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European Commission
Directorate-General for Competition
Consultation Jurisdictional Notice
Merger Registry
B-1049 Brussels
Belgium

By E-mail: comp-jurisdictional-notice@ec.europa.eu

**COMMENTS OF PAVIA E ANSALDO ON THE PROPOSED
CONSOLIDATED JURISDICTIONAL NOTICE**

Dear Sirs:

In my capacity as Head of the Antitrust Department of Pavia e Ansaldo, I hereby submit the comments of our firm to the Consolidated Jurisdictional Notice (“**Notice**”).

The introduction of the Notice as the unitary superseding instrument of the various documents published under the previous Merger Regulation is welcome. Clarity in the interpretation of Reg. 139/2004 can only benefit from the diffusion of a single notice whereby all major issues are dealt with in a comprehensive manner.

As a general observation, the Notice appears to be well-drafted, rich of examples and references to fact-specific instances. This will certainly help practitioners and interested constituencies in properly administering antitrust counselling and abeyance.

What follows is a brief list of those few aspects which, in our opinion, either deserve additional scrutiny or, possibly, warrant a different treatment altogether.

For sake of ease of reading, reference will be made to the headings used in the Notice.



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II. Acquisition of control

Paras. 11 et seq. of the Notice address the issue of acquisitions being made by individuals who control “*at least one other undertaking*”. The rationale is well exposed in para. 12, where it is made clear that the test aims at ascertaining, for a concentration to occur, whether the same individual carries out an economic activity on his/her own account.

Yet, it would be probably opportune to make clear in this Section of the Notice that the mere fact that an individual owns certain other corporate entities (e.g. mere acquisition vehicles or tax shelters, dormant and/or real estate companies) is not, absent special circumstances, considered relevant for the purpose of this provision, as long as a true additional economic activity is not carried out by the individual.

1.2. Means of control

We are of the opinion that the interplay between the notions of “*control on a contractual basis*”/”*Control by other means*” (paras. 15 et seq.) and “*control on a lasting basis*” (paras. 26 et seq.) may give rise to some conflict.

It is evident that the two sets of paragraphs purport to regulate different situations. On the one hand, the Notice wants to give indications as to what may constitute control on a contractual basis (to wit, short of the acquisition of shares or other voting instruments). On the other hand, for the event control is indeed proven to exist, the Notice addresses the issue of what constitutes a change thereof on a lasting basis, upon the statutory assumption that only changes of such nature are caught by the EU merger rules.

Yet, it is also undisputed that the two issues refer to common elements of fact and they both embody ‘time’ as a crucial factor for their operation.

The problem arises when one considers that para. 15 of the Notice requires “*long term*” contracts for a contractual control to exist, specifying that the relative agreements must be characterized by “*a very long duration*”. And footnote 18 seems to further suggest, by citing the case-law of the Commission, that a time span in excess of 8 years may be needed to that effect, at least as a rule of thumb.

Conversely, para. 26 requires only a “*sufficiently long*” period to trigger control on a lasting basis. And para. 32, for the case of joint-ventures, suggests that a 1-year terms is sufficient (thus superseding the previous *Kelt-American Express* jurisprudence which had stated that 3-years was not enough to establish a lasting change in control).

As a matter of fact, contrary to what appears to be the sense of paras. 15 and seq.:

- contractual control is not necessarily linked to a “*very long period of time*”. There might be agreements (allowed under certain of the Member States’ legislations, as mentioned in para. 15 and footnote 19) which have as their natural object and/or effect the power to exert decisive influence over another company: here, the existence of control seems to stem quite clearly from the very purpose/effect of

the agreement while, in all likelihood, duration is not a major factor (at least as regards proof of the existence of control);

- contractual control may be linked with time solely in those circumstances mentioned under **para. 17**.

In other words, it is not fully clear how time will have a role when contractual control and/or economic dependence is at stake.

Our opinion is that the Notice should elaborate more on these paragraphs. In this connection, we respectfully submit that the abandonment of the *Kelt-American Express* jurisprudence should be carefully re-assessed, so as to avoid catching within the realm of the Merger Regulation purely temporary changes in control.

Acquisition of control by investment funds

We appreciate the fact that the Notice gives greater attention to the increasingly important phenomenon of investment funds. Yet, we are of the opinion that certain of the specificities of the private equity transactions are still not fully perceived by the Notice.

Investment funds operate as the fiduciary arm of investors. They receive monies from the investors and they have compelling duties to manage each fund in the sole and best interest of its investors. The rules establishing the fund usually limit the operation of the fund and the management powers of the investment firm. At the same time, they also often provide for representatives of the investors to be present in various committees (e.g. Advisory Boards) so as to monitor the activity of the management firm. Last but certainly not least, national financial rules heavily regulate the activity of investment firms. One cannot forget that, pursuant to EU accounting and tax rules, investment firms do not consolidate the accounts of the fund and/or of the companies acquired by the fund, precisely because those assets are not treated as assets of the investment firms themselves.

All of the above to say that an investment firm cannot be assimilated to an 'ordinary' entrepreneur, who makes strategic business decision at its discretion. Conversely, investment firms seem to operate akin to Board of Directors in corporations, managing assets which belong not to the investment firm but to the investors only.

Boards of Directors make strategic decisions on behalf of the companies they work for. Yet, they themselves are not treated as controlling entity for the purpose of EU merger control law. At the same time, it could be argued that investment firms are not controlling entities of the funds they manage on behalf of the investors.

Under this perspective, investment firms would not be considered undertakings concerned for the purpose of the Merger Regulation and their turnovers (and that of the groups they belong to) should not be taken into account for the purpose of Article 5.

Who will be the controlling entity then ? We are of the opinion that two scenarios may occur:

- a) if there is a majority investor as beneficial owner of the fund and the rules establishing the fund give to the latter certain significant rights, the majority investor could be said to be the controlling entity of the fund;
- b) if there is no single investor who has a majority stake in the fund, then the acquisition vehicle ultimately making the acquisition (as the fund itself has no legal personality) could be considered the controlling entity. It goes by itself that the calculation of turnover pursuant to Article 5 shall be made accordingly.

This approach to investment firms seem to be better suited to address the issues raised by investment funds.

In light of the above, we urge this Hon. Commission to re-consider its position.

In this connection, the Notice could take the occasion to also dwell into the ‘sister’ issue of acquisitions made by trustees. Who can be considered the controlling entity: the settler ? The beneficiary ? Or the trustee ?.

1.3 Object of control

When discussing the issue of intellectual property rights being transferred and, in itself, such transfer being considered a concentration, **para. 22** should clarify to what extent, e.g., (long-term) licenses may also amount to a concentration for the purposes of the Merger Reg.

There is case-law to this effect in the records of the Italian Antitrust Authority. It would be interesting to understand where the Commission draws the line between a sale of a trade-mark or other IP right (which, under **para. 22** could amount to a concentration) and – e.g. - a 15-year license thereof. This obviously has a significant impact also as regards the relations between the Merger Reg. and the application of TTBE 772/2004.

The way this distinction is set forth in **para. 22** seems to suggest that, in theory, all exclusive licenses are concentrations and therefore subject to potential merger filing.

Sole control

Para. 54 considers the importance and relevance of options for assessing control. Since options may be used to overcome situations of deadlock between various shareholders, as past case-law and **para. 78** witness, it could be probably opportune to add this element also in **para. 54**.

Joint Control

We are of the opinion that, after over 15 years of merger enforcement at the EU level, the time has come for a deeper reconsideration of which rights effectively confer joint-control.

The impression is that, on this crucial subject, the Notice is excessively prudent, essentially mirroring its previous text.

We believe that it would be important to re-consider the impact of veto rights to the budget and/or the business plan, especially in situations (e.g. acquisitions by investment funds) where a veto right in respect thereof is clearly a mere protection of the minority investment. This is even more so the case as **para. 66** seems to suggest that usually a veto right on the business plan (if the latter is specific) is on its own sufficient to grant joint-control.

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We remain at the disposal of this Hon. Commission for any additional comment and/or explanation that is requested.

Best Regards

