

Evaluation of procedural and jurisdictional aspects of EU Merger Control

Fields marked with * are mandatory.

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I. Introduction

Preliminary Remark: The following questionnaire has been drafted by the Services of the Directorate General for Competition in order to collect views on some procedural and jurisdictional aspects of EU merger control. The questionnaire does not necessarily reflect the views of the European Commission and does not prejudice its future decisions, if any, on further action on these aspects.

A. Purpose of the consultation

The purpose of the present consultation is to gather information on particular aspects of the performance of EU merger control. This consultation invites citizens, businesses, associations, public authorities and other stakeholders to provide feedback on their experience/knowledge of issues under scrutiny and what action, if any, should be taken in this regard.

Input from stakeholders will be used in a Staff Working Document to evaluate procedural and jurisdictional aspects of EU merger control. The Commission will carefully analyse the outcome of this consultation and previous consultations as well as the findings of the evaluation as a whole before deciding whether it should take further action.

B. Background

Merger control constitutes one of the instruments of EU competition law. Its main objective is to ensure that competition in the internal market is not distorted by corporate reorganisations in the form of concentrations.

In recent years (particularly in 2009 and from 2013 onwards), the European Commission has taken stock and assessed the functioning of different aspects of EU merger control and identified possible areas for refinement, improvement and simplification.

In particular, the European Commission adopted in 2014 the White Paper "Towards More Effective EU Merger Control (the "White Paper", COM(2014) 449 final). The White Paper confirmed that EU merger control works well and that no fundamental overhaul of the system is needed, but envisaged specific amendments in order to make it more effective.

The key proposals of the White Paper were the following:

1. Introducing a light and tailor-made review of acquisitions of non-controlling minority shareholdings which could harm competition;
2. Making case referrals between Member States and the Commission more business-friendly and effective;
3. Making procedures simpler for certain categories of mergers that normally do not raise competition concerns; and
4. Fostering coherence and convergence between Member States with a view to enhance cooperation and to avoid divergent decisions in parallel merger reviews conducted by the competition authorities of several Member States.

Based on the White Paper, the Commission carried out a public consultation. Respondents mostly agreed that the EU merger control system overall works well but welcomed the White Paper's proposals in relation to the streamlining of the case referral system and simplification.

Recently, a debate has emerged among stakeholders and competition experts on a new topic, namely the effectiveness of the current turnover-based jurisdictional thresholds of EU merger control. These jurisdictional thresholds are set out in Article 1 of the Merger Regulation and determine which transactions have a Union dimension and are reviewed, in principle, by the European Commission.

Some stakeholders have raised the question of whether the turnover-based jurisdictional thresholds allow capturing, under EU merger control rules, all transactions which can potentially have an impact in the internal market. This question may be particularly significant for transactions in the digital economy, but also in other industry sectors, such as pharmaceuticals, where acquisition targets may not have always generated substantial turnover yet, but nevertheless are highly valued and constitute, or are likely to become, an important competitive force in the relevant market(s).

Moreover, recent experience in enforcing the EU merger control rules has shown that certain technical aspects of the procedural and investigative framework for the assessment of mergers may merit further evaluation. Some of these aspects had already been identified in the 2014 Commission Staff Working Document accompanying the White Paper.

Scope of the Evaluation

It therefore appears opportune to build upon the work undertaken so far in the context of the White Paper and prior consultations and complement it by evaluating the following procedural and jurisdictional aspects of EU merger control in more detail:

1. Simplification: the treatment of certain categories of cases that do not generally raise competitive concerns, as set out in the Merger Regulation,^[1] the Implementing Regulation,^[2] and the Commission Notice on simplified procedure;^[3]
2. Functioning of the turnover-based jurisdictional thresholds set out in the Merger Regulation in light of highly valued acquisitions of target companies that have not yet generated substantial turnover;
3. Functioning of the case referral mechanisms set out in the Merger Regulation, the Implementing Regulation and the Commission Notice on case referral;
4. Certain technical aspects of the procedural and investigative framework for the assessment of mergers.

[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.01.2004, p. 1.

[2] Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004, OJ L 133, 30.04.2004, p. 1, as amended.

[3] Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) 139/2004, OJ C 366, 14 December 2013, p.5 and its Corrigendum to the Commission notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, OJ C 011, 15 January 2014, p 6 (the "Commission Notice on simplified procedure").

II. Practical Guide to fill in the questionnaire

Please respond to all questions that you have knowledge about. Feel free to skip those questions that you cannot answer or are unsure about.

Replying to the questions:

- Questions with a radio-button are "single choice": only one option can be chosen.
- Question with a check-box are "multiple choice": several answers can be chosen.
- Questions showing an empty box are free text questions.
- Depending on your answer to a given question, some additional questions may appear automatically asking you to provide further information. This, for example, is the case when the reply "Other" is chosen.
- Please use only the "Previous" and "Next" buttons to navigate through the questionnaire (do not use the backwards or forward button of the browser).

Saving your draft replies

- The questionnaire is split into several sections.
- At the end of each section you have the possibility to either continue replying to the remaining sections of the questionnaire (clicking on "Next") or saving the replies made so far as a draft (clicking on "Save as Draft").
- If you chose "Save as Draft", the system will:
 - show you a message indicating that your draft reply has been saved,
 - give you the link that you will have to use in order to continue replying at a later stage,
 - give you the possibility to send you the link by email (we encourage you to use this option).
- You can then close the application and continue replying to the questionnaire at a later stage by using the said link.

Submitting your final reply

- The submission of the final reply can only be done by clicking the "Submit" button that you will find in the last section "Conclusion and Submission".
- Once you submit your reply, the system will show you a message indicating the case identification number of your reply ("Case Id"). Please keep this Case Id. number as it could be necessary in order to identify your reply in case you want to modify it at a later stage.
- You will also be given the opportunity to either print or download your reply for your own records.

III. About you

Please provide your contact details below:

*1. Are you replying as:

- ☒ a private individual
- ☐ an organisation or a company
- ☐ a public authority or an international organisation

*Your full name

Association des Avocats pratiquant le Droit de la Concurrence

*Email address

Apdcconseil@bredinprat.com

*1.2 Please provide a brief description of the activities of your organisation.

Les avocats pratiquant le droit de la concurrence savent que garantie du contradictoire et efficacité se confortent mutuellement. Interlocuteurs quotidiens des juridictions et autorités de concurrence, ils ont acquis la conviction que la dimension économique du droit de la concurrence rend encore plus nécessaire le respect du débat à armes égales et l'observation rigoureuse des garanties procédurales. Plus le débat des thèses en présence est approfondi, plus l'équilibre est assuré entre celui qui accuse et celui qui se défend, plus la réalité, et en particulier la réalité économique a des chances d'être cernée.

L'association se donne donc pour objectif principal de mettre en avant, de manière concrète qu'un droit de la concurrence performant est un droit qui est mis en œuvre selon des règles claires, transparentes et respectueuses des principes fondamentaux de notre droit.

Elle est évidemment ouverte à tous les avocats pratiquant le droit de la concurrence en France

*1.3 Where are you based?

- ☐ Austria
- ☐ Belgium
- ☐ Bulgaria
- ☐ Croatia
- ☐ Cyprus
- ☐ Czech Republic
- ☐ Denmark
- ☐ Estonia
- ☐ Finland
- ☒ France
- ☐ Germany
- ☐ Greece
- ☐ Hungary
- ☐ Iceland
- ☐ Ireland
- ☐ Italy
- ☐ Latvia
- ☐ Liechtenstein
- ☐ Lithuania
- ☐ Luxemburg
- ☐ Malta
- ☐ Netherlands
- ☐ Norway
- ☐ Poland
- ☐ Portugal
- ☐ Romania
- ☐ Slovak Republic
- ☐ Slovenia
- ☐ Spain
- ☐ Sweden
- ☐ United Kingdom
- ☐ Other

*Please specify.

Paris

2. Transparency Register ([Register now](#))

In the interests of transparency, the Commission asks organisations who wish to submit comments in the context of public consultations to provide the Commission and the public at large with information about whom and what they represent by registering in the [Transparency Register](#) and subscribing to its [Code of Conduct](#). If an organisation decides not to provide this information, it is the Commission's stated policy to list the contribution as part of the individual contributions. (Consultation Standards, see COM (2002) 704; Better Regulation guidelines, see SWD(2015)111 final and Communication on ETI Follow-up, see COM (2007) 127).

If you are a registered organisation, please indicate below your Register ID number when replying to the online questionnaire. Your contribution will then be considered as representative of the views of your organisation.

If your organisation is not registered, you have the opportunity to register now, please click on the link in the title. Then you can return to this page, continue replying to the questionnaire and submit your contribution as a registered organisation.

It is important to read the specific privacy statement available on the public consultation website for information on how your personal data and contribution will be used.

For registered organisations: indicate your Register ID number here:

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* 3. Please choose from one of the following options on the use of your contribution:

- ☒ My/our contribution can be directly published with my personal/organisation information (I consent to publication of all information in my contribution in whole or in part including my name/the name of my organisation, and I declare that nothing within my response is unlawful or would infringe the rights of any third party in a manner that would prevent publication).
- ☐ My/our contribution can be directly published provided that I/my organisation remain(s) anonymous (I consent to publication of any information in my contribution in whole or in part (which may include quotes or opinions I express) provided that this is done anonymously. I declare that nothing within my response is unlawful or would infringe the rights of any third party in a manner that would prevent publication. I am aware that I am solely responsible if my answer reveals accidentally my identity).
- ☐ My/our contribution cannot be directly published but may be included within statistical data (I understand that my contribution will not be directly published, but that my anonymised responses may be included in published statistical data, for example, to show general trends in the response to this consultation) Note that your answers may be subject to a request for public access to documents under Regulation (EC) No 1049/2001.

*4. Finally, if required, can the Commission services contact you for further details on the information you have submitted?

☒ YES

☐ NO

IV. Questionnaire

IV.1. Simplification

In December 2013, the Commission adopted a package of measures aimed at simplifying procedures to the fullest extent possible without amending the Merger Regulation itself (the so called "Simplification Package"). In particular, the Simplification Package:

- Widened the scope of application of the so-called simplified procedure for non-problematic cases;
- Streamlined and simplified the forms for notifying mergers to the Commission.

Through the Simplification Package, which entered into force on 1 January 2014, the number of cases dealt with under the simplified procedure has increased by 10 percentage points from an average of 59% over the period 2004-2013 to around 69% of all notified transactions over the period January 2014 to September 2016).

According to the Commission Notice on simplified procedure ("the Notice"), the Commission in principle applies the simplified procedure to each of the following categories of concentrations:

- i. Transactions where two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities within the territory of the European Economic Area (EEA); such cases occur where: (i) the turnover of the joint venture and/or the turnover of the contributed activities is less than EUR 100 million in the EEA territory at the time of notification; and (ii) the total value of assets transferred to the joint venture is less than EUR 100 million in the EEA territory at the time of notification (see point 5 (a) of the Notice);
- ii. Transactions where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, provided that none of the parties to the concentration are engaged in business activities in the same product and geographic market, or in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged (see point 5 (b) of the Notice);
- iii. Transactions where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking and both of the following conditions are fulfilled: (i) the combined market share of all the parties to the concentration that are engaged in business activities in the same product and geographic market (horizontal relationships) is less than 20 %; (ii) the individual or combined market shares of all the parties to the concentration that are engaged in business activities in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged (vertical relationships) are less than 30 % (see point 5 (c) of the Notice);
- iv. Transactions where a party is to acquire sole control of an undertaking over which it already has joint control (see point 5 (d) of the Notice)
- v. Transactions where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, and both of the following conditions are fulfilled: (i) the combined market share of all the parties to the concentration that are in a horizontal relationship is less than 50 %; and (ii) the increment (delta) of the Herfindahl-Hirschman Index (HHI) resulting from the concentration is below 150 (see point 6 of the Notice).

The Notice sets out a number of safeguards and exclusions from the simplified procedure (see notably points 8 to 21). The Commission may decide not to accept a proposed concentration under the simplified procedure or revert at a later stage to a full assessment under the normal merger procedure.

The 2014 White Paper made further-reaching proposals for amendments to the Merger Regulation that would make procedures simpler:

- This could be achieved for example by excluding certain non-problematic transactions from the scope of the Commission's merger review, such as the creation of joint ventures that will operate outside the European Economic Area (EEA) and have no impact on European markets;
- Moreover, notification requirements for other non-problematic cases - currently dealt with in a 'simplified' procedure - could be further reduced, cutting costs and administrative burden for businesses.

These proposals are still being assessed. Your response to the following questions will contribute to that assessment.

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

(1 = "did not create much added value"; 7 = "created much added value"):

	1	2	3	4	5	6	7
Your rating	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

Please explain.

The Commission expressly confirmed that the question (and consequently the rate) refers to the interest of a one stop shop review of concentrations for simplified procedure (and not the interest of the simplified procedure).

The APDC believes that the one stop shop review at EU level for these concentrations has created much added value, since it avoids having potential numerous and divergent views from the different Member States.

Further simplification of the treatment of certain categories of non-problematic cases

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

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

- ☒ YES
☐ NO
☐ OTHER

Please explain

The 2013 Simplification Package has reduced the burden on companies for transactions falling under point 5(b) of the Notice. However there is still a lot of information to provide, regarding notably the details of the concentration, ownership and control, the business activities of the party or parties acquiring control, the business activities of the target, and the justification for the absence of reportable markets.

All the information required does not appear to be justified by these categories of concentrations which do not raise any competition concerns.

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

- ☐ YES
- ☐ NO
- ☒ OTHER

Please explain

There is still a very heavy documentation to provide in the cases of transactions falling under point 5(c) or point 6 of the Notice, thereby maintaining a significant burden for companies preparing a filing. Two examples of this heavy documentation can be provided.

First, the Commission requires notably to identify and to provide some information about all reportable markets, consisting of all relevant product and geographic markets, as well as plausible alternative relevant product and geographic markets definitions. Such an approach results in uncertain and potentially very broad information requirements. In addition, this leads to quasi systematic long discussions with the case team, in order to define the reportable markets and the market shares that shall be included in the Short Form.

This requirement to cover all reportable markets also appears inconsistent with the spirit of the simplified procedure, with the Notice of the Commission stating that “Where it is difficult to define the relevant markets or to determine the parties’ market shares, the Commission will not apply the simplified procedure” (para 8). Indeed the APDC understands from this assertion that a simplified procedure would not be appropriate where there are several plausible alternative relevant product and geographic markets definitions.

Moreover, as a consequence of this new requirement, there is a huge discrepancy between:

- on the one hand the very detailed information that the Commission receives in the filings under the simplified procedure, and
- the short-form decisions that do not include any detail on the reportable markets.

For that reasons, the APDC believes that reportable market should be limited to the relevant markets.

Second, since there are reportable markets in cases of transactions falling under point 5(c) or point 6 of the Notice, the Commission requires the notifying party to provide the following internal presentations, as a supporting documentation: “copies of all presentations prepared by or for or received by any members of the board of management, or the board of directors, or the supervisory board, as applicable in the light of the corporate governance structure, or the other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders’ meeting analysing the notified concentration”. This documentation, which is surprisingly not limited to excerpts as for the documentation required in the normal Form CO, can be very extensive and complex to obtain, especially because these documents are seen as highly confidential by the undertakings concerned.

This requirement was introduced by the Simplification Package in 2013.

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

- ☒ YES
☐ NO
☐ OTHER

Please explain

The Simplification Package has limited the amount of information required in such a case. However, the APDC believes there is still room for simplification (see below).

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

- ☒ YES
☐ NO
☐ OTHER

Please explain

The 2013 Simplification Package has reduced the burden on companies for transactions falling under point 5(d) of the Notice. However, there is still a very substantial amount of documentation to provide, in particular where there is one or more reportable markets (see above the transactions falling under point 5(c) or point 6 of the Notice).

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

(i) In the pre-notification phase:

- ☐ YES
☐ NO

Please explain under which category of simplified cases (listed in question 2 above) it initially fell and the reasons underlying the change to the normal procedure.

YES
Those cases were covered by paragraph 5(d) of the Notice.

(ii) Post notification:

- ☒ YES
☐ NO

Please explain under which category of simplified cases (listed in question 2 above) it initially fell and the reasons underlying the change to the normal procedure.

Those cases were covered by paragraph 5(c) of the Notice. The change to the normal procedure occurred following a third party complaint after publication of the concentration on the website of the Commission.

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

- ☒ YES
☐ NO

Please explain under which category of simplified cases it fell and the reasons why the case was notified under the normal procedure.

Due to the substantial amount of documentation that needs to be collected under the simplified procedure and the often lengthy discussions about reportable markets (see above), the parties do hesitate sometimes to follow the normal review procedure, even though they are eligible for notification under the simplified procedure.

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

- ☒ YES
☐ NO
☐ OTHER

Please explain

From the APDC's standpoint, beyond the types of cases listed in question 2, there are other cases that are generally not likely to raise competition concerns but do not currently benefit from the simplified procedure. The ADPC would suggest to modify the thresholds of some of the existing categories listed in question 2. First, the market shares thresholds of concentrations referred to in category 5(c) of the Notice should be increased. The current thresholds, i.e. 20% in

case of horizontal relationships and 30% in case of vertical relationships, still appear to be low. Consequently, concentrations that do not raise any competition concern are subject to the normal procedure, whereas they could benefit from a simplified procedure without impairing the Merger Regulation's objective of preventing harmful effects on competition.

The APDC considers that the thresholds should be increased by 5 points, in other word 25% in case of horizontal relationships and 35% in case of vertical relationships.

In this respect, it could be noted that the French Competition Authority applies a higher threshold for affected markets. According to the latter, a market is affected where two or several undertakings concerned are present in the same market with combined market shares equal or exceeding 25% . Where the combined market share of the undertakings concerned is below 25% in a horizontal transaction, the French Competition Authority indeed considers that the transaction is not likely to raise competition concerns

.
In addition, the cases where market shares are exclusively below [20-30]% in case of horizontal relationships, or [30-40]% in case of vertical relationships, are not likely to raise any competition concern; the Commission grants authorization in phase I without condition. This observation results from the analysis of the Commission's decisional practice over the past year.

Second, the reference to the HHI index should be modified, for category 6 of the Notice. Currently, the increment of HHI resulting from the concentration must be below 150 (in addition to the condition of market shares below 50%). The value of the HHI itself is not taken into account. This HHI criterion introduced in 2013 appears to be very restrictive and can accommodate only very small increments in market shares.

The APDC believes that the Commission should be consistent with the Guidelines on the assessment of horizontal mergers , whereby the Commission mentions that horizontal competition concerns are unlikely in these three different situations:

- the HHI is below 1 000;
- the HHI is between 1 000 and 2 000, with a delta below 250;
- the HHI exceeds 2 000, with a delta below 150.

Accordingly, each of these three different situations should justify the application of a simplified procedure.

Third, an additional threshold should be also added regarding vertical relationships in which one of the parties has more than 30% market share and the other party has less than 5% on a vertically related market. Transactions below this new threshold should be eligible for notification under the simplified procedure.

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

- ☐ YES
☒ NO
☐ OTHER

Please explain your answer with respect to each of the categories of cases listed in question 2 above.

- Transactions falling under point 5a of the Notice:

- ☐ YES
☒ NO

Please explain.

- Transactions falling under point 5b of the Notice:

- ☐ YES
☒ NO

Please explain.

- Transactions falling under point 5c or point 6 of the Notice:

- ☐ YES
☒ NO

Please explain.

For these categories of concentrations, the workload incurred by businesses when notifying the cases that fall under the simplified procedure appears particularly disproportionate. As mentioned in the answer to question 2(ii), the requirements regarding both the definition of the reportable markets and the internal documentation are very burdensome. Definition of the markets quasi systematically gives rise to lengthy discussions with the case-team (see above).

- Transactions falling under point 5d of the Notice:

☐ YES

☒ NO

Please explain.

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

In terms of workload and resources spent, the APDC has not observed at all a reduction since the 2013 Simplification Package.

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

☒ YES

☐ NO

☐ OTHER

If you replied yes or other, do you consider that there is scope for further simplification by, in particular:

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

☒ YES

☐ NO

Please explain.

The APDC believes that concentration falling under paragraph 5(a) should be exempted.

French version: L'APDC estime que les opérations de concentration visées au paragraphe 5(a) devraient être exemptées.

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

- ☒ YES
☐ NO

Please explain.

The APDC believes that an initial short information should be introduced for non-exempted concentrations falling under the scope of the merger regulation, namely those falling under paragraphs 5(b), 5(c), 5(d) and 6 of the Notice.

Indeed determining whether a given transaction indeed falls under these categories requires to define the markets and to calculate market shares, which can sometimes raise questions. The lack of a bright line, revenue based, notification thresholds can thus give rise to legal uncertainty as to whether or not the filing obligation has been complied with. A new system introducing lighter information requirements would allow parties i) to reduce the burden of the preparation of a filing, and ii) to obtain the benefits of legal certainty.

The initial short information notice should require only limited information: presentation of the parties and the sectors where they are active and a presentation of the concentration.

On the basis of such information, the APDC is of the opinion that the Commission should comply with a strict deadline of 10 business days, in order to decide whether or not to examine the case.

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

- ☐ YES
☒ NO

Please explain.

The APDC does not support the introduction of a self-assessment system.

Introducing a self-assessment would imply a decision of the parties based on their own analysis of the decisional practice regarding the reportable markets. This analysis could be risky, especially given all the plausible definitions currently considered by the Commission and the relative decrease in the number of detailed decisions published by the Commission (with the increase of the number of short-form decisions).

In addition, the Commission's proposal to have the possibility to start an investigation (on its own initiative or further to a complaint) would create risks for undertakings. A lengthy post-closing investigation period would be detrimental to legal certainty since it would leave undertakings exposed to potential investigations following the completion of a transaction.

Introducing a self-assessment can therefore lead to substantial legal uncertainty.

If this option were further considered by the Commission, the APDC believes that (i) the period in which the Commission can investigate should be limited to a maximum of 1 month from the date of completion of the transaction and (ii) an information notice should be published, whereby it would provide the self-assessment criteria of the categories of concentration concerned.

Moreover, a self-assessment system should be combined with a voluntary notification system, pursuant to which parties could decide to file an information notice with the Commission, but would be under no obligation to do so. A voluntary system of this kind would allow parties to obtain certain benefits of legal certainty.

8.4 Other

- ☒ YES
☐ NO

Please explain.

The APDC warmly welcomes the initiative of the Commission to think about the possible further simplification of EU merger control.

In this respect, the APDC respectfully draws the Commission's attention to the following points:

Should the Commission maintain the current requirement about reportable markets, the APDC considers that the short-form decisions should provide details on the reportable markets developed by the undertakings concerned. This would help the companies to prepare the filings under the simplified procedure.

The APDC suggests that the Commission review and update its notice on the definition of the relevant market (dated 1997).

As a general comment, the APDC considers that there is currently scope for further simplification in terms of deadlines. Whereas the Commission had announced that a shorter time needed for pre-notification contacts should result from the overall reduction of information requirements decided in 2013, the APDC did not observe such change. According to Commission Best practices guidelines, the parties should initiate pre-notification contacts at least two weeks before notification. Yet in practice, such discussions can last up to many weeks or months, including for simplified procedures.

When replying to question 8, please take into account the benefits and potential risks involved in each particular measure. For example, by exempting from notification all cases without horizontal or vertical overlaps [see point (8.1) above], the Commission may not be able to examine certain concentrations that could raise competition concerns, for instance because of potential competition or conglomerate aspects. Conversely, in cases where Parties file only a short information notice [see point (8.2) above], the Commission may not have sufficient information to assess whether the merger should be examined because it could potentially raise competition concerns. Similarly, in a self-assessment system [see point (8.3) above], the Commission may not become aware of mergers that could potentially raise competition concerns; moreover, under such system, the Commission may decide to intervene against a transaction which has already been implemented, which may cause some businesses to notify in any event just to obtain legal certainty.

In case you identify any risks, please explain those and indicate whether you envisage any measure to address / mitigate such risks.

Further simplification of the treatment of extra-EEA joint ventures

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

- ☐ YES
☒ NO
☐ OTHER

Please explain

The APDC believes these categories of concentrations should be exempted (see above and below).

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

- ☒ YES
☐ NO
☐ OTHER

Please explain

The APDC believes that the one stop shop review at EU level for these concentrations has created much added value, since it avoids having potential numerous and divergent views from the different Member States.

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

- ☐ YES
☒ NO
☐ OTHER

Please explain

The APDC believes these categories of concentrations should be exempted (see above and below).

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

As an association of lawyers, the APDC has no view on this issue.

13. On the basis of your experience on the functioning of the Merger Regulation, particularly after the changes introduced with the 2013 Simplification Package, do you consider that the treatment of extra-EEA joint ventures is sufficiently simplified and proportionate in view of the Merger Regulation's objective of preventing harmful effects on competition through concentrations or is there scope for further simplification?

- ☐ The treatment of extra-EEA joint ventures is sufficiently simplified.
- ☒ There is scope for further simplification.

Further simplification could be realised by:

(i) Excluding extra-EEA joint ventures from the scope of the Merger Regulation;

- ☐ YES
- ☒ NO

Please explain your answer taking into account both the scope for cost-savings and the potential risk that the Commission may not have the possibility to examine joint ventures that may impact competition in the EEA in the future (for instance if the scope of activity of the joint venture is expanded at a later stage). Also consider the possibility that these transactions may be subject to control in one or several EU Member States. In case you identify any risks, please indicate whether you envisage any measure to address / dispel such risks.

As a consequence of the exclusion of extra-EEA joint ventures from the scope of the Merger Regulation, these transactions could be subject to control in one or several EU Member States, with different approaches and deadlines. In the end, this could create a substantial additional burden for the companies, with legal uncertainty.

The APDC consequently believes that the Commission should not exclude from the scope of the EUMR extra-EEA joint ventures, which should simply be exempted from any filing requirement.

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

- ☒ YES
- ☐ NO

Please explain your answer, taking into account both the scope for cost-savings and any potential risk. In case you identify any risks, please indicate whether you envisage any measure to address/ dispel such risks.

The APDC believes that extra-EEA joint ventures are not likely to raise any competition concerns and that consequently, they should be exempted from the obligation of prior notification, provided the conditions listed in the Notice (point 5 (a)) are fulfilled.

(iii) Other.

Please explain.

IV.2. Jurisdictional thresholds

The Merger Regulation only applies to concentrations of a Union dimension, which are those where the undertakings concerned meet the different relevant turnover thresholds set out in Article 1 of the Merger Regulation.

Article 1 of the Merger Regulation

Scope

1. Without prejudice to Article 4(5) and Article 22, this Regulation shall apply to all concentrations with a Union dimension as defined in this Article.

2. A concentration has a Union dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and

(b) the aggregate Union-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Union-wide turnover within one and the same Member State.

3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Union dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate Union-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Union-wide turnover within one and the same Member State.

4. [...]

5. [...]

Recently, a debate has emerged on the effectiveness of these turnover-based jurisdictional thresholds, specifically on whether they allow capturing all transactions which can potentially have an impact on the internal market. This may be particularly significant in the digital economy, where services are regularly launched to build up a significant user base before a business model is determined that would result in significant revenues. With significant numbers of users, these services may play a competitive role. Moreover, relevant business models may involve collecting and analysing large inventories of data that do not yet generate significant turnover (at least in an initial period). Therefore, players in the digital economy may have considerable actual or potential market impact that may be reflected in high acquisition values, although they may not yet generate any or only little turnover. Acquisitions of such companies with no substantial turnover are likely not captured under the current turnover-based thresholds triggering a notification under the EU Merger Regulation, even in cases where the acquired company already plays a competitive role, holds commercially valuable data, or has a considerable market potential for other reasons. It has been suggested to complement the existing turnover-based jurisdictional thresholds of the EU Merger Regulation by additional notification requirements based on alternative criteria, such as the transaction value. The perceived legal gap may not only concern the digital industry, but also other industry sectors, such as the pharmaceutical industry. There have been indeed a number of highly valued acquisitions, by major pharmaceutical companies, of small biotechnology companies, which predominantly research and develop new treatments that may have high commercial potential, and do not yet generate any or only little turnover.

Moreover, the question of whether there is a legal gap needs to be assessed in the context of the case referral system in EU merger control. Even in instances where a merger does not have Union dimension based on the turnover of the merging parties, the Commission may obtain jurisdiction through a referral. According to Article 4(5) of the Merger Regulation, the parties to a merger may ask for referral of a case from the level of Member States to the Commission before it is notified, if the case is notifiable under the national merger control laws in at least three Member States and if the additional criteria set out in Article 4(5) of the Merger Regulation are met. Also, according to Article 22 of the Merger Regulation, national competition authorities may request the referral of a case to the Commission after notification, if the specific conditions of Article 22 of the Merger Regulation are met.

This section of the questionnaire gathers your views on the existence of a possible enforcement gap of EU merger control, and what would be its possible dimension and relevance. Moreover, this section also requests your views on possible policy responses, if such were to be warranted.

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

[1] A well-known example of these transactions is the acquisition in 2014 of WhatsApp by Facebook, which fell outside the thresholds of Article 1 of the Merger Regulation but was ultimately referred to the Commission pursuant to Article 4(5) thereof. Information on merger cases reviewed by the European Commission is accessible via the search function on DG COMP's website at http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=2.

- ☐ YES
- ☐ NO
- ☒ OTHER

- **If yes**, please describe the characteristics of such transactions.

NA.

- **If yes**, please give concrete examples.

NA.

- **If yes**, please estimate how many of those transactions take place per year.

NA.

- **If yes**, do you consider that those transactions would typically qualify for a pre-notification referral under Article 4(5) of the Merger Regulation or a post-notification referral under Article 22 of the Merger Regulation? Please explain.

NA.

- **If no or other**, please explain your answer.

The APDC is not in a position to disclose the details of the transactions in which its members may have been involved. However, after consulting its members, the APDC believes that instances of transactions in the digital economy with cross border effects that fall below the current thresholds, and which may have a significant impact on competition, are rare.

The APDC is thus of the view that introducing an additional threshold based on the value of the transaction would give rise to an additional burden on European and non European companies, which does not seem to be justified by the potential benefit associated with the creation of such additional threshold. A new threshold would indeed create an additional burden in terms of extra notifications. It would also make more complex the analysis of a transaction and imply some additional delays (in particular, necessary deadline to analyze and assess the new threshold expressed in value) and uncertainties, for both the companies concerned and the Commission.

The additional cost and burden would be reinforced by the fact that the EU system is characterized by extensive information requirements in the Form CO and is relatively lengthy even for transaction that do not raise competition concerns. In jurisdictions that require minimal initial information from the parties and where clearance can be quickly obtained, the impact of more inclusive thresholds that may result in a larger number of notifications may be limited because the total cost and burden imposed by such a system are relatively low. This is in particular the case in the United States which is the main jurisdiction applying a merger threshold in terms of transaction value. This is also the case of Germany, which is contemplating a similar reform of its notification regime.

This would also constitute a serious disadvantage for the companies investing in Europe, notably private investors / private equity funds which are very sensitive to the speed of transactions completion.

The transactions referred to by the Commission in the digital economy sector being rare, the APDC believes that introducing a new threshold would be disproportionate in light of the potential benefit.

Moreover, the APDC notes that the acquisition of WhatsApp by Facebook was ultimately cleared unconditionally by the Commission. Conversely, many of the recent transactions in the digital economy that did give rise to competition concerns (such as the acquisition of LinkedIn by Microsoft) were caught by the current thresholds.

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

[1] An example of such transactions is the 2015 acquisition of Pharmacyclis by AbbVie.

- ☐ YES
- ☐ NO
- ☒ OTHER

- **If yes**, please describe the characteristics of such transactions.

- **If yes**, please give concrete examples.

- **If yes**, please estimate how many of those transactions take place per year.

- **If yes**, do you consider that those transactions would typically qualify for a pre-notification referral under Article 4(5) of the Merger Regulation or a post-notification referral under Article 22 of the Merger Regulation? Please explain.

- **If no or other**, please explain your answer.

The APDC is not in a position to disclose the details of the transactions in which its members may have been involved. However, after consulting its members, the APDC believes that instances of transactions in the pharmaceutical sector with cross border effects that fall below the current thresholds and which may have a significant impact on competition are rare.

The APDC is thus of the view that introducing an additional threshold based on the value of the transaction would give rise to an additional burden on European and non European companies, which does not seem to be justified by the potential benefit associated with the creation of such additional threshold.

A new threshold would indeed create an additional burden in terms of extra notifications. It would also make more complex the analysis of a transaction and imply some additional delays (in particular, necessary deadline to analyze and assess the new threshold expressed in value) and uncertainties, for both the companies concerned and the Commission.

The additional cost and burden would be reinforced by the fact that the EU system is characterized by extensive information requirements in the Form CO and is relatively lengthy even for transaction that do not raise competition concerns. In jurisdictions that require minimal initial information from the parties and where clearance can be obtained quickly, the impact of more inclusive thresholds that may result in a larger number of notifications may be limited because the total cost and burden imposed by such a system are relatively low. This is in particular the case in the United States which is the main jurisdiction applying a merger threshold in terms of transaction value. This is also the case of Germany, which is contemplating a similar reform of its notification regime.

This would also constitute a serious disadvantage for the companies investing in Europe, notably private investors / private equity funds which are very sensitive to the speed of transactions completion.

The transactions referred to by the Commission in the pharmaceutical sector being rare, the APDC believes that introducing a new threshold would be disproportionate in light of the potential benefit.

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

- ☐ YES
- ☐ NO
- ☒ OTHER

- **If yes**, please describe the characteristics of such transactions.

- **If yes**, please give concrete examples.

- **If yes**, please estimate how many of those transactions take place per year.

- **If yes**, do you consider that those transactions would typically qualify for a pre-notification referral under Article 4(5) of the Merger Regulation or a post-notification referral under Article 22 of the Merger Regulation? Please explain.

- **If no or other**, please explain your answer.

See the responses to questions 14 and 15 above.

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

- ☒ YES
- ☐ NO
- ☐ OTHER

Please explain.

As explained above, the APDC is of the view that the possible “enforcement gap” discussed in this consultation concerns a very limited number of transactions, if any. To the extent there would indeed be transactions with significant cross border effects that would fall below the EU thresholds, it is more likely than not that the current referral system would allow those transactions to be reviewed at the most appropriate level.

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

- ☐ YES
- ☒ NO
- ☐ OTHER

- **If yes**, please also indicate which are, in your opinion, the complementary jurisdictional criteria whose absence may impair the above-mentioned goal. Please also take into account, in your reply, the Commission's objective of not imposing undue burdens on businesses.

See the responses to question 14 to 17 above. The APDC believes that the current system adequately captures most (if not all) transactions having a meaningful impact on EEA markets.

More generally, the APDC believes that jurisdictional thresholds are by definition “imperfect” in the sense that one can always think of examples of transactions that may have an adverse impact on a given market and which would not be caught by the applicable thresholds, regardless of how such thresholds are designed. For example, transactions relating to very small (local) markets may have an adverse impact on competition, even if the participating undertakings have very low revenues and the value of the transaction is small. Such shortcomings are inevitable and would not be addressed by any practicable thresholds (the APDC believes that market share thresholds are not appropriate, as they give rise to significant uncertainties, with respect to market definitions and market shares calculations, very difficult to apply in practice).

The relevant question for the purpose of the public consultation is thus whether there is an “enforcement gap” that is significant enough to warrant the creation of an additional threshold, which, by definition, will give rise to an additional administrative burden for companies and which may delay the implementation of a larger number of transactions.

As explained above, and based on the experience of its members, the APDC is of the view that the answer to this question is negative.

The APDC believes that there is actually a risk of “over enforcement”, should a new threshold in value be adopted. Indeed many additional transactions not raising any competitive issues would therefore fall within the scope of the Commission under merger control rules.

- **If no or other**, please explain.

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

- ☐ YES
- ☒ NO
- ☐ OTHER

Please explain.

A "deal size" threshold could appear subjective and complex to determine or assess. It could imply more legal uncertainty compared to the thresholds based exclusively on the achieved turnover. See above.

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

Not applicable.

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

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

Please explain your response and provide examples where appropriate.

Assuming an additional, value based, threshold would be incorporated in the EUMR (which, again, is not an option that the APDC supports), it would need to be accompanied by a “bright line” local nexus test that would ensure that only transactions that are likely to have a significant impact in the EEA are effectively captured. In this respect, in its 2016 background paper on local nexus and jurisdictional thresholds in merger control, the OECD noted that a notification criterion based on the value of the transaction is unsuitable to determine whether a transaction will have an impact on a specific jurisdiction, and must be associated with an additional local nexus criteria. In such circumstances, local effects tests must be subjective, easy to quantify and easily ascertainable by the parties in line with the International Best Practice Recommendations. The only two OECD members which adopt this criterion as a merger control threshold (i.e., Mexico and the United States) combine the value of the transaction test with other notification criteria which are better suited to establish local nexus. The OECD also noted that local nexus is increasingly important in light of the evolution of the international merger control system, since more and more countries have adopted merger control systems and therefore the costs of compliance for multinational companies involved in mergers keep growing, and the risk of conflicting decisions and remedies by competition authorities is increasing.

Such local nexus should not be industry specific, in order to guarantee legal certainty. Indeed the determination of whether a particular transaction belongs to an industry or not could raise some questions. Moreover, many industries are very innovative (aside from the digital and pharmaceutical sectors). See below for more detail.

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

- ☒ YES
- ☐ NO
- ☐ OTHER

- Please state if any of the following criteria would be appropriate to ensure the desired efficiency [multiple answers are possible]:
 - ☒ A minimum level of aggregate worldwide turnover of all undertakings concerned.
 - ☒ A minimum level of aggregate Union-wide turnover of at least one of the undertakings concerned.
 - ☒ A maximum level of the worldwide turnover of the target business, in cases where the latter does not meet the Union-wide turnover thresholds (with the aim of only covering highly valued transactions where the target has a strong potential for instance to drive future sales but not cases where the target already generates significant turnover but outside of the EEA).
 - ☐ The requirement that the ratio between the value of the transaction and the worldwide turnover of the target exceeds a certain multiple. (Example: transaction value = EUR 1 billion, worldwide turnover of the target = EUR 100 million, ratio/ multiple = 10. The aim of this requirement would be to identify transactions where the valuation of the target company exceeds its annual revenues by several multiples, which could signal high market potential of the target.).
 - ☐ Other.

Please explain your answer.

The APDC believes that the three first criteria mentioned above would, especially if they are applied cumulatively and are sufficiently high, contribute to ensuring that only transactions with a sufficient EEA nexus would be captured by the new threshold (the introduction of which the APDC does not support in any case).

IV.3. Referrals

The division of competence between the Commission and the EU Member States is based on the application of the turnover thresholds set out in Article 1 of the Merger Regulation and includes three corrective mechanisms.

The first corrective mechanism is the so-called "two-thirds rule". Pursuant to this rule, notification under the Merger Regulation is not required if each of the parties concerned realises more than two thirds of its EU-wide turnover in one and the same Member State, even if the general thresholds under Articles 1(2) and 1(3) of the Merger Regulation are met. The objective of this rule is to exclude from the Commission's jurisdiction certain cases which contain a clear national nexus to one Member State.

The second corrective mechanism is the pre-notification referral system introduced in 2004. This mechanism allows for the re-allocation of jurisdiction to the Member States under Article 4(4) of the Merger Regulation or to the Commission under Article 4(5) if certain conditions are fulfilled. The initiative for requesting such a referral prior to notification lies in the hands of the parties. However, pre-notification referrals are subject to approval by the Member States and the Commission under Article 4(4) and by the Member States under Article 4(5) of the Merger Regulation.

The third corrective mechanism is the post-notification referral system whereby one or more Member States can request that the Commission assess mergers that fall below the thresholds of the Merger Regulation under certain conditions (Article 22 of the Merger Regulation). Conversely, a Member State may, in cases that have been notified under the Merger Regulation, request the transfer of competence to the national competition authorities under certain conditions (Article 9 of the Merger Regulation).

In relation to the current case referral mechanism foreseen by the Merger Regulation, the White Paper proposals aimed at making case referrals between Member States and the Commission more business-friendly and effective.

Those proposals essentially consist of:

1. Abolishing the two step procedure under Article 4(5) of the Merger Regulation, which requires that parties first file a Form RS and then the Form CO, if they would like the Commission to deal with a case that is notifiable in at least three Member States, but does not meet the jurisdictional thresholds of the Merger Regulation;
2. Specific modifications concerning the post-notification referrals from Member States to the Commission under Article 22 of the Merger Regulation, namely
 - an expansion of the Commission's jurisdiction to the entire EEA if it accepts a referral request under Article 22 of the Merger Regulation (currently the Commission only obtains jurisdiction in those Member States that join the referral request),
 - and a renouncement of jurisdiction over the entire EEA, if one or several Member States oppose the referral request, and
3. The removal of the requirement under Article 4(4) of the Merger Regulation pursuant to which parties have to assert that the transaction may "significantly affect competition in a market" in order for a case to qualify for a referral. Showing that the transaction is likely to have its main impact in a distinct market in the Member State in question would suffice. Removing the perceived "element of self-incrimination" may lead to an increase in the number of Article 4(4) requests.

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

- ☐ YES
- ☒ NO
- ☐ OTHER

Please explain.

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

- ☐ YES
- ☐ NO
- ☒ OTHER

Please explain.

OTHER, see the response to question 25 below.

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

- ☒ YES
- ☐ NO
- ☐ OTHER

Please explain.

Due to the size limitation, the APDC's answer is included in the attached document.

IV.4. Technical aspects

The 2014 Commission Staff Working Document (2014 SWD) accompanying the White Paper identified additional technical aspects of the procedural and investigative framework for the assessment of mergers where experience has shown that improvement may be possible. The SWD included the following proposals:

- Modifying Article 4(1) of the Merger Regulation in order to provide more flexibility for the notification of mergers that are executed through share acquisitions on a stock exchange without a public takeover bid.
- Amending Article 5(4) of the Merger Regulation to clarify the methodology for turnover calculation of joint ventures.
- Introducing additional flexibility regarding the investigation time limits, in particular in Phase II merger cases.
- Modifying Article 8(4) of the Merger Regulation to align the scope of the Commission's power to require dissolution of partially implemented transactions incompatible with the internal market with the scope of the suspension obligation (Article 7(4) of the Merger Regulation).
- Tailoring the scope of Article 5(2)(2) to capture only cases of real circumvention of the EU merger control rules by artificially dividing transactions and to address the situation where the first transaction was notified and cleared by a national competition authority.
- Clarification that "parking transactions" should be assessed as part of the acquisition of control by the ultimate acquirer.
- Amending the Merger Regulation to allow appropriate sanctions against parties and third parties that receive access to non-public commercial information about other undertakings for the exclusive purpose of the proceeding but disclose it or use it for other purposes.
- Amending the Merger Regulation to clarify that referral decisions based on deceit or false information, for which one of the parties is responsible, can also be revoked.

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

Due to the size limitation, the APDC's answer is included in the attached document.

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

The APDC would like to draw the Commission's attention to some other issues of a technical nature that would rather concern (for most of them) an amendment of the Commission Consolidated Jurisdictional Notice, notably:

- regarding the concept of undertaking: pursuant to article 3.1 (b), a concentration is characterized by a change of control over an undertaking. The Commission Consolidated Jurisdictional Notice (para. 24) defines an

undertaking as a business with a market presence, to which market turnover can be clearly attributed.

In the Real Estate sector, it is very usual that investors jointly acquire a real estate asset or land, without any attributed turnover at the time of the closing. Sometimes, a lease can be already concluded and enter into force a few years later, when construction works are completed. In such case, the Commission should clarify its position: since no clear turnover can be attributed to the asset at the closing, it is not deemed to be an undertaking. Consequently, the transaction should not be considered as a concentration. Should it be the case, what is the time-period to be taken into consideration by the Commission to consider that a turnover will be effectively achieved by the asset?

The Commission could also clarify the situation where the control of a real estate asset is acquired by investors and a lease is concluded with a non-controlling investor, providing an entry into force at the closing. In such case, the APDC considers that the asset does not have a market presence since the revenues are not achieved "on the market" but with a party involved into the transaction. Consequently, the asset would not constitute an undertaking and the transaction would not be a concentration.

- regarding the full function criteria: The Commission Consolidated Jurisdictional Notice (para. 91) states that a transaction involving several undertakings acquiring joint control of another undertaking from third parties will constitute a concentration according to Article 3(1) without it being necessary to consider the full-functionality criterion.

In the Real Estate sector, it is very usual that an investor acquires joint control, together with the existing owner, of a real estate asset by way of purchase of shares (see for a recent example, case M.8217 - CPPIB / Hammerson / Grand Central). In such a case, the company owning the real estate asset is usually not full-function.

The Commission should thus clarify that the full-functionality criterion needs only to be considered in the context of the creation of a joint venture and not in the context of a change of control, directly or indirectly, over the whole or a part of an undertaking, i.e. a business with a market presence, to which a market turnover can be clearly attributed.

- regarding the pre-filing: The Merger Regulation should provide that the Commission is authorized to launch the market test before the formal filing of the concentration, provided obviously that all the relevant information has been provided by the parties during the pre-filing period. Such a modification could be useful as, in some cases, some case teams have raised legal issues to refuse to launch the market test before the formal filing .

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

- ☐ YES
- ☐ NO
- ☐ OTHER

Please consider, inter alia, the time needed for the Commission to carry out its investigation and for the notifying parties to make legal and economic submissions, exercise their rights of defence and to propose and discuss commitments.

.

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

- ☐ YES
- ☐ NO
- ☐ OTHER

Please explain.

V. Submission of additional information

Please feel free to upload a concise document, such as a position paper, explaining your views in more detail or including additional information and data. The maximal file size is 1MB. Please note that the uploaded document will be published alongside your response to the questionnaire which is the essential input to this open public consultation. The document is an optional complement and serves as additional background reading to better understand your position.

**7aba8f17-4ff7-430e-98c8-c2aa480e2162/Consultation_merger_contribution_APDC_-
_version_EN_et_FR_11012017.docx**

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