



Competition Law Association

British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)

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

These comments are submitted on behalf of the Competition Law Association (CLA). The CLA is an association of lawyers and other professionals including economists and intellectual property practitioners. Our members include private practitioners, employed professionals and academics.

1. Proposal for a revised and consolidated jurisdictional notice

The CLA is pleased to have this opportunity to comment on the Commission's proposal to update its jurisdictional guidance on the EC Merger Regulation ("the Merger Regulation"). As the Commission is aware, the current guidance was last updated in 1998 and is set out in Commission Notices 98/C 66/01 - 66/04 ("the 1998 Notices"). The revised Merger Regulation which came into force in 2004 did not alter the general principles governing the issues dealt with in the 1998 Notices and therefore did not necessitate substantial revision of the 1998 Notices. However since the 1998 Notices came into force there have been a substantial number of further Commission merger decisions and CFI and ECJ decisions on appeal which have dealt with jurisdictional issues and serve as useful precedents. In addition, during this period the Commission has developed its thinking and policy in respect of a number of jurisdictional areas. We welcome the Commission's proposal to update and expand on the 1998 Notices to take account of these subsequent developments ("the Draft Notice"). We also welcome the proposal to combine all the jurisdictional guidance on the Merger Regulation into a single notice.

While we broadly welcome the updating, expansion and consolidation of the 1998 Notices, there are a number of specific aspects of the Draft Notice where the CLA considers the current drafting could be clarified. Further, there are a number of specific areas where expansion of the 1998 Notices would be of assistance. Lastly, as regards a limited number of aspects the CLA disagrees with the approach taken by the Commission. These areas of disagreement generally relate to situations where the Commission has expanded on the previous guidance in the 1998

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Notices, but in doing so has moved from a relatively bright line test to a more nuanced approach. While generally the further level of- detail and further guidance in specific situations contained in the Draft Notice is to be welcomed we note that it is also important that the Commission is careful to ensure that parties are able to determine that parties are able to determine their position under the Merger Regulation without significant delay or difficulty. Bright line tests are generally the best means of achieving this and we would encourage the Commission to adopt such clear tests so far as possible.

Our specific comments, and where relevant suggested revised wording, in respect of each of these issues are set out below.

2. The concept of concentration

Paragraph 18 - At paragraph 18 of the Draft Notice the Commission discusses the scenario whereby an undertaking can acquire control even if that undertaking ("the Passive Undertaking") has no active involvement in the relevant transaction and the acquisition of control is triggered by the actions of third parties. In such a situation it will often be the case that the Passive Undertaking is not able to influence the time-table of the transaction and as such the concentration may be implemented prior to the Passive Undertaking being able to notify and/or obtain clearance from the Commission (e.g. this might be the case where two companies share joint control of a company and one undertaking then sells down its holding to a number of different purchasers with the shares transferred to the new buyers immediately and the other undertaking ("the Passive Undertaking") given no prior notice. In this case the Passive Undertaking is likely to have moved from a position of joint control to a position of de facto sole control or negative sole control, but will have obtained that position prior to notifying the Commission or obtaining clearance.)

While such cases are unusual, they are by no means exceptional. Presumably in such cases the Commission does not consider that it would be appropriate to pursue the Passive Undertaking for breach of the implementation rules under the Merger Regulation (not least because it is unlikely that it would be possible to demonstrate that the breach was either intentional or negligent - see Article 14(2) of the Merger Regulation). It would be helpful for parties who find themselves in such a situation in future if the Commission were able to set this out expressly (perhaps in a footnote to paragraph 18). In addition (or alternatively) it would be helpful if the Commission could expressly set out that in such cases it would generally be prepared to grant a derogation pursuant to Article 7(3) (retrospectively if necessary). *(Please also note the comment below on Paragraph 148 of the Draft Notice in relation to situations of this kind).*

Paragraph 19 - Paragraph 19 sets out new guidance on investment fund structures and those instances where the fund itself or the relevant investment company may be deemed to have the ability to exercise decisive influence over the investment fund and the portfolio companies within it. In particular, the paragraph sets out a range of factors which indicate that an investment company has control over a fund and the portfolio companies within the fund. The new guidance in this paragraph is useful and is welcomed by the CLA. We note, however, that it is usually the case in the most commonly used current private equity structures that the



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investment company will be considered to control each of the relevant funds under its branding (or within its broad group of funds) and the portfolio companies within those funds. The opposite situation, where the investment company is not considered to control some or all of the funds under its branding (or within its broad group of funds), is the less common scenario and therefore the scenario in respect of which further guidance would be of particular assistance. Given this, it would be particularly helpful if the Commission were able to expand on the discussion in paragraph 19 by giving examples of exceptions to the general rule where the Commission has found that the investment company does not have control over some or all of the funds under its branding (or within its broad group of funds).

Paragraphs 23 and 24 - Outsourcing and the circumstances in which an outsourcing arrangement is sufficient to amount to a concentration under the Merger Regulation has always been a difficult area. As such, the further guidance provided at paragraphs 23 and 24 is extremely useful. However, we suggest the Commission reconsiders the current wording of this guidance in two respects:

- First, as currently worded, the guidance is somewhat ambiguous as to the position where the only transfer of assets is the relevant employees, e.g. the wording in the first sentence of paragraph 24 refers to a transfer of the " ... *associated assets and/or personnel*" (emphasis added)). An outsourcing involving only the transfer of employees and no other assets is a not uncommon situation. It would be helpful if the Commission were able to clarify when such situations would be considered to amount to the transfer of the whole or part of an undertaking and therefore a concentration; paragraph 24 makes no further reference to personnel but concentrates thereafter on assets. Presumably this would be unusual but might perhaps be the case where the know-how and sales contacts of the employees in effect represented the entire business (e.g. this might be the case in a skilled service industry such as management consultancy or advertising).
- Second, we are also uncomfortable with one aspect of the approach taken in paragraph 24 in relation to those assets which are sufficient to amount to the transfer of whole or part of an undertaking. It is stated that as regards the provision of services the assets transferred must either have the core elements necessary for a market presence " ... *or the acquiring undertaking must be able to complement them with its own assets to build up a market presence*". We think this later wording is particularly vague and risks creating significant uncertainty as to those outsourcings which do amount to a concentration and those which do not. We consider it important that the guidance on this issue sets a clear bright line as to which outsourcings are included and which are excluded. As such, we consider that the Commission should take the approach in its guidance that if the core elements necessary for a market presence are not transferred then the outsourcing should not be considered a concentration. Accordingly, we suggest that the words in italics noted above are deleted from the relevant sentence in paragraph 24.

Paragraph 26 - The penultimate sentence of this paragraph is confusing and appears to be



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unnecessary. The final sentence of the paragraph makes it clear that agreements with a definite end date may result in a concentration if that period is sufficiently long to result in a lasting change of control. However it is not clear what the prior sentence adds to this clear statement in the final sentence. Presumably the Commission is not intending to suggest that an agreement for an initial period with a definite end date and where the initial period is not sufficient to lead to a lasting change of control may nonetheless result in a concentration merely because the agreement is renewable? We suggest that this sentence is either removed or the Commission expands on the concept that it is trying to capture here (e.g. the renewal rights it has in mind).

Paragraph 103 - It is helpful that the Commission has set out guidance as to the circumstances in which the enlargement of a joint venture may be considered to amount to a new concentration. We note that this is an area where there is significant potential for uncertainty and attendant costs for joint venture businesses and therefore it is important that a clear dividing line is established between what is considered organic growth of the joint venture and what amounts to a new concentration. As currently drafted, paragraph 102 does set out a sufficiently clear dividing line in relation to the transfer of further assets or business activities to an existing joint venture. However the current drafting of paragraph 103 in relation to an enlargement of the joint venture without a transfer of assets from the parents is not as clear.

We suggest that in such situations generally, the Commission should be hesitant to find that an enlargement of a joint venture does result in a new concentration and we query whether in most such cases a further structural change in the market (in addition to the initial establishment of the joint venture) will have in fact occurred. As a result, the Commission may wish to consider whether it removes this paragraph altogether. If the paragraph is to remain we suggest that the paragraph is further expanded with specific examples of the factors which would be taken into account by the Commission and, ideally, examples of past cases where an expansion of this kind has been considered to result in a new concentration.

Paragraph 114 - At paragraph 114 of the Draft Notice the Commission states that in relation to concentrations the subject of a binding agreement the Commission will require " ... *proof of the legally binding cancellation of the agreement in the form envisaged by the initial agreement...* " in order to be satisfied that the parties have abandoned the concentration. It appears that the Commission envisages here that the parties enter into a further agreement cancelling the original agreement. We consider that this paragraph should note one common scenario as an exception to this general position. It is often the case that sale and purchase agreements will have "long stop" provisions; if all the relevant conditions precedent (including required competition clearances) are not obtained by the long-stop date the parties are no longer bound by the agreement. In cases where the relevant sale and purchase agreement contains a long stop provision of this kind and the long-stop date has been reached without the relevant conditions being satisfied then no further documentation should be required by the Commission in order to be satisfied that the parties have abandoned the transaction. That said, clearly further documentation may be required by the Commission where under the terms of the longstop provision, it is open to the parties to agree to extend the long stop date and to continue with the



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agreement nonetheless.

3. Community Dimension

Para 148 - Further to our comments above in relation to paragraph 18, an unusual but not exceptional situation is where an undertaking acquires control without being actively involved in a transaction. It would be helpful if the Commission could clarify the relevant triggering event in this circumstance, perhaps by way of footnote to this paragraph (the clarification may simply be that the same set of events is relevant albeit that some of those events, e.g. conclusion of a binding agreement, are not within the control of the undertaking obtaining control).

Para 160 - Paragraph 160 of the Draft Notice provides useful further guidance on the extent to which the concept of turnover group pursuant to Article 5(4) of the Merger Regulation differs from the control test under Article 3(2). The explanation of the fact that the two tests differ in relation to the concept of de facto control is particularly useful. However the current wording of this paragraph is somewhat confused and leaves room for doubt on this important issue. We suggest that the following amendments are made to this paragraph:

- The paragraph currently begins by discussing de facto sole control, moves on to de facto joint control and then reverts to discussing negative sole control. The paragraph would be clearer if the sole control concepts (de facto sole control and negative sole control) were discussed first with the concept of de facto joint control following.
- In relation to de facto sole control it is noted that this would only be taken into account for the purposes of 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.* " Later, in relation to negative sole control, it is noted that this will only be covered if " ... *the conditions of Article 5(4)(b)(i)-(iii) were met in the specific case.* "The different terminology used in each case is confusing and we suggest that in both cases the reference is to " ... *one of the conditions in Article 5(4)(b)(i)-(iii) being met*".

Paragraphs 174-176 - In relation to calculating the turnover of credit and other financial institutions Article 5(3) of the Merger Regulation cross refers to Council Directive 86/635/EEC for the definitions of the various items listed in Article 5(3)(a). However it is not clear from a simple cross reference to this directive that the correct turnover to be taken into account as regards interest income is gross interest income rather than net interest income (the later being what many financial institutions in practice consider to be their total turnover). Thus it would be helpful if the Commission were able to explicitly clarify this point perhaps by adding a new paragraph 177 commenting on this issue.

Para 179 - We note the approach adopted in paragraph 179 in relation to the geographic allocation of turnover whereby a distinction is drawn between situations where there is a direct customer and where there is not and that this position accords with the approach taken



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by the Commission in the *Hong Kong & Shanghai Bank/Midland* decision at footnote 117. Nonetheless it is not clear to us how the Commission is able to reconcile this approach with the clear wording of Article 5(3) of the Merger Regulation which simply states that the turnover of a credit or financial institution in the Community or in a Member State shall comprise the income items as comprised in Article 5(3)(a)(i) to (v) " ... *which are received by the branch or division of that institution established in the Community or the Member State in question, as the case may be*". Article 5(3) does not differentiate between dealing with a direct customer or otherwise. Further we note that the approach suggested by the Commission would entail a significant additional administrative burden on credit and financial institutions in determining their turnover in each member state and in the community. We suggest the Commission reconsiders the approach currently taken.

Para 212 - Paragraph 212 sets out the undertakings concerned in the context of an acquisition by a natural person and notes that the turnover of the undertakings controlled by that natural person should be included in the calculation of that natural person's turnover to the extent that the terms of Article 5(4) are satisfied. In some cases of this kind the natural person will also have direct income which may be significant (e.g. from a significant portfolio of minority interests in shares). Presumably in such cases this direct income will only be taken into account if it amounts to an economic activity carried out by the natural person. It would be helpful if the Commission could expressly clarify this at paragraph 212. In particular it would be helpful if the Commission could clarify the treatment of income received directly by the natural person from minority interests in shares.

4. Concluding Comments

We reiterate our support for this useful and important updating exercise and we trust that the above comments will be of assistance to the Commission in producing its final guidance.

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