RESPONSE TO THE EUROPEAN COMMISSION' STAFF WORKING DOCUMENT "TOWARDS MORE EFFECTIVE EU MERGER CONTROL"

1 INTRODUCTION AND EXECUTIVE SUMMARY

1.1 Berwin Leighton Paisner LLP ("**BLP**") welcomes the opportunity to submit comments on the Staff Working Paper published by the European Commission (the "**Commission**") on 25 June 2013, *"Towards more effective EU merger control"* (the "**Consultation Document**"). BLP has considerable experience of representing clients on the basis of the existing EU Merger Regulation and the Commission's ancillary guidance and believes that the Consultation Document represents a useful contribution to improving the EU's present merger control regime. However, there are a number of respects in which it believes that the proposals may be improved.

1.2 Listed in sections 2 to 4 below are our responses to the various questions posed by the Commission in the Consultation Document. Our comments relate principally to the proposed extension of the current merger control regime (or an adapted version of it) to the acquisition of non-controlling minority shareholdings ("**structural links**") and to the proposed reforms to the system for referral of cases between the Commission and the national competition authorities of the EU's Member States.

1.3 We have incorporated into our responses our own reflections on 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 difficult economic climate. We note the Commission's own recent acknowledgement[1] that over the years "*the EU has benefited greatly from capital movements, having been traditionally among the main recipients and senders of financial resources*", and that both inward and outward foreign direct investment are important drivers of economic growth within the EU. The present proposals to introduce measures which have the potential to represent a significant impediment to the free flow of capital within the EU appear at odds with this commitment to ensuring that the Single Market continues to benefit from foreign (and European) investors' capacity to invest in businesses without undue regulatory interference.

1.4 We are likewise conscious of the need to ensure the best application of the Commission's already limited resources. In this context, we urge the Commission to be wary of adopting measures likely to increase significantly the scope of its own jurisdiction during a period of relatively low economic activity. Once the level of investment activity in the EU improves, such measures may place an excessive degree of demand on the Commission's own resources, which could in turn reduce the quality of analysis and decision-making by the Commission's case teams.

1.5 We also consider that the Commission's Consultation Document does not sufficiently describe the likely extent of changes to existing legislation and guidance which will be required to reflect the revised concepts of 'control' and a 'concentration', should the proposed reforms be implemented. We urge the Commission not to proceed with these reforms until it has arrived at a complete understanding of the full scope of the documentary amendments which will be required as a result. The governments of a number of Member States are likely to experience political opposition (or may themselves wish to oppose) the transfer of additional regulatory powers to the EU's institutions, with the result that implementation of new legislation required to effect the Commission's proposals may prove lengthy and difficult.

1.6 The views expressed herein do not necessarily reflect the views of any of BLP's clients.

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[1] Commission Staff Working Document on the free movement of capital in the EU, 14 April 2013.

2 APPLICATION OF MERGER CONTROL TO STRUCTURAL LINKS

2.1 In your view would it be appropriate to complement the Commission's toolkit to enable it to investigate the creation of structural links under the Merger Regulation?

2.1.1 In our view, the Commission's existing powers under Articles 101 and 102 TFEU, in addition to its power to conduct own-initiative market investigations, are sufficient to enable it to exercise regulatory control over structural links likely to give rise to potentially harmful effects on the functioning of competition in the vast majority of cases. We do not, therefore, support the Commission's proposal to extend the scope of its mandatory notification system to encompass the creation of structural links. Set out in the present section 2.1 are our reasons for this view. Our responses in the subsequent sections 2.2 to 2.9 should all be read in the light of our considerable reservations regarding the extension of the Commission's jurisdiction to structural links except in certain strictly circumscribed circumstances.

Existing toolkit

2.1.2 In *Philip Morris*[2], the European Court of Justice (the "ECJ") confirmed that in specific circumstances structural links may be assessed under Article 101. The ECJ acknowledged that, although the acquisition of a minority shareholding in a competitor may not in itself restrict competition for the purposes of Article 101, "*such an acquisition may nevertheless serve as an instrument for influencing the commercial conduct of the companies so as to restrict or distort competition on the market on which they carry on business*"[3].

2.1.3 The ECJ also stated in *Philip Morris* that the acquisition of a minority shareholding may infringe the Article 102 prohibition on abuse of a dominant position "*where the shareholding in question results in effective control of the other company or at least in some influence on its commercial policy*"[4].

2.1.4 There is, therefore, existing legal authority enabling the Commission to investigate attempts by undertakings to prevent, restrict or distort competition by manipulating a minority shareholding in a competitor. Admittedly, these tools only permit the Commission to conduct *ex post* review of structural links. However, in our view the Commission is better placed in the vast majority of cases to assess the anticompetitive effects, if any, arising as a result of a structural link on an *ex post* basis, as following an acquisition the behavioural effects of a structural link are more readily measurable. Moreover, *ex post* review ensures that the Commission's resources are only deployed in circumstances where a structural link raises particular anticompetitive concerns.

2.1.5 However, we acknowledge the existence, in a small number of cases, of a requirement for the Commission's *ex ante* jurisdiction to extend to minority shareholdings held by one competitor in another, enabling the former to exercise a degree of influence which, while not amounting to 'control' as defined in the Merger Regulation, nevertheless gives rise to a potentially harmful effect on the functioning of competition. This may be the case where, for example, the holder of a minority shareholding acquires the ability to access confidential information regarding future strategic conduct of a competitor, or to exercise a veto over its strategic investment decisions.

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[2] Joined Cases 142/84 and 156/84, *British American Tobacco Company Limited and RJ Reynolds Industries, Inc v European Commission* [1987] ECR 4487, 17 November 1987.

[3] Ibid, paragraph 37.

[4] Ibid, paragraph 65.

Disproportionality

2.1.6 We are concerned that the expenditure of resources required to review the creation of structural links – which may be expected to raise competition concerns only in a very limited number of cases – is disproportionate to the need to maintain effective competition through the application of merger control to structural links. The Commission's proposed reforms will first require it to undertake a considerable amount of work to produce effective legislation in this area; once such legislation enters into force, unless the notification system introduced is strictly limited, the Commission may thereafter be required to review a large number of additional acquisitions, the vast majority of which are unlikely to result in appreciable competitive effects within the EU. As such, we believe there exists a danger that the proposed reforms do not represent an efficient use of the Commission's resources.

2.1.7 We emphasise, in this regard, that the only notable public examples to date of the Commission being prevented from reviewing a transaction which it regarded as having a potentially harmful effect on competition because there was no change of 'control' for the purposes of the Merger Regulation are Ryanair's acquisition of a minority shareholding in Aer Lingus[5] and Andritz's minority shareholding in Schuler[6]. The adoption of fundamental reforms to the current EU merger control regime as a result of a two cases in which the Commission has regarded a transaction as falling into the regulatory 'gap' between the Merger Regulation, on one hand, and Articles 101 and 102 TFEU and the Commission's market investigation powers on the other, appears likely to constitute a disproportionate reaction to a limited shortcoming in the legislation as presently formulated. We consider that the Commission's proposed reforms present a significant danger of placing an excessive regulatory burden on a large number of transactions which cannot reasonably be expected to have any impact on competition (and on the Commission itself), in order to bring within the Commission's jurisdiction a very few transactions potentially giving rise to competition concerns. We therefore oppose the extension of any form of mandatory notification system to the creation of structural links.

2.1.8 The other examples cited in Annex II to the Consultation Document of structural links being regarded as problematic by the Commission[7] arose in the context of transactions notified to the Commission under the present merger control system, in which the minority shareholding of one party to the notified merger became problematic as a result of its concentration with the other party. In none of the cases referred to does the Commission suggest that the minority shareholding, absent the notified merger, had a potentially harmful impact on competition. That being the case, the existing merger control regime provided an adequate basis for the exercise of regulatory control over structural links by the Commission in every instance cited. It is notable, in this regard, that in the *IPIC/MAN Ferrostaal* case, the minority shareholding at issue conferred decisive influence on MAN Ferrostaal, with the result that the acquisition of that shareholding would of itself have attracted the application of the merger control rules as presently formulated (provided the jurisdictional criteria were also satisfied). A number of the minority shareholdings required to be divested in *VEBA/VIAG*, *Exxon/Mobil* and *AXA/GRE* likewise conferred control, and would therefore have constituted 'concentrations' for the purpose of the current Merger Regulation on a standalone basis.

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5 Case No COMP/M.4439 *Ryanair/Aer Lingus*, 27 June 2007.

6 Case No COMP/M.6662 *Andritz IV/Schuler*, 15 October 2012. Andritz gained unconditional clearance of its acquisition of outright control over Schuler from the Commission, indicating that its previous minority shareholding did not have a harmful effect on competition.

7 Case No COMP/M.6541 *Glencore/Xstrata*, 22 November 2012; Case No COMP/M.5406 *IPIC/MAN Ferrostaal*, 13 March 2009; Case No COMP/M.4153 *Toshiba/Westinghouse*, 19 September 2006; Case No COMP/M.3696 *E.ON/MOL*, 21 December 2005; Case No COMP/M.3653 *Siemens/VA Tech*, 13 July 2005; Case No COMP/M.1673 *VEBA/VIAG*, 13 June 2000; Case No COMP/M.1383 *Exxon/Mobil*, 29 September 1999; and Case No COMP/M.1453 *AXA/GRE*, 8 April 1999.

2.1.9 In 2001, the Commission itself concluded that, owing to the fact that only a very limited number of cases could "*not be satisfactorily addressed under Articles 81 and 82 EC… it would appear disproportionate to subject all acquisitions of minority shareholdings to the* ex ante *control of the Merger Regulation*".[8] We do not consider that the situation in 2013 has departed appreciably from that in 2001. Even if the Commission takes the position that Articles 101 and 102 TFEU and its own-initiative market investigation powers are insufficient to enable it to exercise regulatory control over the creation of potentially anticompetitive structural links, the dearth of cases to date in which the question of the competitive effects of a structural link has arisen demonstrates that the practical impact of this insufficiency is extremely limited. We therefore consider that concerns regarding disproportionality hold true today and that the introduction of a (voluntary) notification system in respect of the creation of structural links should be limited to certain clearly defined cases.

Minority control

2.1.10 We consider it important to emphasise in the present context that the Commission is already empowered under the Merger Regulation to review cases (meeting the relevant jurisdictional thresholds) involving minority shareholdings which confer control. Indeed, the concept of *de facto* control is sufficiently flexible to recognise the existence of control in circumstances where no shareholding whatsoever is acquired, but where control instead arises as a result of the grant of certain rights conferring decisive influence. As such, the Commission already has the ability to review a very large number of cases involving minority acquisitions which may give rise to competition concerns.

Departure from existing merger control regime

2.1.11 In our view, if the Commission chooses to extend the present merger control regime to the creation of structural links, it will effect a shift in its direction and policy away from the primary aim of merger control, which is to avert structural changes in the market which have the potential to damage incentives to compete. We encourage the Commission to have regard to this overarching aim of the merger control regime as a means of informing the present proposals for reform, to avoid a situation in which the Commission's expanded jurisdiction imposes a unduly onerous regulatory burden on business activity (and indeed on its own resources). As a general point of regulatory good order, we consider that undertakings should be able to carry on business in the EU subject only to restrictions indispensable for the preservation of effective competition on the market. In our view, the Commission's proposed expansion of merger control to encompass structural links risks exceeding this indispensability criterion.

2.1.12 Further, we note that the proposal to extend the present EU merger control regime to the creation of structural links poses a danger of undermining one of the key benefits of the current regulatory framework, namely the 'bright line' means of identifying circumstances in which a requirement to notify the Commission arises through the application of the jurisdictional criteria set out in the Merger Regulation, coupled with the concept of a 'concentration' as presently formulated. The definition of a 'concentration' can already be difficult to apply in situations involving *de facto* control; years of the Commission's decisional practice and professional experience has been required to develop the current understanding of how *de facto* control may be constituted (or avoided). Professional practitioners' understanding (and that of the EU's institutions themselves) would be set back significantly by a need to develop a working knowledge of how the new rules are to be applied in practice.

[8] Commission Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM(2001) 745 final, 11 December 2001, paragraph 109.

Commission's influence

2.1.13 Finally, we consider that, in contemplating the Commission's proposed reforms, it is important to have regard to the significant influence exercised by the Commission in the merger control sphere internationally. Many competition authorities worldwide, both national and supranational, have elected to model their own merger control policies on those of the Commission – in particular the national authorities of numerous EU Member States. The Commission's widespread influence has recently been demonstrated by the draft COMESA Competition Guidelines published in April 2013, which are closely modelled on the Commission's own published guidance. Thus, if the Commission elects to expand its jurisdiction to cover the creation of structural links, other competition authorities may in time be expected to adopt similar legislation. Such an outcome could lead to merger review timetables for transactions creating structural links being unnecessarily prolonged in a very large number of cases, which could in turn stifle investment activity. In this regard, we note that there is a danger of the Commission's approach furnishing national authorities minded to implement protectionist policies in order to exercise excessive regulatory supervision over foreign investments with a basis for doing so.

2.2 **Do you agree that the substantive test of the Merger Regulation is an appropriate test to assess whether a structural link would lead to competitive harm?**

2.2.1 As described above, our view is that Articles 101 and 102 TFEU and its own-initiative market investigation powers are sufficient to enable the Commission to investigate structural links in the vast majority of cases. As such, we consider that the most appropriate of the reforms proposed by the Commission would be the introduction of a self-assessment system (coupled with an ability for parties to file on a voluntary basis) in respect of a limited category of structural links.

2.2.2 If the Commission proceeds with new legislation enabling it to investigate the creation of structural links, we consider that the substantive test applied by the Merger Regulation would be an appropriate means of assessing whether a structural link is likely to harm competition.

2.3 **Which of the three basic systems set out above do you consider the most appropriate way to deal with the competition issues related to structural links? Please take into account the following considerations:**

(a) the need for the Commission, Member States and third parties to be informed about potentially anti-competitive transactions;

(b) the administrative burden on the parties to a transaction;

(c) the potential harm to competition resulting from structural links, both in terms of the number of potentially problematic cases and the impact of each potentially harmful transaction on competition;

(d) the relative ease to remove a structural link as opposed to the difficulties to separate two businesses after the implementation of full merger;

(e) the likelihood that anti-competitive effects resulting from an already implemented structural link can be eliminated at a later stage.

2.3.2 As described above, our view is that Articles 101 and 102 TFEU and its own-initiative market investigation powers are sufficient to enable the Commission to investigate structural links in the vast majority of cases. We therefore consider that the most appropriate of the reforms proposed

by the Commission would be the introduction of a self-assessment system (coupled with an ability for parties to file on a voluntary basis) in respect of a limited category of structural links.

2.3.3 For present purposes, set out below are our principal concerns with regard to each of the three basic systems proposed by the Commission for dealing with structural links. In accordance with its own Guidelines[9], we urge the Commission not to implement any extension to the current system of merger control without first conducting a full impact assessment relative to its proposed reforms.

Notification system

2.3.4 The Commission has identified minority shareholdings in competitors as the form of structural link most likely to have a harmful effect on competition. In our view, the Commission's proposed mandatory notification system goes far beyond what is required to address this concern, by seeking to impose a notification obligation (accompanied by suspensory effect) in cases which may be expected to have no or limited competitive effects.

2.3.5 A mandatory notification system in the case of structural links would result in a significant increase in the number of notifications submitted to the Commission, the vast majority of which will concern transactions with no impact on the effective functioning of competition in the EU. As such, we do not consider that a mandatory notification system would represent an efficient use of the Commission's resources. Such a system would also increase significantly the regulatory burden on parties to transactions creating structural links, both in terms of delay arising as a result of a requirement to notify and of additional expenditure necessary to assemble the requisite materials and on professional advisers' fees. We regard the imposition of a standstill obligation in the case of the creation of structural links as particularly difficult to justify, relative to the disruption to transactions which such an obligation is likely to cause, given the very small number of transactions which may reasonably be expected to give rise to competition concerns. A mandatory notification system accompanied by suspensory effect in the case of the creation of a structural link may be expected to slow significantly the flow of capital within the Single Market area.

Transparency system

2.3.6 We consider that the transparency system, relative to the notification system discussed in the preceding paragraphs, has a number of benefits. By ensuring that *prima facie* problematic structural links are notified to the Commission, it would furnish parties with a greater degree of legal certainty, provided that the Commission adopted a strict timetable within which to issue its clearance (or other) decision.

2.3.7 However, we consider that the benefit of greater legal certainty would be undermined by a number of aspects of the proposed transparency system. First, even a limited form of notification requirement would impose an additional regulatory burden on parties. The precise scope of this burden is difficult to assess for present purposes, particularly because it remains unclear at this stage how extensive the information to be submitted to the Commission would be and how the definition of a prima facie 'problematic' structural link would be formulated. If a 'problematic' structural link is to be identified, for example, by reference to the parties' combined market share, the difficulty of assessing whether the relevant threshold is exceeded would undermine the purported benefits of a simplified notification system. Secondly, the transparency system would

[9] European Commission Impact Assessment Guidelines, 15 January 2009.

be likely to result in a significant increase in filings in cases which raised no competition concerns, but which nonetheless were required to be reviewed by the Commission. We question whether such an additional burden on the Commission would represent the most efficient use of its resources. Thirdly, it is unclear whether the proposed transparency system would include a standstill obligation, or whether parties would be able to implement a transaction following notification.

Self-assessment system

2.3.8 To address the regulatory gap identified by the Commission in connection with the *Ryanair/Aer Lingus*-type scenario discussed at paragraphs 2.1.5 and 2.1.7 above, we favour the introduction of the Commission's proposed self-assessment system (coupled with a voluntary filing regime) in certain strictly circumscribed circumstances. The Commission has indicated that the self-assessment system would be designed to capture only structural links likely to give rise to competition concerns, principally acquisitions of minority shareholdings in competitors. Further, the self-assessment system is intended to enable parties to assume the regulatory risk of proceeding with a transaction without first submitting a notification to the Commission, thereby limiting the burden placed on parties by the application of a standstill obligation.

2.3.9 We have identified several concerns in connection with the self-assessment system proposed in the Consultation Document. First, it would lead to a lack of legal certainty with regard to ensuring compliance with the Merger Regulation, unless parties are given the option to file on a voluntary basis. Secondly, the self-assessment system would increase the administrative burden on the Commission by requiring it to monitor transactions in 28 Member States. It is unclear whether the resources presently at the Commission's disposal are sufficient to enable it to monitor all potentially relevant transactions. Thirdly, as the self-assessment system would enable transactions to proceed prior to investigation by the Commission, it would create a risk that previously acquired shareholdings could have to be divested following an investigation by the Commission. We anticipate that this would create uncertainty in the market, and it could in some cases prove difficult to unwind transactions subsequently prohibited by the Commission. Because the self-assessment system would function selectively, even a decision by the Commission to open an investigation in a given case would be likely to send a signal to the market that a transaction was problematic from a competition law perspective. Such uncertainty could have a significant negative impact on the share price of publicly traded companies which came under investigation.

2.3.10 To address the first of the concerns identified in the preceding paragraph, we consider that parties should be granted the ability to notify the Commission on a voluntary basis. To address the second and third concerns identified above, we consider that the Commission should define certain 'safe harbours', identifying circumstances in which a presumption would apply that the Commission would not initiate an investigation into the creation of a structural link. The safe harbours we propose for this purpose are described in further detail at paragraph 2.7.1 below.

2.4 **In order to specify the information to be provided under the transparency system:**

(a) What information do you consider necessary to enable the Commission and Member States to assess whether a case merits further investigation or to enable a third party to make a complaint (e.g. information describing the parties, their turnover, the transaction, the economic sectors and/or markets concerned)?

(b) What type of information which could be used by the Commission for the purpose of the transparency system is ready available in undertakings, e.g.

because of filing requirements under securities laws in case of publicly listed companies? What type of information could be easily gathered?

2.4.2 For the reasons set out in the preceding section 2.3, we do not consider that the Commission's proposed transparency system is the most appropriate means of addressing the limited number of cases in which the creation of a structural link may be expected to give rise to a potentially harmful impact on competition. Our response in the present section 2.4 should therefore be read in the light of our fundamental opposition to the introduction of the transparency system described in the Consultation Document.

2.4.3 Under the proposed transparency system, the Commission has stated that it intends to limit the information which would be required from parties in order to minimise the regulatory burden imposed on them. However, we are nonetheless concerned that, to enable the Commission and Member States to assess whether a case warrants further investigation or to enable third parties to determine whether to submit a complaint regarding a proposed transaction, a significant amount of information would likely be required from parties.

2.4.4 As a minimum, we anticipate that parties would be required to provide market share data with regard to relevant markets. 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.[10]

2.4.5 Other information likely to be required, such as information describing the parties, details of their turnover and a description of the transaction itself, may be readily available. Nonetheless, the requirement to assemble such data would place an additional – and potentially costly – regulatory burden on parties.

2.5 **For the acquirer of a structural link, please estimate the cost of filing for a full notification (under the selective system in case the Commission decides to investigate a case, or under the notification system). Please indicate whether the costs of a provision of information under the transparency system would be considerably less if the information required were limited to the parties, their turnover, the transaction and the economic sectors concerned.**

2.5.1 We do not consider that we are in a position to provide a meaningful estimate of the likely cost of submitting a filing under the selective system where the Commission decides to investigate a case, or under the notification system, given that the complexity of a notified transaction and the ease with which parties can assemble the requisite information vary to a considerable extent. However, we do consider that the provision of information under the transparency system would be considerably less costly 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.

[10] Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), pages 5 to13.

2.6 **Do you consider the turnover thresholds of the Merger Regulation, combined with the possibility of case referrals from Member States to the Commission and vice versa, an appropriate and clear instrument to delineate the competences of the Member States and the Commission?**

2.6.1 We consider that the turnover thresholds set out in the Merger Regulation provide a clear means of delineating the competence of the Commission to exercise jurisdiction over a transaction.

2.6.2 However, it is unclear how the case referral mechanism between Member States and the Commission would function in the case of structural links. We note that 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 structural links. That being the case, it is unclear whether the other 25 Member States would be competent to review a structural link 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 creation of a structural link in any of those 25 Member States, it is unclear how any such State could refer a structural link for review by the Commission.

2.7 **Regarding the Commission's powers to examine structural links, in your view, what would be an appropriate definition of a structural link and what would constitute appropriate safe harbours?**

2.7.1 Broadly, we agree with the Commission's definition of a structural link as an acquisition of a non-controlling minority shareholding. However, we urge the Commission to adopt a number of 'safe harbours' to provide parties with a greater degree of certainty as to circumstances in which a transaction would not fall within the scope of the Commission's jurisdiction. We propose that the Commission should not investigate the creation of a structural link where any one of the following conditions is met:

(a) The non-controlling minority shareholding does not exceed 10%.

(b) In cases involving a transaction between undertakings which are actual or potential competitors, the parties' combined market share does not exceed 20% on any of the relevant markets affected by the transaction.

(c) In cases involving a transaction between undertakings which are not actual or potential competitors, the market share of any individual party does not exceed 30% on any of the relevant markets affected by the transaction.

2.8 **In a self-assessment or a transparency system, would it be beneficial to give the possibility to voluntarily notify a structural link to the Commission? In answering please take into account the aspects of legal certainty, increased transaction costs, possible stand-still obligation as a consequence of the notification, etc.**

2.8.1 In the event of the introduction of a self-assessment or transparency system by the Commission, we consider that it would be imperative that parties be able to notify the creation of a structural link on a voluntary basis. Submission of a voluntary notification would lead to increased transaction costs, but would also provide parties with a valuable ability to gain legal certainty. However, we do not consider that submission of a voluntary notification should 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.

2.8.2 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.

2.9 **Should the Commission be subject to a limitation period (maximum time period) after which it can no longer investigate/intervene against a structural link transaction, which has already been completed? If so, what would you consider an appropriate time period for beginning a Commission investigation? And should the length of the time period depend on whether the Commission had been informed by a voluntary notification?**

2.9.1 In the event that a notification system for the creation of a structural link is introduced, we consider that the Commission should be subject to a limitation period after which it can no longer investigate/intervene against a structural link which has already been implemented.

2.9.2 We would propose a four-month limitation period, beginning on the date when either:

(a) material facts in respect of the merger are made public; or

(b) the Commission is provided with material facts concerning the transaction.

2.9.3 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.

3 REFERRAL OF MERGER CASES

3.1 **Do you consider that the suggestions would make the referral system overall less time consuming and cumbersome?**

3.1.1 Yes. We consider that the Commission's proposals would result in a referral system which was both less time consuming and less cumbersome.

3.2 **Regarding the suggestion on Article 4(5) referrals:**

(a) Do you support the idea to be able to directly notify to the Commission without preceding Form RS?

3.2.1 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 Merger Regulation but does trigger a requirement to notify in at least three EU Member States.

3.2.2 We welcome for this purpose the proposal in the Consultation Document that the Form CO to be used in the case of Article 4(5) (or its successor provision) referrals would 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.

(b) Please try to estimate savings in (a) time and (b) costs resulting from the elimination of the Form RS procedure in a typical case.

3.2.3 Given that the cost of completing a Form RS is dependent to a very significant extent on the features and complexity of an individual case, we are not in a position to provide a meaningful estimate of the likely cost saving expected to arise as a result of elimination of the Form RS procedure. However, in our experience preparation of a Form RS may involve approximately the same level of expenditure as preparation of a Form CO. Thus, eliminating one of these two forms from the referral process would be likely to lead to a very significant reduction in costs.

3.2.4 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) of the Merger Regulation in which to object to the parties' reasoned submission requesting referral to the Commission.

(c) For transactions to be notified in at least three Member States, would you consider that you will use the referral according to Article 4(5) under the suggested system more often than under the current system – or that you will advise your clients to use it more often?

3.2.5 Yes. We anticipate that the significant reduction in the review timetable expected to arise as a result of elimination of the Form RS procedure would be likely to make the referral system considerably more attractive to parties than it has been to date.

(d) Do you consider that the 15 working days consultation period could be shortened in order to limit the duration of uncertainty as to whether or not a case will remain in the competences of the Member States?

3.2.6 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 reasoned submission requesting referral of a case to the Commission. A ten-working day period in which to consider whether to object to a request for referral to the Commission 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 case is to be reviewed.

3.2.7 The view expressed in the preceding paragraph 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 the matter of whether to object to the parties' 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 Commission's legislation in which to consider whether to object to a referral request (at least in the majority of cases).

(e) Do you consider it useful if contacts between the Commission and the competent Member States could take place already during a possible pre-notification phase, in order to enable the Member States to assess the referral?

3.2.8 Yes, provided that the confidentiality of proposed transactions *vis-à-vis* the wider market would be maintained and that such contact would not result in further slowing of the pre-notification period (which is already lengthy in many cases). As referred to in paragraph 3.2.7 above, in our experience parties frequently initiate contact with national authorities in cases where they intend to request a referral to the Commission, and participation by the Commission in such discussion can, in our view, only serve further to smooth the process of ensuring timely handling of referral requests.

(f) Do you agree that a broad information exchange between the Commission and the Member State which includes the information gathered in the market investigation should be made possible? Should the results of the Commission's market investigation be accessible to NCAs also following a veto of a Member State?

3.2.9 Please refer to our response in paragraphs 3.2.10 to 3.2.11 below.

(g) What would be in your view appropriate measures to assure that the Member States have a good understanding of the case in order to decide whether or not to ask for a referral (e.g. early information of the Member States, forwarding of a draft notification received by the Commission)? How do you view this suggestion with regard to confidential transactions which are not yet in the public domain?

3.2.10 Subject to maintaining the strict confidentiality of transactions prior to their formal notification to the Commission, we are broadly in favour of a dialogue between the Commission and the national authorities in competent Member States, to facilitate the handling of referral requests in as timely a manner as possible.

3.2.11 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. 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.

(h) Regarding pre-notification referrals from the Commission to the Member States, Article 4(4), do you see a similar room for improvement to streamline the process and to align it with the suggestions on Article 4(5) above, while at the same time safeguarding the interests of all Member States?

3.2.12 We consider that it would be advisable to reduce the period in 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 3.2.7 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 the request to the Commission.

3.3 **Regarding the suggestion on Article 22 referrals:**

(a) Do you agree with the underlying principle of the envisaged modification, i.e. that Article 22 should enable the Member States to refer cases to the Commission for which the Commission is the more appropriate authority due to cross-border effects? Do you also agree that the Commission should then have EEA-wide jurisdiction as for all the other cases it is dealing with?

3.3.1 Yes. We consider that the Commission's proposed reforms represent a useful simplification of the current position. In particular, 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 and enhancing the consistency of decision-making in merger cases across the EU.

(b) Do you agree that the envisaged modification would lead to a clear delineation of which level – Commission or Member States – should deal with a case, taking account of the one-stop-shop principle? Do you agree that this would avoid a patchwork approach of parallel proceedings of the Commission and Member States?

3.3.2 Yes. We support the proposed reforms' aim of reducing the number of instances of parallel proceedings taking place simultaneously at national level, due to the danger of inconsistency in decision-making which inevitably arises as a result of parallel proceedings.

(c) Do you agree that the envisaged system would make European merger control more effective and would allow it to obtain cases for which the Commission is the more appropriate authority? In particular, do you consider it appropriate that only competent Member States can refer cases to the Commission, as opposed to the current system where also non-competent Member States can refer a case?

3.3.3 Yes. We do not consider that non-competent Member States should retain 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.

(d) Do you agree that legal certainty for undertaking would be increased if only a Member State competent under its national law could make a referral request?

3.3.4 Yes. We consider that 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.

(e) Do you agree that the procedural solutions would prevent the scenario or mitigate the risk that a Member State might have already cleared the transaction before another Member State requests a referral? In your view what would be appropriate procedural solutions?

3.3.5 Please refer to our response in paragraphs 3.3.6 to 3.3.8 below.

(f) How do you see the possibility of making a national clearance decision conditional upon no Article 22 referral taking place? Under the law of your respective Member State, would it be possible to issue clearance decisions under the condition that no Article 22 referral takes place?

3.3.6 Parties require certainty in merger cases, in particular regarding what is to be the forum for review at an early stage in the process. In our view, it would lead to an unacceptable degree of legal uncertainty if a Member State's clearance decision in a given case were to be conditional on the occurrence (or non-occurrence) of an event outside the control of the parties or the relevant national authority. We therefore oppose a situation in which a Member State's clearance decision would be conditional on no Article 22 referral taking place, even if – as a technical matter – a Member State could prevent the occurrence of such a referral by exercising its veto.

3.3.7 We consider that the simplest means of ensuring that no Member State has cleared a transaction before a referral occurs would be to introduce, in the case of transactions notified in two or more Member States, a 15-working day period from the date of submission of notifications at national level (or from the date of the latest submission to occur in time, where the notifications are not filed on the same day), within which no Member State may issue a decision clearing the transaction and the parties would be subject to a suspensory obligation (including in Member States, such as the United Kingdom, which currently do not require the parties to suspend implementation of a transaction prior to clearance). Likewise in the case of transactions notified in two or more Member States, parties could be required to indicate in their notifications at national level that the transaction is being notified in at least one other Member State, to alert the national authorities that the 15-working day pre-clearance period (and accompanying standstill obligation) apply.

3.3.8 In tandem with the above, we urge the Commission to consider introducing a fixed cut-off date by which undertakings will know whether a transaction is to be dealt with at EU or national level. We would suggest that this cut-off date be 20 working days from the date of submission of the latest in time notification at national level, providing Member States with a minimum of five working days in which to consider a request for referral to the Commission by another competent Member State.

(g) In your view, could the suggestion raise costs for undertakings or would it lead to costs savings due to a better predictability of the system?

3.3.9 Given that costs are highly dependent on the specific features of an individual case, we do not consider that we are in a position to provide a meaningful assessment of the likely impact on costs of the Commission's proposed reforms to the Article 22 referral mechanism.

(h) Regarding Article 22(5) do you consider that the current procedure that the Commission can invite the Member States to refer a case could be improved in terms of procedure? And if so, in which ways?

3.3.10 No response.

4 MISCELLANEOUS

4.1 **How could the jurisdictional rules of the Merger Regulation be modified in order to ensure that joint ventures with activities exclusively outside the EEA and not affecting competition within the EEA do not have to be notified to the Commission? Please take into account the need for jurisdictional rules to be clear and easy to apply.**

4.1.1 We are in favour of reforming either the Merger Regulation itself or the Commission's guidance on its practical application to grant the Commission discretion to waive its jurisdiction in the case of 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 Merger Regulation, 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 Merger Regulation. 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).

4.1.2 A number of jurisdictions worldwide have an established practice of applying a 'effects' doctrine, demonstrating that such a test does in practice provide parties and regulators with a sufficient degree of legal certainty. As such, we urge the Commission to adapt its interpretation of the Merger Regulation to apply a similar effects test.

4.1.3 In cases where the parties do not believe that the effects test is satisfied, we consider that it should be possible for the parties 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.

4.2 **Would you recommend any other amendments to the Merger Regulation? Please elaborate.**

4.2.1 We consider that the length of pre-notification contact between parties and the Commission should be reduced, particularly in straightforward cases. In transactions where the parties wish to benefit from the Short Form CO procedure, or where the parties wish to discuss with the Commission whether a transaction amounts to a 'concentration' with a 'Community dimension' at all, we consider that it would be advisable for senior members of the Commission's case team to be made available to participate in initial contact with the parties, in order to establish from an

early stage in proceedings whether a requirement to file arises, and if so what is the scope of information to be provided to the Commission.

4.2.2 Further, we encourage the Commission to amend the wording of Article 3(1) of the Merger Regulation to clarify that a change in the quality of control over a joint venture constitutes a 'concentration' only where the joint venture in question performs on a lasting basis all the functions of an autonomous economic entity and therefore satisfies the full-functionality criterion described at Article 3(4). That a change in the quality of control over a joint venture is notifiable only in the case of a full-function joint venture is not unambiguously stated in the Merger Regulation at present. Moreover, the wording of paragraphs 91 and 24 of the Commission's Consolidated Jurisdictional Notice[11], if read in isolation, is likewise insufficiently clear to be determinative of whether or not a change of control over a non-full-function joint venture falls within the scope of Article 3(1) of the Merger Regulation.

Berwin Leighton Paisner LLP
12 September 2013

[11] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01).