APDC's Response to the questionnaire of EU Commission regarding the evaluation of procedural and jurisdictional aspects of EU Merger Control January 13, 2017

The APDC wishes to inform the Commission that its responses to this questionnaire have been prepared by several of its members, namely: Robert Saint-Esteben, Emmanuel Reille, Marie de Drouâs, Sébastien Dominguez, Juliette Goyer, Jean-Julien Lemonnier, Charles-Henri Calla, Alexandre Glatz, David Tayar, Frédéric de Bure, Laëtitia Gavoty, Philippe Guibert.

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	○	○	○	○	○	○	○

Please explain.

Rate: 7

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.

French version: *Niveau : 7.*

La Commission a expressément confirmé que la question (et donc l'estimation demandée) se réfère à l'intérêt du « guichet unique » dans le cadre de la procédure simplifiée en matière de contrôle des concentrations (et non de l'intérêt de la procédure simplifiée elle-même).

L'APDC estime que l'examen de ces concentrations par le biais d'un « guichet unique » a créé une forte valeur ajoutée dans la mesure où cette procédure permet d'éviter d'être confrontés à plusieurs avis potentiellement divergents, de la part des différents Etats Membres.

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

YES

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.

French version: *Les mesures de simplification adoptées en 2013 ont réduit la charge qui pesait sur les entreprises pour les opérations visées au point 5(b) de la Communication de la Commission relative à la procédure simplifiée (ci-après la « Communication »). Cependant, de nombreuses informations doivent toujours être fournies, concernant notamment la description détaillée de la concentration, la propriété et le contrôle, les activités de la partie ou des parties acquérant le contrôle, les activités de la cible et la justification de l'absence de marchés « à déclarer ».*

Toutes ces informations demandées n'apparaissent pas justifiées pour ces catégories de concentration, qui ne soulèvent aucun problème de concurrence.

(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

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.

French version: Autre

Une documentation très lourde est toujours exigée dans le cas des opérations visées au point 5 (c) ou point 6 de la Communication, pesant ainsi sur les entreprises qui préparent une notification. Deux exemples de l'importance de cette documentation peuvent être fournis.

Premièrement, la Commission demande notamment d'identifier et de fournir des informations relatives aux marchés « à déclarer », comprenant tous les marchés de produits et géographique pertinents, ainsi que des définitions alternatives de marchés de produits et géographique possibles. Il résulte d'une telle approche une demande d'informations très vaste et incertaine. En outre, cela mène quasi systématiquement à de longues discussions avec l'équipe de rapporteurs en charge du cas, pour définir les marchés « à déclarer » et les parts de marché qui doivent figurer dans le Formulaire simplifié.

Cette exigence relative à l'ensemble des marchés « à déclarer » apparaît également incompatible avec l'esprit de la procédure simplifiée, la Communication de la Commission indiquant que « Lorsqu'il est difficile de définir les marchés en cause ou de déterminer les parts de marché des parties, la Commission n'appliquera pas la procédure simplifiée » (para 8). En effet, l'APDC comprend de cette affirmation qu'une procédure simplifiée ne serait pas appropriée lorsqu'il existe plusieurs alternatives plausibles de définitions de produits et géographique pertinents.

En outre, il résulte de cette nouvelle exigence un décalage manifeste entre :

- *les informations très précises que la Commission reçoit dans les notifications soumises à la procédure simplifiée, d'une part, et*
- *les décisions simplifiées qui ne comportent aucun détail sur les marchés « à déclarer », d'autre part.*

Pour ces raisons, l'APDC estime que les marchés à déclarer devraient être limités aux seuls marchés pertinents.

Deuxièmement, lorsqu'il existe des marchés « à déclarer » dans les opérations visées au point 5 (c) ou point 6 de la Communication, la Commission demande à la partie notifiante de fournir les présentations internes suivantes, en tant que pièces justificatives : « des copies de toutes les présentations préparées par ou pour un ou des membres du conseil d'administration ou de l'organe de surveillance ou reçus par un ou des membres du conseil d'administration ou de l'organe de surveillance, selon la structure de la gouvernance d'entreprise, ou toute autre personne exerçant des fonctions similaires (ou à laquelle de telles fonctions ont été déléguées ou confiées) ou de l'assemblée générale des actionnaires analysant la concentration notifiée ». Cette documentation, laquelle n'est étonnamment pas limitée aux extraits comme pour celle requise dans le formulaire de notification « standard », peut être très importante et difficile à obtenir, en particulier parce que ces documents sont vus comme hautement confidentiels par les entreprises concernées.

Or cette exigence a été introduite par les mesures de simplification adoptées en 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

YES

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).

French version: *Les mesures de simplification ont limité le nombre d'informations demandées dans un tel cas. Cependant, l'APDC pense qu'il est possible d'aller encore plus loin dans la simplification (voir ci-dessous).*

(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

YES

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).

French version: *Les mesures de simplification adoptées en 2013 ont réduit la charge qui pesait sur les entreprises pour les opérations visées au point 5(d) de la Communication. Cependant, un nombre substantiel de documents doit toujours être fourni, notamment lorsqu'il existe un ou plusieurs marchés « à déclarer » (voir ci-dessus concernant les opérations visées au point 5 (c) ou au point 6 de la Communication).*

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

YES

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

French version: *Ces cas étaient couverts par le paragraphe 5(d) de la Communication.*

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.

(ii) Post notification:

- YES
- NO

YES

Those cases were covered by paragraph5(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.

French version: *Ces cas étaient couverts par le paragraphe 5 (c) de la Communication. Le changement en faveur de la procédure normale a eu lieu à la suite d'une plainte d'un tiers, après la publication de l'opération de concentration sur le site internet de la Commission.*

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.

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.

YES

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.

French version: *En raison du nombre substantiel de documents qu'il est nécessaire de réunir lors de la procédure simplifiée et des longues discussions sur les marchés « à déclarer » (voir ci-dessus), les parties hésitent à finalement suivre la procédure « normale », bien qu'elles soient éligibles à suivre la procédure simplifiée.*

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

YES

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%[1]. 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[2].

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[3], 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.

French version: *Du point de vue de l'APDC, au-delà des types de cas listés à la question 2, il en existe d'autres qui ne sont généralement pas susceptibles de soulever des problèmes de concurrence mais qui ne bénéficient pourtant pas de la procédure simplifiée. L'APDC suggère de modifier les seuils de certaines catégories, listées à la question 2.*

Premièrement, les seuils de parts de marché des concentrations visées au point 5(c) de la Communication devraient être relevés. Les seuils actuels, à savoir 20% en cas de relation horizontale et 30% en cas de relation verticale, semblent encore bas. En conséquence, des concentrations qui ne posent pas de problème de concurrence sont soumises à la procédure normale, alors qu'elles pourraient bénéficier de la procédure simplifiée sans remettre en cause l'objectif du Règlement d'empêcher les effets restrictifs de concurrence.

L'APDC considère que les seuils devraient être relevés de 5 points, soit 25% en cas de relation horizontale et 35% en cas de relation verticale.

A cet égard, il peut être observé que l'Autorité de la concurrence française applique un seuil plus élevé pour les marchés affectés. Selon cette dernière, un marché est affecté lorsque deux ou plusieurs entreprises concernées

[1] Merger control guidelines of the French competition Authority, para 182.
[2] Merger control guidelines of the French competition Authority, para 384.
[3] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), JO 5.2.2004, para 20.

exercent des activités sur un même marché et que leurs parts de marché cumulées atteignent 25% ou plus[4]. Lorsque la part de marché combinée des entreprises concernées est inférieure à 25% dans une concentration horizontale, l'Autorité de la concurrence considère, en effet, que l'opération n'est pas susceptible de porter atteinte à la concurrence[5].

En outre, les opérations dans lesquelles les parts de marchés sont strictement inférieures à [20-30]% en cas de relation horizontale ou [30-40]% en cas de relation verticale, ne sont pas susceptibles de poser des problèmes de concurrence ; la Commission accorde des autorisations en phase I sans engagement. Cette observation est tirée de l'analyse de la pratique décisionnelle de la Commission au cours de la dernière année.

Deuxièmement, la référence à l'indice HHI devrait être modifiée, pour la catégorie 6 de la Communication. Actuellement, l'incrément de l'HHI résultant de la concentration doit être inférieur à 150 (en plus de la condition des parts de marché inférieure à 50%). La valeur de l'indice HHI elle-même ne doit pas être prise en compte. Ce critère de l'HHI introduit en 2013 semble être très restrictif et ne trouve à s'appliquer qu'en cas de très faibles incréments de parts de marché.

L'APDC considère que la Commission devrait être cohérente avec les Lignes directrices sur l'appréciation des concentrations horizontales[6], aux termes desquelles la Commission estime que des relations horizontales ne sont pas susceptibles de soulever des problèmes de concurrence dans les trois situations suivantes :

- *l'HHI est inférieur à 1000 ;*
- *l'HHI est compris entre 1000 et 2000, avec un delta inférieur à 250 ;*
- *l'HHI excède 2000, avec un delta inférieur à 150.*

En conséquence, chacune de ces trois situations devrait justifier l'application d'une procédure simplifiée.

Troisièmement, un seuil supplémentaire devrait être ajouté en cas de relations verticales dans lesquelles une des parties a plus de 30% de parts de marché et l'autre partie a moins de 5% de parts de marché sur un marché verticalement lié. Les opérations qui seraient en dessous de ce nouveau seuil devraient être éligibles à la procédure simplifiée.

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.

NO

Transactions falling under point 5a of the Notice:

- YES
- NO

NO

Please explain.

Transactions falling under point 5b of the Notice:

- YES
- NO

[4] Lignes directrices de l'Autorité en matière de contrôle des concentrations, para 182.
[5] Lignes directrices de l'Autorité en matière de contrôle des concentrations, para 384.
[6] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), JO 5.2.2004, para 20.

NO

Please explain.

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

- YES
- NO

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).

French version: *Pour ces catégories de concentration, la charge de travail fournie par les entreprises qui notifient l'opération dans le cadre de la procédure simplifiée apparaît particulièrement disproportionnée. Comme indiqué dans la réponse à la question 2(ii), les exigences concernant à la fois la définition des marchés « à déclarer » et la documentation interne sont très contraignantes. La définition des marchés donne lieu quasi systématiquement à de longues discussions, avec l'équipe de rapporteurs en charge du cas (voir ci-dessus).*

Transactions falling under point 5d of the Notice:

- YES
- NO

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.

French version: *En termes de charge de travail et de ressources mobilisées, l'APDC n'a nullement observé une réduction depuis les mesures de simplifications adoptées en 2013.*

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

YES

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

YES

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

YES

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.

French version: *L'APDC estime qu'un formulaire « sommaire » d'informations devrait être introduit pour les concentrations non exemptées tombant dans le champ d'application du règlement sur les concentrations, à savoir celles visées aux paragraphes 5(b), 5(d) et 6 de la Communication.*

En effet, déterminer si une opération donnée est visée par ces dispositions exige de définir les marchés et de calculer les parts de marché, ce qui soulève le plus souvent des questions. Le défaut de critère clair, lié seulement aux seuils de notification en chiffre d'affaires, peut ainsi donner lieu à une insécurité juridique quant à savoir s'il faut ou non notifier l'opération. Un nouveau système introduisant des demandes d'informations sommaire permettrait aux parties i) de réduire la charge de travail pour la préparation de la notification et ii) d'obtenir le bénéfice d'une sécurité juridique.

Le formulaire « sommaire » d'informations ne devrait couvrir que des champs limités : une présentation des parties et des secteurs dans lesquels elles sont actives et une présentation de l'opération de concentration.

Sur la base de ces informations, l'APDC est d'avis que la Commission devrait disposer d'un délai de 10 jours ouvrables, afin de décider si elle examine ou non le cas.

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

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.

French version: *L'APDC désapprouve l'introduction d'un système d'auto-évaluation.*

Introduire un système d'auto-évaluation impliquerait une décision des parties, basée sur leur propre analyse de la pratique décisionnelle eu égard aux marchés « à déclarer ». Cette analyse serait risquée, étant donné toutes les définitions plausibles actuellement considérées par la Commission et la relative diminution du nombre de décisions détaillées publiées par la Commission (en raison de l'augmentation du nombre de décisions simplifiées).

En outre, la proposition de la Commission de disposer de la possibilité d'initier une enquête (de sa propre initiative ou après une plainte) créerait davantage de risques pour les entreprises. Prévoir un long délai pendant lequel la Commission pourrait décider d'examiner le cas après la réalisation de l'opération diminuerait également la sécurité juridique, puisque cela exposerait les entreprises à de potentielles enquêtes après la réalisation complète de l'opération.

L'introduction d'une auto-évaluation peut dès lors mener à une insécurité juridique substantielle.

Si cette option devait être suivie par la Commission, l'APDC considère que (i) la période durant laquelle la Commission pourrait enquêter devrait être limitée à un mois maximum à compter de la date de la réalisation de l'opération et (ii) la Commission devrait publier des lignes directrices, détaillant précisément les critères de l'auto-évaluation des catégories de concentration concernées.

En outre, un système d'auto-évaluation devrait être associé à un système de notification volontaire, en vertu duquel les parties pourraient décider de notifier un avis informatif à la Commission, sans être obligées de le faire. Un système volontaire de cette nature permettrait aux parties d'obtenir le bénéfice d'une sécurité juridique.

8.4 Other

YES

NO

YES

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.

French version: *L'APDC accueille très favorablement l'initiative de la Commission de réfléchir à de nouvelles simplifications dans le contrôle européen des concentrations.*

A cet égard, l'APDC attire respectueusement l'attention de la Commission sur les points suivants :

- *Si la Commission devait maintenir l'exigence actuelle relative aux marchés « à déclarer », l'APDC considère que les décisions simplifiées devraient fournir des détails sur les marchés « à déclarer » développés par les entreprises en cause. Cela aiderait les entreprises à préparer les notifications dans le cadre de la procédure simplifiée.*
- *L'APDC suggère que la Commission revoie et mette à jour sa communication sur la définition du marché pertinent (datant de 1997)*
- *De manière générale, l'APDC considère qu'actuellement des simplifications en termes de délai sont possibles. Alors que la Commission avait annoncé qu'un délai plus court pour les contacts de pré-notification devrait résulter d'une réduction des demandes d'informations décidées en 2013, l'APDC n'a pas observé un tel changement. Selon les Lignes directrices sur les meilleures pratiques de la Commission, les parties devraient initier la pré-notification au moins deux semaines avant la notification. En pratique, de telles discussions peuvent encore durer jusqu'à plusieurs semaines ou plusieurs mois, y compris dans le cadre de procédures simplifiées.*

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

No

Please explain

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

French version: *L'APDC estime que ces catégories de concentrations devraient être exemptées (voir ci-dessus et ci-dessous).*

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

Yes

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.

French version: *L'APDC estime que l'examen de ces opérations par le biais d'un « guichet unique » a créé une forte valeur ajoutée, dans la mesure où cette procédure permet d'éviter d'être confrontés à plusieurs avis potentiellement divergents de la part des différents Etats Membres.*

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

NO

Please explain

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

French version: *L'APDC estime que ces catégories de concentrations devraient être exemptées (voir au-dessus et en-dessous).*

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.

French version: *En tant qu'association d'avocats, l'APDC n'a pas d'avis sur la question.*

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

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.

French version: *L'exclusion des entreprises communes hors EEE du champ d'application du Règlement sur les concentrations aurait pour conséquence de soumettre ces opérations au contrôle d'un ou plusieurs Etats membres de l'UE, avec leurs différentes approches et délais. En fin de compte, cela créerait une charge de travail supplémentaire substantielle pour les entreprises, avec une insécurité juridique.*

Par conséquent, l'APDC estime que la Commission ne devrait pas exclure du champ d'application du Règlement sur les concentrations les entreprises communes hors EEE, lesquelles devraient simplement être exemptées de toute exigence de notification.

(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

YES

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.

French version: *L'APDC estime que les entreprises communes hors EEE ne sont pas susceptibles de soulever des problèmes de concurrence et qu'en conséquence, elles devraient être exemptées de l'obligation préalable de notification, sous réserve que les conditions listées dans la Communication (point 5(a)) soient remplies.*

(iii) Other.

Please explain.

IV.2 Jurisdictional thresholds

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.

- **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.

French version: *L'APDC n'est pas en mesure de divulguer des détails sur les opérations dans lesquelles ses membres peuvent être impliqués. Cependant, après avoir consulté ces derniers, l'APDC considère que les exemples d'opérations dans l'économie digitale ayant des effets transfrontaliers qui franchissent les seuils actuels, et qui peuvent avoir un impact significatif sur la concurrence, sont rares.*

L'APDC est d'avis que l'introduction d'un seuil supplémentaire basé sur la valeur de l'opération engendrerait une charge supplémentaire pour les entreprises européenne et non-européenne, qui ne semble pas être justifiée par un bénéfice potentiel. En effet, un nouveau seuil créerait une charge additionnelle avec des notifications supplémentaires. Il rendrait aussi plus complexe l'analyse de l'opération et impliquerait des délais supplémentaires (notamment le délai nécessaire à l'analyse et l'évaluation du nouveau seuil exprimé en valeur) et des incertitudes, à la fois pour les entreprises concernées et pour la Commission.

Le coût et la charge supplémentaires seraient renforcés par le fait que le système européen est caractérisé par des demandes d'informations extensives dans le cadre du Form CO et qu'il est relativement long, même pour une transaction qui ne soulève pas de problème de concurrence. Dans les pays où l'on demande aux parties des informations sommaires et dans lesquels l'autorisation peut être rapidement obtenue, l'impact de seuils plus larges, qui peut résulter en un plus grand nombre de notifications, peut être limité parce que le coût total et la charge imposés par un tel système sont relativement faibles. C'est le cas notamment aux Etats-Unis qui est le principal pays appliquant un seuil de concentration exprimé en valeur de la transaction. C'est également le cas en Allemagne qui envisage actuellement une réforme similaire de son régime de notification.

Cela constituerait également une sérieuse contrainte pour les entreprises investissant en Europe, notamment les investisseurs privés / les fonds d'investissement, très sensibles à la rapidité de la réalisation de l'opération.

Les opérations auxquelles se réfère la Commission dans le secteur de l'économie digitale étant rares, l'APDC estime que l'introduction d'un nouveau seuil serait disproportionnée par rapport au bénéfice potentiel qui en résulterait.

En outre, l'APDC observe que l'acquisition de WhatsApp par Facebook a été finalement autorisée sans engagement par la Commission. Inversement, de nombreuses opérations récentes dans l'économie digitale qui n'ont pas donné lieu à des préoccupations de concurrence (telle que l'acquisition de Linkedin par Microsoft) ont franchi les seuils actuels.

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.

French version: *L'APDC n'est pas en mesure de divulguer des détails sur les opérations dans lesquelles ses membres peuvent être impliqués. Cependant, après avoir consulté ces derniers, l'APDC considère que les exemples d'opérations dans le secteur pharmaceutique ayant des effets transfrontaliers et franchissant les seuils actuels, et qui peuvent avoir un impact significatif sur la concurrence, sont rares.*

L'APDC est d'avis que l'introduction d'un seuil supplémentaire basé sur la valeur de l'opération engendrerait une charge supplémentaire pour les entreprises européenne et non-européenne, qui ne semble pas être justifiée par un bénéfice potentiel. En effet, un nouveau seuil créerait une charge additionnelle avec des notifications supplémentaires. Il rendrait aussi plus complexe l'analyse de l'opération et impliquerait des délais supplémentaires (notamment le délai nécessaire à l'analyse et l'évaluation du nouveau seuil exprimé en valeur) et des incertitudes, à la fois pour les entreprises concernées et pour la Commission.

Le coût et la charge supplémentaires seraient renforcés par le fait que le système européen est caractérisé par des demandes d'informations extensives dans le cadre du Form CO et qu'il est relativement long même pour une transaction qui ne soulève pas de problème de concurrence. Dans les pays où l'on demande aux parties des informations sommaires et dans lesquels l'autorisation peut être rapidement obtenue, l'impact de seuils plus larges, qui peut résulter en un plus grand nombre de notifications, peut être limité parce que le coût total et la charge imposés

par un tel système sont relativement faibles. C'est le cas notamment aux Etats-Unis qui est le principal pays appliquant un seuil de concentration exprimé en valeur de la transaction. C'est également le cas en Allemagne qui envisage actuellement une réforme similaire de son régime de notification.

Cela constituerait également une sérieuse contrainte pour les entreprises investissant en Europe, notamment les investisseurs privés / les fonds d'investissement, très sensibles à la rapidité de la réalisation de l'opération.

Les opérations auxquelles se réfère la Commission dans le secteur pharmaceutique étant rares, l'APDC considère que l'introduction d'un nouveau seuil serait disproportionnée par rapport au bénéfice potentiel qui en résulterait.

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.

French version: *Voir les réponses aux questions 14 et 15 ci-dessus.*

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.

French version: *Comme indiqué ci-dessus, l'APDC estime que l'éventuel « vide juridique » envisagé dans cette consultation concerne, le cas échéant, un nombre très limité d'opérations. Dans la mesure où il y aurait effectivement des opérations avec des effets transfrontaliers significatifs qui franchiraient les seuils européens, le système actuel de renvoi est susceptible de permettre à ces opérations d'être examinées au niveau le plus approprié.*

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.

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

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.

French version: *Voir les réponses aux questions 14 à 17 ci-dessus. L'APDC estime que le système actuel couvre de manière adéquate la plupart, voire toutes les transactions, ayant un impact significatif sur les marchés de l'EEE.*

Plus généralement, l'APDC estime que les seuils juridictionnels sont, par définition, « imparfaits » dans le sens où il y a toujours des exemples d'opérations qui peuvent avoir un impact négatif sur un marché donné et qui ne franchissent

pas les seuils applicables, quelle que soit la manière dont les seuils sont déterminés. A titre d'illustration, les opérations relatives à des marchés très restreints (locaux) peuvent avoir un impact négatif sur la concurrence, même si les entreprises concernées réalisent de très faibles chiffres d'affaires et que la valeur de l'opération est minime. De tels inconvénients sont inévitables et ne seront pas supprimés quels que soient les seuils (l'APDC considère que les seuils de parts de marché ne sont pas non plus appropriés car ils donnent lieu à des incertitudes significatives liées aux définitions de marché et au calcul des parts de marché, très difficiles à appliquer en pratique).

La question pertinente dans le cadre de cette consultation publique est donc de savoir s'il existe un « vide juridique » suffisant pour justifier la création d'un seuil supplémentaire qui, par définition, donnera lieu à une charge administrative supplémentaire pour les entreprises et retardera la réalisation d'un grand nombre d'opérations.

Comme indiqué ci-dessus, et au vu de l'expérience de ses membres, l'APDC est d'avis que la réponse à cette question est négative.

L'APDC estime qu'il existe un réel risque d'un champ de contrôle « excessif » si un nouveau seuil en valeur était adopté. En effet, de nombreuses opérations ne donnant lieu à aucun problème de concurrence tomberaient ainsi dans le champ d'application des dispositions relatives au contrôle des concentrations de la Commission.

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?

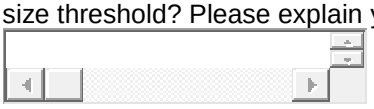
- ○ YES
- ◉ NO
- ○ OTHER

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.

French version *: Un seuil de « valeur de transaction » apparaît subjectif et complexe à déterminer ou à estimer. Il créerait plus d'insécurité juridique comparé aux seuils basés exclusivement sur le chiffre d'affaires réalisé. Voir ci-dessus.*

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[7]. 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.

French version: *Si un seuil supplémentaire basé sur la valeur de la transaction dans le Règlement européen sur les concentrations était introduit (cette option n'étant, une fois encore, pas soutenue par l'APDC), il conviendrait de l'accompagner d'un test clair lié à l'effet local, lequel assurerait que seules les opérations qui sont susceptibles d'avoir un impact significatif au sein de l'EEE sont effectivement soumises à la législation européenne. A cet égard, dans le document de travail de 2016 relatif à l'effet local et aux seuils juridictionnels dans le contrôle des concentrations, l'OCDE observe qu'un critère de notification basé sur la valeur de la transaction est inapproprié pour déterminer si l'opération aura un impact dans un pays spécifique, et doit être associé à un critère supplémentaire d'effet local. Dans de telles circonstances, les tests d'effets locaux doivent être subjectifs, faciles à quantifier et facilement vérifiables par les parties conformément aux Recommandations internationales des meilleures pratiques. Les deux seuls membres de l'OCDE qui adoptent ce critère en tant que seuil de contrôle des concentrations (à savoir le Mexique et les Etats-Unis) associent le test de la valeur de la transaction avec un autre critère de notification qui est plus à même d'établir un effet local. L'OCDE observe également que l'effet local est de plus en plus important au regard de l'évolution du système international de contrôle des concentrations, puisque de nombreux pays ont désormais adopté des systèmes de contrôle des concentrations et, donc, les coûts de conformité pour les entreprises internationales impliquées dans des concentrations restent élevés. Le risque de décisions et d'engagements contradictoires par les autorités de concurrence s'accroît en conséquence.*

Un tel effet local ne devrait pas être spécifique à un secteur afin de garantir la sécurité juridique. En effet, le fait de savoir si une opération donnée appartient à un secteur ou non est susceptible de soulever des questions. En outre, de nombreux secteurs sont très innovants (en-dehors du secteur digital et du secteur pharmaceutique). Voir ci-dessous pour plus de détails.

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 explain your answer.

- Please state if any of the following criteria would be appropriate to ensure the desired efficiency [multiple answers are possible]:

[7] OECD, "Local Nexus and Jurisdictional Thresholds in Merger Control", Background paper by the Secretariat, 14-15 June 2016.

- [x] A minimum level of aggregate worldwide turnover of all undertakings concerned.
- [x] A minimum level of aggregate Union-wide turnover of at least one of the undertakings concerned.
- [x] 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.

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).

French version: *L'APDC considère que les trois premiers critères mentionnés ci-dessus, en particulier s'ils sont appliqués cumulativement et sont suffisamment élevés, garantissent que seules les opérations avec un lien suffisant à l'EEE seraient notifibales sur la base de ce nouveau seuil (l'introduction de ce seuil n'étant pas soutenue par l'APDC).*

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.

NO

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.

French version: *AUTRE. Voir la réponse à la question 25 ci-dessous.*

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.

YES

Article 4 (4)

The APDC is in favor of amending the substantive test in Article 4(4) and the corresponding provisions of Form RS so that parties do not have to claim that the transaction may lead to a "significant effect in a market", even though the parties are in fact currently only required to demonstrate that the transaction leads to affected market(s). As provided by Recital 16, the parties do not need to demonstrate a likely adverse effect on competition.

The APDC suggests to reduce from 25 to 20 working days the time-period given to the Commission to issue its referral decision, it being recalled that the Member State has 15 working days to decide whether or not to oppose the referral. A delay of 5 working days between the Member State's decision and the Commission's decision seems reasonable, in particular if the Commission accept to adopt a simplified decision.

French version: *L'APDC est favorable à une modification du test prévu à l'article 4(4) et aux dispositions correspondantes du Form RS de manière à ce que les parties n'aient pas à démontrer que la transaction risque d'« affecter de manière significative » la concurrence sur un marché à l'intérieur d'un Etat membre, bien que l'on demande, de fait, aux parties de prouver que l'opération conduit à des marchés affectés. Comme indiqué au considérant 16, les parties n'ont pas besoin de démontrer un potentiel effet négatif sur la concurrence.*

L'APDC suggère de réduire de 25 à 20 jours ouvrables le délai donné à la Commission pour rendre sa décision de renvoi, étant rappelé que les Etats membres disposent de 15 jours ouvrables, pour décider s'ils s'opposent ou non au renvoi. Un délai de 5 jours ouvrables entre la décision de l'Etat membre et la décision de la Commission semble raisonnable, notamment si la Commission accepte d'adopter une décision simplifiée.

Article 4 (5)

The APDC strongly supports the abolishment of the requirement that the parties file a Form RS to the Commission under Article 4(5) of the Merger Regulation. The parties would then notify directly to the Commission, but the Member States competent to examine the transaction under their national law would still have the right to oppose the referral.

The APDC suggests that the 15 working days period for the Member State to veto the referral should be reduced to 10 working days in order to limit the uncertainty as to whether or not the case will remain under the Commission's jurisdiction.

More importantly, and apart from those technical adjustments, the APDC recommends modifying the scope of the referral under Article 4(5) of the Merger Regulation. This procedure should be amended in order to provide that the Commission would only obtain jurisdiction for the territories of the Member States which were competent under their national merger control regulation, the jurisdiction of which triggered the referral of the concentration to the Commission.

Currently, the parties are very often deterred from requesting the referral of the concentration to the Commission where only a limited number (between 3 to 10-15) of Member States are concerned because, should the case be referred to the Commission, the extent of the information to be provided will be much more important, i.e. information on up to potentially 28 Member States / national markets. The modification will have an impact on the level of information to be provided to the Commission and will consequently make the referral under Article 4(5) much more appealing.

On the substance of the Commission's assessment, the modification would not have any negative impact and, in particular, would not raise the same issues that lead the Commission to suggest a modification of Article 22. Since all the Member State which are competent would have agreed to the referral, there is no risk of parallel investigations.

French version: *L'APDC est largement favorable à la suppression de l'exigence tenant à ce que les parties notifient un Form RS à la Commission en vertu de l'article 4(5) du Règlement sur les concentrations. Les parties notifieraient donc directement à la Commission, mais les Etats membres compétents pour examiner l'opération au regard de leur droit national disposeraient toujours du droit de s'opposer au renvoi.*

L'APDC suggère que le délai des 15 jours ouvrables ouvert aux Etats membres pour s'opposer au renvoi soit réduit à 10 jours ouvrables afin de limiter l'insécurité liée à la question de savoir si le cas restera ou non soumis à la compétence de la Commission.

Plus important, et au-delà de ces ajustements techniques, l'APDC recommande de modifier le champ d'application du renvoi prévu à l'article 4(5) du Règlement sur les concentrations. Cette procédure doit être amendée afin que la Commission conserve la compétence uniquement pour les territoires des Etats membres qui seraient compétents conformément à leur réglementation nationale sur le contrôle des concentrations, ces juridictions ayant permis le

renvoi de la concentration à la Commission.

Actuellement, les parties sont très souvent dissuadées de demander le renvoi de la concentration à la Commission lorsqu'un nombre limité seulement (entre 3 et 10-15) d'Etats membres sont concernés parce que, en cas de renvoi à la Commission, l'étendue des informations à fournir est beaucoup plus importante, à savoir les informations sur les potentiels 28 Etats membres/marchés nationaux. La modification aura un impact sur le niveau d'information à fournir à la Commission et, en conséquence, permettra de recourir davantage au renvoi prévu à l'article 4(5).

Concernant l'analyse de la Commission sur le fond, la modification n'aurait aucun impact négatif et, en particulier, ne soulèverait pas les mêmes problèmes justifiant une modification de l'article 22 : tous les Etats membres compétents étant favorables au renvoi, il n'existerait pas de risques d'enquêtes parallèles.

Article 9

The APDC disagrees with the Commission's proposal to toll the 65 working days deadline (to decide on the referral request in Phase II) as from the start of the Phase II proceedings, instead of the date of the notification as it is currently the case. Such a modification would exacerbate the negative impact of an already very unreasonable situation where the referral of a case is decided in Phase II.

Going further, the APDC strongly suggests abolishing entirely the possibility to refer the case to a Member State in Phase II. The duration of Phase I is long enough to allow the Commission to assess the merits of the referral request and to take a decision, without the need to postpone such decision until after the opening of a Phase II.

More importantly, the APDC recommends an amendment to Article 9 in order to provide that only Member States which are competent under their national law to review a concentration would be able to request a referral of the concentration. Such a modification would provide more legal certainty to the parties. It would also harmonize and make more understandable the rules regarding downward referrals (For Article 4(5) referrals, the parties are requested to specify for each Member State whether the concentration is capable of being reviewed under its national competition law).

French version: *L'APDC n'est pas d'accord avec la proposition de la Commission de faire courir le délai de 65 jours ouvrables (pour décider de la demande de renvoi en phase II) à compter du début de la procédure de phase II, et non à partir de la date de notification, comme c'est actuellement le cas. Une telle modification accentuerait l'impact négatif d'une situation déjà très déraisonnable dans laquelle le renvoi d'un cas est décidé en phase II.*

Pour aller plus loin, l'APDC suggère fortement de supprimer complètement la possibilité de renvoyer un cas à un Etat membre en phase II. La durée de la phase I est suffisamment longue pour permettre à la Commission d'évaluer le fond d'une demande de renvoi et de prendre une décision, sans avoir besoin de reporter une telle décision jusqu'à l'ouverture d'une phase II.

D'une manière plus importante, l'APDC recommande une modification de l'article 9 afin d'assurer que seuls les Etats membres, compétents en vertu de leur législation nationale pour examiner une concentration, soient en mesure de demander un renvoi de la concentration. Une telle modification fournirait plus de sécurité juridique aux parties. Elle harmoniserait également la législation et la clarifierait au regard du renvoi vers les Etats membres (Pour le renvoi de l'article 4(5), il est demandé aux parties de spécifier pour chaque Etat membre si la concentration peut être examinée à la lumière de la législation nationale de concurrence).

Article 22

The APDC is in favor of the Commission's proposal, subject to some amendments.

Article 22 of the Merger Regulation should be modified in order to provide that only those Member States that are competent under their national law should have the possibility to request the referral of a concentration to the Commission. Should none of the competent Member State oppose the referral, the Commission should have sole jurisdiction to assess the concentration.

The APDC also recommends that the Commission remain competent only for the territory of the Member States which have requested the referral (or have joined the referral request). The Commission should not have jurisdictions over territories for which the relevant Member States have not requested a referral.

For the sake of clarity, the APDC would finally suggest the Commission to include all referrals situations into one single article or chart, so as to allow the notifying parties to get a clearer picture of the various possibilities offered in this very

context.

French version: *L'APDC est favorable à la proposition de la Commission, sous réserve de quelques aménagements.*

L'article 22 du Règlement sur les concentrations devrait être modifié afin d'assurer que seuls les Etats membres, compétents en vertu de leur législation nationale, aient la possibilité de demander un renvoi d'une concentration à la Commission. Si aucun des Etats membres ne s'oppose au renvoi, la Commission devrait avoir l'entière compétence pour évaluer la concentration.

L'APDC recommande également que la Commission reste uniquement compétente pour les territoires des Etats membres qui ont demandé le renvoi (ou se sont joints à une demande de renvoi). La Commission ne devrait pas être compétente pour les territoires pour lesquels les Etats membres pertinents n'ont pas demandé un renvoi.

Enfin, par souci de clarté, l'APDC suggère à la Commission d'inclure toutes les situations de renvoi dans un seul article ou disposition, afin de permettre aux parties notifiantes d'avoir une vision plus claire des différentes possibilités offertes dans ce cadre.

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?

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:

YES

This question deals with the notification of mergers that are executed through share acquisitions on a stock exchange without a public takeover. It results from the 2014 Staff working paper that the additional flexibility referred to in the question could concern the possibility of notifying such transactions before the acquisition of control on the basis of good faith intention.

The APDC is in favor of the proposed amendment that consists in extending the date for a notification of stock market transactions. Such notifications could be filed on the basis of a good faith intention and on a voluntary basis, before the level of shareholding required to exercise control is acquired. Subject to domestic stock-exchange and confidentiality regulations, the acquiring party could be allowed to do so, where it can demonstrate a clear commitment to carry out the acquisition of control, by preparing everything necessary to proceed immediately.

The APDC understands that this amendment would address the situation where an undertaking A acquires *de facto* control through a gradual increase of its share in undertaking B. In this situation, undertaking A would anticipate the achievement of a *de facto* majority of voting rights in shareholders' meeting, thereby *de facto* control over undertaking B. However, this possibility may have a substantial impact on the stock price of the concerned companies, once the notification is published by EU Commission.

This amendment would also concern the situation where a shareholder's share in undertaking C would increase, due to the capital reduction decided by the undertaking C. In such case, the shareholder could also anticipate the achievement of a *de facto* majority of voting rights in shareholders' meeting, without a public takeover under domestic stock-exchange regulations.

French version: *OUI.*

Cette question porte sur la notification des concentrations qui sont réalisées à l'occasion d'acquisitions d'actions en bourse, sans offre publique d'achat. Il résulte du document de travail de 2014 que la flexibilité supplémentaire visée dans cette question concernerait la possibilité de notifier de telles opérations avant l'acquisition même du contrôle, sur la base d'un engagement de bonne foi.

L'APDC est favorable à l'amendement proposé qui consisterait à avancer la date pour la notification de ces opérations en bourse. De telles notifications pourraient être déposées sur la base d'un engagement de bonne foi et sur une base volontaire, avant que ne soit acquis le niveau d'actionnariat nécessaire à l'exercice du contrôle. Sous réserve des réglementations nationales en matière de bourse et de confidentialité, l'acquéreur serait autorisé à le faire lorsqu'il est en mesure de démontrer un engagement clair de réaliser l'acquisition du contrôle, en préparant ce qui est nécessaire pour y procéder sans délai.

L'APDC comprend que cet amendement serait applicable à la situation dans laquelle une entreprise A acquiert de facto *le contrôle à travers une augmentation progressive de sa participation dans l'entreprise B. Dans cette situation, l'entreprise A anticiperait l'acquisition de la majorité de fait des droits de vote lors des assemblées des actionnaires, donc le contrôle de fait sur l'entreprise B. Cependant, cette possibilité est susceptible d'avoir un impact substantiel sur le cours de bourse des actions des entreprises concernées, une fois la notification publiée par la Commission européenne.*

Cet amendement concernerait également la situation dans laquelle la participation d'un actionnaire dans une entreprise C augmenterait, en raison de la réduction du capital décidé par l'entreprise C. Dans un tel cas, l'actionnaire pourrait également anticiper l'acquisition de la majorité de fait des droits de vote lors des assemblées d'actionnaires (et donc du contrôle), sans une offre publique prévue par les réglementations boursières nationales.

Amending Article 5(4) of the Merger Regulation to clarify the methodology for turnover calculation of joint ventures:

YES

Article 5(4) of the Merger Regulation could indeed be amended in order to explicitly articulate the methodology for the calculating a joint venture's relevant turnover, as currently laid out in the Commission Consolidated Jurisdictional and currently applied.

French version: *OUI.*

L'article 5(4) du Règlement sur les concentrations pourrait, en effet, être amendé afin d'expliciter la méthodologie pour le calcul du chiffre d'affaires pertinent d'une entreprise commune, telle qu'exposée dans la Communication consolidée de la Commission et actuellement appliquée.

Introducing additional flexibility regarding the investigation time limits, in particular in Phase II merger cases.

YES, BUT ADDITIONNAL FLEXIBILITY REQUIRED

Pursuant to the 2014 Staff working paper, the Commission's purpose is (i) to increase from 20 to 30 the maximum number of working days by which the Phase II deadline may be extended and (ii) to clarify that the automatic 15 working days extension for Phase II is triggered in all cases where commitments are offered following a SO and that the exception to the automatic extension for commitments before 55 working days only applies if the commitments are sufficient to remove the concerns identified without the need for a SO.

The APDC considers that the increase of the duration of the deadline extension might indeed offer greater flexibility to the parties in Phase II, where time-constraints might be challenging in complex cases. However, the APDC would recommend to introduce greater flexibility in Article 10(3)(2) by removing the constraints imposed on the notifying

parties who request a deadline extension, i.e. the deadline of 15 working days after the opening of the Phase II and the fact that only one request can be submitted.

Taking into account those amendments, Article 10(3)(2) would read as follows :

> "~~The periods set by the first subparagraph shall likewise be extended if the notifying parties make a request to that effect not later than 15 working days after the initiation of proceedings pursuant to Article 6(1)(c). The notifying parties may make only one such request. Likewise, a~~At any time following the initiation of proceedings, the periods set by the first subparagraph may be extended by the Commission with the agreement of the notifying parties or by the notifying parties. The total duration of any extension or extensions effected pursuant to this subparagraph shall not exceed ~~20~~ 30 working days."

French version: *OUI, MAIS AVEC UNE FLEXIBILITE SUPPLEMENTAIRE.*

Selon le document de travail de 2014, l'objectif de la Commission est (i) d'augmenter de 20 à 30 le nombre maximum de jours ouvrables par lequel le délai de la phase II peut être prolongé et (ii) clarifier le fait que la prolongation automatique des 15 jours ouvrables pour la phase II est déclenchée chaque fois que les engagements sont offerts après une communication des grief, l'exception à la prolongation automatique pour les engagements avant 55 jours ouvrables s'appliquant seulement si les engagements sont suffisants pour retirer les problèmes identifiés, sans qu'une communication des griefs soit nécessaire.

L'APDC considère que l'augmentation de la durée du délai de prolongation pourrait, en effet, offrir une plus grande flexibilité aux parties en phase II, lorsque les contraintes de temps peuvent être délicates dans les cas complexes. Cependant, l'APDC recommande d'introduire une plus grande flexibilité dans l'article 10(3)(2) en retirant les contraintes imposées aux parties notifiantes qui demandent un délai de prolongation, à savoir le délai de 15 jours ouvrables après l'ouverture d'une phase II et le fait qu'une seule demande peut être soumise.

En tenant compte de ces amendements, l'article 10(3)(2) serait rédigé comme suit :

> *« ~~Les délais fixés au premier alinéa sont également prolongés si les parties notifiantes présentent une demande à cet effet au plus tard quinze jours ouvrables suivant l'ouverture de la procédure en vertu de l'article 6, paragraphe 1, point c). Les parties notifiantes ne peuvent présenter qu'une seule demande à cet effet. De même, à~~ A tout moment après l'ouverture de la procédure, les délais fixés au premier alinéa peuvent être prolongés par la Commission sous réserve de l'accord des parties notifiantes ou par les parties notifiantes. La durée totale des prolongations accordées conformément au présent alinéa ne dépasse pas ~~vingt~~ trente jours ouvrables ».*

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 :

NO

It results from the 2014 Staff working paper that, with the above-mentioned proposal, the Commission's purpose is to address the scenario illustrated by the case COMP/M.4439 Ryanair/Aer Lingus I in 2007. The APDC understands that according to the Commission, article 8(4) of the Merger Regulation could clarify that when a partially implemented concentration is prohibited, the Commission may order full divestiture of the acquired stake, even if it would not confer control.

However, the APDC believes that the Ryanair/Aer Lingus transaction constitutes is a unique case . In addition, the Commission seems to have ruled out the proposed reform extending merger control to certain acquisitions of non-controlling minority shareholdings – which is warmly welcomed by the APDC (see our answer to the public consultation, dated November 20, 2013). In this context, if, following the complete dissolution of a prohibited concentration under Article 8(4), the acquirer had acquired a minority stake in the target company, the APDC considers that the Commission is not in a position to order full divestiture of the non-controlling acquired stake. In other words, the Commission should not have the power to require dissolution of transactions that are not subject to review under the Merger Regulation.

The APDC is thus of the view that modifying Article 8(4) would not be justified.

French version: *NON.*

Il ressort du document de travail de 2014 qu'au travers de la proposition susmentionnée, l'objectif de la Commission

est de tenir compte du cas illustré par l'affaire COMP/M.4439 Ryanair/Aer Lingus I de 2007. L'APDC comprend que, selon la Commission, l'article 8(4) du Règlement sur les concentrations devrait être modifié de manière à ce que lorsqu'une concentration partiellement réalisée est interdite, la Commission puisse ordonner la cession complète de la participation acquise, même si cette dernière ne confère pas de contrôle.

Cependant, l'APDC considère que l'opération Ryanair/Aer Lingus constitue un cas unique. De plus, la Commission semble écarter la réforme envisagée concernant l'extension du contrôle des concentrations à certaines acquisitions de participations minoritaires non-contrôlantes – ce qui est accueilli chaleureusement par l'APDC (voir notre réponse à la consultation publique datant du 20 novembre 2013). Dans ce contexte, si à la suite de la dissolution complète d'une concentration interdite en vertu de l'article 8(4), l'acquéreur avait tout de même acquis une participation minoritaire dans la cible, l'APDC considère que la Commission n'est pas en position d'ordonner une cession complète de la participation non-contrôlante. En d'autres termes, la Commission ne devrait pas être habilitée à ordonner la dissolution des opérations qui ne sont pas soumises à son examen conformément au Règlement sur les concentrations.

L'APDC considère donc qu'une modification de l'article 8(4) n'est pas justifiée.

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.

YES

The APDC considers that Article 5(2)(2) of the Merger Regulation should provide that any concentration which has been notified and cleared by the Commission or by a competition authority shall not be taken into account for the purpose of the "two-year rule".

French version: *OUI.*

L'APDC considère que l'article 5(2)(2) du Règlement sur les concentrations devrait prévoir que toute concentration qui a été notifiée et autorisée par la Commission ou par une autorité de concurrence ne devrait pas être prise en compte pour « la règle des deux ans ».

Clarification that "parking transactions" should be assessed as part of the acquisition of control by the ultimate acquirer.

NO

Pursuant to the 2014 Staff working paper, with the above-mentioned proposal, the Commission's purpose is to clarify in the Merger Regulation that "parking transactions" should be assessed as part of the acquisition of control by the ultimate acquirer, it being recalled that the Jurisdictional Notice already considers that such "parking transactions" are the first step of a single concentration leading to the ultimate buyer's lasting acquisition of control.

The APDC understands that such a proposal would be tantamount to prohibiting the use of "parking transactions" in the context of concentration. Indeed, should the "parking transactions" and the following acquisition of the target be considered as constituting a single concentration, wherein the ultimate buyer acquires the control of the target, this means that the "parking transactions" and the following acquisition will both have to be suspended until the merger control clearance.

The APDC does not understand the rationale of the proposal made by the Commission, it being specified that the 2014 Staff working paper does not provide any explanation of the Commission's position. For its part, the APDC considers that "parking transactions" mechanisms are very useful in potentially complex concentrations as they actually ensure, in the context of a bidding process for an acquisition, a level playing field between strategic buyers (for which the concentration is more likely to raise competition issues) and private investment undertakings (for which the concentration rarely raises competition issues).

In this respect, the APDC supports the position of the French Competition Authority which considers that where the first acquirer does not acquire a decisive influence over the target, the first transaction is not a concentration: only the acquisition by the ultimate acquirer can fall within the scope of merger control application, if the relevant turnover thresholds are met[8].

The APDC is thus of the view that no modification is required in the Merger Regulation regarding "parking transactions". On the contrary, the Jurisdictional Notice should be modified in order to acknowledge the validity of

[8] Merger control guidelines of the French competition Authority, para 68.

such "parking transactions".

French version: *NON.*

Selon le document de travail de 2014, avec la proposition susmentionnée, l'objectif de la Commission est de clarifier le Règlement sur les concentrations concernant « les opérations de portage », lesquelles devraient être analysées dans le cadre de l'acquisition du contrôle par le dernier acquéreur, étant rappelé que la Communication juridictionnelle considère que de telles « opérations de portage » constituent la première étape d'une seule concentration menant l'acquisition du contrôle durable de la part du dernier acquéreur.

L'APDC comprend qu'une telle proposition reviendrait à interdire l'utilisation des « opérations de portage » dans le contexte d'une concentration. En effet, si l'« opération de portage » et l'acquisition qui s'en suit de la cible sont considérées comme constituant une seule concentration, dans laquelle le dernier acheteur acquiert le contrôle de la cible, l'« opération de portage » et l'acquisition qui s'en suit devraient toutes deux être soumises à l'effet suspensif, jusqu'à l'autorisation du contrôle des concentrations.

L'APDC ne comprend pas les raisons de la proposition formulée par la Commission, étant donné que le document de travail de 2014 ne fournit aucune explication sur sa position. Pour sa part, l'APDC considère que le mécanisme des « opérations de portage » est très utile dans les opérations potentiellement complexes : elles permettent effectivement, dans le contexte d'une procédure d'appel d'offres pour une acquisition, une situation équitable entre les acheteurs industriels (pour lesquels la concentration est plus susceptible de soulever des problèmes de concurrence) et les fonds d'investissement (pour lesquels la concentration soulève rarement des problèmes de concentrations).

A cet égard, l'APDC soutient la position de l'Autorité de la concurrence française qui considère que lorsque le premier acquéreur n'acquiert pas une influence déterminante sur la cible, la première opération n'est pas une concentration : seule l'acquisition par le dernier acquéreur peut tomber dans le champ d'application du contrôle des concentrations, si les seuils de chiffre d'affaires pertinents sont atteints[9]*.*

L'APDC est donc d'avis qu'aucune modification n'est requise dans le Règlement des concentrations au regard des « opérations de portage ». Au contraire, la Communication juridictionnelle devrait être modifiée afin de tenir compte de l'intérêt de telles « opérations de portage ».

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.

YES

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.

YES

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

[9] Lignes directrices de l'Autorité en matière de contrôle des concentrations, para 68.

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[10].

French version: *L'APDC souhaiterait attirer l'attention de la Commission sur quelques points de nature technique qui concernent plutôt (pour la plupart d'entre eux) des modifications de la Communication juridictionnelle consolidée de la Commission, notamment :*

- sur le concept d'entreprise : en vertu de l'article 3.1 (b), une concentration est caractérisée par un changement de contrôle sur une entreprise. La Communication juridictionnelle consolidée de la Commission (para 24) définit une entreprise comme une activité se traduisant par une présence sur un marché et à laquelle un chiffre d'affaires peut être rattaché sans ambiguïté.

Dans le secteur immobilier, il est fréquent que les investisseurs acquièrent ensemble des actifs immobiliers ou des terrains, sans qu'aucun chiffre d'affaires n'y soit rattaché au moment de la réalisation de la transaction. Parfois, un contrat de bail a déjà été conclu et entre en vigueur quelques années plus tard, lorsque les travaux de construction sont terminés. Dans cette hypothèse, la Commission devrait clarifier sa position : puisque aucun chiffre d'affaires clair ne peut être rattaché aux actifs au moment de la réalisation de la transaction, ces actifs ne devraient pas être considérés comme des entreprises. En conséquence, l'opération ne devrait pas être considérée comme une concentration. Dans ce cas, quel est le délai à prendre en compte par la Commission pour considérer qu'au-delà de ce délai, un chiffre d'affaires est effectivement réalisé par l'actif sans ambiguïté ?

La Commission pourrait également clarifier la situation dans laquelle le contrôle d'un actif immobilier est acquis par des investisseurs et un contrat de bail est conclu avec un investisseur non-contrôlant, avec une une entrée en vigueur au moment de la réalisation de la transaction. Dans un tel cas, l'APDC considère que l'actif ne dispose pas d'une présence sur le marché puisque le chiffre d'affaires n'est pas réalisé « sur le marché » mais avec une partie impliquée dans l'opération. En conséquence, l'actif ne constituerait pas une entreprise et l'opération ne serait pas une concentration.

- sur le critère de « plein exercice » : La Communication juridictionnelle consolidée de la Commission (para 91) stipule qu'une opération impliquant plusieurs entreprises qui acquièrent auprès de tierces parties le contrôle en commun d'une autre entreprise constitue une concentration conformément à l'article 3, paragraphe 1, sans qu'il soit nécessaire de considérer le critère de « plein exercice ».

Dans le secteur de l'immobilier, il est très fréquent qu'un investisseur acquiert le contrôle en commun, avec un propriétaire existant, d'un actif immobilier par l'achat de parts (voir pour un récent exemple, l'affaire M.8217 – CPPIB / Hammerson /Grand Central). Dans un tel cas, l'entreprise propriétaire de l'actif immobilier n'est généralement pas de plein exercice.

[10] See the Merger control guidelines of the French competition Authority (para 222) which provide that the market test can be launched before the formal filing of the concentration provided the notifying party gives its consent.

La Commission devrait donc clarifier le fait que le critère de plein exercice est uniquement pertinent dans un contexte de création d'une entreprise commune et non dans un contexte de changement de contrôle, direct ou indirect, sur tout ou partie d'une entreprise existante, à savoir une activité se traduisant par la présence sur un marché et à laquelle un chiffre d'affaires peut être rattaché sans ambiguïté.

- sur la pré-notification : Le Règlement sur les concentrations devrait prévoir que la Commission est autorisée à lancer un test de marché avant la notification formelle d'une concentration, à condition naturellement que toutes les informations pertinentes aient été fournies par les parties pendant le délai de pré-notification. Une telle modification serait utile puisque, dans certains cas, les équipes de rapporteurs en charge des cas ont évoqué des raisons juridiques pour refuser de lancer un test de marché avant la notification formelle[11].

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.

[11] French version: *Voir les Lignes directrices sur le contrôle des concentrations de l'Autorité de la concurrence (para. 222) qui prévoient que le test de marché peut être lancé avant la notification formelle de la concentration à condition que les parties donnent leur consentement.*