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# RESPONSE TO:

# DRAFT COMMISSION CONSOLIDATED JURISDICTIONAL NOTICE UNDER COUNCIL REGULATION (EC) NO 139/2004 ON THE CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS

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**8 December 2006**

**Response to Draft Commission Consolidated Jurisdictional Notice**

## A. Introduction

1. This paper comments on the Commission's draft consolidated guidance concerning jurisdiction in merger control (the **"Draft Notice"**).

2. McDermott Will & Emery welcomes the opportunity to comment on the Draft Notice and commends the Commission's efforts to engage interested parties in the consolidation of the existing essential Notices concerning jurisdiction in merger control. We support the Commission's intention to make the issue of jurisdiction more user-friendly and to allow parties to establish more easily whether the Commission is competent for an envisaged transaction. We also welcome the fact that the Commission has taken into account the changes introduced by the new Merger Regulation in relation to jurisdictional issues, and that the Commission has incorporated into the Draft Notice recent case law and the development of its own established practice.

3. These comments are based on the extensive experience of McDermott Will & Emery in advising and representing businesses in relation to merger control at EU and national level in Europe, as well as in the USA.

## B. The Concept of Concentration

*General*

4. In establishing whether a transaction is notifiable under the Merger Regulation, the key factor is *control*. The definition of control requires careful consideration of a number of elements. The complexity of the test stands in contrast to the US model, where the mere acquisition of shares or assets of a company makes a transaction "reportable", subject to certain quantitative thresholds. Clear guidance on the concept of *control* is crucial for the assessment of whether a transaction constitutes a concentration and we welcome the guidance set out in the Draft Notice.

*Change of control on a lasting basis (paragraphs 26-32)*

5. We find helpful the Commission's guidance regarding the appropriate length of a transitory, jointly-controlled operation for a start-up period that ultimately results in sole control. The Commission refers to previous merger enforcement experience where start-up periods lasting as long as three years have found to be an acceptable start-up period. However, the Commission does not explain its basis for reducing generally acceptable start-up periods from three years to one year.

6. In contrast, based on Article 5(2) of the Merger Regulation, the Commission provides a two-year period during which two or more transactions between the same persons or

undertakings will be qualified as a single concentration for purposes of calculating turnover (paragraph 46).

7. It seems unclear why a start-up period could not equally last up to two years without impacting the market structure. Although each case would be considered on its merits, clarification of the rationale behind the one-year period, and the test to be applied, would be helpful.

*Negative Control – control exercised via veto rights (paragraphs 56-57)*

8. We note the reference to a "supermajority" required for strategic decisions which may confer a veto right upon only one shareholder, irrespective of whether it is a majority or a minority shareholder. This corresponds with the reference to a supermajority in the section dealing with sole control (paragraph 50). However, we make the following points:

   (i) The term "supermajority" would benefit from clarification, given that the case law cited involves veto rights being attached to a minority shareholding, as opposed to a requirement for a supermajority which in fact confers control. We suggest that some worked examples would be helpful in the Draft Notice.

   (ii) It would be helpful to understand why the Commission has removed the reference to the situation where a quorum requirement confers rights upon minority shareholders. It is possible that the Commission intends that the quorum point is accounted for within the wording: "if this does not lead to sole control on a *de facto* basis". However, this would benefit from clarification and explanation.

*Changes in the quality of control – reduction in the number of shareholders (paragraphs 86-87)*

9. We welcome the guidance on changes in the quality of control, which provides valuable assistance in assessing whether a change in the control structure of a company amounts to a notifiable concentration. However, we suggest that the Commission should clarify what it means by "*considerable more weight* in the decision making process (apart from a numerical increase of their voting rights)" (paragraph 87, emphasis added). In the interest of completeness, we believe that an example would be useful to illustrate what is meant by "*considerable more weight*".

*Joint ventures - the concept of full-functionality (paragraphs 88-101)*

10. The Draft Notice provides helpful, expanded guidance on a number of issues, including when a joint venture's activities render it "full-function"; how sale/purchase relations between the joint venture and parents affect the full-function character of the joint venture; and when a joint venture is considered to operate on a lasting basis.

11. It would be helpful if the Commission could similarly expand on the analysis required to determine whether a joint venture has sufficient resources to operate autonomously on a market (paragraphs 88-90). While the guidance is helpful on how personnel issues affect the joint venture's operational independence, it would be helpful to have elaboration of how particular categories of assets (e.g., intellectual property, raw material and infrastructure) also affect the full functional character of the joint venture. Indeed, in many previous Commission decisions, full-functionality was determined based on whether a joint venture had sufficient resources to operate independently of its parents.

12. While the analysis of whether a joint venture is capable of performing functions normally carried out by undertakings operating on the same market is fact-specific, some general guidance can be given for particular categories of resources. For example:

- *Intellectual property*. Several cases identify intellectual property as a key resource but make clear that full functionality will not necessarily be undermined if the joint venture's parents retain ownership of industrial and intellectual property rights if those rights are licensed to the joint venture for its lifetime. See, for example: *Hitachi/St Miroelectronics/SuperH JV*[1] (joint venture for development and licensing of Reduced Instruction Set Computer microprocessor); *Mannesmann/ Vallourec/Ilva*[2] (joint venture to run seamless stainless steel business), *Thomson/ Siemens/TM*[3] (joint venture in the field of air transport management systems and airport turnkey systems); *DMDATA/Kommunedata/e-BOKS*[4] (joint venture to manage safe Internet based Business-to-Consumer mailing and storage infrastructure facility); and *Rhodia/Raisio/JV*[5] (production and sale of latex).

- *Raw materials*. The Commission has found raw materials a resource needed to give a joint venture a "full-function" character. Previous Commission decisions demonstrate that a joint venture's autonomy is an issue where it obtains most of its raw materials from its parent(s) unless such arrangements are of limited duration and are non-exclusive. See, for example: *Rhodia/Raisio/JV*[6] (raw materials for latex); *Saint-Gobain/Wacker-Chemie/NOM*[7] (silicon carbide and micro grits); and *BP Chemicals/Solvay/HDPE JV*[8] (ethylene).

- *Infrastructure*. This is a broad category which covers facilities, utilities and/or services that are integrated into its parent's businesses. Generally speaking, the Commission's practice shows that a joint venture which depends on certain

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1 Case IV/M.2439.
2 Case IV/M.315.
3 Case IV/M.953.
4 Case COMP/M.2334.
5 Case COMP/M.1993.
6 Case IV/M.1993.
7 Case IV/M.774.
8 Case IV/M.2299.

infrastructure may nevertheless be considered autonomous provided its parents are unable to exercise significance influence over the joint venture so as to render it dependant on them. See, for example: *Nokia/Autoliv*[9] (providing accounting and administrative services); *Courtaulds/SNIA*[10] (production facilities); and *Harrisons & Crosfield/AKZO*[11] (production facilities).

*Changes in the activities of joint ventures (paragraphs 102-103)*

13. We suggest that the factors relevant to the assessment of whether a change in the activities of the joint venture triggers a notification requirement would benefit from some clarification or examples.

*Exceptions (paragraphs 105-110)*

14. There is a minor typographical inconsistency. It appears as though there are five exceptional situations, i.e. two more than in the existing Notice. In fact, the paragraphs commencing "fourth" and "fifth" (paragraphs 109-110) do not contain further exceptions, but describe situations where no exceptions apply. We suggest that this ambiguity be resolved through the use of an additional sub-heading or dropping the references to "fourth" and "fifth".

## C. Community Dimension

*General*

15. We welcome the clarification provided in relation to: (i) the general rule in calculating turnover, in particular the clarification regarding the use of provisional accounts (paragraph 143); (ii) the discussion on the relevant date for establishing the Commission's jurisdiction (paragraphs 148-150); and (iii) the detailed analysis of calculation of turnover, when provision of services are involved.

16. We consider that it would be helpful if the Commission could provide additional practical examples to assist merging parties in the sometimes complex task of establishing whether a concentration has a Community dimension.

*Pass-through revenues*

17. We note that the Notice on calculation of turnover does not refer to the concept of "passing through" of revenues derived by companies from the sale of products and the provision of services. The issue of "pass-through" of revenues, i.e. where amounts

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[9] Case IV/M.686.
[10] Case IV/M.113.
[11] Case IV/M.310.

collected by one company are then passed through to third parties, was discussed by the Commission in its *Endesa/Gas Natural* jurisdiction decision.[12]

18. Although paragraph 13 of the Notice on calculation of turnover refers to commissions received by intermediaries, it would be helpful if the Commission referred to the concept of "passing through" in the Draft Notice, in order to clarify the extent to which revenues passed on to third party service providers need to be taken into account.

*Accounting standards*

19. Paragraph 26 of the Notice on calculation of turnover states that the Commission "will refer to audited or other definitive accounts". In order to avoid any ambiguity as to the types of audited accounts that will acceptable by the Commission, it would be helpful if the Commission could state in the Draft Notice what types of accounts it will deem acceptable.

20. This could either refer to appropriate Community legislation, for example, Regulation 1606/2002 on the application of international accounting standards (as amended and implemented) or by providing that the Commission will issue additional guidance stating which accounting standards it considers acceptable (e.g., IFRS or standard GAAP). In any event, there should be sufficient clarity for companies in knowing what kind of accounting standards will be acceptable by the Commission, even if the position of other jurisdictions (such as the US) is left open.

*Air transport cases*

21. Paragraph 170 states that in air transport cases, the turnover generated is to be attributed to the location of the customer at the moment at which provision of the service commences, i.e. the place of departure. We would welcome the clarification by the Commission of the scenario of indirect flights, where the second flight is performed by a different undertaking.

## D. Detailed analysis of different types of concentration (paragraphs 191-216)

22. It would be helpful to include further examples of prior merger decisions to illustrate the principles underpinning the observations contained in the Draft Notice.

23. *Acquisition of parts of an undertaking:* It is important to be clear that an acquisition of specific assets is only notifiable if the assets constitute a business to which a market turnover can be attributed. Examples of cases include *Blokker/Toys 'R' Us*[13] and

[12] Case COMP/M.3986 declaring lack of Community Dimension – 15/11/2006.

[13] Case IV/M.890.

*Vattenfall/Elsam and E2 Assets*[14]. We therefore suggest that the second sentence of paragraph 14 of the concept of undertaking Notice be retained in the Draft Notice.

24. *Acquisition of control by a joint venture*. In footnote 124, there is a typographical error in that reference to ECU 250 million should be replaced with EUR 250 million.

25. *Changes of controlling shareholders in cases of joint control of an existing joint venture.* We believe that the categorisation at paragraph 34 of the Concept of Undertaking Notice is a helpful clarification and should also be included in the Consolidated Jurisdictional Notice.

26. *Break-up of joint ventures and exchange of assets.* While we understand the Commission's intention to simplify guidance in this section by defining assets as "businesses" (paragraph 209), we believe that this could lead to confusion. The explanation of the term "assets" (as currently used at paragraph 46 of the concept of undertaking Notice) should be used in the Draft Notice.

27. At paragraph 211, it would be helpful to include an explanation that the asset exchange operations are unlikely in most circumstances to qualify as a single concentration and will have to be notified separately. See, for example, *Solvay-Laporte/Interox*[15].

28. *Acquisitions of control by natural persons*. We suggest that the Draft Notice should deal with the situation of when investors/investment funds are deemed to be the controlling undertaking(s), rather than the managers, as occurred in *CWB/Goldman Sachs/Tarkett*[16].

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[14] Case IV/M.3867.
[15] Case IV/M197.
[16] Case IV/M.395.