1. INTRODUCTION

1.1 By way of preliminary comments, Olswang does not consider that the Commission has clearly identified sufficient competition concerns to justify expanding its jurisdiction with respect to EU Merger Regulation, as set out in the White Paper. In particular, in our view the previous case law has not sufficiently demonstrated a need to overhaul the current merger control regime. The only case in recent years which has given rise to a significant issue is the Ryan Air / Aer Lingus case, which it is noted was resolved by the work of both the Commission and the UK competition authority. Olswang would remind the Commission of the adage “hard cases make bad law” and caution it from seeking to expand its jurisdiction principally on the basis of one admittedly difficult, but nonetheless isolated, case.

1.2 Whether the Commission should extend its jurisdiction to minority shareholdings is in any event a delicate balancing exercise between the possible anticompetitive nature of the acquisition and the potentially chilling effect on minority acquisitions. Minority shareholdings are necessarily less likely to have anti-competitive effects. Therefore, very few transactions would potentially significantly impede effective competition. Olswang considers that these few problematic cases do not outweigh the significant administrative burden that an expansion of jurisdiction for the Commission could entail.

1.3 In the event that the Commission proceeds with the implementation of the minority shareholding regime as set out in the White Paper, Olswang considers it imperative that the Commission clearly sets the boundaries of its jurisdiction. Olswang considers it important that if these measures are introduced, it should be in the form of a specific threshold percentage, which clearly indicates to merger parties the point at which a share acquisition will fall within the Commission’s jurisdiction. Parties to transactions must be able to clearly understand when their transactions will be subject to Commission review. In this regard, it is considered that notification of any minority shareholding acquisition of as low as 5% will capture too many – unproblematic – transactions. This is likely to have a chilling effect on transactions across the EU.

1.4 Olswang suggests that a suitable figure to trigger the Commission’s jurisdiction on minority shareholdings is an acquisition of 25% or more of a company's shareholdings. In the event that the Commission is minded to introduce a lower trigger point then Olswang suggests that such a percentage threshold (which in any event should not be lower than 15%) is accompanied by a second-limb threshold, before bringing the acquisition within the Commission’s jurisdiction. For example, could be where a company acquires (i) a 15% shareholding; and (ii) obtains the right to appoint a director.
1.5 One of the suggested criteria for bringing a minority shareholding acquisition into the Commission's jurisdiction is the creation of a 'competitively significant link'. As it stands, the meaning of this term is ambiguous. Parties to transactions must be able to identify definitive criteria in order to assess whether their merger falls within the jurisdiction of the Commission. In this regard it is possible to turn to other jurisdictions by way of example – in Germany notification is normally required where a certain percentage shareholding is acquired, in the US notification is required dependent on the value of the transaction. In both of these cases it is clear when a notification will be required. Finally, one should exercise caution when looking to the UK as an example in this context as the UK merger notification regime is voluntary and therefore by its very nature works in a distinct way to the EU merger regime.

1.6 Below we have set out responses to the Commission's specific questions in the Commission Staff Working Document accompanying the White Paper: ‘Towards more effective EU merger control’.

2. **MINORITY SHAREHOLDINGS:**

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

   2.1 Olswang is concerned that the proposed amendments to the banking clause are not sufficiently clear. In particular, it is noted that “restructuring transactions” is not defined and it is not at all certain which transactions would be covered by the term. It is important to clarify this point from the outset because investment companies purchasing stakes in their particular target sectors, such as technology, could be considered as establishing a competitively significant link, for instance when they purchase shares in competing undertakings. A financial institution acquiring minority shareholdings in competing undertakings should not be submitted to the Commission’s scrutiny.

   2.2 Olswang underlines the importance of carefully defining the remit of the Commission’s jurisdiction in general and, in particular, of specifying which situations should not be considered as creating a competitively significant link, to the extent that this term should be used as a criterion at all. As it stands, the amendment to the banking clause leaves too much scope for interpretation.

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

   2.3 Please see reply to question 1 (a).

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

2.4 Olswang does not consider that an information notice is required in order for the Commission to become aware of potentially problematic transactions. Provided a system similar to that set out below in paragraph 2.13 is followed, Olswang believes that by monitoring the market and taking account of third party complaints the Commission will be aware of any problematic transactions.

2.5 In the event that the Commission proceeds with the introduction of an information notice Olswang considers that the scope of the information notice should be limited to the brief information required under the German system for those minority shareholding acquisitions of below 20%. Specifically, this would mean that parties should not be required to submit market data to the Commission. The information notice should be limited to include only key details of the transaction, for example the identity of the parties, turnover, outline details of the transaction as well as the level and nature of the shareholding.

2.6 In principle, Olswang is not opposed to following a system similar to that used by the US whereby so-called "4(c)" documents must be submitted. The US system requires the submission of all studies, surveys, analyses and reports prepared by or for an officer or director of the company for the purpose of evaluating or analysing the merger or acquisition concerning market shares, competition, competitors, markets, potential for sales growth and expansion into product or geographic markets. However, it should be noted that for many minority shareholding acquisitions there would not be many internal documents to submit to the Commission, as investment in a minority shareholding is unlikely to generate much internal paperwork beyond a board paper for approval of the investment.

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

2.7 The time and cost associated with the preparation of a notice is very difficult to estimate, whether under a German or a US oriented system. Many factors determine the cost of preparing a notice – not least the level of detail required by the notice itself. The nature of the market concerned is a very important factor. As the Commission will be aware, certain market definitions are straightforward or are guided by precedents or publications, whereas others (probably the majority) require deeper analysis to establish the relevant market. The same holds true for market information such as market shares, certain transactions being able to rely on pre-existing external statistics, whereas others will require a market investigation. In regard to Olswang’s practice, it is our experience that the complexity of the TMT market is generally characterized by a difficult market assessment, which necessarily results in higher costs.

2.8 Experience shows that high costs and significant efforts are required in the preparation of a Short Form CO, and therefore Olswang would caution the Commission against
producing an information notice which resembles the Short Form CO and in particular would advise against any requirement to include market information.

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

2.9 Olswang does not consider that parties should be required to adhere to a standstill period before completing minority shareholding transactions. In most cases minority shareholding acquisitions are transactions which are completed quickly and do not require any form of integration - they are often purely investments. It is unclear how such a standstill period would function in practice; delaying transactions with a standstill period would cause undue delay in investment process, potentially cause problems on Europe’s stock exchanges and would undoubtedly have a chilling effect on European transactions at a time when Europe’s economies are starting to recover from severe financial crisis and the EU institutions should be encouraging spending.

2.10 Olswang considers that combining the proposed standstill period with a prescription period after implementation of the transaction during which the Commission can still launch an investigation gives rise to serious concerns. The standstill period gives the perception of legal certainty, whilst in fact transactions would remain vulnerable to investigation for potentially months after the standstill period has passed. The rationale behind the stand-still obligation is therefore devoid of purpose and is not justified in light of pressing business needs.

2.11 Olswang considers that a voluntary waiting period presents a pragmatic solution. During such a voluntary waiting period the Commission could decide whether or not to initiate an investigation. This period would also give the business community an opportunity to come forward with any complaints. Under this system parties could self-assess the likelihood of the transaction being considered prima facie problematic and can, at their own risk, decide to close the deal before the end of the waiting period. The parties can take due account of the relative urgency of the deal and their interest in legal certainty.

2.12 It goes without saying that such a voluntary waiting period should strike a balance between remaining as short as possible, and being long enough to allow third parties to raise concerns and the Commission to assess the likely anti-competitive effects of the transaction. Olswang considers that a waiting period of between 4 and 6 months is too long. It is considered that a waiting period of no more than 2 months is sufficient for the Commission to determine whether a transaction gives rise to any issues, and equally this should be an adequate time frame for third parties to raise any concerns with the Commission.

2.13 In the event that the Commission decides to proceed with its proposals for minority shareholdings, Olswang would suggest the following as minimum requirements:

2.13.1 Establish clear percentage thresholds which must be met before an acquisition of a minority shareholding can be investigated – preferably this threshold
should be set to include only those acquisitions of shareholdings of 25% or more;

2.13.2 Create a two month voluntary waiting period starting on the date that a transaction enters the public domain in order to give third parties the opportunity to raise concerns and the Commission a chance to conduct a preliminary review of the merger, if considered appropriate (note there should be no standstill requirement imposed on parties to a transaction, who may complete a transaction at their own risk during the two month period);

2.13.3 Stipulate that the end of the two month period signals the deadline for the Commission to start an investigation. After that period has passed the transaction should be cleared and from that point can no longer be subject to investigation by Commission under their EU merger regulations.

3. **REFERRALS - ARTICLE 22**

a) **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 Olswang does not have any comments with respect to the White Paper’s proposals regarding Article 22 referrals.

3. **PLEASE COMMENT ON THE SUGGESTIONS LISTED IN SECTION 5 "MISCELLANEOUS" INCLUDING THE MORE DETAILED AND TECHNICAL SUGGESTIONS IN THE ACCOMPANYING STAFF WORKING DOCUMENT.**

3.2 Olswang does not have any comments on the suggestions set out in Section 5 “Miscellaneous”.
