Submission

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12 September 2013

To European Commission - Directorate-General for Competition

Re Response to the Consultation 'Towards more effective EU merger control' (HT. 3053)

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

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Executive Summary

The Public Affairs Executive welcomes the opportunity to respond to the Consultation. The industry believes that the Commission's existing toolkit is adequate to address the rare competition issues that may be raised by structural links and that there is no need to extend the Merger Regulation or to introduce a new Merger-Regulation-like system to review structural links. The Commission has had the power to investigate the agreements, decisions and concerted practices arising from such links under Regulation 1/2003 for many years. The Commission has apparently not regarded such links as an enforcement priority, and the Consultation acknowledges that the number of cases that may raise concerns is limited and the concerns raised in those rare cases are likely to be less pronounced than in a merger context.

While extending the Merger Regulation to structural links would not serve a clearly demonstrated competition policy need, such an action would have serious negative consequences for EVCA members and for the European economy generally, since it would impede venture capital investment, a significant driver of innovation and economic growth. VC-backed companies typically have very limited resources and are cash-flow negative. To survive, they need to raise financing in multiple rounds from syndicates including multiple investors, and they need to be able to do so often with only a few months between financing rounds. In addition, confidentiality is always essential to allow these companies to grow and become viable.

Our specific concerns vary depending on the model being proposed and are discussed in detail below. The "notification" and "transparency" systems discussed below could require dozens of notifications per investee company over a period of 2-3 years and lead to premature disclosure of innovative, pro-competitive activity. This would make many if not most VC transactions unviable and cut off VC financing to many innovative companies that depend on such financing to survive.

The "self assessment" system discussed below would potentially be less onerous, but we note that there is a self-assessment system in place today under Regulation 1/2003. The industry would like to invite the Commission to provide guidance on the types of structural links it considers to raise competition issues to help the VC sector - and European business more generally - assess the potential competition issues raised by minority non-controlling investments. The Commission might also consider introducing a voluntary notification system for such links under Regulation 1/2003, comparable to the system that was in place under Regulation 17/62, or otherwise enhance companies' ability to seek guidance from the Commission on competition issues raised by structural links.

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In light of future guidance on competition issues raised by structural links, an analysis of the extent to which there is a gap in the Commission's powers under Regulation 1/2003 and experience with any new voluntary notification or consultation system that may be put in place, the Commission will be better placed to consider whether any extensions to the Commission's toolkit would be appropriate.

Introduction

We write on behalf of the representative national and supranational European private equity and venture capital ("PE/VC") bodies. Our members cover the whole investment spectrum, including the institutional investors investing in a broad range of PE/VC funds, as well as the PE/VC firms raising such funds, which in turn invest in the full life-cycle of unlisted companies, from high-growth technology start-ups, to the largest global buyout funds turning around and growing mature companies, and thus we speak on behalf of the entire European PE/VC industry, investors as well as managers.

The Public Affairs Executive (PAE) of the European Private Equity and Venture Capital industry welcomes the opportunity to respond to the European Commission consultation 'Towards more effective EU merger control' (the "Consultation"). For many years, the EVCA has been an engaged interlocutor with the European Commission and other European institutions, following closely the different discussions and initiatives affecting the European private equity ("PE") and venture capital ("VC") industry.

In this response, we have focused solely on those aspects of the consultation which are of particular importance to the PE/VC industry. As such, we have provided answers to the questions dealing with the extension of merger control to the acquisition of non-controlling minority shareholdings, but not to those dealing with the referral of merger cases between the Commission and the Member States.

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

Venture capital and its contribution to the European economy

Before addressing the questions in the Consultation in detail, we believe it will be useful to provide some background information on the role of PE, and in particular VC, in the European economy.

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- VC funds typically acquire minority, non-controlling interests in young, unlisted, entrepreneur-led, companies, many of which are technology focused.

- VC funds provide valuable know-how to help these SMEs develop. In particular, VC funds bring strategic and operative advice and specialist sector knowledge. The corporate governance and value creation model that VC investors apply to the ownership and long-term development of unlisted companies has earned VC a position as a well-established investment strategy. It is valued by the businesses and employees in whom it invests for the contribution it can make to their long-term prosperity, helping to deliver innovation, growth, renewed dynamism and sustainability.

- Many of the companies in which VC funds invest have difficulties accessing finance markets. Although they are considered to have high potential, these companies often have limited track records and collateral, as well as negative cash flow.

- As a result of these constraints, VC investments are typically small and time sensitive. VC-backed companies typically seek to raise funds in a series of financing "rounds" to meet immediate financing needs. A new financing round may be launched a few months before the investee company runs out of money. A small group of investors, typically fewer than ten, participates in each round. These investors must complete their due diligence and negotiations very quickly, in two or three months or less. The average VC investment is about EUR 1.1m. A VC-backed company may conduct four or five such rounds over a period of several years.

- As highlighted by the Commission in previous consultations, the tightening of credit conditions during the crisis has made access to finance difficult, especially for SMEs. Some corrective measures have been adopted,[1] but access to finance continues to be difficult. This is a critical issue for the European economy, since among high-growth firms, as measured by employment expansion rates, small firms exhibit higher net job creation rates than larger ones (85% of all new jobs in the EU between 2002 and 2010 were created by SMEs).

- VC channels equity into such innovative companies from institutional investors such as pension funds and insurance companies as well as family offices, corporate investors and high net worth individuals; it contributes to the financing of SMEs and to their growth and addresses a significant need of SMEs. For these reasons, VC plays a positive role in supporting the real economy in

[1] COM(2011) 642 final, COMMUNICATION FROM THE COMMISSION, Industrial Policy: Reinforcing competitiveness. See also COM(2011) 702 final, COMMUNICATION FROM THE COMMISSION, Small Business, Big World — a new partnership to help SMEs seize global opportunities.

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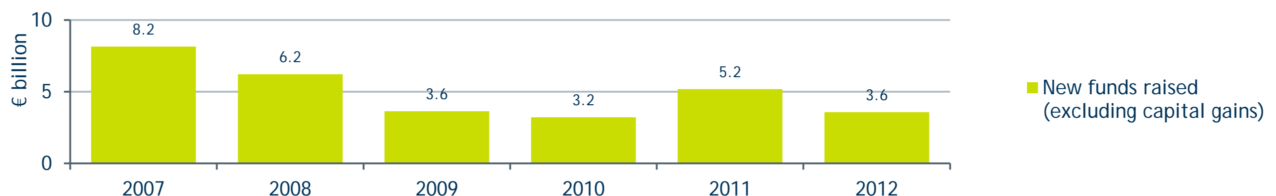
Europe and should be nurtured and grown, particularly in an economic environment characterised by low macro-economic growth.

- However, the European VC market remains underdeveloped, in particular when compared with the US VC market. The economic crisis has clearly taken its toll on the VC market in Europe. VC fundraising has decreased and investments have been postponed. Many VC funds in Europe are also too small on their own to support the later stage funding rounds required to help innovative companies reach their true potential.

- In the wake of the financial crisis, and due to the factors listed above, fundraising in the European VC industry has been significantly more difficult. In spite of some improvements and signs of recovery, it has not fully recovered its 2007 levels, as seen in Figure 1 below.

Figure 1: New venture funds raised over the past 6 years (2007-2012)



Source: EVCA / PEREP_Analytics

Incremental amounts raised by VC funds during the year reached over EUR 8 billion in 2007, over EUR 6 billion in 2008, over EUR 3 billion in both 2009 and 2010, over EUR 5 billion in 2011 and EUR 3.6 billion in 2012.

- In terms of actual investments, VC funds invested €3.2 billion in 2012. The number of venture-backed companies in 2012 was about 2,900. Start-up-stage investments accounted for the majority of VC activity by amount invested and by number of companies (respectively 56% and 60%).

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Figure 2: 2012 investment data for Venture Capital

2012	Venture Capital*
Investments - Amount (Market statistics[2])	€3.2bn
Investments - Number of companies (Market statistics)	2,923
Number of firms involved (Market statistics)	556
Number of funds involved (Market statistics)	952

* Relates to the investment stage of the portfolio company

Source: EVCA / PEREP_Analytics

Life sciences, computer & consumer electronics, communications and energy & environment accounted for over 75% of all VC investments.

[2] **Market statistics** are an aggregation of figures according to the location of the portfolio company. At European level, this relates to investments in European companies regardless of the location of the private equity firm.

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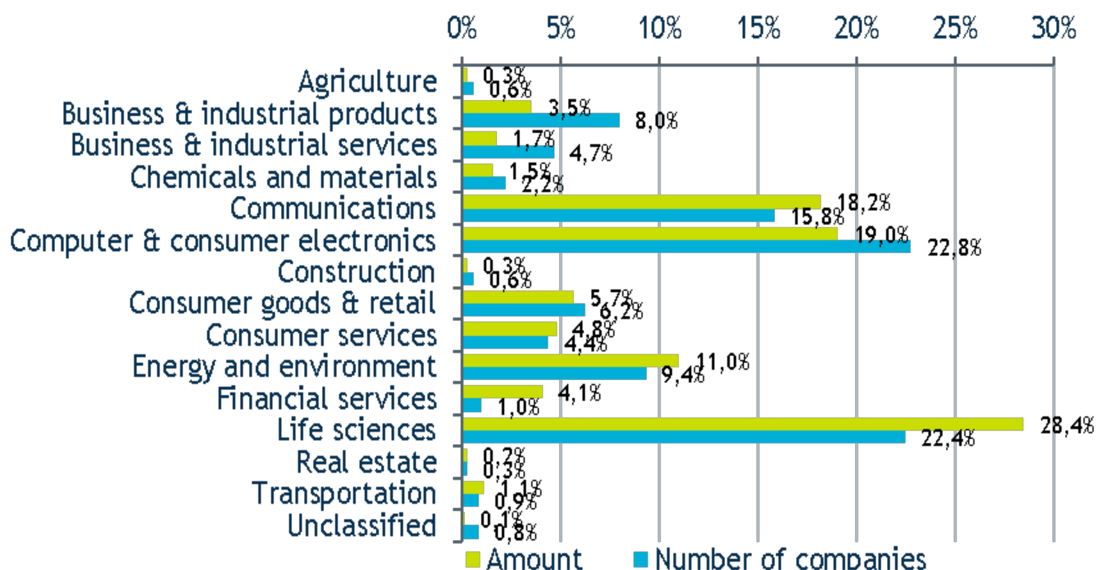
Figure 3: VC - % of Total Amount / Number of Companies Invested in Particular Sectors (2012)



Source: EVCA / PEREP_Analytics

- For new business creation to be converted into a population of robust and competitive European companies, SMEs need access to finance throughout their development. This finance is provided by various types of small funds through the different stages of the SME's development (from seed, start-up, expansion to restructuring phases). Indeed, of the 26,000 companies in Europe backed by private equity and VC,[3] around 24,000 are SMEs.

- VC investments do not raise competition concerns, taking into account the small size of the investee companies and the small amounts involved in most transactions. Thus, there is no credible competition policy rationale for imposing new antitrust review procedures on VC transactions.

- Moreover, any new review procedures would increase costs and introduce delays that would significantly discourage VC investment. This would place EU companies at a disadvantage to non-EU companies; over time, it may even disincentivise investors from choosing EU companies. Costs that may appear modest to the Commission in absolute terms would be very significant for small companies with limited resources and negative cash flow, especially if

[3] Whenever reference is made to the European private equity, venture and enterprise capital industry this reference should be interpreted as comprising all fund managers that are members of the EVCA either directly or indirectly through a national private equity and VC association which is member of the EVCA.

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they are multiplied by four to five separate rounds of financing and again by five to ten investors participating in each round. Potentially even more damaging, any delay would be fatal for many companies seeking to raise new capital a few months before their resources are exhausted. Given the critical role of innovative start-ups to the European economy and the importance of VC financing in the early growth stages of these companies, any measure that could stifle VC investment in today's difficult economic conditions should be avoided.

Consultation response

Merger control for the acquisition of non-controlling minority shareholdings ("structural links")

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

The PAE respectfully submits that the Commission's existing toolkit is adequate to deal with competition issues raised by structural links. The Commission already has the power to investigate most if not all structural links under Regulation 1/2003. The European Courts have confirmed the Commission's power to apply Articles 101 (*Philip Morris*[4]) and 102 (*Philip Morris* and *Gillette*[5]) to anti-competitive structural links. To date, however, the Commission has not seen fit to use its powers under Regulation 1/2003 to address structural links. The Commission has also provided no guidance on the situations in which it considers that structural links may give rise to competition issues under Articles 101 and 102, as it has done in many other areas.

We acknowledge the possibility that the Commission's powers under Regulation 1/2003 may not give it jurisdiction over the mere acquisition of a minority stake, but Regulation 1/2003 would apply to any agreements, such as shareholders' agreements, giving the acquirer power to influence the competitive behaviour of the target and to any restrictive agreements, decisions or concerted practices arising out of the acquisition. The absence of any such agreements, decisions or practices would presumably indicate that the mere acquisition of a minority interest did not give rise to competition issues. We

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[4] Cases 142/85 and 156/84, *British American Tobacco Company Limited and R.J. Reynolds Industries Inc. v European Commission* ("Philip Morris") 1987 ECR 4487

[5] Case IV.33.440 – *Warner-Lambert/Gillette*, Commission decision of November 10, 1992 (1193 OJ L 116/21)

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note here that the concept of "agreement" under Article 101 has been interpreted broadly by the European Court of Justice.[6]

The Consultation does not discuss the Commission's powers under Regulation 1/2003 or attempt to analyse how the examples of potential concerns arising from structural links discussed in the Consultation might be addressed under Regulation 1/2003. Rather, the Consultation claims that minority shareholdings that do not confer control within the meaning of the Merger Regulation but that may allegedly generate anti-competitive effects are not currently notifiable under such Regulation (Annex I, paragraph 3 and 19). Without discussing other available legal tools, in particular Regulation 1/2003, it concludes that there is a gap in the Commission's existing toolkit. But even under this narrow approach, we believe that the Commission's conclusion is not warranted. The Consultation argues that structural links may confer "material influence," a rather elusive term that the Consultation claims falls short of "decisive influence", which confers control under the Merger Regulation. However, it is difficult to distinguish the "material influence" that raises the Commission's concerns from the concept of "decisive influence" under the Merger Regulation.

Thus, the PAE is of the view that there is no meaningful gap in the Commission's powers. However, on the assumption that there is a gap, we feel that the Commission has not established that this gap gives rise to significant concerns. Indeed, the Commission states that anti-competitive effects from structural links are likely to be less pronounced than those in cases involving the acquisition of control (page 4) and that the number of structural links that raise competition issues is "rather limited" (page 6). In any event, it is relatively easy to remove structural links at a later stage and to address any potential anti-competitive effects arising from them (page 10).

It is useful to recall that slightly over 10 years ago the Commission proposed the elimination of the voluntary notification system provided for in Regulation 17/62, noting that it was "too bureaucratic, cumbersome and ineffective".[7] The Commission felt that administering such a voluntary notification system was an inefficient use of Commission resources and that its elimination would:

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[6] Case T-41/96, *Bayer AG v Commission* [2000] ECR II-3383

[7] Report on the proposal for a Council regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87

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> [A]llow the Commission to become more active in the pursuit of serious competition infringements and to increase enforcement of the competition rules by the national authorities and courts.[8]

While the need for a new toolkit for the Commission to review "structural links" has not been demonstrated, the risk of extending the Merger Regulation to the acquisition of minority non-controlling shareholdings by VC funds is clear. Even a small cost in absolute terms could have a significant discouraging effect in view of the very limited resources of the investee companies, the small size of VC investments, and the number of financing rounds and investors involved. Perhaps even more seriously, any administrative procedure that would delay the infusion of capital to VC-backed companies could be fatal, since these companies launch financing rounds only a few months before they run out of cash, and once this happens, the company would fail. As such, this proposal seems incompatible with the Commission's own efforts to establish an innovative culture in Europe.

In summary, we feel that the Commission should provide further guidance on the situations in which it believes structural links raise competition issues and consider how it can apply its *existing* powers under Regulation 1/2003 to such situations rather than introduce a potentially burdensome new assessment system that would add significant costs without any demonstrated competition policy benefit.

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

As discussed in response to question 1, the PAE does not believe that the Commission's toolkit needs to be augmented by extending the Merger Regulation to structural links. If the Commission nonetheless concludes that a new mechanism is needed, we agree that the significant-impediment-to-effective-competition test would be appropriate to assess any anti-competitive effects arising out of the structural link itself. To avoid the application of overlapping tests and legal uncertainty, however, it would be important to address the possible residual application of Articles 101 and 102. Specifically, it should be made clear that the Commission and national authorities would be precluded from applying Articles 101 and 102 to competition issues arising out of the acquisition of a structural link, as opposed to competition issues arising from conduct separate from the acquisition.

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[8] 1999 White Paper on modernisation of the rules implementing Articles 81 and 82 [Official Journal C 132 of 12.5.1999].

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

a) the need for the Commission, Member States and third parties to be informed about potentially anti-competitive transactions,
b) the administrative burden on the parties to a transaction,
c) the potential harm to competition resulting from structural links, both in terms of the number of potentially problematic cases and the impact of each potentially harmful transaction on competition;
d) the relative ease to remove a structural link as opposed to the difficulties to separate two businesses after the implementation of full merger;
e) the likelihood that anti-competitive effects resulting from an already implemented structural link can be eliminated at a later stage.

As discussed above, the PAE does not believe that any of the proposed systems is necessary or appropriate to deal with the rare situations in which competition issues may arise from the acquisition of structural links. However, in our comments below, we have assessed the relative merits of each of the proposed systems from the perspective of PE and VC funds.

Of the three options, the worst would be a mandatory notification system. Although the Consultation does not indicate what information would be required in such a mandatory notification, if Form CO and even the Short Form under the Merger Regulation are any indication, a mandatory notification system would be completely unworkable for VC investments. If each VC investor were required to file a notification each time it participates in a new financing round, dozens of notifications could be required for each VC-backed company over a period of a few years. Such an additional burden would prove very detrimental. The number of notifications and the aggregate cost would be enormous even for much larger companies. Processing all of these notifications would also consume significant Commission resources. Many companies financed by VC investments would see their activity negatively impacted or go bankrupt while waiting for Commission approval.

As an alternative to the "notification system",[9] the Commission proposes a selective system, which could take the form either of a "self-assessment system" or a "transparency system."

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[9] We note that the term "notification system" is something of a misnomer, since the Commission's proposals for a selective system may also involve notifications, either mandatory (under the "transparency system") or voluntary.

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A self-assessment system would require parties entering into a transaction that gives rise to a structural link to assess whether the transaction would be likely to raise competition issues. The Commission would have the option whether and when to open an investigation if the structural link were perceived to raise competition issues. This is essentially the system under Regulation 1/2003 today. As noted, the Commission has not provided detailed guidance on the characteristics of structural links perceived to raise competition issues. It is therefore difficult for parties to predict the Commission's views on these issues, but the Commission has not seemed to regard such issues as an enforcement priority. We note that there is no need for the Commission to introduce a whole new system for it to issue guidance on its assessment of competition issues raised by structural links under Articles 101 and 102.

A transparency system would involve imposing an obligation on parties acquiring a structural link to file a short information notice to the Commission, which would then be subject to publicity. This approach would inform other potentially interested parties of the transaction. The transparency system would have serious drawbacks from the perspective of the VC industry, including imposing unsustainable costs on VC-backed companies, delaying the provision of urgently needed financing to these companies and providing unwanted publicity.

The costs imposed by the transparency system are difficult to estimate without more clarity about the nature of the notification that would be required. The Consultation refers to a Short Form notification under the EU Merger Regulation as an example of a notification requiring only limited information (page 10), but even the preparation of Short Form notifications is an expensive and time-consuming process. If the Commission were to adopt a transparency system in respect of structural link transactions, the type of information contained in a case allocation request under the Merger Regulation would be more appropriate. However, an information notice of any type would result in unnecessary costs that would be very significant in the context of multiple financing rounds with multiple investors for young companies with limited resources and negative cash flow.

In addition to imposing potentially unsustainable costs, a transparency system would also delay the provision of financing to investee companies, potentially causing their bankruptcy. Even without a standstill obligation, a transparency system would presumably involve a review period during which the Commission could decide whether to request additional information or open an investigation. (These timing issues are discussed below in the responses to questions 8 and 9.) VC investors would not be willing to advance funds to investee companies during such period because the companies in which they invest are cash-flow negative, and if the Commission were to raise competition concerns VC investors would not be able to get their money back. Although the risk of competition concerns arising in the context of a VC investment is *de minimis*, the need for legal

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certainty would lead many if not all investors to delay their investment until the expiration of any such period, with potential fatal consequences for the companies facing such a delay.

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

In summary, the Commission criticized the voluntary notification system under Regulation 17/62 as "bureaucratic, cumbersome and ineffective". The notification and transparency systems proposed by the Commission would be even more so. The self-assessment system is effectively already in place under Regulation 1/2003. The industry encourages the Commission to provide guidance on the characteristics of structural link transactions that it considers may give rise to competition issues to assist parties in the self-assessment process. Based on its experience applying such guidance and feedback from the business community, the Commission would then have a better basis to assess whether any new procedures would be appropriate to assess structural links.

4. In order to specify the information to be provided under the transparency system:

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

As discussed above in response to question 3, the PAE respectfully submits that a transparency system would be unduly onerous in light of the limited competition risks involved in structural link transactions. Nonetheless, if the Commission decides to proceed with a transparency system, the industry submits that the information required should be modelled on a case allocation request under the Merger Regulation. This would include information describing the parties, their turnover, the transaction and information on the economic sectors or markets concerned. This would be sufficient for the Commission and potentially interested parties in the relevant sector to determine whether a transaction gives rise to potential issues that make further investigation appropriate. As noted, however, even such a short notice would be unacceptable to investee companies who need to maintain their confidentiality while developing their products. In any event, the Short Form notification under the Merger Regulation

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would not be an appropriate basis for an information notice under the transparency system, since the preparation of Short Forms is a burdensome, expensive process.

b) *What type of information which could be used by the Commission for the purpose of the transparency system is readily available in undertakings, e.g. because of filing requirements under securities laws in case of publicly listed companies? What type of information could be easily gathered?*

The PAE respectfully submits that this question is not meaningful. Completing any form of mandatory information notice will constitute an additional burden for companies even if the information required is "easily gathered", and this burden will serve no useful policy purpose in the vast majority of cases. As noted, to the extent an information notice is required under a future transparency system, the case allocation request form under the Merger Regulation could be a more appropriate model, although even such a notice would be problematic in the context of the VC sector.

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

The costs of notification will vary from case to case and it is impossible to determine costs without knowing what the form itself would involve. We note, however, that the costs of Form CO and Short Form notifications are significant. Moreover, with the Commission's current proposals, costs would be multiplied at each funding round, and for each new investor, potentially rendering otherwise attractive investments unviable. Costs of such magnitude would be prohibitive for many VC investments.

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

To answer this question, we believe that it is necessary to understand which entities would be considered "undertakings concerned" for purposes of applying the Merger Regulation turnover thresholds to structural link transactions.

Currently, under the Merger Regulation, the undertakings concerned include the target company and all undertakings concerned acquiring "control" for purposes

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of the Merger Regulation. If the "undertakings concerned" for purposes of applying a new notification or transparency system were to include all undertakings having a defined shareholding percentage (say 25% or more), the turnover thresholds of the Merger Regulation could be met in a very large number of cases.

But if the turnover thresholds were applied only to entities acquiring a new structural link and to the investee company, the Merger Regulation turnover thresholds would seem to be an appropriate and clear instrument to delineate the competence of the Commission to apply any new system for assessing structural links.

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

As discussed, the industry submits that introduction of a new system to assess structural links would be unnecessary and burdensome, and has the potential to stifle an important source of financing for European SMEs. How burdensome such a system would be in practice would depend on the model adopted (notification, self-assessment or transparency) and the information to be provided in any mandatory notification (under the notification or transparency systems), as well as on the definition of structural links subject to the system and to the definition of safe harbours excluding certain categories of structural links from the application of the system.

The Commission refers on page 3 to structural links as *"non-controlling minority shareholdings".* This definition comprises two elements: "non-controlling" and "minority". The Consultation does not discuss the meaning of "non-controlling". We submit that "non-controlling" shareholdings could be defined as minority shareholdings that do not confer control for purposes of the Merger Regulation, as described in the Commission's Consolidated Jurisdictional Notice. To delineate the concept of "non-controlling minority shareholding", vague phrases such as "competitively significant influence" or "material influence" should be avoided as they would introduce confusion when set alongside the concept of "decisive influence" under the Merger Regulation. In any event, as noted above, it is not clear how the "material influence" that raises the Consultation's concerns differs from the "decisive influence" concept in practical terms.

The Commission's proposed definition of structural links is extremely broad. The industry encourages the Commission to develop clear and practical "safe harbours" for structural links that the Commission considers will not normally give rise to competition concerns. We submit that these safe harbours can be developed as part of Commission guidance under Articles 101 and 102, without introducing a new assessment system. If a new assessment system is introduced,

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however, definition of such safe harbours will be particularly important to reduce the burden of such a system on PE and VC funds.

The Consultation suggests that safe harbours can be based on a given level of shareholding or on the absence of special shareholder rights (page 8). The PAE submits that defining a safe harbour based on arbitrary shareholding levels alone or on particular shareholder rights alone would be inappropriate. Even assuming that a shareholder with a relatively high minority interest might have an incentive to influence the investee company's competitive behaviour, without relevant shareholder rights it will have no ability to do so. Conversely, if a shareholder does have certain shareholder rights but only a small participation, it will have no meaningful incentive to restrict competition by or against the investee company. Thus, we propose that any safe harbours be based on a combination of these elements. For example, any shareholding that is (i) less than 25% or (ii) does not confer special shareholder rights should benefit from a safe harbour and would not be subject to any mandatory notification or information requirements that might otherwise apply.

In order to define safe harbours based on the absence of special shareholder rights, it will be necessary to define what rights will give rise to concerns in the context of a structural link without giving rise to control for Merger Regulation purposes; *i.e.,* rights normally accorded to minority shareholders to protect their financial interests. The Consultation does not indicate which rights intended to protect the financial interests of minority shareholders are considered to give rise to competition concerns. The PAE submits that this would be a topic on which Commission guidance would be useful.

Depending on the Commission's analysis of competitive risks raised by structural links, the safe harbours defined by the Commission could have other elements. For example, one element of a safe harbour where a structural link involves competitors could be implementation of a firewall meeting minimum criteria to prevent the exchange of competitively sensitive information (e.g., that the same individual will not serve as a director of two companies that compete directly with one another).

In any event, the industry believes that any guidance or new assessment system introduced by the Commission should provide a safe harbour for investments in small companies, which are by definition highly unlikely to affect competition to a significant extent. As noted, moreover, many VC-backed companies have negative or barely positive cash flow, and providing a safe harbour for investments in such companies would significantly mitigate the negative effect on new investment that any new assessment system would create. The safe harbour could exclude all SMEs, as defined in other EU law, or any company with EU turnover of less than € 100 million.

Submission

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

In a self-assessment system, it would be helpful for companies to have the option of making a voluntary notification, but for this option to be used effectively it will be necessary for the Commission first to publish guidance on the structural links that it considers may give rise to competition issues.

Whether a voluntary notification option would be useful in a transparency system depends on the contents of the required information notice. If the information notice requires only limited information (comparable to the information in a case allocation request), parties could benefit from the possibility of providing more detailed information to the Commission to help the Commission complete its assessment more quickly. Again, for such a system to be beneficial, companies and their counsel will need guidance from the Commission on the structural links considered most likely to raise competition issues.

To achieve the objective of providing legal certainty to companies, any form of notification should be coupled with a time limit for the Commission to indicate whether it intends to investigate the relevant structural link transaction. The relevant time limits could be based on the Merger Regulation.

Also, to reduce the burdens on companies completing such notifications, it will be important that any notification form developed by the Commission be limited to the information required for the Commission's assessment and that any related procedures, in particular the pre-notification review of draft notifications, be focused and limited in time. As the Commission is aware, concerns have been raised about the length of pre-notification review of notifications under the Merger Regulation and case teams' requirements to provide information not called for by Form CO or the Short Form.

In any of the assessment systems discussed in the Consultation (notification, self-assessment or transparency), submission of a notification should not involve any stand-still obligations. In the case of the self-assessment system, imposing an automatic standstill would be inconsistent with the voluntary nature of the notification and would be a significant deterrent to parties making such notifications. The Commission could however have the power to impose a standstill obligation where it determines that acquisition of a structural link would be likely to lead to a significant impediment to competition that could not

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be addressed by an order to unwind the transaction at the conclusion of the Commission's investigation.

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

As noted in response to questions 3 and 8, we submit that any notification of a structural link should trigger time limits for the Commission's review. The Commission's experience in applying the Merger Regulation demonstrates that the Commission is capable of meeting stringent deadlines, and that such deadlines are an important source of legal certainty for companies, which is particularly important for VC fund managers. The time periods applicable under the Merger Regulation could be appropriate for this purpose.

As discussed in the response to question 3, however, in practice VC investors would not be willing to advance any funds to investee companies until the expiration of any relevant period. Any such delay would be fatal for many VC-backed companies, who typically launch new financing rounds only a few months before they run out of cash. From this perspective, a self-assessment system would be preferable to a transparency system. In a self-assessment system, the parties would presumably only notify the Commission in the extremely rare case that a proposed investment is thought to raise competition issues. The transparency system would result in a delay for all transactions subject to the information requirement, which would disadvantage many companies for no policy reason and potentially even lead to their bankruptcy.

The PAE notes that in light of the fact that the vast majority of structural link transactions will not raise competition issues, under either the self-assessment or transparency systems the Commission may not feel the need to adopt a formal decision in all cases but could simply let the relevant time period expire, as provided in Art. 10(6) of the Merger Regulation.

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About the PAE

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

About EVCA

The EVCA is the voice of European private equity.

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

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

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

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

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

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