



International Chamber of Commerce

The world business organization

Comments on the European Commission's Draft Jurisdictional Notice on the Control of Concentrations

Prepared by the Commission on Competition

In general, ICC welcomes the idea of a consolidated notice since it is easier to use. In addition, the draft Notice takes into account the changes to the Merger Regulation from 2004 and the recent changes in jurisdictional policy.

ICC also welcomes the fact that the draft Notice contains new guidance in some areas and improves the guidance in other areas. In particular, ICC, along with many legal practitioners, is pleased to see that the draft Notice includes new guidance on acquisitions by investment funds, on outsourcing arrangements and on the policy that a concentration exists when an operation brings about a “lasting change” in the control of the undertakings concerned.

ICC also notes the new guidance on changes in transactions after they have been approved by the European Commission (“the Commission”).

In addition, ICC welcomes the improvements to the previous notices, with regard to interrelated transactions and clarification of the concepts of sole control, joint control and changes in the quality of control.

General comment

1. ICC is of the view that there is a difference in nature between the provisions of the Merger Regulation on jurisdictional matters and those dealing with substantive matters. The former, together with guidance of the Commission determine whether or not the Merger Regulation applies to a given transaction and thus whether or not undertakings have a duty to notify a transaction. Such provisions and the guidance of the Commission need to be precise and obviate as much as possible the need for undertakings to embark on an assessment. In other words, jurisdictional rules must be “hard and fast”.

This is why EU Member States abandoned in their merger control rules the notification threshold expressed in terms of market shares of the parties to a merger. This is also why, for the purposes of defining the jurisdiction of the European Commission, the EU Merger Regulation adopted EC-wide turnover figures as the criterion for the effect on trade between Member States. The Merger Regulation did so notwithstanding the fact that an EC-wide turnover below such figures may affect trade between Member States and an EC-wide turnover above such figures may not affect trade between Member States.

International Chamber of Commerce

38, Cours Albert 1er, 75008 Paris, France

Telephone +33 1 49 53 28 28 Fax +33 1 49 53 28 59

Website www.iccwbo.org E-mail icc@iccwbo.org

ICC would thus recommend that on a number of points the drafting take better account of the need for “hard and fast” jurisdictional guidelines. This is particularly the case for the topics which follow.

2. With respect to “control on a contractual basis”, paragraph 15 states “such contracts must be characterized by a very long duration”. One precedent referred to had a duration of 10-15 years, another one had a duration of 8 years.

ICC suggests that the guidelines state the duration.

3. Similarly, with respect to “control by other means”, paragraph 17 refers, for example, to “very important long-term supply agreements”.

ICC suggests that the guidelines define precisely what such agreements are for jurisdictional purposes.

4. This is a potential for confusion between the concept of turnover-generated activity in paragraph 22 and, in the context of outsourcing, “access to market” in paragraph 24. Whilst it can be assumed that the two are intended to be distinct concepts, the draft does not make this clear and the point merits clarification.
5. On the “object of control”, the last two sentences of paragraph 22 relate to a transaction limited to the assignment of IPRs. ICC would suggest that the text describe more clearly the situations in which the mere transfer of intangible assets is considered to be a concentration.

Paragraphs 23 to 25 dealing with outsourcing are a welcome clarification.

However, paragraph 24 would require that the outsourcing service supplier be able to supply also third parties either immediately or within a short period after the transfer. ICC suggests that the guidelines define what is meant by “within a short period”.

6. With respect to sole control, paragraph 53 deals with sole *de facto* control by minority shareholders. It states how the Commission will analyse this.

From the perspective of undertakings that have to assess whether or not to notify, it appears rather difficult to anticipate the result of the Commission analysis. ICC suggests that the guidelines provide figures which, where met, constitute a presumption of *de facto* control.

7. Paragraph 67 relates to the importance of investment decisions for the strategic behaviour of an undertaking. When assessing whether joint control exists on the basis of a given shareholders’ agreement how investment decisions are dealt with is an issue that is quite often faced and in borderline cases investment decisions may even play a decisive role.

According to ICC, it would therefore be important to more clearly describe the situations in which veto rights over investment decisions are considered to lead to joint control. Guidance

such as “whether investments constitute an essential feature of the market”, “the investment policy of the undertaking is normally an important element”, or “there may be some markets where investment does not play a significant role” is too vague.

Some other, specific comments

8. *Outsourcing*

Paragraph 24 provides that an outsourcing transaction where associated assets and/or personnel are transferred and the assets constitute the whole or part of an undertaking, i.e. a business with access to the market, is treated as a concentration.

ICC is of the view that such a transaction should only be qualified as a concentration where the turnover of the business transferred exceeds a certain threshold.

9. *Change of control on a lasting basis and interrelated transactions*

The issue of most practical interest to businesses is how warehousing and other interim structures will be dealt with by the Commission. As presently drafted sections 1.4 and 1.5 can be interpreted as offering the prospect of two alternative modes of treatment. Under paragraphs 28 to 32, the Notice provides that where a transaction takes place in several phases and the first phase is intended from the outset to be short-lived and temporary and where the second phase is legally bound to occur, the first phase does not constitute a transaction.

As far as the first possible mode of treatment is concerned, paragraph 29 and footnote 34 are too strict in stating that merger clearance for the second phase must be obtained in order for the first phase to be considered transitory.

The alternative approach to these forms of transactions is detailed in paragraphs 33-44, i.e. they may be viewed as a series of transactions linked by inter-conditionality and, as such, constitute one concentration. The notification requirement would then arise at stage 1.

Current practice seems to treat the first phase as a first step in the implementation of a single concentration but it is unclear from the draft whether this will be the Commission’s preferred approach. Clearer guidance would be welcome.

10. *Public bids*

With reference to paragraph 44 ICC is of the view that since the outcome of a public bid is inherently uncertain, the initial purchase of shares on the market (falling short of any form of control) should not trigger a notification even if part of the wider plan to make a public bid for the undertaking.

11. *“Negative” versus “positive control”*

The concept of “negative control” is distinguished from that of “positive control” (i.a. paras 56-57). The distinction is based on the assumption that “positive control” enables a shareholder to

impose on the merged entity certain actions that it could not impose if it had only negative control.

ICC doubts very much that there is in real life such a difference in nature as to require that a change from negative to positive control be notified under the Merger Regulation. Regarding the sentence in paragraph 81 the “possibility to determine strategic decisions on its own is of a different quality than the mere possibility to veto strategic decisions”, ICC notes that if an undertaking can block strategic decisions, it can also tell the other shareholders that, if the decision is changed in a certain way, it will not veto such a modified decision. In that sense, an undertaking with a veto does have the power to determine strategic decisions.

12. *Joint exercise of voting rights – Paragraphs 73 to 76*

These paragraphs are an attempt to clarify the concept of the joint exercise of voting rights. However, the explanations are not very helpful in defining the concept. ICC suggests that the Commission provide some guidance on this concept which is more precise in nature.

13. *Changes in the quality of control – Paragraphs 79 to 81*

ICC questions the need to file a notification when there has been a change in the quality of control. This approach will lead to the situation where an undertaking that initially acquired control and filed a notification, will, e.g. two years later, if there is a change in the quality of control by that undertaking, have to notify this as a new concentration.

14. *Joint ventures*

The statement in paragraph 102 that a notification may arise on transfer of additional assets from the parents or acquisition of whole or part of an undertaking that would on its own constitute a concentration causes concern. Presumably, such a transfer of assets should only give rise to a requirement to notify where those assets constitute a business to which turnover can be clearly attributed (cf. paragraph 22 of the draft Notice). This section requires rephrasing.

The attempt in paragraph 103 to draw a line between a decision (motivated by the parents) to enlarge the joint venture’s activities and “organic growth” would prove difficult to apply in practice. How does one differentiate what constitutes notifiable “enlargement” from organic growth?

In any event, a notifiable transaction requires a triggering event and no guidance is provided in that respect. This paragraph as currently drafted seems difficult to reconcile with the wording of Article 3(4) of the Merger Regulation which states that only the “creation” of a joint venture gives rise to a concentration.

Paragraph 104 deals with changes to an existing joint venture to render it full function, thereby giving rise at that point to a concentration. This notion is unworkable in practice and would give rise to great uncertainty. It is inherent in Articles 3(1)(b) and 3(4) of the Merger Regulation that the time at which full function status must be assessed is the time of the change in control.

There may be a potential concern that a joint venture may initially be set up as non-full function in order to circumvent the rules, with the intention of converting to full function soon thereafter.

However, this is a matter of evidence at the time the joint venture is formed. Any attempt to track changes in full functionality during the course of the joint venture is unworkable in practice. Again, the draft guidelines appear on this point to be contrary to the definition of a concentration in Article 3(1)(b) of the Merger Regulation.

15. *Turnover – Investment funds*

ICC recommends that the Notice provide much needed guidance on the calculation of turnover for investment funds. A clearer account of the rules applied to calculate such turnover, at least to mirror paragraph 19 on control of investment funds, is important. Footnote 26 to that paragraph states that “an investment company may be considered to indirectly have the power to exercise the voting rights held by the funds in the portfolio companies within the meaning of Article 5(4)(b)” with the potential result that turnover of all portfolio companies held by different funds is to be taken into account in calculating turnover. This is, however, not discussed in the section on turnover. It would be very helpful to have clarity on the criteria for calculating turnover in these circumstances.

16. On the geographical allocation of turnover, paragraph 167 addresses the case of a multinational corporation with a central purchasing organization.

ICC accepts that the situation in which such purchasing organization re-distributes goods to subsidiaries and that in which there is a direct link between the seller and the various subsidiaries of such corporation are different from a competition policy point of view. ICC wonders whether for jurisdictional purposes this is important, where the allocation rule would be relevant for determining which authority within the EU would have jurisdiction. In addition, ICC doubts whether technically it will always be possible for an undertaking with a central purchasing organization to identify the exact place of delivery.

Document No. 225/638
18 December 2006