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EC CONSULTATION ON REVISION OF MERGER IMPLEMENTING REGULATION AND REVISION OF THE NOTICE ON SIMPLIFIED PROCEDURE

RESPONSE OF ASHURST LLP

1. INTRODUCTION

1.1 Ashurst LLP welcomes the opportunity to respond to the consultation by the European Commission (the "**Commission**") on its draft revised Notice on Simplified Procedure (the "**Draft Notice**") and draft revised Merger Implementing Regulation (the "**Draft Implementing Regulation**"). This response contains our own views, based on our experience of advising and representing clients involved in merger control proceedings before the Commission, and is not made on behalf of any of our clients.

1.2 We confirm that nothing in this response is confidential. We also confirm that we would be happy to be contacted by the Commission in relation to our responses.

2. GENERAL REMARKS

2.1 We welcome the modernisation and simplification of the EU merger control framework, in particular the proposals to: (i) change the eligibility criteria for the simplified procedure through the creation of new alternative thresholds on vertical overlaps for simplified cases and the introduction of the flexibility clause; (ii) streamline the review of simplified cases; (iii) streamline of the review of non-simplified cases; and (iv) digitalise the submission process. We are supportive of such measures which will expand the scope of the simplified procedure and limit information requirements to what is necessary for the Commission's review without creating unnecessary red tape for the parties.

2.2 We have a number of suggestions which would further improve efficiency and legal certainty for both the notifying parties and the Commission. In particular, we would highlight the following preliminary points:

Procedural points

- Extra-EEA joint ventures ("**JVs**"): the Draft Notice does not eliminate the requirement to notify extra-EEA JVs which have no connection with the EU. We recognise that the Draft Notice clarifies that pre-notification contacts are not required for extra-EEA JVs and not all sections of the Short Form CO must be completed. In practice, such JVs are highly unlikely to give rise to competition concerns in the EU and we therefore submit that requiring notification in any form imposes an unnecessary administrative burden on the parties and the Commission.

- Pre-notification contacts: we note that a number of stakeholders suggested that the Commission prescribe a fixed time limit for pre-notification discussions in the Draft Notice. This has not been included in the Draft Notice. We think that the Commission should reconsider this point. In practice, pre-notification discussions can last for many weeks and parties have limited visibility as to when formal notification will be possible. Without going as far as setting a fixed deadline upfront, which could be difficult to organize, the Commission could agree, as a best practice, to set an indicative timetable for the pre-notification discussions. This would improve the current situation for the notifying parties, help in managing expectations of the companies involved and set a common goal in terms of calendar which could be useful also for the case team.

- Switch from simplified to non-simplified review: the Draft Notice does not eliminate the possibility for the Commission to revert to a non-simplified procedure during the 25 working days of review. A switch to a non-simplified review means that the Commission will consider the notification effective only on the date on which it receives the complete Form CO. This would be particularly problematic for the parties in cases where, for example, the parties' written agreement sets out a deadline for formal notification which may have passed by the date on which the Commission decides to switch to a non-simplified procedure. While this rarely happens in practice, we suggest that a requirement for the Commission to confirm in pre-notification discussions that a non-simplified review is excluded would provide greater legal certainty.

Substantive points

- Market definition: the thresholds for horizontal and vertical overlaps apply to "*all plausible market definitions*". The current definition of plausible market is wide ranging and includes markets reflected in internal presentations or parties' internal documents. Asking for data in relation to merely plausible markets may lead to the gathering of a significant amount of data in relation to markets which actually do not exist from a market definition standpoint and are a pure creation from the business. This obligation should be qualified in some ways. For example, it could be specified that by plausible market, the Commission refers to a market which exists based on convincing (economic) evidence, not simply based on a mention in an internal document or market studies which may have a totally different objective.

- Supporting documentation: the nature and quantity of supporting documentation required has not been reduced in the Draft Notice. The definition of supporting documents is very broad and creates a significant burden on notifying parties, also considering the potential consequences if the documentation submitted is considered incomplete. We would propose to define more clearly the supporting documents whose submission is needed under the Form CO, as in any event, the Commission can during the prenotification discussions require additional documents if it considers that this is necessary.

- Tick-box tables: the new tables included in the Form CO and Short Form CO will enable the Commission to more quickly get an understanding of the case and therefore help accelerate the merger review process. However, in cases where the facts are not clear-cut a tick-box approach may limit the parties' ability to advocate and fully explain the transaction to the Commission. It is therefore important to maintain some flexibility as to how parties' format their submission while remaining within the simplified procedure. For example, section 6.3 of the Short Form CO lists the relevant criteria for full-functionality and requires the party to tick the box for each full-functionality criterion (i.e. sufficient resources, own market presence etc.). However, full-functionality is a crucial element of the transaction and more often than not, not a black and white assessment. To avoid an extensive request for information, the parties should be able to complement this table with a written analysis of each criterion.

- Types of concentrations excluded from the simplified procedure: as in the current version of the Notice on Simplified Procedure, the Commission provides a list of indicative examples of types of cases which may be excluded from the simplified procedure. However, the list is not exhaustive and the Commission has expanded the scope of relevant circumstances which will revert to a non-simplified procedure. In the interest of legal certainty, we suggest that these exclusions should be limited and clearly defined.

3. ELIGIBILITY FOR THE SIMPLIFIED PROCEDURE

3.1 We welcome the Commission's retention of the existing categories/thresholds for the simplified procedure, the addition of two alternative thresholds for vertical relationships and the introduction of the flexibility clause. However, we have some concerns about the expansion of the list of circumstances which exclude the applicability of the simplified procedure. Parties will therefore need to consider the criteria for eligibility, application of the flexibility clause and possible exclusions: a key challenge to parties undertaking this assessment is that the application of the flexibility clause and exclusions are at the Commission's discretion.

3.2 We also note that certain amendments to existing categories of simplified cases may, as currently drafted, be detrimental to legal certainty and the objective of further streamlining the simplified procedure.

(a) Expanding the categories of simplified cases

First new threshold

> Article 5(d)(ii)(bb) of the Draft Notice: The individual or combined upstream market share of the parties to the concentration is below 30% and the combined purchasing share for upstream input of parties active in the downstream market is below 30%.

3.3 In our view, a purchasing share threshold should take into account the nature of the input. If the upstream input is a highly homogeneous product which is not essential for downstream sales, the combined purchasing share is unlikely to be relevant in analysing the vertical relationship.

Second new threshold

> Article 5(d)(ii)(cc) of the Draft Notice: The individual or combined upstream and downstream market shares of the parties to the concentration are below 50% and the HHI delta is below 150 and the smaller undertaking in terms of market share is the same in the upstream and downstream markets.

3.4 This second threshold is inspired by the similar horizontal threshold set out in the current version of the Notice on Simplified Procedure (see Article 5(d)(i)(bb) in the Draft Notice). The key difference between the two thresholds is that the vertical threshold requires the asymmetry in the parties' market positions to be consistent on the upstream and the downstream markets (i.e., the weak competitor is the same on both markets). We welcome the introduction of this threshold as it is likely to increase the number transaction which qualify for the simplified procedure.

Flexibility clause

3.5 We consider the flexibility clause to be beneficial to the merger review process as it will give the Commission more leeway in applying the simplified procedure at the request of the notifying parties, with the Commission retaining full discretion in deciding whether to apply the flexibility clause.

3.6 It is however unclear when the parties will have the opportunity to discuss whether the Commission will apply the flexibility clause for their particular case. In the interest of timing, parties should receive confirmation from the Commission that the flexibility clause applies (and that the Commission will therefore accept a Short Form CO) early on in the process. The Commission could provide in its Best practices that the notifying parties could ask the case team, with a reasoned submission, to benefit from the simplified procedure and the case team should then try to take a definitive stance on this request with e.g. 10 working days from the initial request.

3.7 As a result of the flexibility clause, the Commission will be able to apply the simplified procedure in four scenarios as set out in paragraphs 8 and 9 of the Draft Notice. In terms of horizontal overlaps, a 5% margin of flexibility is unlikely to materially increase the number of transactions caught. However, in a vertical context, providing flexibility where the parties' (individual or combined) market shares do not exceed 50% in one market and 10% in the other market is likely to significantly increase the applicability of the simplified procedure in vertical transactions (although narrow market definitions may limit its impact in practice).

(b) Limiting the expansion of simplified cases through exclusions

3.8 The Draft Notice also proposes a revised list of circumstances excluding the availability of the simplified procedure to *a priori* eligible transactions. As in the current version of the Notice, the list of exclusions is non-exhaustive. The Draft Notice includes new/revised circumstances, such as non-controlling shareholdings in markets upstream/downstream of the target's activities and increased market power by combining competitively valuable assets such as user base or data inventories.

3.9 To ensure parties are better able to understand the availability of the simplified procedure for a given transaction, we would support an approach limiting the categories of exclusions which would offer greater certainty for the parties. We therefore suggest that for each exclusion the Commission carefully weighs the harm to parties of excluding a transaction from the simplified procedure in terms of timing, cost and administrative burden with the potential harm in not reviewing a transaction.

3.10 We would also propose that the Commission provides for a time limit within which it shall exercise its power to exclude from the benefit of the simplified procedure a transaction which would have been otherwise eligible e.g. within 10/15 working days from receiving the draft Short Form CO.

(c) New wording on eligible simplified cases

Market definition

3.11 When reviewing whether the concentration is eligible for the simplified procedure based on the thresholds and flexibility clause, the Commission emphasises in the Draft Notice that the parties should consider "*all plausible market definitions*". This is a very broad requirement also considering the wide ranging definition of plausible markets, as discussed above. Furthermore, it may be challenging for the parties to collect reliable market share data on markets which are merely plausible and thus in relation to which generally no public data is available. We therefore believe that the concept of plausible market should be made clearer and possible narrower as already indicated in previous paragraphs. For instance, one could agree that a market will be viewed as "plausible" if it is based on precedents and / or industry practice (complemented with advocacy if there has been a substantial shift in the market for instance) and/or be based on sound economic evidence.

JV expected turnover

3.12 In the Draft Notice, the Commission clarifies that for JVs (paragraphs 5(a) and 5(b) of the Draft Notice), expected turnover should be taken into account and that "*expected turnover*" means turnover in the three years following notification. Currently, only expected turnover that would "*significantly surpass*" the threshold for simplified procedure is taken into account and it is only a possible cause of exclusion by the Commission from the simplified procedure (not part of the threshold requirement itself). In our view, expected turnover is often an unreliable metric and this amendment is likely to have the opposite effect to the Commission's objective in reviewing the Notice as it will exclude a number of transactions from the simplified procedure.

JV with "negligible activities"

3.13 In paragraph 5(b) of the Draft Notice, the Commission reiterates that JVs with negligible activities in the EEA can be notified under the simplified procedure. While the threshold for negligible activities remains unchanged (i.e., turnover and assets of less than EUR 100 million in the EEA), the wording of the Draft Notice is more open-ended than the current Notice as the language has been changed to "*[t]his <u>includes</u> concentrations […]*" suggesting that that the Commission does not exclude alternative scenarios. We would support additional flexibility which could allow greater weight to be given to the relevant factors in the particular case. If, however, that is not the Commission's intention then we suggest clarifying the wording to ensure legal certainty for the relevant parties.

4. STREAMLINING THE REVIEW OF SIMPLIFIED CASES AND THE SHORT FORM CO

4.1 We support streamlining the simplified review procedure and simplifying the Short Form CO template. In relation to the Short Form CO, we welcome the more limited information requirements and clearer structure. We believe that tick-box tables are particularly suitable for notifications under the simplified procedure (particularly the turnover and control aspects).

Scope of turnover data

4.2 We consider that streamlining the turnover information required in simplified cases would be a positive development given the unproblematic nature of simplified cases. Under Section 2 of the new Short Form CO, the parties only need to provide:

- worldwide and EU turnover; and
- where the parties meet the alternative Article 1(3) EUMR thresholds, the turnover breakdown only for the relevant Member States only.

4.3 Parties are, however, required to provide more detailed information in relation to EFTA States, including the ratio of turnover in EFTA States compared with total EEA turnover, individual turnover in EFTA States and possible distinct market in EFTA States.

4.4 We note that section 14 of the new Short Form CO includes in the suite of annexes "Turnover data – EEA breakdown". While there is no indication that this annex is mandatory (in contrast to other annexes which have been labelled mandatory), we would welcome confirmation that completing this annex is voluntary and the notifying party is only required to provide the information listed above.

Tables format

4.5 While we welcome the use of tables to simplify the review process, we note that flexibility may be required in certain cases to allow the parties to include explanations and/or advocacy in certain cases. For example, we welcome categorising products by NACE code rather than providing detailed market definitions as this reduces the burden on parties, however, where novel products/services are concerned it may be more appropriate for the parties to provide a narrative market definition.

Publication of decisions

4.6 Finally, we would welcome additional guidance from the Commission on whether there will be any changes to the scope of information published by the Commission in the context of simplified decisions. In particular, we would welcome additional input from the Commission on market definition where new markets not previously defined are concerned for increased transparency and consistency with future transactions.

5. STREAMLINING THE REVIEW OF NON-SIMPLIFIED CASES AND THE FORM CO

5.1 While we welcome a more structured approach to the Short Form CO detailing precisely what information is required for the competitive assessment (i.e., pre-formatted market share tables in Sections 7 and 8), we would advocate for retaining a flexible approach to avoid delays and to encourage cooperation with the Commission.

5.2 We support the elimination of certain information requirements altogether (e.g., regarding trade associations) but we note that new information requirements have also been introduced. We suggest the Commission weighs the benefit of these additional information requirements against the work required by the parties to obtain such information.

Simplified markets in the context of a Form CO

5.3 The Commission also indicates that, in the context of a non-simplified procedure, the final decision will not include a detailed assessment of any markets that meet the requirements of the simplified procedure (consistent with decisions published under the simplified procedure). While we welcome the clarification that those markets should be assessed by the Commission in a streamlined manner, we suggest that the Form CO includes a specific section with a table for "simplified" markets (i.e., markets falling under paragraph 5 of the Draft Notice) in addition to the table for markets falling under the flexibility clause in section 7 of the Form CO.

5.4 In the absence of a specific section in the Form CO, our understanding is that it will suffice to list markets benefiting from the simplified procedure and indicate the relevant category as set out under paragraph 5 of the Draft Notice.

Contact details

5.5 The new draft Form CO indicates that only personalised email addresses will be accepted and that the Commission may declare the notification incomplete if general company mailboxes are used. While we are aware of the importance of contact details for the Commission, it is not always possible for parties to identify personalised phone numbers and e-mail addresses for their competitors. The Commission should therefore ensure some flexibility is retained for instances where the parties have made a good faith effort to obtain personalised email addresses.

Additional information requirements amendments

5.6 These new information requirements listed below will create an additional burden for the parties. It is important that the Commission weighs the utility of this information for the substantive assessment against the increased administrative burden for parties.

- Section 3 requires more detailed information about: (i) the status of parallel notifications (including the expected date of notification and the stage of the investigation) and (ii) competitors' non-controlling shareholdings in any of the parties (above 10%).

- Section 6 requires the parties to provide a full competitive assessment of other markets in which the notified operation may have a significant impact (as well as affected markets). The new draft Form CO also provides a lower market share threshold (from 30% to 20%) for markets in which one party is active and the other party would be a potential competitor. The new draft Form CO also requires additional information if the parties reach certain thresholds in relation to neighbouring markets, a concept which should be more clearly defined.

- Section 7 requires the parties to tick which threshold is met for each market falling under the flexibility clause and complete market share tables on horizontal and vertical overlaps for these markets.

- Section 8 requires more detailed information on pipeline products and overlaps between marketed products of one party and a pipeline product of another party. In many sectors, it will be difficult for the parties to provide reliable projected sales and market share data for pipeline products for the next three years. Parties are also unlikely to have access to any reliable information regarding their (potential) competitors developing similar pipeline products. Therefore, we would support a limitation of this requirement to specific industries.

6. ELECTRONIC NOTIFICATIONS

6.1 We welcome the digitalisation of the submission process and the shift to electronic transmission as the default.

6.2 The Commission is introducing fully digital notifications, including digital signatures. The parties will be able to sign the declaration electronically using a Qualified Electronic Signature. This will save cost and time for the parties. Furthermore, it is our understanding that the Commission will also accept the Power of Attorney in digital format. However, this point would need to be expressly clarified by the Commission in the relevant forms or the dedicated guidance document on digital submissions. For example, the Form CO and Form RS still require the "*original written proof*" which may be confusing and the Short Form CO includes the original power of attorney in the suite of annexes (which has not been labelled mandatory). We support the Commission's move towards a fully digitalised procedure to accelerate the review process.

6.3 The draft Notice also contains novel stricter provisions in terms of modalities of the electronic transmission. In particular, Form COs transmitted electronically outside working hours shall be deemed received "*on the next working day*". In our view, this requirement is unnecessary, creates legal uncertainty as "working hours" is not a defined term and will create an additional logistical hurdle for the parties who were previously able to submit Form COs until late in the evening.

6.4 Furthermore, we are concerned that the Draft Notice indicates that documents which are "*unusable*" will be deemed not to have been received. This may be particularly problematic in the context of a request for information by decision with a strict timeline. A more pragmatic approach would be to promptly notify the parties and request that the document(s) are re-sent within the next few hours.

7. FORM RS

7.1 The new draft Form RS includes a section for Member State referrals for concentrations that do not give rise technically to so-called "affected markets" but still risk significantly affecting competition in a market within a certain Member State which presents all the characteristics of a distinct market (clause 5.1.3 of the Form RS). Similarly, there is a provision on Commission referrals for (i) concentrations with affected markets in less than three Member States and (ii) concentrations that do not technically give rise to "affected markets" (clause 5.2.3 of the Form RS). We note that these additions appear to interfere with the EUMR legal requirements for referrals but are unlikely to be problematic in practice as such referral requests would be made on a voluntary basis by the parties.