RESPONSE OF THE APDC
TO THE EUROPEAN COMMISSION'S CONSULTATION
ON THE REVISION OF THE SIMPLIFIED PROCEDURE
AND MERGER IMPLEMENTING REGULATION

1. The *Association des Avocats Pratiquant le Droit de la Concurrence* (the "APDC") is a French association constituted by more than 130 lawyers, all of them being regular EC & Domestic Competition law practitioners.

2. The APDC is grateful for the opportunity to contribute to the debate on the reform of the simplified procedure, by commenting the different documents made available by the Commission on its Internet website on March 27, 2013. The APDC strongly supports the objective of the Commission to make administrative procedures less burdensome for Merger control, and especially the proposal to expand the scope of the simplified procedure.

3. Prior to commenting upon the proposed reform, the APDC would like to draw the Commission's attention on a few preliminary remarks:

   - From EU and non-EU companies' perspective, EU Merger control is presently considered as a burdensome and lengthy procedure that can be detrimental to the development of their business. While the "slot" to obtain the financing of a transaction (from their credit institutions) has been substantially shortened over the past months due to the financial crisis, the length of the EU merger control process entails a significant risk that certain transactions simply cannot be implemented.

   - In particular, the length of the pre-notification process and the difficulty to justify the reasons for the application of a simplified procedure leads to legal uncertainty regarding the tight time schedule of a transaction.

   - While companies and practitioners understand the need for the Commission to carefully examine a transaction which could raise some competitive concerns, they consider that a real simplified and "fast track" procedure should be implemented for "easy" transactions.

   - The contrast between the application of the current EU simplified procedure and the process followed in some other jurisdictions, for instance in Germany and in the USA, is startling: unproblematic transactions are cleared far more quickly with the parties having to provide significantly less information than what is typically required at EU level.

4. In the context of the current industrial and economic crisis, the initiative of the Commission to address those issues is a very positive one. If adopted, the proposed modifications would likely and significantly improve European merger control. However, the APDC believes the proposed reform could be even more constructive and helpful if certain elements were to be clarified or further developed (see hereunder).

5. The APDC comments hereunder are based on its members' substantial experience in advising companies during European and domestic merger control proceedings. For the sake of simplification, these comments are drafted in English. However, the APDC takes this opportunity to underline the importance of the possibility for companies to file their notification in their national language, and the necessity of being fully understood by members of the Commission.

6. For ease of reference and clarity of this submission, the comments below will address in turn the revision of the Commission Notice on a simplified procedure and the Short Form CO (**1**) and the revision of the Form CO (**2**).

1. THE REVISION OF THE COMMISSION NOTICE ON A SIMPLIFIED PROCEDURE AND THE SHORT FORM CO

7. The APDC warmly welcomes the initiative of the Commission to extend the scope of the Notice on a simplified procedure so that more concentrations can be reviewed and approved under such procedure. The APDC believes, however, that some aspects of the Commission's current practice and of the proposed reform may undermine the objectives of the simplified procedure.

Extension of the scope of the simplified procedure

8. The APDC agrees that transactions that fall below the market share thresholds provided for in the draft Notice usually do not raise antitrust concerns and may therefore be reviewed and approved without having to unduly increase the workload of both the notifying parties and the Commission. Increasing by 5% the market share thresholds contained in the current Notice and introducing a possibility of a simplified procedure where the increment in market share is limited, is a good policy decision as matter of principle.

9. If implemented, the reform will shorten the review periods for those transactions that will benefit from the extension of the scope of the Notice, thus facilitating their prompt implementation, to the benefit of the parties. Also, extending the scope of the Notice will reduce the administrative burden of notifying parties, allowing them to save costs and resources.

10. Importantly, reviewing more unproblematic transactions under the simplified procedure would give rise to a more efficient allocation of the Commission's resources. Devoting more time and personnel to transactions that do require a more thorough substantive assessment should facilitate and smoothen the review of those more complex cases as well. This should ultimately lead to shorter pre-notification periods (as mentioned above, the length and unpredictability of the pre-notification phase have become a genuine source of concern for the business community) and, possibly, to a decrease of the number of cases giving rise to in-depth investigations (so-called "Phase II").

11. The APDC respectfully submits, however, that the objectives of the reform would be seriously undermined if, in practice, having access to the simplified procedure proved to be time consuming and difficult and/or would give rise to a significant risk of subsequent delays.

12. In this respect, the APDC would like to draw the Commission's attention to a number of issues raised by its current practice and by the proposed reform, which, in its view, are likely to limit the benefits of the simplified procedure and to strongly discourage companies to make use of the Short Form CO.

Excessively narrow interpretation of the safe harbours

13. The experience of the members of the APDC shows that some case teams adopt a very strict interpretation of the safe harbours contained in the Notice. In particular, a number of case handlers seem to construe the existence of a "vertical relationship" in a very broad sense, as basically covering every instances when the parties may potentially be engaged in a buyer/supplier relationship, even when such relationship has no connection with the markets concerned by the transaction, and when no foreclosure concern can possibly arise.

14. As a matter of example, the benefit of the simplified procedure may be refused by some case teams for a merger involving a small company active in the food sector that would be acquired by and investment fund which happens to control a gas or an electricity supplier with a market share in excess of 25% of a particular market. The rationale for refusing the simplified procedure in such a case would be that the target purchases electricity or gas to operate its business and thus technically has a vertical relationship with the acquirer, although such vertical relationship cannot possibly give rise to any competition concern.

15. In fact, many companies produce and sell goods which are procured by virtually all undertakings (energy or stationery products for instance) and thus have a "vertical relationship" with the entire economy. Excluding the benefit of the simplified procedure for all mergers involving such firms would seem to be an overly conservative approach.

16. The APDC thus submits that the Commission's practice when assessing whether a case is eligible for a simplified procedure should be consistent across units and case teams and should be based on a reasonably pragmatic approach. This would avoid that a significant number of unproblematic cases end up being reviewed under the full procedure, whereas they in fact raise no substantive concern.

17. More generally, the members of the APDC have found that, in many instances, it proves to be very difficult to convince the case team that a particular transaction is suitable for a simplified procedure. Pre-notification contacts on this issue can sometimes give rise to multiple questions covering a wide range of hypotheses that are not always plausible nor supported by a reasonable definition of the markets concerned. In fact, it may often take more time and resources for the notifying parties (and their outside counsels) to successfully argue that the case is a suitable candidate for a simplified procedure than submitting a full Form CO from the start and be subject to a full review.

18. This, in turn, has the perverse effect of practitioners recommending their clients not to ask for a simplified procedure nor to use a Short Form CO, even when the case cannot raise substantive concerns.

19. In sum, the APDC submits that while it is the responsibility of notifying parties not to ask for a simplified procedure when the case at hand is clearly not a suitable candidate, the Commission should not be excessively formalistic in its assessment of the eligibility criteria of such procedure.

New exclusion drafted in vague terms with no bright line test

20. The APDC notes that the draft Notice provides at paragraph 11 that joint ventures with limited turnover in the EEA may not be suitable for a simplified procedure in certain circumstances, in particular when the joint venture is active outside the EEA but its products/services "constitute important inputs for products/services sold in the EEA" and/or where the joint venture is likely to "achieve significant sales in the foreseeable future".

21. The APDC understands the Commission's willingness to review under the full procedure joint venture which, although formally falling in the safe harbour because of their low revenues, may still justify a full review because they may have an impact in the territory of the EEA.

22. However, the APDC is concerned that the terms of this new exclusion are too vague and broad. The APDC would thus suggest the Commission to introduce some form of "bright line test" to limit the scope of the new exclusion and thus provide more legal certainty to notifying parties.

23. With respect to joint ventures producing and/or selling goods or services that are important inputs in the EEA, the Commission could for instance limit the exclusion to cases where the joint venture represent a significant share of the market for the inputs concerned (for instance more than 20%). Similarly, for joints ventures that are likely to achieve significant sales in the foreseeable future, the exception could apply to cases where the joint venture would, within the typical 3 year time frame used by the Commission in its prospective analysis, likely to account for more than 20% of the relevant market.

Possible declaration of incompleteness when reverting to full procedure

24. Although the application of the simplified procedure and the use of a Short Form CO are not necessarily related, most cases reviewed under the simplified procedure are, in practice, filed on a Short Form CO.

25. In this respect, the APDC notes that paragraph 22 of the draft Notice, while confirming the Commission's discretion to revert to a full procedure when it judges that it is "appropriate" to do so, introduces the new possibility for the Commission to declare the notification incomplete when the latter was not originally filed under a full Form CO.

26. This new provision is a genuine source of concern from the APDC's standpoint. As currently drafted, it seems to allow the Commission to declare the notification incomplete regardless of whether an element that would be material to the Commission's assessment would have been found to be missing from the filing, following the Commission's initial review.

27. Rather, the Commission's ability to declare the filing incomplete would appear to be solely based on the fact that the notification was made on the basis of a Short Form CO, as opposed to a full Form CO (even if such a Short Form does require "substantial" information, to use the Commission's own words).

28. Considering the serious consequences attached to a declaration of incompleteness (which means that the whole review has to start afresh, giving rise to several weeks/months of delay for the notifying parties), this new provision is likely to act as a strong deterrent to the use of the Short Form CO (and in turn to the parties asking for a simplified procedure).

29. Indeed, the notifying parties are unlikely to take the risk of using a Short Form CO if such a decision opens the possibility of their notification being declared incomplete by reason of an event that is completely beyond their control. For instance, it is well known that the Commission typically reverts to the full procedure when it receives negative comments from third parties, regardless of whether such comments are substantiated or ultimately founded as a matter of law. If such an unpredictable (although not uncommon) event may open the door for a declaration of incompleteness, just because the filing was not submitted on a Full Form CO (and even when no material information is missing from the notification) then no reasonable company would ever elect to use a Short Form CO.

30. The APDC thus urges the Commission to remove this provision or to explicitly clarify that a declaration of incompleteness may only be issued when it is established that a material piece of information was not contained in the initial notification.

2. THE REVISION OF THE FORM CO

31. The APDC notes that, while the Merger Simplification Project as set in the Roadmap of January 2013 aim primarily at reviewing the Notice on a simplified procedure, a number of amendments proposed by the Commission would apply to the Form CO (the "Amended Form CO"). The APDC notes that some of these amendments are consistent with the aim of modernizing merger control procedures. However, the APDC respectfully submits that a number of them are unlikely to reduce the complexity and length of merger control procedures and, as such, raise concerns.

Proposed amendments of the Form CO aiming at modernizing the merger control procedures

32. First of all, the APDC welcomes the increase by 5% in the level of market shares triggering affected markets as defined in Section 6 of the Amended Form CO[1]. Such increase is consistent with the one concerning the thresholds of the proposed amended Short Form CO (see above para. 8) and aims at reducing the level of information to be provided by the notifying parties in the framework of a merger control procedure.

33. The APDC also notes that a number of proposed amendments and modifications aim at modernizing the existing Form CO to make it consistent with the most recent guidance on merger control.

34. This is, notably, the case for:

- the proposed introduction of a new Section 1-8 on quantitative economic data, consistent with the Best Practices of the Commission for the submission of economic evidence and data collection. In this context, the APDC warmly welcomes the fact

[1] 20% for horizontally affected markets and 30% for vertically affected ones.

that the Commission expressly indicates that quantitative economic data is not required in order for the Amended Form CO to be considered as complete;

- the proposed amendment of the current Section 8.7 (now transformed in Section 8.3 of the Amended Form CO) to reflect the recent modernisation of the assessment of the closeness of competition between the parties to the transaction.

35. The APDC also welcomes the proposed removal of some information requirements of the existing Form CO that have proved not to be always entirely useful for the assessment (such as, for instance, the contact details of the parties' suppliers).

Concerns regarding a number of proposals unlikely to reduce the complexity and length of merger control procedures

36. The APDC notes that a number of proposed amendments and modifications of the Amended Form CO could result in imposing a significant additional workload on the notifying parties (and on the Commission) with the effect of increasing the length of the pre-notification phase and creating uncertainty.

"All plausible alternative" relevant market definitions

37. The proposed modifications to the Amended Form CO include a new requirement for the notifying parties to provide information on affected markets, which consist of "*all plausible alternative product and geographic market definitions (in particular but not limited to alternative product and geographic market definitions that were considered in previous Commission decisions)*"[2].

38. It is proposed that the provision of such information would constitute a requirement for completeness of the Form CO.

39. The APDC has a number of concerns in relation to such proposed change.

40. First of all, the rationale for such a change is not clear: the members of the APDC are not aware of any significant issues that may have arisen due to insufficient information on alternative market definitions in a Form CO since, in practice, the case team may request information on such alternative geographic or product market definitions in the course of the prenotification process.

41. In addition, the expression "*plausible alternative*" is too vague. The APDC knows, from experience, that depending on the individual case team, different approaches to geographic or product market definition may occur for the same economic activity, and that narrow market definitions may be envisaged, although all would not be equally realistic from a business point of view. Since the structure of the Form CO is such that for each market identified as affected under Section 6, the detailed information requested under Sections 7 and 8 will have to be provided for the Form to be complete, the introduction of the notion of "*plausible alternative market definition*" is likely to be very burdensome.

[2] Section 6 of the Amended Form CO. Emphasis added.

42. The APDC respectfully draws the attention of the Commission on the significant risk generated by such proposal that runs counter to the Commission's objectives of streamlining the procedures, since it is likely to:

- increase the number of (formally) affected markets;

- increase the workload for the notifying parties and their external counsels in gathering the additional information and drafting the relevant sections of the Form CO;

- increase, as a consequence of the above, the duration of the pre-notification period.

43. The APDC considers, in any case, that there seems to be no sustainable ground for rendering the provision of such broad information a condition for completeness of the Form CO.

44. The APDC therefore respectfully proposes to remove such proposed amendment in its entirety, or, at least, to limit its scope to the alternative product and geographic market definitions that have been envisaged in the most recent decisions of the Commission that have addressed the activity at stake.

45.

46. In sum, the proposed amendment concerning "*all plausible alternative*" market definitions means that the notifying parties would not notify their transaction before having provided detailed information on all plausible market definitions, or obtained a waiver.

47. In this respect, the APDC notes that the extension of the information requirement is partially counterbalanced by an increased emphasis on the possibility for the parties to seek waivers[3]. But although the APDC welcomes such tendency, it is not likely to mitigate the concerns raised by the increase in the amount of information required. Indeed, there is no publicly available information on the practice of the Commission regarding waivers and there is therefore no certainty that such practice will be entirely consistent and will not vary depending on the case team involved. Therefore, there is no guarantee that the waivers requested would be granted.

48. The APDC therefore fears that the notifying parties would be required to negotiate and agree with the Commission on "*all plausible alternative*" market definitions. It cannot be excluded, in a worst case scenario, the notifying parties would provide detailed information on all plausible alternative market definitions in order to avoid any risk of the notification being found incomplete.

[3] Such possibility for seeking waivers is expressly mentioned for: section 3.5 (list of undertakings active in affected markets in which 10% or more of the voting rights are held); section 3.6 (acquisitions made during the last three years of undertakings in affected markets); section 5.4 (iii) (supporting documents prepared for the purpose of analyzing the concentration); section 5.4 (iv) (supporting documents prepared in the past three years for the purpose of assessing an of the affected markets); section 6.3 (identification of each affected market (including all plausible market definitions); section 7.4 (capacity information; section 8.11 (information on cooperative agreements); and section 8.14 (information on contact details for trade associations).

Extension of the scope of Section 5.4 of the Form CO

49. The requirement to provide a number of documents drafted by or for the members of the board of directors, the supervisory board or the general assembly is already present in the existing Form CO, but is limited to analyses associated with the notified transaction and dealing with competition-related issues.

50. The APDC notes with surprise that such requirement is proposed to be significantly expanded under Section 5.4 of the Amended Form CO. The new requirement is undoubtedly more burdensome and its proposed scope is even wider than that the one provided for under US law: indeed, under article 4(c) of the so-called "Hart-Scott Rodino" Form, parties are required to attach to the notification a number of documents prepared by or for any officer or director of the companies involved in the transaction, but only as far as their purpose is for the evaluation or analysis of the transaction in question. It is worth mentioning (see above para. 3) that, under US law, the total amount of information to provide is limited in contrast to what is required under EU law.

51. The APDC is particularly concerned by the proposed requirement under Section 5.4 (iv) of the Amended Form CO that imposes the submission of a wide list of documents ("*analyses, reports, studies, surveys and any comparable documents*") from the last three years and that relate to the assessment of any of the affected markets, even if they are not directly linked to the notified transaction. The APDC considers, from experience, that this goes far beyond what is necessary for the assessment of the greatest part of the transactions that are notified to the Commission.

52. In addition, and although the Amended Form CO expressly provides that the notifying parties have the possibility to request a waiver for such requirement (see above, para. 47 for the general comment of the APDC on the issue of waivers), making the provision of such documents a condition for completeness of the Form CO would, again, increase the workload imposed on the notifying parties.

53. In any case, the APDC wonders whether the case teams will even have the possibility to review such an amount of documents within the tight deadlines of the Phase I. The APDC therefore fears that such requirement will increase the duration of the prenotification period, the case team may being incentivized to start the review of such documents in the framework of the prenotification (and therefore request additional information).

54. Finally, the APDC fears that such requirement could potentially lead to a reversal of the burden of the proof. By requesting a potentially disproportionate amount of documents, the Commission could, in practice, be in a position to compel the notifying parties to demonstrate that the notified transaction will not significantly impede effective competition, rather than proving such a theory of harm itself.

55. In sum, given that the Commission's clear objective in the framework of such review is to streamline the procedure so as to require only information which is necessary to conduct the investigation and gather enough information for a possible clearance, this proposed requirement appears to go too far.

56. The APDC considers that the provision of all of these documents up-front should not be a requirement for completeness. Should the Commission consider that 5.4 (iv) is useful for its assessment, in complex cases, it could still request information in the course of the

notification (as is proposed to be the case under Section 1.8 of the Amended Form CO for economic data).

Contact details

57. The APDC finally notes that Section 1.4 c) of the Amended Form CO contains a proposal that increases the threshold for completeness with regards to contact details. While the existing Form CO mentions that "*multiple instances of incorrect contact details*"[4] could form a grounds for declaring a notification incomplete, the Amended Form CO proposes to mention only) "*instances of incorrect contact details*". Such a change is likely to create an additional and unnecessary burden for the companies that, although they already spend a considerable amount of time gathering such information, are not always able to provide perfectly accurate contact details. The provision of limited instances of contact details which are not correct should not be, from the APDC's standpoint, a ground for incompleteness.

CONCLUSION

58. The APDC strongly supports the Commission's initiative to simplify and modernize the current EU merger control process. In particular, it welcomes the proposed extension of the simplified procedure. The APDC is however concerned that the objectives of such extension may not be achievable absent certain changes in the Commission's current practice and may also be hindered by some aspects of the proposed reform.

59. Also, the APDC is fully in favor of modernizing the current Form CO. It nevertheless expresses concerns with respect to a number of the proposed changes which would have the effect of significantly increasing the workload of notifying parties and the amount of information to be provided to the Commission.

[4] Section 1.4 of the existing Form CO.