3 June 2022

REPLY TO THE PUBLIC CONSULTATION ON THE SIMPLIFICATION OF MERGER CONTROL PROCEDURES

1. In the context of the public consultation launched on 6 May 2022 by the European Commission (the "**Commission**"), the Association of Lawyers Practicing Competition Law (hereinafter, the "**APDC**") welcomes the opportunity to comment on the draft revised Notice on a simplified treatment of certain concentrations ("**the Simplified Notice**"), the draft revised Regulation implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ("**the Implementing Regulation**") as well as the annexes to these revised texts.

2. The APDC wishes to thank the Commission for the opportunity to provide its views on the draft Simplified Notice and Implementing Regulation. It generally considers that, when entering into force, the revised Notice and Regulation will contribute to the objective of simplifying merger control procedures for obviously non-problematic cases. The APDC however wishes to point out that there may still be room for further improvements in relation to:

   - the definition of eligible concentrations (**1**);
   - the treatment of eligible concentrations (**2**);
   - the treatment of non-eligible concentrations (**3**).

3. As a general principle, the APDC suggests, in line with the Commission's simplification objective, that the contemplated revised procedure for the simplified treatment of certain concentrations should never give rise to more burdensome procedural requirements for the parties than the current regime.

I. DEFINITION OF ELIGIBLE CONCENTRATIONS

4. In line with its previous submission[1], the APDC generally welcomes the extension of the access to the simplified EU merger control procedure, especially considering the significant number of cases which do not raise any competition concerns but which currently still need to be notified under the normal procedure.

[1] APDC's contribution to the Commission's Consultation on the revision of certain procedural aspects of EU merger control, 18 June 2021.

5. The APDC encourages amendments to the existing rules governing the availability of the simplified procedure to the extent that (*i*) they reduce the administrative burden for the notifying parties; and (*ii*) they ensure higher legal certainty / predictability as to procedural eligibility of a given case.

6. For instance, the APDC supports the introduction of a "*super-simplified procedure*" for cases corresponding to the acquisition of control over / the creation of a full function joint-venture with activities that have no nexus to the European Union.

7. The APDC however draws the Commission's attention to certain aspects of the proposed new regime that are either unduly formalistic or that may give rise to legal uncertainty as to the availability of the simplified procedure.

(a) Categories of cases qualifying for the simplified procedure

8. The APDC generally welcomes the introduction of new types of vertical transactions that would become eligible to the simplified procedure[2] and agrees that the types of cases identified by the Commission are unlikely to raise concerns.

9. However, the APDC would note that:

- the first new category of vertical cases that would be eligible to the simplified procedure (*i.e.*, upstream market shares and downstream purchasing share below 30%) should still apply to cases where one party has a market (respectively purchasing) share over 30% on a specific segment market but where there is no genuine vertical relationship on that specific segment because either (*i*) the party active downstream does not purchase the input supplied by the party active upstream or (*ii*) the party active upstream does not sell the input used by the party active downstream ;

- the second new category of vertical cases (*i.e.*, downstream market shares below 50% and HHI delta below 150) is arguably too complex and/or limited. To provide increased flexibility, the APDC would suggest referring to a specific market share increment as an alternative to the HHI delta (in line with the other thresholds for simplified cases).

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[2] In practice, the Commission suggests to introduce two new categories of eligible cases: (*i*) when, under all plausible market definitions, the individual or combined upstream market share of the parties to the concentration is below 30% and their combined purchasing share is below 30%; and (*ii*) when, under all plausible market definitions, the individual or combined upstream and downstream market shares of the parties to the concentration are below 50% and the HHI delta is below 150 and the smaller undertaking in terms of market share is the same in the upstream and downstream markets.

10. More generally, the reference to "*all plausible markets*" in para 5(d) and para 8 is likely to raise issues in terms of justifying the applicability of the simplified procedure, or even to jeopardize the effectiveness of this new category of eligible cases, in particular when there are many alternative markets to consider, some of which may be very theoretical and not necessarily relevant. The APDC would encourage a more pragmatic approach referring for instance to the "*main alternative market definitions*", that would be more in line with an extension of the benefit of the simplified regime to additional categories of transactions.

(b) On the introduction of a flexibility clause

11. The APDC is supportive of the introduction of a flexibility clause enabling the Commission to be pragmatic in selecting cases that are eligible for the simplified procedure.

12. Yet, the APDC considers that, as currently drafted, the flexibility clause is not likely to provide much improvement considering the limited leeway provided to the Commission (it is essentially based on minor deviations in market shares / turnover or asset value rather than on the fundamentals of the case).

13. From this perspective, it does not provide the Commission with the opportunity to apply the simplified procedure to cases where sufficiently granular or reliable market share data is not available (for instance on narrow segments) but for which there is no doubt that the transaction is unlikely to raise any sort of competition concern. As mentioned in its previous submission, the APDC considers that the Commission should have a certain degree of discretion to apply the simplified procedure to cases that do not strictly fall within pre-defined categories. The Commission should also strive to apply this discretion, so that any flexibility afforded by the Simplified Notice is actually used in practice (the experience of APDC members suggests that the flexibility of para 6 of the current Simplified Notice was rarely applied in practice, which frequently led the parties to unproblematic cases to notify under the normal procedure).

14. The APDC also wonders whether it is useful to distinguish between (*i*) cases that are fully eligible to the simplified procedure (para 5 of the Simplified Notice); and (*ii*) cases for which the parties have to request the application of the simplified procedure (para 8 and 9 of the Simplified Notice). The turnover or market share difference between the two categories of cases is minimal. Accordingly, the risk that a case could raise competition concerns is identical for both categories of cases and they should therefore be treated in the same manner. Also, the list of safeguards and exclusions always gives room for the Commission to revert to the normal procedure.

15. Finally, foregoing the need for the parties to request the application of the simplified procedure for cases falling under para 8 and 9 of the Simplified Notice would make it possible to allow all cases to proceed without pre-notification (as suggested *infra*).

(c) On the safeguards and exclusions

16. The proposed revised rules applicable to the simplified procedure provide for the introduction of a long list of various circumstances which can lead to the exclusion of certain transactions from the scope of the simplified procedure (although they would have otherwise qualified for such procedure).

17. As previously stated, the APDC fears that this new list would lead to the Commission to refuse to apply the simplified procedure to a given case despite the fact that, given the limited shares of the parties, the case would not raise concerns, regardless of the existence of one of the circumstances listed in the safeguards and exclusions.

18. Moreover, the APDC is concerned that the systematic use of such circumstances to define the scope of the simplified procedure may be burdensome for the parties and difficult to apply in practice, notably due to a lack of readily-available information on the circumstances in question. In particular, determining whether certain circumstances listed among the exclusions are actually present would require significant additional data collection (*e.g.,* production or capacity shares exceeding market shares in any plausible market), with no or little added-value to the Commission's analysis.

19. In this regard, care should be taken to avoid that pre-notification discussions over procedural eligibility annihilate the advantages of the simplified procedure in terms of data gathering and time management.

20. Besides, some circumstances call for a subjective assessment (*e.g.,* use of the term "*important*" with regards to "*technological, financial, or competitively valuable assets*", brand recognition, shop location, "*technical specifications, quality or level of service*", advertising, innovators or pipeline product or the use of "*significant*" with regards to user base, or even the notion of "*closely related neighboring markets*" that has proven over the years to entail a certain degree of discretion), which prevents the parties to the transaction from having sufficient predictability and will inevitably raise consistency issues in the application of these criteria, with no reasoned decisions to cast light on the Commission's decisional practice.

21. At the very least, the Commission should retain only exclusion criteria (*i*) that are objective; (*ii*) that do not require disproportionate data gathering or otherwise impose an excessive burden on the parties to establish. Also, as explained below, this list of safeguards and exclusion should be assessed in a much more pragmatic way than is currently contemplated in the draft Short Form CO.

II. THE TREATMENT OF ELIGIBLE CONCENTRATIONS

22. As a preliminary comment, the APDC welcomes the Commission's endeavour to simplify the Short Form CO and the proceedings leading to the adoption of a simplified decision.

23. The APDC wishes to make the few following comments.

24. ***First***, the APDC welcomes the possibility of not having to pre-notify transactions falling under 5 a) of the Communication on the simplified procedure. However, the APDC is of the view that all simplified cases should be able to proceed without pre-notification. This pre-notification contact may extend the review by several days or weeks which significantly increases the official 25 business days of the Phase I period. Under a direct notification system, the Commission would still have the possibility to raise specific questions during the 25 business days of Phase I. This procedure would be similar to the one used in Germany, Austria, or North America.

25. In the alternative, the APDC considers that the Commission should at least amend para. 28 of the draft Simplified Notice to include a best effort commitment to limit any pre-notification discussions to two-weeks and to confirm within that timeframe that a concentration is eligible to the simplified procedure.

26. ***Second*** the APDC understands that where it is not explicitly requested, no specific additional explanations are required beyond ticking the relevant boxes. For instance, in relation to Section 6.1 and the description of the change of control, the parties to a concentration would merely have to check the relevant boxes and provide the underlying documentation. The parties would not have to provide the Commission with a detailed analysis of why *e.g.*, two parties would exercise joint control, or a joint-venture would be full-function.

27. If that is indeed the case, it would be useful for the Commission to expressly confirm this point in the Short Form CO.

28. ***Third***, the APDC notes that the market shares tables of Sections 8 to 10 remain very detailed and cumbersome for the parties since they cover all possible overlap markets, which in some cases may make the provision of information more burdensome than would be required under the Form CO. Also, a specific and detailed computation of market shares does not seem warranted for concentrations that are eligible to the simplified procedure.

29. A more efficient process should be based on increased flexibility and could consist in the Commission merely requesting the Parties to confirm that they can guarantee that their market shares do not cross the thresholds provided for in the Simplified Notice.

30. In any event:

- providing market shares both in value and in volume does not seem necessary. When the parties have a 20 % combined market share in volume, the likelihood that their combined market share in value would reach a level that could raise any competition concern appears extremely remote. Accordingly, the Commission could clarify that providing only one of these metrics is sufficient (or any metric available and generally used in the industry considered).

- requiring a detailed description of "*metrics, sources and methodology followed for market* share *calculation*" also appears excessively burdensome. In many cases, the parties to a concentration have full certainty that their market shares would in no way exceed *e.g.*, 15 or 20%. Yet, they do not have specific market share data, and might not have any reliable way of assessing the total market's value or volume. In such circumstances, the Commission should accept that the parties cannot provide a detailed methodology for the calculation of market shares. In addition, the Commission could consider that market shares estimates that a company refers to in the ordinary course of business are sufficient. Providing proof of such estimates, where available, should be sufficient, even if no detailed computation is provided.

- Should the Commission have reasons to believe that the notifying parties' representation of their market shares is inaccurate, it would always have the opportunity to require more detailed information and corresponding documentation to confirm or infirm the parties' views.

  The parties have in any event to confirm in all notifications that, to the best of their knowledge and belief that the information provided in the notification is true, correct, and complete, that true and complete copies of documents required have been supplied, that all estimates are identified as such and are best estimates of the underlying facts, and that all the opinions expressed are sincere.

31. ***Fourth***, the APDC underlines that the revised draft Short Form CO only offers a limited simplification with respect of the supporting documentation to be provided by the parties. The requirement to submit, where the transaction leads to one or more horizontal overlaps and/or vertical links in the EEA, "*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, 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 to analyse the notified concentration*" remains extremely burdensome. This information can be very extensive and complex to obtain, especially because responsive documents are often numerous and disseminated within the parties' organizations, especially when certain board members also have executive positions, and these documents are seen as highly confidential by the undertakings concerned. In practice, section 5.3 of the current Short Form CO results in a waiver request in a significant percentage of cases (approx. 26% of cases over the period 2019-

2021 based on some APDC members calculation), which reflects the unnecessary burden of the requirement.

32. At the very least, the APDC is of the view that, where the parties are able to confirm that their market share is below a materiality threshold of, *e.g.* 10% or 20%, the obligation to provide supporting documentation should be removed. In specific instances where the Commission finds that it does need to review some or all of the documents, it can request them from the notifying parties through a RFI, including a stop-the-clock mechanism in extreme cases.

33. This request could also further be streamlined for simplified cases by covering only documents provided to the board of directors (or equivalent body) as a whole rather than to "any members" of such board.

34. ***Fifth***, the APDC considers that further simplification appears possible in relation to Section 11 of the draft Short Form CO.

35. As explained *supra*, the APDC fears that as currently drafted, the list of safeguards and exclusions would preclude the application of the simplified procedure in many unproblematic cases.

36. In addition, the APDC wonders whether ticking boxes is adequate. Ticking each individual box for each set of circumstances indeed risks being both overly formalistic and ill-suited. In many cases, some questions will have no relevance at all. In other cases, it might be difficult to answer with a simple yes or no to questions that call for a subjective assessment, even if the case on its face does not raise any competitive concerns at all. In such circumstances, the Commission risks receiving many Short Forms CO where "*yes*" boxes are ticked, together with an explanation of why this positive answer does not call into question that case's eligibility to the simplified procedure. In this respect, filling out the Short Form CO would actually become more burdensome for the parties than in the current regime.

37. A simpler alternative would be for the parties to carry out their substantive assessment, including on the sets of circumstances listed in the Simplified Notice, and to give their conclusions to the Commission in an open-text reply. The Commission could then request clarifications, on a case-by-case basis. This would not generate additional work for the Commission, as compared to the likely scenario where in many cases, yes boxes are ticked and additional explanations are provided.

38. ***Sixth***, the APDC would like to point to a few potential technical issues in the draft Short Form CO:

    - In Section 1, is it useful to keep distinguishing the various legal basis for situations of joint control? Since the *Austria Asphalt* judgment[3], the distinction between a brown-field and green-field joint venture has lost its relevance for jurisdictional purposes. In practice, it is often not easy to distinguish one from the other.

    - the APDC does not fully understand the purpose of the last question of Section 1 ("*seat of the companies involved*"). Also, this information is requested elsewhere in the Short Form CO.

    - in Section 6, the Commission asks whether any party has a casting vote with a simple yes/no answer. Yet, in some case, further explanations might be necessary to explain why this casting vote is of limited relevance and effectiveness pursuant to para 82 of the Commission's consolidated jurisdictional notice.

III. THE TREATMENT OF NON-ELIGIBLE CONCENTRATIONS

39. The APDC welcomes the simplifications introduced in the proposed revised Form CO, mostly the removal of the information requirements in Section 8 of the current Form CO concerning "*Cooperative Agreements*", "*Trade between Member States and imports from outside the EEA*" and "*Trade associations*".

40. The APDC regrets, however, that these reductions in the scope of information required by the Form CO are in fact quite limited and that several new requirements, on the contrary, [significantly] increase the information and data gathering burden placed on the parties to a concentration notified to the Commission, even those that are not likely to raise competition concerns.

41. ***First***, the proposed revised draft Form CO significantly increases the information requirements with respect to quantitative economic data.

42. Indeed, Section G of the Introduction to the current Form CO provides that quantitative economic data collected by the parties should be described "*in cases in which quantitative economic analysis for the affected markets is likely to be useful*" and provides examples of cases where such data could be useful. It also specifies that such information "*is not required for the Form CO to be considered complete*".

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[3] ECJ, 7 September 2017, case C-248/16.

43. By contrast, Section G of Introduction to the proposed revised Form CO:

    - generalizes the requirement to describe quantitative economic data collected by the parties to any concentration, without any exception, and accordingly removes examples of cases where such description could be useful; and

    - adds several items to the list of information to be described (new item (d) in para 25 and new para 26); and

    - provides that this information must be supplied for the Form CO to be considered complete.

44. The APDC considers that these extended information requirements applicable to any concentration are disproportionate. Instead, the current requirements should be preserved, leaving it (*i*) to the parties the task to identify if the concentration they notify warrants a description of quantitative economic data; and (*ii*) to the case team the possibility to request such description, on a case-by-case basis rather than systematically.

45. ***Second***, in the proposed revised draft Form, Section 3.4 includes a new second sentence requesting "*to indicate whether any of the parties to the concentration has been the* beneficiary *of aid that is or has been subject to Union State aid proceedings*".

46. Currently, Section 3.4 of the Form CO requires a description of "*any financial or other support received from public authorities by any of the parties to the* concentration *and the nature and amount of this that support*". Based on the experience of the members of the APDC contributing to this consultation, this section is consistently interpreted as requiring to describe whether the parties have received such financial support <u>as part of the notified transaction</u>. Accordingly, this section is most of the times not applicable.

47. The second sentence which the Commission proposes to add to Section 3.4 would therefore significantly increase the information gathering burden required to complete a Form CO. The parties would indeed have to check within their (potentially large) organizations whether they have benefited of any State aid. The APDC considers that requesting such information for each and every notified concentration is disproportionate. The APDC recommends that this new requirement either be dropped altogether or at the very least that it be requested only for affected markets and for aids received in relation with the parties' activities on such markets.

48. ***Third***, in Section 6.3(a) of the proposed revised Form CO, the market share threshold above which a notified concentration is considered as having a significant impact in cases of potential competition is decreased from 30% in the current Form CO to 20% (while the 30% threshold remains unchanged in para. 6.3(b)).

49. The Commission has not provided any reason justifying such reduction in this market share threshold, which will result in increasing the number of transactions for which the onerous information requested for affected markets will need to be gathered by the parties

to complete a Form CO. The APDC considers that the current 30% threshold should remain unchanged as it is sufficiently low and adequate to cases of potential competition.

50. ***Fourth***, the APDC has with respect to Section 7.4 of the proposed revised Form CO the same reservations as expressed above with respect to the identical Section 11 of the proposed revised Short Form CO. As mentioned, those sections include criteria which are either too subjective and/or too burdensome to allow straightforward answers to a "yes" or "no" tick-the-box form.

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