Introduction

1. The In-House Competition Lawyers’ Association (“ICLA”) is an informal association of in-house competition lawyers across Europe. The Association meets quarterly to discuss matters of common interest, as well as to share knowledge and best practices in competition law. There are currently approximately 180 members in 14 countries. The Association does not represent companies but is made up of individuals as experts in this area of law. This paper represents the views of some of its members only.

2. Because of their role, in-house competition lawyers have a clear interest in a simple and straightforward merger control regime that prioritises certainty, minimizes costs for business, and does not represent a disproportionate burden on businesses’ time and resources.

3. We welcome the opportunity to comment on the European Commission's review of the EU merger control in relation to minority shareholdings and the referral system to transfer cases between Member States and the Commission (the “White Paper”). This response should be read together with our submission on last year's consultation on the same topic.
4. We do not seek to respond to every point raised in the White Paper but we will focus on those areas on which ICLA members’ views and experience can assist the Commission the most.

5. In general, while we welcome many of the changes relating to the referral process and the proposal to exclude certain joint ventures that do not have any ‘impact’ in the EEA, we continue to have serious concerns about the proposal to extend the European Commission’s jurisdiction to minority shareholdings. The White Paper, to a certain extent, reflects many of the comments and criticisms made by various stakeholders in the course of last year’s consultation. However we do not believe that the revised proposals are sufficient to allay all the concerns that businesses have. We express those concerns in this response.

Minority shareholdings

6. We have serious concerns about the proposal to extend the Commission’s powers to review ex ante the acquisition of non-controlling minority shareholdings as suggested in the White Paper.

7. We do not think that, as stated in the White Paper, the proposal “fits with the merger control regimes currently in place at both the EU and national level”. Of the 31 EEA countries, 28 do not impose an obligation to notify ex ante acquisitions of minority shareholding. Only Germany and Austria currently do so. The UK, on the other hand, operates a voluntary system.

8. At a time when the “European Council has called for further efforts to reduce the overall regulatory burden at EU and national level”\(^1\), the current proposal on minority shareholdings does not align with this and with the ‘Think Small

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First principles⁹. Imposing an ex ante notification burden on companies before testing less burdensome alternatives would not be in line with such principles either.

9. We would strongly urge the Commission to reconsider the proposal for the reasons listed below.

10. Burden for businesses

While we understand the Commission’s concern that currently there might be a limited gap in the enforcement powers of the Commission in relation to certain minority shareholdings that might cause harm, we do not share the view that the gap is so large to warrant the creation of such a burdensome process as the one presented in the White Paper. We believe that the few cases that have raised the Commission’s concern are characterized by very specific and exceptional features and in particular the acquisition of a minority shareholding in a strong competitor within a concentrated market.

We are concerned about the impact that the proposal will have for businesses in Europe such as increased costs of doing business, difficulties in preparing information notices, delays, chilling effects on deals and greater uncertainty in a system that so far has been more or less predictable. The establishment of such barriers to business as well as the corresponding costly administrative burden will be highly disproportionate: the system will capture a substantial number of transactions that do not raise any competition concern at all. Based on our experience, we believe that the Commission’s assessment as to the amount of transactions that are likely to fall within the scope to be quite conservative. In our experience the number would be much greater. We provide the Commission with our views on the possible number in the Annex.

The proposal is also in contrast with the very laudable efforts by the Commission to streamline and simplify the EUMR regime. As the Commission itself states in paragraph 42 of the White Paper, ‘any change

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should avoid any unnecessary and disproportionate administrative burden on companies’.

11. The perceived enforcement gap and the application of Art. 101 and Art. 102 TFEU

The Commission states in the White Paper that it does not have the powers to examine minority shareholding under Art. 101 or Art. 102 TFEU. It can only do so in the context of a notified transaction for the acquisition of control. The Commission states that it is not clear whether acquiring minority shareholdings would constitute an agreement in all cases. We do not entirely agree.

First, several transactions (such as the acquisition of minority shareholdings in a joint venture) have agreements that could be reviewed under Art. 101.

Secondly, the concept of “agreement” under Art. 101(1) is broad enough to capture any bi- or multilateral conduct ranging from a fully executed contract to a mere meeting of the minds or non-opposition to a proposed course of action. Indeed, as the General Court pointed out in, among others, Bayer, the concept “centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention”. While “a distinction should be drawn between cases in which an undertaking has adopted a genuinely unilateral measure […] and those in which the unilateral character of the measure is merely apparent”, the Court goes on to say, “the latter must be regarded as revealing an agreement between undertakings and may therefore fall within the scope of that article [Art. 101(1)]. That is the case, in particular, with practices and measures in restraint of competition which, though apparently adopted unilaterally […], nevertheless receive the tacit acquiescence of [the undertaking’s counterparts]”. The line that separates agreements from concerted practices, also prohibited under Art. 101(1), is blurred at best.

Thirdly, concerns about horizontal coordination and vertical foreclosure could be assessed under Articles 101 and 102 TFEU, if such behaviour arose post-acquisition of the minority shareholding, when the concern is no longer purely hypothetical. An ex-post assessment would be the proportionate response to deal with this very small number of cases rather than introducing a wide notification obligation ex ante.

Fourthly, if the concern is the sharing of competitively sensitive information between competitors, this would be caught by Art. 101(1) – as this has been expansively interpreted by the EU courts e.g. T-Mobile and in the Guidelines on the applicability of Art 101 TFEU to horizontal cooperation agreements. The Guidelines contain an entire section on information exchanges. If the Commission felt it necessary, a more proportionate approach would be for it to include a section in the Guidelines dealing with information exchanges in the context of minority shareholdings, for example on Chinese walls and what is expected by shareholders and directors who have access to sensitive information. Non-compliance with those guidelines might trigger an investigation. Therefore the concern about information exchanges in the context of minority shareholdings is not a valid reason to introduce a burdensome notification system. In-house lawyers are quite used to the setting up of safeguards such as firewalls and limited flows of information and we would be very happy to discuss with the Commission our experience in this field.

In addition, it is difficult to foresee many instances where a conduct between undertakings that infringes competition rules might take place that would be appreciable enough to warrant action by the Commission, but where the Commission lacked the necessary powers to act. Any attempt to anticipate the point in time when the Commission can assert jurisdiction by shifting the focus from *ex post facto* antitrust enforcement to *ex ante* merger control would be unsound, particularly if the only triggering event to base this assertion is the mere acquisition of equity that is enough to confer the buyer as little as a non-controlling influence over the target.

12. Disproportionate
The enforcement gap perceived by the Commission is overstated. We consider that, if there is a gap at all, it is very small since many issues can be dealt under Art 101 and as such we think that the suggested measures on minority shareholdings are disproportionate in relation to the problem identified and are much wider than would be necessary. Furthermore, in our opinion the Commission has not presented sufficient evidence to show that the countless structural links that exist for legitimate commercial reasons in Europe has created a critical mass of suitable transactions resulting in significant anti-competitive effects to justify the proposed legislative reform.

13. **Competitively significant link**

It appears unfortunate that the Commission is planning a partial return to a system that did not work well in the past before Regulation 1/2003, when it received a large number of unnecessary notifications of agreements on its Form AB. Indeed it received so many that it could only deal with them by sending mere “comfort letters”.

We are concerned that introducing the test of a ‘competitively significant link’ as described in the White Paper would catch a very large number of unproblematic transactions, since this is too widely defined. As such the so-called “targeted transparency system” is, in our view, far from being targeted. In this context we are concerned about the notification thresholds, the inclusion of vertical relationships in the notification system and the acquisition of minority shareholdings by one company that does not itself compete with the target but which already holds a minority stake in one or more firms competing with the target.

- **The notification thresholds**

  In our view the notification thresholds suggested by the Commission are too low and would lead to too many unproblematic minority shareholdings being notified. It is also quite unlikely that somebody with a 5% shareholding might have the rights and power to influence the conduct of the target against the will of the other shareholders holding the remaining 95%. It would be unlikely for any competition concern to arise in cases
where the target’s EU turnover is small and where the acquirer’s shareholding is low (e.g. below 20-25%).

- **Inclusion of vertical relationships**

  The Commission has acknowledged that "non-horizontal mergers are generally less likely to create competition concerns than horizontal mergers" as they "do not entail the loss of direct competition between the merging firms in the same relevant market" (paras 11-13 of the Non-Horizontal Merger Guidelines) and the Court has noted that such mergers are "not usually of such a nature as immediately to create or strengthen a dominant position due to the combination of the market shares held by the parties to the merger" (Tetra Laval, paragraph 150) and are generally considered to be neutral or even beneficial for competition (Tetra Laval, paragraph 155). This is even more likely to be true where the acquisition is simply of a non-controlling stake, rather than control. As such, we believe it is disproportionate to include non-controlling shareholdings in vertical relationships.

- **Companies not competing with the target but having minority shareholdings in other companies that do compete with the target**

  This is foreseen in footnote 67 of the Commission Staff Working Document. We believe that the inclusion of these types of links is unnecessary. It is our understanding that the Commission considers that the main possible theory of harm would be one of coordination, where, for instance, the holding company sits on the board of several competitors and has access to confidential information that it can share with other competitors.

  Since the concern is again in relation to information exchanges (and therefore caught by Art. 101 TFEU), we do not believe a notification system is necessary or proportionate. Chinese walls and other means to avoid the sharing of that information are more than adequate. Companies engaged in these kinds of activities (and their legal advisers) are quite used to setting up such firewalls. For example these are common in the banking, private equity and venture capital industries where an investment
firm might have a minority equity stake in several companies in a sector that compete with each other. These firms will often have appropriate processes and procedures to avoid the sharing of sensitive information between competitors in which it owns a minority stake. As noted above, the Commission could offer further guidance through an update to its Guidelines on horizontal agreements.

14. The creation of legal uncertainty

The Commission’s proposals represent a departure from the certainty of the ‘bright-line’ jurisdictional thresholds and timetable established under the EU merger control regime to date. The existing regime provides a high degree of legal certainty for parties in predicting whether their transaction requires notification, and if so, what impact this is likely to have on the timetable. This provides a regulatory environment that is conducive to investment. In contrast, the Commission’s proposed thresholds for triggering an information notice under the targeted transparency regime are uncertain. As currently foreseen, it would be difficult for businesses to ascertain whether an information notice is required or not. Once an information notice has been submitted, the proposals create further uncertainty for the parties’ transaction timetable. The information notice would suspend the transaction timetable automatically for three weeks. After this period, the acquirer could complete the transaction but would still not have legal certainty that the Commission would not intervene in the transaction until the expiry of a further 4-6 month prescription period. The Commission’s suggestion that parties could submit a full-form merger notification in order to obtain legal certainty is impractical.

Any proposed change to the EU merger control regime should allow businesses to complete their legal transactions efficiently without unnecessary burdens, especially when they do raise competition concerns. The preparation of a full Form CO notification and the triggering of a full review timeline for acquisitions that are unlikely to be problematic is not a practical approach in order to provide businesses with legal certainty.

15. Progressive increases in shareholdings
In many cases, minority shareholdings may be gradually increased over time, for example when target companies in their growth phase seek further funding for investments. It would be a significant burden on business (and in many instances impossible) to establish whether each increase in minority shareholding triggers a ‘competitively significant link’ that should be notified to the Commission.

16. The costs and burden of the information notice

The Commission states that, under the targeted transparency system, an undertaking would be required to submit an information notice which would contain information relating to the parties, their turnover, a description of the transaction, the level of shareholding before and after the transaction, any rights attached to the minority shareholding and some essential market share information. The description of the information to be included in the information notice will result in a substantial burden on the parties. We are concerned and we believe that the cost for the preparation of an information notice for all transactions that might have a ‘competitively significant link’ should not be underestimated. In particular the preparation of market share data and relevant market definition will be a complex exercise and disproportionate to the small number of cases that actually could be problematic and warrant review. In addition, market share information should not be relevant in the context of an acquisition that will not enhance concentration in the market. Preparing such analyses will be expensive, as shown by the cost borne by companies even when preparing short form notifications, together with their external advisers. This is particularly true in the context of acquisitions of non-controlling shareholdings, where the target may not cooperate in the notification exercise.

Rather then market share information, the Commission should only require information about the sector the companies are in. In addition, the request for internal documents also seems superfluous to the Commission’s needs and will be burdensome to compile.

We are also concerned about the potential fines for submitting incorrect or misleading information notices. The fines so far imposed by the Commission
for failure to notify would seem excessive in the context of minority shareholdings. In our view no fines should be imposed or a different and proportionate fining regime should be set up.

We are concerned that these additional costs would have an impact in particular on venture capital investment transactions where targets are in urgent need of capital. In addition in certain sectors (especially in fast moving technology markets), the terms of these investments are confidential: this is critical for innovative targets, which are developing new ideas or products and want their projects to remain secret. Any information on such deals in the public domain might have a negative impact.

17. The 15-working day waiting period and the prescription period

The combination of these two periods would create delays and legal uncertainty at the same time. A 15-working day waiting period (i.e. at least 3 weeks), represents a significant delay and it could disrupt or have a chilling effect on legitimate transactions that do not raise any competition concerns. It should be possible for the Commission to review the notification and establish if it warrants review or not within a shorter period than 15 working days.

The four to six months prescription period will produce further delays, since investors for example are likely to request targets to retain the funds in blocked accounts until there is legal certainty about the transaction (i.e. until the expiration of the prescription period). The end (and odd) result is that minority shareholders would be in a more cumbersome position than parties in a standard “concentration” case. In effect, the latter are also subject to a standstill obligation (which is not much longer than the suggested 15-working days waiting period) but in exchange they obtain legal certainty once the waiting period has expired. This is one of the reasons why we would prefer a voluntary system coupled with very clear and strong guidelines (if the Commission were finally to extend the EUMR’s scope).

18. Possible large number of notifications

In light of the far-reaching thresholds for notification that the Commission is minded to use and the uncertainty in relation to the concept of ‘competitively
significant links’, there is a danger that the Commission might receive a larger number of filings than its current estimate. In particular, we are aware that many companies (in which our members are employed) might take a conservative approach if the proposed changes are introduced in order to get clarity and approval even for transactions that raise no issue or only minor issues. Therefore we believe the Commission’s estimate of 20-30 filings per year to be unrealistic⁴ (and we provide further information in the Annex).

Instead we think this might lead to the review by the Commission of a significant number of cases that have no real competition issues. This in turn would have an impact on its enforcement priorities, its resources and ability to focus on transactions that raise serious competition concerns.

19. The EUMR filing thresholds

The Commission Staff Working Document suggests that the EUMR filing thresholds would apply. It remains unclear however what methodology the Commission intends to use. If it takes into account sales from all the parent companies of or co-investors in the target, that would significantly increase the number of cases that would be reportable. This may even lead to situations where the acquisition of a minority shareholding would be “notifiable” whereas the acquisition of control may not. The Commission should only consider as parties, for the purpose of turnover calculation, the acquirer and the target company, and not other co-investors, regardless of their size (if the Commission feels it must extend merger control to minority shareholdings).

We are also very concerned about the difficulty in obtaining turnover information if the definition of “undertaking concerned” is expanded to also include minority acquisitions.

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⁴ The Commission’s estimate of 20-30 yearly filings under the targeted transparency system (§85 of the Staff Working Document accompanying the White Paper) is an extrapolation based on the proportion of minority shareholdings reviewed by NCAs that would have triggered the EUMR thresholds. However, since only three Member States (Austria, Germany and the UK) currently review minority shareholding acquisitions, it is highly likely that this figure actually underestimates the number of non-controlling stakes that are acquired throughout the entire EU each year. As a result, we expect the number of deals that would be subject to notification and clearance prior to implementation under the proposed rules to be much greater.
20. The ripple effect

Although not a direct issue for the Commission to address, it is an unintended consequence of the proposal. We are very concerned about the ripple effect that the introduction of this notification system may have in other competition law systems (both in the EU and outside), as they often are eager to mirror the European Commission’s initiatives. Not only will it add additional layers of administrative complexity to transactions that almost never raise antitrust concerns but also the proliferation of a notification system for minority shareholding in multiple jurisdictions will generate further uncertainty and costs.

Suggestions

21. We feel that the European Commission should abandon the proposal relating to minority shareholdings in its entirety. The number of cases that would actually cause concerns is likely to be very small. However should the Commission decide to proceed with a proposal, as a minimum it should consider narrowing the scope and introduce as a minimum the following safeguards that, while not making the system perfect, would at least alleviate some (but not all) of the concerns expressed above:

• As explained above, we consider that the Commission has not been able to demonstrate that the proposed system is proportionate to the magnitude of the perceived problem to be addressed. Therefore we believe that the Commission, if at all, should start with a less demanding system consisting of self-assessment and voluntary filings, if it decides to proceed. The Commission should issue substantive guidance and delineate clearly the situations in which a minority shareholding could give rise to anti-trust concerns, which would then form the basis for the self-assessment. Such a system would reduce the burden on business while giving the Commission the power to focus its review on those minority shareholdings that might cause competitive harm. The Commission could learn from this experience and then assess whether, on the basis of actual evidence, a notification system (even targeted) is warranted. Such a system would leave companies free to notify to achieve certainty in
cases where there might be ‘competitively significant links’ and would
leave the Commission free to investigate cases which have not been
notified. Any system should focus on problematic transactions rather than
capturing a large number of unproblematic ones to deal with a very few
problematic ones.

• The notion of “competitively significant link” is too wide. It should therefore
be redefined in a narrower manner and in any case it should exclude
vertical relationships.

• The shareholding thresholds to find a competitive significant link are too
low. Both the 20% and the 5% should be increased. Setting the lower
threshold at 5% will mean that a large number of transactions will have
the potential to trigger the thresholds. In addition the 5% is so small to
make it unrealistic that a company could exercise influence on the target
with no regard to the other 95%.

• The qualifying “additional factors” are too vague and can lead to
significant legal uncertainty. They should be better defined and focus on
specific factors that can influence the competitive conduct of the target,
not the target in general. It is not appropriate to consider that just having a
board member creates a competitively significant link. It is standard
practice for most companies that invest in other companies and want to
control their investment to appoint a board member in order to protect
their investment. But if their board member has no veto right or any other
kind of special right that could influence the target’s strategy, this could
not possibly create a competitive significant link. We provide the
Commission with further comments in the Annex.

• Unlike the case of concentrations or joint ventures, undoing an acquisition
of a minority shareholding typically does not pose a significant problem,
as there is no integration of the two businesses. The suspensory
requirement should therefore be eliminated. Imposing a waiting period
once an information notice has been submitted, during which the parties
would not be able to close the transaction, is not necessary (and possibly
damaging for companies in urgent need of funds).
• The so called ‘prescription’ period, that is the Commission’s ability to investigate transactions which have already been implemented is too far-reaching and will create an environment where companies will not be able to fully take advantage of their economic investment due to such uncertainty. This will lead to companies notifying non-problematic minority shareholdings in order to get legal certainty. If the notification process becomes too burdensome and the transaction timetable becomes overly elongated, the Commission may inadvertently introduce a situation in which deals that could help to stimulate growth are not contemplated in the first place, or collapse prior to clearance being obtained. If any limitation period is introduced at all it should be as short as possible.

• Where there are multiple minority co-investors, each non-controlling minority shareholding acquisition should be considered as a separate transaction for the turnover calculation purposes. Hence, for each acquisition separately, only the relevant acquirer’s and the target’s turnover should be considered and not that of other investing minority shareholders, nor that of other companies which have a controlling stake over the target.

• The information notice should not be a burden to undertakings and should be extremely easy to prepare. It should contain the minimum amount of information required for the Commission to establish jurisdiction and certainly not require information on market shares or internal documents. Rather it could be limited to information on the sectors in which the companies are active. The Commission in those cases could request more detailed information where it might consider that the minority shareholding could be a problem.

• Guidance under Art. 101 on Chinese walls and duties of directors could be prepared to avoid notifications in all those cases where the concern is only exchange of competitively sensitive information between competitors.

Other comments
22. In relation to the other points in the White Paper and in particular on the referral options, we are broadly satisfied with the proposed changes and we would refer the Commission to the comments we made in September last year. There are however three points that we would like to highlight:

- **JVs with no impact**

  We welcome the proposal that the Merger Regulation could be amended so that the creation of a full-function joint venture located and operating totally outside the EEA (and which would not have any impact on markets within the EEA) would not have to be notified to the Commission even if the turnover thresholds of Article 1 are met. This is something our members have been advocating for some time and we are pleased to see that change now making it into the EUMR. However, the way in which ‘impact’ will be interpreted will be crucial for the success of this amendment and for providing clarity and certainty for businesses. Perhaps the absence of an immediate, substantial and foreseeable effect should suffice. Whichever wording is chosen, it will be important for the Commission to provide practical guidance on it in the Consolidated Jurisdictional Notice. For example, over what timeframe must the parties not be able to / have no plans to market their product in the EEA?

- **Referral process**

  Article 4(5) referral: we believe that Member States should be required to show strong justification before being able to submit an opposition. The Commission seems to imply that no justification is needed since a Member State is competent for the case. In our view, no requirement for a justification could limit the laudable objectives of these reforms.

  Article 22 referral: we believe that the current conditions under which a Member State can refer a transaction to the Commission are too loosely defined. First, Member States need to be able to review the
transaction under their own merger control rules in order to be able to refer it. Second, clear time limitations should be imposed that would bar any such referral in order to create legal certainty. In particular, if a transaction has been disclosed publicly, any Member State interested in a potential referral would need to have taken a referral decision within the 15-day waiting period. The Notice should be updated accordingly.

- **Greater convergence**

The Commission should also consider what other steps are necessary to ensure greater convergence between the NCAs and the Commission and between the NCAs themselves to avoid conflicting and inconsistent outcomes (as the Eurotunnel example shows).

**Conclusions**

23. There are many positive reforms considered within the White Paper (such as limiting reviews of joint ventures which have no conceivable impact in the EEA and streamlining of the referral process). However, we are concerned that other proposals (such as introducing merger control review of non-controlling minority shareholdings) will significantly increase the cost of doing business in the EU and have the effect of stifling investment, innovation and growth. Although the Commission’s ‘ideal’ of catching all potentially anti-competitive transactions is laudable, it is difficult to see how this can be reconciled with the Commission’s commitment to avoid unnecessary administrative burden on parties.
1 - The numbers of acquisition of minority shareholdings by companies and reasons for such acquisitions

The number of minority shareholdings that companies might acquire in other entities in the same sector depends on the company and the sector. However many of our members have highlighted that they carry out a significant number of such acquisitions each year. For example, a large multinational company could do 3 or 4 of these acquisitions in Europe in a year. For some companies 15 acquisitions a year is not uncommon. In some very specific cases – for example when a company or one of its subsidiaries is active in a sector as a “start-up accelerator” – it could have hundreds of minority investments in its portfolio, possibly completing between 50 to a 100 acquisitions per year. Of course not all of these would include a ‘competitively significant link’ but many of these are likely to be caught and possibly require notification if the proposed rules on minority shareholdings are unclear or defined too widely.

Companies acquire minority shareholdings in other companies for a variety of different reasons. Without trying to be exhaustive, here are some examples mentioned by our members:

- As a way of securing access to a specific technology or market knowledge;

- As an investment in technologies relating to products which are complementary to those of the acquirer, for example components that are used together with the acquirer’s final product;

- Investments in companies to assist a faster adoption of new technologies in certain markets;

- Investments in companies that sell technology that is needed to produce the investor’s product;
Investments in emerging technologies that might be useful in three to five years, but are not necessarily related to the investor’s current business;

As part of a broader strategic / commercial strategy to benefit from joint procurement or from cost savings for example by sharing some assets or infrastructure, joint R&D;

In order to enter a new market or a new country especially where the target company has existing expertise or facilities;

So that a key company for the acquirer is not acquired by somebody else, in order not to lose some of the benefits mentioned above;

As a first step towards a potential future greater integration that might lead to full control;

To accelerate innovation within the acquirer’s core business by providing funding and experienced industry insight into an innovative target;

To share risks on a specific project;

Simply as an investment;

To access new technology or research particularly where this would complement existing products or activities of the acquirer;

To develop security of supply of a particular product (e.g. obtaining equity in return for a cash investment and supply agreement);

In developing the acquirer’s knowledge and expertise in a particular area;

A financial investor might invest in minority shareholdings in companies as part of a portfolio risk management tool, to minimise its risk exposure in certain types of assets/ companies in a specific sector, and might be willing to remain a minority shareholder and decide not to participate in the
management of the company as long as certain conditions are met – for example a defined shareholders’ remuneration policy;

• A venture capital company might invest in SMEs that are in need of capital but are too small or find it difficult to raise financing from capital markets. Such SMEs cannot be financed through bank loans or by issuing debt themselves, as larger companies usually do.

2 – The type of issues to consider if a clear test has to be created.

It is impossible to foresee all possible instances in which ‘material influence’ could be exercised in a minority shareholding. This case-by-case variation again suggests that a voluntary system is a better way to address minority shareholdings than a mandatory system where the thresholds cannot be clearly defined. In any case, it would be useful to consider the points made below.

The primary focus of any reform must be on the ability to actually influence the commercial objectives and activities of the target, either through acquiring control of the board or where an investor has a veto over the key commercial decision of a company, for example the adoption of the business plan. In this respect, where there are a number of minority shareholding investors qualifying as a “competitively significant link” and acting independently from each other (which is often the case in venture capital investments), it is very unlikely that any of them could exercise such influence over the target. This is so because the relevant minority shareholders will likely constraint each other’s ability to influence the target.

Neither the right to a board seat nor the right to receive information gives such influence. Regarding the appointment of a board director, it should be noted that the typical size of a board for an SME is 5 people – therefore even where an investor has the right to appoint one director, this does not give it the ability to direct a company’s activities. Moreover this is standard practice to ensure protection of the minority investor’s investment. This criterion would only be justified where the appointed director has veto rights that may be deemed to provide him/her with *de facto* or *de iure* “decisive influence” within the meaning of the EUMR. The same applies to the information that is provided to minority shareholders. Typically this information allows the minority investor to monitor and protect its investment. This criterion would only
be justified where the investor is in the same relevant market than the target and the information relates to competitive sensitive issues such that they may constitute a prohibited exchange of information between competitors under Article 101.

What we are talking about is a combination of multiple rights which can give a shareholder significant and enduring influence over the target's commercial policy and strategic decisions. This level of influence should lie above the level of merely protecting its investment, in a manner that could create competition concerns but somehow fall short of de facto control.

We think that the following should be excluded from any list of rights that could trigger the Commission’s jurisdiction:

- A board observer position;

- Access to commercially sensitive information (this is essential for any investor to monitor its investment);

- Key industry knowledge by an individual: this is too broad and subjective, and would seemingly always be triggered in the context of the Commission’s definition of a ‘competitively significant link’ which requires the acquirer and target to operate in the same sector/market;

- Very small percentage shareholdings (i.e. less than 20-25%);

- The acquisitions of non-controlling minority shareholdings in Small and Medium sized Enterprises (SMEs), which are considered to be major drivers of growth and innovation in the market;

- A “competitively significant link” should only arise when an investor acquires a holding in a competitor, i.e. both acquirer and target are active in the “same relevant market”. Further, there should be a sort of de minimis threshold based on the target’s market share. A noncontrolling minority holding acquisition in a target with little market presence is very unlikely to give rise to anti-competitive concerns.