EUROPEAN COMMISSION CONSULTATION ON REVISION OF THE SIMPLIFIED PROCEDURE AND MERGER IMPLEMENTING REGULATION

RESPONSE OF ASHURST LLP

1. INTRODUCTION AND STRUCTURE OF THIS RESPONSE

1.1 Ashurst LLP welcomes the opportunity to comment on the European Commission's ("the Commission") public consultation on "EU merger control – Draft revision of simplified procedure and merger implementing regulation" of 27 March 2013 ("the Proposal").

We regularly advise clients who are parties to mergers that are subject to the EU merger control regime or who are interested third parties in relation to such mergers.

1.2 In general terms, we support the Commission's decision to examine the notification procedures and consider whether improvements can be made with the stated aim of "making EU merger control even more business-friendly by cutting red tape and streamlining procedures". In our experience, the significant time and expense involved in notifying a merger to the Commission is often a source of concern for the merging parties, and to the extent that the burden can be reduced without decreasing the effectiveness of the regime for cases which raise genuine competition concerns, then changes to the current procedures are to be welcomed. In particular, we welcome the proposed amendments to the Short Form jurisdictional thresholds for mergers with horizontal and/or vertical overlaps.

1.3 We are not, however, convinced that the procedural amendments set out in the Proposal will necessarily result in an overall decrease in the burden on notifying parties. Whilst some aspects of the Proposal may have a positive impact, there are a number of amendments which are likely to result in a net increase in the burden faced by notifying parties. For example:

(a) requirements to provide even more internal documents under Section 5 of the proposed revised Form CO and Short Form CO;

(b) requirement to identify "all plausible" market definitions;

(c) potential requirement to summarise data stored by notifying parties which may be useful for quantitative economic analysis; and

(d) new questions in the Form CO on, for example, market exit, barriers to access to customers, research and planning and launch of new products.

1.4 We would urge the Commission to reconsider amendments which have the effect of increasing the burden on notifying parties. In this regard, it is not sufficient to claim that

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an individual amendment may not, by itself, significantly increase the burden on notifying parties. It is important to appreciate that the cumulative effect of a number of amendments may add up to a significant increase in the burden on notifying parties, which goes directly against the Commission’s stated aim of making the process less burdensome for business, with a view to stimulating growth and making Europe more competitive.¹

1.5 We also have concerns that the Proposal will have the effect of “front-loading” even more issues into the pre-notification discussion phase. The degree of uncertainty surrounding pre-notification discussions - both in terms of timing, and the extent of the information required by the Commission before it will deem a notification to be "complete" - is already a source of considerable concern for merging parties. In our view, the Proposal will exacerbate the current problems, increasing the scope of these discussions, making them more uncertain and complex, and potentially more time-consuming and expensive for the merging parties (for example, by increasing financing costs as well as advisers' fees and management time).

1.6 Against this background, in this response, we set out:

(a) in section 2, our observations on the proposal to change the scope of the simplified procedure;

(b) in section 3, our observations on amendments which are intended to streamline, reduce, standardise and update the information requirements in the Form CO, Short Form CO and Form RS;

(c) in section 4, our concerns about the Proposal leading to even more extensive and complex pre-notification discussions; and

(d) in section 5, our observations on the burdens the EU merger control regime places on businesses which are not notifying parties but which may nevertheless receive lengthy and detailed information requests from the Commission in relation to a particular merger, e.g. customers, suppliers and competitors. As discussed in more detail in that section, we consider that the Commission should, as a matter of priority, consider how it can reduce the burden on such third parties as well as reducing the burden on notifying parties.

2. AMENDMENTS TO THE SCOPE OF THE SIMPLIFIED PROCEDURE

2.1 In this section, we set out our observations on proposals to extend the scope of the simplified procedure.

Application of simplified procedure in general

2.2 The Draft Revised Simplified Procedure Notice states that the Commission will now "in principle" apply the simplified procedure to each of identified categories (i.e. under the Proposal, the words "in principle" will be added). This appears to place greater emphasis on the Commission’s discretion in applying the simplified procedure and, accordingly, suggests that there is less certainty for businesses as to the circumstances in which the simplified procedure will apply. We consider that this increased uncertainty is undesirable, and unless it is the Commission’s intention to change its approach in this context (which is not clear from the Proposal), we would recommend that the Commission does not proceed with the proposed amendment.

2.3 We also note the proposed increase in scope for reversion to the long-form Form CO procedure, through the inclusion of additional scenarios in paragraph 11 (extra-EEA joint

¹ See footnote 2 above.
venture with products/services that constitute important inputs for products sold in the EEA) and paragraph 16 (cases where the new high market share/small increment criterion may be applicable).

2.4 Whilst we recognise the need for a degree of Commission discretion in this context, the cumulative effect of these amendments when combined with the increased focus on the pre-notification discussion phase (see further section 4 of this response) will, in our view, result in further uncertainty for parties.

Raising the jurisdictional thresholds

2.5 We support the proposal to extend the scope of application of the simplified procedure by revising the thresholds, so that the procedure is available provided the combined market share of all of the parties does not exceed 20 per cent for horizontal relationships (increased from 15 per cent) or 30 per cent for vertical relationships (increased from 25 per cent).

2.6 As well as enabling more mergers to benefit from the simplified procedure, this change also brings welcome consistency as between the Draft Revised Simplified Procedure Notice and the Commission’s guidelines on the assessment of non-horizontal mergers, which state that the Commission is unlikely to find concern in non-horizontal mergers where the market share post merger of the new entity in each of the markets concerned is below 30%.5

New high market share/small increment criterion

2.7 In principle, we also welcome the proposal to apply the simplified procedure to mergers where the combined market share of all parties to the concentration that are in a horizontal relationship is less than 50 per cent and the increment is very small. We agree that such mergers do not generally raise competition concerns and should, therefore, benefit from the simplified procedure.

2.8 However, we have a number of reservations about this new criterion, and in particular the proposed use of a "Herfindahl-Hirschman Index ("HHI") delta of less than 150" threshold:

(a) We note that the Commission will decide whether to apply the simplified procedure to this category of mergers on a case-by-case basis. Accordingly, there will be no certainty for parties as to whether, even if they are able to ascertain that their transaction falls within the high market share/small increment criterion, the Commission will allow the merger to be reviewed under the simplified procedure.

(b) Notifying parties are required to fulfil the conditions of this criterion "under all the plausible alternative market definitions". This is a very high burden for businesses, especially for products that may not have previously been subject to competition analysis by the Commission or other competition authorities and for which the relevant market definition may not be clear.

(c) In order to achieve an HHI delta of no more than 150, the maximum market share of the smaller market participant must in practice be so small that the ability of merging parties to establish whether their transaction meets this criterion is likely to be heavily influenced by the quality of the market information available (in particular data relating to the total size of the market). By way of example, where one party to the transaction has a market share of 45 per cent, the other party

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5 Paragraph 25 of the guidelines.
must have a market share of no more than 1.67 per cent in order to meet the HHI increment element of the new criterion. In our experience, it is often difficult for businesses to provide accurate market shares below the five per cent level, with particular difficulties arising where market share levels are less than two to three per cent. The margin of error for such small market shares can be very high, yet extremely small changes to market share figures are likely to have a significant impact on the application of the proposed new high market share/small increment criterion. Such uncertainties will inevitably increase the amount of time spent in pre-notification discussions with the Commission – see further section 4 of this response which discusses in more detail the implications of the Proposal for pre-merger discussions.

(d) Under the proposed new criterion, there is no "clear line" which can be identified due to the number of different possible permutations of combined market shares and HHI deltas, which again increases the uncertainty for the undertakings concerned. For example, whilst a merger between two parties with market shares of 40 per cent and 1.88 per cent (i.e. aggregated share of 41.88 per cent) would qualify for review under the simplified procedure under the new criterion (subject to the Commission's discretion), a merger between two parties with market shares of 35 per cent and 2.2 per cent (i.e. aggregated share of 37.7 per cent and an increment only marginally above the 1.88 per cent increment permissible where the other party has a market share of 40 per cent) would not qualify under this criterion as the HHI increment would be above 150.

2.9 In light of the above, we consider that it would be preferable to replace the proposed HHI delta threshold with a simpler market share threshold, such that the simplified procedure would be available where the combined market share of all parties to the concentration that are in a horizontal relationship is less than 50 per cent and the increment is less than X per cent.

2.10 We would also suggest that the simplified procedure should be available in principle in all cases which meet this revised criterion, rather than merely stating, as in the Draft Revised Simplified Procedure Notice, that it "may" be applied. Finally, we consider that it would also be helpful if the final version of the Revised Simplified Procedure Notice provided the Commission with an explicit discretion to accept for review under the simplified procedure transactions that, although they do not fulfil the conditions of the high market share/small increment criterion, nevertheless clearly do not raise any competition concerns and are suitable for review under the simplified procedure.

"No overlap" transactions

2.11 The Commission's Simplified Procedure Notice currently clearly states that the simplified procedure will apply when "two 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 geographical market, or in a product market which is upstream or downstream of a product market in which any other to the concentration is engaged."

As a result, mergers in which there are no horizontal overlaps and no potential vertical relationships between the parties to the transaction (i.e. "no overlap" transactions) qualify for review under the simplified procedure.

2.12 Pursuant to the Proposal, this wording will be deleted from both the Commission's Simplified Procedure Notice and the Short Form CO. As a result, it will no longer be clear that such "no overlap" transactions would qualify for review under the simplified procedure, due to ambiguity in how the revised jurisdictional thresholds would apply to such transactions. Specifically, it is not clear that such transactions would fall within the

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5 This criterion is also set out in the current Short Form CO.
scope of any of the categories of concentrations set out in paragraphs 5-7 of the Draft Revised Simplified Procedure Notice.

2.13 Unless the Commission intends that "no overlap" transactions should no longer automatically qualify for review under the simplified procedure, we consider that the existing wording set out in paragraph 2.11 above should be retained in both the final version of the Revised Simplified Procedure Notice and the Revised Short Form CO.

2.14 If the Commission intends to exclude "no overlap" transactions from the simplified procedure, it is incumbent on the Commission to explain why it is narrowing the scope of the simplified procedure, especially in light of its stated objective of widening the scope of the simplified procedure.

3. STREAMLINING, REDUCING, STANDARDISING AND UPDATING THE INFORMATION REQUIREMENTS

3.1 The Proposal includes a large number of amendments which are stated to be intended to streamline, reduce, standardise and update the information requirements in the Form CO, Short Form CO and Form RS. As explained further below, we consider that some of these amendments are in practice likely to increase, rather than decrease, the burden on notifying parties, and counter-act the other efficiency-enhancing amendments proposed by the Commission.

Requirement to submit "all plausible" market definitions

3.2 We are concerned that the amendments to Form CO and Form RS to include a requirement for notifying parties to identify "all plausible alternative product and geographic market definitions" will significantly increase the burden on notifying parties, particularly given that such definitions are expressly stated not to be limited to alternative product and geographic market definitions that have been considered in previous Commission decisions, and a notification may be deemed incomplete on the basis that a largely theoretical but still plausible market has not been listed and explored. We note in this regard that the definition of "affected markets" (in respect of which a considerable amount of information must be provided) is to be based on this list of "all plausible relevant product and geographic markets", which is likely to result in a disproportionate amount of information being required about markets which, although "plausible", are not genuinely likely to be relevant to the Commission's assessment of the transaction. Moreover, whether a potential market definition is "plausible" is inherently uncertain and a matter for debate.

3.3 In practice, these amendments are likely to increase the amount of time and resources required to prepare a notification, and to increase the uncertainty for notifying parties as to whether the Commission will accept a notification as "complete", without increasing the effectiveness or efficiency of the Commission's review.

3.4 Similar concerns also arise in respect of the amendments to the definition of "reportable markets" in the revised Short Form CO. In our experience, the existing requirement in the current Short Form CO to provide information on "all relevant product and geographic markets, as well as plausible alternative relevant product and geographic market definitions" already gives rise to considerable difficulties for the parties and is often the subject of lengthy discussions with the case team during the pre-notification stage. Yet under the proposed revised wording this requirement will, far from being streamlined and reduced in scope, be extended by referring to "all plausible relevant product and geographic markets" (emphasis added). This may appear to be a small change, but we are concerned that it introduces a requirement to set out an exhaustive list of all potentially plausible alternative market definitions, and thereby broadens the scope of "reportable markets" in respect of which information must be provided. This is likely to unnecessarily increase the burden on notifying parties, particularly in light of the
uncertainty as to exactly what is meant by "plausible", and particularly when combined
with the proposed additional information requirements in the revised Short Form CO (see
further below).

3.5 We would therefore suggest that the existing wording should be retained. In addition, we
would welcome further clarification from the Commission as to what is meant by the use
of the term "plausible" in this context. We would also suggest that it should be made
expressly clear that if additional "plausible" market definitions arise as a result of the
Commission's investigations, after the notification has been otherwise accepted as
complete, this should not lead to the conclusion that the notification was in fact
incomplete.

Amendments to definition of other markets in which the notified operation may
have a significant impact

3.6 We note that section 6.4(a) of the draft revised Form CO (in respect of other markets in
which the notified operation may have a significant impact) has been amended to reduce
the relevant market share threshold in cases involving a merger with a potential
competitor to 20 per cent (from 25 per cent) and to expand the definition of a "potential
competitor" to include undertakings which have developed or pursued plans to enter a
market (defined on the basis of all plausible market definitions) within the last three years
(rather than two years, as is currently the case). It is unclear to us why these
amendments have been made, and they do not seem to be consistent with the
Commission's stated objective of reducing the burden on notifying parties. We would
suggest that the current definition should be retained.

Supporting documentation – section 5.4 Form CO and 5.3 Short Form CO

3.7 The amendments to the supporting documentation required to be submitted under section
5.4 of the Form CO will significantly increase the burden on notifying parties by expanding
the scope of documentation required. We are concerned that the proposed new
requirements are disproportionate and unnecessary for the Commission's assessment of
the potential impact of the transaction on competition, as well as being inconsistent with
the Commission's stated aim to reduce the burden on notifying parties and streamline the
process. In our experience, collating documents, checking for legal privilege and
redacting irrelevant/unresponsive and privileged excerpts is a very time-consuming task
and the impact of the expansion of this obligation should not be underestimated.

3.8 As a general observation, the scope of the documentation requested in the revised section
5.4 appears to be unnecessarily broad, extending to all documents prepared by or for or
received by any member of the board, regardless of subject matter or relevance to the
transaction, and apparently without any limitations as to relevant time period. In the draft
revised Form CO the documents listed in sub-paragraphs (i)-(iv) of section 5.4 are now
preceded by the additional words "in particular", indicating that this is not intended to be
an exhaustive list of the documentation required, but rather a list of examples of the type
of documentation in which the Commission is particularly interested. As currently drafted,
the amount of wholly irrelevant information which the revised Form CO appears to
demand is disproportionate and goes directly against the Commission's stated aim of
streamlining and reducing the information requirements.

3.9 We would therefore suggest that the wording of section 5.4 of the final version of the
revised Form CO should therefore be amended as follows:

(a) the first line of section 5.4 should refer to "copies of the following documents as
prepared by or for or received..." (additional text underlined; the word "all" has
been deleted); and
With regard to the specific categories of documents listed in sub-paragraphs (i)-(iv) of revised section 5.4, we wish also to make the following comments:

(a) In relation to the requirement to provide minutes of board meetings at which the transaction should be discussed, we consider that only the relevant extracts of such minutes should be required to be provided, rather than the full board minutes which are likely to cover a broad range of other potentially sensitive topics which are not relevant to the Commission's assessment of the notified transaction.

(b) The rationale for including a new requirement to provide internal presentations analysing different options for acquisitions is unclear, and it strikes us that for a large number of notified transactions, this requirement is unlikely to produce any documents relevant to the Commission's analysis of the notified transaction. For example, a large number of notified transactions relate to purchases by venture capital funds and other investment bodies. In these circumstances, the relevant purchaser is likely to be considering a number of diverse transactions, often in completely unrelated markets or even unrelated industries. Internal documents assessing the relative merits of such unrelated potential transactions are unlikely to be informative for the Commission when assessing the notified transaction and the appropriate counterfactual. Although this concern is particularly pertinent in relation to venture capital funds and other investment bodies, it could equally apply to other businesses, especially those with diversified interests. Our concerns in this regard are heightened by the open-ended nature of the requirement as currently drafted: there appear to be no limitations in terms of relevant time period, and no requirement that the previously contemplated acquisitions are in the same or even related markets as the transaction which has been notified.

(c) The addition of a requirement to provide analyses, reports, studies, surveys and any comparable documents of the last three years for the purpose of assessing any of the affected markets is likely to prove extremely burdensome for notifying parties in many cases, particularly given the proposed approach to defining the affected markets (see paragraphs 3.2-3.4 above). We are not convinced that requesting such a large amount of detailed information at the pre-notification stage as part of the Form CO requirements is justified or proportionate.

In relation to the new requirement in section 5.3 of the draft revised Short Form CO for parties to provide, in cases which fall within the scope of points 5(b) or 6 of the draft revised Simplified Procedure Notice, copies of all internal presentations analysing different options for acquisitions, we have the same concerns as outlined above in paragraph 3.9(b) in respect of amendments to section 5.4 of the draft revised Form CO. We also wish to emphasise that given that the Short Form CO is intended to be used for transactions which are not expected to raise competition concerns, the Commission's starting point for the information requirements included in the Short Form CO should be to limit the requirements to the minimum information which will be relevant and necessary in the majority of cases.

It is not clear to us what the rationale is for requiring the information set out in revised section 5.3 in all cases qualifying for the simplified procedure under points 5(b) or 6 of the draft revised Simplified Procedure Notice – in the majority of cases, it will not be relevant or necessary for the Commission's assessment. If the provision of such information were considered to be helpful in the circumstances of a particular case, it could be requested by the Commission during the pre-notification phase.

Requiring such information as a matter of course for all transactions considered under the simplified procedure would effectively negate a substantial part of the benefits of the
simplified procedure, and we therefore recommend that section 5.3 of the draft revised Short Form CO should be deleted.

**Requirement to provide a description of data collected and stored which may be useful for quantitative economic analysis**

3.14 Section 1.8 of the draft revised Form CO states that "[i]n cases in which quantitative economic analysis is likely to be useful" notifying parties should "briefly describe the data that each of the undertakings concerned collects and stores in the ordinary course of its business operations and which could be useful for such analysis." It is unclear whether the undertakings concerned are under a legal obligation to provide this information if it exists, or whether they are merely being invited to do so if they consider that it would be helpful to provide it. We would suggest that the latter interpretation should be adopted, and that the wording of section 1.8 of the final version of the revised Form CO should be amended to make the position clearer.

3.15 In any event, we do not consider that it is appropriate to include such a requirement in the Form CO given that businesses generally collect a wide range of data and this data is not necessarily centrally located (indeed, certain data may be independently collated and stored by a single employee). It could, therefore, be a very time-consuming and difficult task to summarise the complete range of potentially useful data collected by undertakings concerned at the pre-notification stage.

3.16 In light of these concerns, we do not consider that it is an appropriate use of the resources of notifying parties to attempt to summarise potentially useful data in the Form CO.

**Information relating to cross-directorships**

3.17 Footnote 21 of the draft revised Form CO introduces a new requirement that the Commission "may" require, for "suitable concentrations", information on cross-directorships. We do not consider that it is helpful to introduce such uncertainty into the Form CO without any further explanation of what would be a "suitable concentration" in this context, particularly given the implication in footnote 21 that if such information was not supplied in a case which the Commission deemed "suitable" then the notification would be treated as incomplete.

**Contact details**

3.18 In our experience, notifying parties often encounter difficulties in completing the Commission's template for contact details with all the requested data, due to some information not being publicly available, or not having been updated on company websites. We are therefore concerned by the proposed amendment to recital 1.4(c) of the draft revised Form CO, which provides that "instances of missing or incomplete contact details" will be considered as incorrect or misleading information rendering the notification incomplete. We consider that it is disproportionate to place a notifying party at risk of a notification being deemed incomplete and a fine potentially being imposed under Article 14(1)(a) of the EU Merger Regulation in circumstances in which the relevant contact details cannot be obtained even having taken reasonable steps.

**Additional information requirements**

3.19 Despite the fact that the Commission claims that the purpose of the Proposal is to reduce the burden on notifying parties, we note that the draft revised Form CO includes a number of other new questions asking for additional data that has not previously been required, for example in relation to:

(a) market exit over the previous 5 years;
(b) barriers to access to customers, such as those resulting from product certification procedures or the importance of reputation;

(c) research and planning and priorities over the next 3 years; and

(d) frequency of introduction of new products and/or services.

3.20 Given that Commission's stated purpose of reducing the burden on notifying parties, we suggest that the Commission should reconsider whether it is necessary to increase the burden on notifying parties by requiring such additional information to be provided in the Form CO as a matter of course.

3.21 Similar concerns arise in respect of the draft revised Short Form CO, where significant additions are proposed to the information requirements set out in section 7. As previously emphasised above, given that the simplified procedure is intended to be used for transactions which are not expected to raise competition concerns, we would suggest that the Commission's starting point for the information requirements included in the Short Form CO should be to limit the requirements to the minimum information which will be relevant and necessary in the majority of cases.

**Applying for waivers**

3.22 We note that the Proposal envisages parties being able (and indeed encouraged) to apply for a waiver in respect of any of the information requirements considered above where they do not wish to provide the level of detail requested, or are unable to do so.

3.23 However, this is to adopt a default position of requiring significantly more information from parties compared to the current regime and then offering the possibility of a waiver which may or may not be granted. It is difficult to see how this is consistent with the Commission's stated aim of reducing the burden on notifying parties, and such an approach will inevitably increase the level of uncertainty for merging parties and further front-load the pre-notification discussions stage (see further section 4 of this response).

**Transactions which have no impact in the EU**

3.24 Whilst we recognise that the focus of this consultation is on the circumstances in which the simplified procedure should be available and the information which should be required in revised versions of the Short Form CO, Form CO and Form RS, we would query whether there might be some merit in introducing an even shorter notification form for transactions which, although falling within the scope of the EU Merger Regulation, clearly have no impact whatsoever in the EU - for example, two multinational firms that together satisfy the turnover thresholds in Article 1(2) of the EU Merger Regulation entering into a full-function joint venture outside of the EU which does not make any sales into the EU.

3.25 In such cases, we consider that even the requirements of the Short Form CO (particularly in its revised form) impose a considerable and disproportionate burden on merging parties. Where the transaction cannot, on any basis, have an impact in the EU, a short description of the parties, the transaction, and the rationale for the transaction should suffice for the purposes of notifying the transaction to the Commission.

4. **IMPLICATIONS FOR PRE-NOTIFICATION DISCUSSIONS**

4.1 As highlighted in the introductory section of this response, it strikes us that if the amendments set out in the Proposal are implemented, the pre-notification discussions will become even more important than they are currently, as even more issues will be "front-loaded" into the pre-notification discussion phase.
4.2 We note in this regard that whilst pre-notification is stated to remain voluntary, the Proposal includes amendments to both the Form CO and Short Form CO which will require even more detailed pre-notification discussions between the Commission and the merging parties. For example:

(a) the new high market share/small increment threshold in the proposed revised Short Form CO;

(b) the requirement to identify "all plausible" market definitions and provide information in respect of "affected markets" defined by reference to such markets;

(c) the increased weight placed on the Commission's discretion to accept a Short Form CO (see paragraph 2.2 above).

4.3 Whilst there are obvious advantages in having a pre-notification discussion phase, not least ensuring that a submitted notification is considered to be "complete" before the statutory timetable starts to run, in our experience the pre-notification discussion process introduces an unwelcome degree of uncertainty for notifying parties. This is particularly so when there is no formal guidance or target timeframe for such discussions: the draft revised Simplified Procedure Notice suggests that parties should consider engaging in pre-notification discussions with the Commission two weeks before the intended submission date, but we have been involved in transactions where the pre-notification stage has taken many months, due not only to the complexity of the transaction but also internal administrative priorities of the Commission (for example the Commission asking parties to delay submission of a completed notification by several weeks to fit in with Commission holidays or the Commission's general workload).

4.4 The lack of certainty of the process raises considerable issues for businesses. For risk analysis and control purposes, businesses require certainty as to process and timetable (indeed the lack of certainty can have considerable consequences, not least in relation to deal financing, general transaction timetabling and assessing the relative attractiveness of rival bids). Against this background, a lack of certainty as to process can raise businesses' costs and lead to inefficiencies.

5. **INTERNATIONAL CO-OPERATION BETWEEN THE COMMISSION AND OTHER COMPETITION AUTHORITIES**

5.1 We note the inclusion of an additional section 1.9 in the draft revised Form CO encouraging merging parties to submit a list of jurisdictions outside the EEA where the concentration is subject to regulatory clearance under merger control rules before or after closing, and also to submit waivers of confidentiality that would enable the Commission to share information with other competition authorities outside the EEA reviewing the same concentration.

5.2 In principle, we do not object to the sharing of information between the Commission and other competition authorities in this way, and indeed recognise that it may bring significant benefits. However, we believe that this should be considered on a jurisdiction-by-jurisdiction basis in light of potential confidentiality concerns.

6. **BURDEN ON THIRD PARTIES**

6.1 The Commission's information requests to third parties (customers, suppliers and competitors) can be very onerous and can place significant burdens on businesses. We have advised businesses which have received information requests as third parties comprising over 100 questions (in Phase I, with further information requests if the merger is referred for Phase II review), to which a response has been demanded within a one-week timeframe. Respondents are also required to provide confidential and non-
confidential versions of their responses to information requests. These detailed information requests pose a considerable burden on third parties which are exacerbated as a result of, inter alia:

(a) third parties generally having no advance warning that it will receive an information request and the extent of the questions being asked. Third parties are, therefore, unable to collate data or arrange to have the necessary personnel available in advance;

(b) the information request potentially relating to markets of which the respondent does not have detailed knowledge (in this regard, we are aware of respondents receiving information requests in relation to markets in which the respondent is not even geographically present); and

(c) third parties having particular difficulties in responding to questions requiring the provision of internal documents. In this regard, third parties are often simply requested to provide documents which provide information regarding certain (or all) aspects of the relevant market and competitive position of market participants. Whilst merging parties often have processes in place to capture relevant documents as part of a transaction, this request can be quite unwieldy for third parties as such documents are not necessarily centrally stored and often do not relate solely to the markets under review by the Commission. In our clients' experience, it can take considerable time to identify the relevant documents and then considerable further time needs to be spent collating and processing such documents such that they can be submitted to the Commission. It could be more efficient and, in any event, the Commission could gain a better understanding of the overall market and relevant competitors, if, rather than asking for a broad range of documents, the Commission would ask direct questions of the parties.

6.2 Against this background, just as the Commission has acknowledged in the Proposal that the procedures for notifying parties should be simplified and streamlined, we believe it is necessary for the Commission also to consider the extent to which information requests sent to third parties could be simplified and streamlined. This would reduce the burden on third parties and drive efficiencies within the merger process as a whole.

Ashurst LLP
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