On 9 July 2014 the European Commission Directorate General on Competition published the White Paper “Toward a more effective merger control within the EU” covering a series of proposals for the reform of the current regulatory framework regarding mergers on an EC level (hereinafter the ECMR\(^1\)).

Regarding the proposed reform of the ECMR, the CNMC have made the following comments:

1. **Control over the acquisition of minority shareholdings.**

   Opportunity

   1.1. The CNMC shares the Commission’s concern over the effects of acquiring minority shareholdings in a company that may be a market competitor. Nevertheless, we feel it essential to justify the need to introduce such a regulation (not all legislations provide for it) as well as the need for intervention from the European Commission on an EU level.

   1.2. The way that these acquisitions are handled differs from one Member State to another. For example, Germany, Austria and the United Kingdom have established an *ex ante* control system, while other Member States, such as Spain, have a regulatory framework in place that analyses operations of this type solely from an *ex post* perspective.

   1.3. With the introduction of this new control, the CNMC would like to stress the importance of the **workload** that this reform may represent, not only to companies but also to the competition authorities, among them the European Commission.

   1.4. For this reason, the CNMC feels an in-depth analysis of the **costs and benefits** that the introduction of such a control system represents.

   1.5. The CNMC is of the opinion that the *ex ante* control over the acquisition of minority shareholdings between companies is only justifiable if:

      1.5.1. The number of operations which may raise concerns from defence of competition point of view is significant enough to justify the intervention of the European Commission.

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\(^1\) “European Commission Merger Regulation”
1.5.2. There are no alternative mechanisms provided for in the legislation that allow the control of the distortions that may arise in markets as a result of such acquisitions.

1.6. According to the European Commission figures supplied during the public consultancy process, the proposed control framework would affect 20 to 30 minority shareholding acquisitions per year. However, the CNMC feels that the market impact study was based on extrapolations and suppositions which may underestimate the real impact.

1.7. There is also a need to assess whether such cases would come under the existing control system in Germany, Austria or the United Kingdom, or under control mechanisms currently in place in Member States for strategic or regulated sectors.

1.8. The CNMC feels that, at the current time, there is a need to review the impact analysis and suggest that the Commission behind it include all these factors in order to obtain a real number of cases which would be affected by the new control environment. To this end and given the costs involved in implementing the system a decision should be made regarding its introduction. This new regulation should only be adopted where strictly necessary and deemed proportionate to the objectives being pursued.

Existing control mechanisms

1.9. A number of EU countries, including Spain, have acquisition supervision mechanisms in place which deal with shareholdings in companies in strategic or regulated sectors. On an EC level there are other regulations that govern acquisitions of shareholdings in European companies, including rules applicable to foreign investments. There needs to be in-depth analysis of the compatibility of all these norms with the design of the minority shareholding control systems.

Conflict with Article 101 and equivalents

1.10. The CNMC feels that there may be a conflict between minority shareholding control and the application of Article 101 of the Treaty on the Functioning of the European Union (TFEU) and the equivalent article in Spanish competition law (for example Article 1 of the Defence of Competition Act [DCA] 15/2007 of 3 July).

1.11. Certain agreements including the acquisition minority shareholdings between companies which may be involved in mergers or joint ventures. Countries which do not have a system in place with which to supervise minority...

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2 See the ninth Additional Provision of the Creation of the National Authority for Markets and Competition Act 3/2013 of 4 June (the CNAMCA) regarding Public holdings in the energy sector.
shareholdings assess these agreements through the regulations that prohibit anti-competitive agreements.

1.12. Within such a context there may be a **coexistence of both analyses** which may cause **substantive and procedural problems**. Therefore, for example, in the event that during an investigation into a breach of Article 101 (or the equivalent in domestic legislation) there is a notification of minority shareholdings, doubts may exist regarding the prevalence of procedures, responsibilities, time frames, type of analysis etc.

1.13. We need to evaluate possible scenarios prior to the design and implementation of this supervision.

**Thresholds**

1.14. The CNMC is of the opinion that if the main reason to set a threshold between 5% and 20-25% is the **existence of additional rights that may affect competition**, this should be the criteria, including those that are below 5%.

1.15. The European Commission should clarify the motives for setting this 5% threshold, which in its current terms seems arbitrary to the extent that the reason to require notification below 20-25% is the existence of additional rights.

1.16. In theory, these rights may exist below this threshold, which begs the question whether or not they should be set as criteria for notification via an information note.

**Concepts**

1.17. Basic concepts should be cleared up in order to implement the minority shareholding control systems, such as the notion of “**competitor**” and “**significant links from a competition perspective**”. These concepts determine the obligation to present the information note and need to be clarified along with those that affect legal questions.

**Time periods and legal uncertainty**

1.18. The CNMC feels that the procedure proposed by the Commission in the White Paper will represent excessive expense for companies in terms of legal uncertainty, and therefore not in line with the effort made in recent years to provide a substantive assessment of the procedures in place to apply regulations established to defend competition, both on a domestic and European level.

1.19. In this context, the obligation to suspend execution of the acquisition of the minority shareholding for 15 days would seem reasonable. However, a **limitation period of 4-6 months** during which the Commission can request detailed analysis of the operation is unreasonable. **Companies cannot be**
subjected to such uncertainty for nearly half a year, waiting for the Commission to come to decision.

1.20. We feel that the cost, in terms of legal uncertainty, is excessive, however viewed. It should be borne in mind that the European Commission currently stipulates a much shorter period for assessing mergers.

1.21. The CNMC therefore feels that the limitation period should be reduced to just a few weeks, with the possibility of non-implementation over the same period examined.

Content of the information note

1.22. The content of the information note has not been looked at by the European Commission in any of the documents subject to consultation, making it difficult to assess the additional burden that the introduction of the proposed monitoring system with represent to companies, or the information that the competition authority should have in order to come to a decision regarding in-depth analysis of the operation.

No obligation to reach an express decision

1.23. Finally, in the CNMC’s opinion, the fact that the European Commission has no express obligation to announce a decision creates unnecessary legal uncertainty within organisations affected by the new notification framework. The reform should include the Commission’s express obligation to announce a decision (at least to announce non-opposition).

2. Merger referral mechanism:

General

The reform proposed in the white paper sets out modifications to the referral system, covered in Articles 4.5 and 22 of EC regulation 139/2004, as well as minor alterations to Articles 4.4 and 9.

Given the experience gathered over recent years in this area, the CNMC takes a very positive view of some of the proposed reforms, as they represent a clear improvement for the Authorities and companies alike.

We also feel that the reform proposed in Article 22 should be analysed in greater detail and could be substantially improved upon.

The CNMC would have liked to have seen comprehensive treatment of this area which includes improvement proposals to Article 9 of the Mergers Regulations, in the light of the problems that have been detected.

Specific aspects of the reform proposal.

Article 4.5

2.1. The CNMC agrees with the reform to Article 4.5.
Article 22

2.2. The CNMC shares the view that the European Commission should have the authority to assess the operation across all jurisdictions, although it has disagreements concerning the procedure.

2.3. The CNMC also shares the position that in order for the Commission to ensure effective control over such mergers it should similarly be able review them across all jurisdictions. We also agree with increasing the exchange of information between authorities in order to prevent any kind of strategy employed by companies in the period for the presentation of notifications that may influence those who are aware of the case or the result of the control procedure.

2.4. Nevertheless, the CNMC feels that if a Member State has reached a decision regarding the case prior to the merger referral request, this should not prevent the Commission from making its assessment with regard other Member States. A partial referral should be possible in the event of a previous merger approved in a Member State in such a way that the Commission may adopt a Decision that covers the rest of the markets involved in the merger.

2.5. The CNMC also expressed concern regarding the capacity and resources of National Competition Authorities (NCAs) to obtain and evaluate the information on other EU markets that may be affected by each operation in the short space of time covered by the White Paper, particularly in the case of authorities which do not have the legal capacity to demand this information and in those where there are a large number of merger notifications which affect more than one member state.

2.6. An exhaustive study should therefore be made of the impact of those requirements within a framework of normal procedure in the various jurisdictions prior to setting a specific procedure for referrals.

2.7. We are also concerned about the possibility of excessive interference in the procedure timeframes employed by national authorities and specifically the abuse in the use of this mechanism, where the mere possibility of a referral request, or an invitation to do so by the European Commission, leads to a suspension of the procedure time period across national jurisdictions.

2.8. As a result, the CNMC feels that this procedure should be reviewed in greater depth.

Article 9

2.9. CNMC believes that review of Article 9 should be prioritised in order to reduce the discretionary nature of Referral Decisions. It is also opposed to the proposal to extend the time period to announce the referral decision.

2.10. Pursuant to EC Regulation 139/2004, the Commission must be able to refer notified mergers on a European Community level to a Member State which
threaten to have a significant effect on competition in a market in said Member State which has all the characteristics of a defined market. When the merger affects such a market that does not represent a major part of the common market, the Commission should have to refer the matter, either wholly or partially, to the affected Member State on request.

2.11. However, we have noticed a trend in European Commission Decisions to reject requests for referral to Member States in certain sectors which, in the CNMC’s opinion, may contravene that set out in EC Regulation 139/2004, in particular Section 8 which states:

“The provisions to be adopted in this Regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State. Such concentrations should, as a general rule, be reviewed exclusively at Community level, in application of a ‘one-stop shop’ system and in compliance with the principle of subsidiarity.”

2.12. We have noticed that certain operations that are especially related to economic sectors that are subject to specific supervision have been analysed by the European Commission in spite of them carrying out their activities in the territory of a member state and there being specific national regulatory requirements in place.

2.13. In view of this, we feel that, within the framework of the ECMR review, and specifically, the reform of the referral system, it is appropriate to set specific criteria which create predictability in Commission Decisions with regard merger referrals to National Authorities, in response to the principle of their assessment by the authority in the best position, pursuant to the principles a ‘one-stop shop’ system and subsidiarity.

2.14. In the CNMC’s opinion, extending the time period for the final decision regarding the referral, it is inconsistent with the effort being made to reduce timeframes for other referrals. These days, a referral to national authorities may represent an additional burden on companies who have provided the Commission with all the information required for their decision, with a significant delay in the execution of the merger, a period of time that would increase in the event of referral.

2.15. Nevertheless, the CNMC feels that the Commission should decide on referrals before the corresponding decision to commence a second phase in order to improve legal safety and reduce as far as possible the extra burden on companies.

3. Other proposed reforms

In general, the CNMC has a positive view of the following reform proposals:

— The elimination of EC control and the creation of joint ventures that operate outside the EEA and which have no impact on their markets.
— The regulation of the exchange of confidential information between the Commission and NCAs.

— The modification of Article 4.1 of the Mergers Regulations, extending the good faith criterion.

— The review of the procedure to be applied in the case of successive mergers.

— The clarification of the analysis of transactions in the case of provisional purchasers (“parking transactions”).

— The establishment of effective sanctions penalising the use of confidential information obtained during merger procedures.

— The Commission’s capacity to revoke Decisions in cases of referrals where these are based on incorrect or misleading information.

Nonetheless, the CNMC feels that with regard the rest of the proposals the following provisos should be made:

3.1. The CNMC feels that modification of the time period provided for in the aforementioned Article 9 should form a part of a comprehensive reform of the referral system and be appropriately handled within the cooperation framework of the CSS, as with the reform of other articles (Article 4.5, Article 22 etc.)

3.2. The CNMC is of the view that the transparency system for non-overlapping operations is responsible for almost the same burdens on the parties concerned, creates greater uncertainty and in any event, may not be effective. In the CNMC’s experience, there are occasionally overlaps that the parties concerned have not taken into consideration. The proposed reforms will not see these overlaps duly detected. As an alternative, time periods should be reduced in order to resolve cases which present no problems.

3.3. The CNMC feels it is not necessary to modify Article 5.4 of the Mergers Regulations pursuant to the EC Communication. While in practice the Commission calculates the turnover of joint ventures as proposed here, there are alternatives to this calculation method. For this reason, its inclusion in the Regulations removes all flexibility and leads to a greater distancing between the various legislations.