

DRAFT COMMISSION CONSOLIDATED JURISDICTIONAL NOTICE

Clifford Chance comments

1. Introduction

- 1.1 Clifford Chance welcomes the opportunity to comment on the Draft Commission Consolidated Jurisdictional Notice (the "**Draft Jurisdictional Notice**"). Based on our extensive, specific experience of jurisdictional issues in Case T-417/05 *Endesa v Commission*, this submission mainly focuses on Section C (Community Dimension) of the Draft Jurisdictional Notice, in relation to which Clifford Chance considers it can perhaps provide particular insight.
- 1.2 We welcome the Commission's motivations for producing the Draft Jurisdictional Notice as set out in its Press Release of 28 September 2006¹ and consider that the Draft Jurisdictional Notice is generally more precise than the previous Notices and, for the most part, achieves the Commission's stated aims.

2. Section B

Part II - Acquisition of control

Section 1 - Concept of control

- 2.1 We note that paragraph 18 of the Draft Jurisdictional Notice states that there may be a "passive" acquisition of control which is triggered by the actions of third parties. This may lead to the acquisition of control occurring without the acquiring undertaking being aware or able to notify the concentration to the Commission. Undertakings in this situation should not be penalised for such a failure to notify.
- 2.2 We welcome the Commission's guidance on the acquisition of control by investment funds, as set out in paragraph 19 of the Draft Jurisdictional Notice, but would encourage the Commission to adhere to its commitment to "analyse structures involving investment funds on a case-by-case basis". We disagree with the statement in paragraph 19 that brand is relevant in determining whether different funds are linked. We note from footnote 26 that the turnover of all portfolio companies held by different funds may be taken into account in the turnover calculation. However, the Draft Jurisdictional Notice does not provide equivalent guidance on the allocation of costs in Section C.

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<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1273&format=HTML&aged=0&language=EN&guiLanguage=en>

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- 2.3 We welcome the guidance on transactions linked by conditionality in paragraph 35 of the Draft Jurisdictional Notice and consider that the guidance vis-à-vis the treatment of such transactions is clearer.

Section 3 - Negative control - control exercised by veto rights

- 2.4 We consider that the Draft Jurisdictional Notice must clarify the concept of negative control, as set out in paragraphs 56 and 57 of the Draft Jurisdictional Notice. The Draft Jurisdictional Notice appears to create a new category of control at a level below "sole control". We consider that there is no apparent need for such a categorisation and moreover it would be more consistent with recent case law to describe such negative control as a category of "sole control". We would encourage the Commission to justify why negative control is to be regarded as a distinct category of control, as opposed to a type of sole control and to provide more expansive legal explanations.

3. **Section C**

Part I - Thresholds

- 3.1 We welcome the clarification in relation to the thresholds under the EC Merger Regulation² ("ECMR") which is brought about by paragraphs 119 and 120 of the Draft Jurisdictional Notice.
- 3.2 We note that there is no mention of the two-thirds rule in the thresholds part of the Draft Jurisdictional Notice. The Draft Jurisdictional Notice would benefit from clarification in this regard, especially given the fact that the Commission has recently indicated its intention to review the two-thirds rule.
- 3.3 Following the judgment of the Court of First Instance ("CFI") in *Endesa v Commission*, we consider that the Draft Jurisdictional Notice should confirm that, when establishing whether a concentration has Community dimension, the burden of proof is not on the Commission, but rather the undertakings concerned.

Part III - Turnover

Section 2 - Ordinary activities

- 3.4 We welcome the clarification in paragraph 135 of the Draft Jurisdictional Notice that aid granted to undertakings by public bodies must be included in the calculation of turnover for those undertakings.
- 3.5 We consider that the guidance provided in paragraph 136 of the Draft Jurisdictional Notice in relation to internal revenues is useful. However, the Draft Jurisdictional Notice would benefit from some further guidance/examples in this area.

Section 4 - Turnover calculation and financial accounts

- 3.6 We welcome the guidance in paragraph 142 of the Draft Jurisdictional Notice that turnover should be calculated on the basis of the most accurate and reliable figures available, which are generally the audited accounts for the closest financial year to the transaction and figures which are audited under the standard applicable to the undertaking in question and compulsory for the relevant financial year.
- 3.7 Paragraph 142 of the Draft Jurisdictional Notice also sets out that adjustments to the audited figures should only be made where this is required by the provisions of the ECMR. However, it is unclear to which specific provisions of the ECMR this refers; we consider that this should be set out explicitly.
- 3.8 We consider that the final sentence of paragraph 146 of the Draft Jurisdictional Notice should be amended to clarify that the turnover of businesses divested must be excluded from the accounts in full and the annual turnover of the businesses acquired must be included in full.
- 3.9 We note that, in paragraph 179 of its judgment in *Endesa v Commission*, the CFI explicitly defined the "exceptional circumstances" in which undertakings may rely on provisional accounts as "significant and permanent changes in the economic reality of the undertakings concerned". Although the Commission has incorporated this wording into the Draft Jurisdictional Notice, it has done so in paragraph 145, which relates to adjustments, as opposed to in paragraph 143, which refers to exceptional circumstances and would therefore have been more appropriate. The Commission should consider amending the wording of paragraph 145, in order to clarify whether acquisitions or divestments are *an example* of a permanent change which can justify an adjustment, or whether permanent changes can *only* be acquisitions or divestments.

Part IV - Geographic allocation of turnover

- 3.10 We welcome the Commission's additional guidance on the geographic allocation of turnover in paragraphs 164 to 170 of the Draft Jurisdictional Notice
- 3.11 We consider that it would be useful if the Commission set out in Part IV generally, and in particular in relation to its example of the purchase of airline tickets, how turnover should be allocated where goods or services have been purchased over the Internet.
- 3.12 It is not clear whether the Commission's proposed approach to termination payments will also apply to mobile telephony roaming charges; it would be helpful if this was addressed in paragraph 170 of the Draft Jurisdictional Notice. In any event, we consider that, as roaming and call termination raise such complex issues, the Draft Jurisdictional Notice should include a separate section on telecoms.

² Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] O.J. L24/1

Part VI - Provisions for credit and other financial institutions and insurance undertakings

Section 2 - Calculation of turnover

- 3.13 We consider that the Commission's approach regarding the allocation of turnover for credit and other financial institutions and insurance undertakings, as set out in paragraph 179 of the Draft Jurisdictional Notice, is clearly incompatible with the requirements of Article 5(3) ECMR. Such a change would also cause considerable difficulties for financial institutions in calculating their turnover for ECMR purposes.
- 3.14 Paragraph 185 of the Draft Jurisdictional Notice states that the annual revenues produced by investments held by insurance undertakings, such as shares and land, are in the future to be taken into account when calculating the turnover of those undertakings. We consider that this change is also incompatible with Article 5(3) ECMR.

4. Section D

Acquisition of joint control

- 4.1 We consider that the Commission should clarify in paragraph 200 of the Draft Jurisdictional Notice whether it intends that, where a pre-existing company was under the sole control of one company and one or several new shareholders acquire joint control while the initial parent company remains, the target company should not be regarded as an undertaking concerned. If this is indeed intended to be the case, as opposed to the situation under paragraph 23 of the Notice on the Concept of Undertakings Concerned, the reasons for the change should be clarified, as this would have an impact on whether concentrations meet the jurisdictional thresholds under the ECMR.

Clifford Chance LLP

1 December 2006