

# Response of AmCham EU to the European Commission's public consultation: «Towards More Effective EU Merger Control »

*AmCham EU applauds many thoughtful suggestions to improve the EU Merger Regulation; we are however concerned by the desire to expand the EU merger control system to capture minority shareholdings*

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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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CONSULTATION RESPONSE

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### Introduction

AmCham EU applauds the European Commission ("**Commission**") for a number of very important and significant proposals that aim to make the EU Merger Regulation ("**EUMR**") more efficient, remove unnecessary red tape and focus scarce resources on merger transactions that truly merit analysis. Many of the suggestions made by the Commission mirror AmCham EU positions made in the past, and we are delighted that the Commission has included these in its consultation. The public consultation demonstrates yet again the openness that the Commission shows to business and the willingness to continuously adopt positive suggestions for reform in the competition policy area.

However, there is one significant exception to the otherwise largely positive response that AmCham is submitting. AmCham EU wishes to express grave concern with the desire to expand the EU merger control system to capture minority shareholdings. Not only does this initiative appear inconsistent with the Commission's desire to simplify existing procedures, but it also appears to be based on a perceived need for which no compelling evidence exists.

Better regulation will be at the core of the work of the new Commission. Indeed, the European Council has called for further efforts to reduce the overall regulatory burden at EU and national level. Efforts at the EU level are expected to be focused only where action can deliver the desired result, and will entail the most efficient and least burdensome approach. The Political Guidelines for the new Commission that Commission President Jean-Claude Juncker presented to the European Parliament on 15 July, set out a new Agenda for Jobs, Growth, Fairness and Democratic Change. AmCham EU notes how strongly Commission President Juncker has emphasised that the Competition Commissioner is expected to contribute to projects steered and coordinated under the Jobs, Growth, Investment and Competitiveness agenda. We also note how Commission President Juncker has acknowledged the "privilege of being supported by an excellent, highly motivated European civil service and a professionally well-run administration" but one whose "resources are limited and have to be used to best effect", which is why "resources must be allocated to the EU's priorities and to make sure that every action we take delivers maximum performance and value added".

AmCham EU believes an expansion of the EU merger control to minority shareholdings significantly defies these stated goals and objectives; this would not be a measure which would contribute to strengthening Europe's competitiveness, and would in AmCham EU's view not constitute "Better Regulation".

AmCham EU is similarly very much concerned with how the suggestions of minority shareholding merger control may be perceived internationally in that developing competition law jurisdictions may similarly make – in AmCham EU's opinion, misguided – attempts to expand merger control systems to mirror a possible EU 'reform' in this area. This is even more important when Commission President Juncker, in his mission letter to Commissioner-Designate Vestager has emphasised the crucial role that the Commission has in the international arena (a stated goal is "Maintaining and strengthening the Commission's reputation world-wide and promoting international cooperation in this area.")

We have below listed more detailed comments in response to the consultation.

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1. **Minority shareholdings:**

**AmCham EU does not endorse an expansion of the current EU merger control system to minority shareholdings. AmCham EU is of the view that such an expansion would have a pernicious effect. We are also of the view that the “targeted transparency system” as developed in the Commission Staff Working Document will not alleviate these effects.**

Contrary to the Commission's view, the proposal to extend the EUMR's remit is unnecessary and imposes a disproportionate administrative burden on companies. It will be costly, cause market uncertainty (in the already complex and risk averse world of acquisitions) and discourage companies from acquiring minority shareholdings. Contrary to the Commission's statement, the proposal will also capture venture capital investments in small and innovative companies. Thus, it would be radically contrary to the Commission's strong efforts to lighten the regulatory load on SMEs. Discouraging investments in SMEs, which are recognised to be major drivers of growth and innovation in Europe, will have a damaging effect on the European economy as a whole.

While AmCham understands the Commission's antitrust concerns, it considers that the cases cited in the White Paper do not constitute sufficient evidence to justify an extension of the EUMR, let alone the imposition of an ex ante notification obligation on acquisition on minority shareholdings.

Ex ante control of transactions, while burdensome, is justified in those circumstances where there is overwhelming evidence that: (i) if unchecked, companies would engage in anticompetitive acquisitions; and (ii) the conduct, if found anticompetitive, cannot be brought effectively to an end once it has taken place (e.g. it is very difficult to undo an acquisition of control or a merger).

For this reason, out of the 31 EEA countries, 29 do not consider it necessary to exert control over acquisitions of minority shareholdings. Contrary to the White Paper statement, the Commission proposal does not fit with the merger control regimes currently in place at both the EU and national level.

However, if the Commission were finally to adopt a new system, imposing an ex ante notification burden on companies before testing less burdensome alternatives is the opposite of better or smart regulation, which the European Commission considers a priority.

**There is in fact a better way of addressing the antitrust concern. Before creating an ex ante control on acquisitions of minority shareholdings, before departing from the principles of the merger control system found at the EU level and in the vast majority of EU Member States, before imposing a significant burden on companies in Europe and causing market uncertainty, before other jurisdictions around the world follow the Commission lead and impose a similar burden, at the very least the Commission should consider starting with a voluntary ex post system. Such a system would allow the Commission to gain more experience, and gather more evidence with respect to minority shareholdings and whether, in the future, it would be necessary to move towards a mandatory system.**

- A) Regarding the concerns that a competence to control the acquisition of minority shareholdings should not inhibit restructuring transactions and the liquidity of equity markets, do you consider that the suggestions put forward in the White Paper are sufficient to alleviate this

concern? Please take into account that the transactions would either not be covered by the Commission's competence or not be subject to the 15 days waiting period.

AmCham EU is of the view that the “targeted transparency system” as developed in the Commission Staff Working Document will not alleviate the pernicious effect that extending the EUMR will have on the equity markets and in the European economy in general.

Small and medium-sized enterprises (SMEs) are a major driver of growth and innovation in Europe<sup>1</sup>. In order to develop their innovative ideas and compete, SMEs require access to capital<sup>2</sup>. Venture capital and growth funding, including corporate venture funding, play an instrumental role in providing financing to these companies.

The Executive Summary Sheet of the “Commission Staff Working Paper: Impact Assessment” asserts that *“SMEs and micro-enterprises are not directly affected by the proposals as the Merger Regulation would continue to apply only to transactions where parties meet the turnover thresholds set out in Article 1”*. AmCham EU respectfully submits that this assertion is misplaced. It disregards the usual structure of venture investments. Funding is normally done by a group of co-investors (including venture funds, corporate venture units, founders, etc). Due to the inherent risk involved in financing small innovative firms, it is very unusual for such financing to be provided by a single investor on its own. In these circumstances, it would not be uncommon for at least two co-investors to meet the EUMR's turnover thresholds, regardless of the target's turnover, in particular if these investors are corporate venture units of large multinationals. For the same reason, AmCham EU is also of the view that the rough estimation at paragraph 85 of the Commission Staff Working Document, according to which only around 20-30 acquisitions of minority shareholdings would meet the EU turnover thresholds per year, is a gross underestimation. In this respect, it should be noted that more than 3,000 companies were venture backed in Europe in 2013<sup>3</sup>.

Therefore, the proposed “targeted transparency system” would also apply to venture and growth capital investments in SMEs. AmCham EU submits that it would create significant legal barriers to these investments and therefore it would run contrary to the Commission's strong efforts to lighten the regulatory load on SMEs<sup>4</sup>. Those barriers would be due to the following reasons.

First, a main feature of venture investments is that expedited execution is of the essence. Funds need to be available to avoid target's bankruptcy and to allow their speedy execution of critical business milestones in order to permit them to acquire a competitive advantage.. In this respect, both the 15-working days waiting period (at least three whole weeks) and the subsequent 4-6 months prescription period will discourage investors or cause delays in availability of funds and increase costs, which may jeopardize transactions or even render them impractical. These unintended consequences will be

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<sup>1</sup> The Commission supports this view: see for example Communication from the Commission to the European Parliament, The Council, the European Economic and Social committee and the Committee of the Regions: “Commission follow-up to the “TOP TEN” Consultation of SMEs on EU Regulation” 18.6.2013, COM(2013) 446 final, at page 2.

<sup>2</sup> The Commission also supports this: see *Ibid* at footnote 1.

<sup>3</sup> EVCA, 2013 European Private Equity Activity Report, p. 6.

<sup>4</sup> See Report from the Commission to the Council and the European parliament: “Minimizing regulatory burden for SMEs. Adapting EU regulation to the needs of micro-enterprises” Brussels, 23.11.201; COM(2011) 803 final.

exacerbated in the likely event that other antitrust agencies, notably those in developing jurisdictions, mirror this proceeding concerning minority shareholdings.

Investors may be discouraged to participate because they would be facing the worst of both worlds; on the one hand they would be subject to a standstill obligation (which is not much shorter than the standard phase 1 duration) and on the other hand they would not benefit from any legal certainty after the waiting period has expired. In fact, the proposed system will give rise to an anachronistic situation; parties in a minority shareholding case would be in a more cumbersome position than parties in a “concentration” case. Otherwise, if investors do participate, there would be delays due to the fact that investors will most likely withhold funding until the time both these periods have lapsed or will request their funds to be held in escrow until these periods have expired. These unintended consequences will be exacerbated in the likely event that other antitrust agencies, notably those in developing jurisdictions, mirror the Commission’s proposed system.

Secondly, another central feature of venture investments is confidentiality. Many companies looking for funding are innovative and operate in “stealth mode” so that financing rounds are not publicly announced. In addition, investors such as large corporates may also want to avoid public announcement of financing transactions, for example where they are investing in next generation technologies ahead of their competitors. An information notice that requires disclosing details of the transaction will have significant adverse consequences for both targets and investors. Targets will no longer be able to operate in “stealth mode” and will thereby potentially lose their competitive advantage. Similarly, investors will be obliged to disclose their strategies to their competitors.

Thirdly, it is considered standard and good business practice that investors seek to obtain certain shareholders’ rights in order to safeguard their financial interest in the companies in which they invest. The list of these protective rights is fairly standard and includes, inter alia, the right to nominate a board director and information rights (in relation to financial and other issues). In this respect, the fact that having the right to nominate a board director or having some information rights would constitute relevant triggering criteria may discourage many venture capital and growth funding investors. This is so in particular taking into account that venture capital often holds more than 5% of target’s issued share capital.

Fourthly, and in general, some features of the “targeted transparency system” are too ambiguous or far reaching (e.g. it captures minority acquisitions in vertically related companies; it defines “competitors” as players in the “same sector” as opposed to the “same market”; it covers acquisitions where there is not a “direct link” between acquirer and target, as it transpires from footnote 67 of the Commission’s Staff Working Document). Venture capital investors often invest in target companies that are broadly in the same sector, but not necessarily in the same relevant market. As a result, there may be a significant number of innocuous transactions falling under the extended remit of the EUMR, given that the criteria to qualify as a “competitively significant link” will be easily met. The above features, therefore, are likely to act as a deterrent to investments or otherwise will generate unnecessary and disproportionate administrative burden on companies, the Commission and NCAs. This contradicts the principles that any proposed system should meet according to paragraph 42 of the White Paper.

AmCham EU submits that the above pernicious effects on corporate venture investments and on start-ups and small, innovative target companies in need of capital will, by implication, have a negative effect on the growth of the European economy as a whole.

**B) Are there any other mechanisms that could be built into the system to exclude transactions for investment purposes from the competence?**

As stated, AmCham EU does not endorse an extension of the current EU merger control system to minority shareholdings. As noted above, if the Commission were to move forward with an expanded EUMR, the Commission should consider starting with a voluntary ex post system.

In any event, whether the new system were to be mandatory ex ante or voluntary, AmCham EU would urge the Commission to introduce the following exemptions, amendments and clarifications.

In cases where there are multiple co-investors, which are acting independently from each other, each non-controlling minority investment should be considered as a separate transaction. Under the Commission's own premises, non-controlling minority co-investors will not be controlling the target. Hence, there is neither a need nor justification to combine their economic resources for calculation of turnover purposes. The intention of the Commission is not clear in this respect. Otherwise, the new rules would give rise to incoherent results in cases where the investment is in a target that does not meet itself the EUMR turnover thresholds (which will be the most likely scenario regarding venture capital and growth investments). In effect, transactions with a single investor acquiring a high minority stake would not fall under the Commission's jurisdiction. However, transactions with multiple investors each acquiring lower stakes (and thus less prone to potential anti-competitive effects under the Commission's theories of harm) may well fall under the EUMR's extended remit if each is considered an "undertaking concerned" by the transaction.

Alternatively, there could be an exemption excluding minority investments in SMEs. Although AmCham considers that the suggestion in the above paragraph would be much more in line with the current tenor of the EUMR and is thus preferable, this alternative suggestion might also contribute to generate a sound economic and policy environment for venture capital investments in SMEs, which is critical for the European economy's growth.

As a third alternative, or also in addition, the Commission could make clear that, where there are a number of minority shareholding investors acting independently from each other, the transaction should be exempted from the proposed rules. The Commission's main concern is the degree of influence that these minority shareholders may exert upon the target. However, where more than one minority shareholder meets the "competitively significant link" requirement, their respective ability to influence the target would counter each other. The suggested exemption would be in line with the Commission's position in a "concentration" case where there are several minority shareholders. In such a case, the Commission's Consolidated Jurisdictional Notice states that the possibility of changing coalitions between minority shareholders will normally exclude the assumption of joint control.

On a different front, it should be made perfectly clear that the first suggested criterion to qualify as a "competitively significant link" relates to holdings in companies which are active in the "same relevant market" as the acquirer, as opposed to in the "same sector"; i.e. acquirer and target must be real competitors. Paragraph 46 of the White paper and 88 of the Staff Working Document are ambiguous in this respect. If this criterion is not sufficiently clarified, the parties would notify as a matter of caution (to avoid penalties) numerous transactions that produce no anti-competitive effects at all. This would either discourage investments or give rise to an unnecessary and disproportionate

administrative burden. In the same vein, it should be clarified that this criterion excludes situations where acquirer and target are only potential competitors.

In addition, this first criterion should not cover minority acquisitions in vertically related companies. As the Commission itself recognizes at paragraph 20 of its Staff Working Document, there have been relatively few vertical cases (entailing a change of control) that have raised the Commission's competition concerns. Hence, the number of vertical cases raising concerns will be much lower in the minority shareholding scenario. Requiring filing vertical cases, which usually do not raise antitrust concerns, would generate an unnecessary and disproportionate administrative burden.

The rule set out at footnote 67 SWD should be abolished so that the first suggested criterion is met only where there is a "direct link" between acquirer and target, i.e. both are in the same relevant market. Otherwise, this rule would impose a very cumbersome burden upon venture capital firms, which will have to be constantly up to date of the activities and sectors entered by large numbers of portfolio companies. Most importantly, this rule would capture many minority investments that would be innocuous from a competition perspective and thus discourage investments or generate an unnecessary and disproportionate administrative burden. In effect, venture capital investors tend to invest through non-controlling shareholdings in several companies that compete in the same relevant market, in which the acquirer, to which the unit belongs, is not active and thus in which it has no intention to intervene. The reason for this is that investments are often made into innovative companies developing next generation products or services so, as with all nascent market sectors, it is unclear which companies are going to be successful.

If the Commission is to set equity threshold above which information notice is required, such threshold should be 25%. This is the threshold that other European jurisdictions (Germany and Austria), which cover non-controlling minority shareholding investments, have considered appropriate. The lower the threshold the more likely it is that the new scope would capture harmless transactions and generate unnecessary and disproportionate administrative burden.

The right to nominate a member of the board as a relevant triggering criterion should also be abolished. As explained, it is standard practice for an investor to retain board membership as part of safeguarding its investment. This criterion would constitute a deterrent to venture capital investments and is not justified. The underlying theory of harm based on an exchange of information between competitors may be addressed by putting in place appropriate firewalls; otherwise it is sufficiently covered by the Article 101 prohibition. In addition, the Commission should clarify what is meant by "commercially sensitive information of the target" (at paragraph 47 of the White paper). This should be limited to competitively sensitive information whose exchange between competitors would be unlawful under EU competition law. This clarification, however, flags the fact that including this criterion is unnecessary since it is already covered by current competition tools.

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

As explained above, a very worrying issue stemming from the obligation to provide an information notice is that making public details of a proposed transaction is completely contrary to the basis on which corporate venture investments are carried out. The terms of a venture transaction are

confidential to the parties. This issue is particularly critical for innovative targets that are developing leading edge products and want to be and remain in “stealth mode”. It will also be critical for corporate investors, where the rationale for the investment is often to invest in next generation products or services which may enable the corporate investor to gain a competitive advantage over its competitors.

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

The primary costs involved in M&A activity are not the costs of preparing regulatory filings. Very significant costs can be expected from the need to restructure transactions to cater for regulatory review processes, separating signing and closing, and from the delays incurred for closing which may have very serious negative effects on target companies given that they are often in need of cash. Still, the preparation of an information notice may incur more costs than initially expected. This is so because in venture capital investment cases there may be quite a few co-investors involved. Hence, the required legal assessment as to whether there is a “competitively significant link” and as to the calculation of turnover will extend to a quite a few potential undertakings concerned. Furthermore, access to the target’s information may not be readily available, which is likely to delay the completion of the notification and the 15 working day suspensory period.

Further, venture capital investment cases typically take place in a number of successive rounds over a number of months. It may well be that each investor triggers the application of the EUMR at different rounds. Hence, a new legal assessment and potentially a new information notice may be required in each relevant round.

Given that investee companies typically pay for transaction costs incurred by investors and given that the amount of venture investments tends to be low, some transactions may not even make economic sense as a result of these additional costs. The situation will be even worse if the Commission opens an investigation or if account is taken of potential fines for submitting incorrect or misleading information.

Finally, AmCham EU has already mentioned its concern about the ripple effect that the proposed system may have in other developing competition law jurisdictions often eager to mirror the European Commission initiatives. The proliferation of similar systems in multiple jurisdictions will add additional layers of administrative complexity and costs to transactions that almost never raise antitrust concerns. And it will also generate further uncertainty and its associated costs, notably in jurisdictions with a less developed legal system.

- E)** Do you consider a waiting period necessary or appropriate in order to ensure that the Commission or Member States can decide which acquisitions of minority shareholdings to investigate?

AmCham EU has already expressed above its concerns about the imposition of a waiting period. Given the pernicious delaying effects of a waiting period, the Commission should contemplate eliminating it. In this light, and as noted above if the Commission were finally to introduce a system that covers non-controlling minority shareholdings, AmCham EU is of the view that an ex post voluntary system coupled with clear guidelines would be much more appropriate.

### **General views on the minority shareholdings proposal**

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

The Commission basically identifies three theories of harm that would purportedly justify such an extension: (i) the ability of the acquirer to influence the target's competitive decisions; (ii) the acquirer's financial incentive to compete less aggressively since it would partially internalize, via its financial interest in the competing target, the positive effects that its softened competition has on the target; and (iii) the acquirer's access to the competing target's sensitive information would facilitate coordination in the market as well as the monitoring of that coordination and the detection of deviations. AmCham EU submits that none of the above three scenarios justifies an extension of the EUMR remit.

Both the Commission and the Member States find that competition concerns are more likely to be serious in the scenario (i) above (paragraph 30 of the White paper). The Commission would appear to be concerned about a degree of "influence" whereby: the acquirer "*influence[s] the target firm to increase its prices*" (paragraph 51 of the Staff Working Document); "*the target company is ultimately forced to stop competing with the acquirer*" (idem); or "*the acquirer can ... limit the competitive strategies available to the target firm, thereby weakening it as a competitive force*" (paragraph 54 of the Staff Working Document).

In this light, it is not apparent that there exists a gap in the current system. There appears to be no relevant difference between the "influence" to which the White paper refers, and the "decisive influence" under the EUMR. In effect, within the context of the EUMR, "decisive influence" means the possibility of determining the strategic decisions in an undertaking or the possibility of blocking actions which determine the strategic commercial behaviour of an undertaking. There is no doubt that the possibility of taking decisions resulting in "the target increasing its prices", "forcing the target to stop competing" or "limiting the target's competitive strategies thereby weakening its competitive force" is tantamount to the possibility of affecting the target's "strategic commercial decisions" and thus constitutes "decisive influence" within the meaning of the EUMR.

AmCham EU believes that the Commission Consolidated Jurisdictional Notice 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. The Commission enjoys a wide discretion to determine on a case by case basis by taking into account a variety of factors, what constitutes "decisive influence" and thus what deals may fall under its competence. Accordingly, AmCham EU does not see a need for the Commission to depart from this established practice, a practice that has been followed in a great number of jurisdictions globally.

The Commission makes reference to a very few number of cases which would appear to illustrate the purported gap regarding the theory of harm based on a degree of "influence". With respect, AmCham EU submits that none of these cases convincingly supports the Commission's case for an extension of the EUMR's scope.

The *Siemens/VA Tech* merger does not appear to be an example of anti-competitive concerns arising out of an “influence” over the target.

In *Toshiba/Westinghouse*, Toshiba's veto rights could be used to prevent GNF from expanding into new business areas, in which it would have competed with Westinghouse. The Commission was of the view that these rights could not be regarded as conferring Toshiba control over GNF. However, in a more strict approach, a veto right preventing the target from entering strategic related business segments may in fact be deemed to confer “decisive influence” over the target's commercial strategy (see paragraph 72 of the Consolidated Jurisdictional Notice). Thus, it is submitted that the Commission might have dealt with Toshiba's minority shareholding in GNF under the EUMR even if Toshiba had acquired that minority shareholding after the *Toshiba/Westinghouse* merger took place.

In the *IPIC/MAN Ferrostaal* merger, MAN Ferrostaal had a 30% minority shareholding in a critical supplier, Eurotecnica. According to the Commission's decision itself, such minority shareholding gave MAN decisive influence over the target. Hence, the Commission could have very well scrutinized the acquisition of the minority shareholding in Eurotecnica had it occurred after the *IPIC/MAN Ferrostaal* merger.

Finally, it is submitted that, under a strict approach, even the *Ryanair/Aer Lingus* case could have fallen under the EUMR's remit. The United Kingdom's Competition Commission found that Ryanair's minority shareholding gave it the ability to influence the commercial policy and strategy of Aer Lingus. In particular, it allowed Ryanair to block special resolutions limiting Aer Lingus's ability to effectively manage its portfolio of Heathrow slots. Surely, this possibility went to the core of Aer Lingus's strategic commercial decisions.

In any case, to the extent the Commission feels that an enforcement gap does exist in the current EUMR, AmCham EU strongly encourages the Commission to deal with this gap by providing further clarification of the meaning of “decisive influence”, as opposed of putting in place an entirely new mechanism that may entail very heavy, pernicious effects on the equity market and in the European economy as a whole, as explained above.

It should also be noted that all the above examples relate to minority shareholdings in companies of a significant size. AmCham EU would like to stress that the most pernicious effects of the proposed “targeted transparent system” will be felt in those cases where the target is a small, innovative company. In this respect, if the Commission were finally to extend the EUMR's scope, AmCham EU reiterates the need to introduce an exemption excluding all venture capital investments in targets whose turnover is below a certain threshold, regardless of the size of the co-investors that may be involved.

The Commission invokes a second theory of harm based on the acquirer's “financial incentive” to increase prices. AmCham EU submits that the pressure to increase prices after a minority acquisition in a competitor will depend on a number of complex factors. First and foremost, it will depend on the proportion of sales that will divert from the acquirer to the target as a result of the acquirer increasing its prices (or reducing its output). This in turn will depend on the number of competitors in the market, on whether the products of both companies (acquirer and target) are close, on the perceived reputation of the target and other competitors, on whether the target's product are of a better quality than other competitors' products, and on the price of the target's products vis-à-vis other competitor's

products. Other factors to take into account will be the level of the acquirer's financial interest in the target as well as the target's margin relative to the acquirer's marginal cost.

The combination of all these factors makes it very difficult for an acquirer to determine whether there are sufficient incentives to increase its prices; thus, it may be expected that anti-competitive concern might potentially arise only in very exceptional cases, namely only in markets where there are very few competitors and have high barriers to enter. The Commission's approach to this theory of harm does not seem to be based on precise and thorough economic studies but rather on economic intuition. It is strongly submitted that thorough economic studies should still be carried out before extending the EUMR remit on the basis of a "financial incentive" justification.

In any case, the suggested criteria to determine whether a transaction qualifies as a "competitively significant link" do not take into account the above-mentioned factors and thus are wholly unsuitable for capturing only those very rare cases that may raise concerns under this theory of harm.

The Commission refers to a third theory of harm, namely that minority shareholdings in a competitor may lead to coordinated anti-competitive effects in the market by increasing market participants' ability and incentives to tacitly or explicitly collude. The approach is based on the view that a minority shareholding may enhance transparency due to the privileged view it offers the acquirer into the commercial activities of the target, and it may also increase the credibility and effectiveness of any threat of retaliation in the event that the target deviates from the collusive behaviour.

There is a fundamental difference between coordinated effects in a standard merger case and coordinated effects in the acquisition of a non-controlling minority shareholding in a competitor. In a merger case, the alleged coordinated effects are 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, in the case of a non-controlling minority shareholding in a competitor, the increased transparency will only affect acquirer and target since it is based on a potential exchange of information between them only. Any possible coordination would be limited to the acquirer and target. Therefore, save where the acquirer and target are clearly the most relevant players in the market, there will be no coordinated effects in the market as a whole.

Most importantly, the exchange of information will derive from the acquirer's participation and rights in the target's board of directors, shareholders and/or other meetings. It is these meetings that will offer the acquirer the privileged insight into the commercial activities of the target, about which the Commission is concerned. There is no doubt that these meetings would constitute at least "concerted practices" between competitors within the meaning of Article 101; indeed, the exchange of information taking place within them can lead to a collusive outcome penalized by this provision. In other words, the Commission has currently appropriate and sufficient legal tools to address the anti-competitive effects arising out of exchange of information resulting from the acquisition of a minority shareholding in a competitor.

In this respect, it is worth noting that in the *Aer Lingus* case<sup>5</sup>, one of the claims was that Ryanair used its shareholding to seek access to Aer Lingus' confidential strategic plans and business secrets.

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<sup>5</sup> Case T-411/07 *Aer Lingus v Commission* [2010] ECR II-3691.

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Interestingly, the General Court concluded that *“such an exchange of information would not be a direct consequence of the minority shareholding, but would constitute subsequent conduct on the part of the two companies which could potentially be examined under Article 81 EC”* (paragraph 70).

In conclusion, AmCham EU is of the view that extending the scope of the EUMR to give the Commission the power to intervene in cases involving the acquisitions of non-controlling minority shareholdings is not warranted under any theory of harm.

In addition, as shown above, the proposed “targeted transparent system”, as it currently stands, contains ambiguous criteria to qualify as a “competitively significant link”, will give rise to legal uncertainty, will increase administrative burden on the parties involved, and will capture many cases that are innocuous from a competition perspective. Hence, it will defeat the objectives that the Commission purports to pursue, i.e. that *“innocuous transactions, such as those entered into for investment purposes only, would not”* be caught by the proposed system, and that the system *“limits cases to those that are strictly necessary to prevent harm to consumer”* (paragraphs 56-58 of the White paper and paragraph 81 of the Staff Working Document). All the above will discourage investments and thus will affect innovative target companies in need of capital. In turn, this will affect negatively innovation and growth in Europe.

In fact, any system put in place to capture non-controlling minority investments, no matter how light it may be, risks discouraging investors and produce the above-mentioned effects. When these negative consequences are balanced against the uncertain benefits of capturing a very few rare cases, which might be potentially harmful on competition, the adoption of any proposed option would appear truly disproportionate and thus would defeat the principles the Commission enshrines at paragraph 42 of the White paper. In this respect, AmCham EU observes that when we last reviewed U.S. data this showed 228 notified minority ‘acquisitions’ in the U.S. and zero in-depth ‘Second Request’ investigations with respect to those ‘acquisitions’.

AmCham EU's concern is all the more acute if account is taken of the fact that the Commission has already enough tools to tackle the concerns it raises in the White paper. And if it still were to be of the view that there is an enforcement gap to be filled, the Commission could address it by simply providing further guidance as to what constitutes “decisive influence” under the meaning of the EUMR.

Consistent with the legal requirement to ensure that all business transactions, including potential minority shareholdings, comply with the requirements of current EU competition law (specifically Article 101 and the concept of ‘decisive influence’ under the EUMR), businesses today conduct self-assessments. AmCham EU is strongly of the opinion that the current requirements generally have proven to be effective.

## **2. Referrals - Article 22:**

- A) Please comment on the suggestions regarding the information system amongst the Member States and the Commission. In particular, would such a system give sufficient information to the Member States to decide about a referral request?
- B) Would such a system reduce the risk of diverging decisions by the Member States?

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) 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. 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 proposes 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.

**3. Please comment on the suggestions listed in Section 5 "Miscellaneous" including the more detailed and technical suggestions in the accompanying Staff Working Document.**

AmCham EU provides below comments with respect to this section and offers further suggestions for the Commission's consideration.

Extra- EEA joint ventures

AmCham EU welcomes suggestions to exempt extra-EEA joint ventures from the scope of the EUMR. This is likely to be a very significant reform.

Under the current EUMR, 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 a 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 joint control of a local JV 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.

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.

As a result, AmCham EU supports the Commission's suggestion, which brings the EUMR in line with international legal principles, that a merger notification is not required in situations where the joint venture is located and operating outside the EEA and without any effects on EEA markets, even if the EUMR turnover thresholds are met.

AmCham EU would welcome further guidance in the EUMR or the Jurisdictional Notice with respect to this proposed effects test.

#### Conditional approvals involving divestments

Where in an EU process, remedies are imposed, the buyer approval process for the divestment business includes a competitive assessment. Under the Remedies Notice<sup>6</sup>, the suitability of the purchaser is assessed inter alia with reference the following criterion: *"the acquisition of the business by a proposed purchaser must neither be likely to create new competition problems [and] the proposed purchaser must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the business to be divested."*

It is the view of AmCham EU that once the purchaser approval process has been finalised, no (further) merger filing should be required for the acquisition of the divestment business. It is duplicative, an unnecessary burden on the merging parties and the buyer of a divestment business. Where the acquisition of a divestment business does not have community dimension but instead falls under the jurisdiction of one of many Member States, this also leads to the risk of conflicting outcomes, which is highly undesirable.

#### Block exemptions for certain transactions

AmCham EU believes the proposal to empower the Commission to block exempt certain types of transactions by way of Commission Regulation (i.e. a "Merger Block Exemption") is very interesting and could lead to a significant reduction in unnecessary notifications.

#### Standstill obligations

The Commission remains reluctant to grant waivers from the stand-still obligation. This is mainly so, because the relevant provision is interpreted narrowly. An amendment to the EUMR could clarify that in simple cases that raise not even hypothetical competition issues, a waiver from the stand-still obligation should be considered favourably and not as a very rare exception.

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<sup>6</sup> Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, (2008/C 267/01).