

Submission

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On behalf of the Public Affairs Executive (PAE) of the
EUROPEAN PRIVATE EQUITY AND VENTURE CAPITAL INDUSTRY

Friday, 3 October 2014

To European Commission - Directorate-General for Competition

Re Response to the White Paper ‘Towards more effective EU merger control’ (COM(2014) 449 final) (the ‘White Paper’) and the Commission Staff Working Document accompanying the document White Paper ‘Towards more effective EU merger control’ (SWD (2014) 221 final) (the ‘Working Document, and, together, the ‘Consultation’)

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The European Private Equity and Venture Capital Association (EVCA) is a member-based, non-profit trade association that was established in Brussels in 1983. The EVCA is a member of the Transparency register (ID: 60975211600-74).

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Introduction

The Public Affairs Executive ('PAE') of the European Private Equity and Venture Capital industry welcomes the opportunity to respond to the European Commission consultation on its White Paper 'Towards more effective EU merger control' (the 'Consultation'). For many years, the EVCA has been an engaged interlocutor with the European Commission and other European institutions, following closely the different discussions and initiatives affecting the European private equity ('PE') and venture capital ('VC') industry. We write on behalf of the representative national and supranational European private equity and venture capital ('PE/VC') bodies. Our members cover the whole investment spectrum, including the institutional investors investing in a broad range of PE/VC funds, as well as the PE/VC firms raising such funds and the venture capital arms of European corporates. Our members invest in the full life-cycle of unlisted companies, from high-growth technology start-ups, to the largest global buyout funds turning around and growing mature companies, and thus we speak on behalf of the entire European PE/VC industry, investors as well as managers.

As discussed in the PAE's response dated 4 September 2013 to the Consultation "Towards more effective EU merger control" (HT.3053) (the '2013 Consultation'), the industry believes that:

- the Commission's existing toolkit is adequate to address the rare competition issues that may be raised by the acquisition of non-controlling minority shareholdings, and
- there is no need to extend the Merger Regulation or to introduce a new Merger-Regulation-like system to review such investments.

Moreover, extension of the Merger Regulation to cover minority non-controlling investments could have serious negative consequences for our members and for the European economy generally by impeding PE and VC investment.

More specifically, the PAE believes that the proposals in the White Paper will negatively impact (pro-competitive) investments in EEA companies, including the SMEs and start-ups that are major drivers of growth and innovation in Europe.

Indeed, the current European Commission proposal would **not only impact on pure PE/VC firms, but would also** be particularly problematic for VCs associated with an operating company, sometimes referred to as **corporate venture capital**. Given that corporate VC investors often invest in SMEs that have operations in sectors that are the same as or related to the sectors in which they are active, many VC investments are likely to satisfy the Commission's tests for "competitively significant links" even though they raise no substantive competition issue.

The PAE recognizes the Commission's efforts in the proposals set out in the Consultation to mitigate the burden of the proposed new system. However, the PAE is still concerned with the principles driving the approach of the Commission in its White Paper. In particular, the PAE strongly disagrees with the European Commission's assertion that "the targeted transparency system would limit the administrative burden on businesses, because the Commission would only

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need to be informed of a limited number of cases, namely those which create a “competitively significant link” (para. 57).

We are concerned that the Commission significantly **underestimates the additional preliminary legal analysis** that would be necessary **and the number of information notices and/or notifications** that would be required under its proposed “targeted transparency system,” as well as the **burden and legal uncertainty** that such a system would create for transactions which are almost invariably benign and would not restrict competition. The PAE submits therefore that the Commission proposals **lack legitimacy** and would be **in breach of the principle of proportionality**. This would impact not only on the VC and PE firms themselves, but even more importantly on investee companies in urgent need of financing.

As discussed in more detail below, the use of vague and subjective tests to identify “competitively significant links” would make the preliminary legal analysis to determine whether an information notice would be required extremely difficult if not impossible. PE investors often invest in a wide range of industries, but particularly in the case of minority investments they often lack detailed information on the specific markets in which their investee companies are active or any legal means to obtain such information. Even if modified to be more limited and practical, the White Paper proposals would add significant costs.

Any new review procedures would **increase costs and introduce delays that would significantly discourage investment**. These costs would be (very) significant for small companies with limited resources and negative cash flow, especially if they are multiplied by four to five separate rounds of financing and again by five to ten investors participating in each round. The procedures envisaged (e.g. the prescription period) would create (significant) legal uncertainty for investors. **Delays in investments resulting from this uncertainty would be fatal in the case of small companies seeking to raise new capital a few months before their resources are exhausted.**

In this response, we have focused solely on those aspects of the consultation which are of particular importance to the PE/VC industry. As such, we have provided answers to the questions dealing with the extension of merger control to non-controlling minority investments, but not to those dealing with the referral of merger cases between the Commission and the Member States. **The PAE generally welcomes the other proposals in the White Paper, which would considerably improve the efficiency of the EU merger control system, and indeed encourages the Commission to explore other ways in which the Merger Regulation could be improved.** For example, the possibility of granting exemptions from the Merger Regulation’s standstill obligation is rarely used; it would be helpful to revise the Merger Regulation to make this tool more effective where there is no serious risk to competition, for example by facilitating exemptions in cases qualifying for the simplified procedure.

We stand ready to provide whatever further contribution to this work the Commission might find helpful, including attending meetings and contributing further materials in writing.

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Private equity and venture capital's contribution to the European economy

Before addressing the questions in the Consultation in detail, we believe it will be useful to provide some background information on the role of PE and VC in the European economy. Such context may help to explain our concerns about the consequences of the additional burdens that are being created.

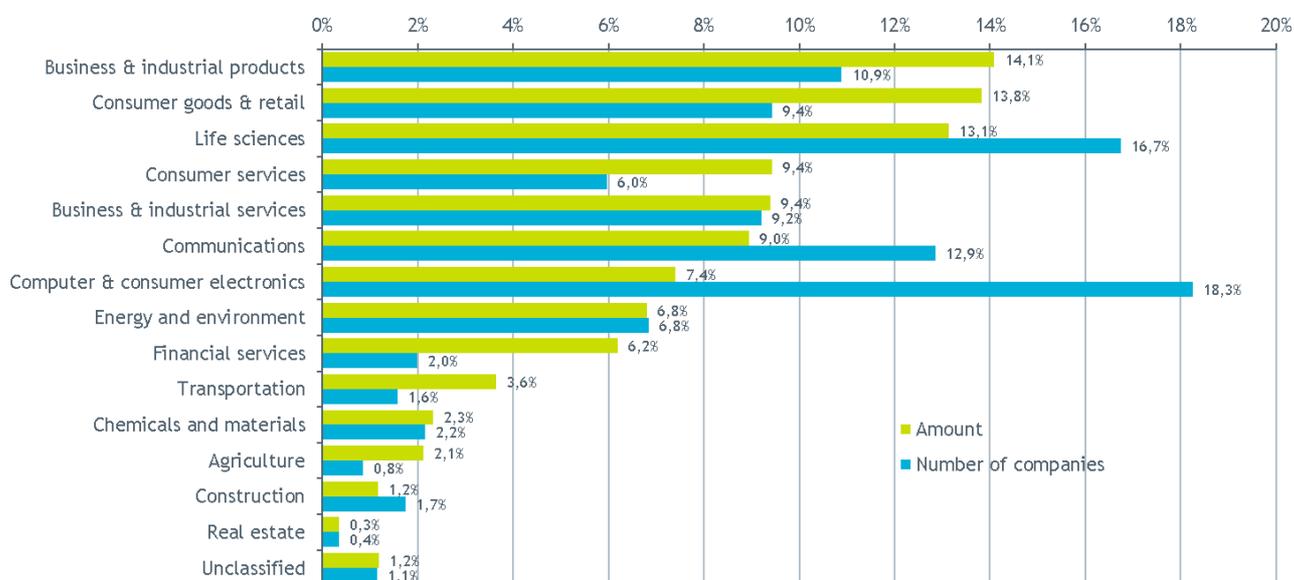
The PE/VC Investment Model

Our industry provides long-term financing to European companies, many of whom are innovative high-growth companies and SMEs¹. In addition to providing financing, PE and VC provide valuable know-how to help investee companies develop. They bring strategic and operational advice and specialist sector knowledge.

The corporate governance and value creation model that such investors apply to the ownership and long-term development of companies have made PE and VC a well-established effective investment strategy. It is valued by the businesses and employees in whom it invests for the contribution it can make to their long-term prosperity, helping to deliver innovation, growth, renewed dynamism and sustainability.

PE and VC firms invest in a range of industrial sectors

Figure 1: 2013 - Market statistics - % of Amount & Number of companies



Source: EVCA / PEREP_Analytics

¹ In 2013, 87% of the companies that received PE and VC backing had fewer than 250 employees.

Source: EVCA / PEREP_Analytics

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Funding Innovative & High Growth Potential Companies

Firms supported by PE and VC are often young, unlisted, entrepreneur-led companies, many of which are in high-growth areas such as technology or healthcare. Sustainable economic growth in Europe is directly linked to creating the right environment for high growth potential companies to emerge and thrive.

VC funds have a particularly important role to play in helping these companies, and the **link between innovation, entrepreneurship, venture capital and economic growth is well established and recognised**, including by the European Commission and the EIB.

These high-potential companies often face particular constraints, and investments made by our members in these are typically small and time sensitive, often with a series of financing “rounds” to meet immediate financing needs. Investors must complete their due diligence and negotiations very quickly, in two or three months or less, and so any significant additional administrative burden may have serious consequences.

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Executive Summary

As discussed in more detail in its response to the 2013 Consultation, the PAE respectfully submits that **the Commission’s existing toolkit is adequate to deal with competition issues raised by structural links**. The Commission already has the power to investigate most if not all structural links under Regulation 1/2003. Although the Commission’s powers under Regulation 1/2003 may not cover the mere acquisition of a minority stake, Regulation 1/2003 would apply to any agreements, such as shareholders’ agreements, giving the acquirer power to influence the competitive behaviour of the target and to any restrictive agreements, decisions or concerted practices arising out of the acquisition. The absence of any such agreements, decisions or practices would presumably indicate that the mere acquisition of a minority interest did not give rise to competition issues. In this respect, in the cases cited by the Commission in the White Paper to demonstrate the existence of competition risks², none of the issues identified arose solely due to non-controlling minority shareholdings, besides the fact that they could have been addressed under Article 101 or 102 TFEU. To date, indeed, the Commission has not seen fit to use its powers under Regulation 1/2003 to address structural links, although it would have the power to do so in the vast majority of cases. The Commission has also provided no guidance on the situations in which it considers that structural links may give rise to competition issues under Articles 101 and 102, as it has done in many other areas.

In any event, we submit that **non-controlling minority acquisitions are almost invariably benign in competition terms**, and the likelihood of any of the three theories of harm set out in the White Paper arising in a particular case is extremely low. In relation to PE/VC entities, moreover, this likelihood is further reduced because of the way these financial investors run their investments. For example, in relation to vertical links the White Paper states that input foreclosure is a concern, yet input foreclosure can only be a concern if a minority shareholder has control over the supply/purchase decisions of the target. If this were the case, the acquisition of the minority shareholding would be reviewable by the Commission in any event because it would result in a change in control.

Nonetheless, the Commission proposes to apply a so-called “targeted transparency system” to non-controlling minority investments. This system would involve imposing an obligation on parties acquiring a relevant shareholding to file an “information notice” to the Commission, which would then be subject to publicity. This approach would inform other potentially interested parties of the transaction.

In other words, the merger control analysis proposed in the White Paper would require extensive information on the companies in which PE/VC firms make minority investments and on the other shareholders of those companies, even though such information is not publicly available and PE/VC firms typically have no legal or contractual right to obtain it. Paradoxically, if PE/VC investors attempted to negotiate the right to obtain such information for future investments in response to the White Paper proposals, these information rights could themselves increase the chance of an information notice being required. In any event, PE/VC firms would have no legal basis to

² Case COMP M.3653, Siemens / VA Tech ; Case COMP M.4135, Toshiba / Westinghouse ; Case COMP M.5406, IPIC / MAN Ferrostaal.

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renegotiate the terms of their investments to be able to collect such information for existing minority investments.

For transactions triggering a notification requirement, as many would, these proposals would also **impose significant legal costs** to complete the relevant information notices and/or notifications. Again, in the case of minority investments, PE/VC funds would not typically have the required information, especially for a Form CO notification, nor the right to obtain it.

Importantly, the legal uncertainty created by the proposed system would **risk delaying the injection of funds into EEA and other investee companies**. If applied as suggested in the White Paper, the waiting and limitation periods proposed by the Commission would further **delay the provision of urgently needed financing to these companies**. Furthermore, in the case of VC investments, the information notice requirement would lead to the **disclosure of sensitive information about the status of the financing rounds of these typically small and innovative companies**.

The current European Commission proposal would not only impact on pure PE/VC firms, but would also be problematic particularly for VCs associated with an operating company, sometimes referred to as corporate venture capital.

Corporate venture capital units make investments on behalf of their parent corporations. The parent corporation and its subsidiaries are often sufficiently large to satisfy the revenue thresholds. In addition, it is common for more than one corporate VC to invest in the same investee companies.

Indeed, it would not be uncommon in VC financing transactions for SMEs to have at least two co-investors (in particular, corporate venture units) which meet the Merger Regulation's turnover thresholds. Moreover, VC investors typically specialise in particular sectors, while corporate VC investors often invest in SMEs in sectors that are the same as or related to the sectors in which they are active. They often invest together to share the risk of investing in next generation technology, products or services which at the time of the investment are often unproven. Accordingly, many VC investments are likely to satisfy the Commission's (vague) tests for "competitively significant links".

Furthermore, the Commission's **proposed tests to identify a "competitively significant" link are vague, subjective and overly broad**, and would make the preliminary legal analysis to determine whether an information notice is required burdensome and costly, especially in the case of shareholdings between 5% and 20%, for which the Commission proposes another set of vague and overly broad tests.

The costs imposed by the system would increase further where an information notice is required, even in the vast majority of cases that will raise no competition issues. The Consultation refers to a Short Form notification under the EU Merger Regulation as an example of a notification requiring only limited information, but even the preparation of Short Form notifications is an expensive and time-consuming process. The information notice suggested by the Commission in the White Paper would for instance require identifying the markets concerned (product market and geographic market) and providing market share information. Such information cannot be easily gathered and

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the analysis it involves can be complex; the information notice would therefore impose a disproportionate burden on investors. Even an information notice containing the type of information contained in a case allocation request under the Merger Regulation would result in unnecessary costs that would be particularly significant, notably for VC funds, given the context of multiple financing rounds with multiple investors for young companies with limited resources and negative cash flow.

Investee companies seeking VC funding would also likely object to any transparency system, because for such companies it is essential to maintain confidentiality. The innovative companies funded by VC investors are often working on new products or technologies to compete with much larger companies. Any procedure that required them to disclose their activities and fund-raising status to the public would simply mean that the model of VC financing would be significantly at risk.

Against this background, without amendment, the PAE believes that the proposals in the White Paper will:

- have a chilling effect on investment in EEA companies, many of which are SMEs, to the detriment of innovation and competitiveness; and
- disproportionately increase the regulatory burden on VCs to the detriment of the EEA's economy.

In addition, the suggestions put forward in the White Paper would not suffice to avoid inhibiting restructurings and the liquidity of equity markets.

If the Commission nonetheless proceeds with further regulation, there are certain key changes that are fundamental to the PE/VC industry and must be implemented into any new regime.

- **The vague and subjective tests for “competitively significant links” should be replaced by clear, objective criteria. If these concepts are retained, the concept of the same or related sectors should in particular be clarified.** For example, if a fund classified at a high-level as a technology fund invests in a company which is also classified as a technology company, is this a “competitively significant link” regardless of whether or not the target company’s business is in fact competing, or has any direct relationship, with the fund’s existing business?
- Additional measures that could be taken would be **to eliminate the need for information notices below a reasonable cut-off threshold, such as 25%, and to introduce clearly defined conditions that exclude transactions above that threshold where there is no reasonably likely effect on competition.**
- In addition to the need for clarification and the introduction of objective criteria we also note the Commission proposal currently takes no account of the size of the target company, although all the examples cited by the White Paper relate to minority shareholdings in companies of a significant size. There should also, therefore, be an **exemption for any minority shareholding in a company with EU wide turnover of less than €100 million, regardless of the turnover of the different investors that may hold such minority shareholdings.**

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The PAE believes that it is highly unlikely that such holdings would give rise to substantive competition concerns and the burden on such companies would be disproportionately high.

- **If an information notice system is to be introduced, it will be critical to limit the burden of the system;** both the German and the U.S. systems are currently too burdensome. **The Commission's case allocation request form would be a more appropriate model.**
- In any event, the PAE strongly submits that **no waiting period would be necessary or appropriate in light of the competitively benign nature of the vast majority of the minority investments in scope under the proposed system.**

Perhaps even more seriously, any administrative procedure that would delay the infusion of capital to VC-backed companies could be fatal, since these companies launch financing rounds only a few months before they run out of cash, and once this happens, the company would fail. As such, this proposal seems incompatible with the Commission's own efforts to establish an innovative culture in Europe.

It is useful to recall that slightly over 10 years ago the Commission proposed the elimination of the voluntary notification system provided for in Regulation 17/62, noting that it was "too bureaucratic, cumbersome and ineffective". While the need for a new toolkit for the Commission to review "structural links" has not been demonstrated, the risk of extending the Merger Regulation to minority non-controlling shareholdings investments by VC funds is clear. **Even a small cost in absolute terms could have a significant discouraging effect in view of the very limited resources of the investee companies, the small size of VC investments, and the number of financing rounds and investors involved.**

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Consultation response

1. *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.

To address concerns that the proposed system would endanger restructuring transactions in which business decisions might have to be made very quickly and any waiting period could be harmful, the Working Document proposes (Paragraph 100) to adapt Article 3(5) of the Merger Regulation (the “banking clause”). Specifically, the White Paper proposes 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.

The PAE are concerned that the proposed amendments to the banking clause would not avoid the impact of the proposed reform on restructuring transactions for the PE/VC industry. **It is not clear what is meant by “financial institutions” and whether that term is intended to include PE/VC entities. We urge the Commission to clarify that such entities are financial institutions for this purpose.** In any event, a debt-for-equity swap or other restructuring transaction may well involve entities other than financial institutions.

Moreover, the Working Document's reference to “limited period of time” is vague and risks creating legal uncertainty. There is often no way to predict how long it will take for a company in need of restructuring to return to financial health and how long a company acquiring shares through a restructuring will have to wait before it is able to sell them. It is precisely those companies in the most urgent need of restructuring that may not be returned to health in a “limited period”.

The PAE urges the Commission, if it proceeds with the proposed targeted transparency system, to revise the banking clause in such a way that it can be applied in real-life situations and avoid delays in the refinancing of troubled EEA companies in urgent need of financing.

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

If the Commission introduces a targeted transparency system for non-controlling minority stakes into the Merger Regulation then PE/VC entities will have to carry out the following additional steps for every acquisition of a non-controlling share:

- (i) determine if a transaction has an EU dimension (currently this is not carried out for the acquisition of non-controlling shareholdings);

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- (ii) confirm if the acquirer or any of its group (potentially including companies in which it holds minority shares) are active in the same or vertically related markets to the target; and
- (iii) determine if the minority shareholding is “significant”.

In relation to each of the above three stages, PE/VC entities will be required to receive legal advice and carry out extensive due diligence on all their own shareholdings and the proposed investee companies, as well as (potentially) on other shareholders of the investee company. This exercise would be prohibitively expensive, if not impossible, given the limits on minority shareholders’ access to information and the number of companies involved.

However, the PAE welcomes the fact that the Commission is considering mechanisms to exclude transactions that are particularly unlikely to give rise to competition issues. In the PAE’s view, there are a number of adjustments that could be introduced to the Consultation proposals to mitigate the chilling effect of the Commission’s proposals on PE / VC investment.

- First, if the Commission introduces a targeted transparency system, we submit that it would be important to **clarify which entities would be considered “undertakings concerned” for the purposes of applying the Merger Regulation turnover thresholds to structural link transactions**. Currently, under the Merger Regulation, the undertakings concerned include the target company and all undertakings concerned acquiring “control” for purposes of the Merger Regulation. If the “undertakings concerned” for purposes of applying a new notification or transparency system were to include all undertakings having a “competitively significant link” to the target or (much worse) to one another, the turnover thresholds of the Merger Regulation could be met in a very large number of cases. It would be more appropriate for the undertakings concerned in such a case to be limited to entities acquiring a new structural link and to the investee company, in effect treating each investment as a separate transaction.
- Moreover, it would be important to clarify that **the analysis - and the information required in any notice - would be limited to the activities of the acquirer’s controlled group and that of the investee company**. It would be difficult if not impossible for a PE/VC firm to obtain the required information from companies in which they hold only minority interests or from other shareholders of the target in order to complete the analysis, much less to complete a notification under the Merger Regulation, as suggested in footnote 67 of the Commission staff working document that accompanies the White Paper.
- For one thing, to determine if an investment is “competitive”, the parties would have to assess whether they are competitors or have a vertical relationship. The White Paper seems to indicate that the term “competitor” in this context could be interpreted broadly, rather than being limited to competitors in rigorously defined antitrust product and geographic markets, making the self-assessment process even more difficult and potentially leading to even more information notices being filed in cases that raise no competition issue.

It is thus essential to **clarify to what extent there needs to be a competitive relationship between acquirer and target**. It would be appropriate to explicitly exclude the case where



a financial investor such as a VC fund holds minority shareholdings in several companies active in the same sector, since typically the VC fund itself would not be in a competitive relationship with the target. Otherwise, in the case of financial buyers, such as PE/VC firms, who invest in companies in many industries, this approach could lead to the filing of a large number of information notices in competitively benign transactions.

- Furthermore, the concept of “vertical link” is very broad. The Commission does not discuss the types of vertical relationships that would create a competitively significant link, or whether a *de minimis* threshold would apply. If the Commission does apply the targeted transparency system to shareholdings between 5% and 20%, it would help to **require vertical links to exceed certain thresholds**, such as absolute value thresholds (e.g., a vertical link would be disregarded if the value of the goods or services purchased were below a reasonable threshold; for example, €10 million per year) and a minimum percentage of (shares of) the investor’s total purchases or sales. In other words, a vertical link would be disregarded if the value of the product/service supplied between the investor and investee were below a reasonable threshold; for example below 5% of the investor’s total purchases or sales. In addition, a vertical link for these purposes should exist only where the parties’ purchases and sales relate to inputs that are important to the goods or services produced by the investee company. It is worth noting, moreover, that even in cases of acquisitions of control, transactions giving rise to vertical links are particularly unlikely to give rise to competitive harm.
- Most importantly, in relation to the concept of “significance”, the PAE believes strongly that **the proposed system should apply only to the acquisition of minority shareholdings above 25%** (i.e., the Merger Regulation should not cover non-controlling investments between 5% and 25% at all). The Commission’s proposal to identify “competitively significant” stakes between 5% and 20% is vague and would create significant legal uncertainty.

The lower the threshold, the more likely it is that the proposals will capture harmless transactions and increase the administrative burden on investors and SMEs. The proposed tests for 5-20% investments would capture virtually all VC investments, since it is standard practice for major investors to have the right to nominate a board director or non-voting board observer as part of its strategy for safeguarding its investment. In any case, the alleged theory of harm based on an exchange of information between competitors is a traditional Article 101 issue and is already addressed in practice by putting in place appropriate firewalls.

If the Commission decides not to increase the relevant shareholding test to 25% as suggested, then the Commission must **amend the nature of the rights** that would make a shareholding between 5% and 20% “significant”. Presumably, the ability to “exert influence” refers to veto rights that are significant from a competitive perspective but would not give rise to joint control for purposes of the existing Merger Regulation. However this ability is subjective in nature and the PE/VC acquiring entity is unlikely to have access to relevant turnout information or previous voting patterns required to determine if it may or may not “exert influence” at shareholder meetings.

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Similarly, the right to obtain access to competitively sensitive information implies greater rights than general information rights under applicable corporate law. If the Commission applies the targeted transparency system to shareholdings between 5% and 20% it will be essential to clarify which rights would suffice for these purposes and to avoid including rights that do not give a shareholder the possibility of influencing the target's competitive behavior.

- In addition, the PAE respectfully suggests that the Commission should publish guidance on the implementation of the targeted transparency system and **include clearly defined and practical safe harbours** for categories of transactions that will not require an information notice even if they would otherwise be found to create a “competitively significant link.”

Currently, the proposal takes no account of **the size (turnover) of the target company**, although all of the examples cited by the White Paper relate to minority shareholdings in companies of a significant size. The PAE suggests that companies below a certain size should be disregarded as not being of sufficient scale to generate anti-competitive effects; a **safe harbour** should be introduced **for investments in small companies, which are by definition highly unlikely to affect competition to a significant extent**. Many VC-backed companies have negative or barely positive cash flow, and providing a safe harbour for investments in such companies would significantly mitigate the negative effect on new investment that any new assessment system would create. The PAE respectfully suggests that an **exemption** from the Merger Regulation's remit should apply **to any minority shareholding in any company with EU wide turnover of less than €100 million**, regardless of the turnover of the different investors that may be involved in the transaction.

- The PAE is also extremely worried about the currently proposed requirement to notify details of a proposed transaction, including the proposed investment terms, on a **public register**. Such a requirement and publicity is completely contrary to the basis on which SMEs seek VC financing and corporate venturing is currently carried out. The terms of a venture transaction are confidential to the parties, and many transactions are not publicly announced. This issue is particularly critical for innovative targets that are developing leading edge products and want their activities to be and remain confidential. This requirement affects not only investee companies but will also be critical for corporate investors, where the rationale for investment is often to invest in next-generation products or services that may enable the corporate investor to gain a competitive advantage over its competitors.

In summary, the PAE respectfully submits that the targeted transparency system envisaged by the Commission is too far-reaching and lacks clarity and proportionality. It goes beyond what would be strictly necessary to achieve the objective pursued. As it currently stands, the Commission's preferred option would risk capturing too many transactions and impose unnecessary burdens on PE/VC funds. Therefore, a **“self assessment & voluntary notification” system**, as discussed previously by the Commission, with the Commission publishing a notice providing guidance on how to assess minority shareholdings, would be far more proportionate and less burdensome, while leaving to the Commission the possibility to examine cases it considers problematic.

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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?

As discussed above, the PAE respectfully submits that a targeted transparency system would be unduly onerous in light of the limited competition risks involved in structural link transactions. Nonetheless, if the Commission decides to proceed with a transparency system, the industry submits that **the information required should be modelled on a case allocation request** under the Merger Regulation. This would include information describing the parties, their turnover, the transaction and information on the economic sectors or markets concerned. This would be sufficient for the Commission and potentially interested parties in the relevant sector to determine whether a transaction gives rise to potential issues that make further investigation appropriate. In any event, the Short Form notification under the Merger Regulation would not be an appropriate basis for an information notice under the transparency system, since the preparation of Short Forms is a burdensome, expensive process. As noted, however, even such a short notice would be unacceptable to investee companies who need to maintain their confidentiality while developing their products.

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.

The costs of notification will vary from case to case and it is impossible to determine costs without knowing what the form itself would involve. We note, however, that the costs of Form CO and Short Form notifications are significant. The cost of conducting the preliminary legal analysis to determine whether an information notice would be called for in a given transaction could potentially be even more significant given the vague and overly broad criteria proposed. Moreover, **in the VC context, costs would be multiplied at each funding round, and for each new investor**, potentially rendering otherwise attractive investments unviable. Costs of such magnitude would be prohibitive for many VC investments.

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?

The PAE strongly believes that if the Commission introduces the proposed targeted transparency system, **no waiting period is necessary or appropriate**, and the 15-day waiting period should be removed. Otherwise, the proposals would create significant legal uncertainty for our members, in particular VC funds and corporate VC investors, and delay often urgently needed financing for potential investees, potentially causing their bankruptcy.

Also, the proposal that the Commission should be able to re-open a transaction for a period of 4-6 months after completion should be abolished, as this possibility would create significant legal uncertainty for PE/VC investors and investee companies alike. Such an *ex post* control, if applied

Submission

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to non-controlling minority shareholdings, would be all the more disproportionate since it would be more stringent than the regime applicable today under EU merger control.

VC investors would not be willing to advance funds to investee companies during such period because the companies in which they invest are cash-flow negative, and if the Commission were to raise competition concerns VC investors would not be able to get their money back. Although there would typically be no competition concerns arising in the context of a VC investment, the need for legal certainty would lead many if not all investors to delay their investment until the expiration of any such period, with potential fatal consequences for the companies facing such a delay.

Even without a waiting period, the legal uncertainty created by the targeted transparency system would chill VC investment. Many VC investors would not be willing to advance any funds to investee companies until the expiration of any relevant period for the Commission to decide whether to require a full notification or open an investigation. Any such delay would be fatal for many VC-backed companies, who typically launch new financing rounds only a few months before they run out of cash.

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CREATING LASTING VALUE

About the PAE

The Public Affairs Executive (PAE) consists of representatives from the venture capital, mid-market and large buyout parts of the private equity industry, as well as institutional investors and representatives of national private equity associations (NVCAs). The PAE represents the views of this industry in EU-level public affairs and aims to improve the understanding of its activities and its importance for the European economy.

About EVCA

The EVCA is the voice of European private equity.

Our membership covers the full range of private equity activity, from early-stage venture capital to the largest private equity firms, investors such as pension funds, insurance companies, fund-of-funds and family offices and associate members from related professions. We represent 650 member firms and 500 affiliate members.

The EVCA shapes the future direction of the industry, while promoting it to stakeholders such as entrepreneurs, business owners and employee representatives.

We explain private equity to the public and help shape public policy, so that our members can conduct their business effectively.

The EVCA is responsible for the industry's professional standards, demanding accountability, good governance and transparency from our members and spreading best practice through our training courses.

We have the facts when it comes to European private equity, thanks to our trusted and authoritative research and analysis.

The EVCA has 25 dedicated staff working in Brussels to make sure that our industry is heard.



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