II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COMMISSION

Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings

(2008/C 95/01)

CONTENTS

A. INTRODUCTION

(1) The purpose of this Notice is to provide guidance as to jurisdictional issues under Council Regulation (EC) No 139/2004, OJL 24, 29.1.2003, page 1 (the Merger Regulation) ([1]). This formal guidance should enable firms to establish more quickly, in advance of any contact with the Commission, whether and to what extent their operations may be covered by Community control of concentrations.

(2) This Notice replaces the Notice on the concept of concentration ([2]), the Notice on the concept of full-function joint ventures ([3]), the Notice on the concept of undertakings concerned ([4]) and the Notice on calculation of turnover ([5]).

(3) This Notice deals with the concepts of a concentration and of a full-function joint venture, undertakings concerned and the calculation of turnover as set out in Articles 1, 3 and 5 of the Merger Regulation. Issues concerning referrals are dealt with in the Notice on referrals ([6]). The Commission's interpretation of Articles 1, 3 and 5 in the present Notice is without prejudice to the interpretation which may be given by the Court of Justice or by the Court of First Instance of the European Communities.

(4) The guidance set out in this Notice reflects the Commission's experience in applying the recast Merger Regulation and the former Merger Regulation since the latter entered into force on 21 September 1990. The general principles governing the issues dealt with in this Notice have not been changed by the entry into force of Regulation (EC) No 139/2004, but where changes have occurred, the Notice deals with them explicitly. The principles contained in the Notice will be applied and further developed by the Commission in individual cases.

(5) According to Article 1, the Merger Regulation only applies to operations that satisfy two conditions. First, there must be a concentration of two or more undertakings within the meaning of Article 3 of the Merger Regulation. Secondly, the turnover of the undertakings concerned, calculated in accordance with Article 5, must satisfy the thresholds set out in Article 1 of the Regulation. The notion of a concentration (including the particular requirements for joint ventures), as the first condition, is dealt with under Part B; the identification of undertakings concerned and the calculation of their turnover as relevant for the second condition are dealt with under Part C.

(6) The Commission addresses the question of its jurisdiction over a concentration in decisions according to Article 6 of the Merger Regulation ([7]).

B. THE CONCEPT OF CONCENTRATION

(7) According to Article 3(1) of the Merger Regulation, a concentration only covers operations where a change of control in the undertakings concerned occurs on a lasting basis. Recital 20 in the preamble to the Merger Regulation further explains that the concept of concentration is intended to relate to operations which bring about a lasting change in the structure of the market. Because the test in Article 3 is centred on the concept of control, the existence of a concentration is to a great extent determined by qualitative rather than quantitative criteria.

([1]) Where it is necessary in this Notice to distinguish between Regulation 139/2004 and Council Regulation (EEC) No 4064/89 (OJL 395, 30.12.1989, corrected version in OJL 257, 21.9.1990, p. 13, Regulation last amended by Regulation (EC) No 1310/97, OJL 180, 9.7.1997, p. 1, corrigendum in OJL 40, 13.2.1998, p. 17), the former will be referred to as the 'recast Merger Regulation' whereas the latter will be referred to as the 'former Merger Regulation'. Articles without reference refer to the recast Merger Regulation.

([2]) OJC 66, 2.3.1998, p. 5.

([3]) OJC 66, 2.3.1998, p. 1.

([4]) OJC 66, 2.3.1998, p. 14.

([5]) OJC 66, 2.3.1998, p. 25.

([6]) OJC 56, 5.3.2005, p. 2.

([7]) See also opinion of AG Kokott in Case C-202/06 Cementbouw v Commission of 26 April 2007, paragraph 56 (not yet reported).

(8) Article 3(1) of the Merger Regulation defines two categories of concentrations:

— those arising from a merger between previously independent undertakings (point (a));

— those arising from an acquisition of control (point (b)).

These are treated respectively in Sections I and II below.

I. MERGERS BETWEEN PREVIOUSLY INDEPENDENT UNDERTAKINGS

(9) A merger within the meaning of Article 3(1)(a) of the Merger Regulation occurs when two or more independent undertakings amalgamate into a new undertaking and cease to exist as separate legal entities. A merger may also occur when an undertaking is absorbed by another, the latter retaining its legal identity while the former ceases to exist as a legal entity. ([8])

(10) A merger within the meaning of Article 3(1)(a) may also occur where, in the absence of a legal merger, the combining of the activities of previously independent undertakings results in the creation of a single economic unit ([9]). This may arise in particular where two or more undertakings, while retaining their individual legal personalities, establish contractually a common economic management ([10]) or the structure of a dual listed company ([11]). If this leads to a *de facto* amalgamation of the undertakings concerned into a single economic unit, the operation is considered to be a merger. A prerequisite for the determination of such a *de facto* merger is the existence of a permanent, single economic management. Other relevant factors may include internal profit and loss compensation or a revenue distribution as between the various entities within the group, and their joint liability or external risk sharing. The *de facto* amalgamation may be solely based on contractual arrangements ([12]), but it can also be reinforced by cross-shareholdings between the undertakings forming the economic unit.

II. ACQUISITION OF CONTROL

1. **Concept of control**

1.1. ***Person or undertaking acquiring control***

(11) Article 3 (1)(b) provides that a concentration occurs in the case of an acquisition of control. Such control may be acquired by one undertaking acting alone or by several undertakings acting jointly.

([8]) See, for example, Case COMP/M. 1673 — Veba/VIAG of 13 June 2000; Case COMP/M.1806 — AstraZeneca/Novartis of 26 July 2000; Case COMP/M.2208 — Chevron/Texaco of 26 January 2001; and Case IV/M.1383 — Exxon/Mobil of 29 September 1999. A merger in the meaning of Article 3(1)(a) is not deemed to occur if a target company is merged with a subsidiary of the acquiring company to the effect that the parent company acquires control of the target undertaking under Article 3(1)(b), see Case COMP/M.2510 — Cendant/Galileo of 24 September 2001.

([9]) In determining the previous independence of undertakings, the issue of control may be relevant as the merger might otherwise only be an internal restructuring within the group. In this specific context, the assessment of control also follows the general concept set out below and includes *de jure* as well as *de facto* control.

([10]) This could apply for example in the case of a 'Gleichordnungskonzern' in German law, certain 'Groupements d'Intérêt Economique' in French law, and the amalgamation of partnerships, as in Case IV/M.1016 — Price Waterhouse/Coopers&Lybrand of 20 May 1998.

([11]) Case IV/M.660 — RTZ/CRA of 7 December 1995; Case COMP/M.3071 — Carnival Corporation/P&O Princess II of 24 July 2002.

([12]) See Case IV/M.1016 — Price Waterhouse/Coopers&Lybrand of 20 May 1998; Case COMP/M.2824 — Ernst & Young/Andersen Germany of 27 August 2002.

Person controlling another undertaking

(12) Control may also be acquired by a person in circumstances where that person already controls (whether solely or jointly) at least one other undertaking or, alternatively, by a combination of persons (which control another undertaking) and undertakings. The term 'person' in this context extends to public bodies ([13]) and private entities, as well as natural persons. Acquisitions of control by natural persons are only considered to bring about a lasting change in the structure of the undertakings concerned if those natural persons carry out further economic activities on their own account or if they control at least one other undertaking ([14]).

Acquirer of control

(13) Control is normally acquired by persons or undertakings which are the holders of the rights or are entitled to rights conferring control under the contracts concerned (Article 3(3)(a)). However, there are also situations where the formal holder of a controlling interest differs from the person or undertaking having in fact the real power to exercise the rights resulting from this interest. This may be the case, for example, where an undertaking uses another person or undertaking for the acquisition of a controlling interest and has the power to exercise the rights conferring control through this person or undertaking, i.e. the latter is formally the holder of the rights, but acts only as a vehicle. In such a situation, control is acquired by the undertaking which in reality is behind the operation and in fact enjoys the power to control the target undertaking (Article 3(3)(b)). The Court of First Instance concluded from this provision that control held by commercial companies can be attributed to their exclusive shareholder, their majority shareholders or to those jointly controlling the companies since these companies comply in any event with the decisions of those shareholders ([15]). A controlling shareholding which is held by different entities in a group is normally attributed to the undertaking exercising control over the different formal holders of the rights. In other cases, the evidence needed to establish this type of indirect control may include, either separately or in combination and to be assessed on a case-by-case basis, factors such as shareholdings, contractual relations, source of financing or family links ([16]).

Acquisition of control by investment funds

(14) Specific issues may arise in the case of acquisitions of control by investment funds. The Commission will analyse structures involving investment funds on a case-by-case basis, but some general features of such structures can be set out on the basis of the Commission's past experience.

(15) Investment funds are often set up in the legal form of limited partnerships, in which the investors participate as limited partners and normally do not exercise control, either individually or collectively. The investment funds usually acquire the shares and voting rights which confer control over the portfolio companies. Depending on the circumstances, control is normally exercised by the investment company which has set up the fund as the fund itself is typically a mere investment vehicle; in more exceptional circumstances, control may be exercised by the fund itself. The investment company usually exercises control by means of the organisational structure, *e.g.* by controlling the general partner of fund partnerships, or by contractual arrangements, such as advisory agreements, or by a combination of both. This may be the case even if the investment company itself does not own the company acting as a general partner, but their shares are held by natural persons (who may be linked to the investment company) or by a trust. Contractual arrangements with the investment company, in particular advisory agreements,

([13]) Including the State itself, e.g. Case IV/M.157 — Air France/Sabena, of 5 October 1992 in relation to the Belgian State, or other public bodies such as the Treuhandanstalt in Case IV/M.308 — Kali und Salz/MDK/Treuhand, of 14 December 1993. See, however, recital 22 of the Merger Regulation.

([14]) Case IV/M.82 — Asko/Jakobs/Adia of 16 May 1991 including a private individual as undertaking concerned.; Case COMP/M3762 — Apax/Travelex of 16 June 2005 in which a private individual acquiring joint control was not considered an undertaking concerned.

([15]) Judgment in Case T-282/02 Cementbouw v Commission, paragraph 72, [2006] ECR II-319.

([16]) See Case M.754 — Anglo American Corporation/Lonrho of 23 April 1997.

will become even more important if the general partner does not have any own resources and personnel for the management of the portfolio companies, but only constitutes a company structure whose acts are performed by persons linked to the investment company. In these circumstances, the investment company normally acquires indirect control within the meaning of Article 3(1)(b) and 3(3)(b) of the Merger Regulation, and has the power to exercise the rights which are directly held by the investment fund. ([17])

1.2. *Means of control*

(16) Control is defined by Article 3(2) of the Merger Regulation as the possibility of exercising decisive influence on an undertaking. It is therefore not necessary to show that the decisive influence is or will be actually exercised. However, the possibility of exercising that influence must be effective. ([18]) Article 3(2) further provides that the possibility of exercising decisive influence on an undertaking can exist on the basis of rights, contracts or any other means, either separately or in combination, and having regard to the considerations of fact and law involved. A concentration therefore may occur on a legal or a *de facto* basis, may take the form of sole or joint control, and extend to the whole or parts of one or more undertakings (cf. Article 3(1)(b)).

Control by the acquisition of shares or assets

(17) Whether an operation gives rise to an acquisition of control therefore depends on a number of legal and/or factual elements. The most common means for the acquisition of control is the acquisition of shares, possibly combined with a shareholders' agreement in cases of joint control, or the acquisition of assets.

Control on a contractual basis

(18) Control can also be acquired on a contractual basis. In order to confer control, the contract must lead to a similar control of the management and the resources of the other undertaking as in the case of acquisition of shares or assets. In addition to transferring control over the management and the resources, such contracts must be characterised by a very long duration (ordinarily without a possibility of early termination for the party granting the contractual rights). Only such contracts can result in a structural change in the market. ([19]) Examples of such contracts are organisational contracts under national company law ([20]) or other types of contracts, *e.g.* in the form of agreements for the lease of the business, giving the acquirer control over the management and the resources despite the fact that property rights or shares are not transferred. In this respect, Article 3(2)(a) specifies that control may also be constituted by a right to use the assets of an undertaking. ([21]) Such contracts may also lead to a situation of joint control if both the owner of the assets as well as the undertaking controlling the management enjoy veto rights over strategic business decisions. ([22])

([17]) This structure also has an effect on how the turnover is calculated in situations involving investment funds, see paragraphs 189ff.

([18]) Judgment in Case T-282/02 Cementbouw v Commission, paragraph 58, [2006] ECR II-319

([19]) In Case COMP/M.3858 — Lehman Brothers/SCG/Starwood/Le Meridien of 20 July 2005 the management agreements had a duration of 10-15 years; in Case COMP/M.2632 — Deutsche Bahn/ECT International/United Depots/JV of 11 February 2002 the contract had a duration of 8 years.

([20]) Examples of such specific contracts under national company law are the 'Beherrschungsvertrag' in German law or the '*Contrato de subordinação*' in Portuguese law; such contracts do not exist in all Member States.

([21]) See Case COMP/M.2060 — Bosch/Rexroth of 12 January 2001 concerning a control contract (Beherrschungsvertrag) in combination with a business lease; Case COMP/M.3136 — GE/Agfa NDT of 5 December 2003 concerning a specific contract to transfer control over entrepreneurial resources, management and risks; Case COMP/M.2632 — Deutsche Bahn/ECT International/United Depots/JV of 11 February 2002 concerning a business lease.

([22]) Case COMP/M.3858 — Lehman Brothers/SCG/Starwood/Le Meridien of 20 July 2005; see also case IV/M.126 — Accor/Wagon-Lits of 28 April 1992 in the context of Article 5(4)(b) of the Merger Regulation.

Control by other means

(19) In line with these considerations, franchising agreements as such do not normally confer control over the franchisee's business on the franchisor. The franchisee usually exploits the entrepreneurial resources on its own account even if essential parts of the assets may belong to the franchisor ([23]). Furthermore, purely financial agreements, such as sale-and-lease-back transactions with arrangements for a buyback of the assets at the end of the term, do not normally constitute a concentration as they do not change control over the management and the resources.

(20) Furthermore, control can also be established by any other means. Purely economic relationships may play a decisive role for the acquisition of control. In exceptional circumstances, a situation of economic dependence may lead to control on a *de facto* basis where, for example, very important long-term supply agreements or credits provided by suppliers or customers, coupled with structural links, confer decisive influence ([24]). In such a situation, the Commission will carefully analyse whether such economic links, combined with other links, are sufficient to lead to a change of control on a lasting basis ([25]).

(21) There may be an acquisition of control even if it is not the declared intention of the parties or if the acquirer is only passive and the acquisition of control is triggered by action of third parties. Examples are situations where the change of control results from the inheritance of a shareholder or where the exit of a shareholder triggers a change of control, in particular a change from joint to sole control ([26]). Article 3(1)(b) covers such scenarios in specifying that control may also be acquired 'by any other means'.

Control and national company law

(22) National legislation within a Member State may provide specific rules on the structure of bodies representing the organization of decision-making within an undertaking. While such legislation may confer some power of control upon persons other than the shareholders, in particular on representatives of employees, the concept of control under the Merger Regulation is not related to such a means of influence as the Merger Regulation focuses on decisive influence enjoyed on the basis of rights, assets or contracts or equivalent *de facto* means. Restrictions in the articles of association or in general law concerning the persons eligible to sit on the board, such as a provisions requiring the appointment of independent members or excluding persons holding office or employment in the parent companies, do not exclude the existence of control as long as the shareholders decide the composition of the decision-making bodies ([27]). Similarly, despite provisions of national law foreseeing that decisions of a company must be taken by its company organs in its interests, those persons holding the voting rights have the power to adopt those decisions and therefore have the possibility to exercise decisive influence on the company ([28]).

([23]) Case M.940 — UBS/Mister Minit, in the context of Article 5(4)(b) of the Merger Regulation. For the treatment of franchising relationships in the competitive assessment, see Case COMP/M.4220 — Food Service Project/Tele Pizza of 6 June 2006. The situation in Case IV/M.126 — Accor/Wagon-Lits of 28 April 1992 has to be distinguished from franchising agreements. In this case, again in the context of Article 5(4)(b), the hotel company had a right to manage also hotels in which it only owned a minority stake as it had entered into long-term hotel management agreements giving it decisive influence over the day-to-day operations of these hotels, including decisions on budgetary matters.

([24]) See Case IV/M.794 — Coca-Cola/Amalgamated Beverages GB of 22 January 1997; Case IV/ECSC.1031 — US/Sollac/Barnesa of 28 July 1993; Case IV/M.625 — Nordic Capital/Transpool of 23 August 1995; for the criteria see also Case IV/M.697 — Lockheed Martin Corporation/Loral Corporation, of 27 March 1996.

([25]) See Case IV/M.258 — CCIE/GTE, of 25 September 1992 where the Commission did not find control due to the temporary nature of the commercial agreements involved.

([26]) See Case COMP/M.3330 — RTL/M6 of 12 March 2004; Case COMP/M.452 — Avesta (II) of 9 June 1994.

([27]) Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 70, 73, 74 [2006] ECR II-319.

([28]) Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 79 [2006] ECR II-319.

Control in other areas of legislation

(23) The concept of control under the Merger Regulation may be different from that applied in specific areas of Community and national legislation concerning, for example, prudential rules, taxation, air transport or the media. The interpretation of 'control' in other areas is therefore not necessarily decisive for the concept of control under the Merger Regulation

1.3. *Object of control*

(24) The Merger Regulation provides in Article 3(1)(b), (2) that the object of control can be one or more, or also parts of, undertakings which constitute legal entities, or the assets of such entities, or only some of these assets. The acquisition of control over assets can only be considered a concentration if those assets constitute 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 ([29]). The transfer of the client base of a business can fulfil these criteria if this is sufficient to transfer a business with a market turnover ([30]). A transaction confined to intangible assets such as brands, patents or copyrights may also be considered to be a concentration if those assets constitute a business with a market turnover. In any case, the transfer of licences for brands, patents or copyrights, without additional assets, can only fulfil these criteria if the licences are exclusive at least in a certain territory and the transfer of such licences will transfer the turnover-generating activity ([31]). For non-exclusive licences it can be excluded that they may constitute on their own a business to which a market turnover is attached.

(25) Specific issues arise in cases where an undertaking outsources in-house activities, such as the provision of services or the manufacturing of products, to a service provider. Typical cases are the outsourcing of IT services to specialised IT companies. Outsourcing contracts can take several forms; their common characteristic is that the outsourcing service supplier shall provide those services to the customer which the latter has performed in-house before. Cases of simple outsourcing do not involve any transfer of assets or employees to the outsourcing service suppliers, but it is usually the case that any assets or employees are retained by the customer. Such an outsourcing contract is akin to a normal service contract and even if the outsourcing service supplier acquires a right to direct those assets and employees of the customer, no concentration arises if the assets and employees will be used exclusively to service the customer.

(26) The situation may be different if the outsourcing service supplier, in addition to taking over a certain activity which was previously provided internally, is transferred the associated assets and/or personnel. A concentration only arises in these circumstances if the assets constitute the whole or part of an undertaking, i.e. a business with access to the market. This requires that the assets previously dedicated to in-house activities of the seller will enable the outsourcing service supplier to provide services not only to the outsourcing customer but also to third parties, either immediately or within a short period after the transfer. This will be the case if the transfer relates to an internal business unit or a subsidiary already engaged in the provision of services to third parties. If third parties are not yet supplied, the assets transferred in the case of manufacturing should contain production facilities, the product know-how (it is sufficient if the assets transferred allow the build-up of such capabilities in the near future) and, if there is no existing market access, the means for the purchaser to develop a market access within a short period

([29]) See, *e.g.*, Case COMP/M. 3867 — Vattenfall/Elsam and E2 Assets of 22 December 2005.

([30]) Case COMP/M.2857 — ECS/IEH of 23 December 2002.

([31]) In addition, the granting of licences and the transfer of patent licences will only constitute a concentration if this is done on a lasting basis. In this respect, similar considerations as set out above in paragraph 18 for the acquisition of control by (long-term) agreements apply.

of time (e.g. including existing contracts or brands) ([32]). As regards the provision of services, the assets transferred should include the required know-how (e.g. the relevant personnel and intellectual property) and those facilities which allow market access (such as, *e.g.*, marketing facilities) ([33]). The assets transferred therefore have to include at least those core elements that would allow an acquirer to build up a market presence in a time-frame similar to the start-up period for joint ventures as set out below under paragraphs 97, 100. As in the case of joint ventures, the Commission will take account of substantiated business plans and general market features for assessing this.

(27) If the assets transferred do not allow the purchaser to at least develop a market presence, it is likely that they will be used only for providing services to the outsourcing customer. In such circumstances, the transaction will not result in a lasting change in the market structure and the outsourcing contract is again similar to a service contract. The transaction will not constitute a concentration. The specific requirements under which a joint venture for the provision of outsourcing services is qualified as a concentration are assessed in the present Notice in the section on full-function joint ventures.

1.4. ***Change of control on a lasting basis***

(28) Article 3(1) of the Merger Regulation defines the concept of a concentration in such a manner as to cover operations only if they bring about a lasting change in the control of the undertakings concerned and, as recital 20 adds, in the structure of the market. The Merger Regulation therefore does not deal with transactions resulting only in a temporary change of control. However, a change of control on a lasting basis is not excluded by the fact that the underlying agreements are entered into for a definite period of time, provided those agreements are renewable. A concentration may arise even in cases in which agreements envisage a definite end-date, if the period envisaged is sufficiently long to lead to a lasting change in the control of the undertakings concerned ([34]).

(29) The question whether an operation results in a lasting change in the market structure is also relevant for the assessment of several operations occurring in succession, where the first transaction is only transitory in nature. Several scenarios can be distinguished in this respect.

(30) In one scenario, several undertakings come together solely for the purpose of acquiring another company on the basis of an agreement to divide up the acquired assets according to a pre-existing plan immediately upon completion of the transaction. In such circumstances, in a first step, the acquisition of the entire target company is carried out by one or several undertakings. In a second step, the acquired assets are divided among several undertakings. The question is then whether the first transaction is to be considered as a separate concentration, involving an acquisition of sole control (in the case of a single purchaser) or of joint control (in the case of a joint purchase) of the entire target undertaking, or whether only the acquisitions in the second step constitute concentrations, whereby each of the acquiring undertakings acquires its relevant part of the target undertaking.

([32]) See Case COMP/M.1841 — Celestica/IBM of 25 February 2000; Case COMP/M.1849 — Solectron/Ericsson of 29 February 2000; Case COMP/M.2479 — Flextronics/Alcatel — of 29 June 2001; Case COMP/M.2629 — Flextronics/Xerox of 12 November 2001.

([33]) See, in the context of joint ventures, Case IV/M.560 — EDS/Lufthansa of 11 May 1995; Case COMP/M.2478 — IBM Italia/Business Solutions/JV of 29 June 2001.

([34]) See, in cases of joint ventures, Case COMP/M.2903 — DaimlerChrysler/Deutsche Telekom/JV of 30 April 2003 where a period of 12 years was considered sufficient; Case COMP/M.2632 — Deutsche Bahn/ECT International/United Depots/JV of 11 February 2002 with a contract duration of 8 years. In Case COMP/M.3858 Lehman Brothers/Starwood/Le Meridien of 20 July 2005, the Commission considered a minimum period of 10-15 years sufficient, but not a period of three years. The acquisition of control by the acquisition of shares or assets is not normally confined to a definite period of time and is therefore assumed to lead to a change of control on a lasting basis. Only in the scenarios set out in paragraphs 29 ff., will an acquisition of control by shares or assets be exceptionally considered to be transitory in nature and thus not to lead to a lasting change in the control of the undertakings concerned.

(31) The Commission considers that the first transaction does not constitute a concentration, and examines the acquisitions of control by the ultimate acquirers, provided a number of conditions are met: First, the subsequent break-up must be agreed between the different purchasers in a legally binding way. Second, there must not be any uncertainty that the second step, the division of the acquired assets, will take place within a short time period after the first acquisition. The Commission considers that normally the maximum time-frame for the division of the assets should be one year ([35]).

(32) If both conditions are met, the first acquisition does not result in a structural change on a lasting basis. There is no effective concentration of economic power between the acquirer(s) and the target company as a whole since the acquired assets are not held in an undivided way on a lasting basis, but only for the time necessary to carry out the immediate split-up of the acquired assets. In those circumstances, only the acquisitions of the different parts of the undertaking in the second step will constitute concentrations, whereby each of these acquisitions by different purchasers will constitute a separate concentration. This is irrespective of whether the first acquisition is carried out by only one undertaking ([36]) or jointly by the undertakings which are also involved in the second step. ([37]) In any case, it must be noted that the scope of a clearance decision will only allow for a takeover of the entire target if the break-up can proceed within a short time-frame afterwards and the different parts of the target undertaking are directly sold on to the respective ultimate buyer.

(33) However, if these conditions are not fulfilled, in particular if it is not certain that the second step will proceed within a short time-frame after the first acquisition, the Commission will consider the first transaction as a separate concentration, involving the entire target undertaking. This, *e.g.*, is the case if the first transaction may also proceed independently of the second transaction ([38]) or if a longer transitory period is needed to divide up the target undertaking ([39]).

(34) A second scenario is an operation leading to joint control for a starting-up period but, according to legally binding agreements, this joint control will be converted to sole control by one of the shareholders. As the joint control situation may not constitute a lasting change of control, the whole operation may be considered to be an acquisition of sole control. In the past, the Commission accepted that such a start-up period could last up to three years ([40]). Such a period seems to be too long to exclude that the joint control scenario has an impact on the structure of the market. The period therefore should, in general, not exceed one year and the joint control period should be only transitory in nature ([41]). Only such a relatively short period will make it unlikely that the joint control period will have a distinct impact on the market structure and can therefore be considered as not leading to a change in control on a lasting basis.

(35) In a third scenario, an undertaking is 'parked' with an interim buyer, often a bank, on the basis of an agreement on the future onward sale of the business to an ultimate acquirer. The interim buyer generally acquires shares 'on behalf' of the ultimate acquirer, which often bears the major part of the economic risks and may also be granted specific rights. In such circumstances, the first transaction is only undertaken to facilitate the second transaction and the first buyer is directly linked to the ultimate acquirer. Contrary to the situation described in the first scenario in paragraphs 30-33, no other ultimate

([35]) See, e.g., Cases COMP/M. Case No COMP/M.3779 — Pernod Ricard/Allied Domecq of 24 June 2005 and COMP/M.3813 — Fortune Brands/Allied Domecq of 10 June 2005, where the split-up of the assets was foreseen to become effective within 6 months after the acquisition.

([36]) For a first acquisition by only one undertaking see Case COMP/M.3779 — Pernod Ricard/Allied Domecq of 24 June 2005 and Case COMP/M.3813 — Fortune Brands/Allied Domecq/Pernod Ricard of 10 June 2005; Case COMP/M.2060 — Bosch/Rexroth of 12 January 2001.

([37]) For a joint acquisition see Case COMP/M.1630 — Air Liquide/BOC of 18 January 2000; Case COMP/M.1922 — Siemens/Bosch/Atecs of 11 August 2000; Case COMP/M.2059 — Siemens/Dematic/VDO Sachs of 29 August 2000.

([38]) See Case COMP/M.2498 — UPM-Kymmene/Haindl of 21 November 2001 and Case COMP/M.2499 — Norske Skog/Parenco/Walsum of 21 November 2001.

([39]) Case COMP/M.3372 — Carlsberg/Holsten of 16 March 2004.

([40]) Case IV/M.425 — British Telecom/Santander of 28 March 1994.

([41]) See Case M.2389 — Shell/DEA of 20 December 2001 where the ultimate acquirer of sole control had a strong influence in the operational management during the joint control period; Case M.2854 — RAG/Degussa of 18 November 2002 where the transitional period was designed to facilitate internal post-merger restructuring.

acquirer is involved, the target business remains unchanged, and the sequence of transactions is initiated alone by the sole ultimate acquirer. From the date of the adoption of this Notice, the Commission will examine the acquisition of control by the ultimate acquirer, as provided for in the agreements entered into by the parties. The Commission will consider the transaction by which the interim buyer acquires control in such circumstances as the first step of a single concentration comprising the lasting acquisition of control by the ultimate buyer.

1.5. *Interrelated transactions*

1.5.1. Relation between Article 3 and Article 5(2) second subparagraph

(36) Several transactions can be treated as a single concentration under the Merger Regulation either according to the general rule of Article 3 — as the transactions are interdependent — or according to the specific provision of Article 5(2) second subparagraph.

(37) Article 5(2) second subparagraph governs a different question from that referred to by Article 3 of the Merger Regulation. Article 3 defines the existence of a 'concentration' in general and material terms, but does not directly determine the question of the Commission's competence in respect of concentrations. Article 5 intends to specify the scope of the Merger Regulation, in particular by defining the turnover to be taken into account for the purpose of determining whether a concentration has Community dimension, and Article 5(2) second subparagraph allows the Commission in this respect to consider two or more concentrative transactions to constitute a single concentration for the purposes of calculating the turnover of the undertakings concerned. The assessment whether, in application of Article 3, a number of transactions give rise to a single concentration or whether those transactions must be regarded as giving rise to a number of concentrations, is thereby logically precedent to the question addressed in Article 5(2) second subparagraph ([42]).

1.5.2. Interdependent transactions under Article 3

(38) The general and teleological definition of a concentration set out in Article 3(1) — the result being control of one or more undertakings — implies that it makes no difference whether control was acquired by one or several legal transactions, provided that the end result constitutes a single concentration. Two or more transactions constitute a single concentration for the purposes of Article 3 if they are unitary in nature. It should therefore be determined whether the result leads to conferring one or more undertakings direct or indirect economic control over the activities of one or more other undertakings. For the assessment, the economic reality underlying the transactions is to be identified and thus the economic aim pursued by the parties. In other words, in order to determine the unitary nature of the transactions in question, it is necessary, in each individual case, to ascertain whether those transactions are interdependent, in such a way that one transaction would not have been carried out without the other ([43]).

(39) Recital 20 to the Merger Regulation explains in this respect that it is appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition. The requirement that the transactions are interdependent as set out by the Court of First Instance in the *Cementbouw* judgment ([44]) thereby corresponds to the explanation set out in recital 20 that the transactions are linked by condition.

(40) This general approach reflects, on the one hand, that under the Merger Regulation transactions which stand or fall together according to the economic objectives pursued by the parties should also be analysed in one procedure. In these circumstances, the change of the market structure is brought about by these transactions together. On the other hand, if different transactions are not interdependent and if the parties would proceed with one of the transactions if the other ones would not succeed, it seems appropriate to assess these transactions individually under the Merger Regulation.

([42]) Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 113-119 [2006] ECR II-319.
([43]) Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 104-109 [2006] ECR II-319.
([44]) Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 106-109 [2006] ECR II-319.

(41) However, several transactions, even if linked by condition upon each other, can only be treated as a single concentration, if control is acquired ultimately by the same undertaking(s). Only in these circumstances two or more transactions can be considered to be unitary in nature and therefore to constitute a single concentration for the purposes of Article 3 ([45]). This excludes de-mergers of joint ventures by which different parts of an undertaking are split between its former parent companies. The Commission will consider those transactions as separate concentrations ([46]). The same applies to transactions where two (or more) companies exchange assets in transactions involving de-mergers of joint ventures or assets swaps. Although the parties will normally consider those transactions as interdependent, the purpose of the Merger Regulation requires a separate assessment of the results of each of the transactions: Several undertakings acquire control of different assets; a separate combination of resources takes place for each of the acquiring undertakings; and the impact on the market of each of those acquisitions of control needs to be analysed separately under the Merger Regulation.

(42) The acquisition of different degrees of control (for example joint control of one business and sole control of another business) raises specific questions. An operation involving the acquisition of joint control of one part of an undertaking and sole control of another part is in principle regarded as two separate concentrations under the Merger Regulation ([47]). Those transactions constitute only one concentration if they are interdependent and if the undertaking acquiring sole control is also acquiring joint control. In any case, such a scenario is considered to constitute one concentration where a corporate entity is acquired to which both the solely controlled and the jointly controlled undertaking belong. On the basis of the interpretation in recital 20, the situation where the same undertaking acquires sole and joint control of other undertakings based on interdependent agreements is not to be treated differently. These transactions, if they are interdependent, therefore constitute a single concentration.

Requirement of conditionality of transactions

(43) The required conditionality implies that none of the transactions would take place without the others and they therefore constitute a single operation ([48]). Such conditionality is normally demonstrated if the transactions are linked *de jure*, *i.e.* the agreements themselves are linked by mutual conditionality. If *de facto* conditionality can be satisfactorily demonstrated, it may also suffice for treating the transactions as a single concentration. This requires an economic assessment of whether each of the transactions necessarily depends on the conclusion of the others ([49]). Further indications of the interdependence of several transactions may be the statements of the parties themselves or the simultaneous conclusion of the relevant agreements. A conclusion of *de facto* interconditionality of several transactions will be difficult to reach in the absence of their simultaneity. A pronounced lack of simultaneity of legally interconditional transactions may likewise put into doubt their true interdependence.

(44) The principle that several transactions can be treated as a single concentration under the mentioned conditions only applies if the result is that control of one or more undertakings is acquired by the same person(s) or undertaking(s). First, this may be the case if a single business or undertaking is acquired via several legal transactions. Second, also the acquisition of control of several undertakings — which could constitute concentrations in themselves — can be linked in such a way that it constitutes a single concentration. However, it is not possible under the Merger Regulation to link different legal transactions which only partly concern the acquisition of control of undertakings, but partly also the acquisition of

([45]) This also covers situations where an undertaking sells a business to a purchaser and then acquirers the seller including the business sold, see Case COMP/M.4521 — LGI/Telenet of 26 February 2007.

([46]) See parallel cases COMP/M.3293 — Shell/BEB and COMP/M.3294 — ExxonMobil/BEB of 20 November 2003; case IV/M.197 — Solvay/Laporte of 30 April 1992.

([47]) See Case IV/M.409 ABB/Renault Automation of 9 March 1994.

([48]) Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 127 et seq. [2006] ECR II-319.

([49]) Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 131 et seq. [2006] ECR II-319. See Case COMP/M.4521 — LGI/Telenet of 26 February 2007, where the interdependence was based on the fact that two transactions were decided and carried out simultaneously and that, according to the economic aims of the parties, each of the transactions would not have been carried out without the other.

other assets, such as non-controlling minority stakes in other companies. It would not be in line with the general framework and the purpose of the Merger Regulation if different transactions, linked by conditionality, were assessed as a whole under the Merger Regulations if only some of these transactions lead to a change in control of a given target.

Acquisition of a single business

(45) A single concentration may therefore exist if the same purchaser(s) acquire control of a single business, *i.e.* a single economic entity, via several legal transactions if those are inter-conditional. This is the case irrespective of whether the business is acquired in a corporate structure, consisting of one or several companies, or whether various assets are acquired which form a single business, *i.e.* a single economic entity managed for a common commercial purpose to which all the assets contribute. Such a business may comprise majority and minority stakes in companies as well as tangible and intangible assets. If several legal transactions which are interdependent are required to transfer such a business, these transactions constitute one concentration ([50]).

Parallel and serial acquisitions of control

(46) For the treatment of several acquisitions of control as a single concentration, several scenarios have arisen in the Commission's past decisional practice. One such scenario is a parallel acquisition of control, i.e. undertaking A acquires control of undertaking B and C in parallel from separate sellers on condition that A is not obliged to buy either and neither seller is obliged to sell, unless both transactions proceed ([51]). Another scenario is a serial acquisition of control, i.e. undertaking A acquires control of undertaking B conditional on B's prior or simultaneous acquisition of undertaking C, as illustrated by the Kingfisher case ([52]).

Serial acquisition of sole/joint control

(47) In the same way as the Kingfisher scenario, the Commission approaches cases where, in a serial transaction, an undertaking agrees to acquire first sole control of a target undertaking, with a view to directly selling on parts of the acquired stake in the target to another undertaking, finally resulting in joint control of both acquirers over the target company. If both acquisitions are inter-conditional, the two transactions constitute a single concentration and only the acquisition of joint control, as the final result of the transactions, will be considered by the Commission ([53]).

1.5.3. Series of transactions in securities

(48) Recital 20 of the Merger Regulation further explains that a single concentration will also arise in cases where control over one undertaking is acquired by a series of transactions in securities from one or several sellers taking place within a reasonably short period of time. The concentration in these scenarios is not limited to the acquisition of the 'one and decisive' share, but will cover all the acquisitions of securities which take place in the reasonably short period of time.

([50]) See Case IV/M.470 — Gencor/Shell of 29 August 1994; COMP/M.3410 — Total/Gaz de France of 8 October 2004; Case IV/M.957 — L'Oreal/Procasa/Cosmetique Iberica/Albesa of 19 September 1997; Case IV/M.861 — Textron/Kautex of 18 December 1996 where all the assets were also used in the same product market. The same considerations apply if a joint venture is created by several companies, forming a single business, see Case M.4048 — Sonae Industria/Tarkett of 12 June 2006 where the interdependence of transactions establishing, respectively, a production and a distribution joint venture was necessary in order to demonstrate that there was a single concentration that would create a full-function joint venture.

([51]) Case COMP/M.2926 — EQT/H&R/Dragoco — of 16 September 2002; the same considerations apply to the question when several mergers constitute one concentration in the meaning of Article 3(1)(a), Case COMP/M. 2824 — Ernst & Young/Andersen Germany of 27 August 2002.

([52]) Case IV/M.1188 — Kingfisher/Wegert/ProMarkt of 18 June 1998; case COMP/M.2650 — Haniel/Cementbouw/JV (CVK) of 26 June 2002.

([53]) Case COMP/M.2420 — Mitsui/CVRD/Caemi of 30 October 2001.

1.5.4. Article 5(2) subparagraph 2

(49) Article 5(2) subparagraph 2 provides a specific rule which allows the Commission to consider successive transactions occurring in a fixed period of time a single concentration for the purposes of calculating the turnover of the undertakings concerned. The purpose of this provision is to ensure that the same persons do not break a transaction down into series of sales of assets over a period of time, with the aim of avoiding the competence conferred on the Commission by the Merger Regulation ([54]).

(50) If two or more transactions (each of them bringing about an acquisition of control) take place within a two-year period between the same persons or undertakings, they shall be qualified as a single concentration ([55]), irrespective of whether or not those transactions relate to parts of the same business or concern the same sector. This does not apply where the same persons or undertakings are joined by other persons or undertakings for only some of the transactions involved. It is sufficient if the transactions, although not carried out between the same companies, are carried out between companies belonging to the same respective groups. The provision also applies to two or more transactions between the same persons or undertakings if they are carried out simultaneously. Whenever they lead to acquisitions of control by the same undertaking, such simultaneous transactions between the same parties form a single concentration even if they are not conditional upon each other ([56]). However, Article 5(2) subparagraph 2 would not appear to apply to different transactions at least one of which involves an undertaking concerned which is distinct from the common seller(s) and buyer(s). In situations involving two transactions where one transaction results in sole control and the other in joint control, Article 5(2) subparagraph 2 therefore does not apply unless the other jointly controlling parent(s) in the latter transaction are the seller(s) of the solely controlling stake in the former transaction.

1.6. *Internal restructuring*

(51) A concentration within the meaning of the Merger Regulation is limited to changes in control. An internal restructuring within a group of companies does not constitute a concentration. This applies, e.g., to increases in shareholdings not accompanied by changes of control or to restructuring operations such as a merger of a dual listed company into a single legal entity or a merger of subsidiaries. A concentration could only arise if the operation leads to a change in the quality of control of one undertaking and therefore is no longer purely internal.

1.7. *Concentrations involving State-owned undertakings*

(52) An exceptional situation exists where both the acquiring and acquired undertakings are companies owned by the same State (or by the same public body or municipality). In this case, whether the operation is to be regarded as an internal restructuring depends in turn on the question whether both undertakings were formerly part of the same economic unit. Where the undertakings were formerly part of different economic units having an independent power of decision, the operation will be deemed to constitute a concentration and not an internal restructuring ([57]). However, where the different economic units will continue to have an independent power of decision also after the operation, the operation is only to be regarded as an internal restructuring, even if the shares of the undertakings, constituting different economic units, should be held by a single entity, such as a pure holding company ([58]).

([54]) Judgment in Case T-282/02 Cementbouw v Commission, paragraph 118 [2006] ECR II-319.

([55]) See Case COMP/M.3173 — E.ON/Fortum Burghausen/Smaland/Endenderry of 13 June 2003. This also applies to situations where sole control is acquired whereby only parts of the undertaking were previously jointly controlled by the acquiring undertaking, case COMP/M. 2679 — EdF/TXU/Europe/24 Seven of 20 December 2001.

([56]) Case IV/M.1283 — Volkswagen/RollsRoyce/Cosworth of 24 August 1998.

([57]) Case IV/M.097 — Péchiney/Usinor, of 24 June 1991; Case IV/M.216 — CEA Industrie/France Telecom/SGS-Thomson, of 22 February 1993; Case IV/M.931 — Neste/IVO of 2 June 1998. See also recital 22 of the Merger Regulation.

([58]) Specific issues concerning the calculation of turnover for state-owned companies are dealt with in paragraphs 192-194.

(53) However, the prerogatives exercised by a State acting as a public authority rather than as a shareholder, in so far as they are limited to the protection of the public interest, do not constitute control within the meaning of the Merger Regulation to the extent that they have neither the aim nor the effect of enabling the State to exercise a decisive influence over the activity of the undertaking ([59]).

2. **Sole control**

(54) Sole control is acquired if one undertaking alone can exercise decisive influence on an undertaking. Two general situations in which an undertaking has sole control can be distinguished. First, the solely controlling undertaking enjoys the power to determine the strategic commercial decisions of the other undertaking. This power is typically achieved by the acquisition of a majority of voting rights in a company. Second, a situation also conferring sole control exists where only one shareholder is able to veto strategic decisions in an undertaking, but this shareholder does not have the power, on his own, to impose such decisions (the so-called negative sole control). In these circumstances, a single shareholder possesses the same level of influence as that usually enjoyed by an individual shareholder which jointly-controls a company, *i.e.* the power to block the adoption of strategic decisions. In contrast to the situation in a jointly controlled company, there are no other shareholders enjoying the same level of influence and the shareholder enjoying negative sole control does not necessarily have to cooperate with specific other shareholders in determining the strategic behaviour of the controlled undertaking. Since this shareholder can produce a deadlock situation, the shareholder acquires decisive influence within the meaning of Article 3(2) and therefore control within the meaning of the Merger Regulation ([60]).

(55) Sole control can be acquired on a *de jure* and/or *de facto* basis.

De jure sole control

(56) Sole control is normally acquired on a legal basis where an undertaking acquires a majority of the voting rights of a company. In the absence of other elements, an acquisition which does not include a majority of the voting rights does not normally confer control even if it involves the acquisition of a majority of the share capital. Where the company statutes require a supermajority for strategic decisions, the acquisition of a simple majority of the voting rights may not confer the power to determine strategic decisions, but may be sufficient to confer a blocking right on the acquirer and therefore negative control.

(57) Even in the case of a minority shareholding, sole control may occur on a legal basis in situations where specific rights are attached to this shareholding. These may be preferential shares to which special rights are attached enabling the minority shareholder to determine the strategic commercial behaviour of the target company, such as the power to appoint more than half of the members of the supervisory board or the administrative board. Sole control can also be exercised by a minority shareholder who has the right to manage the activities of the company and to determine its business policy on the basis of the organisational structure (e.g. as a general partner in a limited partnership which often does not even have a shareholding).

(58) A typical situation of negative sole control occurs where one shareholder holds 50 % in an undertaking whilst the remaining 50 % is held by several other shareholders (assuming this does not lead to positive sole control on a *de facto* basis), or where there is a supermajority required for strategic decisions which in fact confers a veto right upon only one shareholder, irrespective of whether it is a majority or a minority shareholder ([61]).

([59]) Case IV/M.493 — Tractebel/Distrigaz II, of 1 September 1994.

([60]) Since this shareholder is the only undertaking acquiring a controlling influence, only this shareholder is obliged to submit a notification under the Merger Regulation.

([61]) See consecutive Cases COMP/M.3537 — BBVA/BNL of 20 August 2004 and M.3768 — BBVA/BNL of 27 April 2005; Case M.3198 — VW-Audi/VW-Audi Vertriebszentren of 29 July 2003; Case COMP/M.2777 — Cinven Limited/Angel Street Holdings of 8 May 2002; Case IV/M.258 — CCIE/GTE, of 25 September 1992. In Case COMP/M.3876 — Diester Industrie/Bunge/JV of 30 September 2005, there was the specific situation that a joint venture held a stake in a company by which it had negative sole control over this company.

De facto sole control

(59) A minority shareholder may also be deemed to have sole control on a *de facto* basis. This is in particular the case where the shareholder is highly likely to achieve a majority at the shareholders' meetings, given the level of its shareholding and the evidence resulting from the presence of shareholders in the shareholders' meetings in previous years ([62]). Based on the past voting pattern, the Commission will carry out a prospective analysis and take into account foreseeable changes of the shareholders' presence which might arise in future following the operation ([63]). The Commission will further analyse the position of other shareholders and assess their role. Criteria for such an assessment are in particular whether the remaining shares are widely dispersed, whether other important shareholders have structural, economic or family links with the large minority shareholder or whether other shareholders have a strategic or a purely financial interest in the target company; these criteria will be assessed on a case-by-case basis ([64]). Where, on the basis of its shareholding, the historic voting pattern at the shareholders' meeting and the position of other shareholders, a minority shareholder is likely to have a stable majority of the votes at the shareholders' meeting, then that large minority shareholder is taken to have sole control ([65]).

(60) An option to purchase or convert shares cannot in itself confer sole control unless the option will be exercised in the near future according to legally binding agreements ([66]). However, in exceptional circumstances an option, together with other elements, may lead to the conclusion that there is *de facto* sole control ([67]).

Sole control acquired by other means than voting rights

(61) Apart from the acquisition of sole control on the basis of voting rights, the considerations outlined in section 1.2 concerning the acquisition of sole control by purchase of assets, by contract, or by any other means also apply.

3. **Joint control**

(62) Joint control exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking. Decisive influence in this sense normally means the power to block actions which determine the strategic commercial behaviour of an undertaking. Unlike sole control, which confers upon a specific shareholder the power to determine the strategic decisions in an undertaking, joint control is characterized by the possibility of a deadlock situation resulting from the power of two or more parent companies to reject proposed strategic decisions. It follows, therefore, that these shareholders must reach a common understanding in determining the commercial policy of the joint venture and that they are required to cooperate ([68]).

(63) As in the case of sole control, the acquisition of joint control can also be established on a *de jure* or *de facto* basis. There is joint control if the shareholders (the parent companies) must reach agreement on major decisions concerning the controlled undertaking (the joint venture).

([62]) Case IV/M.343 — Société Générale de Belgique/Générale de Banque, of 3 August 1993; Case COMP/M.3330 — RTL/M6 of 12 March 2004; Case IV/M.159 — Mediobanca/Generali of 19 December 1991.

([63]) See Case COMP/M.4336 — MAN/Scania of 20 December 2006 as regards the question whether Volkswagen had acquired control of MAN.

([64]) Case IV/M.754 — Anglo American/Lonrho of 23 April 1997; Case IV/M.025 — Arjomari/Wiggins Teape, of 10 February 1990.

([65]) See also Case COMP/M.2574 — Pirelli/Edizione/Olivetti/Telecom Italia of 20 September 2001; Case IV/M.1519 — Renault/Nissan of 12 May 1999.

([66]) Judgment in Case T 2/93, Air France v Commission [1994] ECR II-323. Even though an option does normally not in itself lead to a concentration, it can be taken into account for the substantive assessment in a related concentration, see Case COMP/M.3696 — E.ON/MOL of 21 December 2005, at paragraphs 12-14, 480, 762 *et subseq.*

([67]) Case IV/M.397 — Ford/Hertz of 7 March 1994.

([68]) See also Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 42, 52, 67 [2006] ECR II-319.

3.1. *Equality in voting rights or appointment to decision-making bodies*

(64) The clearest form of joint control exists where there are only two parent companies which share equally the voting rights in the joint venture. In this case, it is not necessary for a formal agreement to exist between them. However, where there is a formal agreement, it must be consistent with the principle of equality between the parent companies, by laying down, for example, that each is entitled to the same number of representatives in the management bodies and that none of the members has a casting vote ([69]). Equality may also be achieved where both parent companies have the right to appoint an equal number of members to the decision-making bodies of the joint venture.

3.2. *Veto rights*

(65) Joint control may exist even where there is no equality between the two parent companies in votes or in representation in decision-making bodies or where there are more than two parent companies. This is the case where minority shareholders have additional rights which allow them to veto decisions which are essential for the strategic commercial behaviour of the joint venture ([70]). These veto rights may be set out in the statute of the joint venture or conferred by agreement between its parent companies. The veto rights themselves may operate by means of a specific quorum required for decisions taken at the shareholders' meeting or by the board of directors to the extent that the parent companies are represented on this board. It is also possible that strategic decisions are subject to approval by a body, e.g. supervisory board, where the minority shareholders are represented and form part of the quorum needed for such decisions.

(66) These veto rights must be related to strategic decisions on the business policy of the joint venture. They must go beyond the veto rights normally accorded to minority shareholders in order to protect their financial interests as investors in the joint venture. This normal protection of the rights of minority shareholders is related to decisions on the essence of the joint venture, such as changes in the statute, an increase or decrease in the capital or liquidation. A veto right, for example, which prevents the sale or winding-up of the joint venture does not confer joint control on the minority shareholder concerned ([71]).

(67) In contrast, veto rights which confer joint control typically include decisions on issues such as the budget, the business plan, major investments or the appointment of senior management. The acquisition of joint control, however, does not require that the acquirer has the power to exercise decisive influence on the day-to-day running of an undertaking. The crucial element is that the veto rights are sufficient to enable the parent companies to exercise such influence in relation to the strategic business behaviour of the joint venture. Moreover, it is not necessary to establish that an acquirer of joint control of the joint venture will actually make use of its decisive influence. The possibility of exercising such influence and, hence, the mere existence of the veto rights, is sufficient.

(68) In order to acquire joint control, it is not necessary for a minority shareholder to have all the veto rights mentioned above. It may be sufficient that only some, or even one such right, exists. Whether or not this is the case depends upon the precise content of the veto right itself and also the importance of this right in the context of the specific business of the joint venture.

([69]) Case COMP/M.3097 — Maersk Data/Eurogate IT; Global Transport Solutions JV of 12 March 2003; Case IV/M.272 — Matra/CAP Gemini Sogeti, of 17 March 1993.

([70]) Case T 2/93, Air France v Commission [1994] ECR II-323; Case IV/M.010 — Conagra/Idea, of 3 May 1991.

([71]) Case IV/M.062 — Eridania/ISI, of 30 July 1991.

Appointment of senior management and determination of budget

(69) Very important are the veto rights concerning decisions on the appointment and dismissal of the senior management and the approval of the budget. The power to co-determine the structure of the senior management, such as the members of the board, usually confers upon the holder the power to exercise decisive influence on the commercial policy of an undertaking. The same is true with respect to decisions on the budget since the budget determines the precise framework of the activities of the joint venture and, in particular, the investments it may make.

Business plan

(70) The business plan normally provides details of the aims of a company together with the measures to be taken in order to achieve those aims. A veto right over this type of business plan may be sufficient to confer joint control even in the absence of any other veto right. In contrast, where the business plan contains merely general declarations concerning the business aims of the joint venture, the existence of a veto right will be only one element in the general assessment of joint control but will not, on its own, be sufficient to confer joint control.

Investments

(71) In the case of a veto right on investments, the importance of this right depends, first, on the level of investments which are subject to the approval of the parent companies and, secondly, on the extent to which investments constitute an essential feature of the market in which the joint venture is active. In relation to the first criterion, where the level of investments necessitating approval of the parent companies is extremely high, this veto right may be closer to the normal protection of the interests of a minority shareholder than to a right conferring a power of co-determination over the commercial policy of the joint venture. With regard to the second, the investment policy of an undertaking is normally an important element in assessing whether or not there is joint control. However, there may be some markets where investment does not play a significant role in the market behaviour of an undertaking.

Market-specific rights

(72) Apart from the typical veto rights mentioned above, there exist a number of other possible veto rights related to specific decisions which are important in the context of the particular market of the joint venture. One example is the decision on the technology to be used by the joint venture where technology is a key feature of the joint venture's activities. Another example relates to markets characterized by product differentiation and a significant degree of innovation. In such markets, a veto right over decisions relating to new product lines to be developed by the joint venture may also be an important element in establishing the existence of joint control.

Overall context

(73) In assessing the relative importance of veto rights, where there are a number of them, these rights should not be evaluated in isolation. On the contrary, the determination of whether or not joint control exists is based upon an assessment of these rights as a whole. However, a veto right which does not relate either to strategic commercial policy, to the appointment of senior management or to the budget or business plan cannot be regarded as giving joint control to its owner ([72]).

3.3. ***Joint exercise of voting rights***

(74) Even in the absence of specific veto rights, two or more undertakings acquiring minority shareholdings in another undertaking may obtain joint control. This may be the case where the minority shareholdings together provide the means for controlling the target undertaking. This means that the minority shareholders, together, will have a majority of the voting rights; and they will act together in exercising

([72]) Case IV/M.295 — SITA-RPC/SCORI, of 19 March 1993.

these voting rights. This can result from a legally binding agreement to this effect, or it may be established on a *de facto* basis.

(75) The legal means to ensure the joint exercise of voting rights can be in the form of a (jointly controlled) holding company to which the minority shareholders transfer their rights, or an agreement by which they undertake to act in the same way (pooling agreement).

(76) Very exceptionally, collective action can occur on a *de facto* basis where strong common interests exist between the minority shareholders to the effect that they would not act against each other in exercising their rights in relation to the joint venture. The greater the number of parent companies involved in such a joint venture, however, the more remote is the likelihood of this situation occurring.

(77) Indicative for such a commonality of interests is a high degree of mutual dependency as between the parent companies to reach the strategic objectives of the joint venture. This is in particular the case when each parent company provides a contribution to the joint venture which is vital for its operation (e.g. specific technologies, local know-how or supply agreements) ([73]). In these circumstances, the parent companies may be able to block the strategic decisions of the joint venture and, thus, they can operate the joint venture successfully only with each other's agreement on the strategic decisions even if there is no express provision for any veto rights. The parent companies will therefore be required to cooperate ([74]). Further factors are decision making procedures which are tailored in such a way as to allow the parent companies to exercise joint control even in the absence of explicit agreements granting veto rights or other links between the minority shareholders related to the joint venture ([75]).

(78) Such a scenario may not only occur in a situation where two or more minority shareholders jointly control an undertaking on a de facto basis, but also where there is high degree of dependency of a majority shareholder on a minority shareholder. This may be the case where the joint venture economically and financially depends on the minority shareholder or where only the minority shareholder has the required know-how for, and will play a major role in, the operation of the joint undertaking whereas the majority shareholder is a mere financial investor ([76]). In such circumstances, the majority shareholder will not be able to enforce its position, but the joint venture partner may be able to block strategic decisions so that both parent undertakings will be required to cooperate permanently. This leads to a situation of *de facto* joint control which prevails over a pure *de jure* assessment according to which the majority shareholder could have been considered to have sole control.

(79) These criteria apply to the formation of a new joint venture as well as to acquisitions of minority shareholdings, together conferring joint control. In case of acquisitions of shareholdings, there is a higher probability of a commonality of interests if the shareholdings are acquired by means of concerted action. However, an acquisition by way of a concerted action is not alone sufficient for the purposes of establishing *de facto* joint control. In general, a common interest as financial investors (or creditors) of a company in a return on investment does not constitute a commonality of interests leading to the exercise of *de facto* joint control.

([73]) Case COMP/JV.55 Hutchison/RCPM/ECT of 3 July 2001; see also Case IV/M.553 — RTL/Veronica/Endemol of 20 September 1995.

([74]) Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 42, 52, 67 [2006] ECR II-319.

([75]) Case COMP/JV.55 Hutchison/RCPM/ECT of 3 July 2001. See also Case IV/M.553 — RTL/Veronica/Endemol of 20 September 1995.

([76]) Case IV/M. 967 — KLM/Air UK of 22 September 1997; Case COMP/M.4085 — Arcelor/Oyak/Erdemir of 13 February 2006.

(80) In the absence of strong common interests such as those outlined above, the possibility of changing coalitions between minority shareholders will normally exclude the assumption of joint control. Where there is no stable majority in the decision-making procedure and the majority can on each occasion be any of the various combinations possible amongst the minority shareholders, it cannot be assumed that the minority shareholders (or a certain group thereof) will jointly control the undertaking ([77]). In this context, it is not sufficient that there are agreements between two or more parties having an equal shareholding in the capital of an undertaking which establish identical rights and powers between the parties, where these fall short of strategic veto rights. For example, in the case of an undertaking where three shareholders each own one-third of the share capital and each elect one-third of the members of the Board of Directors, the shareholders do not have joint control since decisions are required to be taken on the basis of a simple majority.

3.4. *Other considerations related to joint control*

Unequal role of the parent companies

(81) Joint control is not incompatible with the fact that one of the parent companies enjoys specific knowledge of and experience in the business of the joint venture. In such a case, the other parent company can play a modest or even non-existent role in the daily management of the joint venture where its presence is motivated by considerations of a financial, long-term-strategy, brand image or general policy nature. Nevertheless, it must always retain the real possibility of contesting the decisions taken by the other parent company on the basis of equality in voting rights or rights of appointment to decision making bodies or of veto rights related to strategic issues. Without this, there would be sole control.

Casting vote

(82) For joint control to exist, there should not be a casting vote for one parent company only as this would lead to sole control of the company enjoying the casting vote. However, there can be joint control when this casting vote is in practice of limited relevance and effectiveness. This may be the case when the casting vote can be exercised only after a series of stages of arbitration and attempts at reconciliation or in a very limited field or if the exercise of the casting vote triggers a put option implying a serious financial burden or if the mutual interdependence of the parent companies would make the exercise of the casting vote unlikely ([78]).

III. CHANGES IN THE QUALITY OF CONTROL

(83) The Merger Regulation covers operations resulting in the acquisition of sole or joint control, including operations leading to changes in the quality of control. First, such a change in the quality of control, resulting in a concentration, occurs if there is a change between sole and joint control. Second, a change in the quality of control occurs between joint control scenarios before and after the transaction if there is an increase in the number or a change in the identity of controlling shareholders. However, there is no change in the quality of control if a change from negative to positive sole control occurs. Such a change affects neither the incentives of the negatively controlling shareholder nor the nature of the control structure, as the controlling shareholder did not necessarily have to cooperate with specific shareholders at the time when it enjoyed negative control. In any case, mere changes in the level of shareholdings of the same controlling shareholders, without changes of the powers they hold in a company and of the composition of the control structure of the company, do not constitute a change in the quality of control and therefore are not a notifiable concentration.

([77]) Case IV/JV.12 — Ericsson/Nokia/Psion/Motorola of 22 December 1998.

([78]) Case COMP/M.2574 — Pirelli/Edizione/Olivetti/Telecom Italia of 20 September 2001; Case IV/M.553 — RTL/Veronica/Endemol of 20 September 1995; Case IV/M.425 — British Telecom/Banco Santander, of 28 March 1994.

(84) These changes in the quality of control will be discussed in two categories: first, an entrance of one or more new controlling shareholders irrespective of whether or not they replace existing controlling shareholders and, second, a reduction of the number of controlling shareholders.

1. **Entry of controlling shareholders**

(85) An entry of new controlling shareholders leading to a joint control scenario can either result from a change from sole to joint control, or from the entry of an additional shareholder or a replacement of an existing shareholder in an already jointly controlled undertaking.

(86) A move from sole control to joint control is considered a notifiable operation as this changes the quality of control of the joint venture. First, there is a new acquisition of control for the shareholder entering the controlled undertaking. Second, only the new acquisition of control makes the controlled undertaking to a joint venture which changes decisively also the situation for the remaining controlling undertaking under the Merger Regulation: In the future, it has to take into account the interests of one or more other controlling shareholder(s) and it is required to cooperate permanently with the new shareholder(s). Before, it could either determine the strategic behaviour of the controlled undertaking alone (in the case of sole control) or was not forced to take into account the interests of specific other shareholders and was not forced to cooperate with those shareholders permanently.

(87) The entry of a new shareholder in a jointly controlled undertaking — either in addition to the already controlling shareholders or in replacement of one of them — also constitutes a notifiable concentration, although the undertaking is jointly controlled before and after the operation ([79]). First, also in this scenario there is a shareholder newly acquiring control of the joint venture. Second, the quality of control of the joint venture is determined by the identity of all controlling shareholders. It lies in the nature of joint control that, since each shareholder alone has a blocking right concerning strategic decisions, the jointly controlling shareholders have to take into account each others interests and are required to cooperate for the determination of the strategic behaviour of the joint venture ([80]). The nature of joint control therefore does not exhaust itself in a pure mathematical addition of the blocking rights exercised by several shareholders, but is determined by the composition of the jointly controlling shareholders. One of the most obvious scenarios leading to a decisive change in the nature of the control structure of a jointly controlled undertaking is a situation where in a joint venture, jointly controlled by a competitor of the joint venture and a financial investor, the financial investor is replaced by another competitor. In these circumstances, the control structure and the incentives of the joint venture may entirely change, not only because of the entry of the new controlling shareholder, but also due to the change in the behaviour of the remaining shareholder. The replacement of a controlling shareholder or the entry of a new shareholder in a jointly controlled undertaking therefore constitutes a change in the quality of control ([81]).

([79]) See, *e.g.*, Case COMP/M.3440 — ENI/EDP/GdP of 9 December 2004.

([80]) Judgment in Case T-282/02 Cementbouw v Commission, paragraph 67 [2006] ECR II-319.

([81]) Generally, it should be noted that the Commission will not assess as a separate concentration the indirect replacement of a controlling shareholder in a joint control scenario which takes place via an acquisition of control of one of its parent undertakings. The Commission will assess any changes occurring in the competitive situation of the joint venture in the framework of the overall acquisition of control of its parent undertaking. In those circumstances, the other controlling shareholders in the joint venture will therefore not be undertakings concerned by the concentration which relates to its parent undertaking.

(88) However, the entry of new shareholders only results in a notifiable concentration if one or several shareholders acquire sole or joint control by virtue of the operation. The entry of new shareholders may lead to a situation where joint control can neither be established on a *de jure* basis nor on a *de facto* basis as the entry of the new shareholder leads to the consequence that changing coalitions between minority shareholders are possible ([82]).

2. **Reduction in the number of shareholders**

(89) A reduction in the number of controlling shareholders constitutes a change in the quality of control and is thus to be considered as a concentration if the exit of one or more controlling shareholders results in a change from joint to sole control. Decisive influence exercised alone is substantially different from decisive influence exercised jointly, since in the latter case the jointly controlling shareholders have to take into account the potentially different interests of the other party or parties involved ([83]).

(90) Where the operation involves a reduction in the number of jointly controlling shareholders, without leading to a change from joint to sole control, the transaction will normally not lead to a notifiable concentration.

IV. JOINT VENTURES — THE CONCEPT OF FULL-FUNCTIONALITY

(91) Article 3(1)(b) provides that a concentration shall be deemed to arise where control is acquired by *one or more* undertakings of the whole or parts of another undertaking. The new acquisition of another undertaking by several jointly controlling undertakings therefore constitutes a concentration under the Merger Regulation. As in the case of the acquisition of sole control of an undertaking, such an acquisition of joint control will lead to a structural change in the market even if, according to the plans of the acquiring undertakings, the acquired undertaking would no longer be considered full-function after the transaction (*e.g.* because it will sell exclusively to the parent undertakings in future). Thus, a transaction involving several undertakings acquiring joint control of another undertaking or parts of another undertaking, fulfilling the criteria set out in paragraph 24, from third parties will constitute a concentration according to Article 3(1) without it being necessary to consider the full-functionality criterion ([84]).

(92) Article 3(4) provides in addition that the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity (so called full-function joint ventures) shall constitute a concentration within the meaning of the Merger Regulation. The full-functionality criterion therefore delineates the application of the Merger Regulation for the creation of joint ventures by the parties, irrespective of whether such a joint venture is created as a 'greenfield operation' or whether the parties contribute assets to the joint venture which they previously owned individually. In these circumstances, the joint venture must fulfil the full-functionality criterion in order to constitute a concentration.

(93) The fact that a joint venture may be a full-function undertaking and therefore economically autonomous from an operational viewpoint does not mean that it enjoys autonomy as regards the adoption of its strategic decisions. Otherwise, a jointly controlled undertaking could never be considered a full-function joint venture and therefore the condition laid down in Article 3(4) would never be complied with ([85]). It is therefore sufficient for the criterion of full-functionality if the joint venture is autonomous in operational respect.

([82]) Case IV/JV.12 — Ericsson/Nokia/Psion/Motorola of 22 December 1998.

([83]) See Case IV/M023 — ICI/Tioxide, of 28 November 1990; see also paragraph 5 (d) of the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004.

([84]) These considerations do not apply to Article 2(4) in the same way. Whereas the interpretation of Article 3, paragraphs (1) and (4) relates to the applicability of the Merger Regulation to joint ventures, Article 2(4) relates to the substantive analysis of joint ventures. The 'creation of a joint venture constituting a concentration pursuant to Article 3', as provided for in Article 2(4), comprises the acquisition of joint control according to Article 3, paragraphs (1) and (4).

([85]) Judgment in Case T-282/02 Cementbouw v Commission, paragraph 62 [2006] ECR II-319.

1. Sufficient resources to operate independently on a market

(94) Full function character essentially means that a joint venture must operate on a market, performing the functions normally carried out by undertakings operating on the same market. In order to do so the joint venture must have a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff, and assets (tangible and intangible) in order to conduct on a lasting basis its business activities within the area provided for in the joint-venture agreement ([86]). The personnel do not necessarily need to be employed by the joint venture itself. If it is standard practice in the industry where the joint venture is operating, it may be sufficient if third parties envisage the staffing under an operational agreement or if staff is assigned by an interim employment agency. The secondment of personnel by the parent companies may also be sufficient if this is done either only for a start-up period or if the joint venture deals with the parent companies in the same way as with third parties. The latter case requires that the joint venture deals with the parents at arm's length on the basis of normal commercial conditions and that the joint venture is also free to recruit its own employees or to obtain staff via third parties.

2. Activities beyond one specific function for the parents

(95) A joint venture is not full-function if it only takes over one specific function within the parent companies' business activities without its own access to or presence on the market. This is the case, for example, for joint ventures limited to R&D or production. Such joint ventures are auxiliary to their parent companies' business activities. This is also the case where a joint venture is essentially limited to the distribution or sales of its parent companies' products and, therefore, acts principally as a sales agency. However, the fact that a joint venture makes use of the distribution network or outlet of one or more of its parent companies normally will not disqualify it as 'full-function' as long as the parent companies are acting only as agents of the joint venture ([87]).

(96) A frequent example where this question arises are joint ventures involved in the holding of real estate property, which are typically set up for tax and other financial reasons. As long as the purpose of the joint venture is limited to the acquisition and/or holding of certain real estate for the parents and based on financial resources provided by the parents, it will not usually be considered to be full-function, as it lacks an autonomous, long term business activity on the market and will typically also lack the necessary resources to operate independently. This has to be distinguished from joint ventures that are actively managing a real estate portfolio and who act on their own behalf on the market, which typically indicates full-functionality ([88]).

3. Sale/purchase relations with the parents

(97) The strong presence of the parent companies in upstream or downstream markets is a factor to be taken into consideration in assessing the full-function character of a joint venture where this presence results in substantial sales or purchases between the parent companies and the joint venture. The fact that, for an

([86]) Case IV/M.527 — Thomson CSF/Deutsche Aerospace, of 2 December 1994 — intellectual rights, Case IV/M.560 EDS/Lufthansa of 11 May 1995 — outsourcing, Case IV/M.585 — Voest Alpine Industrieanlagenbau GmbH/Davy International Ltd, of 7 September 1995 — joint venture's right to demand additional expertise and staff from its parent companies, Case IV/M.686 — Nokia/Autoliv, of 5 February 1996, joint venture able to terminate 'service agreements' with parent company and to move from site retained by parent company, Case IV/M.791 — British Gas Trading Ltd/Group 4 Utility Services Ltd, of 7 October 1996, joint venture's intended assets will be transferred to leasing company and leased by joint venture.

([87]) Case IV/M.102 — TNT/Canada Post etc. of 2 December 1991.

([88]) See Case IV/M.929 — DIA/Veba Immobilien/Deutschbau of 23 June 1997; Case COMP/M. 3325 — Morgan Stanley/Glick/Canary Wharf of 23 January 2004.

initial start-up period only, the joint venture relies almost entirely on sales to or purchases from its parent companies does not normally affect its full-function character. Such a start-up period may be necessary in order to establish the joint venture on a market. But the period will normally not exceed a period of three years, depending on the specific conditions of the market in question ([89]).

Sales to the parents

(98) Where sales from the joint venture to the parent companies are intended to be made on a lasting basis, the essential question is whether, regardless of these sales, the joint venture is geared to play an active role on the market and can be considered economically autonomous from an operational viewpoint. In this respect the relative proportion of sales made to its parents compared with the total production of the joint venture is an important factor. Due to the particularities of each individual case, it is impossible to define a specific turnover ratio which distinguishes full-function from other joint ventures. If the joint venture achieves more than 50 % of its turnover with third parties, this will typically be an indication of full-functionality. Below this indicative threshold, a case-by-case analysis is required, whereby, for the finding of operational autonomy, the relationship between the joint venture and its parents must be truly commercial in character. For this purpose, it is to be demonstrated that the joint venture will supply its goods or services to the purchaser who values them most and will pay most and that the joint venture will also deal with its parents' companies at arm's length on the basis of normal commercial conditions ([90]). Under these circumstances, *i.e.* if the joint venture will treat its parent companies in the same commercial way as third parties, it may be sufficient that at least 20 % of the joint venture's predicted sales will go to third parties. However, the greater the proportion of sales likely to be made to the parents, the greater will be the need for clear evidence of the commercial character of the relationship.

(99) For the determination of the proportion between sales to the parents and to third parties, the Commission will take past accounts and substantiated business plans into account. However, especially where substantial third-party sales cannot be readily foreseen, the Commission will base its finding also on the general market structure. This may be a relevant factor as well for the assessment whether the joint venture will deal with its parents on an arm's length basis.

(100) These issues frequently arise with regard to outsourcing agreements, where an undertaking creates a joint venture with a service provider ([91]) which will carry out functions that were previously dealt with by the undertaking in-house. The JV typically cannot be considered to be full-function in these scenarios: it provides its services exclusively to the client undertaking, and it is dependent for its services on input from the service provider. The fact that the joint venture's business plan often at least does not exclude that the joint venture can provide its services to third parties does not alter this assessment, as in the typical outsourcing setup any third party revenues are likely to remain ancillary to the joint venture's main activities for the client undertaking. However, this general rule does not exclude that there are outsourcing situations where the joint venture partners, for example for reasons of economies of scale, set up a joint venture with the perspective of significant market access. This could qualify the joint venture as full function if significant third-party sales are foreseen and if the relationship between the joint venture and its parent will be truly commercial in character and if the joint venture deals with its parents on the basis of normal commercial conditions.

([89]) Case IV/M.560 — EDS/Lufthansa of 11 May 1995; Case IV/M.686 Nokia/Autoliv of 5 February 1996; to be contrasted with Case IV/M.904 — RSB/Tenex/Fuel Logistics of 2 April 1997 and Case IV/M.979 — Preussag/Voest-Alpine of 1 October 1997. A special case exists where sales by the joint venture to its parent are caused by a legal monopoly downstream of the joint venture, see Case IV/M.468 — Siemens/Italtel of 17 February 1995, or where the sales to a parent company consist of by-products, which are of minor importance to the joint venture, see Case IV/M.550 — Union Carbide/Enichem of 13 March 1995.

([90]) Case IV/M.556 — Zeneca/Vanderhave of 9 April 1996; Case IV/M.751 — Bayer/Hüls of 3 July 1996.

([91]) The question under which circumstances an outsourcing arrangement qualifies as a concentration is dealt with in paragraphs 25ff. of this Notice.

Purchases from the parents

(101) In relation to purchases made by the joint venture from its parent companies, the full-function character of the joint venture is questionable in particular where little value is added to the products or services concerned at the level of the joint venture itself. In such a situation, the joint venture may be closer to a joint sales agency.

Trade markets

(102) However, in contrast to this situation where a joint venture is active in a trade market and performs the normal functions of a trading company in such a market, it normally will not be an auxiliary sales agency but a full-function joint venture. A trade market is characterised by the existence of companies which specialise in the selling and distribution of products without being vertically integrated in addition to those which are integrated, and where different sources of supply are available for the products in question. In addition, many trade markets may require operators to invest in specific facilities such as outlets, stockholding, warehouses, depots, transport fleets and sales and service personnel. In order to constitute a full-function joint venture in a trade market, an undertaking must have the necessary facilities and be likely to obtain a substantial proportion of its supplies not only from its parent companies but also from other competing sources ([92]).

4. **Operation on a lasting basis**

(103) Furthermore, the joint venture must be intended to operate on a lasting basis. The fact that the parent companies commit to the joint venture the resources described above normally demonstrates that this is the case. In addition, agreements setting up a joint venture often provide for certain contingencies, for example, the failure of the joint venture or fundamental disagreement as between the parent companies ([93]). This may be achieved by the incorporation of provisions for the eventual dissolution of the joint venture itself or the possibility for one or more parent companies to withdraw from the joint venture. This kind of provision does not prevent the joint venture from being considered as operating on a lasting basis. The same is normally true where the agreement specifies a period for the duration of the joint venture where this period is sufficiently long in order to bring about a lasting change in the structure of the undertakings concerned ([94]), or where the agreement provides for the possible continuation of the joint venture beyond this period.

(104) By contrast, the joint venture will not be considered to operate on a lasting basis where it is established for a short finite duration. This would be the case, for example, where a joint venture is established in order to construct a specific project such as a power plant, but it will not be involved in the operation of the plant once its construction has been completed.

(105) A joint venture also lacks the sufficient operations on a lasting basis at a stage where there are decisions of third parties outstanding that are of an essential core importance for starting the joint venture's business activity. Only decisions that go beyond mere formalities and the award of which is typically uncertain qualify for these scenarios. Examples are the award of a contract (*e.g.*, in public tenders), licences (*e.g.*, in the telecoms sector) or access rights to property (*e.g.*, exploration rights for oil and gas). Pending the decision on such factors, it is unclear whether the joint venture will become operational at all. Thus, at that stage the joint venture cannot be considered to perform economic functions on a lasting

([92]) Case IV/M.788 — AgrEVO/Marubeni of 3 September 1996.

([93]) Case IV/M.891 — Deutsche Bank/Commerzbank/J.M. Voith of 23 April 1997.

([94]) See Case COMP/M.2903 — DaimlerChrysler/Deutsche Telekom/JV of 30 April 2003 where a period of 12 years was considered sufficient; Case COMP/M.2632 — Deutsche Bahn/ECT International/United Depots/JV of 11 February 2002 with a contract duration of 8 years. In Case COMP/M.3858 Lehman Brothers/Starwood/Le Meridien of 20 July 2005, the Commission considered a minimum period of 10-15 years sufficient, but not a period of three years.

basis and consequently does not qualify as full function. However, once a decision has been taken in favour of the joint venture in question, this criterion is fulfilled and a concentration arises ([95]).

5. **Changes in the activities of the joint venture**

(106) The parents may decide to enlarge the scope of the activities of the joint venture in the course of its lifetime. This will be considered as a new concentration that may trigger a notification requirement if this enlargement entails the acquisition of the whole or part of another undertaking from the parents that would, considered in isolation, qualify as a concentration as explained in paragraph 24 of this Notice ([96]).

(107) A concentration may also arise if the parent companies transfer significant additional assets, contracts, know-how or other rights to the joint venture and these assets and rights constitute the basis or nucleus of an extension of the activities of the joint venture into other product or geographic markets which were not the object of the original joint venture, and if the joint venture performs such activities on a full-function basis. As the transfer of the assets or rights shows that the parents are the real players behind the extension of the joint venture's scope, the enlargement of the activities of the joint venture can be considered in the same way as the creation of a new joint venture within the meaning of Article 3(4) ([97]).

(108) If the scope of a joint venture is enlarged without additional assets, contracts, know-how or rights being transferred, no concentration will be deemed to arise.

(109) A concentration arises if a change in the activity of an existing non-full-function joint venture occurs so that a full-function joint venture within the meaning of Article 3(4) is created. The following examples may be given: a change of the organisational structure of a joint venture so that it fulfils the full functionality criterion ([98]); a joint venture that used to supply only the parent companies, which subsequently starts a significant activity on the market; or scenarios, as described in paragraph 105 above, where a joint venture can only start its activity on the market once it has essential input (such as a licence for a joint venture in the telecoms sector). Such a change in the activity of the joint venture will frequently require a decision by its shareholders or its management. Once the decision is taken that leads to the joint venture meeting the full functionality criterion, a concentration arises.

V. EXCEPTIONS

(110) Article 3(5) sets out three exceptional situations where the acquisition of a controlling interest does not constitute a concentration under the Merger Regulation.

(111) First, the acquisition of securities by companies whose normal activities include transactions and dealing in securities for their own account or for the account of others is not deemed to constitute a concentration if such an acquisition is made in the framework of these businesses and if the securities are held on only a temporary basis (Article 3(5)(a)). In order to fall within this exception, the following requirements must be fulfilled:

— the acquiring undertaking must be a credit or other financial institution or insurance company the normal activities of which are described above;

([95]) Subject to the other criteria mentioned in this chapter of the Notice.

([96]) See Case COMP/M.3039 — Soprol/Céréol/Lesieur of 30 January 2003.

([97]) The triggering event for the notification in such a case will be the agreement or other legal act underlying the transfer of the assets, contracts, know-how or other rights.

([98]) Case COMP/M.2276 — The Coca-Cola Company/Nestlé/JV of 27 September 2001.

— the securities must be acquired with a view to their resale;

— the acquiring undertaking must not exercise the voting rights with a view to determining the strategic commercial behaviour of the target company or must exercise these rights only with a view to preparing the total or partial disposal of the undertaking, its assets or the securities;

— the acquiring undertaking must dispose of its controlling interest within one year of the date of the acquisition, that is, it must reduce its shareholding within this one-year period at least to a level which no longer confers control. This period, however, may be extended by the Commission where the acquiring undertaking can show that the disposal was not reasonably possible within the one-year period.

(112) Second, there is no change of control, and hence no concentration within the meaning of the Merger Regulation, where control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding-up, insolvency, cessation of payments, compositions or analogous proceedings (Article 3(5)(b));

(113) Third, a concentration does not arise where a financial holding company within the meaning of Article 5(3) of the Council Directive 78/660/EEC ([99]) acquires control. The notion of 'financial holding company' is thus limited to companies whose sole purpose it is to acquire holdings in other undertakings without involving themselves directly or indirectly in the management of those undertakings, the foregoing without prejudice to their rights as shareholders. Such investment companies must be further structured in a way that compliance with these limitations can be supervised by an administrative or judicial authority. The Merger Regulation provides for an additional condition for this exception to apply: such companies may exercise the voting rights in the other undertakings only to maintain the full value of those investments and not to determine directly or indirectly the strategic commercial conduct of the controlled undertaking.

(114) The exceptions under Article 3(5) of the Merger Regulation only apply to a very limited field. First, these exceptions only apply if the operation would otherwise be a concentration in its own right, but not if the transaction is part of a broader, single concentration, in circumstances in which the ultimate acquirer of control would not fall within the terms of Article 3(5) (see e.g. paragraph 35 above). Second, the exceptions under Article 3(5)(a) and (c) only apply to acquisitions of control by way of purchase of securities, not to acquisitions of assets.

(115) The exceptions do not apply to typical investment fund structures. According to their objectives, these funds usually do not limit themselves in the exercise of the voting rights, but adopt decisions to appoint the members of the management and the supervisory bodies of the undertakings or to even restructure those undertakings. This would not be compatible with the requirement under both Article 3(5)(a) and (c) that the acquiring companies do not exercise the voting rights with a view to determine the competitive conduct of the other undertaking ([100]).

(116) The question may arise whether an operation to rescue an undertaking before or from insolvency proceedings constitutes a concentration under the Merger Regulation. Such a rescue operation typically involves the conversion of existing debt into a new company, through which a syndicate of banks may acquire joint control of the company concerned. Where such an operation meets the criteria for joint

([99]) Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies, OJL 222, 14.8.1978, p. 11, as last amended by Directive 2003/51/EC of 18 June 2003, OJL 178, 17.7.2003, p. 16. Article 5(3) of this Directive defines financial holding companies as 'those companies the sole objective of which is to acquire holdings in other undertakings, and to manage such holdings and turn them to profit, without involving themselves directly or indirectly in the management of those undertakings, the foregoing without prejudice to their rights as shareholders. The limitations imposed on the activities of these companies must be such that compliance with them can be supervised by an administrative or judicial authority'.

([100]) Case IV/M.669 — Charterhouse/Porterbrook, of 11 December 1995.

control, as outlined above, it will normally be considered to be a concentration ([101]). Although the primary intention of the banks is to restructure the financing of the undertaking concerned for its subsequent resale, the exception set out in Article 3(5)(a) is normally not applicable to such an operation. In a similar way as set out for investment funds, the restructuring programme normally requires the controlling banks to determine the strategic commercial behaviour of the rescued undertaking. Furthermore, it is not normally a realistic proposition to transform a rescued company into a commercially viable entity and to resell it within the permitted one-year period. Moreover, the length of time needed to achieve this aim may be so uncertain that it would be difficult to grant an extension of the disposal period.

VI. ABANDONMENT OF CONCENTRATIONS

(117) A concentration ceases to exist and the Merger Regulation ceases to be applicable if the undertakings concerned abandon the concentration.

(118) In this respect, the revised Merger Regulation 139/2004 introduced a new provision related to the closure of procedures concerning the control of concentrations without a final decision after the Commission has initiated proceedings under Article 6(1)(c), first sentence. That sentence reads as follows: 'Without prejudice to Article 9, such proceedings shall be closed by means of a decision as provided for in Article 8(1) to (4), unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration'. Prior to the initiation of proceedings, such requirements do not apply.

(119) As a general principle, the requirements for the proof of the abandonment must correspond in terms of legal form, intensity etc. to the initial act that was considered sufficient to make the concentration notifiable. In case the parties proceed from that initial act to a strengthening of their contractual links during the procedure, for example by concluding a binding agreement after the transaction was notified on the basis of a good faith intention, the requirements for the proof of the abandonment must correspond also to the nature of the latest act.

(120) In line with this principle, in case of implementation of the concentration prior to a Commission decision, the re-establishment of the *status quo ante* has to be shown. The mere withdrawal of the notification is not considered as sufficient proof that the concentration has been abandoned in the sense of Article 6(1)(c). Likewise, minor modifications of a concentration which do not affect the change in control or the quality of that change, cannot be considered as an abandonment of the original concentration ([102]).

— Binding agreement: proof of the legally binding cancellation of the agreement in the form envisaged by the initial agreement (i.e. usually a document signed by all the parties) will be required. Expressions of intention to cancel the agreement or not to implement the notified concentration, as well as unilateral declarations by (one of) the parties will not be considered sufficient ([103]).

— Good faith intention to conclude an agreement: In case of a letter of intent or memorandum of understanding reflecting such good faith intention, documents proving that this basis for the good faith intention has been cancelled will be required. As for possible other forms that indicated the good faith intention, the abandonment must reverse this good faith intention and correspond in terms of form and intensity to the initial expression of intent.

— Public announcement of a public bid or of the intention to make a public bid: a public announcement terminating the bidding procedure or renouncing to the intention to make a public bid will be required. The format and public reach of this announcement must be comparable to the initial announcement.

([101]) Case IV/M.116 — Kelt/American Express, of 28 August 1991.

([102]) This paragraph does not prejudge the assessment whether the modification requires submitting additional information to the Commission under Article 5(3) of Regulation (EC) No 802/2004.

([103]) See Case COMP/M.4381 — JCI/VB/FIAMM of 10 May 2007, paragraph 15, where only one party did no longer wished to implement an agreement, whereas the other party still considered the agreement to be binding and enforceable.

— Implemented concentrations: In case the concentration has been implemented prior to a Commission decision, the parties will be required to show that the situation prevailing before the implementation of the concentration has been re-established.

(121) It is for the parties to submit the necessary documentation to meet these requirements in due time.

VII. CHANGES OF TRANSACTIONS AFTER A COMMISSION AUTHORISATION DECISION

(122) In some cases, parties may wish not to implement the concentration in the form foreseen after authorisation of the concentration by the Commission. The question arises whether the Commission's authorisation decision still covers the changed structure of the transaction.

(123) Broadly speaking, if, before implementation of the authorised concentration, the transactional structure is changed from an acquisition of control, falling under Article 3(1)(b), to a merger according to Article 3(1)(a), or *vice versa*, then the change in the transactional structure is considered a different concentration under the Merger Regulation and a new notification is required ([104]). However, less significant modifications of the transaction, for example minor changes in the shareholding percentages which do not affect the change in control or the quality of that change, changes in the offer price in the case of public bids or changes in the corporate structure by which the transaction is implemented without effects on the relevant control situation under the Merger Regulation, are considered as being covered by the Commission's authorisation decision.

C. **COMMUNITY DIMENSION**

I. THRESHOLDS

(124) A two fold test defines the operations to which the Merger Regulation applies. The first test is that the operation must be a concentration within the meaning of Article 3. The second comprises the turnover thresholds contained in Article 1, designed to identify those operations which have an impact upon the Community and can be deemed to be of 'Community dimension'. Turnover is used as a proxy for the economic resources being combined in a concentration, and is allocated geographically in order to reflect the geographic distribution of those resources.

(125) Two sets of thresholds are set out in Article 1 to establish whether the operation has a Community dimension. Article 1(2) establishes three different criteria: The worldwide turnover threshold is intended to measure the overall dimension of the undertakings concerned; the Community turnover threshold seek to determine whether the concentration involves a minimum level of activities in the Community; and the two-thirds rule aims to exclude purely domestic transactions from Community jurisdiction.

(126) This second set of thresholds, contained in Article 1(3), is designed to tackle those concentrations which fall short of achieving Community dimension under Article 1(2), but would have a substantial impact in at least three Member States leading to multiple notifications under national competition rules of those Member States. For this purpose, Article 1(3) provides for lower turnover thresholds, both worldwide and Community-wide, and for a minimum level of activities of the undertakings concerned, jointly and individually, in at least three Member States. Similarly to Article 1(2), Article 1(3) also contains a two-thirds rule excluding predominantly domestic concentrations ([105]).

([104]) See cases COMP/M.2706 — Carnival Corporation/P&O Princess of 11 April 2002 and COMP/M.3071 — Carnival Corporation/P&O Princess of 10 February 2003. In such circumstances, the identity of the notifying parties changes, as both parties to a merger must notify, whereas only the party acquiring control must do so. However, if the parties implement an acquisition of control over a target company and only *subsequently* decide to merge with the newly acquired subsidiary, this would be regarded as an internal restructuring that does not give rise to a change in control and would thus not fall within the terms of Article 3 of the Merger Regulation.

([105]) A concentration is further deemed to have a Community dimension if it is referred to the Commission under Article 4(5) of the Merger Regulation. These cases are dealt with in the Commission Notice on Case Referral in respect of concentrations, OJ C 56, 5.3.2005, p. 2.

(127) The thresholds as such are designed to govern jurisdiction and not to assess the market position of the parties to the concentration nor the impact of the operation. In so doing they include turnover derived from, and thus the resources devoted to, all areas of activity of the parties, and not just those directly involved in the concentration. The thresholds are purely quantitative, since they are only based on turnover calculation instead of market share or other criteria. They pursue the objective to provide a simple and objective mechanism that can be easily handled by the companies involved in a merger in order to determine if their transaction has a Community dimension and is therefore notifiable.

(128) Whereas Article 1 sets out the numerical thresholds to establish jurisdiction, the purpose of Article 5 is to explain how turnover should be calculated to ensure that the resulting figures are a true representation of economic reality.

II. NOTION OF UNDERTAKING CONCERNED

1. **General**

(129) From the point of view of determining jurisdiction, the undertakings concerned are those participating in a concentration, i.e. a merger or an acquisition of control as foreseen in Article 3(1). The individual and aggregate turnover of those undertakings will be decisive in determining whether the thresholds are met.

(130) Once the undertakings concerned have been identified in a given transaction, their turnover for the purposes of determining jurisdiction is to be calculated according to the rules set out in Article 5. Article 5(4) sets out detailed criteria to identify undertakings whose turnover may be attributed to the undertaking concerned because of certain direct or indirect links with the latter. The legislator's intention was to lay down concrete rules which, seen together, can be taken to establish the notion of a 'group' for the purposes of the turnover thresholds in the Merger Regulation. The term 'group' will be used in the following sections exclusively to refer to the collection of undertakings whose relations with an undertaking concerned come within the terms of one or more of the sub-paragraphs of Article 5(4) of the Merger Regulation.

(131) It is important, when referring to the various undertakings which may be involved in a procedure, not to confuse the concept of 'undertakings concerned' under Articles 1 and 5 with the terminology used elsewhere in the Merger Regulation and in Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (hereinafter referred to as the 'Implementing Regulation') ([106]) referring to the various undertakings which may be involved in a procedure. This terminology refers to the notifying parties, other involved parties, third parties and parties who may be subject to fines or periodic penalty payments, and they are defined in Chapter IV of the Implementing Regulation, along with their respective rights and duties.

2. **Mergers**

(132) In a merger the undertakings concerned are each of the merging entities.

3. **Acquisition of control**

(133) In the remaining cases, it is the concept of 'acquiring control' that will determine which are the undertakings concerned. On the acquiring side, there can be one or more undertakings acquiring sole or joint control. On the acquired side, there can be one or more undertakings as a whole or parts thereof. As a general rule, each of these undertakings will be an undertaking concerned within the meaning of the Merger Regulation.

Acquisition of sole control

(134) Acquisition of sole control of the whole undertaking is the most straightforward case of acquisition of control. The undertakings concerned will be the acquiring undertaking and the target undertaking.

([106]) OJ L 133, 30.4.2004, p. 1.

(135) Where the target undertaking is acquired by a group through one of its subsidiaries, the undertakings concerned are the target undertaking and the acquiring subsidiary if this is not a mere acquisition vehicle. However, even though the subsidiary is normally the undertaking concerned for the purpose of calculating turnover, the turnover of all undertakings with which the undertaking concerned has the links as specified in Article 5(4) shall be included in the threshold calculations. In this respect, the group is considered to be a single economic unit and the different companies belonging to the same group cannot be considered as different undertakings concerned for jurisdictional purposes under the Merger Regulation. The actual notification can be made by the subsidiary concerned or by its parent company.

Acquisition of parts of an undertaking and staggered operations — Article 5(2)

(136) The first subparagraph of Article 5(2) of the Merger Regulation provides that when the operation concerns the acquisition of parts of one or more undertakings, only those parts which are the subject of the transaction shall be taken into account with regard to the seller. The possible impact of the transaction on the market will depend only on the combination of the economic and financial resources that are the subject of the transaction with those of the acquirer and not on the remaining business of the seller. In this case, the undertakings concerned will be the acquirer(s) and the acquired part(s) of the target undertaking, but the remaining businesses of the seller will be ignored.

(137) The second subparagraph of Article 5(2) includes a special provision on staggered operations or follow-up deals. The previous concentrations (within two years) involving the same parties become (re)notifiable with the most recent transaction, provided this constitutes a concentration, if the thresholds are met whether for one or more of the transactions taken in isolation or cumulatively. In this case, the undertakings concerned are the acquirer(s) and the different acquired part(s) of the target company taken as a whole.

Change from joint to sole control

(138) If the acquisition of control occurs by way of a change from joint control to sole control, one shareholder normally acquires the stake previously held by the other shareholder(s). In this situation, the undertakings concerned are the acquiring shareholder and the joint venture. As is the case for any other seller, the 'exiting' shareholder is not an undertaking concerned ([107]).

Acquisition of joint control

(139) In the case of acquisition of joint control of a newly-created undertaking, the undertakings concerned are each of the companies acquiring control of the newly set-up joint venture (which, as it does not yet exist, cannot be considered to be an undertaking concerned and moreover, as yet, has no turnover of its own). The same rule applies where one undertaking contributes a pre-existing subsidiary or a business (over which it previously exercised sole control) to a newly created joint venture. In these circumstances, each of the jointly-controlling undertakings is considered an undertaking concerned whereas any company or business contributed to the joint venture is not an undertaking concerned, and its turnover is part of the turnover of the initial parent company.

(140) The situation is different if undertakings newly acquire joint control of a pre-existing undertaking or business. The undertakings concerned are each of the undertakings acquiring joint control on the one hand, and the pre-existing acquired undertaking or business on the other.

(141) The acquisition of a company with a view to immediately split up the assets is, as explained above in paragraph 32, mostly not considered as an acquisition of joint control of the entire target company, but as the acquisition of sole control by each of the ultimate acquirers of the respective parts of the target company. In line with the considerations for the acquisition of sole control, undertakings concerned are the acquiring undertakings and the acquired parts in each of the transactions.

([107]) Case IV/M.023 — ICI/Tioxide, of 28 November 1990.

Changes of controlling shareholders in cases of joint control of an existing joint venture

(142) A notifiable concentration may arise, as explained above, where a change in the quality of control occurs in a joint control structure due to the entrance of new controlling shareholders, irrespective of whether or not they replace existing controlling shareholders.

(143) In the case where one or more shareholders acquire control, either by entry or by substitution of one or more shareholders, in a situation of joint control both before and after the operation, the undertakings concerned are the shareholders (both existing and new) who exercise joint control and the joint venture itself ([108]). On the one hand, similar to the acquisition of joint control of an existing company, the joint venture itself can be considered as an undertaking concerned as it is an already pre-existing undertaking. On the other hand, as set out above, the entry of a new shareholder is not only in itself a new acquisition of control, but also leads to a change in the quality of control for the remaining controlling shareholders as the quality of control of the joint venture is determined by the identity and composition of the controlling shareholders and therefore also by the relationship between them. Furthermore, the Merger Regulation considers a joint venture as a combination of the economic resources of the parent companies, together with the joint venture if it already generates turnover on the market. For these reasons, the newly entering controlling shareholders are undertakings concerned alongside with the remaining controlling shareholders. Due to the change of the quality in control, all of them are considered to undertake an acquisition of control.

(144) As Article 4(2) first sentence of the Merger Regulation foresees that all acquisitions of joint control shall be notified jointly by the undertakings acquiring joint control, existing and new shareholders in principle have to notify concentrations arising from such changes in joint control scenarios jointly.

Acquisition of control by a joint venture

(145) In transactions where a joint venture acquires control of another company, the question arises whether or not the joint venture should be regarded as the undertaking concerned (the turnover of which would include the turnover of its parent companies), or whether each of its parent companies should individually be regarded as undertakings concerned. This question may be decisive for jurisdictional purposes ([109]). Whereas, in principle, the undertaking concerned is the joint venture as the direct participant in the acquisition of control, there may be circumstances where companies set up 'shell' companies and the parent companies will individually be considered as undertakings concerned. In this type of situation, the Commission will look at the economic reality of the operation to determine which are the undertakings concerned.

(146) Where the acquisition is carried out by a full-function joint venture, with the features set out above, and already operates on the same market, the Commission will normally consider the joint venture itself and the target undertaking to be the undertakings concerned (and not the joint venture's parent companies).

([108]) See Case IV/M.376 — Synthomer/Yule Catto, of 22 October 1993.

([109]) Assume the following scenario: The target company has an aggregate Community turnover of less than EUR 250 million, and the acquiring parties are two (or more) undertakings, each with a Community turnover exceeding EUR 250 million. If the target is acquired by a 'shell' company set up between the acquiring undertakings, there would only be one undertaking (the 'shell' company) with a Community turnover exceeding EUR 250 million, and thus one of the cumulative threshold conditions for Community jurisdiction, namely, the existence of at least two undertakings with a Community turnover exceeding EUR 250 million, would not be fulfilled. Conversely, if instead of acting through a 'shell' company, the acquiring undertakings acquire the target undertaking themselves, then the turnover threshold would be met and the Merger Regulation would apply to this transaction. The same considerations apply to the national turnover thresholds referred to in Article 1(3).

(147) Conversely, where the joint venture can be regarded as a mere vehicle for an acquisition by the parent companies, the Commission will consider each of the parent companies themselves to be the undertakings concerned, rather than the joint venture, together with the target company. This is the case in particular where the joint venture is set up especially for the purpose of acquiring the target company or has not yet started to operate, where an existing joint venture has no full-function character as referred to above or where the joint venture is an association of undertakings. The same applies where there are elements which demonstrate that the parent companies are in fact the real players behind the operation. These elements may include a significant involvement by the parent companies themselves in the initiation, organisation and financing of the operation. In those cases, the parent companies are regarded as undertakings concerned.

Break-up of joint ventures and exchange of assets

(148) When two (or more) undertakings break up a joint venture and split the assets (constituting businesses) between them, this will normally be considered as more than one acquisition of control, as explained above in paragraph 41. For example, undertakings A and B form a joint venture and subsequently split it up, in particular with a new asset configuration. The break-up of the joint venture involves a change from joint control over the joint venture's entire assets to sole control over the divided assets by each of the acquiring undertakings ([110]).

(149) For each break-up operation, and in line with the consideration to the acquisition of sole control, the undertakings concerned will be, on the one hand, the acquiring party and, on the other, the assets that this undertaking will acquire.

(150) Similar to the break-up scenario is the situation where two (or more) companies exchange assets constituting a business on each side. In this case, each acquisition of control is considered an independent acquisition of sole control. The undertakings concerned will be, for each transaction, the acquiring companies and the acquired undertaking or assets.

Acquisitions of control by natural persons

(151) Control may also be acquired by natural persons, within the meaning of Article 3 of the Merger Regulation, if those persons themselves carry out further economic activities (and are therefore classified as economic undertakings in their own right) or if they control one or more other economic undertakings. In such a situation, the undertakings concerned are the target undertaking and the individual acquirer (with the turnover of the undertaking(s) controlled by that natural person being included in the calculation of the natural person's turnover to the extent that the terms of Article 5(4) are satisfied) ([111]).

(152) An acquisition of control of an undertaking by its managers is also an acquisition by natural persons, and paragraph 151 above is also relevant. However, the managers may pool their interests through a 'vehicle company', so that it acts with a single voice and also to facilitate decision-making. Such a vehicle company may be, but is not necessarily, an undertaking concerned. The general guidance given above in paragraphs 145-147 on acquisitions of control by a joint venture also applies here.

([110]) See parallel cases COMP/M.3293 — Shell/BEB and COMP/M.3294 — ExxonMobil/BEB of 20 November 2003; Case IV/M.197 — Solvay/Laporte of 30 April 1992.

([111]) See Case IV/M.082 — Asko/Jacobs/Adia, of 16 May 1991 where a private individual with other economic activities acquired joint control of an undertaking and was considered an undertaking concerned.

Acquisition of control by a State-owned undertaking

(153) As described above, a merger or an acquisition of control arising between two undertakings owned by the same State (or the same public body) may constitute a concentration if the undertakings were formerly part of different economic units having an independent power of decision. If this is the case, both of them will qualify as undertakings concerned although both are owned by the same State ([112]).

III. RELEVANT DATE FOR ESTABLISHING JURISDICTION

(154) The legal situation for establishing the Commission's jurisdiction has been changed under the recast Merger Regulation. Under the former Merger Regulation, the relevant date was the triggering event for a notification according to Article 4(1) of this Regulation — the conclusion of a final agreement or the announcement of a public bid or the acquisition of a controlling interest — or, at the latest, the time when the parties were obliged to notify (i.e. one week after a triggering event for a notification) ([113]).

(155) Under the recast Merger Regulation, there is no longer an obligation for the parties to notify within a certain time-frame (provided the parties do not implement the planned concentration before notification). Moreover, according to Article 4(1) second subparagraph, the undertakings concerned can already notify the transaction on the basis of a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid. At the time of the notification at the latest, the Commission — as well as national competition authorities — must be able to determine their jurisdiction. Article 4(1) subparagraph 1 of the Merger Regulation provides, generally, that concentrations shall be notified following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. The dates of these events are therefore still decisive under the recast Merger Regulation in order to determine the relevant date for establishing jurisdiction, if a notification does not occur before such events on the basis of a good faith intention or an announced intention ([114]).

(156) The relevant date for establishing Community jurisdiction over a concentration is therefore the date of the conclusion of the binding legal agreement, the announcement of a public bid or the acquisition of a controlling interest or the date of the first notification, whichever date is earlier ([115]). Regarding the date of notification, a notification to either the Commission or to a Member State authority is relevant. The relevant date needs in particular to be considered for the question whether acquisitions or divestitures which occur after the period covered by the relevant account, but before the relevant date, require adaptations to those accounts according to the principles set out in paragraphs 172 and 173.

IV. TURNOVER

1. **The concept of turnover**

(157) The concept of turnover as used in Article 5 of the Merger Regulation comprises 'the amounts derived […] from the sale of products and the provision of services'. Those amounts generally appear in company accounts under the heading 'sales'. In the case of products, turnover can be determined without difficulty, namely by identifying each commercial act involving a transfer of ownership.

([112]) See recital 22 of the Merger Regulation, directly related to the calculation of turnover of a state-owned undertaking concerned in the context of Article 5(4).

([113]) See Case COMP/M.1741 — MCI Worldcom/Sprint of 28 June 2000.

([114]) The alternative possibility that turnover should be defined on the latest date when the relevant parties are obliged to notify (seven days after the 'triggering event' under the former Merger Regulation) cannot be retained under the recast merger Regulation, because there is no deadline for notification.

([115]) See also opinion of AG Kokott in Case C-202/06 Cementbouw v Commission of 26 April 2007, paragraph 46 (not yet reported). Only the recast merger Regulation has provided for the possibility to take into account the first notification if this is earlier than the date of the conclusion of the binding legal agreement, the announcement of a public bid or the acquisition of a controlling interest, see fn. 35 of the opinion.

(158) In the case of services, the method of calculating turnover in general does not differ from that used in the case of products: the Commission takes into consideration the total amount of sales. However, the calculation of the amounts derived from the provision of services may be more complex as this depends on the exact service provided and the underlying legal and economic arrangements in the sector in question. Where one undertaking provides the entire service directly to the customer, the turnover of the undertaking concerned consists of the total amount of sales for the provision of services in the last financial year.

(159) In other areas, this general principle may have to be adapted to the specific conditions of the service provided. In certain sectors of activity (such as package holidays and advertising), the service may be sold through intermediaries ([116]). Even if the intermediary invoices the entire amount to the final customer, the turnover of the undertaking acting as an intermediary consists solely of the amount of its commission. For package holidays, the entire amount paid by the final customer is then allocated to the tour operator which uses the travel agency as distribution network. In the case of advertising, only the amounts received (without the commission) are considered to constitute the turnover of the TV channel or the magazine since media agencies, as intermediaries, do not constitute the distribution channel for the sellers of advertising space, but are chosen by the customers, *i.e* those undertakings wishing to place advertising.

(160) The examples mentioned show that, due to the diversity of services, many different situations may arise and the underlying legal and economic relations have to be carefully analysed. Similarly, specific situations for the calculation of turnover may arise in the areas of credit, financial services and insurance. These issues will be dealt with in Section VI.

2. **Ordinary activities**

(161) Article 5(1) provides that the amounts to be included in the calculation of turnover should correspond to the 'ordinary activities' of the undertakings concerned. This is the turnover achieved from the sale of products or the provision of services in the normal course of its business. It generally excludes those items which are listed under the headers 'financial income' or 'extraordinary income' in the company's accounts. Such extraordinary income may be derived from the sale of businesses or of fixed assets. However, company accounts do not necessarily delineate the revenues derived from ordinary activities in the way required for the purposes of turnover calculation under the Merger Regulation. In some cases, the qualification of the items in the accounts may have to be adapted to the requirements of the Merger Regulation ([117]).

(162) The revenues do not necessarily have to be derived from the customer of the products or services. With regard to aid granted to undertakings by public bodies, any aid has to be included in the calculation of turnover if the undertaking is itself the recipient of the aid and if the aid is directly linked to the sale of products and the provision of services by the undertaking. The aid is therefore an income of the undertaking from the sale of products or provision of services in addition to the price paid by the consumer ([118]).

(163) Specific issues have arisen for the calculation of turnover of a business unit which only had internal revenues in the past. This may in particular apply for transactions involving the outsourcing of services by transfer of a business unit. If such a transaction constitutes a concentration on the basis of the considerations outlined in paragraphs 25 ff. of this Notice, the Commission's practice is that the turnover should normally be calculated on the basis of the previously internal turnover or of publicly quoted

([116]) An undertaking will normally not act as an intermediary if it sells products via a commercial act which involves a transfer of ownership, Judgment in Case T-417/05, Endesa v Commission, paragraph 213, [2006] ECR II-2533.

([117]) In Case IV/M.126 — Accor/Wagons-Lits, of 28 April 1992, the Commission decided to consider certain income from car-hire activities as revenues from ordinary activities although they were included as 'other operating proceeds' in Wagons-Lits' profit and loss account.

([118]) See Case IV/M.156 — Cereol/Continentale Italiana of 27 November 1991. In this case, the Commission excluded Community aid from the calculation of turnover because the aid was not intended to support the sale of products manufactured by one of the undertakings involved in the merger, but the producers of the raw materials (grain) used by the undertaking, which specialised in the crushing of grain.

prices where such prices exist (e.g. in the oil industry). Where the previously internal turnover does not appear to correspond to a market valuation of the activities in question (and, thus, to the expected future turnover on the market), the forecast revenues to be received on the basis of an agreement with the former parent may be a suitable proxy.

3. 'Net' turnover

(164) The turnover to be taken into account is 'net' turnover, after deduction of a number of components specified in the Regulation. The aim is to adjust turnover in such a way as to enable it to reflect the real economic strength of the undertaking.

3.1. *Deduction of rebates and taxes*

(165) Article 5(1) provides for the 'deduction of sales rebates and of value added tax and other taxes directly related to turnover'. 'Sales rebates' mean all rebates or discounts which are granted by the undertakings to their customers and which have a direct influence on the amounts of sales.

(166) As regards the deduction of taxes, the Merger Regulation refers to VAT and 'other taxes directly related to turnover'. The concept of 'taxes directly related to turnover' refers to indirect taxation linked to turnover, such as, for example, taxes on alcoholic beverages or cigarettes.

3.2. *The treatment of 'internal' turnover*

(167) The first subparagraph of Article 5(1) states that 'the aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4', *i.e.* the group to which the undertaking concerned belongs. The aim is to exclude the proceeds of business dealings within a group so as to take account of the real economic weight of each entity in the form of market turnover. Thus, the 'amounts' taken into account by the Merger Regulation reflect only the transactions which take place between the group of undertakings on the one hand and third parties on the other.

(168) Article 5(5)(a) of the Merger Regulation applies the principle that double counting is to be avoided specifically to the situation where two or more undertakings concerned in a concentration jointly have the rights or powers listed in Article 5(4)(b) in another company. According to this provision, the turnover resulting from the sale of products or the provision of services between the joint venture and each of the undertakings concerned (or any other undertaking connected with any one of them in the sense of Article 5(4)) should be excluded. As regards joint ventures between undertakings concerned and third parties, insofar as their turnover is taken into account according to Article 5(4)(b) as set out in paragraph 181 below, the turnover generated by sales between the joint venture and the undertaking concerned (as well as undertakings linked to the undertaking concerned in accordance with the criteria set out in Article 5(4)) is not taken into account according to Article 5(1).

4. Turnover calculation and financial accounts

4.1. *The general rule*

(169) The Commission seeks to base itself upon the most accurate and reliable figures available. Generally, the Commission will refer to accounts which relate to the closest financial year to the date of the transaction and which are audited under the standard applicable to the undertaking in question and compulsory for the relevant financial year ([119]). An adjustment of the audited figures should only take place if this is required by the provisions of the Merger Regulation, including the cases explained in more detail in paragraph 172.

([119]) See Case COMP/M.3986 — Gas Natural/Endesa of 15 November 2005; confirmed by Judgment in Case T-417/05, Endesa v Commission, paragraphs 128, 131, [2006] ECR II-2533.

(170) The Commission is reluctant to rely on management or any other form of provisional accounts in any but exceptional circumstances ([120]). Where a concentration takes place within the first months of the year and audited accounts are not yet available for the most recent financial year, the figures to be taken into account are those relating to the previous year. Where there is a major divergence between the two sets of accounts, due to significant and permanent changes in the undertaking concerned, and, in particular, when the final draft figures for the most recent year have been approved by the board of management, the Commission may decide to take those figures into account.

(171) Despite the general rule, in cases where major differences between the Community's accounting standards and those of a non-member country are observed, the Commission may consider it necessary to restate these accounts in accordance with Community standards in respect of turnover.

4.2. *Adjustments after the date of the last audited accounts*

(172) Notwithstanding the foregoing paragraphs, an adjustment must always be made to account for permanent changes in the economic reality of the undertakings concerned, such as acquisitions or divestments which are not or not fully reflected in the audited accounts. Such changes have to be taken into account in order to identify the true resources being concentrated and to better reflect the economic situation of the undertakings concerned. Those adjustments are only selective in nature and do not endanger the principle that there should be a simple and objective mechanism to determine the Commission's jurisdiction as they do not require a complete revision of the audited accounts ([121]). First, this applies to acquisitions, divestments or closure of part of its business subsequent to the date of the audited accounts. This is relevant if a company closes a transaction concerning the divestment and closure of part of its business at any time before the relevant date for establishing jurisdiction (see paragraph 154) or where such a divestment or closure of a business is a pre-condition for the operation ([122]). In this case, the turnover to be attributed to that part of the business must be subtracted from the turnover of the notifying party as shown in its last audited accounts. If an agreement for the sale of part of its business is signed, but the closing of the sale (in other words, its legal implementation and the transfer of the legal title to the shares or assets acquired) has not yet occurred, such a change is not taken into account ([123]), unless the sale is a pre-condition for the notified operation. Conversely, the turnover of those businesses whose acquisition has been closed subsequent to the preparation of the most recent audited accounts, but before the relevant date for establishing jurisdiction, must be added to a company's turnover for notification purposes.

(173) Second, an adjustment may also be necessary for acquisitions, divestments or closure of part of the business which have taken place during the financial year for which the audited accounts are drawn up. If acquisitions, divestments or closure of part of the business within this period are made, the changes in the economic resources may only partly be reflected in the audited accounts of the undertaking concerned. As the turnover of the businesses acquired may be included in the accounts only from the time of their acquisition, this may not reflect the full annual turnover of the acquired business. Conversely, the turnover of the businesses divested or closed may still be included in the audited accounts up to the point in time of their actual divestment or closure. In these cases, adjustments have to be made to remove the turnover generated by the divested or closed businesses from the audited accounts until the time of de-consolidation and to add the turnover which the acquired businesses have generated in the year until the time they have been consolidated in the accounts. As a result, the turnover of the businesses divested or closed must be excluded in full and the full annual turnover of the businesses acquired must be included.

([120]) See Case COMP/M.3986 — Gas Natural/Endesa of 15 November 2005; confirmed by Judgment in Case T-417/05, Endesa v Commission, paragraphs 176, 179, [2006] ECR II-2533.

([121]) Judgment in Case T-417/05, Endesa v Commission, paragraph 209, [2006] ECR II-2533.

([122]) See Judgment in Case T-3/93, Air France v Commission, [1994] ECR II-121 paragraphs 100 et seq. in relation to Case IV/M.278 — British Airways/Dan Air; Case IV/M.588 — Ingersoll-Rand/Clark Equipment.

([123]) Case IV/M.632 — Rhône Poulenc Rorer/Fisons of 21 September 1995; Case COMP/M.1741 — MCI Worldcom/Sprint of 28 June 2000.

(174) Other factors that may affect turnover on a temporary basis such as a decrease in orders for the product or a slow-down in the production process within the period prior to the transaction will be ignored for the purposes of calculating turnover. No adjustment to the definitive accounts will be made to incorporate them.

5. Attribution of turnover under Article 5(4)

5.1. *Identification of undertakings whose turnover is taken into account*

(175) When an undertaking concerned by a concentration belongs to a group, not only the turnover of the undertaking concerned is considered, but the Merger Regulation requires to also take into account the turnover of those undertakings with which the undertaking concerned has links consisting in the rights or powers listed in Article 5(4) in order to determine whether the thresholds contained in Article 1 of the Merger Regulation are met. The aim is again to capture the total volume of the economic resources that are being combined through the operation irrespective of whether the economic activities are carried out directly by the undertaking concerned or whether they are undertaken indirectly via undertakings with which the undertaking concerned possesses the links described in Article 5(4).

(176) The Merger Regulation does not delineate the concept of a group in a single abstract definition, but sets out in Article 5(4)(b) certain rights or powers. If an undertaking concerned directly or indirectly has such links with other companies, those are to be regarded as part of its group for purposes of turnover calculation under the Merger Regulation.

(177) Article 5(4) of the Merger Regulation provides the following:

'Without prejudice to paragraph 2 [acquisitions of parts], the aggregate turnover of an undertaking concerned within the meaning of Article 1(2) and (3) shall be calculated by adding together the respective turnovers of the following:

(a) the undertaking concerned;

(b) those undertakings in which the undertaking concerned directly or indirectly:

(i) owns more than half the capital or business assets, or

(ii) has the power to exercise more than half the voting rights, or

(iii) has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or

(iv) has the right to manage the undertaking's affairs;

(c) those undertakings which have in an undertaking concerned the rights or powers listed in (b);

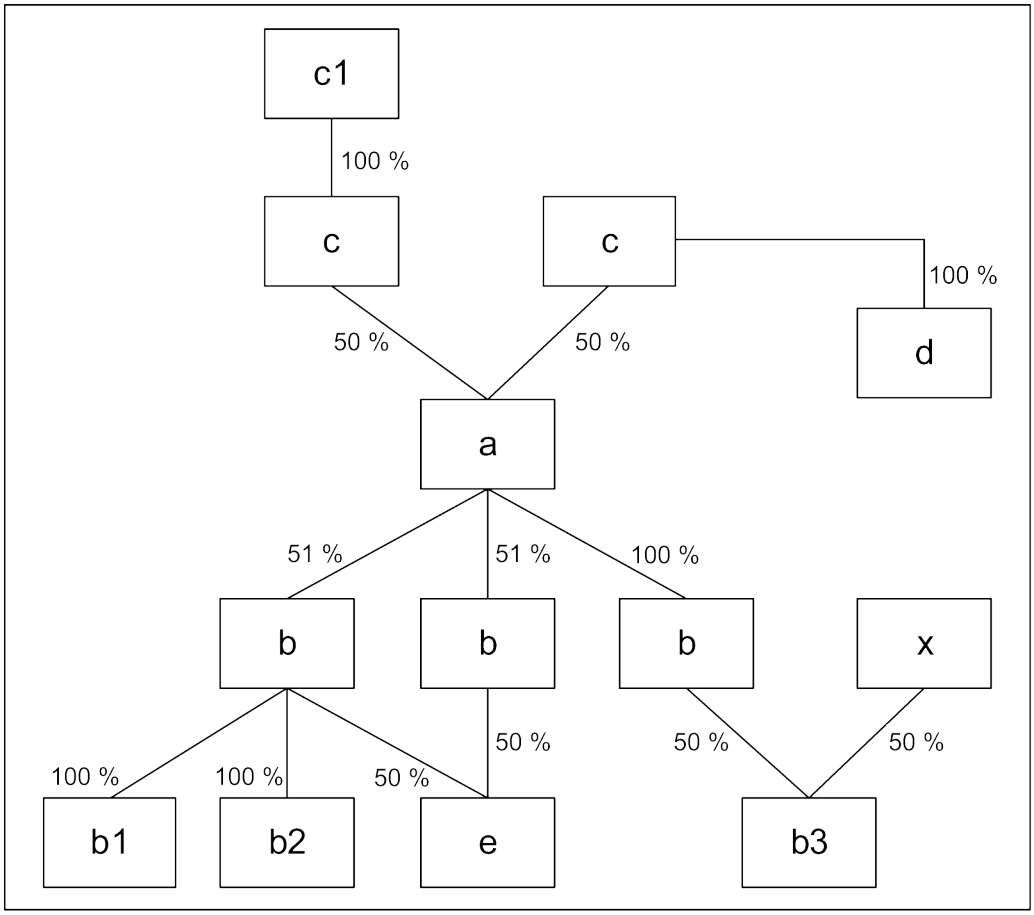
(d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);

(e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).'

An undertaking which has in another undertaking the rights and powers mentioned in Article 5(4)(b) will be referred to as the 'parent' of the latter in the present section of this Notice dealing with the calculation of turnover, whereas the latter is referred to as 'subsidiary' of the former. In short, Article 5(4) therefore provides that the turnover of the undertaking concerned by the concentration (point (a)) should include its subsidiaries (point (b)), its parent companies (point (c)), the other subsidiaries of its parent undertakings (point (d)) and any other subsidiary jointly held by two or more of the undertakings identified under (a)-(d) (point (e)).

(178) A graphic example is as follows:

The undertaking concerned and its group:



a: The undertaking concerned ([124])

b: Its subsidiaries, jointly held companies together with third parties (b3) and their own subsidiaries (b1 and b2)

c: Its parent companies and their own parent companies (c1)

d: Other subsidiaries of the parent companies of the undertaking concerned

e: Companies jointly held by two (or more) companies of the group

x: Third party

Note: the letters a — e correspond to the relevant points of Article 5(4). Percentages set out in the graph relate to the percentage of voting rights held by the respective parent company.

(179) The rights or powers listed in Article 5(4)(b)(i)-(iii) can be identified in a rather straightforward way as they refer to quantitative thresholds. These thresholds are fulfilled if the undertaking concerned owns more than half of the capital or business assets of other undertakings, has more than half of the voting rights or has legally the power to appoint more than half of the board members in other undertakings. However, the thresholds are also met if the undertaking concerned *de facto* has the power to exercise more than half of the voting rights in the shareholders' assembly or the power to appoint more than half of the board members in other undertakings ([125]).

([124]) For the graph it is assumed that the joint venture itself is the undertaking concerned according to the criteria set out in paragraph 146 (acquisition by a full-function JV operating on the same market).

([125]) Case IV/M.187 — Ifint/Exor of 2 March 1992; Case IV/M.062 — Eridania/ISI of 30 July 1991.

(180) The provision contained in Article 5(4)(b)(iv) refers to the right to manage the undertaking's affairs. Such a right to manage exists under company law in particular on the basis of organisational contracts such as a '*Beherrschungsvertrag*' under German law, on the basis of business lease agreements or on the basis of the organisation structure for the general partner in a limited partnership ([126]). However, the 'right to manage' may also result from the holding of voting rights (alone or in combination with contractual arrangements, such as a shareholders' agreement) which enable, on a stable, *de jure* basis, to determine the strategic behaviour of an undertaking.

(181) The right to manage also covers situations in which the undertaking concerned jointly has the right to manage an undertaking's affairs together with third parties ([127]). The underlying consideration is that the undertakings exercising joint control have jointly the right to manage the controlled undertakings' affairs even if each of them individually may have those rights only in a negative sense, *i.e.* in the form of veto rights. In the example, the undertaking (b3) which is jointly controlled by the undertaking concerned (a) and a third party (x) is taken into account as both (a) and (x) have veto rights in (b3) on the basis of their equal shareholding in (b3) ([128]). Under Article 5(4)(b)(iv) the Commission only takes into account those joint ventures in which the undertaking concerned and third parties have *de jure* rights that give rise to a clear-cut right to manage. The inclusion of joint ventures is therefore limited to situations where the undertaking concerned and third parties have a joint *right* to manage on the basis of an agreement, *e.g.* a shareholders' agreement, or where the undertaking concerned and a third party have an equality of voting rights to the effect that they have the right to appoint an equal number of members to the decision-making bodies of the joint venture.

(182) In the same way, where two or more companies jointly control the undertaking concerned in the sense that the agreement of each and all of them is needed in order to manage the undertaking affairs, the turnover of all of them is included. In the example, the two parent companies (c) of the undertaking concerned (a) would be taken into account as well as their own parent companies (c1 in the example). This interpretation results from the referral from Article 5(4)(c), dealing with this case, to Article 5(4)(b), which is applicable to jointly controlled companies as set out in the preceding paragraph.

(183) When any of the companies identified on the basis of Article 5(4) also has links as defined in Article 5(4) with other undertakings, these should also be brought into the calculation. In the example, one of the subsidiaries of the undertaking concerned a (called b) has in turn its own subsidiaries b1 and b2 and one of the parent companies (called c) has its own subsidiary (d).

(184) Article 5(4) sets out specific criteria for identifying undertakings whose turnover can be attributed to the undertaking concerned. These criteria, including the 'right to manage the undertaking's affairs', are not coextensive with the notion of 'control' under Article 3(2). There are significant differences between Articles 3 and 5, as those provisions fulfil different roles. The differences are most apparent in the field of *de facto* control. Whereas under Article 3(2) even a situation of economic dependence may lead to control on a *de facto* basis (see in detail above), a solely controlled subsidiary is only taken into account on a *de facto* basis under Article 5(4)(b) if it is clearly demonstrated that the undertaking concerned has the power to exercise more than half of the voting rights or to appoint more than half of the board members. Concerning joint control scenarios, Article 5(4)(b)(iv) covers those scenarios where the controlling undertakings jointly have a right to manage on the basis of individual veto rights. However, Article 5(4) would not cover situations where joint control occurs on a *de facto* basis due to strong common interests between different minority shareholders of the joint venture company on the basis of shareholders' attendance. The difference is reflected in the fact that Article 5(4)(b)(iv) refers to the *right* to manage, and not a *power* (as in subparagraph (b)(ii) and (iii)) and is explained by the need for precision and certainty in the criteria used for calculating turnover so that jurisdiction can be readily verified.

([126]) Case IV/M.126 — Accor/WagonLits of 28 April 1992.

([127]) Case COMP/M.1741 — MCI Worldcom/Sprint; Case IV/M. 187 — Ifint/Exor; Case IV/M.1046 — Ameritech/Tele Danmark.

([128]) However, only half of the turnover generated by b3 is taken into account, see paragraph 187.

Under Article 3(3), however, the question whether a concentration arises can be much more comprehensively investigated. In addition, situations of negative sole control are only exceptionally covered (if the conditions of Article 5(4)(b)(i)-(iii) are met in the specific case); the 'right to manage' under Article 5(4)(b)(iv) does not cover negative control scenarios. Finally, Article 5(4)(b)(i), for example, covers situations where 'control' under Article 3(2) may not exist.

5.2. *Allocation of turnover of the undertakings identified*

(185) In general, as long as the test under Article 5(4)(b) is fulfilled, the whole turnover of the subsidiary in question will be taken into account regardless of the actual shareholding which the undertaking concerned holds in the subsidiary. In the chart, the whole turnover of the subsidiaries called b of the undertaking concerned a will be taken into account.

(186) However, the Merger Regulation includes specific rules for joint ventures. Article 5(5)(b) provides that for joint ventures between two or more undertakings concerned, the turnover of the joint venture (as far as the turnover is generated from activities with third parties as set out above in paragraph 168) should be apportioned equally amongst the undertakings concerned, irrespective of their share of the capital or the voting rights.

(187) The principle contained in Article 5(5)(b) is followed by analogy for the allocation of turnover for joint ventures between undertakings concerned and third parties if their turnover is taken into account according to Article 5(4)(b) as set out above in paragraph 181. The Commission's practice has been to allocate to the undertaking concerned the turnover of the joint venture on a per capita basis according to the number of undertakings exercising joint control. In the example, half of the turnover of b3 is taken into account.

(188) The rules of Article 5(4) also have to be adapted in situations involving a change from joint to sole control in order to avoid double counting of the turnover of the joint venture. Even if the acquiring undertaking has rights or powers in the joint venture which satisfy the requirements of Article 5(4), the turnover of the acquiring shareholder has to be calculated without the turnover of the joint venture, and the turnover of the joint venture has to be taken without the turnover of the acquiring shareholder.

5.3. *Allocation of turnover in case of investment funds*

(189) The investment company, as set out above in paragraph 15, normally acquires indirect control over portfolio companies held by an investment fund. In the same way, the investment company may be considered to indirectly have the powers and rights which are set out in Article 5(4)(b), in particular to indirectly have the power to exercise the voting rights held by the investment fund in the portfolio companies.

(190) The same considerations, as set out above in the framework of Article 3 (paragraph 15), may also apply if an investment company sets up several investment funds with possibly different investors. Typically, on the basis of the organisational structure, in particular links between the investment company and the general partner(s) of the different funds organised as limited partnerships, or contractual arrangements, especially advisory agreements between the general partner or the investment fund and the investment company, the investment company will indirectly have the power to exercise the voting rights held by the investment fund in the portfolio companies or indirectly have one of the other powers or rights set out in Article 5(4)(b). In these circumstances, the investment company may exercise a common control structure over the different funds which it has set up and the common operation of the different funds by the investment company is often indicated by a common brand for the funds.

(191) Consequently, such an organisation of the different funds by the investment company may lead to the result that the turnover of all portfolio companies held by different funds is taken into account for the purpose of assessing whether the turnover thresholds in Article 1 are met if the investment company acquires indirect control of a portfolio company via one of the funds.

5.4. *Allocation of turnover for State-owned undertakings*

(192) As regards the calculation of turnover of State-owned undertakings, Article 5(4) should be read in conjunction with recital 22 of the Merger Regulation. This recital declares that, in order to avoid discrimination between the public and private sectors, 'in the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them' ([129]).

(193) This recital clarifies that Member States (or other public bodies) are not considered as 'undertakings' under Article 5(4) simply because they have interests in other undertakings which satisfy the conditions of Article 5(4). Therefore, for the purposes of calculating turnover of State-owned undertakings, account is only taken of those undertakings which belong to the same economic unit, having the same independent power of decision.

(194) Thus, where a State-owned company is not subject to any coordination with other State-controlled holdings, it should be treated as independent for the purposes of Article 5, and the turnover of other companies owned by that State should not be taken into account. Where, however, several State-owned companies are under the same independent centre of commercial decision-making, then the turnover of those businesses should be considered part of the group of the undertaking concerned for the purposes of Article 5.

V. GEOGRAPHIC ALLOCATION OF TURNOVER

(195) The thresholds concerning Community-wide and Member State turnover in Article 1(2) and (3) aim to identify cases which have sufficient turnover within the Community in order to be of Community interest and which are primarily cross-border in nature. They require turnover to be allocated geographically to the Community and to individual Member States. Since audited accounts often do not provide a geographical breakdown as required by the Merger Regulation, the Commission will rely on the best figures available provided by the undertakings. The second subparagraph of Article 5(1) provides that the location of turnover is determined by the location of the customer at the time of the transaction:

'Turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State as the case may be.'

General rule

(196) The Merger Regulation does not discriminate between 'products sold' and 'services provided' for the geographic allocation of turnover. In both cases, the general rule is that turnover should be attributed to the place where the customer is located. The underlying principle is that turnover should be allocated to the location where competition with alternative suppliers takes place. This location is normally also the place where the characteristic action under the contract in question is to be performed, *i.e.* where the service is actually provided and the product is actually delivered. In the case of Internet transactions, it may be difficult for the undertakings to determine the location of the customer at the time when the contract is concluded via the Internet. If the product or the service itself is not supplied via the Internet, focusing on the place where the characteristic action under the contract is performed may avoid those difficulties. In the following, the sale of goods and the provision of services are dealt with separately as they exhibit certain different features in terms of allocation of turnover.

([129]) See also Case IV/M.216 — CEA Industrie/France Telecom/Finmeccanica/SGS-Thomson, of 22 February 1993.

Sale of goods

(197) For the sale of goods, particular situations may arise in situations in which the place where the customer was located at the time of concluding the purchase agreement is different from the billing address and/or the place of delivery. In these situations, the place where the purchase agreement was entered into and the place of delivery are more important than the billing address. As the delivery is in general the characteristic action for the sale of goods, the place of delivery may even be prevailing over the place where the customer was located at the time when the purchase agreement was concluded. This will depend on whether the place of delivery is to be considered the place where competition takes place for the sale of goods or whether competition rather takes place at the residence of the customer. In the case of a sale of mobile goods, such as a motor car, to a final consumer, the place where the car is delivered to the customer is decisive even if the agreement was concluded via the phone or the Internet before.

(198) A specific situation arises in cases where a multinational corporation has a Community buying strategy and sources all its requirements for a good from one location. As a central purchasing organisation can take different forms, it is necessary to consider its concrete form since this may determine how to allocate the turnover. Where goods are purchased by and delivered to the central purchasing organisation and are subsequently re-distributed internally to different plants in a variety of Member States, turnover is allocated only to the Member State where the central purchasing organisation is located. In this case, competition takes place at the location of the central purchasing organisation and this is also the place where the characteristic action under the sales contract is performed. The situation is different in case of direct links between the seller and the different subsidiaries. This comprises the case where the central purchasing organisation concludes a mere framework agreement, but the individual orders are placed by and the products are directly delivered to the subsidiaries in different Member States as well as the case where the individual orders are placed via the central purchasing organisation, but the products are directly delivered to the subsidiaries. In both cases, turnover is to be allocated to the different Member States in which the subsidiaries are located, irrespective of whether the central purchasing organisation or the subsidiaries receive the bills and effect the payment. The reason is that in both cases competition with alternative suppliers takes place for the delivery of products to the different subsidiaries even though the contract is concluded centrally. In the first case, in addition, the subsidiaries actually decide upon the quantities to be delivered and on an element essential for competition on their own.

Provision of services

(199) For services, the Merger Regulation foresees that the place of their provision to the customer is relevant. Services containing cross-border elements can be considered to fall into three general categories. The first category comprises cases where the service provider travels, the second category cases where the customer travels. The third category comprises those cases where a service is provided without either the service provider or the customer having to travel. In the first two categories, the turnover generated is to be allocated to the place of destination of the traveller, *i.e* the place where the service is actually provided to the customer. In the third category, the turnover is generally to be allocated to the location of the customer. For the central sourcing of services the above outlined principles for the central purchasing of goods apply in an analogous way.

(200) An example of the first category would be a situation where a non-European company provides special airplane maintenance services to a carrier in a Member State. In this case, the service provider travels to the Community where the service is actually provided and where also competition for this service takes place. If a European tourist hires a car or books a hotel directly in the United States, this falls into the second category as the service is provided outside the Community and also competition takes place between hotels and rental car companies at the location chosen. However, the case is different for package holidays. For this kind of holiday, the service starts with the sale of the package through a travel agent at the customer's location and competition for the sale of holidays through travel agents takes place locally, as with retail shopping, even though parts of the service may be provided in a number of distant locations. The case therefore falls into the third category and the turnover generated is to be allocated to the customer's location. The third category also comprises cases like the supply of software or the distribution of films which are made outside the Community, but are supplied to a customer in a Member State so that the service is actually provided to the customer within the Community.

(201) Cases concerning the transport of goods are different as the customer, to whom those services are provided, does not travel, but the transport service is provided to the customer at its location. Those cases fall into the third category and the location of the customer is the relevant criterion for the allocation of the turnover.

(202) In telecom cases, the qualification of call termination services may raise problems. Although call termination would appear to fall into the third category, there are reasons to treat it differently. Call termination services are provided, *e.g.*, in situations where a call, originating from a European operator, is being terminated in the United States. Although neither the European nor the US operator travels, the signal travels and the service is provided by the US network to the European operator in the United States. This is also the place where competition takes place (if any). The turnover is therefore to be considered as non-Community turnover ([130]).

Specific sectors

(203) Certain sectors do, however, pose very particular problems with regard to the geographical allocation of turnover. These will be dealt with in Section VI below.

VI. CONVERSION OF TURNOVER INTO EURO

(204) When converting turnover figures into euro great care should be taken with the exchange rate used. The annual turnover of a company should be converted at the average rate for the twelve months concerned. This average can be obtained via DG Competition's website ([131]). The audited annual turnover figures should be converted as such and not be broken down into quarterly or monthly figures which would then be converted individually.

(205) When a company has sales in a range of currencies, the procedure is no different. The total turnover given in the consolidated audited accounts and in that company's reporting currency is converted into euros at the yearly average rate. Local currency sales should not be converted directly into euros since these figures are not from the consolidated audited accounts of the company.

VII. PROVISIONS FOR CREDIT AND OTHER FINANCIAL INSTITUTIONS AND INSURANCE UNDERTAKINGS

1. **Scope of application**

(206) Due to the specific nature of the sector, Article 5(3) contains specific rules for the calculation of turnover of credit and other financial institutions as well as insurance undertakings.

(207) In order to define the terms 'credit institutions and other financial institutions' under the Merger Regulation, the Commission in its practice has consistently adopted the definitions provided in the applicable European regulation in the banking sector. The Directive on the taking up and pursuit of the business of credit institutions foresees that ([132]):

— 'Credit institution shall mean an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account.'

— 'Financial institution shall mean an undertaking other than a credit institution, the principal activity of which is to acquire holdings or to carry on one or more of the activities listed in points 2 to 12 of Annex I.'

([130]) This does not affect the turnover which the European telephony operator generates vis-à-vis its own customer with this call.

([131]) See http://europa.eu.int/comm/competition/mergers/others/exchange_rates.html#footnote_1. The website makes reference to the European Central Bank's Monthly Bulletin.

([132]) The definitions are to be found in Article 1 (1) and (5) of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ L 126, 26.5.2000, p. 1).

(208) Financial institutions within the meaning of Article 5(3) of the Merger Regulation are, accordingly, on the one hand holding companies and, on the other hand, undertakings which perform on a regular basis as a principal activity one or more activities expressly mentioned in points 2 to 12 of the Annex of the banking Directive. These activities include:

— lending (comprising activities such as consumer credit, mortgage credit, factoring);

— financial leasing;

— money transmission services;

— issuing and administering means of payment (e.g. credit cards, travellers' cheques and bankers' drafts);

— guarantees and commitments;

— trading for own account or for account of customers in money market instruments, (cheques, bills, certificates of deposit, etc.), foreign exchange, financial futures and options, exchange and interest-rate instruments, transferable securities;

— participation in securities issues and the provision of services related to such issues;

— money broking;

— portfolio management and advice; and

— safekeeping and administration of securities.

2. **Calculation of turnover**

(209) Article 5(3) of the Merger Regulation sets out the methods of calculation of turnover for credit and other financial institutions and for insurance undertakings. In the following Section, some supplementary questions related to turnover calculation for the abovementioned types of undertakings are addressed.

2.1. ***Calculation of turnover of credit and financial institutions (other than financial holding companies)***

2.1.1. General

(210) There are normally no particular difficulties in applying the banking income criterion for the definition of the worldwide turnover to credit institutions and other kinds of financial institutions.

For the geographic allocation of turnover to the Community and to individual Member States, the specific provision of Article 5 (3)(a) second subparagraph applies. It specifies that the turnover is to be allocated to the branch or division established in the Community or in the Member State which receives this income.

2.1.2. Turnover of leasing companies

(211) There is a fundamental distinction to be made between financial leases and operating leases. Basically, financial leases are made for longer periods than operating leases and ownership is generally transferred to the lessee at the end of the lease term by means of a purchase option included in the lease contract. Under an operating lease, on the contrary, ownership is not transferred to the lessee at the end of the lease term and the costs of maintenance, repair and insurance of the leased equipment are included in the lease payments. A financial lease therefore functions as a loan by the lessor to enable the lessee to purchase a given asset.

(212) As already mentioned above, a company performing as its principal activity financial leasing is a financial institution within the meaning of Article 5(3)(a) and its turnover is to be calculated according to the specific rules set out in this provision. All payments on financial leasing contracts, except for the redemption part, are to be taken into account; a sale of future leasing payments at the beginning of the contract for re-financing purposes is not relevant.

(213) Operational leasing activities are, however, not considered to be carried out by financial institutions, and therefore the general turnover calculation rules of Article 5(1) apply ([133]).

2.2. *Insurance undertakings*

(214) In order to measure the turnover of insurance undertakings, Article 5(3)(b) of the Merger Regulation provides that gross premiums written are taken into account. The gross premiums written are the sum of received premiums, including any received reinsurance premiums if the undertaking concerned has activities in the field of reinsurance. Outgoing or outward reinsurance premiums, *i.e.* all amounts paid and payable by the undertaking concerned to get reinsurance cover, are only costs related to the provision of insurance coverage and are not to be deducted from the gross premiums written.

(215) The premiums to be taken into account are not only related to new insurance contracts made during the accounting year being considered but also to all premiums related to contracts made in previous years which remain in force during the period taken into consideration.

(216) In order to constitute appropriate reserves allowing for the payment of claims, insurance undertakings, usually hold a portfolio of investments in shares, interest-bearing securities, land and property and other assets providing annual revenues. The annual revenues coming from those sources are not considered as turnover for insurance undertakings under Article 5(3)(b). However, a distinction has to be made between pure financial investments, which do not confer the rights and powers specified in Article 5(4) to the insurance undertaking in the undertakings in which the investment has been made, and those investments leading to the acquisition of an interest which meets the criteria specified in Article 5(4)(b). In the latter case, Article 5(4) of the Merger Regulation applies, and the turnover of this undertaking has to be added to the turnover of the insurance undertaking, as calculated according to Article 5(3)(b), for the determination of the thresholds laid down in the Merger Regulation ([134]).

2.3. *Financial holding companies*

(217) As an 'other financial institution' within the meaning of Article 5(3)(a) of the Merger Regulation, the turnover of a financial holding company has to be calculated according to the specific rules set out in this provision. However, in the same way as mentioned above for insurance undertakings, Article 5(4) applies to those participations which meet the criteria specified in Article 5(4)(b). Thus, the turnover of a financial holding is to be basically calculated according to Article 5(3), but it may be necessary to add turnover of undertakings falling within the categories set out in Article 5(4) ('Art. 5(4) companies') ([135]).

([133]) See Case IV/M.234 — GECC/Avis Lease, 15 July 1992.

([134]) See Case IV/M.018 — AG/AMEV, of 21 November 1990.

([135]) The principles for financial holding companies may to a certain extent be applied to fund management companies.

(218) In practice, the turnover of the financial holding company (non-consolidated) must first be taken into account. Then the turnover of the Art. 5(4) companies must be added, whilst taking care to deduct dividends and other income distributed by those companies to the financial holdings. The following provides an example for this kind of calculation:

(*EUR million*)

1. Turnover related to financial activities (from non-consolidated P&L)	3 000
2. Turnover related to insurance Art. 5(4) companies (gross premiums written)	300
3. Turnover of industrial Article 5(4) companies	2 000
4. Deduct dividends and other income derived from Art. 5(4) companies 2 and 3	<200>
Total turnover financial holding and its group	5 100

(219) In such calculations different accounting rules may need to be taken into consideration. Whilst this consideration applies to any type of undertaking concerned by the Merger Regulation, it is particularly important in the case of financial holding companies ([136]) where the number and the diversity of enterprises controlled and the degree of control the holding holds on its subsidiaries, affiliated companies and other companies in which it has shareholding requires careful examination.

(220) Turnover calculation for financial holding companies as described above may in practice prove onerous. Therefore a strict and detailed application of this method will be necessary only in cases where it seems that the turnover of a financial holding company is likely to be close to the Merger Regulation thresholds; in other cases it may well be obvious that the turnover is far from the thresholds of the Merger Regulation, and therefore the published accounts are adequate for the establishment of jurisdiction.

([136]) See for example Case IV/M.166 — Torras/Sarrió, of 24 February 1992.