INTRODUCTION AND EXECUTIVE SUMMARY

1.1 Berwin Leighton Paisner LLP (“BLP”) welcomes the opportunity to submit comments on the White Paper published by the European Commission (the “Commission”) on 8 July 2014, “Towards more effective EU merger control” (the “White Paper”), and on the Commission Staff Working Paper accompanying the White Paper (the “Staff Working Paper”). BLP has considerable experience of representing clients on the basis of Council Regulation (EC) No 139/2004 (the “EUMR”) and the Commission’s ancillary guidance, and believes that the White Paper and Staff Working Paper represent a useful contribution to improving the EU’s present merger control regime. However, there are a number of respects in which we believe that the proposals may be improved.

1.2 Set out in sections 2 to 7 below are our responses to the various questions posed by the Commission in the Staff Working Paper, in addition to our observations on a number of additional aspects of the proposed reforms. Our comments relate principally to the proposed extension of the current merger control regime to the acquisition of non-controlling minority shareholdings under a new ‘targeted’ transparency system, and to the proposed reforms to the system for referral of cases between the Commission and the national authorities of the Member States. Our comments have been informed by our view of the likely impact of the Commission’s proposals on the wider functioning of economic activity within the EU, having particular regard to the need to avoid stifling investment activity in the present economic climate. The extension of the current system of merger control to encompass acquisitions of non-controlling minority shareholdings, in particular, has the potential to overburden businesses and thereby impair inward and outward foreign direct investment, which has long been an important driver of economic growth within the EU. Our overarching concern, therefore, is that the correct balance be struck between the Commission’s desire to close the enforcement ‘gap’ in respect of potential anticompetitive effects arising from minority shareholding acquisitions, on the one hand, and the potentially harmful impact of the Commission’s proposed reforms on the free flow of capital, on the other.

1.3 In addition, we are conscious of the need to ensure the best application of the Commission’s already limited resources. In this context, we urge the Commission to inform its decision with regard to how best to reform the current EU merger control system by reference to the need to avoid placing an excessive degree of demand on its own resources, thereby preserving the quality of analysis and decision-making by the Commission’s case teams. This is particularly so during the current period of economic recovery, during which the growing level of investment activity in the EU is likely to place an increasing burden on the Commission’s resources in any event.

1.4 The views expressed herein do not necessarily reflect the views of any of BLP’s clients.
MINORITY SHAREHOLDINGS

2.1 Regarding the concerns that a competence to control the acquisition of minority shareholdings should not inhibit restructuring transactions and the liquidity of equity markets, do you consider that the suggestions put forward in the White Paper are sufficient to alleviate this concern? Please take into account that the transactions would either not be covered by the Commission’s competence or not be subject to the 15-day waiting period.

2.1.1 We agree with the Commission’s proposal to amend Article 3(5) EUMR to specify that restructuring transactions, carried out by financial institutions in the normal course of business and for a limited period of time, would not create competitively significant links. In our view, this is likely to be an appropriate means of alleviating concerns that the Commission’s proposed transparency system may inhibit restructuring transactions and the liquidity of equity markets. We consider that this approach would be furthered by clarifying that the acquisition of minority shareholdings for investment purposes fall outside the scope of the proposed transparency system. Possible means of achieving this aim are addressed in paragraphs 2.2.1 to 2.2.3 below.

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

2.2.1 We note that there is a degree of tension inherent in the introduction of a mandatory notification system predicated on a self-assessment by the parties as to whether a transaction falls within the Commission’s definition of a ‘competitively significant link’. As such, we consider that it would be beneficial to provide investment funds and similar acquirers of minority shareholdings for investment purposes with greater legal certainty by clarifying the application of the Commission’s definition of a competitively significant link to potential vertical relationships, and by providing guidance as to the circumstances (if any) in which sanctions will be imposed for failure to submit an information notice to the Commission in relation to a competitively significant link.

2.2.2 In the case of acquisitions of minority shareholdings by investment funds active across a wide range of sectors, there may be considerable scope for the identification of potential vertical links between the parties. In such circumstances, acquirers may seek to limit their identification of potential vertical links to direct vertical relationships between undertakings active on prima facie related markets. The Commission itself appears to endorse this approach by referring to the acquisition of a minority shareholding in a “directly vertically related company”. We regard this as a reasonable and proportionate approach, avoiding a situation in which the proposed transparency system would impose a requirement to submit an information notice in the case of every acquisition of a shareholding of at least 20% by an acquirer already active across a range of industries. Such an approach also corresponds to the Commission’s stated aim that “innocuous transactions, such as those entered into for investment purposes only, would not [be covered by the transparency system]”. However, to provide companies with a greater degree of legal certainty as to the exclusion of transactions for investment purposes from the Commission’s proposed transparency system, we encourage the Commission to consider adopting guidance regarding the meaning of a ‘direct’ vertical link.

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1 By way of an example, numerous potential vertical links may be identified in a case involving an acquirer which already holds interests in several undertakings active in the United Kingdom, each of which employs staff, and which subsequently acquires a minority interest in a further undertaking active in the provision of payroll services in the United Kingdom.

2 Staff Working Paper, paragraph 88.

3 Staff Working Paper, paragraph 81.
2.2.3 In addition, having regard to the fact that the identification of a competitively sensitive link is open to a degree of interpretation, we urge the Commission to clarify its approach to sanctions for failure to submit an information notice under the proposed transparency system. In marginal cases where the parties have concluded in good faith that no notification requirement applies due to the absence of any vertical relationship between them, it may be disproportionate and indeed incompatible with the general principles of EU law to impose sanctions for a failure to notify.

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

2.3.1 In general terms, we consider that the provision of information under the transparency system would be considerably less costly and time-consuming if the information required were limited to the identity of the parties, their turnover, a description of the transaction and details of the economic sectors concerned, all of which is likely to be readily available to the parties. Our view is that it would be altogether more proportionate to the likelihood of anticompetitive effects if both market share data and internal documents were excluded from the scope of the information notice.

2.3.2 However, as between the German and US systems, our preference is for the adoption of a US-style system, whereby the Commission would rely on internal documents submitted by the parties to form a view of the relevant market(s). While the Commission has proposed that the information notice to be submitted by the parties may include only “some limited market share information”, such data may not be readily available, with the result that assembling the requisite information could be costly and time-consuming. The regulatory burden on parties would be further increased if data were required for all ‘plausible’ definitions of the relevant market(s), rather than on the basis of the likely relevant market(s) in accordance with the Commission’s Notice on market definition. It would also be unduly burdensome for the parties to be required to submit market share information both for themselves and for their principal competitors, as the Staff Working Paper seems to suggest. Such a situation would be contrary to the Commission’s aim of “limiting the amount of information to be submitted to the Commission at the initial stage.” We therefore consider that it would be preferable not to require parties to engage in the process of gathering information required to calculate market share estimates at the information notice stage. Should the Commission decide to proceed with requiring the submission of market share data as part of the information notice, we strongly urge it to implement its proposal to limit the requirement for information to markets where the parties’ combined market share is at least 20%.

2.3.3 Equally, however, we consider that the submission of internal documents should be strictly confined to a limited category of documents, such as final versions of documents prepared for consideration at board and/or shareholder level, in contemplation of the notified transaction, excluding any earlier versions of such documents, documents relating to potential alternative acquisitions and documents prepared by the parties addressing the relevant market(s) more generally. Given the very small number of competitively significant links likely to be problematic from a competition perspective, we consider that it would be appropriate to exclude from the

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4 Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), pages 5 to 13.
5 Paragraph 104.
6 Staff Working Paper, paragraph 82.
scope of the information notice both market share data and all but a very limited category of internal documents.

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

2.4.1 We do not consider that we are in a position to provide a meaningful estimate of the time and cost likely to be associated with preparing an information notice, given that the extent of the horizontal overlap(s) and/or vertical relationship(s) between the parties, the complexity of the rights attached to a 5-20% shareholding giving rise to a competitively significant link and the ease with which the parties can assemble the requisite information vary to a considerable extent. However, we consider that preparation of the notice would be considerably less costly if the information required did not include market share data, and the scope of any requirement to submit internal documents were strictly limited to a narrow category of such documents, along the lines suggested in paragraph 2.3.3 above.

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

2.5.1 We do not consider that the Commission should introduce a waiting period following submission of an information notice, during which the parties would be prevented from closing the transaction. Given the very small number of minority shareholding acquisitions likely to give rise to competition concerns, a requirement to suspend implementation of a transaction following submission of an information notice would represent a disproportionate regulatory burden. Such risk as may exist of a minority shareholding acquisition giving rise to a material restriction of competition may be sufficiently addressed by the Commission’s proposal to introduce interim measures, such as hold separate orders, in respect of partially or completely implemented transactions. Should the Commission decide to proceed with the adoption of powers to impose interim measures, we encourage it to adopt guidance regarding the circumstances in which such measures will be regarded as appropriate.7

2.5.2 In addition, we consider that the Commission should be required to decide whether to investigate a transaction within a prescription period limited to four months8 following:

(i) submission of an information notice; or

(ii) if no information notice is submitted, the date when material facts concerning the transaction were made public.

2.5.3 For this purpose, ‘material facts’ would include information regarding the identity of the merging parties, the nature of the transaction and the date on which the transaction was announced, completed or will complete. ‘Made public’ would require material facts to have been publicised in such a way as to be generally known or readily available, for example by publication in a trade journal, national newspaper or on at least one party’s website.

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7 Guidance from the Commission could be informed by the CMA’s recent extension of its powers to adopt interim measures and guidance in relation to such measures. See: “Mergers: Guidance on the CMA’s jurisdiction and procedure” (CMA2, January 2014), Annex C.

8 A four-month period would reflect the four-month deadline currently applied by the United Kingdom’s Competition and Markets Authority (the “CMA”) for the opening of an in-depth review. We note in this regard that many respondents to the Commission’s 2013 consultation on proposed reform to the EUMR likewise referred to the four-month period applied in the United Kingdom as appropriate (Staff Working Paper, paragraph 109).
2.5.4 A period of six months for the initiation of an investigation would give rise to an unacceptable degree of legal uncertainty for businesses.

2.6 Other comments on the proposed transparency system

2.6.1 We consider that the Commission’s proposed ‘targeted’ transparency system has a number of benefits. By ensuring that information about prima facie competitively sensitive minority shareholding acquisitions is provided to the Commission, giving it the opportunity to request submission of a full notification and the Member States the opportunity to request referral, it would furnish parties with a greater degree of legal certainty, provided that the Commission and Member States are bound by a strict timetable within which to request notification and/or referral.

Definition of a ‘competitively significant link’

2.6.2 We support the Commission’s proposal to delimit the scope of the second limb of its test for a ‘competitively significant link’ with reference to the acquisition of a shareholding of 20% or more, or the acquisition of a shareholding of 5-20%, accompanied by rights enabling the acquirer materially to influence the target’s commercial policy. We note, in this regard, the Commission’s reference to the lower 15% threshold applied by the CMA. However, the relevant jurisdictional test in the United Kingdom does not include reference to smaller minority shareholdings accompanied by additional rights conferring material influence on the holder; therefore, we submit that the Commission should retain the higher threshold of 20%, in the alternative to a smaller shareholding conferring material influence.

Referrals to Member States

2.6.3 With regard to the Commission’s conclusion that the “targeted transparency system would fit with the existing systems for controlling minority shareholdings on a national level”\(^9\), we note that it is in fact unclear how the case referral mechanism between Member States and the Commission would function in the case of minority shareholding acquisitions. As the White Paper observes, only three of the EU’s 28 Member States, namely Austria, Germany and the United Kingdom, currently apply merger control rules which grant the national authorities jurisdiction to review minority shareholding acquisitions. That being the case, it is unclear whether the other 25 Member States would be competent to review such a transaction in the event that the acquisition of a non-controlling minority shareholding was referred to one or more of them by the Commission. Moreover, as there is no requirement to submit a filing in connection with the acquisition of a minority shareholding in any of those 25 Member States, it is unclear how any such State could refer a minority shareholding acquisition for review by the Commission. Without clarification of these questions, the Commission’s proposed transparency system is in danger of extending the national merger control regimes of all of the EU Member States to encompass minority shareholding acquisitions, ‘by the back door’.

Voluntary notification

2.6.4 We support the Commission’s proposal that parties should be able to notify a minority shareholding acquisition on a voluntary basis. Submission of a voluntary notification would lead to increased transaction costs, but would also provide parties with a valuable opportunity to gain legal certainty. However, we do not consider that submission of a voluntary notification should

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\(^9\) Staff Working Paper, paragraph 83.
give rise to a standstill obligation; instead, parties should be able to determine whether they wish to assume the regulatory risk involved in implementing a notified transaction prior to clearance.

2.6.5 We consider that a system in which parties are granted the ability to notify the Commission of a transaction voluntarily could be undermined by an obligation to complete an extensive notification form in all cases. Parties wishing to benefit from the greater degree of legal certainty provided by a voluntary notification, or those involved in a transaction regarded as likely to attract the attention of the Commission as a result of its possible competitive effects, may be dissuaded from submitting a voluntary notification if the time and resources required to do so significantly outweigh the benefits. As such, the advantages of a voluntary notification system are more likely to be realised – both for parties and for the Commission itself, by limiting its own-initiative enforcement activity – where a more limited form of notification is adopted than the current Form CO. In our experience, in many cases the full Form CO places a disproportionately onerous regulatory burden on parties.
REFERRALS – ARTICLE 22 EUMR

3.1 Please comment on the suggestions regarding the information system amongst the Member States and the Commission. In particular, would such a system give sufficient information to the Member States to decide about a referral request?

3.1.1 We are broadly in agreement that the introduction of an information notice, to be circulated by a national competition authority indicating that it is considering requesting referral to the Commission as a means of triggering the suspension of national deadlines in all Member States, is an appropriate means of addressing the risk of an Article 22 referral request being made after one or more other Member States has issued a clearance decision. In addition, we consider that the Commission’s proposals with regard to the contents of the information notice (namely, that the notice should include information concerning the likely scope of the relevant geographic market(s), particularly where they are supranational, and list other competent Member States) are likely to provide Member States with sufficient information to enable them to decide whether to oppose a referral request. The residual risk of any information deficit among the non-notified Member States is, in our view, sufficiently addressed by the possibility of those Member States contacting the parties to request information regarding why they do not regard the transaction as notifiable in the relevant jurisdiction.

3.1.2 We consider that it would be appropriate to limit the suspension period to 15 working days from the date when the information notice is received by the Member States, reflecting the 15-working day period under Article 22(1) within which a Member State must decide whether to make a request for referral. We consider that the Commission’s proposal that the suspension period should endure until 15 working days after the Member State which sent the notice receives a formal notification is excessive, particular where notification in that Member State is made following a lengthy pre-notification period.

3.1.3 However, we do not consider that it should be possible for the Commission to invite a Member State to request referral under Article 22, triggering the suspension of national deadlines, as such an invitation from the Commission would, in our view, undermine the competent Member State’s discretion to assess whether it or the Commission is the most appropriate forum for review.

3.1.4 Finally, we agree with the Commission’s proposal that non-competent Member States should lose their right to request referral of a case to the Commission, on the basis that Member States without jurisdiction to review a given transaction (and which, therefore, cannot have received a notification from the parties setting out information regarding the relevant transaction) are not best placed to assess whether or not to make a request for referral to the Commission. Requests for referral of a transaction to the Commission should emanate only from those Member States in which a transaction may be expected to have appreciable competitive effects, necessarily excluding those Member States which themselves apply jurisdictional criteria exempting such transactions. The present position, in which any EU Member State may request referral of a transaction to the Commission, undermines the parties’ ability to enter into dialogue – should they wish to do so – with relevant national authorities regarding the possibility of a request at national level for referral to the Commission. Narrowing the category of Member States empowered to request such a referral to those competent to review a transaction will enable the parties to identify in advance those national authorities capable of seeking a referral, and approach them for the purpose of an exchange of views in appropriate circumstances. As noted in paragraph 3.1.1 above, any non-notified Member State would of course remain able to request information from the parties regarding why no notification has been made to the relevant national competition authority.
3.2 Would such a system reduce the risk of diverging decisions by the Member States?

3.2.1 We consider that the Commission’s proposed reforms represent a useful simplification of the current position, which is more likely to result in ‘splitting’ the review of an individual transaction between two or more competent authorities. Instead, transferring EEA-wide jurisdiction to review a case to the Commission (provided that no competent Member State objects) would be a valuable step towards furthering the Commission’s ‘one-stop-shop’ jurisdictional principle by reducing the number of instances of parallel proceedings taking place simultaneously at national level, particularly having regard to the danger of inconsistency in decision-making which inevitably arises as a result of parallel proceedings.

4 REFERRALS – ARTICLE 4(5) EUMR

4.1.1 We support the Commission’s proposal that parties should be able to proceed directly to submission of a Form CO in cases where a transaction does not meet the jurisdictional thresholds set out in the EUMR but does trigger a requirement to notify in at least three EU Member States. We anticipate that the saving of time arising as a result of elimination of the Form RS procedure will be at least 15 days, i.e. the time granted to Member States under Article 4(5) to object to the parties’ request for referral to the Commission. This significant reduction in the review timetable as a result of elimination of the Form RS procedure would be likely to make the Article 4(5) referral system considerably more attractive to parties than it has been to date.

4.1.2 We recommend for this purpose that the Form CO to be used in the case of Article 4(5) (or its successor provision) referrals include a section similar to that currently set out in the Form RS, requiring the parties to provide details of their referral request and an explanation of why (in their view) the case should be referred to the Commission.

4.1.3 With regard to the Commission’s proposed 15-working day period within which Member States will be able to object to a request for referral to the Commission, we consider that it would be feasible for the national authorities of Member States to determine within a period of ten working days whether to object to a request for referral of a case to the Commission. A ten-working day period would, in our view, strike the correct balance between granting national authorities sufficient time to consider whether to oppose a request for referral and limiting uncertainty for parties as to the forum in which their case is to be reviewed. This view is informed by the fact that, in practice, parties frequently enter into informal dialogue with the national authorities of relevant Member States prior to submitting a Form RS, with the result that the authorities in question are aware of the transaction and prepared in advance to consider whether to object to the request for referral to the Commission. We consider that it is reasonable to expect that such informal dialogue would continue in the event that parties were able to proceed directly to submission of a Form CO, with the result that national authorities would in practice continue to have a period longer than that formally granted to them by the EUMR in which to consider whether to object to a referral request (at least in the majority of cases).

4.1.4 In addition, provided that the confidentiality of proposed transactions vis-à-vis the wider market can be maintained and that such contact would not result in further slowing of the pre-notification period (which is already lengthy in many cases), we consider that pre-notification contact between the Commission and the competent Member States may serve as a useful means of enabling the Member States to assess the request for referral at an early stage and thereby facilitate the handling of referral requests in as timely a manner as possible. Likewise, we consider that it should be possible, subject to the parties’ consent or agreement between the Commission and the parties on a redacted form of the draft notification, for the Commission to transmit to the national authorities in competent Member States draft versions of the notification received from the parties prior to formal submission of a Form CO. For this purpose, we support the Commission’s proposal to extend Article 19 EUMR to encompass information received from the parties during the pre-
notification stage. However, we regard it as important that parties should be able to refuse consent to sharing early drafts of the notification with national authorities, for example in cases giving rise to particularly acute confidentiality concerns.

5  REFERRALS – ARTICLE 4(4) EUMR

5.1.1 We agree with the Commission’s proposal to amend the substantive test under Article 4(4) to remove the perceived element of self-incrimination. In our view, this amendment to Article 4(4) may indeed have the effect of increasing the number of Article 4(4) requests for referral from the Commission to a Member State.

5.1.2 With regard to the referral procedure under Article 4(4), we consider that it would be advisable to reduce the period within which a Member State may object to a request by the parties for referral of a transaction from the Commission to ten working days. As referred to in section 4.1.3 above in the context of requests for referral to the Commission of transactions attracting the jurisdiction of three or more Member States, in practice parties frequently enter into informal dialogue with the national authorities of relevant Member States before formally submitting a request for referral to or from the Commission. We therefore regard it as reasonable to expect Member States to finalise their decision regarding whether to object to such a request within ten working days following submission of an Article 4(4) request to the Commission.

6  REFERRALS – ARTICLE 9 EUMR

6.1.1 We oppose the Commission’s proposal to extend the period within which a transaction may be referred to one or more Member States under Article 9 EUMR to 65 working days from the start of Phase II proceedings, rather than 65 working days from the date of notification. The Commission’s proposal adds at least five weeks to the period within which the Commission may decide to refer a transaction for review by the national authorities of one or more Member States. In our view, a total period of 18 weeks within which the Commission may opt to make such a referral on the basis that the transaction affects or threatens significantly to affect competition on a distinct market within that Member State is manifestly excessive, and introduces an altogether disproportionate degree of legal uncertainty for the parties as to the forum in which their case is to be reviewed. This is particularly so having regard to the fact that, following an Article 22 referral by the Commission, the parties could be required to notify anew at Member State level, triggering the start of a further suspensory period during which they would be prevented from implementing the notified transaction.
7.1 MISCELLANEOUS

Please comment on the suggestions listed in Section 5 “Miscellaneous”, including the more detailed and technical suggestions in the accompanying Staff Working Document.

Extra-EEA joint ventures

7.1.1 We are strongly in favour of reforming the EUMR to exempt from the notification requirement transactions which cannot reasonably be expected to have any appreciable effect on competition within the EU, namely extra-territorial joint ventures in which the turnover of the proposed joint venture partners meets the jurisdictional thresholds set out in the EUMR, but where the joint venture itself is to be based outside of the EU and its activities will have no effect within the EU. In such cases, we do not consider that it is possible to justify the imposition of additional costs and delay on the parties as a result of a requirement to comply with the EUMR. Any effect on competition within the EU arising as a result of coordination between the joint venture partners effected following the transaction would continue to fall within the Commission's jurisdiction on the basis of Articles 101 and 102 TFEU (and of its own-initiative market investigation powers, where such coordination was a symptom or cause of more widespread dysfunction on the relevant market).

7.1.2 Nonetheless, we consider that it should be possible for the parties to an exempt transaction to notify the Commission on a voluntary basis, either by submitting a brief letter setting out the basic details of the transaction or by completing a Short Form CO, in respect of most of which an automatic waiver of the requirement to supply information would apply. Alternatively, we consider that the Commission could publish a pro forma notification for use in cases involving extra-territorial joint ventures without effects in the EU. We regard it as important that parties should retain the right to submit a voluntary notification in the case of an extra-territorial joint venture for the purpose of gaining legal certainty with regard to the compliance of a proposed arrangement with the EU merger control rules, and to alleviate any concern regarding arrangements subsequently being found to infringe Article 101 or 102 TFEU.

Additional exemptions from notification requirement

7.1.3 We are likewise strongly in favour of reforming the EUMR to exempt from the notification requirement transactions which do not involve any horizontal or vertical relationships between then undertakings concerned, or where the market shares involved are de minimis in nature (such as 5% in the case of any horizontal overlap and 10% in the case of any vertical relationship). However, we do not consider that it would be practicable to bring transactions involving no horizontal or vertical relationships between the participating undertakings within the scope of the Commission's proposed transparency system, given that any such transaction would necessarily fail to satisfy the first limb of the Commission's proposed test for a 'competitively significant link'. In addition, in the event that the Commission decides to proceed with extending the transparency system to cover certain exempt transactions, we do not consider that it would be appropriate to impose a three-week standstill obligation, during which the parties would be prevented from implementing the notified transaction, for the same reasons as those identified in response to question 2.5 above.

Phase II time limits

7.1.4 We agree with the Commission's proposal to introduce a limited increase (of, for example, ten working days) to the to the maximum number of working days by which Phase II proceedings may be extended, provided (as is currently the case) that the consent of the notifying parties is
required for such an extension. It is, in our view, preferable that Phase II proceedings be extended as required, than that a transaction be prohibited due to the Commission having insufficient time within which to consider possible alternatives to an outright prohibition. We also welcome the Commission’s pragmatic clarification that Phase II will automatically be extended by 15 working days where commitments are offered following the statement of objections (the “SO”), and that the exception to this automatic extension will apply only where commitments offered before the SO are sufficient to obviate the need for an SO.

Unwinding of minority shareholdings

7.1.5 We oppose the Commission’s proposal to extend its power to require dissolution of partially implemented transactions to previously acquired non-controlling minority shareholdings. It would, in our view, be contrary to the general principles of EU law to extend the Commission’s powers henceforth to ordering the divestiture of minority shareholdings lawfully acquired by notifying parties prior to introduction of the new transparency system. The acquisition of such shareholdings (provided they give rise to a competitively significant link) will henceforth attract the jurisdiction of the Commission; however, we consider that the Commission would overstep the boundaries of its jurisdiction were it to introduce retrospective powers to order the divestiture of minority shareholdings lawfully acquired in the past. As such, the Commission’s powers under Article 8(4) EUMR should be confined to ordering the divestiture to the controlling portion only of the acquirer’s shareholding.

Qualification of ‘parking’ transactions

7.1.6 We agree with the Commission’s proposal to amend the EUMR to clarify that ‘parking’ transactions, whereby a controlling shareholding is transferred to an interim acquirer (e.g. to a bank) on the basis of an agreement that it will subsequently be transferred to an ultimate acquirer, should be assessed as part of the acquisition of control by the ultimate acquirer. This reform is, in our view, likely to contribute to the freedom to carry out restructuring transactions and promote the liquidity of equity markets referred to in question 2.1 above.

Sanctions against the use of confidential information obtained during merger proceedings

7.1.7 We support the Commission’s proposal to amend the EUMR to permit the imposition of sanctions against parties and third parties which gain access to non-public information in the course of merger proceedings and disclose or use such information for other purposes. In our experience, the confidentiality of information submitted during merger proceedings is of considerable importance to both notifying parties and third parties (such as complainants), in particular those based outside the EEA, which may therefore be less familiar with the merger review process under the EUMR. It would provide businesses with a considerably greater degree of legal certainty and comfort regarding the confidentiality of information submitted to the Commission if the inappropriate use of confidential information were subject to effective powers of sanction. This reform would, in our view, be likely to encourage third parties, in particular, to respond to and participate in the Commission’s merger review proceedings.

Berwin Leighton Paisner LLP
3 October 2014