

Group Legal Department

DRAFT COMMISSION CONSOLIDATED JURISDICTIONAL NOTICE

**France Télécom Group answer to the EC consultation
01/12/2006**

France Telecom welcomes the initiative of the Commission to consolidate and simplify the jurisdictional rules applicable to the European procedure of control of concentration under Regulation 139/2004.

France Telecom would like to make a number of comments on the proposition of the European Commission. On a general level, France Telecom regrets that the Commission decided to keep the structure of the existing notices, adding them up in one document instead of reorganising the analysis so as to discuss all related points in same "sections". In particular, section D relating to parties concerned and specific types of concentrations should be discussed in the section relating to the concept of concentration, rather than being left at the end after calculation of turnover and without any relation with the rest of the notice.

This being said, France Telecom would like to raise the following issues on particular elements of the general notice, and will do so following the structure of the draft notice, for an easier read.

I. Concept of Control

France Telecom welcomes the official position taken by the EC on outsourcing contracts (pt 22). Indeed, such position is in line with the business reality of outsourcing agreements, which should only be considered concentrations in specific cases, rather than being included in principle in the definition of concentration. France Telecom also hopes the EC will encourage the adoption of this position in all EU Member States in their national system, in order to ensure coherence at EU level.

France Telecom considers as inappropriate to maintain in the new notice the possibility of exercising joint control through the possession of one veto right only (point 64). Indeed, as explained by the EC for sole control, the control should result from a addition of specific veto rights. The existence of only one of such rights, in the hands of a party, should never be considered sufficient in itself to constitute control.

II. Joint Ventures and the concept of full-functionality

France Telecom considers that the EC is creating a room for a certain enlargement of the concept of full-functionality.

Firstly, in pt 89 of the draft notice, the EC indicate that the criterion of full-functionality is fulfilled if the joint venture is autonomous in operational respect only, adding in pt 90 that the secondment of personnel by the parent company 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. France Télécom considers that such criteria are not sufficient, in particular the absence of own staff for a JV, to qualify full-functionality.

As for the development of the JV's activities, described in pt 102 and following, the conditions in which the enlargement of the JV's activities could constitute a new concentration must be more clearly defined with reference to existing notions rather than using the general words "new activity". In this sense, France Telecom proposes that the new activity be expressly defined as the JV's apparition on a distinct relevant market, either through the addition by the parents of new assets, or through the acquisition of a new company. In any case, the reference to "new activity" can not be left open as proposed, since it would grant the EC significant discretion, thus leaving the companies in a great uncertainty faced with the constant changes of the markets.

III. Changes of transactions after a Commission authorisation decision

France Telecom would welcome a further clarification from the EC as regards the necessity of a new notification when the structure of a notified deal changes from article 3(1)b to a merger according to article 3(1)a (point 117). Indeed, the EC should clearly state that in all cases where such a change, after approval, does not modify the structure of the control, even if the identity of the notifying parties changes (be it through a "minor change in shareholding" or a substantial change in shareholding even before implementation), the parties should not be under the obligation to "re-notify" the deal, since the change will not affect the competition law analysis. The parties could be subject to an obligation to inform the EC of the change, but should not have the burden of a whole new notification.

IV. Turnover calculation and allocation

For the sake of clarity and simplification, which is the aim of the proposed notice, France Télécom proposes to use for the calculation of turnover the notion of control above described, in order to determine which companies should be taken into account for the calculation of turnover. The reference would make it easier for the companies, and render it closer to the accounting rules, rather than having to relate to the detention of shareholding only, which may lead to incoherence.