The views stated in this submission are presented on behalf of the Section of Antitrust Law and Section of International Law ("Sections") of the American Bar Association ("ABA") only. These comments have not been approved by the ABA House of Delegates or the ABA Board of Governors and therefore do not state the views or policy of the American Bar Association.

The Sections welcome the opportunity to participate in the public consultation by the European Commission ("Commission") regarding its proposals to revise certain aspects of merger control in the European Union. The Sections appreciate the significant work and thought reflected in the Commission’s White Paper “Towards More Effective EU Merger Control” ("White Paper") and the accompanying staff working document ("Staff Working Document") and impact assessment ("Impact Assessment").

The following comments ("Comments") reflect the experience and expertise of the Sections’ members with competition law in the United States and other jurisdictions, including the European Union. The Sections are available to provide additional comments or to participate in any further consultations with the Commission as appropriate.

Section I of the Comments (pages 2 to 11) provides the Sections’ comments on the Commission’s proposals regarding review of acquisitions of non-controlling minority shareholdings. Section II (page 11 to 12) provides the Sections’ comments on the Commission’s proposals regarding case referrals. Section III (pages 12 to 14) provides the Sections’ comments on the Commission’s remaining proposals.

The Sections refer to the Joint Comments of the American Bar Association’s Section of Antitrust Law and Section of International Law on the European Commission’s Public Consultation on Possible Improvements of the EU Merger Regulation (Sept. 20, 2013) ("September 2013 ABA Sections’ Comments"). These earlier comments continue to reflect the view of the Sections; the following Comments provide additional detail and commentary on issues raised by the White Paper and related materials.
I. PROPOSALS REGARDING ACQUISITIONS OF NON-CONTROLLING MINORITY SHAREHOLDINGS

A. General Comments

The Commission’s White Paper proposes the following changes to the EU merger control law regarding the acquisition of non-controlling minority shareholdings:

(a) expansion of the Commission’s jurisdiction under Regulation 139/2004 on the control of concentrations between undertakings (the “Merger Regulation”) to enable the Commission to determine whether such acquisitions will significantly impede effective competition (i.e., a jurisdictional change); and

(b) introduction of a new notification system, described as a “targeted transparency system,” that would require notification of acquisitions of certain non-controlling minority shareholdings (i.e., a procedural change).

With respect to the proposed jurisdictional change, the Sections recognize that the limitation of Commission jurisdiction under the Merger Regulation to acquisitions of “control” as defined in Article 3(2) of the Merger Regulation could under certain circumstances preclude Commission review of transactions that are capable of giving rise to significant competitive harm but are not subject to Commission review under Regulation 1/2003 (“Regulation 1/2003”) on the implementation of the rules on competition laid down in the Treaty on the Functioning of the European Union (“TFEU”).

The Sections have significant reservations regarding the proposed procedural change. We continue to believe that a notification system such as the “targeted transparency system” proposed in the White Paper raises significant practical challenges and uncertainties that will make it difficult for parties to ensure compliance. In the Sections’ view, the costs and burdens of such a system — including the costs and burdens resulting from the vagueness and ambiguity of certain elements of the proposal — likely will outweigh the proposal’s benefits. As a result, and for the reasons described in more detail below, the Sections respectfully propose that, at least at this stage, the Commission instead adopt a “self-assessment” approach, in which the Commission — working as appropriate in partnership with national competition authorities (“NCAs”) — would remain free to investigate and challenge transactions involving non-controlling shareholdings that could give rise to competitive concerns. In the Sections’ view, this should be paired with a voluntary notification system that would enable companies to proceed with the benefit of legal certainty where they choose to do so. Finally, the Sections consider that extensive Commission guidance on the substantive and procedural changes will be necessary if parties are to be reasonably expected to comply with the new rules.

However, if the Commission continues to prefer the implementation of a targeted transparency system, the Sections recommend that the Commission limit the proposed system to acquisitions of minority shareholdings above clear, objective thresholds to avoid the ambiguities and legal uncertainty that would be created by the White Paper’s proposed definition of “competitively significant links.” For example, an information notice could be required only in connection with the acquisition of a shareholding greater than 25 percent.
The Sections note that jurisdictions outside the EU have modeled their merger regimes on the Merger Regulation, including the concepts of "concentration" and "decisive influence". Should such jurisdictions elect to follow the Commission and also increase their coverage of minority holdings and related notification requirements, the resulting overall costs and burdens on international transactions would further outweigh any reasonably expected benefits. Although the Sections recognize that the Commission should, of course, adopt policies and regulations that best further its own interests, we urge the Commission to consider the impact of this "multiplier effect" as well.

**B. Comments in Response to Specific Commission Questions**

**Commission Question 1(a).** Regarding the concerns that a competence to control the acquisition of minority shareholdings should not inhibit restructuring transactions and the liquidity of equity markets, do you consider that the suggestions put forward in the White Paper are sufficient to alleviate this concern? Please take into account that the transactions would either not be covered by the Commission’s competence or not be subject to the 15 days waiting period.

As noted above, in principle, the Sections do not oppose the proposed expansion of Commission jurisdiction to include review of acquisitions of non-controlling shareholdings. The Sections understand that the existing limitation of Commission jurisdiction under the Merger Regulation to transactions that involve a change in control could create a jurisdictional gap that precludes the Commission from investigating and responding to a small number of anticompetitive transactions that do not involve changes of control as defined in Article 3(2) of the Merger Regulation and are not subject to review under Regulation 1/2003 and may not fall within Article 101 and 102 TFEU.

However, the Sections have significant concerns regarding the proposed “targeted transparency system” — essentially a pared-down notification system — for acquisitions of non-controlling shareholdings. The Sections have previously recommended against the imposition of filing requirements for such transactions. In general, the Sections consider that notification rules should conform to at least three principles: (a) they should be clear (i.e., the meaning of the rules should not be ambiguous); (b) they should be simple (i.e., the rules should not require companies to conduct extensive or lengthy factual, legal, or economic analysis in order to determine whether they meet the notification obligation); and (c) they should be reasonably tailored (i.e., the rules should not impose costs on businesses in excess of what is reasonable). The current proposal does not fully satisfy these principles and for that reason threatens to unnecessarily restrict the liquidity of equity markets (which, in turn, could adversely affect European market integration and the further development of capital markets in Europe), as well as impose undue burdens on parties subject to the obligation to notify.

The Sections’ principal concerns can be summarized as follows:

*The parties to a transaction should not be required to determine whether they are connected by a “competitively significant link” in order to comply with a compulsory reporting obligation.*

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1. This subsection responds to the questions listed on pages 53 and 54 of the Staff Working Document.
2. September 2013 ABA Sections’ Comments, 1 et seq.
**obligation.** The White Paper proposes that whether a transaction must be reported to the Commission should turn, among other things, on whether the parties are connected by a “competitively significant link.” The parties would be responsible for self-assessing whether this criterion is fulfilled.³

The Sections believe that this approach is realistically unworkable. As an initial matter, it is not clear how the acquiring party would be reasonably able to determine the reportability of a transaction — involving, for example, the application of turnover thresholds — before acquiring a minority shareholding. At the time of the reporting obligation, the acquirer would be merely a potential future minority stakeholder, and under many circumstances would not have access to information needed to determine whether the turnover thresholds are met, much less to apply the “competitively significant link” test.

In addition, the phrase “competitively significant link” — a concept with horizontal and vertical components, as well as a dimension of magnitude⁴ — is vague and ambiguous. For example, it is not clear how the test could be applied to: (a) when the parties are active in separate, and perhaps distant, geographic areas; (b) when the parties’ products or services are not self-evidently, but arguably, substitutable from a supply or demand perspective; (c) when the parties’ products or services are not self-evidently, but arguably, substitutable with the products or services of the other firm’s suppliers or customers from a supply or demand perspective⁵; or (d) when the parties are actually or potentially active in the same supply chain but at distant levels of that chain. Requiring parties to self-assess complex economic questions of this kind — which often admit of no easy answer — in order to understand their notification obligations sets a standard that appears unnecessarily burdensome and vague.

The difficulties are multiplied by the problem of affiliated companies. The White Paper frames the “competitively significant link” test as turning on the competitive relationship between the acquirer and target — that is, the specific legal entities that are involved in the transaction. However, we note that the Commission appears to take the position that “competitively significant links” may then not be limited to such direct relationships. If such links can be established by indirect relationships, parties will be forced to assess shareholdings held by entities they do not control and for which they lack access to relevant information. They will need to grapple with all the complexities of the “undertaking concerned” issues familiar from Merger Regulation practice, not just for the purposes of assessing relevant competitive relationships, but also in order to apply other relevant thresholds relating to the reportability of an acquisition of a non-controlling shareholding. In fact, the test could be even murkier in this context than in the more familiar context of the Merger Regulation, because the Commission appears to contemplate that other minority shareholdings could be sufficient to bring an entity within the scope of the “competitively significant link” test.

**Self-assessment system with voluntary notification is the best solution.** For the foregoing reasons (and those stated in previous comments), the Sections consider the Commission should avoid the concept of a “competitively significant link” altogether. In light of

³ White Paper, para 46.
⁴ White Paper, para 47.
⁵ This situation would beg the complex and fact-specific question of whether the vertical relationship between the parties was sufficiently proximate to constitute a “competitively significant link.”
the Commission’s recognition that a reporting obligation for all material non-controlling shareholdings would be “disproportionately burdensome,”6 the better approach in the Sections’ view would be a self-assessment system in which the Commission would remain free to investigate transactions that appear to raise competitive concerns (within an appropriate period, such as within 6 months of implementation) and parties would be permitted, but not required, to submit an information notice to obtain legal certainty regarding a transaction.

Putting the onus on the parties to determine whether a notification is appropriate would be consistent with the Commission’s approach under Articles 101 and 102, while extending the Commission’s power to investigate and take action against minority acquisitions that threaten to impede effective competition. It also would appropriately protect the freedom of parties to conduct their business in an efficient manner, and would reflect the fact that the acquisition of non-controlling shareholdings inherently poses less risk to competition than mergers and acquisitions involving a change of control. The ex ante notification-based approach is an exceptional enforcement device that is appropriate in the merger context in large part because: (1) competition between merging parties (to the extent it existed prior to the merger) will be completely eliminated (although effects may be outweighed by efficiencies arising from the transaction); and (2) unwinding a merger after implementation typically is not a simple exercise. But neither of those special factors is present when a non-controlling shareholding is acquired. Instead, in the vast majority of cases involving a non-controlling interest, there is likely to be no loss of competition, while no special difficulties are presented by unwinding the transaction after the fact (or in devising interim measures to protect against potential harm to competition during an investigation or litigated challenge). As a result, the ask-permission-first approach is unnecessarily invasive of parties’ commercial freedom in the context of non-controlling shareholdings.

Finally, the ex post approach would represent an evolutionary, rather than revolutionary, approach to the ongoing revision of the Merger Regulation — i.e., expanding the jurisdictional reach of the Commission without at the same time dramatically expanding parties’ reporting obligations—and can be further modified in due course if it is found to be unsatisfactory.7

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6 Impact Assessment, para 53.
7 The Sections recognize that, in the United States, the HSR Act does require that the acquisition of certain non-controlling interests be reported to the U.S. Department of Justice and Federal Trade Commission. But the Sections caution that that experience may not necessarily be relevant to the EU Merger Regulation, for several reasons including, among others: (a) the scope of reporting obligations under the HSR Act process is limited by a “size of transaction” test that excludes less significant transactions from the notification obligation, while there is no “size of transaction” test in current (or proposed) EU merger control law; (b) the burdens of reporting a transaction under the HSR Act, are more modest than those imposed by even a Short Form notification under the Merger Regulation, or by the “targeted transparency system” suggested in the White Paper; (c) the reporting obligation under the HSR Act is subject to an extensive series of exemptions and exceptions that limit or eliminate that obligation in many situations in which harm to competition is unlikely, including a significant number of non-controlling acquisitions, which have no equivalent in EU merger control law; (d) parties are not required to undertake a competitive assessment in order to determine their reporting obligations under the HSR Act; and (e) as a practical matter, Member States and NCAs are likely to adopt rules that duplicate the substance of EU merger law but with much lower thresholds, with much more varied and onerous procedural laws, and with institutions that may be less well equipped to dispose of the workload effectively and efficiently. Compare, e.g., White Paper, para 19 (noting divergence among domestic merger control laws in the European Union). As a result, isolated elements of United
The Sections propose that such a self-assessment system should be combined with a voluntary notification system, pursuant to which parties could decide to file an information notice with the Commission, but would be under no obligation to do so. A voluntary system of this kind would allow parties to obtain the benefits of legal certainty, following the expiration of an appropriate time period, while avoiding disproportionate burdens and costs.8

If a reporting obligation is imposed, quantitative thresholds should provide a clear safe harbor, avoiding subjective “factors.” If the Commission nevertheless decides to introduce a reporting obligation for acquisitions of a non-controlling shareholding, the Sections propose amendments to the current proposal. Specifically, the Sections propose a safe harbor for acquisitions taking the ownership share held by the acquirer to no more than 25 percent of the target. Under this approach the safe harbor would be an exemption from the reporting obligation only, not a limitation on the reach of Commission jurisdiction under the amended Merger Regulation. The Commission would retain jurisdiction to challenge transactions below the threshold.

The White Paper currently proposes to determine the reportability of a transaction creating a “competitively significant link” by reference, in part, to a three-tiered analysis of the size of the interest to be held by the acquirer. Pursuant to this approach, assuming other elements were satisfied: (a) acquisitions taking the ownership share held by the acquirer to less than five percent of the target would be covered by a safe harbor and would not be reportable; (b) acquisitions taking the ownership share held by the acquirer to between five percent and 20 percent of the target would be reportable if “certain rights” were additionally gained by the acquirer; and (c) acquisitions taking the ownership share held by the acquirer to more than 20 percent of the target would be reportable.

The Sections are concerned about the practical workability of this proposal. As an initial matter, the thresholds could become difficult or impossible to apply in some cases if the calculation of interest includes interests held by companies affiliated with the acquirer, particularly if such affiliations are also based on minority holdings.9 In addition, the thresholds themselves seem to be both unworkably vague and unreasonably low, particularly if (as the Sections propose) the thresholds are not used to limit the Commission’s power to investigate transactions, but simply to set the requirements for mandatory reporting.

In the Sections’ view, the thresholds are undesirably vague because parties should not be required to self-assess whether relevant “additional factors”10 or “special rights”11 — by

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8 See September 2013 ABA Sections’ Comments, 3–4 (noting the advantages of such a system).
9 It is not clear whether the Commission contemplates including such companies in the application of these thresholds. For example, suppose that Company A proposes to acquire a four percent interest in Company B. This would appear to fall below the five percent threshold. But suppose also that a 25 percent interest in Company A is held by Company C, which in turn holds a 25 percent interest in Company B. In that situation, it is not clear whether the Commission contemplates that the A-B transaction would qualify for the five percent safe harbor. If the A-B transaction would not qualify in this situation, parties would have to follow onerous and complicated chains of ownership in order to apply a rule that is intended to reduce, not increase, burden.
10 White Paper, para 47.
11 Staff Working Document, para 93.
definition falling short of “control” — are sufficient to warrant reporting. The criteria are not sufficiently specific to be readily applied. Nor is it clear that the threshold could practically be applied before the acquisition is made insofar as these “factors” or “rights” may only come into effect after the acquisition has been consummated. Suppose, for example, that Company A acquires a 15 percent share in Company B in January 2015, and that the time for the Commission to review that acquisition elapses six months later. If Company A subsequently acquires “special rights” such as board representation in January 2016, it is not clear whether this later devolution of rights alone would be reviewable under the Commission’s proposal. If so, it is hard to see how parties could hope for long-run legal certainty if every subsequent change in shareholders’ rights after an initial minority acquisition is potentially a reportable event. Conversely, if not, the rule could create an incentive for parties to artificially stagger the transaction in this way in every case. A voluntary reporting regime would avoid these difficulties.

The Sections consider that mandatory reporting of acquisitions as low as five to 20 percent should be based only on clear evidence that such acquisitions tend to raise competition concerns as reflected in the law and practice, rather than on vague “additional factors” of the Member States.

The Sections recommend that if quantitative thresholds are employed at all, they should be used to provide simple and clear safe harbors. Specifically, the Sections propose an exemption from any notification requirement for all acquisitions taking the ownership share held by the acquirer to less than 25 percent of the target. This would, for example, be consistent with existing law in Germany and Austria, two of the very few Member States to require any kind of reporting of minority acquisitions.12 Such an approach would reduce the burden for companies in cases that are unlikely to present serious risks to competition.

The Sections recommend that any reporting obligation be subject to a well-developed set of exceptions and exemptions for transactions that are unlikely to present a serious threat to competition. In the event that the Commission decides to impose a reporting obligation of any kind for minority acquisitions, the Sections recommend that the Commission make such an obligation subject to clearly-articulated exceptions and exemptions. (Such exemptions are even more acutely important should the Commission set a reporting less than 25 percent.) Many such exemptions exist under the United States Hart-Scott-Rodino (“HSR”) Act system, and they are of considerable importance in ensuring that the HSR reporting system remains workable and does not impose unreasonable burdens on forms of economic activity that are unlikely to give rise to serious competitive concerns.13 The Sections suggest that the Commission review the HSR exemptions in 16 C.F.R Part 802 and consider introducing a system of exemptions that is at least as extensive as those provisions. The Sections would be pleased to engage in more detailed discussion on this topic if it would assist the Commission.

The proposed protection for restructuring transactions appears inadequate. The White Paper proposes a limited exemption for restructuring transactions. Specifically, it proposes that “restructuring transactions, carried out by financial institutions in the normal course of business and for a limited period of time” would be deemed to involve no “competitively significant

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12 See § 37 GWB and § 7 KartG
13 See 16 C.F.R. Part 802.
In the Sections’ view, however, this exemption is unduly narrow. Restructuring transactions are often undertaken by a wide range of entities, and the conversion of debt to equity that occurs in debt workouts typically results in the debtholder becoming a shareholder with the right to hold the equity for an unlimited period of time. The Sections recommend that any exemption or exception for restructuring transactions should be framed broadly enough to provide meaningful protection for bona fide restructuring transactions and investment acquisitions that are not intended to confer control or material influence (such as a board seat).

**Commission Question 1(b).** Are there any other mechanisms that could be built into the system to exclude transactions for investment purposes from the competence?

In the modern cross-border economy, businesses frequently hold, both directly and indirectly, minority-interests that could be claimed to link them. Under the Commission’s proposed system, parties could be required to trace minority interests held by other entities they do not control in order to determine whether a notification is required. This would, of course, be particularly challenging for the many types of entities — from venture capital and private equity firms to hedge funds and investment banks — that manage broad portfolios of investments in the ordinary course of their business. In the Sections’ view, burdening such activity by imposing a notification system along the lines articulated in the White Paper would be undesirable.

The Sections believe that an approach modeled on that taken under the United States’ HSR Act could provide a useful mechanism of this kind. Specifically, the regulations implementing the HSR Act contain a series of exceptions that are designed to exclude categories of transactions, such as those undertaken for investment purposes, from the scope of the reporting obligation under many circumstances.

For example, the HSR regulations provide that:

> [an acquisition of voting securities] shall be exempt from the requirements of the act pursuant to section 7A(c)(9) if made solely for the purpose of investment and if, as a result of the acquisition, the acquiring person would hold ten percent or less of the outstanding voting securities of the issuer, regardless of the dollar value of voting securities so acquired or held.\(^{15}\)

The regulations further exclude, under specified circumstances, acquisitions that are similarly unlikely to raise concerns, such as acquisitions by securities underwriters,\(^{16}\) certain acquisitions by creditors and insurers,\(^ {17}\) and acquisitions by certain institutional investors.\(^ {18}\)

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\(^{14}\) White Paper, para 100.

\(^{15}\) 16 C.F.R. § 802.9 (emphasis added).

\(^{16}\) 16 C.F.R. § 802.60 (“An acquisition of voting securities by a person acting as a securities underwriter, in the ordinary course of business, and in the process of underwriting, shall be exempt from the requirements of the act.”).

\(^{17}\) 16 C.F.R. §§ 802.63(a) (“An acquisition of collateral or receivables, or an acquisition in foreclosure, or upon default, or in connection with the establishment of a lease financing, or in connection with a bona fide debt workout shall be exempt from the requirements of the act if made by a creditor in a bona fide credit transaction entered into in the ordinary course of the creditor’s business.”), 802.63(b) (“An acquisition pursuant to a condition in a contract of insurance relating to fidelity, surety, or casualty obligations shall be exempt from the requirements of the act if made by an insurer in the ordinary course of business.”).
As noted above, the Sections believe that a similar approach would be appropriate in the European Union to avoid catching a large volume of cases that are unlikely to involve substantive competitive concerns. Such an approach could usefully be adopted in an implementing instrument to ensure that the Commission can update the categories of exception to respond to changing market and enforcement conditions without the need to amend the Merger Regulation itself.

**Commission Question 1(c).** Regarding the scope of the information notice under the transparency system, would you have a preference for assimilating the information requirements to the German system, i.e. with a requirement to give market share information or to the US system which relies on internal documents to form a view on the market structure and market dynamics?

The Sections strongly recommend that parties not be forced, as part of a reporting obligation for acquisitions of non-controlling interests, to take positions on market definition, market shares, or competitive effects. Determining antitrust markets and obtaining share information, for example, is exceptionally burdensome, because it requires determining the scope of all product and geographic markets in which the parties are active (which may be numerous), as well as the collection and analysis of considerable factual information, including information regarding competitors’ activities that may not be readily available to the parties. There will often be many different ways to calculate market shares, with different methods appropriate for different purposes, and the parties may be obliged to engage economic and/or industry experts in order to be sure that their approach is defensible and appropriate. Given the importance of that calculation to much competition law analysis, parties will be required to expend significant time and resources on the analysis before taking a position before the Commission. Moreover, in the most problematic transactions, the information may not be very useful as the parties will tend to advance analyses supportive of their substantive position and may not adequately acknowledge contrary arguments. The Sections therefore believe that parties should not be required to provide such information in an information notice to the Commission.

Nor should parties be forced to prepare detailed or lengthy submissions or undertake exhaustive file searches. To do so would force parties to incur significant costs and burdens materially in excess of what is necessary to determine whether an investigation is appropriate.

A reasonable approach, in the Sections’ view, would be to require the parties to submit: (a) a description of their business drawn from their annual reports or public securities filings, if applicable; and (b) a short summary of the transaction. As the Sections have previously noted,

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18 16 C.F.R. § 802.64(b) (“An acquisition of voting securities shall be exempt from the requirements of the act, except as provided in paragraph (c) of this section, if: (1) Made directly by an institutional investor; (2) Made in the ordinary course of business; (3) Made solely for the purpose of investment; and (4) As a result of the acquisition the acquiring person would hold fifteen percent or less of the outstanding voting securities of the issuer.”). See also 16 C.F.R. § 802.64(a) (definition of “institutional investor”); 16 C.F.R. § 802.64(c) (exception from the exemption any “acquisition[s] of voting securities of an institutional investor of the same type as any entity included within the acquiring person” and any “acquisition[s] by an institutional investor . . . if any entity included within the acquiring person which is not an institutional investor holds any voting securities of the issuer whose voting securities are to be acquired”).
this should be sufficient for Commission staff to determine whether further informal or formal investigation is warranted.\textsuperscript{19}

To the extent that the Commission decides to require the production of documents or information along with the notice, that obligation should be limited to documents already in existence and/or publicly available information, and should not include an obligation to warrant completeness of the production. In this regard, the Sections believe that imposing an obligation to produce documents containing material within the scope of Item 4 of the HSR notification report would impose significant burdens on notifying parties. Although the volume of responsive documents ultimately produced might be modest, to collect and identify documents potentially responsive to Item 4 of an HSR notification typically requires an expansive search of the company’s electronic and hard copy documents and significant time, costs, and burden that would, in the Sections’ view, be inappropriate in this context given the generally benign competitive effects of minority acquisitions.

**Commission Question 1(d).** Please estimate the time and cost associated with preparing a notice, taking into account also the different scopes suggested, such as a notice with market share information, or a notice with relevant internal documents.

Generally speaking, the cost and burden of preparing a notice depends on the scope of the information required. The greater the detail and scope of information and documents required, the more expensive the notification. As the Sections previously have noted, even a Short Form merger notification to the Commission in a straightforward case can cost €150,000 or more.\textsuperscript{20}

The White Paper currently proposes a notice that would include: (1) “information relating to the parties”; (2) “their turnover”; (3) “a description of the transaction”; (4) “the level of the shareholding before and after the transaction”; (5) “any rights attached to the minority shareholding”; and (6) “some limited market share information.” Of these items, the first five appear reasonable as long as parties are not required to generate extensive or detailed materials in the initial notice or in any follow up requests by the Commission or interested Member States. It may be possible to prepare a notice confined to these five items for as little as approximately €15,000. But it could be significantly more expensive and burdensome depending on the nature of the parties’ recordkeeping, the ability of the minority acquirer to access the target’s information, the complexity of the companies’ business activities, and the resolution of relevant jurisdictional and substantive questions (including, for example, the treatment of affiliated companies). Furthermore, the Sections remain concerned that these initial information requirements are likely to become subject to “information creep” as a result of additional questions from the Commission and/or Member States that want to evaluate a referral back. Just as the Form CO notification has become an iterative multi-week, if not multi-month, process, similar pressures and interests could transform the scope of the information notice, formally or informally, into a broader and more time consuming and burdensome exercise.

Finally, the sixth element threatens to multiply the expense and burden several times over, for the reasons stated above. It could force parties to engage in significant legal and

\textsuperscript{19} See September 2013 ABA Sections’ Comments, 5.

\textsuperscript{20} See September 2013 ABA Sections’ Comments, 5 – 6.
economic analysis, as well as extensive fact-gathering. It is not possible to estimate with confidence the burden or cost of such activity in the absence of a clearer indication of the level of information required, but the Sections anticipate that the amount involved could easily exceed approximately €150,000 in a case that called for economic experts or in which issues of market definition or share calculation were complex.

Commission Question 1(e). Do you consider a waiting period necessary or appropriate in order to ensure that the Commission or Member States can decide which acquisitions of minority shareholdings to investigate?

The Sections do not believe that a waiting period is necessary or appropriate for the acquisition of non-controlling shareholdings. As noted above, there is no reason to impose an exceptional “prior restraint” mechanism for non-controlling interest acquisitions, where the threat to competition is inherently less probable and it is substantially less difficult to unwind such a transaction. In the absence of a compelling reason of this kind, the Sections submit that restricting parties’ commercial freedom to engage in commonplace securities transactions is unnecessary and unreasonable.  

Acquisitions of minority shareholdings are also more vulnerable to commercial disruption by the imposition of a waiting period than are traditional “change-of-control” mergers and acquisitions. Relatively small fluctuations in securities prices over a few days can have decisive consequences for transactions involving minority shareholdings, which are commonly undertaken for primarily financial reasons. By contrast, traditional, change-of-control mergers and acquisitions are more likely to be driven by strategic concerns that are less likely to vary on a day-to-day basis. As a result, the burden of a waiting period is likely to be more acute for minority acquisitions than in traditional concentrations reviewed under the Merger Regulation.

If a waiting period is adopted, given the lack of competitive threat presented by the vast majority of transactions involving non-controlling shareholdings, the Sections recommend that early termination of that period be available. Experience in the United States with the HSR Act suggests that this can be an effective tool to reduce the burden on parties in situations that are unlikely, in the view of the reviewing agency, to raise competitive concerns.

II. PROPOSALS REGARDING CASE REFERRALS

Commission Question 2(a): Please comment on the suggestions regarding the information system amongst the Member States and the Commission. In particular, would such a system give sufficient information to the Member States to decide about a referral request?

The Sections welcome the Commission’s intention to shorten and facilitate the referral mechanisms that are currently in place. Regarding an Article 4(5) referral, in particular, removing the two-step process will be a major achievement. The Sections would still recommend (i) allowing parties to use a draft Form CO to trigger the referral timeline, and (ii) shortening the consultation period from 15 working days to 5 working days. Regarding Article

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21 The Sections further note that the proposed waiting period would apply unequally to similar transactions, given its exclusion from situations—like Ryanair/Aer Lingus—in which the relevant shareholding was acquired through a public exchange.
22 post-notification referrals from Member States to the Commission, the Sections are very pleased with the proposals that (i) in the future only Member States that are competent to review a transaction under their national law may request or veto such referral, and (ii) if the Commission takes the case, it has jurisdiction over the whole EEA (except when one Member State has already issued a decision), which would prevent differing decisions by multiple competition authorities. However, the Sections still recommend that the Commission be allowed to take jurisdiction only when a concentration qualifies for review in at least three Member States.

The Sections also welcome the changes proposed by the Commission regarding pre-notification referrals from the Commission to a Member State under Article 4(4) (change of the substantive test to show that the transaction may “significantly affect competition in a market” to showing that “it is likely to have its main impact in a distinct market in the Member State in question”) and post-notification under Article 9 (tolling the 65 working days deadline from the start of the Phase II proceedings).

In the case of an Article 4(5) referral, even if only a draft Form CO is circulated, it may contain even more information than a regular national notification may require. Hence, Member States should be in a position to make an informed decision on whether or not to veto such a referral request. In the case of an Article 22 referral, as (i) only Member States competent to review a transaction may make such a referral request, and (ii) an early information exchange system between the Commission and the NCAs should be set in place, Member States should have sufficient information to decide on a referral request.

Commission Question 2(b): Would such a system reduce the risk of diverging decisions by the Member States?

In general, the Sections believe that such a system would reduce the risk of diverging decisions by the Member States.

III. REMAINING PROPOSALS

Commission Question 3. Please comment on the suggestions listed in Section 5 “Miscellaneous” including the more detailed and technical suggestions in the accompanying Staff Working Document.

(i) Amending Article 1 to exclude extra-EEA joint ventures even if the turnover thresholds are met.

The Sections generally support this proposed amendment. The Merger Regulation’s definitions of concentration and undertakings concerned require the notification of many joint ventures that have no reasonably foreseeable competitive effect in the EEA, wasting resources both for the Commission and for businesses. The Sections note a potential ambiguity in the Commission’s wording, however. To benefit from the exclusion, it appears that the parties would have to show both (i) that the joint venture will not operate in the EEA, and (separately) (ii) that it will have no competitive effect in the EEA. In the interests of legal certainty, the Sections recommend that joint ventures that are not reasonably expected to have turnover in the
EEA during a reasonable period (i.e., one to three years) be excluded from the definition of concentration.

(ii) Amending Articles 19(1) and (2) to allow the Commission or a Member State authority that collects information prior to a referral to share that information with the authority to which a case is referred.

The Sections support this proposed amendment.

(iii) Further extending the simplified procedure to exempt certain categories from the prior notification requirement and potentially replacing that requirement with an information notice under the targeted transparency system.

The Sections support this proposed amendment and note that an information notice along the lines of a case allocation request form would be sufficient for such transactions even if the Commission does not introduce an information notice requirement under the targeted transparency system.

(iv) Modifying Article 4(1) to provide more flexibility for notifying mergers executed through share acquisitions on a stock exchange but without a public takeover bid.

The Sections support this proposed amendment to allow notifications of acquisitions through share acquisitions on a stock exchange based on a good faith intention.

(v) Amending Article 5(4) to include the methodology for the calculation of joint venture turnover laid out in the Commission Consolidated Jurisdictional Notice.

The Sections are not clear on the rationale for this proposed change, which would apparently not change the Commission’s current practice, but could make it more difficult for the Commission to introduce changes or clarifications that may become necessary or appropriate in the future.

(vi) Amending Article 10(3) with regard to extensions.

The Sections support the Commission’s proposals to increase the maximum number of days by which the Phase II deadline may be extended from 20 working days to 30; to clarify that the 15 working day extension applies to all submissions of proposed remedies following a statement of objections; and to clarify that the exception for commitments offered before 55 working days applies only if the commitments are sufficient to remove the concerns identified without the need for a statement of objections.

(vii) Amending Article 8(4) to allow for the unwinding of concentrations with regard to minority shareholdings.

The Sections recognize that it will be appropriate to conform Article 8(4) to allow the Commission to require dissolution of partially implemented transactions, but we recommend that this power be tailored to the scope of the Merger Regulation as amended. In other words, the Commission should not have the power to require dissolution of transactions that are not subject to review under the Merger Regulation.
(viii) **Amending Article 5(2)(2) to capture only cases of “real” circumvention.**

The Sections support the Commission’s proposal to clarify Article 5(2)(2) and stand ready to comment on those proposals.

(ix) **Amending Article 3(1) to clarify the treatment of “parking” transactions.**

The Sections would welcome a clarification of the treatment of “parking” transactions, but suggest that the Commission’s proposal to assess such transactions “as part of the acquisition of control by the ultimate acquirer” be clarified. Assuming the ultimate acquirer’s acquisition of control is notifiable, in any case presumably the competitive effects of that acquisition will be assessed as part of the Commission’s review.

(x) **Amending Article 17(1) to allow imposition of sanctions on private parties and their advisors for misuse of confidential information.**

The Sections support this proposed amendment.

(xi) **Amending Articles 6(3)(a) and 8(6)(a) as regards revocations of decisions in case of referral based on incorrect or misleading information.**

The Sections support amending Articles 6(3)(a) and 8(6)(a) to allow for revocation of decisions in cases of referrals obtained by deceit. The Sections are less convinced of the need to extend that power to decisions in referrals based on innocent mistakes, since in any case a decision approving the referred decision would take place only after the authority to which the case is referred has fully assessed its competitive effects.

### IV. CONCLUSION

The Sections appreciate the opportunity to provide comments on the Commission’s public consultation on possible improvements of the EUMR. The Sections would be pleased to respond to any questions the Commission may have regarding these comments, or to provide any additional comments or information that may be of assistance to the Commission in finalizing any changes to the EU merger control system.