Response to the European Commission's Consultation "Towards more effective EU merger control"

I. Introduction

Mayer Brown welcomes the opportunity to comment on the European Commission's consultation documents "Towards more effective EU merger control" ("**Consultation Paper**"). This document reflects solely the view of Mayer Brown. It does not represent the views of any clients of Mayer Brown.

Our comments below will critically refer to the appropriateness, efficacy and necessity of the proposal to investigate the acquisition of minority shareholdings ("**Structural Links**") under the EUMR. We will then comment on the contemplated changes to the referral mechanism and the treatment of joint ventures, which have no effect in the EEA.

II. Structural Links

1. "IF IT AIN'T BROKE, DON'T FIX IT"

As noted in the preamble to the EUMR, Community law must only include provisions governing those concentrations that may "*significantly impede effective competition in the common market*" and that "*provisions to be adopted in this Regulation should apply to significant structural changes*." The word "significant" is of particular relevance, as it is not sufficiently clear that the acquisition of Structural Links would significantly impede effective competition or lead to significant structural changes.

The current *ex-ante* inapplicability of the EUMR to the acquisition of Structural Links does not mean that it is an area to which antitrust laws do not apply.

- First, as far as merger control is concerned, it is important to recall that existing shareholdings of 10% or more and interlocking directorships have to be identified in any notification to the Commission as far as they concern affected product markets (see Sections 4.2.1. and 4.2.2. Form CO). Hence, in transactions with a Community dimension, the Commission assesses Structural Links within the substantive analysis of the notified concentration. When anticompetitive concerns pertaining to existing Structural Links arise, the Commission, as it has evidenced in the Consultation Paper, has the power to grant clearances subject to conditions and obligations, and, indeed, Structural Links have to be divested on a consistent basis when a remedy is required.
- Second, without going into the discussion as to whether or not an acquisition of a minority shareholding is an agreement pursuant to Article 101 TFEU or not, the minority shareholder, the target and the other shareholders remain independent companies. *Ex-post* enforcement pursuant to Articles 101 and 102 TFEU and the national equivalents are available to analyze anticompetitive conduct associated with Structural Links. Correspondingly, as early as 2001, in its Green Paper on the Review of Council Regulation (EEC) No 4064/89[1], the Commission had noted that it would "*appear disproportionate to subject all acquisitions of minority shareholdings to the* ex-ante *control of the Merger Regulation*." The Commission's conclusion was on the basis that "*only a limited number of such transactions would be liable to raise competition concerns that could not be satisfactorily addressed under Articles 81 and 82 EC.*"
- Third, existing corporate law in Member States would also constrain the ability of a minority shareholder to exercise influence and access information in relation to the target. To give an example, in Germany, corporate law, in general, prevents a minority shareholder from exercising material influence on business decisions. An exchange of competitively sensitive information may give rise to damage and respected claims, hence,

1 European Commission, Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM(2001) 745 final, 11 December 2001.

the target has the right to reject any request directed at such information. In addition, antitrust law restricts the information exchange between the minority shareholder and the target, which are independent companies. The scope and depth of the right to information must be interpreted in view of antitrust laws, in particular in the light of the permissible and non-permissible information exchanges pursuant to Article 101 TFEU. Further, the businesses of today have robust compliance programs to detect the exchange of confidential information, and a properly functioning corporate governance mechanism would not enable minority shareholders to influence company policy in a manner contrary to the interests of other shareholders.

Neither the case law nor the situations in the past decade relied on by the Commission in the Consultation Paper merit a shift in the view that subjecting all acquisitions of Structural Links to *ex-ante* control would be a proportionate remedy to address the perceived enforcement gap. The anticompetitive effects, be it unilateral, coordinated or vertical, are more of a behavioral nature than based on structural changes; an *ex-ante* structural merger control may involve the Commission too early.

In addition, the assumption of jurisdiction over Structural Links would also need to take into account the identification of undertakings whose turnover is to be taken into account for the determination of the jurisdictional turnover thresholds. The inclusion of any other shareholder, including any other minority shareholder exceeding the relevant test for a Structural Link (*e.g.*, a 10% shareholding), would have the consequence that too many notifications would fall under the ambit of the EUMR.

As enunciated in the Green Paper, the principle underlying the EUMR is the "*need to ensure effective, efficient, fair and transparent control of concentrations at the most appropriate level, in accordance with the principle of subsidiarity.*" It is highly questionable whether the inclusion of the acquisition of Structural Links within the scope of EUMR would provide for the most efficient use of time and resources, not only of the Commission but of all others concerned.

In order to include the acquisition of Structural Links within the ambit of EUMR, substantive amendments would have to be made to the current jurisdictional framework of the assessment of concentrations. The acquisition of Structural Links does not fall within any of these situations, and, hence, the Commission would need to substantively amend the provisions that explain the concept of a concentration. This would consequently mean a significant shift from well- established rules relating to the test of control as also provided in the Commission's Jurisdictional Notice.

2. THE THREE OPTIONS

The Consultation Paper suggests three options to deal with competition issues related to Structural Links. In addition to the undesirable complexities described above, each of the proposed systems would create additional uncertainties:

- The application of the current system of an *ex-ante* merger control (pre-notification, notification, suspension obligation) to the acquisition of Structural Links would be disproportionately burdensome on businesses. The suspension obligation would considerably interfere with commercial freedom, especially in transactions where minority shareholdings represent purely passive investments. Further, the minority shareholder, the target and other shareholders remain independent, and, since the anticompetitive effects are more of a behavioral nature than based on structural changes, it could be fixed through the imposition of remedies, even after the transaction is closed.
- The self-assessment system may have relative merits in that it would allow the Commission to choose cases carefully and develop its own internal knowledge as to which are the problematic transactions. However, given the lack of experience in assessing Structural Links, the Commission may be unable to provide detailed and clear guidance on the type of Structural Links that it will investigate. This would result in a situation where parties to a transaction cannot conclusively decide whether or not the acquisition of Structural Links would be subject to an investigation by the Commission. The introduction of a voluntary notification in such instance may encourage businesses to be

overcautious, leading to an inefficient use of resources. At any rate, an appropriate limitation period would be needed, which should end at the date of consummation. In case of a voluntary filing, the parties should not be subject to a suspension obligation.

- In the case of a transparency system that involves the obligation to file a short information notice, it is not clear what would be the "limited information" that the Commission would need for its assessment. It would not be proportionate to request from the parties lengthy submissions on the interpretation of corporate implications (*e.g.*, passive investment *versus* corporate rights) of a minority shareholding pursuant to the national law of each Member State. Despite the proposal that the transparency system would involve only a short information notice, the purpose may be defeated by several rounds of requests for information and lengthy discussions between the companies and the case team. Like in the self-assessment scenario, if the parties voluntarily make a notification, they should not be punished with the suspension obligation.

3. NEW AMMUNITION TO THE TOOLKIT

Any changes to the current framework must be made only if the perceived enforcement gap is so wide that, on balance, there is a need for change, despite the risk of upsetting the current system which is generally functioning well. If the Commission were to conclude that it would be appropriate to complement the Commission's toolkit by enabling it to investigate transactions involving the acquisition of Structural Links, then the Commission should prescribe thresholds that are clear and easily applicable. Tests applicable in Germany or in the UK, such as the "acquisition of a competitively significant influence" or "material influence" are nebulous concepts that would leave too much scope for interpretation and uncertainty. For example in Germany, the *Bundeskartellamt* declined jurisdiction in 11% of all formal notifications of the acquisition of a competitively significant influence.

Applying a shareholding threshold would be clear-cut, but the thresholds should be set sufficiently high (25% or more). Any requirement to inform the Commission must (i) be *post*-acquisition, (ii) have no suspension obligation and (iii) necessitate no formal notification.

III. Referral system

With respect to Article 4(5) EUMR, the initiative of the Commission to remove the need to submit an initial Form RS is fully endorsed. Considering that the Commission is suggesting informal contacts (pre-notification discussions) with Member States, the consultation period can be further reduced from the proposed ten days in the Consultation Paper to five days.

In relation to Article 22 EUMR, since all Member States except Luxembourg have a merger control regime, Article 22 EUMR has lost its initial relevance. A practical downside of the current regime is that even Member States that are not competent to review a transaction in the first place could request a referral and that a successful referral does not automatically lead to the Commission's jurisdiction over the whole of the EEA. The proposal that only competent Member States can refer cases to the Commission, as opposed to the current system, where non-competent Member States can also refer cases to the Commission, is to be endorsed.

IV. JOINT VENTURES

Similarly, the proposal to consider whether transactions relating to joint ventures without any activity in the EEA should not require notification is also supported.

At present, if two parties satisfying the jurisdictional thresholds for notification to the Commission decide to incorporate a joint venture outside the EU that will have no activities in the EU, this would still constitute a concentration that has to be notified. Although the Commission may be prepared to accept a shorter notification, the parties have to run through the full procedure (including pre-notification, prohibition to close until clearance, etc.), which has negative impacts on timing and cost.

The proposal to consider modification of jurisdictional rules to ensure that joint ventures with activities exclusively outside the EEA and not affecting competition within the EEA is to be commended. In view of the fact that the principle of the EUMR is to be effective, efficient and fair, an amendment could be considered through the insertion of an additional proviso in the EUMR. It should state that the creation of a full-function joint venture that would not have

"immediate, substantial and foreseeable effects in the Community" (see Case No COMP/M.1741 – *MCI WorldCom/Sprint*) would not have a Community dimension.

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September 2013