European Commission White Paper
‘Towards more effective EU Merger Control’

This briefing note summarises the EVCA’s key concerns with respect to the European Commission White Paper on Council Regulation 139/2004, ‘Towards more effective EU Merger Control’.

These concerns are described in greater detail in the official industry response to the White Paper, which is available [here](#).

1. Introduction

While the EVCA generally welcomes certain proposals in the White Paper, which would considerably improve the efficiency of the EU merger control system, and indeed encourages the Commission to explore other ways in which the Merger Regulation could be improved, the industry believes that:

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

The EVCA is concerned that the Commission significantly underestimates the additional preliminary legal analysis that would be necessary and the number of information notices and/or notifications that would be required under its proposed “targeted transparency system,” as well as the burden and legal uncertainty that such a system would create for transactions which are almost invariably benign and would not restrict competition.

The proposed new review procedures would increase costs and introduce delays that would significantly discourage investment. They would also create significant legal uncertainty for investors and create further delays, which could be fatal in the case of small companies seeking to raise new capital a few months before their resources are exhausted.

This would impact not only on the private equity and venture capital (PE/VC) firms themselves, but even more importantly on investee companies in urgent need of financing. As such, this proposal seems incompatible with the Commission’s own efforts to establish an innovative culture in Europe. The proposals would be in breach of the principle of proportionality.

A “self assessment & voluntary notification” system, as discussed previously by the Commission, with the Commission publishing a notice providing guidance on how to assess minority shareholdings, would be far more proportionate and less burdensome, while leaving to the Commission the possibility to examine cases it considers problematic.
2. Key Concerns

The proposals in the White Paper would create a serious burden for PE/VC firms and negatively impact (pro-competitive) investments in EEA companies, including the SMEs and start-ups that are major drivers of growth and innovation in Europe.

They would impose a new requirement to conduct a merger control analysis for a large number of minority non-controlling investments; this analysis would be complex and expensive, because the proposed jurisdictional tests are vague, subjective and overly broad.

The analysis would also require extensive information on the companies in which PE/VC firms make minority investments and on the other shareholders of those companies, even though such information is not publicly available and PE/VC firms typically have no legal or contractual right to obtain it. For transactions triggering a notification requirement, as many would, these proposals would also impose significant legal costs to complete the relevant information notices and/or notifications and, importantly, risk delaying the injection of funds into EEA and other investee companies.

The proposals in the White Paper would disproportionately affect VC investors, which typically acquire minority, non-controlling interests in young, unlisted, entrepreneur-led companies, many of which are technology focused. This is because:

- In order to bring both strategic and operative advice and specialist sector knowledge, VC funds tend to invest in SMEs that are (or will be) active in a sector in which the fund has a wide depth of knowledge, such as technology;

- Similarly, corporate VC investors often invest in SMEs that have operations in sectors that are the same as or related to the sectors in which they are active;

- Accordingly, many VC investments are likely to satisfy the Commission’s (vague) tests for “competitively significant links” even though they raise no substantive competition issue; and

- The publicity associated with the White Paper proposals would be highly detrimental to small start-up companies conducting confidential research and development activities. Indeed, in the case of VC investments, the information notice requirement would lead to the disclosure of sensitive information about the status of the financing rounds of typically small and innovative companies.

Against this background, without amendment, we believe that the proposals in the White Paper will:

- have a chilling effect on investment in EEA companies, many of which are SMEs, to the detriment of innovation and competitiveness; and

- disproportionately increase the regulatory burden on VCs to the detriment of the EEA’s economy.
3. Key Proposals

If the Commission nonetheless proceeds with further regulation and if an information notice system is to be introduced, it will be critical to limit the burden of the system. Certain key changes are fundamental to the PE/VC industry and should be implemented into any new regime.

- The vague and subjective tests for “competitively significant links” should be replaced by clear, objective criteria. If these concepts are retained, it would be important to clarify:
  - the concept of the same or related sectors. For example, if a fund classified at a high level as a technology fund invests in a company classified as a technology company, is this a “competitively significant link” regardless of whether or not the target company’s business is in fact competing, or has any direct relationship, with the fund’s existing business?
  - which entities would be considered “undertakings concerned” for the purposes of applying the Merger Regulation turnover thresholds. It would be more appropriate for the undertakings concerned in such a case to be limited to entities acquiring a new structural link and to the investee company, in effect treating each investment as a separate transaction. Particularly in cases where there are multiple co-investors acting independently from one another, each non-controlling minority investment should be considered as a separate transaction. There is neither a need nor a justification to combine the economic resources of non-controlling minority co-investors for purposes of calculating turnover.
  - that the analysis - and the information required in any notice - would be limited to the activities of the acquirer’s controlled group and that of the investee company. As such, the rule as set out at footnote 67 of the Staff Working Paper that accompanies the White Paper should not be incorporated into any new merger review system. Moreover, a preliminary notice should not include any market data, in view of the significant burden involved in identifying antitrust markets and collecting market data.

- Objective and clear-cut thresholds and safe harbours should be introduced to eliminate the need for information notices below a reasonable cut-off threshold and to exclude transactions above that threshold where there is no reasonably likely effect on competition.
  - Minority investments should be caught on the basis of vertical links only where those links exceed certain thresholds, such as absolute value thresholds or shares of investors’ total purchases or sales. In other words, a vertical link would be disregarded if the product/service supplied between the investor and investee were below a reasonable threshold; for example, below 5% of the investor’s total purchases or sales. In addition, a vertical link for these purposes should exist only where the parties’ purchases and sales relate to inputs that are important to the goods or services produced by the investee company.
In relation to the concept of “significance”, the proposed system should apply only to the acquisition of minority shareholdings above 25% (i.e., the Merger Regulation should not cover non-controlling investments between 5% and 25% at all). The lower the threshold, the more likely it is that the proposals will capture harmless transactions and increase the administrative burden put on investors and SMEs. The proposed tests for 5-20% investments would capture virtually all VC investments, since it is standard practice for major investors to have the right to nominate a board director or non-voting board observer as part of its strategy for safeguarding its investment. In any case, the alleged theory of harm based on an exchange of information between competitors is a traditional Article 101 issue and is already addressed by putting in place appropriate firewalls.

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

- There should be an exemption for any minority shareholding in a company with EU wide turnover of less than EUR 100 million, regardless of the turnover of the different investors that may be involved in the transaction. Currently, the Commission proposal takes no account of the size of the target company, although all the examples cited by the White Paper relate to minority shareholdings in companies of a significant size.

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

- No waiting period would be necessary or appropriate, and the 15-day waiting period should be removed. Otherwise, the proposals would create significant legal uncertainty for our members, in particular VC funds and corporate VC investors, and delay often urgently needed financing for potential investees, potentially causing their bankruptcy. Also, the proposal that the Commission should be able to re-open a transaction for a period of 4-6 months after completion should be abolished. Such an ex post control, if applied to non-controlling minority shareholdings, would be all the more disproportionate since it would be more stringent than the regime applicable today under EU merger control.