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AmCham EU's response to the European Commission's consultation 'Towards more effective EU merger control'

American Chamber of Commerce to the European Union
Avenue des Arts/Kunstlaan 53, 1000 Brussels, Belgium
Telephone +32 (0)2 513 68 92 Fax +32 (0)2 513 79 28
Register ID: 5265780509-97
Email:info@amchameu.eu

Secretariat Point of Contact: Pierre Bouygues (pbo@amchameu.eu; +32 (0)2 289 10 32)

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The American Chamber of Commerce to the European Union (AmCham EU) welcomes the opportunity to submit comments to the European Commission ('the Commission') consultation 'Towards more effective EU merger control'.

Minority shareholdings

AmCham EU does not see a need to expand the application of the EU Merger Regulation ('EUMR'). On the contrary, and in line with the desire of the Commission to simplify the merger review process, the scope of the EUMR should be more focused and its application more restricted.

The Commission should devote its resources, and consequently request the deployment of business community resources, to transactions and business conduct that have a tangible and a significant risk of adversely affecting competition.

Minority shareholdings at EU level are not a priority issue. In this respect, the Commission's paper raises basically three concerns. First, the Commission claims that certain rights conferred upon a minority shareholder may give 'material influence' over the acquired firm's competitive decisions and that such 'material influence' may fall short of 'decisive influence' under the EUMR. However, nowhere does the paper define the concept of 'material influence'. Most importantly, nowhere does the paper make clear the distinction between 'material influence' and 'decisive influence' and thus the circumstances that would warrant an extension of the EUMR remit.

In fact, it transpires all through the economic models used in the Commission paper that the 'material influence' that raises Commission's concerns practically cannot be distinguished from the concept of 'decisive influence' under the EUMR. According to the paper, to be relevant the 'material influence' has to entail '*the ability to induce the target*' or even '*the possibility to coerce the target*' to do something. This degree of influence does not appear to differ from '*the possibility to determine*' the target's strategic decisions, which characterises the concept of 'decisive influence'. In addition, the paper makes clear that '*to be relevant, such influence relates to a firm's choice of prices, output, and product selection, and other competition variables*'. Hence, to be relevant, the 'material influence' must relate, like the 'decisive influence' under the EUMR, to the target's strategic commercial decisions.

AmCham EU believes that the *Commission Consolidated Jurisdictional Notice*[1] has established a useful framework under which businesses can generally determine whether a specific transaction could lead to the possibility of exercising decisive influence over another undertaking. In the light of the Notice, the concept of 'decisive influence' appears to be wide and flexible enough to cover any scenario that might raise Commission's concerns. AmCham EU does not see a need for the EU to depart from

[1]http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:095:0001:0048:EN:PDF

this established practice, a practice that has been followed in a great number of jurisdictions globally.

The Commission's second concern is that structural links between competitors may lead to information exchange. This in turn may enhance transparency and create or enhance competitors' incentives and ability to engage in tacit collusion. For this reason, the Commission has indicated an extension of the legal approach it applies to find coordinated effects (tacit collusion) in standard merger cases to the acquisition of minority shareholdings.

However, there is a fundamental difference between a standard merger case and the acquisition of a non-controlling minority shareholding in a competitor. In a merger case, the alleged tacit collusion is between the merged entity and the other (or few others) competitors in the market, which are not party to the merger. There are no direct or indirect contacts between them. The market becomes more transparent as a result of the merger and this may give rise to tacit collusion without the need for agreements or concerted practices between competitors. By contrast, the tacit collusion that concerns the Commission is between the minority shareholder and the target in which the stake is acquired and derives from the exchange of information that takes place through direct contacts between them via board of directors, shareholders or other meetings.

This key difference makes it completely unnecessary to extend the legal approach on tacit collusion under the EUMR to the acquisition of a minority shareholding in a competitor. The Commission currently has appropriate and sufficient legal tools to address the anti-competitive effects arising from exchange of information due to the structural links between competitors. The meetings in which information is exchanged, and that may give rise to coordination, could be addressed under Article 101 TFEU; and any relevant exchange of information taking place within them can lead to a collusive outcome penalised by this provision.

The third Commission concern is that the mere holding of a minority financial interest in a competitor or in an upstream/downstream company may have anticompetitive effects, such as an incentive for the minority shareholder to compete less aggressively. However, the Commission recognises that this view is based on theoretical considerations that have not yet been sufficiently tested in practice and would arise only in very exceptional circumstances.

Yet, the Commission has gathered a number of merger cases that arguably support the proposition that there exist some structural links that may both generate anticompetitive concerns and fall short of the EUMR remit. These cases relate to structural links pre-existing the merger that the Commission was assessing. The Commission is of the view that, if the relevant minority shareholding had been acquired after the Commission examined the relevant merger, it would have had no legal basis to deal with the competition concerns raised by that minority shareholding. Respectfully, AmCham EU does not consider the selection of cases to form a compelling basis in support of the Commission's view.

The Siemens/VA Tech merger is an example of alleged anti-competitive concerns arising out of information exchanges that may well have been dealt with under Article

101 TFEU. In IPIC/MAN Ferrostaal and in AXA/GRE, the relevant pre-existing structural links gave rise to 'decisive influence' and thus the Commission could have very well scrutinised the acquisition of the minority shareholding had it occurred after the merger under assessment. In other cases, either the structural link did not produce any anti-competitive effect (e.g. Andritz/Schuler), or it is unclear to what extent the anticompetitive concerns derived from the structural link (e.g. Glencore/Xstrata), or in a stricter approach the Commission could have found that the pre-existing structural link gave rise to 'decisive influence' and thus it could have been assessed under the EUMR (e.g. Toshiba/Westinghouse).

In any event, extending the EUMR to cover structural links would bring about significant negative consequences for both the parties to the transaction and the Commission itself. The Commission proposes three options: 'notification', 'self-assessment' and 'transparency' systems. Under the 'notification system' the parties would have to undertake the cumbersome notification process and the Commission would have to dedicate significant resources scrutinising transactions that for most part would not be found to be anti-competitive. This would be regressive and contrary to the modernisation trend that has dominated EU competition law in the last decade. Under the 'transparency system' the parties and the Commission would be again exposed to the burdens (albeit lighter) of a notification process. In addition, this system would entail a high degree of legal uncertainty on the parties since they will have the obligation to ascertain whether the transaction constitutes a '*prima facie problematic structural link*'. Finally, under the 'self-assessment system', the parties would have to live with the legal uncertainty that a transaction that does not meet the 'safe harbour' could be investigated at any time. In this situation, very clear guidelines would be required as to when structural links outside the 'safe harbour' may be anti-competitive. The Commission would also have to spend considerable resources even under the self-assessment system, since it would have to keep in place a proper market intelligence gathering mechanism that would allow it to spot potential problematic structural links.

The above should be assessed as against the challenging background that the Commission currently faces regarding the existing flow of filings and the tight schedules established by the EUMR, which are necessary to enable transactions not to be unduly delayed. Extending the EUMR to cover structural links may well put at risk the timely and correct assessment of much higher priority cases.

The great difficulty of finding a one single all-embracing 'safe harbour' that would determine which 'structural links' may raise concerns under fundamentally different scenarios (corporate rights, information exchange, mere holding a financial interest) and thus be subject to the Commission's scrutiny under any of the options, constitutes a major additional problem.

When all the above negative consequences are balanced against the three Commission concerns, and thus against the uncertain benefits of capturing a very few number of exceptional structural links, which might be potentially harmful on the basis of untested theoretical economic models, the adoption of any proposed option would appear truly disproportionate. In this respect, AmCham EU observes that US data from the most recent fiscal year shows 228 notified minority 'acquisitions' in the U.S. and zero in-depth 'Second Request' investigations with respect to those 'acquisitions'.

In summary, AmCham EU is of the view that extending the scope of the EUMR to give the Commission the option to intervene in cases involving the acquisitions of non-controlling minority shareholdings is not warranted. Consistent with the legal requirement to ensure that all business transactions, including potential minority shareholdings, comply with the requirements of competition law (specifically Article 101 TFEU and the concept of 'decisive influence' under the EUMR), businesses today conduct self-assessments. AmCham EU is of the opinion that the current requirements generally have proven to be effective.

However, if the Commission were to pursue an amendment to the EUMR - in spite of the certain significant burdens that fall upon businesses and the Commission alike, and the highly uncertain benefits, if any, that would be derived from including minority shareholdings under the EUMR – AmCham EU would urge the Commission to implement the least intrusive changes. Notably, any requirement to inform the Commission must be based on clear and objective standards, be post-acquisition, and entail no formal notification or suspension requirement.

Referrals

Article 4(5)

AmCham EU welcomes the Commission's desire to make the referral system under the EUMR 'quicker and leaner'.

Many businesses initially welcomed the possibility to refer a case to the European Commission for review, thereby avoiding burdensome and costly local merger reviews. However, AmCham EU maintains its established position that most companies are discouraged from using Article 4(5) ECMR when confronted with the timeline and the need to produce two separate forms (Form RS and Form CO) with pre-notification discussions for both forms.

AmCham EU supports the Commission's suggestion that the Commission would have jurisdiction unless a Member State that is competent to review the transaction exercises its veto.

Removal of the need to submit an initial 'Form RS' and an immediate 'Form CO' filing is similarly supported.

The Commission's suggestion to shorten the consultation period is another welcome proposal. AmCham EU proposes shortening the Member State review period to five working days, and that the formal review period starts from the date of submission of Form CO to the Commission. The suggested informal advance notice to the Member States concerned during pre-notification (to the extent possible, where confidentiality can be ensured) and five working days should be more than sufficient for the agencies involved.

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However, AmCham EU would also urge a review of the veto system. Where at least one Member State opposes a referral, the referral request is refused. While we understand the potential need for the Member States to be able to voice their concerns, we consider this possibility for a single Member State to veto a referral request to be disproportionate and we recommend that a referral can only be refused if a majority, or all, national competition authorities (NCA) back such a severe decision.

In any event, if a veto is used against the merging parties, AmCham EU recommends that the NCAs in question accept Form CO as a notification (this should not disallow the NCAs from seeking additional input where required and request additional information to be provided in the language of the Member State). Although this would mean the NCAs departing from their practice as requiring merger notifications to be made in the forms established by the NCAs themselves, AmCham EU acknowledges that the scope of the Form CO is very comprehensive and is not aware of material and additional information that would be required in the forms used by the NCAs. Acceptance of the Form CO in the case of a veto would appear appropriate given this fact, as well as the significant resources and costs that are deployed for the drafting of a Form CO (and the additional, very significant resources that would be required for re-creating the substance of such a Form CO in separate NCA notification forms).

AmCham EU sees similar room for improvements with regard to Article 4(4) EUMR. The same considerations apply.

Finally, AmCham EU notes that even if the above reforms were to be implemented, parties would not benefit from an early and efficient decision on place of review. Ideally, such a decision could be possible at a much earlier stage, prior to the formal filing of a Form CO. One solution could be that the parties to a transaction provide a simpler notice at an earlier stage in the process and trigger a five working-day review period after which the parties would have a final position on place of review and whether the Form CO will actually be the basis for notification of the transaction.

Article 22

Article 22 EUMR was originally introduced to allow for mergers to be referred to the Commission by those Member States that lacked merger control regimes.

This situation has since changed, with all Member States except Luxembourg having merger control rules in place. It is therefore not unreasonable to claim that Article 22 ECMR has lost its original purpose and should be removed from the EUMR.

After recent reforms to the EUMR, and the introduction of Article 4(5) ECMR, there was a general expectation that Member States would no longer resort to using Article 22 ECMR. On the contrary, we note that the use of this post-notification referral procedure continues to be used and, unfortunately, abused (with Member States referring cases for which they have no jurisdiction).

A subsequent decision to refer a notified case to the Commission under Article 22 EUMR would be adverse to the interests of the merging parties, cause significant

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additional administrative burdens and cost, and result in significant timing concerns. Should the Commission and the Member States be reluctant to extinguish Article 22 EUMR, there should be safeguards built into system, notably:

- As proposed by the Commission, only those Member States that have the competence to review a transaction under their domestic merger control rules should be entitled to refer a transaction. This is a reasonable requirement. Where Member States believe their national thresholds require amendment to capture further transactions, these Member States have the freedom to adapt their thresholds accordingly, at all times respecting international best practice, *inter alia* the ICN Recommended Practices.

- A Member State would have an obligation to inform the parties of its decision to refer a matter within five working days. AmCham EU believes five working days would be more than reasonable for an NCA to assess whether a referral would be warranted, as it should be so eminently clear from the character of the transaction notified that exceptional circumstances needed for a referral exist. We would respectfully submit that a possibility to wait with such a decision for 15 working days (as currently provided for in the EUMR, and where no change is foreseen in the Commission's consultation document) is nothing but poor administration, which has a significant negative effect on business.

- Any proposal to refer must be reasoned and should, in view of the adverse effect to the parties, be subject to hearing the parties in advance.

- As suggested by the Commission, partial referrals and parallel jurisdiction are undesirable. The current system is impractical and confusing. AmCham EU endorses the Commission's suggestion that an accepted referral should lead to the Commission assuming exclusive jurisdiction. However, further to the comments made above with respect to Article 4(5), the ability of a single Member State to effect the referral of a transaction (or the case of an Article 4(5) referral request, veto a business desired referral), does not appear reasonable. Should a single Member State request a referral of a transaction, as originally notified in multiple Member States, there should be a requirement that the majority, or indeed all other Member States competent to review the transaction also agree to such a referral.

Miscellaneous

AmCham EU welcomes the Commission's proposal to consider whether transactions relating to joint ventures (JV) without any activity in the European Economic Area ('**EEA**'), and which do not have any effect in the EEA, should not require notification.

Under Article 1 EUMR, a concentration can only have a Community dimension where at least two of the undertakings concerned have revenues in the EU. However, this can lead to a view that a JV, where both parents meet the thresholds, but the JV has no appreciable activities in the European Union, may be considered notifiable.

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The Commission has itself recognised this inadvertent extraterritorial reach as a problem in the past, although refrained from addressing the issue in its most recent review of the EUMR.

The provision is problematic, not only because of its apparent non-conformity with *inter alia* the ICN's Recommended Best Practices for Merger Notification Procedures (requiring jurisdiction to be asserted only over those transactions that have an appropriate nexus and an appropriate level of materiality with the jurisdiction concerned), but also because of the Commission's leadership globally on competition policy. AmCham EU has noted that certain other jurisdictions have followed suit in this regard, which continues to cause very significant disruptions and immense cost to business. A very clear step towards removing the need for such notifications is a top priority and must be addressed in this review.

AmCham EU encourages the Commission to take the necessary steps to clarify that in line with internationally accepted best practices, the Commission does not take jurisdiction in cases where a JV has no effect in the European Economic Area (EEA). The EUMR could be revised to clarify that the creation of a JV does not have Community dimension when the JV itself would not have appreciable activities in the EEA.

It is important that the EUMR be adapted so that JVs be treated similarly to other merger and acquisition activities for merger filing purposes. Acquisitions of sole control today trigger filing requirements where inter alia the target has presence through material revenues in the EEA. The EUMR should similarly only be triggered in acquisitions of joint control where the target JV or the contributed businesses/assets meet clearly defined thresholds in the EEA. AmCham EU therefore proposes that a filing obligation should arise where the JV itself meets turnover thresholds in the EUMR, in addition to the parents. A JV or the contributed businesses/assets should generate at least €100 million in the EEA for a notification requirement to arise. This would bring the EUMR into conformity with ICN Recommended Practices with respect to material local nexus.

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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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