International Chamber of Commerce
The world business organization

Discussion Paper

Prepared by the ICC Commission on
Competition

ICC comments in response to the European Commission's Public Consultation on proposals for simplifying procedures under the EU Merger Regulation

Highlights

- Introduction
- Changes to form CO and form RS
- Proposed changes to short form CO and the simplified procedure notice

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1. INTRODUCTION

1.1 The International Chamber of Commerce (ICC) welcomes the opportunity to respond to the consultation of the European Commission (the "Commission") on its proposals for simplifying procedures under the EU Merger Regulation (EUMR). The ICC Task Force on Premerger Control Regimes (the "Task Force") is composed of specialist competition lawyers drawn from international law firms and companies with substantial activities in the EU. The views and comments contained in this response reflect the substantial experience of members of the Task Force in advising on notifications under the EUMR and in a large number of other jurisdictions.

1.2 In summary:

1.2.1 Members of the Task Force broadly welcome the Commission's aim to "make EU merger control even more business-friendly by cutting red tape and streamlining procedures" as "part of the Commission's overall effort to make administrative procedures less burdensome for business, thereby stimulating growth and making Europe more competitive". To that aim, a simple and straightforward merger control regime that prioritises legal certainty, keeps costs to a minimum, and does not represent disproportionate burdens on businesses is surely to be welcomed. In particular, we support:

(a) the increased thresholds for identification of "affected" markets in the Forms CO and RS; and

(b) the expansion of the categories of cases that qualify for a simplified procedure and filing with Short Form CO.

1.2.2 We agree that these changes are desirable and will (subject to our comments below) achieve important efficiencies in the filing process, both for the notifying parties and the Commission.

1.2.3 The Task Force is, however, concerned that these benefits risk being outweighed by the adverse effects of certain increases in the information burden that the Commission proposes to introduce. In particular, we consider that the additional requirements for disclosure of internal documents and information on all plausible markets are unnecessary and disproportionate. Such information is useful only in a minority of cases that give rise to complex competition issues and should therefore be requested only in those cases. For the reasons explained below, creating information burdens that are inappropriate for the great majority of notified cases will not be adequately addressed by the increased reliance that the draft forms now place on the use of waivers.

1.2.4 In the experience of members of the Task Force, the pre-notification process has in recent years become excessively long and unpredictable. We are concerned that the increased information requirements contained in the Commission's proposals would

aggravate this trend. The publication of practical guidance on the Commission's pre-notification procedures would go some way to mitigating the present problems with the process, but would not eliminate the inefficiencies that would be created by the increased information burdens contained in the current proposals.

1.2.5 We consider that more important efficiencies could be created if the Commission were to take this opportunity to eliminate unnecessary filing requirements for extraterritorial joint ventures (JVs) having no effect in the EU.

2. CHANGES TO FORM CO AND FORM RS

2.1 Members of the Task Force broadly welcome the Commission's aim to "make EU merger control even more business-friendly by cutting red tape and streamlining procedures" as "part of the Commission's overall effort to make administrative procedures less burdensome for business, thereby stimulating growth and making Europe more competitive". In particular, we support the increased thresholds for identification of "affected" markets in the Forms CO and RS.

2.2 However, we query whether the proposed changes will achieve the Commission's stated aim, "to reduce the net amount of information required to notify all mergers, which will significantly lessen the administrative burden". The reduced information requirements for markets that will no longer be deemed affected appear to us to be outweighed by the substantially increased burden in respect of internal documents (Section 5.4) and all "plausible" relevant markets (Sections 6.3 and 6.4).

2.3 A particular concern that has been expressed by members of the Task Force relates to the impact of these increased information requirements on the pre-notification process. This has become longer, more unpredictable and more inefficient in recent years. Experience of Task Force members is that in simplified procedure cases the prenotification process often stretches to over a month, that a period of 6-8 weeks is not unusual, and that in some cases the pre-notification has taken considerably longer than this. Different approaches by different case teams – to the granting of waivers, in particular – means that it is now difficult to predict with certainty how long it will be before a filing can be submitted, and a clearance obtained. Clearly regulating pre-notification discussions would make it easier for notifying parties to plan adequately their transaction timetables.

2.4 Moreover, the problem of inconsistent approaches frequently means that the scope of the information that is required for completeness of a Form CO is not known until a late stage in the pre-notification process, with attendant delays to the filing date. Contrary to the new wording in recital 1.2 of Form CO, we do not consider pre-notification to be a "service" of which parties may voluntarily avail themselves. The failure to engage in such a process carries such a high risk that the filing will be rejected as incomplete, that it is, in practice, mandatory.

2.5 The proposed amendments to Forms CO and RS will, in our view, aggravate these problems, as they increase both the overall burden of information requirements and the uncertainty as to what information will be required. To a degree, some of these concerns could be addressed by the issue of practical and detailed guidance on the pre-notification process, covering timing and the Commission's approach to waivers. However, we consider that such guidance would be useful even in the absence of the Commission's proposals and would not, in any event, address the full extent of their potential adverse consequences. Our reasons for this view are described in more detail below.

(i) Extended scope of Section 5.4 documents

2.6 The draft Form CO substantially extends the scope of internal documents that must be provided by the parties, for all notified concentrations. They would include various documents unrelated to the transaction in question (including those containing information on all plausible affected markets and those relating to other, unrealised transactions) and board minutes. They would also include documents received by (and not just prepared for or by) board members, as well as documents prepared by or for, or received by, members of the "board of management", or other persons exercising similar functions.

2.7 For the reasons set out below, we consider that making disclosure of these documents a requirement for all mergers is disproportionate, and will result in wasted time and costs both for the notifying parties in gathering the relevant documents, and for the Commission in reviewing them. Moreover, given that the Commission's EUMR procedures are highly regarded by many less mature merger control regimes, it is likely that if the Commission decides to gather such a wide range of sensitive and confidential documents, a number of other regimes will follow suit, including ones with less rigorous protections against inappropriate disclosure to third parties and other government institutions.

The additional documents will be useful only in a minority of cases.

2.8 In the experience of our members, such documents are useful only for assessing the competitive effects of transactions raising relatively complex issues, and even for those transactions, the vast majority of information contained in them will be irrelevant, for the reasons explained in paragraph 2.11 below. Moreover, we do not consider that the additional documents will assist the Commission in identifying the transactions that raise complex issues, as it already, under the current Form CO disclosure requirements and the market-testing process, has sufficient information for this purpose.

2.9 Accordingly, the Task Force submits that a more proportionate approach would be to limit the disclosure requirements to those most likely to be relevant to the assessment of the concentration – *i.e.* those required under the current Form CO – and to rely on information requests for additional documents in those cases raising complex issues.

Disclosure of the additional documents will increase the risk of leaks, both within the EU and in other jurisdictions.

2.10 Many of the additional documents that would now be required will be highly commercially sensitive, such as board minutes discussing financial matters, employment and issues of commercial strategy unrelated to the concentration. An inadvertent leak of such documents may cause notifying parties to suffer considerable commercial harm. While we recognise that the Commission has a good track record in this respect, gathering large volumes of documents that are irrelevant to the Commission's assessment will nevertheless increase the risk that such documents are accidentally misplaced, disclosed, or stolen.

The categories additional documents are defined too widely.

2.11 The Task Force considers that the wording of the categories is too open-ended and imprecise in a number of respects. In particular:

2.11.1 "Board of management": The disclosure requirements would extent not only to the board of directors, but also to the "board of managers […] (as applicable in light of the corporate governance structure)" and persons exercising similar functions, or to whom such functions have been entrusted or delegated. In the absence of any globally-recognised (or even EU wide) concept of a board of managers, this will create substantial uncertainty for companies seeking to gather these documents, and will make it impossible to do so until the Commission has confirmed in pre-notification discussions which individuals are to be treated as forming part of the management board;

2.11.2 Documents "received by" the relevant boards: this new wording will catch unsolicited documents from third parties and publicly available documents that have no bearing on the parties' views of the relevant markets;

2.11.3 Section 5.4(i): the requirement to provide all minutes of board/shareholder meetings during which the transaction has been discussed is not limited to those that are related to competition or the affected markets. As noted above, unrelated issues that are discussed at such board meetings are likely to be highly commercially sensitive. We therefore consider that, if disclosure of board minutes is required, notifying parties should be permitted to redact sections of the minutes that are not relevant to the impact of the transaction on competition in any of the affected markets;

2.11.4 Section 5.4(ii): the requirement to provide presentations analyzing different options for acquisitions, including but not limited to the transaction. Other hypothetical transactions cannot form part of the counterfactual against which the notified transaction is assessed, as they will not have taken place. Accordingly, we query the rationale for requiring disclosure of such documents. To the extent that the Commission retains this requirement, it should be limited to documents prepared in the last (one) year;

2.11.5 Section 5.4(iv): the requirement to provide documents for the last three years, unrelated to the transaction in question, for the purpose of assessing competitive conditions in any of the affected "plausible" markets with respect to market shares, competitive conditions, competitors, potential for growth/expansion and general market conditions. The potential volume of documents covered by this requirement is very substantial. For example, any of the following could be considered as prepared "for the purpose" of assessing the relevant factors: documents relating to branding, finance, recruitment, monthly sales, costs of raw materials, promotional strategies, relationships with suppliers, customers and distributors etc. Many of these are prepared on a daily or weekly basis by a typical multinational company. We are concerned that the Commission will not have the resources to review such large volumes of documents, so increasing the risk that important information is missed and that review periods become further extended while the case team carries out this review.[1] If this requirement is introduced, it should be limited to one year in duration and to documents that "contain" information on market shares and competitors (rather than documents that are "for the purpose of assessing" these factors). References to all other factors (such as "general market conditions" and "competitive conditions") should be removed, as they are too vague and subjective.

Widening the scope of disclosable documents will create problems for documents covered by legal privilege under laws of non-EEA countries.

2.12 There is a risk that the extended scope (including documents *received* by board members/members of the boards of management) will lead to more documents being disclosed that are covered by legal professional privilege in the US, or other countries. If companies were to disclose documents protected by US legal privilege, there is a material risk that the company will waive attorney-client privilege. Even if the documents have been requested by the Commission with sanctions for non-compliance, this may be viewed by a US court as insufficient. If a company operates in a technology industry in which very strict confidentiality and security protocols are required, such an outcome would be devastating. We therefore request that the wording revised Section 5(4) expressly states that the disclosure obligation does not extend to documents covered by legal professional privilege under the law of any country in respect of which the relevant legal advice was given.

(ii) All "plausible" relevant market definitions

2.13 The revised Forms CO and RS include a new requirement – as a condition of completeness of the Forms – for information on "all plausible alternative product and geographic market definitions (in particular but not limited to

[1] E.g. through the use of voluminous information requests with unreasonable deadlines that allow the Phase 1 deadline to be suspended.

alternative product and geographic market definitions that were considered in previous Commission decisions)".

2.14 We recognise that in simplified procedure cases (in which the requirement for information on "plausible" markets already applies), the absence of a market test means that the Commission must, in practice, be able to require from the parties information on alternative market definitions, so as to satisfy itself that the criteria for applying that procedure are met. However, the experience to date of Task Force members is that case teams – and in particular those comprising relatively inexperienced members – often interpret all "plausible" market definitions as equating to all definitions that are conceivable to the case team, regardless of the likelihood that they would, ultimately, be found to constitute the correct market definition. Our experience is also that significant time is already spent in pre-notification discussions considering potential market definitions. The Task Force therefore considers that the proposal to extend this requirement to Forms CO and RS is both unnecessary and undesirable:

2.14.1 It is unnecessary because parties already have appropriate incentives to supply information on alternative market definitions that they consider to be reasonably plausible. Unlike filings made under the simplified procedure, submission of a long Form CO results in a market test which is likely to elicit any information on commercially realistic market definitions which, if omitted by the parties, would risk resulting in a decision rejecting the Form CO as incomplete mid-way through Phase 1. It is for this reason that notifying parties invariably provide information on the basis of market definitions that they consider, in light of their understanding of the markets in question, to be plausible.

2.14.2 It is undesirable, because it will shift the onus of determining what it plausible from the parties to the case team, with no practical possibility for parties to challenge this determination (even if a transaction timetable did permit a challenge before the Union Courts, the threshold of "plausibility" is too low to offer a sufficiently predictable chance of success). The resulting multiplication of "affected markets" (and requirements to complete Sections 7 and 8 of Form CO for each) will have an adverse impact on the timing, predictability and burden of EUMR pre-notification, which, for the reasons set out in paragraph 2.3 above, is already considered to be a problem. In many cases, parties know that this information is of no practical relevance to an assessment of the competitive effects of a transaction, but opt to comply with the Commission's requests in order to expedite the pre-notification process.

2.15 If the Commission decides to proceed with this amendment of Forms CO and RS, we submit that it should clarify that "plausible" is not intended to mean "conceivable" but rather refers to realistic alternative markets that are economically justifiable in light of the information available to the case team.

(iii) Inappropriate reliance on waivers to address excessive information burdens

2.16 For the reasons described above, members of the Task Force consider that the proposed revisions to Forms CO and RS will require information that is not relevant for the assessment of the great majority of notified concentrations. The amended forms increase the emphasis on the use of waivers – through references to the possibility of waivers in various footnotes – to bring information requirements down to a level that is proportionate to the notified transaction. We do not consider that this is an adequate or efficient way to address excessive information requirements, because:

2.16.1 it makes the grant of a waiver the exception to the rule, such that case teams will often require strong justifications to grant them. However, for the reasons set out above, many of the categories of additional information will need to be routinely waived for the majority of transactions in order to bring the filing burden to a proportionate level. An information burden that is more proportionate to the majority of notifiable transactions would mean that instead case teams are more likely to request the additional information in cases where that information is appropriate and useful for the assessment of the transaction in question, and could do so by way of a separate request, so that filing is not unduly delayed.

2.16.2 the experience of members of the Task Force is that case teams adopt widely varying approaches to waivers, which makes it difficult to predict in advance whether they will be granted, and how long it will take. This causes notifying parties to comply with an excessive information burden, rather than endure the uncertainty and potential timing implications of applying for a waiver; and

2.16.3 where parties do apply for waivers, this ties up Commission resources that could better be used analyzing the information that has been provided by the parties and identifying where the real competition issues lie.

2.17 For these reasons, if the Commission does proceed to require additional Section 5.4 documents and information on all plausible markets, we submit that the Commission should issue detailed guidance – for the benefit of both notifying parties and Commission case team members – on its approach to the use of waivers, including the circumstances in which parties may reasonably expect to benefit from one and how long the waiver process should take.

2.18 In addition, the Task Force suggests that the Commission reviews the categories of information that are expressed as being particularly amenable to a waiver. It is unclear, for example, why the Commission would be more open to waiving disclosure of Section 5.4(iii) documents relating to the transaction than Section 5.4(ii) documents relating to other transactions. There are also various other categories that are not highlighted in this way, but which in our

view should be considered routinely for waiver, including "other" markets under Section 6.4, Section 8.3(c) on closeness of substitution for various categories of customer and Section 8.9 on research and development agreements.

(iv) Definition of affected markets

2.19 The Commission proposes to adjust the relevant market shares for affected markets as follows:

2.19.1 from 15% to 20% for horizontally affected markets;

2.19.2 from 25% to 30% for vertically affected markets, neighbouring markets and markets in which a party holds IP that is important to another's market;

2.19.3 from 25% to 20% for markets in which the parties are potential competitors

2.20 In addition, the definitions now clarify that markets cannot be horizontally or vertically affected in the absence of a geographic connection between the relevant activities.

2.21 The Task Force welcomes the increased thresholds, subject to the following comments:

2.21.1 The rationale for reducing the threshold for potential competitors is unclear. The likelihood that a relationship of potential competition will give rise to competition concerns is much lower than that for actual competition concerns, as evidenced by the rarity of EUMR cases in which elimination of a potential competitor has been found to result in a significant impediment of effective competition (SIEC). Accordingly, it should be subject to a less stringent threshold – we consider that 30% would be appropriate.

2.21.2 For horizontally affected markets, we consider that horizontal overlaps should not result in an affected market if the transaction gives rise to an insignificant increment and that, therefore, the Form CO should track the criteria for incremental market shares (based on HHI deltas, or a simpler alternative, as suggested in paragraph 3.1 below) that are now included in the draft Short Form CO. This would be consistent with the intention expressed in the Commission's press release, that "in cases that do not fall under the simplified procedure, merging firms would only have to submit detailed information for those markets where their market share actually exceeds the threshold for applying the simplified procedure".

2.21.3 A similar *de minimis* incremental threshold should also apply for vertically affected markets and for "other" markets in which the parties are active in neighbouring markets. The current definitions give rise to extended information requirements if only one party meets the relevant

threshold, even if the other party's activities are entirely insignificant, so requiring a cumbersome waiver application in these circumstances.

2.21.4 The amended Short Form now clarifies that, for joint ventures, a market is not "reportable" if it is one in which the JV's parent companies have horizontally or vertically related activities, but the JV does not. The Task Force considers that the same change should also be reflected in the definition of affected markets in Section 6.3 of Form CO.

(v) Contact details

2.22 We are concerned by the proposed removal of the reference (in Recitals 1.4 and 1.5 of Form CO) to "multiple" instances of missing or incorrect contact details as grounds for declaring a notification incomplete. This implies that a single typographical error or missing fax number might be considered grounds to reject a Form CO, which would be disproportionate and unfair. It would also be unnecessary, as in the experience of members of the Task Force, notifying parties put a great deal of work and attention into locating and preparing contact details

(vi) Confidentiality waivers

2.23 The Task Force recognises that it can be in the interests of the notifying parties to grant confidentiality waivers to allow the Commission to discuss the transaction with other authorities. However, there may be many circumstances in which it is not in the parties' interests to grant such a waiver (for example, for transactions that are extremely confidential). It is therefore important that no adverse inferences are drawn by the Commission if parties opt to exercise their legal right not to grant a confidentiality waiver, and we consider that the wording of the new recital 1.8 should reflect this.

(vii) Public support

2.24 We consider that Section 3.4 of Form CO should request information on financial or other support received from public authorities in the European Economic Area (EEA).

3. PROPOSED CHANGES TO SHORT FORM CO AND THE SIMPLIFIED PROCEDURE NOTICE

(i) The proposed incremental threshold based on HHI calculations

3.1 We welcome the proposal to allow transactions involving a small increment in market share to benefit from the simplified procedure. However, we consider a threshold based on HHI calculations to be unnecessarily complex, and suggest instead a simple "bright line" incremental market share of 3%. At minimum, footnote 16 should be amended to clarify that an HHI delta can be calculated using the market shares of the parties to the concentration (only),

and that it is not necessary to know the market shares of other market participants in order to be able to apply this threshold.

(ii) The requirement to provide Section 5.3 documents

3.2 The Task Force welcomes the Commission's decision to increase the thresholds that determine whether a transaction is suitable for the simplified procedure and Short Form filing, and to introduce a new threshold for transactions giving rise to a small increment in market share. We also welcome the Commission's calculation that this will entail a further 10% of all transactions being assessed under this procedure, *i.e.* up to 70% of all notified mergers.

3.3 However, we are concerned that this increased efficiency will be negated and outweighed by the proposal to require disclosure of internal documents with the Short Form – including for concentrations in which the parties have no horizontal overlaps or vertical relationships whatsoever – contrary to the Commission's stated aim to "reduce the net amount of information required to notify all mergers, which will significantly lessen the administrative burden". Transactions qualify for simplified treatment because they are extremely unlikely to raise competition concerns. It is therefore unnecessary and disproportionate to require parties to expend resources by gathering internal documents in up to 70% of all notifiable mergers.

3.4 Moreover, due to the increased unpredictability of pre-notification timing in simplified procedure cases in recent years, members of the Task Force are aware of a number of instances in which notifying parties filed using a "long" Form CO, notwithstanding that the transaction was likely to qualify for simplified treatment. This is because doing so affords greater predictability of the likely duration of the pre-notification period (as case teams have the comfort of a market test and so have less tendency to be excessively cautious) and resulting information requirements. By increasing the information burden under the Short Form CO so that it is closer to that of the long form, we consider that this trend is likely to be aggravated, which would further undermine progress towards the Commission's objective of greater efficiency.

3.5 The requirement would also increase the risk of leaks of commercially sensitive documents of the notifying parties, both by the Commission and other jurisdictions that follow its lead (see our comments in paragraph 2.10 above), also taking into account that companies may be required to provide the Commission with an exhaustive set of documents regarding acquisitions that may have been in contemplation at any period in time (*i.e.* without clear time limits).

(iii) Extra-territorial joint ventures

Notifiability of extra-territorial joint ventures.

3.6 The Task Force considers that the requirement to notify joint ventures having no nexus whatsoever with the EU and regardless of their size is the single

largest generator of inefficiency in the EUMR filing process. This requirement is also contrary to the effects doctrine as enshrined in the ICN's Recommended Practices[2], the case law of the EU courts[3] and the Commission's decisional practice in merger cases.[4] This is particularly regrettable, given the Commission's leadership role in the development of efficient merger control systems worldwide. The Task Force believes that this anomaly can be easily rectified by simply interpreting the EUMR in light of the effects doctrine, and thus avoiding the need to change the existing text of the EUMR. Only those transactions which have an immediate, foreseeable and substantial effect in the EU come within the Commission's jurisdiction.[5]

3.7 Every member of the Task Force can cite numerous examples of joint ventures outside the EU incurring unnecessary and excessive costs as a result of the notification obligation in the EU, and the corresponding requirements in numerous other jurisdictions that point to the example of the EUMR as justification for their approach to requiring extra-territorial JVs to be filed. For this reason, we consider that addressing the problem of notifiable extra-territorial joint ventures would contribute more towards the Commission's stated aim of "savings for the merging companies concerned, cutting lawyers' fees by up to one half and reducing preparatory in-house work" than any of the proposals actually put forward by the Commission.

3.8 In the rare instances in which an extra-territorial JV with minimal sales in the EU could give rise to competition concerns, the same competitive harm can be achieved without giving rise to a Union dimension (and triggering jurisdiction under the EUMR), by structuring the relevant concentration of market power as an acquisition of sole control instead. To the extent that a full-function joint venture might affect the prices of inputs for products sold in the EU, that is more appropriately addressed by the competition laws of the jurisdiction in which those inputs are sold, as is the case for acquisitions of sole control. The competition authorities of those countries have ample incentives to ensure that exports from their countries are not rendered uncompetitive as a result of anticompetitive collaborations between rivals. Moreover, other potentially harmful effects – such as those arising where two rivals agree to construct new capacity in a joint venture with the result that existing capacity with sales to the EU is shut down – could be addressed by applying Article 101 to the relevant spill-over effects, if the Commission were to accept that such joint ventures do not have a Union dimension.[6]

3.9 In any event, given that in the vast majority of cases extra-territorial JVs with no or limited sales into the EU will never give rise to an SIEC under the EUMR, we consider that if the Commission does continue to assert jurisdiction

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2 ICN Reccomended Practices for merger notification procedures, published at http://www.internationalcompetitionnetwork.org/working-groups/current/merger.aspx; section I.(A) and (B).

3 Case T-102/96 *Gencor v Commission* [1999] ECR II-753, para. 90.

4 Case COMP/M.1741 *MCI WorldCom/Sprint* OJ [2003] L 300/1, para. 315.

5 Case T-102/96 *Gencor v Commission* [1999] ECR II-753, para. 90.

6 As they would therefore be caught by Article 21(1) EUMR.

over such transactions, a short letter providing the information required in 8.2.2 ought to suffice, *i.e.* explaining the products or services provided by the JV currently and in the future and why the JV would have no direct or indirect effect within the EEA. This could be combined with a power for the Commission to request a short or even a long Form CO to be filed in certain, carefully defined, circumstances, such as:

3.9.1 where shares of supply on a global market will exceed a certain amount and therefore there is a potential issue to consider in the EU despite no direct sales by the JV into the EU; or

3.9.2 where the joint venture gives rise to potential spill-over effects in relation to products sold by its parents into the EU.

3.10 Should the Commission continue to require a Short Form filing for such JVs, the only material sections of Form CO are Sections 1, 2, 8.2.2 and 9, as well as Section 4 to the extent necessary to demonstrate that the parents meet the relevant EU and worldwide thresholds. The requirement of completing the remaining sections should be automatically waived and the burden would shift to the Commission to prove the necessity of providing the information in these sections.

3.11 The Task Force would make one final suggestion with respect to the related jurisdictional issue of "full-functionality". In the case of extraterritorial JVs, this issue can give rise to lengthy and pointless debates as to how the JV will operate on the market, even where the JV's operations will have no effect in the EEA. In order to avoid such debates in the future, the notifying parties should inform the Commission by letter as to why they consider the JV to be full-function. The Commission would then have one week to take a position on this issue. If the Commission failed to respond within this time, the parties' assessment of this transaction would prevail for the purposes of proceeding with or refraining from the filing.

Possible requirement for a long Form CO for extraterritorial JVs.

3.12 The draft simplified procedure notice now indicates (in paragraph 11) that a long Form CO filing maybe required in certain circumstances and that this "includes, but is not limited to situations where the proposed joint venture is active outside the EEA, but its products and/or services constitute important inputs for products and/or services that are sold in the EEA, and/or where the proposed joint venture is likely to achieve significant sales, including in the EEA, in the foreseeable future". We consider this wording to be an inadequate and inaccurate summary of the circumstances in which an extra-territorial JV might, hypothetically, give rise to an SIEC in the EEA:

3.12.1 The supply of products or services that are important inputs for other products/services that are sold in the EEA is not an indicator of anticompetitive effects in the EEA. We recognise that, in an extreme case, a JV could lead to an extra-territorial price rise for inputs that might result in increases in the prices charged by the third parties that purchase those inputs and incorporate them into products or services

sold into the EEA. However, it is fundamentally incorrect to equate a price rise with an impediment to competition. An increase in the price of an input does not, directly or indirectly, decrease competition between the third parties that purchase that input. Accordingly, there is no restriction of, or impediment to, competition in the EEA between those third parties.

3.12.2 Similarly the fact that a JV is likely to achieve significant sales, including in the EEA, is no indicator of anticompetitive effects. Such effects could arise only if either the JV is likely somehow to acquire market power in the EEA, which appears to us to be highly unlikely if it has a non-existent or insignificant present market share, or if it will result in spill-over effects in relation to the pre-existing activities of its parents, which we consider would be better dealt with under Article 101. Moreover, the requirement for sales "in the foreseeable future" is vague and will create more uncertainty for businesses in relation to non-contentious JVs

3.12.3 The revision of the simplified procedure notice represents an important opportunity for the Commission to define the circumstances in which it considers that an extraterritorial JV might result in an SIEC in the EEA. The current wording does no such thing. If the Commission cannot offer credible scenarios in which a JV might restrict competition in the EEA, it should concede that such JVs do not need to be notified.

(iv) Definition of reportable markets

3.13 Section 6.3(b) of the draft standard Form CO clarifies that a market is only vertically related if it is geographically connected to the other (by referring to "relevant market" instead of "product market"). The same clarification should be made in Section 6.2(b) of the Short Form CO.

(v) Weakening of the sage harbour for application of the simplified procedure

The current wording of paragraph 3 of the Notice states that "if the safeguards or exclusions set forth at points 6 to 11 of this Notice are applicable, the Commission may launch an investigation and/or adopt a full decision under the EC Merger Regulation". This creates a safe harbor for certain operations that fall outside those safeguards and exclusions. In contrast, the draft Notice states that "the Commission may launch an investigation and/or adopt a full decision under the Merger Regulation for any proposed concentration, in particular if the safeguards or exclusions set forth at points 8 to 17 of this Notice are applicable". The result is that an important element of legal certainty will be lost. We request the Commission to reconsider this change.

The International Chamber of Commerce (ICC)

ICC is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world.

The fundamental mission of ICC is to promote open international trade and investment and help business meet the challenges and opportunities of globalization. Its conviction that trade is a powerful force for peace and prosperity dates from the organization's origins early in the 20th century. The small group of far-sighted business leaders who founded ICC called themselves "the merchants of peace".

ICC has three main activities: rule setting, dispute resolution, and policy advocacy. Because its member companies and associations are themselves engaged in international business, ICC has unrivalled authority in making rules that govern the conduct of business across borders. Although these rules are voluntary, they are observed in countless thousands of transactions every day and have become part of the fabric of international trade.

ICC also provides essential services, foremost among them the ICC International Court of Arbitration, the world's leading arbitral institution. Another service is the World Chambers Federation, ICC's worldwide network of chambers of commerce, fostering interaction and exchange of chamber best practice. ICC also offers specialized training and seminars and is an industry-leading publisher of practical and educational reference tools for international business, banking and arbitration.

Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on relevant technical subjects. These include anti-corruption, banking, the digital economy, marketing ethics, environment and energy, competition policy and intellectual property, among others.

ICC works closely with the United Nations, the World Trade Organization and intergovernmental forums including the G20.

ICC was founded in 1919. Today its global network comprises over 6 million companies, chambers of commerce and business associations in more than 130 countries. National committees work with ICC members in their countries to address their concerns and convey to their governments the business views formulated by ICC.

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