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

September 20, 2013

The views stated in this submission are presented only on behalf of the Section of Antitrust Law and Section of International Law of the American Bar Association. These comments have not been approved by the ABA House of Delegates or the ABA Board of Governors, and therefore may not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law and the Section of International Law (collectively, the “Sections”) of the American Bar Association (“ABA”) welcome the opportunity to provide comments to the European Commission (“Commission”) in its public consultation on possible improvements to the EU Merger Regulation (“EUMR”) regarding minority shareholdings and the referral system. The Sections appreciate the Commission’s substantial thought and effort reflected in the consultation, and offer these comments in the hope that they may further assist in the completion of any amendments of the EUMR and implementing regulations and notices. The Sections are available to provide additional comments or to participate in any further consultations with the Commission, as appropriate. The Sections’ comments reflect their members’ expertise and experience with competition law in the U.S. as well as in the European Union and in numerous other jurisdictions worldwide.

MINORITY SHAREHOLDINGS

The Sections recommend avoiding changes to the EUMR that would introduce filing requirements for minority shareholdings involving non-controlling structural links. The proposed changes would increase legal uncertainty for, and the overall regulatory burden on, companies doing business in Europe and could make such minority shareholdings a less attractive investment opportunity. However, should the Commission decide otherwise, we strongly recommend a voluntary filing system plus a detailed Commission notice with guidance about circumstances when structural links could make a filing advisable.

Question 1

The Sections’ experience with the EUMR suggests that it is generally effective in identifying transactions that, due to their potential effects on competition in the EU, merit antitrust review at the EU level. However, the Sections caution that a substantial increase in reporting requirements may impose an undue burden not only on parties to merger transactions (see the response to Question 5 below) but also on the Commission.
The Sections recognize that Annexes I and II to the Staff Working Document identify potential competitive concerns and economic conditions under which minority shareholdings can result in anticompetitive outcomes. However, substantial enforcement experience in the United States shows that non-controlling structural links do not pose a serious competitive threat that cannot otherwise be addressed by other antitrust enforcement tools. For example, during the U.S. 2012 fiscal year (October 1, 2011 to September 30, 2012), the most recent fiscal year for which data are available, parties notified 228 minority acquisitions to the U.S. Department of Justice Antitrust Division ("DOJ") and the U.S. Federal Trade Commission ("FTC"). None of these notifications triggered an extended review under the Hart-Scott-Rodino Act. The Sections believe that competitive concerns do not justify imposing significant additional filing and waiting burdens on minority acquisitions, especially with respect to smaller transactions. If the Commission decides to make changes to the EUMR that would require or encourage notification of non-controlling structural links, the Sections suggest that such notifications not require a Short Form filing, but perhaps only some type of "notice submission" in cases of notifiable non-controlling structural links.

The Sections submit that the definition of "control" in the EUMR appears sufficiently broad to cover a number of minority investments where the buyer has either some competitively significant veto powers (e.g., on approval of business plan or budget) that confer joint or negative control, or a sufficiently large minority position that confers de facto control. In the Sections' view where a non-controlling structural link does not confer any of these powers, the level of influence that the acquiring firm can exercise on the acquired firm's competitive decisions is typically lower and much less likely to raise competitive concerns, and therefore does not appear to justify burdensome pre-consummation notification and/or waiting requirements. Further, the Sections consider that the Commission already has sufficient tools to address the acquisition of non-controlling minority shareholdings under the provisions of Articles 101 and 102 TFEU.

If the Commission were to adopt new rules to expand the applicability of the EUMR to structural links and introduce a pre-consummation notification regime, the Sections submit that it is very important that the system be designed to minimize the burden on notifying parties, both in terms of costs and timing. As further discussed in response to

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1. The 228 transactions reflect the acquisitions of voting securities that were not notified at the 50% threshold. See Hart-Scott-Rodino Annual Report, Fiscal Year 2012, available at http://ftc.gov/os/2013/04/130430hsrreport.pdf.
2. While in prior years there have been some Second Requests resulting from reported minority acquisitions, the rate at which these requests are made (<1%) is well below the rate for transactions generally. In addition, the data that the DOJ and FTC make available does not indicate the ownership interest acquired in the transaction or whether it conveyed control, as defined in the EUMR. Therefore, the few Second Request investigations may involve transactions that would already be reportable to the Commission under the EUMR definition of control. The U.S. data also do not show whether any enforcement action was taken for these transactions, so that the enforcement rate for these transactions is likely even lower. See Hart-Scott-Rodino Annual Reports, Fiscal Years 2008 - 2012, available at http://ftc.gov.
Question 5 below, in the Sections’ experience, a Short Form, even in a non-problematic transaction, can involve significant costs and a substantial commitment of management time at the filing companies. The Sections therefore suggest that any notification system for structural links should involve much more limited information requirements than the Short Form, and should certainly not require nearly as much information as is required for Form CO.

In the rare cases that raise serious concerns, the Commission would be able to issue information requests to the parties during the investigation, as it currently does with respect to reportable mergers under Art. 11 of the EUMR. Any notification system for structural links should also involve shorter notification and review periods than those currently provided by the EUMR. In addition, if a standstill obligation is imposed on parties to structural links, the Sections submit that the Commission should have the authority to grant early termination of the waiting period to allow non-problematic transactions to proceed quickly, as in the U.S.

Question 2

In the U.S., the same substantive test is used for both acquisitions of control and acquisitions of minority interests. The Sections believe that having a common test for both types of transactions has worked effectively. Thus, while the Sections believe that no changes are needed to the current system for the reasons discussed above, if the Commission were to adopt a system to review structural links, then the current SIEC-test would also be appropriate for evaluating structural links.

Question 3

While the Sections submit that the U.S. experience suggests that the Commission need not adopt a review system for structural links, if the Commission chooses to adopt such a system, the most appropriate mechanism for evaluating structural links would be a “self-assessment” regime that allows parties to make a voluntary notification if they wish to obtain formal Commission approval. Self-assessment would allow transactions involving potential anticompetitive concerns to be brought to the Commission’s attention, but avoid imposing unnecessary bureaucratic burdens on the vast majority of transactions that do not raise such concerns.

Under such an approach, parties would be able to decide both whether to seek Commission approval and whether to delay closing pending review. This system strikes the best balance between (i) the need for effective enforcement (some parties to potentially problematic structural links may want to obtain approval, and thus would voluntarily file), and (ii) the need to minimize the burden on parties (parties to transactions that do not raise competitive concerns could avoid filing and close immediately). As for the Commission’s need to be informed, we would expect that many parties to a transaction raising potentially
serious issues would choose to notify in order to obtain regulatory certainty and because the acquisition of a significant minority shareholding involving public companies would likely become public. In addition, a post-consummation challenge to the acquisition of a minority interest does not involve as much potential risk to competition as an integrative merger if there were to be an SIIEC, since it would normally be straightforward to order divestiture of a non-controlling structural link.

The desirability of a “transparency system” largely depends on the administrative burden that it would impose on the parties, particularly with respect to the scope and timing of the proposed information notice. If the Commission were to move forward with this type of an approach, the Sections recommend a limited initial information notice. Otherwise, as discussed above, the burdens would likely outweigh the benefits because the overwhelming majority of such transactions will not raise any competitive concerns. In any event, it should be noted that even a mere information notice would increase the administrative burden on companies.

The Sections believe it would be undesirable to extend to structural links the current system of ex-ante merger control, with its extensive pre-merger notification and waiting period requirements, as such an extension would likely impose a disproportionate burden on the parties. The Sections submit that a mandatory notification system based upon the current Form CO would not be justified given (i) the limited evidence suggesting that structural links pose a serious competitive threat that is not otherwise being addressed, (ii) the relative infrequency with which minority transactions raise competitive concerns, as reflected in the U.S. data regarding Second Requests, (iii) the significant administrative burden associated with such a system, and (iv) the relative ease with which the Commission could remove a structural link that is later determined to be anticompetitive. With respect to this last point, it is important to note that when structural links do not involve any element of control (i.e., when they do not trigger a notification under the EUMR today), they also will not involve any integration of operations, assets or management, and therefore may easily be unwound by divestiture even after consummation.

If the Commission were to proceed with a system to evaluate structural links, the buyer of shares in a non-negotiated transaction should not be required to provide extensive information on the target — i.e., nothing beyond information that is publicly available or otherwise in the buyer’s possession. In the U.S., buyers in these sorts of transactions may rely on public information and their knowledge of the target when preparing the notification. The Commission is often better able to obtain non-public information to the extent necessary.

Question 4

Regarding question 4(a), the Sections believe that the Commission should
require only basic, high level objective information on the parties, including their turnover, a brief description of the transaction, and a short description of the economic sector(s) concerned. No market definition or market share data should be required, nor should the parties be required to submit lists of competitors, customers, or suppliers, or to provide any extensive documentation. Of course, if the Commission staff were to determine that a proposed structural link would raise serious competition concerns, the Sections would agree that it would be appropriate to require production of additional information and/or documents.

In its consultation papers, the Commission correctly points out that minority investments are reportable in other jurisdictions, including the U.S. The Sections respectfully submit that if the Commission were to follow such a model with regard to reportability of minority investments, it should also conform its notification requirements to the limited, readily available and objective types of information that are required in the U.S.

As noted above, the Sections believe the Commission should require only publicly available information and information already in the buyer’s possession regarding a target in a non-negotiated transaction. In any event, the U.S. system imposes a relatively light burden on notifying parties because the form requires the submission of objective information or readily identifiable documents in the filer’s possession. This allows parties to prepare and submit their forms and immediately trigger commencement of the initial waiting period without analysis of difficult issues such as product and geographic market definition, or extensive agency consultation in simple and non-controversial cases. These characteristics of the U.S. notification system commend themselves especially to application to non-controlling structural links because competitive issues will rarely arise in such transactions, and because of the relative ease with which a non-controlling structural link can be dissolved following consummation, thus diminishing any benefits of a suspensory notification system.

In light of the foregoing, in response to question 4(b), the Sections recommend that the Commission require only: (i) a description of the parties’ businesses from their annual reports or Form 10-Ks; (ii) if required by rules of the SEC or securities markets regulators in other jurisdictions, the 8-K (or equivalent) summary of the transaction; and (iii) possibly other limited items of information.

Question 5

In the Sections’ experience, the preparation and submission of a Short Form, in even a simplified transaction, can cost €150,000 or more, while a simple HSR filing in the U.S. can be filled out and submitted for under US$20,000 (i.e., approximately €15,000). The cost discrepancy will often be even greater on both a nominal and percentage basis for transactions that require a full Form CO, but do not require any remedy, with Form CO costs potentially exceeding 100 times the cost of preparing an HSR notification. The Sections
note that the Commission’s Merger Simplification Project envisages a significant broadening of the document disclosure requirements for both the Form CO and the Short Form. Such an expansion (if adopted and applied to acquisitions of minority shareholdings) would further increase the administrative burden on companies. Similarly, a Short Form or a Form CO requires a significantly greater time commitment from management to gather the necessary information, documents, and data than does an HSR notification. As a result, if a new notification system is adopted for structural links that do not involve transfers of control, the information requirements in any mandatory notice or notification should be comparable to HSR notifications, as noted above.

The Sections also note that there are significant non-monetary costs associated with the notification and review system currently used for mergers notified under the EUMR, particularly with respect to the parties’ inability to close a transaction for an extended period of time after signing. In this regard, the Sections reiterate that, if a standstill obligation is adopted for structural links, the Commission should be able to grant early termination of the waiting period in cases where review of the transaction can be completed in a shorter period of time.

Question 6

The Sections consider that the current turnover thresholds are appropriate, though it would be helpful for the Commission to clarify whether the entirety of the turnover attributable to the target company or a pro rata proportion of it should be taken into account.

Question 7

The Sections submit that it is critical to establish a safe harbor to exempt small investments from Commission pre-closing review. This is even more important if either a notification or transparency system is ultimately adopted, so as to exempt small transactions from any mandatory pre-consummation notification and waiting requirements.

Austria and Germany have notification systems for minority investments, with filings triggered at 25%. Absent evidence of widespread problems in the EU due to structural links below this level, we recommend that the EU adopt similar thresholds. In the alternative, if the Commission considers that 25% is too high a threshold, we note that in addition to a general 10% safe harbor, the U.S. has a 15% safe harbor for institutional

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3 See also the “Joint Comments of the American Bar Association’s Section of Antitrust Law and Section of International Law on European Commission’s draft revision of Simplified Procedure and Merger Implementing Regulation” dated June 19, 2013.
4 Germany also requires notification for “competitively significant” investments even below the 25% threshold. The UK has a voluntary notification system that regards minority investments as reviewable if they entail “material influence” on the target. “Material influence” is generally understood to include minority ownership shares of 15% or greater.
investors. Thus, particularly in light of the few cases in which minor structural links have raised concerns in the U.S., we recommend a minimum ownership percentage level of at least 15%.

Question 8

The Sections suggest that if any system is needed, it would be beneficial for parties to have the option to notify voluntarily to obtain legal certainty, with very limited information similar to what was suggested in answer to question 4(b). Voluntary notification would increase transaction costs, but presumably if parties decide to notify it would be because they consider the benefits in terms of legal certainty to be greater than the notification costs. As is the case when parties voluntarily notify the U.S. about a transaction that is not covered by the HSR Act, parties should have the option to decide whether or not to wait for the Commission’s decision before closing. In most cases, if the parties voluntarily notify, then they will also voluntarily delay closing. Should the Commission choose such a voluntary notification system, the Sections recommend that the Commission issue appropriate guidance as to the types of structural links that would indicate that a filing would be advisable.

Question 9

The Sections suggest that, if a self-assessment system is adopted, where parties do not voluntarily file, any Commission challenges to non-notified transactions should be subject to some reasonably short limitation period.

On the other hand, if the parties do notify the Commission, either through voluntary notification in a self-assessment system or through a mandatory notification or notice in a notification or “transparency” system, then the timing of the Commission’s investigation should be clearly established as under the EUMR. In other words, the Commission would have to review the transaction and issue a decision within a brief specified timeframe following receipt of the notification or notice. Otherwise, the parties would bear costs associated with the notification or notice regime, but without the benefit of certainty.

REFERRAL SYSTEM

Question 1

While potentially helpful to save time and effort overall, allowing the Form CO to serve as a substitute for the Form RS has the drawback of lengthening the time to obtain a definitive answer on referral approval. As a result, rather than waiting for the final Form CO notification to trigger the referral timeline, the Sections recommend allowing parties to use a draft Form CO to trigger the referral timeline. This would enable parties to
obtain the certainty of Commission review without having either to prepare a Form RS or to await reparation of the full Form CO. The Sections agree that the Form CO could be amended to incorporate certain information to facilitate consultation with the Member States.

Question 2

The Sections’ experience suggests that a Form RS adds 2-6 weeks to the overall approval process, as compared to a transaction that can proceed directly to a Form CO. If a draft Form CO could be used to trigger the referral timeline, as suggested above, the overall time for obtaining Commission clearance will likely be identical for transactions that involve a referral approval as for those that do not.

Also, reducing the consultation period will help parties by providing an earlier definitive answer on referral. Thus, the Sections recommend that the 15-working day consultation period be shortened, e.g., to five working days. Allowing contacts and the exchange of confidential information between the Commission and the national competition authorities of the competent Member States during pre-notification phase seems a reasonable trade-off for shortening the consultation period post-filing.

The Sections are aware of cases where it took over one week for copies of a Form RS to be transmitted from Brussels to certain Member States or for a Member State to identify technical issues preventing the electronic media that were forwarded by the Commission to be read. As part of ensuring that the Member States receive information in a timely manner, the Sections submit that filing parties should be allowed to file their referral requests with the NCAs directly. In this regard, the Sections suggest that the administrative burden on both the Commission and the parties would be reduced if only the Member States where the parties would have had to file were allowed to participate in the referral process.

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5 Although not specifically responsive to the questions regarding the Commission’s proposal, the Sections reiterate a comment in their November 2008 submission regarding how the referral process could become less time-consuming and cumbersome, particularly where a Member State vetoes a referral. Specifically, the Sections recommend that the Commission encourage Member States to accept the form to request referral (whether a Form RS or the draft Form CO as suggested in the text) as a valid notification, subject to possible translation or other ministerial requirements. Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law, Response to Questionnaire Issued by the European Commission in Connection with its Report on Regulation 139/2004, November 2008, available at http://www.americanbar.org/content/dam/aba/antitrust_law/comments_ht1277.authcheckdam.pdf (hereinafter, the November 2008 Comments).

6 Although not directly related to the referral process, the current Commission consideration of this process provides the Sections an opportunity to repeat a suggestion made in their November 2008 Comments. The continued existence of subjective market-share based notification tests at the Member State level complicate the Article 4(5) referral process. While Member States define their own national filing criteria, the Sections respectfully encourage the Commission to use its influence to transition all Member States to objective and ICN-compliant tests.
Question 3

The Sections remain concerned, as expressed in the November 2008 Comments, that Article 22 is not functioning effectively. The operation of Article 22 results in considerable legal uncertainty relating to jurisdiction (and therefore to transaction timetables) for parties to a concentration lacking Community dimension.

Article 22 was originally known as the “Dutch clause” because it was introduced to enable the Commission to review concentrations that raised genuine competition concerns in countries that did not have national laws that would have enabled them to carry out their own merger review. Now that all Member States but one (Luxembourg) have national merger control powers, the Sections question whether there remains any need for a post-notification referral system from Member States to the Commission. If a post-notification referral system to the Commission is to be retained, then the Commission should accept referral requests from Member States only when there are compelling reasons to change the original jurisdiction. If the referral request is accepted, the Sections agree that the Commission should have jurisdiction over the entire EEA so as to ensure consistency with Article 4(5).

In addition, the Sections believe Article 22 should be amended so that:

(i) it is made more consistent with Article 4(5), such that the Commission can accept a referral request only when a concentration qualifies for reviewability in at least three Member States;

(ii) the only Member States that may make or join an Article 22 referral request are those in which the concentration qualifies for review under that Member State’s national merger control legislation; and

(iii) parties should be free to implement the concentration in those jurisdictions whose authorities did not refer the concentration for review by the Commission, so long as this could be done in a way that does not affect competition in those Member States that made or joined an Article 22 referral request. In the event that the Commission accepts or is presumed to have accepted an Article 22 referral request, it may assess the impact of the concentration on competition only in the territories of those Member States that referred the concentration to the Commission. Correspondingly, the bar to closing pursuant to Article 7 should be limited to those Member States.

The Sections suggest that, with the expansion of the EU, point (ii) is critical. Otherwise, parties could be adversely affected by such a request very late in the review period or possibly even after all Member States with competent jurisdiction have completed
their reviews.

**MISCELLANEOUS**

**Question 1**

The Sections believe that limiting the Commission’s jurisdiction for concentrations that do not have any effect in the EEA – such as the creation of full-function joint ventures located and operating outside the EEA and that would not have any conceivable impact on markets in the EEA – and exempting such concentrations from the requirements of the EUMR would promote the effectiveness of the EU merger review system, reduce the compliance burden on the business community, and allow the Commission to focus its resources more effectively on potentially anticompetitive transactions. As a result, the Sections encourage the Commission to adopt such a change.

To that end, the jurisdictional rules in the EUMR could be modified by introducing additional jurisdictional tests for full-function joint ventures that would make such transactions reportable under the EUMR only if (i) the assets to be contributed to the joint venture by all of the parties had a combined aggregate Community-wide turnover in excess of a certain monetary threshold in the more recent fiscal year (e.g., EUR 250 million), and (ii) the assets to be contributed to the joint venture by each of at least two of the parties had an aggregate Community-wide turnover in excess of a certain monetary threshold in the more recent fiscal year (e.g., EUR 250 million). Such approach would be in line with the International Competition Network’s Recommended Practices for Merger Notification and Review Procedures\(^7\), which require a sufficient local nexus, looking to the target business(es) that are actually being acquired.

**Question 2**

Finally, the Sections support amending the EUMR so as to ensure that any persons who obtain non-public commercial information of the merging parties for the purpose and in connection with the Commission’s review of a concentration do not use or disclose such information for any other purposes. Ensuring compliance with such non-use and non-disclosure obligations would encourage the merging parties to provide information and documents that would assist the Commission’s review of a transaction. While sanctions can potentially make such non-use and non-disclosure obligations more effective, the Sections also believe that the Commission should strictly limit any access by third parties to non-public commercial information of the merging parties (with the exception of national competitions authorities in connection with the referral process, as discussed above).

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.