathering and providing internal documents of the type required under EU and US merger filing systems can be a costly exercise. Ultimately, it involves officers or directors of the corporate group in question (which for a large multinational company, could mean a hundreds of individuals spread throughout the world) spending a significant amount of time reviewing their files to locate responsive materials, or, lawyers conducting a document review of each officer or director's files at their expensive hourly billable rate. **Annex 1** of this response contains a more detailed description of the process of gathering Item 4(c) documents for the purposes of preparing a Hart-Scott-Rodino filing in the US.

*A shorter prescription period*

- 3.14 To minimise the period of legal uncertainty (and the resulting disincentives to submit transparency filings), the prescription period should be no more than two months. In the event that the EC requires the parties to provide market share data, this period could be even shorter: if the EC can assess and clear a Form CO filing in 25 working days, it ought to be able to decide whether to "call in" a transaction on the basis of information in a transparency notice within an equivalent period.

**Self assessment**

- 3.15 In our view, the IA does not accurately weigh the benefits of self assessment against the drawbacks of a transparency filing regime. In particular:
- 3.15.1 The table at paragraph 3.4.2.3 of the IA states that the transparency system "would not demand any additional information than what is anyway necessary to assess the transaction under the self assessment system". That is not correct. As noted in 3.13 above, for transactions involving undertakings with little or no market power (i.e. the vast majority), parties can draw on their own market knowledge to verify that there are no competition concerns.
- 3.15.2 The table at 3.4.2.1 states that a self assessment system scores lower for "preventing harm to competition" as "it is not ensured that the Commission or the NCAs become aware of problematic transactions". However, that is also true for a transparency system. There will always be some transactions that escape review, and the Commission has presented no evidence that the number would be significantly higher under a self assessment regime with an effective

monitoring and market intelligence system in place, such as that which exists in the UK.

3.15.3 The experience of the UK shows that it is possible for information on minority shareholdings to be gathered by a merger control authority. We invite the EC to ask the CMA whether it is aware of any potentially harmful minority interest that escaped its (or its predecessor's) jurisdiction. In addition, customers and target companies would have incentives to identify problematic transactions to the EC.

3.15.4 Even if it would be "very difficult for the Commission to keep track of all minority shareholdings in the internal market", it would be much less difficult for NCAs to do so in their respective jurisdictions, and to share that information with each other and the Commission. The administrative burden for the EC and NCAs in implementing such a devolved system would be less than the administrative burden for companies in complying with a transparency filing regime.

3.16 As regards design of a self-assessment system, we favour a self-assessment system in which the prescription period runs (as it does in the UK) from the time that details of an acquisition are published in the national business press or trade journals. The EC might consider, in the alternative, having no automatically-triggered prescription period, and instead giving the parties the option to trigger such a period by submitting a transparency filing to the EC.

#### 4. DESIGN OF THE TRANSPARENCY SYSTEM

##### **Criteria for determining a competitively significant link (CSL)**

###### *Horizontal and vertical links*

4.1 We welcome the EC's efforts to exclude obviously unproblematic minority interest cases from EUMR jurisdiction and agree with the approach of limiting jurisdiction to cases involving horizontal or vertical links between the parties.

4.2 However, focusing jurisdiction in this way is incompatible with the existence of mandatory filing obligations. Imposing a mandatory filing obligation (presumably with fines for failure to accurately second-guess the EC's approach to market definition, or what amounts to the same "sector" of activity) would be inconsistent with legal certainty and would result in large numbers of transparency notices based on precautionary but implausible market definitions. Again, we note that minority shareholders often will lack the detailed information needed to make these sorts of analyses.

4.3 Given the importance of clarity over applicability of the EUMR:

4.3.1 The EC should clarify that (as is implied in paragraph 46 of the WP and paragraph 88 of the SWD) jurisdiction cannot be triggered if the parties are merely potential competitors.

4.3.2 The EC would also need to distinguish between "direct" and indirect vertical links, as indicated in paragraph 88 of the SWD. We suggest that the decisive

criterion should be whether the product or service of the upstream undertaking is an "important input", in line with the definition in footnote 10 of the Simplified Procedure Notice.<sup>5</sup> The EC should also provide guidance on what would amount to an important input for these purposes, perhaps by reference to the proportion of costs of producing the downstream product for which the input accounts (the factors discussed in paragraph 34 of the Non-Horizontal Guidelines are insufficient in this respect).<sup>6</sup>

4.3.3 The information available to acquirers of minority interests is typically much less than that which is available when acquiring a controlling stake. Unless this is addressed, the EC's powers to impose fines should be subject to an exception for cases where the parties can show that they had no reasonable opportunity to obtain the requisite information to allow them to assess whether a horizontal or vertical link arose.

4.4 We are particularly concerned by the suggestion in footnote 67 of the SWD that jurisdiction would be triggered if an acquirer also holds a non-controlling interest in another undertaking with a vertical or horizontal link to the target. That would impose very onerous obligations on financial investors to track all such interests and would multiply the number of transparency filings required by an order of magnitude. The likelihood of anticompetitive effects arising from such weak competitive links seems to us to be far too remote to justify such a burden. For example, where an acquirer has minority financial interests in two competitors or vertically-related undertakings, but no ability to influence the market conduct of either undertaking, it would be impossible for the acquirer to unilaterally increase prices or restrict output of either rival business, which paragraph 50 of the SWD recognises as being a necessary condition for application of the relevant theory of harm. We therefore urge the Commission to specify that only existing links amounting to decisive influence will be taken into account.

*The significance threshold*

4.5 The CLLS welcomes the approach of excluding the filing requirement for competitive links that are not significant. We also welcome the Commission's preliminary efforts to define the criteria that would determine whether a link is deemed to be significant. However, we consider that the thresholds proposed by the Commission are too low and that the qualitative tests set out in the SWD are too broad and too vague.

4.6 As regards the shareholding thresholds:

4.6.1 We recognise the theoretical possibility for financial interests in the profits of another company to distort competition. However, such theories of harm have featured in remarkably few cases to date and, where they have been subject to scrutiny and economic analysis, have been dismissed as unsupported by the

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<sup>5</sup> Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, OJ 2013 C366/04

<sup>6</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2008 C265/6.

evidence.<sup>7</sup> Consequently, if there is to be a level beyond which a CSL is to be presumed (i.e. the “additional rights” are not to be required to found jurisdiction), this level should be increased to at least 25%. Under the national laws in most Member States, this level of shareholding introduces certain rights which may in some circumstances influence business decisions. However, we would question the need for a presumption in circumstances where decisive influence is not being acquired. There is a good case for “additional rights” to be necessary at all levels of interest below decisive influence.

- 4.6.2 We also consider the 5% threshold to be much too low.<sup>8</sup> Unless accompanied by additional control rights that bear directly on the competitive conduct of the target company (as opposed, for example, to a single board seat), it is extremely unlikely that such a low shareholding would allow its holder to impose its will on the target irrespective of the interests of shareholders representing the remaining 95% of the target. Consequently, we consider that this secondary threshold should instead be 15%.
- 4.7 A shareholding threshold of 15% (in a horizontally or vertically related undertaking) would be consistent with the decisions of the EC and NCAs cited in the SWD and Annex II of the 2013 consultation, in which remedies have been imposed in respect of CSLs:
- 4.7.1 Almost all the cases cited by the EC have involved shareholdings of more than 20%;
- 4.7.2 Only three cases involved a shareholding of less than 15% that was required to be divested.<sup>9</sup> These involved either additional structural links (such as a long-term exclusivity agreement in *Glencore/Xstrata* or indirect shareholdings through other minority investments in *VEBA/VIAG*), or in fact amounted to de facto control of voting rights in excess of 25% (due to low shareholder turnout, in *A-Tec Industries*). They are also notable for their absence of any economic analysis of why such low shareholdings might give rise to concerns.
- 4.7.3 All the cases in which the US courts have identified an antitrust merger violation involved shareholdings of more than 15%.<sup>10</sup>
- 4.8 The reason why shareholdings of less than 15% have not given rise to concerns in past decisions is likely to be that levels of shareholder influence are self-policing to a

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<sup>7</sup> See, for example, *Ryanair/Aer Lingus* merger inquiry, Final Report of the CC (August 2013), paragraph 7.148, where having considered this theory in some detail, the CC dismissed it for lack of evidence, in part because of “the uncertainty and indirectness by which Aer Lingus’ profit will flow back to Ryanair.”

<sup>8</sup> Although some stakes in excess of 15% have been required to be sold down to 5% (e.g. in the *Ryanair/Aer Lingus* and *BSkyB/ITV* cases), these were remedies, in respect of which the relevant authorities had a measure of appreciation to prevent future problems. Such cases do not therefore suggest that minority interests of less than 15% are potentially problematic.

<sup>9</sup> Case M.6541 *Glencore / Xstrata*, Commission decision of 22 November 2012; Case COMP/M.1673, *VEBA/VIAG*, Commission decision of 13 June 2003; and B5- 198/07, *A-Tec Industries AG / Norddeutsche Affinerie AG*, decision of the Bundeskartellamt (2008).

<sup>10</sup> See paragraph 76 of Annex II of the 2013 consultation.

degree: other shareholders have no incentives to allow one shareholder a degree of influence that is substantially disproportionate to its financial interest in the target company.

4.9 In addition, in order to justify further review, minority interests should be accompanied by "additional rights" that would trigger a filing obligation:

4.9.1 The test should be consistent with the simplicity, clarity and legal certainty of the "decisive influence" test under the EUMR.

4.9.2 Unless the EC opts for a self-assessment, it would not be appropriate to import into the EUMR the degree of subjectivity that is inherent in assessing whether "material influence" arises under the UK regime, whereby the question of whether a given right is competitively significant depends on the competitive context of the target company.

4.9.3 Instead, the test for "additional" rights should focus (in the same way as the test for decisive influence) on whether the acquirer is able to veto one or more of a clearly defined set of decisions that, while short of decisive influence, have the potential to influence the competitive conduct of the target company. Such an ability would be assessed by reference to all the applicable governance arrangements (articles of association, shareholders agreement, corporate laws) and the test would be satisfied in relation to public companies<sup>11</sup> if there is a de facto ability to veto such decisions due to low turnout at shareholder meetings.<sup>12</sup>

4.9.4 Careful consideration would need to be given to defining the specific types of veto right. There may, for instance, need to be a distinction made between veto rights in the context of public and private companies. For example, rights to veto the dis-application of pre-emption rights will confer much greater influence in public companies, where there are large numbers of small shareholders. Some suggestions of the types of decisions of the target that may be relevant, based on UK and German cases, include decisions to:

- (a) Enter into a merger, a sale of a business, an acquisition, or a joint venture;
- (b) Undertake investments or divest assets;
- (c) Raise funding, whether through debt or equity;
- (d) Enter into supply arrangements;
- (e) Commence legal or regulatory proceedings;
- (f) Amend the corporate governance documents of the company, such as its articles of association; and

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<sup>11</sup> In relation to private companies, it is realistic to assume that all holders of a stake in excess of 5% will vote.

<sup>12</sup> Again it must be borne in mind that minority shareholders are unlikely to have access to historic voting records.

- (g) Change the share capital of the company (in so far as this may inhibit the target's ability to raise new equity funding or enter into strategic M&A transactions).

4.10 We recognise that access to commercially sensitive information regarding the target is a relevant factor for delimiting the scope of cases over which jurisdiction should arise. However:

4.10.1 it should be recognised that acquirers may forego access, even if they have a theoretical right to it.<sup>13</sup> Accordingly, where the acquirer has entered into (or will enter into) appropriate compliance arrangements to restrict the flow of competitively sensitive information between it (and its board nominees) and the target, no filing obligation should be triggered. In this regard, the Commission should publish guidelines to clarify the restrictions that should be put in place on information flows to shareholders and directors with links to vertically– or horizontally–related undertakings;

4.10.2 access to information is irrelevant in the context of vertical links. Exchanges of information between vertically–linked companies only give rise to competition concerns if they amount to the disclosure of pricing intentions of a competitor (i.e. a hub and spoke information exchange). However, such information is not of a type that minority shareholders of a company are entitled to receive (and, even if they were, it is already covered by the Article 101 prohibition). Consequently, even if information rights are considered relevant for determining the significance of a competitive link, this should only be the case for horizontal links; and

4.10.3 reference to a vague standard of “competitively sensitive information” would be unwise. Given the very low threshold and considerable uncertainty which arises from the developing treatment of information exchange as a breach of Article 101, it is questionable whether this would amount to any meaningful type of filter. Rather, the EC should specify the precise types of information, the disclosures of which would trigger jurisdiction.

4.11 We do not consider it appropriate to treat the presence of a single board seat as a factor that would trigger a filing. Instead, the question should be whether the acquirer of the competitive link will have a sufficient number of board seats or voting rights on the board to allow it to veto competitively significant decisions that are taken at board level.

### **Amendment of the Banking Clause**

4.12 We query why the Commission is proposing to limit the extension of the banking clause to "restructuring transactions" (including debt–for–equity swaps). Any transaction that would not be deemed a concentration as a result of Article 3(5)(a) should also not be deemed to be an acquisition of a competitively significant link.

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<sup>13</sup> The same is true for veto rights. If acquirers are entitled to them but forego them they should be disregarded.

## **Staggered Acquisitions**

- 4.13 We agree with the proposal contained in the SWP that a transparency filing should be required only when a significant competitive link is acquired, and that a new filing should not be required every time that the relevant shareholding is increased and/or the accompanying rights are strengthened (unless this amounts to an acquisition of decisive influence).
- 4.14 There are certain implications of this approach that the EC will need to address:
- 4.14.1 In clearing (or opting not to investigate) an acquisition, the EC will be implicitly authorising the acquirer to increase its stake to a level that falls just shy of decisive influence.
- 4.14.2 In many cases, it will therefore need to assess the transaction as if some higher, hypothetical degree of control or financial interest has been acquired, than is actually the case.
- 4.14.3 What must be avoided is a situation in which the EC identifies competition concerns arising from that higher, hypothetical interest and prohibits the transaction (or orders it to be fully unwound, as implied by the proposed reform of Article 8(4) described in paragraphs 190-194 of the SWD), notwithstanding that the actual acquisition does not itself raise competition concerns. For example:
- (a) The EC might conclude that an acquisition of a 20% financial interest with no control rights will not give rise to an incentive and ability to raise prices, but that if the stake were increased in the future to 49% (falling short of decisive influence) such concerns would arise; or
- (b) The EC might conclude that an interest of 5% plus a single board seat would not confer any meaningful degree of competitive influence over decisions that are relevant to the target's competitive conduct, but that concerns would arise if the acquirer were to increase its level of influence to three board members and a right to veto major investments (again, falling short of decisive influence).
- 4.14.4 The EC will therefore need to be prepared, when issuing clearance decisions, to identify the threshold at which any further increases in the magnitude of the CSL might give rise to concerns, and to require the acquirer, as a condition of clearance, to notify to the EC any further increases that exceed that threshold.

## **Turnover thresholds**

- 4.15 The SWP indicates that the current thresholds for Union dimension would apply for acquisitions of CSLs, but does not provide details of how this would be implemented. We make the following suggestions:
- 4.15.1 As indicated in our previous response, any new regime should be neutral as regards its impact on notifiability of acquisitions of decisive influence. Acquisitions of decisive influence that are not currently notifiable should not become notifiable as a result of the implementation of the EC's proposals.

- 4.15.2 Article 5(4) EUMR should apply in the same way for calculating turnover of acquirers of CSLs and their targets as they do for calculating turnover of undertakings concerned in an acquisition of decisive influence.
- 4.15.3 For acquisitions of CSLs, we continue to believe that turnover thresholds should be assessed by reference to the acquirer and target alone, without taking into account turnover of other undertakings which have decisive influence or a CSL in the target, or will have such an interest as a result of the transaction. This would be appropriate, as the theories of harm that have prompted the EC's current proposals all relate to the competitive relationship between acquirer and target. This also appears to correspond with the (albeit ambiguous) suggestion put forward by the EC in footnote 82 of the SWP. If this approach is not adopted, very large numbers of CSLs will satisfy the turnover thresholds simply because of the turnover of other investors whose interests in the target have no bearing on the competitive effects of the CSL under assessment (see also our comments in 3.1 above).
- 4.15.4 The EC will need to consider how to address situations in which an acquiring consortium is comprised of some acquirers of CSLs that meet the turnover thresholds (e.g. because the acquirer and target each have turnover of more than €250 million in the EU) and some that do not (because the acquirer has turnover of less than €250 million in the EU). The implication of the above approach is that the Commission would have jurisdiction to review only acquisitions by the former set of acquirers, leaving acquisitions by the latter set to be reviewed under national merger control regimes, or referred upwards for review by the EC.
- 4.15.5 We consider that this approach would be appropriate. In particular, it would not risk the "artificial division" of transaction assessments (which the EC identifies as a potential concern in the context of acquisitions of decisive influence),<sup>14</sup> as the competitive assessment of each CSL would be standalone, with no relationship between the substantive competition issues raised by different acquirers. It would, however, be important to afford acquirers that do not meet the turnover thresholds the right to request that their related acquisitions are referred upwards for review by the EC, so that they can ensure consistency of timing and procedure for the consortium acquisition as a whole, where desired.

### **Interaction with the referral system**

- 4.16 Careful consideration will need to be given to adapting the referral system to accommodate acquisitions of CSLs. We consider that the right of a Member State to request a referral following a (full) notification of an acquisition of a CSL should be curtailed in circumstances where the NCA has already received information on that CSL in the form of an earlier transparency filing, and did not request a referral at that stage. See also our comments in 4.15.5 above.

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<sup>14</sup> Paragraph 122 of the SWP

## **Substantive Assessment**

- 4.17 Subject to our comments above regarding staggered acquisitions, we agree that the SIEC test is sufficiently flexible and appropriate for the assessment of non-controlling interests. Given that non-controlling interests raise some different issues to acquisitions of control, guidance on the EC's approach to the substantive assessment of non-controlling interests will be necessary.
- 4.18 We also agree with the EC's proposed approach to ancillary restraints.

## **5. CASE REFERRALS**

### **Article 4(5)**

- 5.1 We broadly support the proposed reforms of Article 4(5) referrals, subject to the following comments:

5.1.1 In cases where an NCA has vetoed an Article 4(5) referral following submission of a Form CO by the parties, our view is that the NCA should be required to accept that Form CO as a complete notification for the purpose of its national merger control rules, and that its review period should therefore start to run on the date on which it exercises its veto. Requiring the notifying parties to engage in a second set of pre-notification discussions in order to verify completeness of the filing under the applicable national regime would be inefficient, unnecessary and harmful to the predictability of transaction timing.

5.1.2 Paragraphs 140 and 141 of the SWP indicate that the EC intends to introduce some form of information exchange between the EC and NCAs during pre-notification, and that amendments to Article 19 EUMR might be necessary to "encourage" parties who intend to notify under Article 4(5) to engage in contact with the relevant NCAs. While unclear, this implies that confidential information about a transaction may be disclosed to NCAs without the parties' consent. While we agree that it would be sensible for NCAs to have access to information received by the EC after a notification has been made, in order to assess whether to veto a referral, we see no justification for removing control over the dissemination of such information from merging parties during pre-notification:

- (a) First, involving several NCAs at this early stage of the process could lead to more complexity and a greater information burden for the parties, thus delaying the filing and eliminating the efficiencies and timing advantages that would otherwise arise under the proposed reform.
- (b) Second, for transactions not yet in the public domain, it would result in multiple NCAs receiving highly sensitive market (and insider) information. We recognise that the ECN has a good record of maintaining the confidentiality of documents, but as events in recent years have shown, information can escape from even the most secure of systems.

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

## **Article 22**

- 5.2 We welcome the proposal to remove the possibility for Member States to request an Article 22 referral even when they have no jurisdiction to review a transaction under their national merger control laws. We consider this to be a very positive development.
- 5.3 As regards implementation of this reform, we consider the system described in paragraphs 148–159 of the SWP to be broadly workable, subject to the following comments:
  - 5.3.1 Paragraph 153 suggests that NCAs might be under an obligation to circulate information regarding a transaction to other NCAs during pre-notification discussions. For the reasons outlined above in relation to Article 4(5) referrals, we consider that pre-notification dissemination of confidential information about a transaction should be at the option of the merging parties, and should take place only with their consent. In many cases, it will be advantageous to the parties to allow an information notice to be circulated during pre-notification, as that will mean that the risk of a referral can be resolved at an earlier stage, but that should be a strategic decision for the parties, not an obligation.
  - 5.3.2 Paragraph 154 of the SWP indicates that NCAs would be required to circulate an information notice with an indication of whether they intend to request a referral "without delay". The vagueness of that requirement will adversely impact the predictability of timing for reviews and, ultimately, closing of transactions, with attendant financing costs. We suggest a limit of 3 working days, in line with the EC's obligations under Article 19 EUMR.
  - 5.3.3 The description of the envisaged referral system in paragraphs 153-158 of the SWD is unclear on what would happen if the MS that circulates an information notice in relation to a transaction decides not to request an Article 22 referral, but another Member State is minded to make such a request. We submit that the second Member State should be required to make any such referral within the suspension period that is triggered by the information notice, i.e. no later than 15 working days after notification to the first Member State. That should be the case even if the second Member State has not, at that time, received a full notification, or has received its notification after the first Member State. This could be implemented by providing that any Member State that has decided not to request a referral within 15 working

days of a notification is deemed to have implicitly decided to veto any subsequent request for a referral by another Member State. If Member States are allowed a second opportunity to request a referral (once after receiving an information notice and again after receiving a notification) that would imply that the information notice does not contain sufficient information to allow other Member States to assess whether they should request or veto a referral and that it therefore serves no purpose. Moreover, allowing NCAs multiple opportunities to request a referral would result in a referral system that is even more complex and unpredictable for notifying parties than the current system.

5.3.4 We also query why the applicable suspension obligation would end "at the latest 15 working days after the Member State which sent the notice receives a formal notification". If information notices are circulated during pre-notification, we query why the suspension period should be longer when that takes place. Instead, we consider that the 15 working day suspension period should run from the date on which the notice is circulated.

5.3.5 While we welcome the proposal that Member States with no competence to review a transaction should not be able to request a referral, we have concerns that the possibility for the EC to "invite" a Member State to make a request will operate as a "backdoor" referral mechanism for non-competent Member States, i.e. by asking the Commission to exercise its right to invite a referral. Accordingly, we favour the removal of the EC's right to invite under Article 22(5).

5.3.6 Finally, we consider that, in cases where the EC has exercised its right to invite under Article 22(5), there is little justification for the EC then taking 10 working days to decide whether to accept the request that it has invited. Accordingly, where there has been an invitation under Article 22(5), the referral should take place (deemed acceptance by the EC) on the same date that the MS requests it.

#### **Article 4(4)**

5.4 We agree with the proposal that the test for an Article 4(4) referral should require the parties to show only that the concentration is likely to "primarily impact a distinct market" in the Member State concerned, instead of having to concede (as they do at present) that it would have a "significant effect in a market".

#### **Article 9**

5.5 It is disconcerting for merging parties that under the current Article 9 regime they face the prospect of wasting 65 working days (in addition to the pre-notification period) engaging with the EC before having their transaction referred to a Member State, whereupon they are required to prepare and submit a new notification and their review timetable starts afresh. The EC is now proposing to allow for the possibility of up to 100 working days (plus the pre-notification period) being wasted in this way and this seems to us a disproportionate burden on affected parties.

5.6 In our view, the current possibility for a referral after initiation of Phase 2 proceedings is unjustified. The intensity of review that is required in order to assess whether the

Article 9 criteria are met (e.g. whether the concentration "threatens to affect significantly competition" in a "distinct market") is broadly comparable to that required to assess whether a concentration raises "serious doubts as to its compatibility" with the internal market for the purposes of Article 6(1)(c), and ought therefore to be carried out within the same timeframe, and should not vary according to whether Phase 2 proceedings are initiated. There has only been one case in the history of the EUMR in which the EC has referred a case after initiation of Phase 2 proceedings.<sup>15</sup> In all other Phase 2 cases, the EC has been able either to decide on the referral at the same time as initiating Phase 2 proceedings, or has rejected the referral request during its Phase 2 review.<sup>16</sup> We therefore favour the abolition of the extended period for assessment of referral requests under Article 9(4)(b).

- 5.7 For the same reasons, the proposal to extend the assessment period outlined in the SWD is without merit. One of the justifications put forward by the EC ("to ensure that its investigation is well advanced at the time when it has to decide on a referral") seems to us to be more of a justification for abrogating the period of potentially wasted engagement with the EC. The other – bringing the deadline "in line with the deadline for remedies in Phase 2" – has no bearing on the EC's assessment of whether the Article 9 criteria are met. Moreover, extending the period in this way would allow the EC to put pressure on parties to submit remedies by threatening to refer the transaction, even in cases in which it is not confident that it has robust evidence that the concentration would be incompatible with the internal market in the absence of those remedies. This illustrates a lack of proportionality in the proposal.

## 6. MISCELLANEOUS

### **Extra-EEA joint ventures**

- 6.1 As indicated in our response to the 2013 consultation, we welcome the proposal to remove EUMR jurisdiction for extra-territorial joint ventures. For the reasons set out in that response, we continue to believe that the cleanest and most appropriate solution would be simply to require that the joint venture itself is one of the undertakings concerned that triggers jurisdiction (i.e. that the JV must itself have at least €100 million or €250 million of EU-wide turnover). However, the EC's proposed test of removing jurisdiction for JVs "located and operating outside the EEA and without any effects on EEA markets" appears to us to be broadly workable, provided it is supplemented with sensible interpretative guidelines.

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<sup>15</sup> Case COMP/M.1628, *TotalFina/Elf Aquitaine*, partially referred on 26 November 1999 following initiation of proceedings under Article 6(1)(c) EUMR on 5 October 1999.

<sup>16</sup> Most recently in Case COM/M.7009, *Holcim/Cemex West*, Case COMP/M.7000 *Liberty Global/Ziggo* and Case COMP/M.7018, *Telefonica/Deutschland/E-Plus*.

### **Extending the transparency regime to certain simplified procedure cases**

- 6.2 We agree with this, subject to our comments in Section 4 of this response regarding design of the transparency system.

### **Other issues**

- 6.3 No comments on the other issues raised by the EC, except to note that the proposed reform of Article 8(4) will need to have regard to the issues raised in 4.13 and 4.14 above regarding the assessment of staggered acquisitions of CSLs.

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

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

**CITY OF LONDON LAW SOCIETY**

**3 October 2014**

**ANNEX 1**  
**PROVISION OF ITEM 4(C) AND 4(D) DOCUMENTS AS PART OF AN HSR FILING**

In the United States, for transactions that meet the requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act") and implementing regulations ("HSR Rules"), the ultimate parent entity ("UPE" or "Parent") of the acquiring person and the UPE of the entity whose voting securities, non-corporate interests or assets are to be acquired are each required to file premerger notifications ("HSR filings") with the Federal Trade Commission ("FTC") and Department of Justice ("DOJ"). As part of an HSR filing, parties are required to include Item 4(c) and Item 4(d) documents, which are so-called in reference to the numerical request on the HSR filing to which these documents are responsive. Documents that must be submitted as Item 4(c) documents are:

*"all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) . . . for the purpose of evaluating or analyzing the acquisition [or sale] with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets...."*

Additionally, respondents are also required to submit Item 4(d) documents, a relatively new requirement under the HSR Act and HSR Rules. For Item 4(d), parties must submit: (i) all Confidential Information Memoranda prepared by or for any officer(s) or director(s) that specifically relate to the sale of the acquired entity(s) or assets, and if no such Confidential Information Memorandum exists, any document(s) given to any officer(s) or director(s) of the buyer meant to serve the function of a Confidential Information Memorandum; (ii) all studies, surveys, analyses and reports prepared by investment bankers, consultants or other third party advisors for any officer(s) or director(s) for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that specifically relate to the sale of the target or its assets; and, (iii) all studies, surveys, analyses and reports evaluating or analyzing synergies and/or efficiencies prepared by or for any officer(s) or director(s) for the purpose of evaluating or analyzing the acquisition.

Responding to these requests has become one of, if not the, most burdensome requirements in preparing and making an HSR filing. To begin with, these requests seek documents from all officers or directors. Under the HSR Rules, this includes all persons holding those positions, or positions with similar responsibilities, within the UPE and any of its affiliates or subsidiaries. As one can imagine, for large multinational companies, this could mean starting with a universe of hundreds of employees spread throughout the world. In these roles, these employees often have little time, nor desire, to sift through all of their materials to locate responsive documents. As a result, it is common for assistants to simply send to counsel an entire electronic folder or box of documents containing everything ever received or created for the transaction. This can mean a mountain of materials for counsel to sift through. Ultimately, officers or directors are required to spend a significant amount of time trying to review their files to locate responsive materials, or, counsel conducting a document review of each officer or director's files at their expensive hourly billable rate.

In addition to those that the requests target, the broad nature of the requests themselves pose a significant burden. Under the HSR Rules, parties are required to interpret "studies, surveys, analyses and reports" to mean all documents in written or electronic form. This includes emails, presentations, meeting minutes, and even hand-written notes. Where an officer or Director takes hand-written notes on a presentation, if said presentation contains responsive

material, both the original and the version with notes must be submitted as two separate documents. In today's digital age where employees send hundreds of emails throughout the day, these broad requirements can be stifling for companies trying to adhere to the requirements of the HSR Act. To adhere to these strict requirements, an officer or director could be forced to review days, weeks, or even months worth of email and files. Again, the alternative is for counsel to conduct a costly document collection and review of each officer or director's email account, hard-drive, and paper documents.

In meeting the requirements of the HSR Act, it is now not uncommon for each party to submit twenty or even thirty Item 4(c) and 4(d) documents. Getting to this responsive universe takes sifting through hundreds and even thousands of documents. With counsel charging upwards of \$400 an hour, it is not uncommon for this review portion of the HSR filing alone to cost tens-of-thousands of dollars.