AmCham EU's response to the European Commission's consultation on the draft revision of simplified procedure and merger implementing regulation

CONSULTATION RESPONSE

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Introduction

The American Chamber of Commerce to the EU (AmCham EU) welcomes and strongly supports the goal of the Commission to simplify the merger review process. The importance of the Commission's statement on making EU merger control 'even more business-friendly by cutting red tape and streamlining procedures' cannot be overstated. The Commission should be applauded for its efforts to seek further improvements to the EU merger control system.

AmCham EU is particularly pleased to see further guidance on *inter alia* waivers for information, which should provide DG Competition and notifying parties with more flexibility to focus on data relevant to the individual case. Further, the revision of the thresholds for the simplified procedure is an important step forward so as to decrease the number of non-problematic transactions currently subject to a full review. Provisions on international cooperation are also very much welcomed. There are also many other important enhancements.

There are areas where AmCham EU would like to share some views on potential further improvements that could be considered by the Commission. We hope that these suggestions will be useful and practical, and that some of these may find their way into the final set of modifications the Commission would do to the relevant Notice and Forms.

More specifically, AmCham EU calls on the Commission to consider the following amendments:

1. On changes to the Notice on simplified procedure:

    a. The draft should clarify that the absence of overlaps remains a sufficient reason for the simplified procedure;
    b. AmCham EU calls for a further increase of the thresholds for applying the rules on the simplified procedure; and
    c. The Commission should clarify that transactions relating to joint ventures without any activity in the European Union do not have any effect in the European Union and do not require notification.

2. Review the role, scope and current (mis)use of pre-notification contacts and clarify that in simple cases (e.g. no overlap, within the simplified procedure) pre-notification contacts, while possible, should be the exception, not the rule.

3. Consider a true simplification of the notification forms

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a. Make the Short Form CO as short as possible;
b. Do not introduce a new concept of 'plausible markets';
c. Section 5 (3) documents should not be required in the Short Form CO; and the proposed request for documents discussing unrelated transactions in Sections 5 (3) of Short Form CO and Section 5 (4) of Form CO should be deleted; and
d. Adapt contact details required to modern business practices (i.e. name, company telephone *or* email).

4. Maintain proportionality when applying the sanction of incompleteness. Clarify that minor deviations (such as an incorrect fax or telephone number) do not merit a declaration of incompleteness unless the parties have been provided with an opportunity to rectify.

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Background and Analysis

The EU merger review system has become a significant financial and time burden for global business. As the case statistics published by the Commission show, the EU thresholds capture a large number of transactions regardless of their impact on competition.

The overwhelming majority of transactions notified under the EU thresholds do not raise any competition issues. AmCham EU acknowledges that the revenue thresholds are set in the EU Merger Regulation and therefore beyond the scope of the present review. However, this is a good opportunity to also call for a review of the EU Merger Regulation and the implementing regulations, which remain virtually unchanged since their entry into force in 2004. That said, even within the framework of the existing merger regulation, process and information requirements must be based on what is strictly necessary to conduct the review.

The EU notification forms, including the Short Form CO, are amongst the most complex notification forms in use globally. They require significant amounts of information, run rarely less than 20 pages, even in cases where the relevant content can be easily summarised on less than one page. Specialists often describe the information requirements to clients as 'having to write a book addressing all potential likely and unlikely scenarios' upfront. The forms and process are highly technical, and will typically require assistance of a qualified specialist lawyer even in simple matters, placing additional financial burden on companies.

The EU process has also become extremely slow. Until 2004, prior to the entry into force of the current EU Merger Regulation and its accompanying documents, the EU could pride itself with running arguably one of the strictest merger regimes in terms of its time frame. Pre-notification was the exception, reserved for cases that could potentially raise competition issues, the review period was one month long and the timelines were strictly adhered to. Unfortunately, since 2004, this process has deteriorated significantly. The best practice guidelines foresee that the pre-notification review should be completed within 10 working days, i.e. including in the most complicated cases, yet case teams frequently require 10 working days even for the simplest matters, matters that by any standard should not require pre-notification in the first place. In more complex cases, pre-notification discussions of three months or more are no longer an exception. In addition, given the complexity of the forms, parties have to contend with the threat of a potential declaration of incompleteness that would restart the review timelines. This practice contradicts the strict timelines of the merger regulation. Similar concerns apply to the timelines applied in referral cases.

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Comments on the revised Notice on simplified procedure (the 'Notice')

AmCham EU welcomes the initiative of the Commission to review the Notice. AmCham EU welcomes in particular the clarification in paragraph 6 of the Notice that overlaps between the parents of a joint venture do not impact the applicability of the notice on simplified procedure as well as the clarification in Footnote 14 of the Notice that a vertical relationship presupposes that the product or service of the undertaking active in the upstream market in question constitutes an important input to the product or service of the undertaking active in the downstream market.

The absence of overlaps should remain a sufficient reason for simplified procedure

AmCham EU is concerned that the proposed revisions to point 5 of the Notice appear to delete – potentially inadvertently - the option for using simplified procedure in cases without overlaps. The text as it would appear to read after revisions refers immediately to the market share thresholds and different from the original version now omits a reference to the absence of overlaps.

This would create a significant gap that would lead to significant additional work for notifying parties. Consider the case of a buyer with a significant portfolio of different business lines. This buyer invests in an entirely new line of business, which has no horizontal or vertical relationships with its existing businesses. Under the current notice, this buyer can use the simplified procedure, without discussing its existing unrelated business, because there is no overlap.

As the proposed new text deletes the reference to the absence of overlaps, a conservative reader may raise a doubt as to whether simplified procedure continues to be applicable to cases without an overlap. In such a case, the buyer may be requested to show that it has a market share of less than 50% in each and every – entirely unrelated - market where it is active (because this would mean the combined share is less than 50% and the increment is less than 150) before this buyer could use the simplified procedure under the new point 6.

This would be highly impractical, burdensome and in some cases outright impossible. In order to avoid even the appearance of uncertainty and the related risk that parties may be asked to provide such information, AmCham EU would call on the Commission to clarify that transactions without overlaps will continue to qualify for simplified procedure.

AmCham EU calls for a further increase of the thresholds for applying the rules on simplified procedure

AmCham EU welcomes the proposed increase of the thresholds for affected markets and hence the applicability of the simplified procedure to 20% horizontally and 30% percent vertically. AmCham EU particularly welcomes the proposal that the simplified procedure should also be available where those thresholds are exceeded but where the combined market share is less than 50% and the increment in HHI is 150 or less.

However, AmCham EU is concerned that those thresholds are still too low and that they will continue to capture transactions that do not raise an issue. Thus even

following the proposed rules, business will continue to be required to develop and provide significant amounts of information simply to satisfy the requirements of the form. This information, it should be recalled, is typically not readily available and requires significant amounts of often fairly high-level management time.

For instance, in the horizontal merger guidelines, the Commission has expressed the view that horizontal mergers with a combined market share of 40%, and certainly below 25%[1], are unlikely to raise competition issues. The non-horizontal merger guidelines set 30% as a minimum safe harbour and acknowledge that vertical transactions only raise competition issues in foreclosure scenarios, which are highly unlikely where the highest market share of any party involved is less than 50%.

In any event, the new Section 7.2 of the Short Form CO referring to information requirements in cases that qualify under the new 50% plus HHI 150 test should be deleted. It would appear that the information requirements listed in Section 7.2 would take away all benefit of simplified procedure in cases where the parties have more than 20% but less than 50% market share, because it requires essentially the same information as would be required if no simplified procedure would be available.

The Commission should clarify that transactions relating to joint ventures without any activity in the European Union do not have any effect in the European Union and do not require notification

The revisions introduced in paragraph 11 of the Notice, and more specifically in the new Section 8.2.2 of the Short Form CO relating to extra-EEA joint ventures highlight a recurring and significant practical problem in EU merger control. Under the current EU Merger Regulation, two parties that form a joint venture may technically meet the EU merger thresholds even where the joint venture has no current or planned sales in the EU. This can lead to unnecessary notifications where a transaction has no real or potential effect in the European Union.

AmCham EU considers that this problem creates significant burden on the parties both in terms of delay to closing and in terms of work required to complete the Short Form CO and the review process with the Commission. In addition, AmCham EU would like to flag that unnecessary notifications may not only be technically triggered based on the text of the notification thresholds in the European Union. Many jurisdictions around the world operate two party thresholds. As many of those jurisdictions look primarily to the Commission for guidance on more complicated procedural or substantive questions, they tend to follow the Commission position on many jurisdictional issues. This means that parties acquiring a gas station in Brazil with no activities outside of Brazil may end up unnecessarily notifying a transaction in not only in the EU but potentially in a variety of jurisdictions around the world at considerable expense and with a significant delay to closing.

As a result, AmCham EU would call on the Commission to clarify that in line with international legal principles a merger notification is not required in situations where

[1]See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para. 17 and 18, OJ C 31 of 5 February 2004, page 5 et seq.

the joint venture does not have a material presence or sales in the European Union, because such a transaction cannot possibly have any potential effect on competition in any discernible market in the European Union.

AmCham EU considers that such a clarification would simply interpret the scope of EU jurisdiction under the EU Merger Regulation and thus does not require a change to the text of the EU Merger Regulation. In this context, AmCham EU would like to highlight the Swiss Notice on the practice of the Swiss competition authorities relating to joint ventures dated 25 March 2009[2]. In this notice, the Swiss competition authority explains that extra-Swiss joint ventures, which do not have any activities or sales in Switzerland and where such activities or sales are not planned or anticipated for the near future, do not require notification. The Swiss competition authority did not consider it necessary to change the merger thresholds for this finding.

In any event, independently of the issue raised above, the Commission should revise Section 8.2.2, which requires additional information on joint ventures that have no activities in the EU. Section 8.2.1 fully covers the relevant activities of the target in the EU. The additional information requested in Section 8.2. is not necessary for any assessment by the Commission and should be deleted. That said, Section 8.2.2 can be useful, where the Commission uses this section to clarify that a joint venture will only require notification where it has material actual or material planned or anticipated future (e.g. within six months of notification) sales into the EU.

Furthermore, AmCham EU considers that the proposed changes in paragraph 11 of the Notice should be deleted. The purpose of the revisions in paragraph 11 of the Notice is not clear. Paragraph 11 postulates that the Commission may consider requesting a full Form CO where a joint venture sells *inputs* for products or services that are ultimately sold into the EU or whether they *may have significant future sales* into the EU. AmCham EU would point out that where there are overlaps between the joint venture and one of its parents, the normal thresholds relating to overlaps would apply. Beyond this, it is unclear how the activities referred to in paragraph 11 of the Notice can raise competition issues.

Furthermore, the reference to *inputs to products sold in the EU* is an entirely new concept and unclear. In particular, it is not clear what level of production would be captured. In the extreme, this could lead to significant uncertainty where it is not clear which input is relevant, a product sold, a direct input or any input, however far removed from the product sold in the EU. For example, assume the joint venture is a mining operation in Australia that does not sell to the EU. The ore is further processed into a metal by a third party in Brazil. A fourth party in Mexico further processes the metal into a car part, and this car part is shipped to Spain for incorporation in a car. Surely the activities of the mining joint venture in Australia do not have any relevance in the EU.

[2]As amended (most recently 3 May 2011), see http://www.weko.admin.ch

AmCham EU appeals to the Commission to review the role, scope and current (mis)use of pre-notification contacts

AmCham EU is extremely concerned about the current state of play regarding pre-notification contacts in practice and as reflected in the proposed amendments. AmCham EU welcomes the clarification that pre-notification contacts are voluntary in paragraph 20 of the Notice. That said, it would appear that the introduction to all forms somewhat reverses this statements and places the parties under the threat of incompleteness if they do not engage in pre-notification contacts.

In practice, it would appear that case teams tend to insist on pre-notification in every single matter as a matter of course. AmCham EU would thus urge the Commission to clarify, e.g. in paragraph 20 of the Notice, that pre-notification is not required, and considered the exception rather than the rule, in cases that qualify for simplified procedure and revise sections 1.3 of Short Form CO and 1.2 of Form CO accordingly to align the statements in paragraph 20 and in the forms and to reflect this. Where the Commission considers pre-notification necessary, even in cases falling under the simplified procedure, one may consider starting with a more limited list of matters where pre-notification clearly is unnecessary. The notice should thus specify that pre-notification is not necessary at a minimum in the following matters:

- Move from joint to sole control;
- Extra EEA joint ventures to the extent they have an effect in the EEA;
- Matters where there is no overlap between the parties; and
- Matters with horizontal or vertical overlaps where the combined market share is less than [e.g. 10%].

Furthermore, AmCham EU considers that the process of pre-notification has developed somewhat of a separate life, thereby counteracting the otherwise fairly tight timelines of the EU Merger Regulation. It should be recalled that the stand-still obligation intended to preserve the status quo pending merger review places a significant burden on the parties to a transaction. The parties have to stand by and wait for EU Commission approval prior to closing an agreed transaction.

It is important to recall that the waiting period places significant burdens on the parties. For instance, during this time, a buyer must stand by and watch unable to take action to respond to new developments, customers may not appreciate the impending uncertainty and may choose to contract with the competition, and acquisition funds need to be kept available sometimes at significant cost.

For these reasons, the EU Merger Regulation sets a precise timeline for the merger review and does not account for a pre-phase ahead of phase 1. In 2004, the legislator reviewed the timeline and prolonged phase 1 from one month to 25 working days and hence considered that 25 working days of phase 1 review should be sufficient for the Commission to gather all required information and to form a view of whether there were significant doubts whether a particular transaction is compatible with the common market.

While pre-notification contacts may be useful in more complex matters, the current practice of the Commission to insist on pre-notification contacts under the threat of

unconstructiveness or the threat of incompleteness essentially adds a phase zero ahead of phase 1. This phase zero has been significantly expanded in recent years, and now pre-notification discussions of three months or more are not uncommon anymore. There is significant doubt whether the current practice is still compatible with the obligations of the Commission to properly administer cases.

In this context, it should also be noted that the current process for the appointment of case teams is entirely unsatisfactory and should be addressed in the present review. As a rule, the Commission should institute a process whereby the appointment of a case team on the day following the request becomes the rule, and a case team is also available on a same day basis in urgent cases as a matter of right. Today, parties are asked to file a case team request by noon on a Friday and do not learn of the identity of the case team by Tuesday or Wednesday of the following week. This means, in matters that are ready for a case team request on, e.g. a Monday, it can take a week or more to even obtain a case team allocation. While the Registrar does point out that case teams can be requested outside of those bounds, it will typically require with the good will on the part of the Commission officials in the relevant units to obtain a case team on shorter notice.

The Commission should consider a true simplification of the notification forms

AmCham EU welcomes most of the proposed changes to Short Form CO, Form CO, and Form RS. In particular the revision of the information required to describe the structure of the transaction and the identification of specific areas for waivers in Form CO are noteworthy. However, some of these changes appear to make the forms more burdensome and should be reconsidered. More generally, the Forms remain very long and highly formalistic, and AmCham EU encourages the Commission to consider allowing parties to notify transactions in a shorter more efficient format.

Make a true Short Form CO available

The notification forms are very cumbersome, especially in simple cases and the proposed changes do not appear to change this. In fact, in some cases it can be more difficult and burdensome to complete a Short Form CO than to complete the full Form CO. A shorter notification form will also allow the case team to focus on the essence of a case and avoid wasting time analysing large amounts of irrelevant information.

AmCham EU proposes significantly simplifying at least the Short Form CO and only request elements that are strictly required for the assessment of a simple merger matter are the following:

- Description of the parties;
- Transaction description;
- Identification of revenues relevant for the assessment of applicable thresholds;
- Potential market definition; and

- Discussion of horizontal or vertical overlaps of the parties. Any additional information or clarification requirements should be addressed in the course of the phase 1 review.

The new concept of 'plausible markets' does not add clarity, causes confusion and uncertainty and should thus be removed

AmCham EU considers that the concept of 'plausible markets' should be removed from the draft notice and notification forms, as it does not add anything to the concept of a relevant market.

The parties will typically consider Commission precedent (whether plausible or not), propose potentially one or more relevant markets and may, from time to time, argue in favour of or against a particular relevant market. However, beyond the existing case law and guidance, the parties do not have any further basis for speculating what other segments may be considered to be plausible by a case team. Therefore, the concept of a plausible market will not add anything to the concept of a potentially relevant market.

If the Commission considers that the relevant market may be different from the markets considered by the parties, the Commission should provide guidance to the parties and request such information.

Section 5 (3) documents should not be required in Short Form CO; and the proposed request for documents discussing unrelated transactions in Sections 5 (3) of Short Form CO and Section 5 (4) of Form CO should be deleted

The revised Short Form CO has been expanded to include a request for Section 5 (4) (in short Form Section 5 (3) documents) in all cases other than joint venture cases. AmCham EU recalls that the simplified procedure is a simplified procedure. It should be less burdensome than the main procedure. The review, compilation and submission of deal documentation can take significant time and resources. In cases where per definition do not raise competition issues, these documents are irrelevant

Furthermore, AmCham EU is significantly concerned about the proposal for Section 5 (4) of Form CO to include 'presentations that analyse different options for acquisitions, including but not limited to the notified concentration'. This requirement would go beyond even the significantly more extensive document requirements under the US-HSR Act, which requires the submission of documents that relate to the notified transaction.

The text captures presentations that have no discernible relevance on a notified transaction. Namely, the plan to acquire an unrelated company is entirely irrelevant for the analysis of the competitive impact of a notified transaction. Further, for many companies it will be practically impossible to comply with such a request. Many companies monitor acquisition opportunities systematically and boards may frequently consider potential targets as a matter of course. This could potentially produce a large amount of documents. Furthermore, the review and analysis of acquisition opportunities may be a matter for various business units or may be restricted to a certain group of people within a company. Thus, it will be impossible to gather all of these entirely unrelated documents.

Finally the type of information relating to third parties who are not party to the transaction being notified is highly sensitive and in some cases stock market relevant. Even within the company of the acquiring party, this information will generally be kept in a very closed group and all of the business people involved in the notification of the transaction that is proceeding may not be aware of some planned transactions.

As a result, AmCham EU calls on the Commission to delete this reference. AmCham EU submits that presentations that relate to the transaction are already captured by the existing text of Section 5 (4).

The request for contact details should be adapted

AmCham EU recalls that business is not supposed to be in regular contact with their competitors. Therefore, a requirement to provide accurate contact details for competitors (in any form) under the sanction of incompleteness is overreaching. AmCham EU would submit that the parties are of course able to provide the contact details for their own customers and suppliers. However, as they are not supposed to have ongoing contacts with their competitors, the parties should at most be required to identify their competitors as far as they are known and to provide contact information that is available from public resources. The requirements should not go beyond this, certainly not under a sanction of incompleteness.

In addition, where contact details are required, AmCham EU would urge the Commission to use the opportunity to adapting required contact details to modern business practices. Written correspondence by letter to a physical address is rarely used anymore and would be too slow for purposes of the merger review in any event. Business fax has been superseded by faster methods such as telephone and email. For this reason, the contact request should be modernised and allow the parties to dispense with identifying a physical address and focus on one of the three faster methods (telephone, fax or email) as an alternative.

Maintain proportionality when threatening to apply the sanction of incompleteness

AmCham EU is concerned about the increase in references to a declaration of incompleteness throughout the revised notice and forms. AmCham EU would suggest including a clarification that a declaration of incompleteness will only be made after the parties have been given an opportunity to rectify the allegedly incomplete or incorrect information. In particular, the new references in the various forms that missing or incomplete contact details will lead to a declaration of incompleteness should be deleted.

AmCham EU wishes to recall that a declaration of incompleteness is issued typically well into phase 1, when the parties have already spent significant time waiting for the appointment of the case team; (normally) in pre-notification; and in phase 1. A

new notification will start the process from zero and will thus add significant additional time to the review schedule of the parties.

A delay in the merger review can have a significant economic impact on the parties, especially in simple cases where, absent competition issues, the parties did not anticipate a delay in the competition review. A worst-case example is for instance the expiry of agreed closing deadlines, including potentially an opportunity for one of the parties to walk away from the transaction (sometimes with a break fee), or expiry or expensive prolongation of available financing arrangements.

AmCham EU does not deny that in some cases, the Commission may need to declare a particular notification incomplete in order to ensure that it can evaluate all necessary facts while preparing the Commission decision. However, such power should not be used lightly. It would appear for instance highly disproportional to declare a Form CO as incomplete only because, e.g. the fax number of a competitor has changed (see e.g. Section 1.4 (c) of the introduction to Form CO).

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AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled €1.9 trillion in 2012 and directly supports more than 4.2 million jobs in Europe.

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