Covington & Burling LLP, representing a number of corporate venture capital investors ("CVCs"), including Novo A/S, SR One, Intel Capital Takeda Ventures and others, welcomes the opportunity to respond to the European Commission’s public consultation “Towards more effective merger control”, published on 9 July 2014. Our comments are based on the significant investment activity and experience of these CVCs in the provision of venture capital to early-stage companies and small and medium enterprises (collectively referred to herein as “SMEs”) with activities in the life science and technology sectors.

In this response, we focus solely on the part of the White Paper that concerns the acquisition of minority shareholdings, since this part and the issues that may arise from the application of the system put forward by the European Commission are of major importance to CVCs as well as the SMEs who rely on the availability of inherently risky venture capital funding from these CVCs.

A. Executive Summary

At a fundamental level, the proposals regarding minority shareholdings are at odds with two of the guiding principles that President-elect Juncker set out in his 10 September 2014 Mission Letter to Commissioner-designee Vestager where he states that: “[w]hen we act, we will always look for the most efficient and least burdensome approach” and “[m]obilising competition policy tools and market expertise so that they contribute, as appropriate, to our jobs and growth agenda...”1 In a similar vein, the proposal contradicts the European Union efforts to reduce the overall regulatory burden at EU and national level2; and its ongoing efforts to lighten the regulatory load on SMEs3. In addition, DG Enterprise’s recent public consultation gathering feedback on revisions to the Small Business Act for Europe to support SMEs expressly referenced to “strengthening the venture capital market in Europe”. If implemented, the proposal would add an additional regulatory burden to the venture capital financing of SMEs, especially that provided by CVCs, and would therefore act as a disincentive to such venture capital investment by CVCs in the EEA.

It is important to appreciate that venture capital investment is global, and that the regulatory environment and burden is an important factor considered by investors, including CVCs, in deciding where to invest. As described below, the value of new funding from financial

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venture capital funds⁴ raised for European investment in SMEs has halved since 2007. The funding gap created by the decline in the size of these financial venture capital funds has been increasingly filled by CVCs who have become a critical source of capital for SMEs and for supporting innovation in Europe. Increasing the regulatory burden will jeopardise this effort.

The Commission’s proposals regarding minority shareholdings will likely adversely impact a material number of harmless transactions rather than a rare exception. There are two key reasons for this:

- The proposals take no account of the turnover or size of the investee company; and
- Venture capital investments commonly involve two or more CVC co-investors, each of whom will have affiliates with sufficient worldwide and EU-wide turnover to satisfy the revenue threshold tests in the EUMR.

The impact of the proposals also ignores the fact that co-investors act independently from each other (they do not have agreements to vote together, do not vote that way as a matter of practice, and do not (individually or together) ordinarily have “control” over the target). They, in fact, constrain each other’s ability to influence the investee company.

Increasing the regulatory burden on these CVCs will make venture capital investments in European SMEs less attractive, with potential redirection of capital to SMEs operating in, or relocation of SMEs to, competing jurisdictions (such as the United States) where the regulatory framework does not generally require competition filings for venture capital investments.

In addition to the negative impact on CVCs, the proposals also potentially harm the SME investee company. In particular, many innovative SMEs that are developing innovative products initially operate without public profile, and venture capital financings of such companies are typically not publicly announced. The requirement to put details of such financings on a public register has the potential to deprive these SMEs of deserved competitive advantage and risks further discouraging venture capital investment in Europe. Further, a key feature of venture capital investments is their expedited execution as SMEs are often in urgent need of capital. The proposed waiting and prescription periods would create delays in the availability of funding that could seriously jeopardise transactions and further increase the risk profiles of venture capital investments.

According to the White Paper, the Commission believes that there is real risk in relation to the acquisition of minority interests by entities competing with the target entity. We do not believe that the Commission’s concerns warrant extension of the scope of the EUMR. In any event, we do not believe that minority investments by venture capital investors, including

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⁴ A fund that manages money provided by investors who seek private equity stakes in startup and SMEs with strong growth potential. For the definition, see www.investopedia.com
CVCs, in European SMEs raise the kinds of anti-competitive effects that the Commission is concerned about.

Accordingly, if the Commission were to adopt the proposed new system, we propose to limit the scope of the proposed filing regime by excluding minority investments in start-up, developing and small companies as well as amending the “competitively significant link” concept set out in the White Paper. More particularly:

- Acquisitions of minority shareholdings in any company with EU turnover of less than €50 million should be exempted, regardless of the turnover of the investors that may be involved in the transaction.

- Alternatively, or in addition, where there are multiple co-investors, which are acting independently from each other, each non-controlling minority investment should be considered as a separate transaction. Given that non-controlling minority co-investors will not be acquiring control over the target, there is neither a need to combine, nor justification for combining, their economic resources in assessing whether the EUMR’s turnover thresholds are met. Hence, for each minority holding acquisition separately, only the turnover of the relevant minority shareholder and the target should be taken into account. The turnover of other minority or controlling shareholders should not be relevant to that assessment.

- The “competitively significant link” concept should be limited to the acquisition of stakes in companies that are active in the same “relevant product and geographic market” as the investor, rather than those active in the “same sector”. In this context it is important for the Commission to confirm that the analysis of whether or not undertakings are competitors or potential competitors follows existing EUMR practice.

- The rule proposed in footnote 67 of the Staff Working Document should not be adopted. The “competitively significant link” requirement should only be met where there is a direct competitive link between the target and the acquirer itself, irrespective of whether the acquirer holds a minority shareholding in other entities that compete with the target.

- Replace the proposed 5 to 20% equity threshold range in the context of co-investments in which it is the investors (not the target) that meet the turnover thresholds, with a threshold requiring that at least two investors acquire at least 25% equity interests, to bring it into line with the tests adopted in Germany and Austria.

- The right to nominate a Board member or receive information customarily made available to shareholders should not in and of itself be a relevant triggering criterion. Given the high risks inherent in venture capital investments, it is standard investor practice to require the right to nominate one Board member and in addition receive financial information about the investment in order to monitor, preserve and enhance the underlying value of their investments. Moreover, current corporate legal regimes already ensure that directors owe a fiduciary duty to the companies on whose boards
they serve and to those companies’ shareholders as a group (rather than to the individual investors by whom they may be employed). Lastly, customary contractual undertakings in standard investment documents provide for specific non-disclosure and non-use provisions that cover confidential information disclosed to such investors.

B. The companies involved in the submission

The companies whose views are reflected in this submission are CVCs and each of them is part of a broader corporate group with activities in the sector in which the CVC invests. These companies include:

- **Novo A/S** is the holding company of the Novo Group which includes operating companies such as Novo Nordisk A/S and Novozymes A/S. Novo A/S (through Novo Seeds and Novo Ventures) also provides venture capital to companies in a development stage and takes ownership positions in companies within life science and biotechnology. The objective of Novo A/S is to produce a competitive financial return and to make a significant contribution to research and development aimed at improving the health and welfare of people. Novo A/S is not a strategic investor scouting for opportunities for the operating companies in the Novo Group. Novo A/S invests globally with roughly 30-50% of the capital allocated to European investments.

- **S.R. One, Limited (SR One)** is the corporate venture capital arm of GlaxoSmithKline Plc (GSK) making investments globally in emerging life science companies. Founded in 1985, SR One invests in early stage healthcare companies which are pursuing innovative science. SR One does not invest strategically, operates strictly fire-walled from its parent company, and does not grant special rights to GSK in any investment company. In 2005, SR One opened an office in the UK to increase its focus in Europe and at any one time has between 20 and 50% of its total capital allocated to European investments. To date SR One has invested more than $800M in over 100 biopharmaceutical companies in Europe and the US.

- **Intel Capital**, Intel's global investment organization, makes equity investments in innovative technology start-ups and companies worldwide. Intel Capital invests in a broad range of companies offering hardware, software, and services targeting enterprise, mobility, consumer Internet, digital media and semiconductor manufacturing. In 2013, Intel Capital invested US$333 million in 146 investments with approximately 49 percent of funds invested outside North America.

- **Takeda Ventures, Inc. (TVI)** is the corporate venture arm of Takeda Pharmaceutical Company Limited (TPC) the largest pharmaceutical company in Japan. TVI was founded in 2001 with the vision to extend Takeda’s reach into the Global scientific community and forge strategic relationships that complement and expand internal R&D capabilities.
C. Venture capital investments, CVCs and innovation

Venture capital investors (whether financial venture funds or CVCs) with a focus in the life science and technology sectors have four key features:

- they mostly invest in SMEs which are generally too small to either access the capital markets and, thereby, raise capital or to acquire a bank loan or be financed by issuing debt themselves;
- they generally look to invest in minority stakes along with other venture capital investors so that they can appropriately share the inherent investment risks and rewards, and also ensure that no single investor has sole decision-making authority;
- they typically review hundreds of funding proposals by many fund-seeking SMEs but only invest in only 1-5% of all available deals; and.
- the SMEs in which they invest are generally highly innovative and developing next generation products and services.

In these sectors venture capital investors (including CVCs) frequently invest either before there is product, when the business or the market segment is still embryonic, or when the investee company is in a relatively early stage of development. This means that such investments carry high risk. A significant proportion of the ideas fail to become products and, as such, financing has to be risk tolerant. It is well recognised that venture capital is an important source of funding for innovative SMEs to develop and grow, and to support innovation, in Europe. The importance of such support was recognised in the Commission’s 2014 Annual Report on SMEs, “SMES are at a critical juncture. While there are some reasons for cautious optimism, the inescapable conclusion is that conditions remain extremely tough for SMEs and further support is needed to yield sustainable SME growth”.\(^5\)

Unfortunately, even with the current regulatory environment, Europe has not been able to attract the same quantity of venture capital investment as the United States. During the last six years, the financial crisis, coupled with other negative macro-economic conditions in Europe, has rendered venture capital fundraising increasingly difficult. This is reflected in the chart below, which illustrates the decline of new capital being raised by financial venture funds in Europe since 2007.

![Figure 1: New venture funds raised over the past seven years (2007-2013)](image)

With the gradual decline of capital being raised by financial venture funds in Europe in recent years and the current macro-economic situation in the EU, we believe that all governments in the EU would agree that it is important to encourage investment in European innovation in these key sectors.

This gap left by the decline of the size of private financial venture capital funds has been increasingly filled by CVCs. As described in the chart below, between 2009 and 2013, CVCs have contributed a larger percentage of investments than private financial venture funds (whose activities in Europe have continued to decline).

**Figure 2: Corporate Venture Capital and Financial Venture Capital, 2009-2013**

Across all sectors including science and technology, there were 147 venture capital investments (taking into account only deals worth less than $50m) in Europe that have included CVCs as co-investors in 2013, resulting in an estimated €990 million being raised by SMEs. So far, in 2014, there have been 165 venture capital investments that have included CVCs as co-investors in Europe, resulting in an estimated €935 million being raised by early SMEs to fund their growth and innovation. In human therapeutics alone, CVCs

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6 Source: Global Corporate Venturing.

7 Source: Global Corporate Venturing.
have become instrumental in new company creation in Europe, and accounted for more than 40% of first-time co-investor groups in 2012 (42%) and 2013 (48%).

It is critical, therefore, that the proposals contained in the White Paper do not undermine and constrain the critical role of venture capital. More specifically, it is critical that they do not discourage funding by CVCs of European-based SMEs, thereby potentially hindering European innovation and job creation.

D. The US and other Regulatory Regimes

The United States, which competes with Europe for venture capital investment and where many venture capital funds and CVCs already focus many of their investments, has a regulatory framework that does not increase the regulatory burden on such investment in SMEs. Commentators have expressly noted the role of the “more hospitable regulatory environment” in facilitating non-bank financing of SMEs in the United States. We strongly encourage the Commission to adopt this approach, by excluding such investments from any changes to the scope of the EUMR that may ultimately be made.

The US Hart-Scott-Rodino Act (the “US Act”) excludes small investments in fledging companies through the very structure of their filing thresholds. It does so in two ways.

- First, the US Act’s structure is grounded in a minimum size-of-transaction threshold that applies to each separate investor that is acquiring a minority interest. The statutory minimum size-of-transaction threshold is currently $75.9 million. Thus, even a relatively substantial investment below this threshold by a single venture investor will not trigger the Act’s reporting requirements, even if it is done in conjunction with similar sized-investments by other venture capital funds.

- Second, there is a separate size-of-person test that must be satisfied for acquisitions that result in holdings of more than $75.9 million, but less than $303.4 million. This size-of-person test often results in investments in companies with no or little sales and only minor assets being exempt from the US Act’s requirements.

In addition, the US Act excludes acquisitions of minority stakes by co-investors. For example, the regulations implementing the US Act contain an exemption for non-controlling minority investments in non-US entities by non-US persons. Thus, an acquisition of a 25% interest in a German company by a British-domiciled company (with a British or other non-US ultimate parent) would be exempt from the US Act even if the German target met the minimum jurisdictional threshold for sales into or assets in the US.

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8 BCIQ, based on MS Ventures data, as of September 2014.

9 Commentators have noted that European SMEs account for 66% of job creation and 58% of valued (http://eubulletin.com/3367-too-small-to-fail-smes-as-a-key-to-europes-recovery.html).

In our experience, it is highly unusual for one or more members of a venture capital financing transaction to be required to notify investments in this jurisdiction. In contrast, the regime being proposed in the White Paper would have the opposite effect - many such transactions may become notifiable.

Indeed, many other jurisdictions whose merger control regimes do not cover non-controlling minority shareholdings or whose merger regimes expressly exempt investment funding transactions\(^\text{11}\) will have a significant advantage over Europe when competing for venture capital investments, if the White Paper’s proposal is adopted as it currently stands.

**E. Comments on the White Paper “Towards more effective EU merger control”**

In view of the features and structure of venture capital investments set out in above, the Commission’s proposals regarding minority shareholdings will likely impact a material number of transactions raising no competitive concerns. Notably, the proposals would likely require a filing for any venture capital investment involving two or more CVCs (as typically CVCs each have affiliates with substantial worldwide and EU-wide turnover). The costs, analysis and uncertainty required by the proposals come at a time when CVCs have taken on an increasingly critical role in funding European SMEs and innovation.

We firmly believe that venture capital investments in minority shareholdings in SMEs in the life sciences, technology and similar sectors should not be covered by the EUMR. SMEs backed by venture capital investments usually require several rounds of financing. These investment rounds usually occur not long before the SMEs’ funding from the previous round runs out. Since these SMEs are almost exclusively loss-making, it is crucial that funds can be raised quickly and flexibly, requiring investors to be able to negotiate and act in real time with the expectation (by both, the investors and the SMEs) that the transactions remain confidential. There is generally no time to delay closing for three weeks and publicly disclose the transaction (as the proposed initial waiting period would require) before equity is acquired, the SME is funded, employees are paid and financial obligations of the SME are satisfied in order for it to continue its activities and, indeed, ensure its very existence. Further, the possibility that the Commission may conduct a post-closing review for up to six months simply increases the risk profile of these already high risk transactions even further. In effect, given that these SMEs are usually cash flow negative, investors will likely not want to fund before the suggested four to six month period has expired since, if the Commission were to raise competition concerns, the investors may not be able to get the full amount of their investment back. This delay in availability of funds will likely jeopardise many transactions.

Not only are there important economic and innovation-related reasons to approach venture capital minority acquisitions differently, there are also specific characteristics of such

\(^{11}\) That is the case, for example, of Mexico; see Article 93 of the Federal Law on Economic Competition.
acquisitions, from economic, corporate and administrative perspectives, which warrant exempting them from the targeted transparency system suggested in the White Paper.

The Commission’s main concerns regarding the acquisition of non-controlling minority shareholdings in companies are exemplified in the Ryanair / Aer Lingus and BSkyB / ITV cases, where individual companies acquired a minority stake in close, strong individual competitors in highly concentrated markets. The few cases which raised the Commission’s concern have nothing in common with a typical multi-investor venture capital investment. Both categories of cases can be clearly distinguished and they do not raise the same type of non-coordinated or coordinated concerns. The Commission recognises this in the White Paper where it states that the acquisition of a non-controlling minority shareholding may harm competition, and thus consumers, in some instances only. In this sense, the Commission acknowledges that in the majority of circumstances these minority shareholdings without individual control rights are – by definition – not harmful.

1. Non-coordinated anti-competitive effects

Paragraphs 29 to 32 of the White Paper clarify that the Commission’s key concerns are the possibility that the acquirer’s incentive to unilaterally raise prices or restrict output is increased, and the risk that the acquirer uses its position to influence the target’s competitive, commercial strategies.

These concerns are not present in venture capital transactions.

First, commercial policy or strategy can only be influenced when the target has a market presence. Venture capital investors largely invest in new and small innovative companies. They are frequently involved in the very early research stages of a potential product, often at a point where it is not clear that there will ever be a viable product, where the target company has just entered the market, or where it is striving to settle in the market. Venture capital investors also typically look to exit their investment within three to four years of their investment, which generally means that the investee company will not be of substantial size before a sale or public offering of such company’s shares occurs. As such, there can be no or very little competition between venture capital investors and the entities in which they take minority stakes, or between the various developmental entities in which they take those stakes (assuming that they are all in the same market).

Second, the companies in which venture capital investors take stakes are almost exclusively loss-making (i.e., they have little to no turnover because they make, at best, limited sales). As a result, the acquisition of a minority stake by a single investor would generally not meet the proposed revised thresholds. This is wholly appropriate.

However, the impact of the White Paper is that venture capital minority investments would fall within the minority acquisition proposal because of the multi-investor structure that they commonly take. Despite the fact that co-investors act independently from each other (they do not have agreements to vote together, do not vote that way as a matter of practice, and do not
(individually or together) ordinarily have veto rights over key decisions made by the target), the mere fact that there are a number of co-investors would trigger a filing requirement purely as a result of the turnover generated by the corporate groups to which the venture capital investors belong.

In light of the above, the proposed system would lead to completely inconsistent results. Transactions with a single investor (acquiring a high minority stake) would not fall within the EUMR. However, venture capital transactions with multiple co-investors (each acquiring smaller stakes and constraining each other’s ability to influence the target, such that it is very unlikely that they produce anti-competitive effects) may well fall within the EUMR.

2. The coordinated anti-competitive effects

In Paragraph 35 of the White Paper, the Commission expresses concerns about potential co-ordinated effects that might occur as a result of the equity stakes that a venture capital investor holds in the target company. However, there are corporate laws and legal mechanisms already in place to make sure such potential effects are neutralised or mitigated in the case of venture capital investments.

First, Directors owe a fiduciary duty to act in good faith to promote the success of the company on whose board they sit for the benefit of the company and its members as a whole, rather than for the benefit of any particular investor by whom they have been designated. While this means that there is a potential for conflicts of interest if the interests of an investor and one or more of the entities in which it is a minority investor do not align, corporate law and principles of good governance extensively regulate this risk outside of competition laws.

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12 Investors’ rights are ordinarily limited to that necessary to safeguard their financial interests, commonly including consent rights on major transaction which affect the business as a whole (such as the issue of additional shares that would dilute their investment or the sale of key assets); board nomination rights (depending on the stake held) and information rights (in relation to financial and other information customary for shareholder to enable them to preserve the value of the investment).

13 For example, Section 172(1) of the English 2006 Companies Act provides that a director must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard to the following non-exhaustive factors:
(a) the likely consequence of any decision in the long term;
(b) the interests of the company’s employees;
(c) the need to foster the company’s business relationships with suppliers, customers and others;
(d) the impact of the company’s operations on the community and the environment;
(e) the desirability of the company maintaining a reputation for high standards of business conduct; and
(f) the need to act fairly as between members of the company.

14 A director must avoid situations in which he has, or can have, a direct or indirect interest that conflicts with, or may conflict with, the company’s interests. That applies to the exploitation of property, information or opportunity, and whether or not the company could take advantage of such property, information or opportunity. Independent Board members can authorise conflicts of interest relating to the personal exploitation by a director of any property, information or opportunity of the company, but cannot authorise a conflict of interest arising in (continued…)
Venture funds and CVC investors’ commercial decisions are usually taken by someone other than the investor’s director sitting in the target companies to avoid causing such director to potentially breach his fiduciary duties to the target company and its shareholders. Furthermore, Directors can be recused from voting in relation to one-off conflicts by the other members of the board, or, in circumstances that suggest a broader conflict, the director can simply be asked to step down by the other members of the board. It is important to note that the decisions on conflicts and recusals rest with the board of directors as a whole (rather than with the individual director), since the liability for decisions made by a board of directors in breach of their fiduciary duties impacts the board as a whole, not just the individual director.

**Second**, the Commission has indicated that it is concerned with the potential for minority shareholdings to provide a mechanism for information exchange. Once again, other areas of law provide several mechanisms preventing such information exchange, through both information rights and non-disclosure and non-use clauses.

First, while the target company will have certain obligations to provide financial information to its investors on a regular basis, along with other information that investors could reasonably request, there are limits to these obligations, particularly in relation to highly confidential information the disclosure of which the Board has expressly and specifically determined would be materially adverse to the *bona fide* interests of the company. Such restricted information ordinarily relates to financial and governance matters and strategic investment issues. On the other hand, it would be highly unusual for shareholders in any company (private or public) not to be entitled to receive some relevant financial information in order to be able to monitor and assess the performance of their investment.

Second, when venture capital investors make their investments, they become legally bound by non-disclosure and non-use agreements that require them to keep confidential, not disclose to any third party, or use for *any unpermitted purpose*, any confidential information. Such obligations apply to all of the confidential information that investors *do* receive and the breach of such obligations would carry severe legal liability and reputational risk.

**F. The Commission already has the Tools to Address its Stated Concerns**

More broadly, it is far from clear that there is an enforcement gap in relation to the theories of harm that the Commission has articulated. As a result, it is all the more important for the relation to a transaction or arrangement with the company. Under Section 175 of the English 2006 Companies Act the duty to avoid conflicts of interest will not be infringed:

(a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest.
(b) in the case of a private company, if authorisation has been given by directors who are genuinely independent, unless the company’s constitution prevents such authorisation.

Further, Section 176 of the English 2006 Companies Act provides that a Director must not accept any benefit from a third party which is conferred because he is a Director or his doing or not doing anything as a Director.
Commission to carefully consider whether it is necessary to extend the scope of the EUMR to the acquisition of non-controlling minority shareholdings for the reasons provided.

1. Non-coordinated anti-competitive effects

As described above, the Commission has expressed concerns regarding the potential for influence of the competitive strategies of the target. In doing so it cites Ryanair/Aer Lingus, Toshiba/Westinghouse and a few other cases. In these cases the Commission concluded that the EUMR could not apply because the relevant minority shareholder did not acquire “decisive influence”. However, there appears to be no material difference between the “influence” concept that the White Paper introduces and the existing “decisive influence” test under the EUMR. Under the EUMR, “decisive influence” means the possibility to determine an undertaking’s strategic decisions or block actions which determine the strategic commercial behaviour of an undertaking. The concept is broad and flexible, and can be established de jure or de facto through a case by case basis analysis of a variety of factors. There is no doubt that decisions regarding “increasing prices”, “forcing the target to stop competing” or “limiting the target’s competitive strategies thereby weakening its competitive force”, which appear to raise the Commission’s concerns (see paragraphs 51 and 54 of the Staff Working Document), are “strategic commercial decisions”, such that the ability to determine or block such decisions represents a right to exercise “decisive influence” within the meaning of the EUMR.

Hence, it appears that the White Paper’s concerns relate to situations in which there is a strong argument that the ability to exercise “decisive influence” would in fact be acquired.

As a result, there does not appear to be a real enforcement gap - the cases about which the Commission is concerned could be addressed under the EUMR as it currently stands, as transactions in which “decisive influence” is acquired. If at all, the Commission would need only to provide additional clarity regarding the scope of the “decisive influence” concept in the context of the acquisition of a minority stake, without unnecessarily extending the remit of the EUMR to capture a broader set of minority shareholdings and, as a result, venture capital investment transactions.

The Commission’s second non-coordinated concern about financial incentives of minority shareholders to “internalise” the target’s increased profits resulting from output restrictions or price increases appear to go beyond what economics would support. The Commission’s approach does not seem to be supported by any economic studies that it has commissioned. Any pressure to increase prices after a minority acquisition in a competitor will depend on a number of complex factors. First, it will depend on the proportion of sales that will be diverted from the acquirer to the target as a result of the acquirer increasing its prices (or reducing its output). This is dependent on the number of competitors in the market, on the closeness of substitution between the products of both companies (acquirer and target), on the quality of each market competitor’s products, and on the price of the target’s products relative to competitors’ products. Ordinarily, there may be a risk that a “financial incentive” might raise anti-competitive concerns only in markets where there are very few competitors
and high barriers to entry. Second, it will depend on the size of the acquirer’s stake in the
target. Third, it will depend on the target’s margin relative to the acquirer’s marginal cost. In
sum, anti-competitive concerns can be expected to arise only in very exceptional cases.

As this suggests, an economic approach would take a dynamic (rather than static) approach to
determining the likelihood of unilateral effects. This is why the Commission’s Guidelines on
the assessment of Horizontal Mergers clearly state that factors such as the likelihood of new
entry, the existence of countervailing buyer power, the “closeness” of competition, and the
differentiation between competitors’ products should be considered in assessing unilateral
effects.\(^{15}\) The White Paper makes no reference to these factors.

2. Coordinated anti-competitive effects

The Commission has also expressed concerns about the potential for tacit or explicit
coordination. The Commission’s approach is based on the view that a minority shareholding
may enhance transparency due to the privileged view it offers the acquirer into the
commercial activities of the target; and it may also increase the credibility and effectiveness
of any threat of retaliation in the event that the target deviates from the collusive behaviour.

Coordinated effects in merger cases may occur when a common understanding between all or
most market competitors on the terms of coordination can be easily reached; and the market
is such that participants can monitor these terms and deviations can be easily detected and
deterred. General information exchange in the market enhances transparency and this may
make reaching terms of coordination and monitoring deviations easier. However, in a
minority shareholding case, any information exchanged would not extend beyond the
acquirer and the target to the rest of the market and, in the context of venture capital
transactions, may not be between competitors in any event.

As we have explained above, the potential for enhanced transparency as a result of a minority
shareholding is at least partially constrained by other laws. Further, the potential information
exchange which is of concern to the Commission would occur through communication
between the target and the acquirer (once the acquisition completes). As such it is not clear
why such communications (through board of directors, shareholders and/or other meetings)
would not be considered to be “concerted practices” within the meaning of Article 101
TFEU. As the General Court noted in relation to Aer Lingus’ claim that Ryanair could use its
shareholding to seek access to Aer Lingus’ confidential strategic plans, “such an exchange of
information would not be a direct consequence of the minority shareholding, but would
constitute subsequent conduct on the part of the two companies which could potentially be
examined under Article [101]”.\(^{16}\) It is, once again, far from clear that the EUMR should be
amended to address these concerns.

\(^{15}\) Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of
concentrations between undertakings, OJ C 31, 5.2.2004
\(^{16}\) Case T-411/07 Aer Lingus Group plc v Commission, at para 70.
G. Excluding Certain Acquisitions of Minority Interests

The current proposals would impose a significant additional burden on a significant number of transactions that simply are not capable of producing the (unilateral or coordinated) anticompetitive effects about which the Commission is concerned. In its White Paper, the Commission indicates that it anticipates the minority shareholding proposals to generate only an additional 20 to 30 transactions a year. We understand that this estimate is based on a database that covers only acquisitions of interests in public companies. However, there are many more minority investments in private companies, many of which are not publicly announced. Moreover, as mentioned above, so far in 2014 alone, there have already been an estimated 165 venture capital investments in SMEs that have included CVCs as co-investors, a number well in excess of the Commission’s estimate. Importantly, this number does not include any other minority investments made by private financial venture and private equity capital funds that could also be impacted by the proposal in the White Paper (which is an issue that we do not address in this paper). Accordingly, it appears that the Commission’s estimate is well off the mark, if venture capital investments are included.

Accordingly, irrespective of the Commission’s conclusions regarding the necessity of the proposed changes to address its concerns outside the venture capital sector, it should clearly ensure that minority stake investments in this sector are not caught by its proposals. The White Paper makes it clear that the Commission’s concerns regarding the acquisition of non-controlling minority shareholdings are driven by companies acquiring interests in their close, strong competitors in highly concentrated markets. However, as we have explained above, while the situation of venture capital investments is significantly different in a number of ways, the proposals (at least as currently framed) would also apply to them.

Given the real impediment to innovation and technological development that would flow from the delays and costs of having to file “information notices”, and the Commission’s stated intention of applying the proposed regime only to transactions which create a “competitively significant link”, we propose to limit the scope of the proposed filing regime by excluding minority investments in start-up, developing and small companies as well as amending the “competitively significant link” concept set out in the White Paper. More particularly:

- Acquisitions of minority shareholdings in any company with EU turnover of less than €50 million should be exempted, regardless of the turnover of the investors that may be involved in the transaction. This essentially reflects the current French and Italian turnover thresholds (€50 million and €48 million, respectively), and falls between the Dutch (€40 million) and English (£70 million) thresholds. As such, it appears to reflect an approximate measure of materiality of a transaction for the European marketplace.

- Alternatively, or in addition, where there are multiple co-investors, which are acting independently from each other, each non-controlling minority investment should be considered as a separate transaction. Given that non-controlling minority co-investors
will not be acquiring control over the target, there is neither a need to combine, nor justification for combining, their economic resources in assessing whether the EUMR’s turnover thresholds are met. Hence, for each minority holding acquisition separately, only the turnover of the relevant minority shareholder and the target should be taken into account. The turnover of other minority or controlling shareholders should not be relevant to that assessment.

- The “competitively significant link” concept should be limited to the acquisition of stakes in companies which are active in the same “relevant product and geographic market” as the investor, rather than those active in the “same sector”. In this context it is important for the Commission to confirm that the analysis of whether or not undertakings are competitors or potential competitors follows existing EUMR practice.

- The rule proposed in footnote 67 of the Staff Working Document should not be adopted. The “competitively significant link” requirement should only be met where there is a direct competitive link between the target and the acquirer itself, irrespective of whether the acquirer holds a minority shareholding in other entities that compete with the target.

- Replace the proposed 5 to 20% equity threshold range in the context of co-investments in which it is the investors (not the target) that meet the turnover thresholds, with a threshold requiring that at least two investors acquire at least 25% equity interests, to bring it into line with the tests adopted in Germany and Austria.

- The right to nominate a Board member or receive information customarily made available to shareholders should not in and of itself be a relevant triggering criterion. Given the high risk inherent in venture capital investments, it is standard investor practice to require the right to nominate one Board member and to receive financial information about the investment in order to monitor, preserve and enhance the underlying value of their investments. Moreover, current corporate legal regimes already ensure that directors owe a fiduciary duty to the companies on whose boards they serve and to those companies’ shareholders as a group (rather than to the individual investors by whom they may be employed). Lastly, customary contractual undertakings in standard investment documents provide for specific non-disclosure and non-use provisions that cover confidential information disclosed to such investors.