

AmCham EU Consultation Response on evaluation of procedural and jurisdictional aspects of EU merger control

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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 more than €2 trillion in 2015, directly supports more than 4.3 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

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13 January 2017

1. The Merger Regulation provides for a one stop shop review of concentrations. Several categories of cases that are generally unlikely to raise competition concerns and falling under point 5 or 6 of the Notice (see above) are treated under a simplified procedure. To what extent do you consider that the one stop shop review at EU level for concentrations falling under the simplified procedure has created added value for businesses and consumers? Please rate on a scale from 1 to 7.

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The simplified procedure has created considerable added value compared to the pre-2014 situation, but there is still considerable potential for further simplification.

2. In your experience, and taking into account in particular the effects of the 2013 Simplification Package, has the fact that the above mentioned categories of merger cases are treated under the simplified procedure contributed to reducing the burden on companies (notably the merging parties) compared to the treatment under the normal procedure?

(i) Mergers without any horizontal and vertical overlaps within the EEA or relevant geographic markets that comprise the EEA, such as worldwide markets (transactions falling under point 5b of the Notice);

(ii) Mergers leading only to limited combined market shares or limited increments or to vertical relationships with limited shares on the upstream and downstream markets within the EEA or relevant geographic markets that comprise the EEA (transactions falling under point 5c or point 6 of the Notice);

(iii) Joint ventures with no or limited activities (actual or foreseen), turnover or assets in the EEA (transactions falling under point 5a of the Notice);

(iv) Transactions where a company acquires sole control of a joint venture over which it already has joint control (transactions falling under point 5d of the Notice).

The simplified procedure has reduced the burden on companies compared to the “normal” procedure, in particular taking account of the 2013 Simplification Package. However, we believe there is still potential for additional simplification.

3. As indicated, the Commission may decide not to accept a proposed concentration under the simplified procedure or revert at a later stage to a full assessment under the normal merger procedure. Have you dealt with or otherwise been involved in merger cases notified to the European Commission in the last five years that changed from simplified treatment under the Notice to the normal review procedure?

(i) In the pre-notification phase:

(ii) Post notification:

Although AmCham EU is not directly involved with merger cases, AmCham EU members have been involved in cases that changed from the simplified procedure to the normal review procedure.

4. Have you dealt with or otherwise been involved in any merger cases which fell under the relevant categories of cases listed in question 2 and was thus potentially eligible for notification under the simplified procedure but where, from the outset, the parties decided to follow the normal review procedure?

Although AmCham EU is not directly involved with merger cases, AmCham EU is not aware of any members having decided from the outset to follow the normal review procedure in the case of a transaction qualifying for the simplified procedure.

5. Based on your experience, do you consider that, beyond the types of cases listed in question 2, there are any other categories of cases that are generally not likely to raise competition concerns but do not currently benefit from the simplified procedure?

AmCham EU respectfully suggests that the Commission review cases that did not qualify for the simplified procedure because the parties' combined market shares were slightly over the applicable thresholds and assess whether those cases were determined to be unproblematic or not. If the outcome of such review shows that the vast majority of those cases were indeed unproblematic, the Commission may want to consider raising the thresholds.

6. The main objective of the Merger Regulation is to ensure the review of concentrations with an EU dimension in order to prevent harmful effects on competition in the EEA. Do you consider that the costs (in terms of workload and resources spent) incurred by businesses when notifying the cases that fall under the simplified procedure (listed in question 2 above) have been proportionate in order to achieve this objective of the Merger Regulation?

- **Transactions falling under point 5a of the Notice:**
- **Transactions falling under point 5b of the Notice:**
- **Transactions falling under point 5c or point 6 of the Notice:**
- **Transactions falling under point 5d of the Notice:**

While the simplified procedure has reduced the workload and resources spent by businesses when notifying transactions, AmCham EU submits that these costs continue to be disproportionate in certain cases where we believe that there is room for further simplification.

7. To which extent have such costs (in terms of workload and resources spent) been reduced by the 2013 Simplification Package? Please explain.

Although AmCham EU is not directly involved with merger cases, AmCham EU members have benefitted from reduced costs under the 2013 Simplification Package, although they are not in a position to quantify the benefit.

8. On the basis of your experience on the functioning of the Merger Regulation, particularly after the changes introduced with the 2013 Simplification Package, and your knowledge of the enforcement practice of the Commission in recent years, do you consider that there is currently scope for further simplification of EU merger control without impairing the Merger Regulation's objective of preventing harmful effects on competition through concentrations?

8.1 Exempting one or several categories of the cases listed in question 2 above (and/or any other categories of cases) from the obligation of prior notification to the Commission and from the standstill obligation; in those cases, the Commission would not adopt a decision under the Merger Regulation;

AmCham EU supports the proposal to exempt categories of transactions eligible for the simplified procedure from the obligation of prior notification to the Commission and from the standstill obligation, provided that the relevant transactions would not thereby become subject to notification under EU Member State merger review laws. Otherwise, this proposal could have the unintended effect of increasing the burdens on companies rather than decreasing them. Some of such transactions could be subject to review under the laws of three or more EU Member States and thus be eligible for a voluntary referral request. To avoid such a circular result or increasing the burdens on business, it would be important to clarify that transactions qualifying for the exemption but meeting the EUMR thresholds would still be covered by the EUMR's one-stop-shop.

8.2 Introducing lighter information requirements for certain categories of cases listed in question 2 above (and/or any other categories of cases), notably by replacing the notification form by an initial short information notice; on the basis of this information, the Commission would decide whether or not to examine the case (if the Commission does not to examine the case, no notification would need to be filed and the Commission would not adopt a decision);

AmCham EU supports the proposal to introduce a lighter information requirement for categories of transactions eligible for the simplified procedure, as an alternative to or in combination with the proposal to exempt certain such transactions from the obligation of prior notification to the Commission and from the standstill obligation, again provided that the relevant transactions would not thereby become subject to notification under EU Member State merger review laws if the Commission decides not to investigate such transactions and not to adopt a decision. AmCham EU notes that to yield the intended benefits the categories of transaction qualifying for the "short information notice" approach would need to be clearly defined, the deadline for the Commission to determine whether to require a full notification would need to be short, and the information to be provided in the notice limited to objective, readily available information. For example, the short information notice could be based on the current form of case allocation request form. AmCham EU notes that any form of information notice requiring an analysis and description of antitrust markets and shares would continue to impose significant burdens on companies because of the uncertainty involved in defining such markets and the frequent difficulty of obtaining reliable market data (or to provide such data in the granularity or format asked by the Commission).

8.3 Introducing a self-assessment system for certain categories of cases listed in question 2 above (and/or any other categories of cases); under such system, merging parties would decide whether or not to proceed to notify a transaction, but the Commission would have the possibility to start an investigation on its own initiative or further to a complaint in those cases where it considers it appropriate in so far as they may potentially raise competition concerns;

AmCham EU would support the proposal to introduce a self-assessment system for certain categories of transactions eligible for the simplified procedure, with the possibility that merging parties could decide not to proceed to notify a transaction and be excused from the standstill obligation, again provided that the relevant transactions would not thereby become subject to notification under EU Member State merger review laws, although AmCham EU notes that the other proposed approaches (exemption or short information notice) would be preferable from the perspective of offering parties legal certainty. If the Commission would still have the possibility of starting an investigation where it considers appropriate, it would be important to ensure legal certainty by providing a short time limit for the opening of such investigations.

9. The creation of joint ventures operating outside the EEA and having no effect on competition on markets within the EEA ("extra-EEA joint ventures") can be subject to review by the European Commission. In your experience, has this fact contributed to protecting competition and consumers in Europe?

AmCham EU submits that the EUMR's treatment of joint ventures operating outside the EEA has not contributed to protecting competition and consumers in Europe, but has imposed significant burdens on companies subject to notification requirements in such cases.

10. Has this one stop shop review at EU level of extra-EEA joint ventures created added value for businesses and consumers?

Notwithstanding its response to question 9, AmCham EU acknowledges that the EU one-stop-shop for extra-EEA joint ventures can create value where an extra-EEA joint venture could trigger multiple Member State notifications if it were not subject to the EUMR. AmCham EU notes, however, that such cases are likely to be rare.

11. Do you consider that the costs (in terms of workload and resources spent) incurred by businesses when notifying extra-EEA joint ventures are adequate and proportionate in order to ensure an appropriate review of concentrations with an EU dimension in order to prevent harmful effects on competition in the EEA?

AmCham EU submits that the workload and resources involved in businesses notifying extra-EEA joint ventures are disproportionate to the need for an appropriate review of concentrations having an EU dimension, given the very low likelihood that such joint ventures will have harmful effects on competition in the EEA.

12. To which extent have such costs been reduced by the 2013 Simplification Package? Please explain.

AmCham EU believes that the costs involved in notifying extra-EEA joint ventures have been reduced by the 2013 simplification package, but is not in a position to quantify the savings involved compared to the pre-2014 situation.

13. On the basis of your experience on the functioning of the Merger Regulation, particularly after the changes introduced with the 2013 Simplification Package, do you consider that the treatment of extra-EEA joint ventures is sufficiently simplified and proportionate in view of the

Merger Regulation's objective of preventing harmful effects on competition through concentrations or is there scope for further simplification?

Further simplification could be realised by:

- (i) Excluding extra-EEA joint ventures from the scope of the Merger Regulation;**
- (ii) Introducing, for the treatment of extra-EEA joint ventures, an exemption from notification, or a light information system, or a self-assessment or any other system?**

AmCham EU supports the further simplification of the EUMR treatment of extra-EEA joint ventures, including by means of an exemption from notification, a light information system or a self-assessment system (although as noted a self-assessment system would be less attractive because it would offer less legal certainty). It would be important, however, to clarify that the EUMR one-stop-shop would continue to apply to such joint ventures. For that reason, AmCham EU submits that further simplification, in particular through an exemption from notification or a self-assessment system, would be preferable to exclusion of such joint ventures from the scope of the EUMR, which AmCham EU understands would mean that the EUMR one-stop-shop would no longer apply to them.

Another approach to be considered in this connection would be to re-examine the concept of “undertaking concerned” for purposes of application of the EUMR turnover thresholds. A different approach, consistent with the approach taken in many other jurisdictions, would be to define the undertakings concerned as the undertaking(s) acquiring control and the undertaking over which control is acquired. This approach would also eliminate the issue of joint ventures with little or no connection to the Union triggering EUMR filing requirements.

14. In your experience, have you encountered competitively significant transactions in the digital economy in the past 5 years which had a cross-border effect in the EEA but were not captured by the current turnover thresholds set out in Article 1 of the Merger Regulation and thus fell outside the Commission's jurisdiction?

AmCham EU is not aware of any competitively significant transactions in the digital economy that had a cross-border effect in the EEA but fell outside the Commission's jurisdiction. AmCham EU notes that certain transactions that were not captured by the current turnover thresholds, such as Facebook/WhatsApp, did become subject to the Commission's jurisdiction, while other transactions, such as Facebook/Instagram, were reviewed at the Member State level. AmCham EU is not aware of any transaction considered significant from an antitrust perspective that was not subject to review by at least one competent EEA authority. AmCham EU notes that the ECN already provides a mechanism for the Commission and other interested authorities to be consulted where a transaction considered to have cross-border effects in the EEA is caught by the merger review rules of one or more Member States but not by the EUMR.

More generally, AmCham EU respectfully submits that it is not, and has never been, the objective of the thresholds set out in Article 1 of the Merger Regulation to capture all transactions that are potentially competitively significant and have a cross-border effect in the EEA. Rather, these thresholds were intended to provide a clear and objective test to capture the transactions most likely to be significant, recognizing that the EEA Member States can and will define other thresholds to capture transactions that fall outside the Commission's jurisdiction. Bearing in mind the Commission's [Best Regulation Guidelines](#), and given the significant burden that any expansion of scope of the EUMR

notification thresholds will create, AmCham EU respectfully submits that any deviation from this approach should be based on a careful, prior analysis of whether the current division of jurisdiction has resulted in any anti-competitive transactions (not only potentially “significant”) not being reviewed by either the Commission or one or more Member State authorities.

15. In your experience, have you encountered competitively significant transactions in the pharmaceutical industry in the past 5 years which had a cross-border effect in the EEA but were not captured by the current turnover thresholds set out in Article 1 of the Merger Regulation and thus fell outside the Commission's jurisdiction?

AmCham EU is not aware of any competitively significant transactions in pharmaceutical sector that had a cross-border effect in the EEA but fell outside the Commission’s jurisdiction.

16. In your experience, have you encountered competitively significant transactions in other industries than the digital and pharmaceutical sectors in the past 5 years which had a cross-border effect in the EEA but were not captured by the current turnover thresholds set out in Article 1 of the Merger Regulation?

No.

17. In your experience and in light of your responses to the previous questions (14 to 16), are the possible shortcomings of the current turnover-based jurisdictional thresholds of Article 1 of the Merger Regulation (in terms of possibly not capturing all competitively significant transactions having a cross-border effect in the EEA) sufficiently addressed by the current case referral system (including the pre-notification referrals to the Commission under Article 4(5) of the Merger Regulation and the post-notification referral to the Commission under Article 22 of the Merger Regulation)?

AmCham EU is not persuaded that the current turnover-based jurisdictional criteria in the EUMR involve shortcomings requiring changes to the EUMR’s definition of concentrations having a Union dimension. The EUMR’s turnover-based criteria were adopted because they are objective, relatively easy to apply and reflect a rough measure of the significance of the undertakings concerned to the EEA economy and the potential for combinations of such parties to have an effect on competition.

To the extent these thresholds resulted in potentially excluding transactions that could have anti-competitive effects, if any, Article 4(5) EUMR provides further protection against those transactions having potential cross-border effects in the EEA falling outside EU jurisdiction. Where a transaction does not have a Union dimension, Member States are free under EU law to define which jurisdictional thresholds best reflect the potential of a transaction to affect competition in its territory. Article 4(5) reflects a realization that review by the Commission may be appropriate where a transaction would be subject to review in three or more Member States. The Facebook/WhatsApp case, as well as many others in the digital economy and pharmaceutical sectors, indicate that this mechanism works well.

18. Do you consider that the current absence, in the Merger Regulation, of complementary jurisdictional criteria (i.e. criteria not based exclusively on the turnover of the undertakings concerned) impairs the goal of ensuring that all competitively significant transactions with a cross-border effect in the EEA are subject to merger control at EU level?

As noted, AmCham EU respectfully disagrees that the goal of the jurisdictional thresholds set out in Article 1 of the Merger Regulation is to ensure that all competitively significant transactions with a cross-border effect in the EEA are subject to merger control at EU level. On the contrary, these thresholds were designed to provide a clear and objective basis for EU jurisdiction, recognizing that EEA Member States can and would define their own complementary thresholds.

AmCham EU respectfully submits that any extension of mandatory notification requirements should be considered only after it is established that there is currently a gap in jurisdiction that results in a significant impact (or any) on the functioning of the Single Market. AmCham EU notes that any broadening of thresholds risks having a disproportionate impact on incentives to engage in pro-competitive transactions given the increased cost, delay in closing and possible commercial uncertainty that result whenever a new regulatory burden is introduced.

AmCham EU also respectfully recalls that EU initiatives in the area of merger control are commonly emulated by other competition authorities around the world. The extension of the Commission's relatively front-loaded, burdensome system of merger review to transactions in which one or both parties have very limited activities in the EU would set a precedent that would multiply the burdens for business around the world if the Commission's approach were widely adopted.

19. In particular, do you consider that the current absence, in the Merger Regulation, of a complementary jurisdictional threshold based on the value of the transaction ("deal size threshold") impairs the goal of ensuring that all competitively significant transactions with a cross-border effect in the EEA are subject to merger control at EU level?

AmCham EU is not aware of evidence that high-value transactions that do not meet the turnover thresholds are any more likely to have cross-border effects on competition in the EEA than lower value transactions. Indeed, a company's willingness to pay a high purchase price for a target with turnover below the EUMR thresholds arguably implies less of a competition issue rather than more, since the high value likely reflects complementarities between the parties' businesses.

AmCham EU respectfully notes that the introduction of a deal-size threshold in the context of the EUMR would raise numerous technical questions, including (i) how to assess the "deal size" in transactions where the consideration includes securities whose value may fluctuate (where the securities are publicly traded) or not be readily determinable (where the securities are not regularly traded), (ii) whether only the value of securities or assets whose ownership will change as a result of the transaction should be taken into account, or also other undertakings (such as the value of shares or assets held by other undertakings already exercising sole or joint control over the target), and (iii) whether the deal size threshold would be met only where an undertaking acquires control over the target within the meaning of the EUMR. As discussed in more detail below, introducing a deal-size threshold would also require introduction of supplemental tests to avoid notification requirements being extended to transactions with no substantial nexus to the EU, raising further complex issues. Given the significant costs and potential for unintended consequences in extending mandatory notification requirements to transactions that don't meet the EUMR thresholds, it would also be important to assess the levels at which any such deal-size threshold and local nexus requirements are set in light of the number of transactions that would likely be captured and the potential for such transactions to raise competition issues.

AmCham EU notes that, to the extent a transaction involving payment of a high price not reflected in the purchase price were to raise substantive antitrust issues, such issues would presumably revolve around the potential for the transaction to impede potential competition, rather than actual competition. In its Horizontal Merger Guidelines, the Commission notes that acquisition of a potential competitor can generate anti-competitive effects if the target possesses assets that could easily be used to enter the market without incurring significant sunk costs or is very likely to incur the necessary sunk costs to enter the market in a relatively short period of time. AmCham EU notes that in high-value transactions it is often not possible for the target to become a significant constraint on the acquirer quickly or without significant investments, and the target would often lack the resources (absent the acquisition) to do so in a short period of time.

AmCham EU respectfully recommends that in its further work in this area the Commission consider how the potential theories of harm to potential competition would relate to a possible transaction-value threshold and whether such a threshold would be likely to capture a sufficient number of cases raising significant competition issues to outweigh the burden on companies of imposing an additional notification requirement. AmCham EU further suggests that the Commission consider what remedies could be suitable to address serious doubts it may identify where the target has little or no turnover, as well the potential economic effects of such remedies. For example, the prospect of mandatory licensing of target intellectual property rights being imposed could significantly reduce the value of such assets to the acquirer and diminish the incentive to invest in new technology. This exercise would be helpful in assessing whether the addition of a new deal-size threshold would be proportionate to the perceived risks of the current thresholds.

In any event, AmCham EU notes that it would likely be necessary for the Commission to review the current Form CO and notices on assessment of horizontal and vertical mergers, which are less clear on the information required to assess the impact of notified transactions on potential competition or the theories of harm the Commission may apply in such case. AmCham EU also notes the difficulties the Commission would face in market testing theories of harm based (solely) on threats to potential competition. Comments from customers and competitors would necessarily be speculative, and it would be difficult for Commission case teams to assess the likelihood of any concerns expressed in the market test materializing.

20. If you replied yes to question 19, which level of transaction value would you consider to be appropriate for a deal size threshold? Please explain your answer.

If a deal-size threshold is introduced into the EUMR jurisdictional criteria, AmCham EU submits that it should be set high enough to make clear that only exceptional transactions would meet the threshold. AmCham EU notes that the transactions referenced by the Commission as potentially suggesting the need for such a threshold are valued at around USD 20 billion.

21. If you replied yes to question 19, what solutions do you consider appropriate to ensure that only transactions that have a significant economic link with the EEA ("local nexus") would be covered by such a complementary threshold? In responding, please consider that the purpose of this deal size threshold would be to capture acquisitions of highly valued target companies that do not (yet) generate any substantial turnover.

- A general clause stipulating that concentrations which meet the deal size threshold are only notifiable if they are likely to produce a measurable impact within the EEA, complemented by specific explanatory guidance.

AmCham EU respectfully submits that if a deal-size threshold is introduced in the EUMR, it would be important to complement such a threshold with an appropriate local nexus test to ensure that transactions that are unlikely to have a significant impact in the EU are excluded. Any such local nexus test should be objective and easy to apply. AmCham EU notes with concern that the local nexus test proposed to be implemented in Germany is likely to create significant legal uncertainty.

- **Industry specific criteria to ensure a local nexus.**

AmCham EU respectfully submits that the use of industry-specific criteria to ensure a local nexus should be avoided. Such criteria are likely to be defined based on perceptions of issues that made past transactions significant (though not necessarily from an antitrust standpoint). It is impossible to predict whether the same criteria will be important in future transactions. The Commission could be put in a position of constantly trying to adapt existing industry-specific criteria based on characteristics that are not recognized as important today and/or proposing new ones for different sectors as and when high-value transactions become common in other sectors as a result of industry trends.

- **Other**

AmCham EU notes that the U.S. system exempts acquisitions of non-US shares or assets where the target does not have significant turnover or assets in the US (currently about USD 78 million). AmCham EU encourages the Commission to consider following a similar approach in case it decides to pursue the inclusion of a deal-size threshold. AmCham EU also encourages the Commission to clarify that the simplified procedure, including the proposed improvements discussed in this consultation, would apply to transactions caught by virtue of a potential new deal-size threshold.

22. If you replied yes to question 19, would you see a need for additional criteria limiting the scope of application of this deal size threshold in order to ensure a smooth and cost-effective system of EU merger control?

- **A minimum level of aggregate worldwide turnover of all undertakings concerned.**

If the Commission decides to pursue introduction of a deal-size threshold in the EUMR, AmCham EU submits that the existing aggregate worldwide turnover threshold should still apply to such transactions. AmCham EU notes that this aggregate worldwide turnover threshold is not an alternative to a local nexus requirement as discussed in question 21, but a complement to such a threshold.

- **A minimum level of aggregate Union-wide turnover of at least one of the undertakings concerned.**

Again, if the Commission decides to pursue introduction of a deal-size threshold in the EUMR, AmCham EU submits that it would be appropriate to also require a minimum level of aggregate Union-wide turnover. AmCham EU submits, however, that such a threshold should apply to the buyer, not “at least one” of the undertakings concerned. The rationale of including a deal-size threshold, as AmCham EU understands it, would be to capture transactions in which the size of the deal indicates a competitive significance for the target that is not reflected in its turnover. A transaction in which the target has a significant Union-wide turnover but the buyer does not would not fit this profile, and it would seem logical to apply the existing turnover thresholds. Again, AmCham

EU notes that this aggregate worldwide turnover threshold is not an alternative to a local nexus requirement as discussed in question 21, but a complement to such a threshold.

- **A maximum level of the worldwide turnover of the target business, in cases where the latter does not meet the Union-wide turnover thresholds (with the aim of only covering highly valued transactions where the target has a strong potential for instance to drive future sales but not cases where the target already generates significant turnover but outside of the EEA).**

Again, if the rationale of including a deal-size threshold would be to capture transactions in which the size of the deal indicates a competitive significance for the target that is not reflected in its turnover, it seems inappropriate to apply a worldwide turnover threshold to the target business. If the target has significant turnover, it would seem logical to apply the existing turnover thresholds. Again, AmCham EU notes that this aggregate worldwide turnover threshold is not an alternative to a local nexus requirement as discussed in question 21, but a complement to such a threshold.

- **The requirement that the ratio between the value of the transaction and the worldwide turnover of the target exceeds a certain multiple. (Example: transaction value = EUR 1 billion, worldwide turnover of the target = EUR 100 million, ratio/ multiple = 10. The aim of this requirement would be to identify transactions where the valuation of the target company exceeds its annual revenues by several multiples, which could signal high market potential of the target.).**

In AmCham EU's view, the proposed measure would not be suitable because it does not reflect the competitive significance of a transaction in the EEA. As mentioned before, the value of a target company is a very subjective factor, and does not necessarily signal "high market potential" of the target. Moreover, the "high market potential" that the Commission refers to is often not inherent to the target company as such, but only gets created as a consequence of the acquisition or transaction (as such value arises from the complementarity of products or services, as mentioned above).

- **Other.**

23. Do you consider that the current case referral mechanism (i.e. Articles 4(4), 4(5), 9, and 22 of the Merger Regulation) contributes to allocating merger cases to the more appropriate competition authority without placing unnecessary burden on businesses?

AmCham EU agrees that the current case referral mechanisms contribute to an appropriate allocation of merger cases, but submits that there is room for improvement in these mechanisms to reduce burdens on business.

24. If you consider that the current system is not optimal, do you consider that the proposals made by the White Paper would contribute to better allocating merger cases to the more appropriate competition authority and/or reducing burden on businesses?

AmCham EU agrees that the proposals in the White Paper – in particular eliminating the two-step process for a voluntary referral under Article 4(5) of the EUMR – would be an appropriate means of reducing the burden on business.

25. Do you consider that there is scope to make the referral system (i.e. Articles 4(4), 4(5), 9, and 22 of the Merger Regulation) even more business friendly and effective, beyond the White Paper's proposals?

AmCham EU supports the improvements to the referral system proposed in the White Paper. AmCham EU would however like to draw attention to the following comments on these proposals:

Article 4(5)

AmCham EU welcomes the Commission's desire to make the referral system under the EUMR quicker and leaner. As AmCham EU has stated in past submissions, many businesses initially welcomed the possibility to refer a case to the Commission for review, thereby avoiding burdensome and costly local merger reviews. However, most companies are discouraged from using Article 4(5) EUMR 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. The Commission's suggestions address this concern to an important degree. The White Paper proposes that the referral to the Commission based on the 3 Member State rule (Article 4 (5) EUMR) should become a one step process. This will greatly reduce the time and administrative effort currently imposed by the need to complete two forms and two processes. AmCham EU would also suggest that Member States may directly be involved already at the pre-notification stage. While this may indeed add to certainty and help avoid late surprises, this also needs to be balanced against the need for confidentiality that exists in some cases.

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. 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).

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 4(4)

According to Article 4(4) EUMR, prior to the notification of a concentration, the parties may request that the transaction be reviewed at the Member State level when concentration "may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that Member State." AmCham EU supports the view that this is of concern, as in order to justify the Article 4(4) referral request, parties would have to make self-incriminatory statements regarding the appearance of competition concerns.

AmCham EU supports the Commission's proposal to amend the substantive test in Article 4(4) so parties do not have to claim that the transaction may lead to a "significant effect in a market" in order for a case to qualify for a referral, but rather that the concentration is likely to primarily impact a distinct market in the Member State in question.

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 EUMR 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) EUMR, there was a general expectation that Member States would no longer resort to using Article 22 EUMR. 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 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. The Commission's proposals address this to a certain extent but further improvements can be made.

Notably, 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.

The Commission proposes that one or more Member State(s), competent under their national law to review a merger, would be able to request a referral to the Commission within 15 working days. Unlike the current system, only Member States that are originally competent could request referrals. AmCham EU supports this. 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. However, AmCham believes the referral request period should be shortened to 5 working days. 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 is nothing but poor administration, which has a significant negative effect on business. We trust the NCAs and the Commission to be able to act more efficiently today, in particular in light of the significantly evolved ECN cooperation and new communication technologies available to the authorities.

The Commission's proposal that its decision to accept a referral would give it jurisdiction for the entire EEA and it would therefore become unnecessary for Member States to join the request. AmCham supports this fully. 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, 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.

26. Do you consider that there is currently scope to improve the EU merger control system and that each of the proposals contained in the 2014 SWD would contribute to achieving this purpose?

AmCham EU agrees that there is scope to improve the EU merger control system and supports the proposals contained in the 2014 SWD.

27. Based on your experience, are there any other possible shortcomings of a technical nature in the current Merger Regulation? Do you have any suggestions to address the shortcomings you identified?

AmCham EU respectfully submits that it would be useful for the Commission to address the following:

- clarification of the application of the full-function test to formation of JVs/acquisitions of joint control;
- particular issues with calculation of turnover, e.g. in commodity trading situations not covered by the guidance on financial institution turnover;
- Application of the staggered transaction rules (e.g., the application of the standstill requirement to transactions entered into previously and potentially already notified to other competition authorities or even (at least theoretically), already completed).

28. One of the proposals contained in the 2014 SWD relates to the possibility of introducing additional flexibility regarding the investigation time limits. In this regard, have you experienced any particularly significant time constraints during a Phase 2 merger investigation, in particular in those cases where a Statement of Objections had been adopted (for example, for remedy discussions following the adoption of the Statement of Objections)?

AmCham EU supports the possibility of introducing greater flexibility to the investigation time limits to allow for remedy discussions, but notes that the issue is not limited to Phase 2 investigations. Indeed, the timeframe for discussing potential remedies in Phase 1 is even tighter and arguably problematic in a greater number of cases.

29. In the light of your reply to question 28 above, do you consider that the current distinction between remedies presented before or after working day 55 since the opening of phase II proceedings, on which depends the extension of the procedure by 15 additional working days, is working well in practice?

AmCham EU consider that this distinction is unnecessarily black-or-white and may not work well in practice in some cases.