

DRAFT¹ COMMISSION

CONSOLIDATED JURISDICTIONAL NOTICE

under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings

¹ The attached draft Commission Consolidated Jurisdictional Notice is for public consultation purposes only. It does not replace in any way the current Commission Notices on this subject (the Notice on the concept of concentration, the Notice on the concept of full-function joint ventures, the Notice on the concept of undertakings concerned and the Notice on calculation of turnover). Those Notices will continue to be in force until the time when they will be repealed.

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A. Introduction

1. The purpose of this Notice is to provide guidance as to jurisdictional issues under Council Regulation (EC) No 139/2004, OJ L 24, 29.1.2003, page 1 (the “Merger Regulation”).² This formal guidance should enable firms to establish more quickly, in advance of any contact with the Commission, whether and to what extent their operations may be covered by Community control of concentrations.
2. This Notice replaces the Notice on the concept of concentration³, the Notice on the concept of full-function joint ventures,⁴ the Notice on the concept of undertakings concerned⁵ and the Notice on calculation of turnover⁶.
3. This Notice deals with the concepts of a concentration and of a full-function joint venture, undertakings concerned and the calculation of turnover as set out in Articles 1, 3 and 5 of the Merger Regulation. Issues concerning referrals are dealt with in the Notice on referrals.⁷ The Commission's interpretation of Articles 1, 3 and 5 in the present Notice is without prejudice to the interpretation which may be given by the Court of Justice or by the Court of First Instance of the European Communities.
4. The guidance set out in this Notice reflects the Commission's experience in applying the recast Merger Regulation and the former Merger Regulation since the latter entered into force on 21 December 1990. The general principles governing the issues dealt with in this Notice have not been changed by the entry into force of Regulation (EC) No 139/2004; the Notice will explicitly indicate the changes brought about by the recast Merger Regulation with respect to the issues concerned. The principles contained in the Notice will be applied and further developed by the Commission in individual cases.
5. According to Article 1, the Merger Regulation only applies to operations that satisfy two conditions. First, there must be a concentration of two or more undertakings within the meaning of Article 3 of the Merger Regulation. Secondly, the turnover of the undertakings concerned, calculated in accordance with Article 5, must satisfy the

² Where it is necessary in this Notice to distinguish between Regulation 139/2004 and Council Regulation (EEC) No 4064/89 (OJ L 395, 30.12.19989, corrected version in OJ L 257, 21.9.1990, p.13, Regulation last amended by Regulation (EC) No 1310/97, OJ L 180, 9.7.1997, p.1, corrigendum in OJ L 40, 13.2.1998, p.17), the former will be referred to as the “recast Merger Regulation” whereas the latter will be referred to as the “former Merger Regulation”.

³ OJ C 66, 02.03.1998, p. 5.

⁴ OJ C 66, 02.03.1998, p.1.

⁵ OJ C 66, 02.03.1998, p.14.

⁶ OJ C 66, 02.03.1998, p.25.

⁷ OJ C 56, 05.03.2005, p. 2.

thresholds set out in Article 1 of the Regulation. The notion of a concentration (including the particular requirements for joint ventures), as the first condition, is dealt with under B; the identification of undertakings concerned and the calculation of their turnover as relevant for the second condition are dealt with under C. The application of these concepts in practice to different types of operations is explained in D.

B. The concept of concentration

6. According to Article 3(1) of the Merger Regulation, a concentration is only covering operations where a change of control in the undertakings concerned occurs on a lasting basis. Recital 20 in the preamble to the Merger Regulation further explains that the concept of concentration is intended to relate to operations which bring about a lasting change in the structure of the market. Because the test in Article 3 is centred on the concept of control, the existence of a concentration is to a great extent determined by qualitative rather than quantitative criteria.
7. Article 3(1) of the Merger Regulation defines two categories of concentrations:
 - those arising from a merger between previously independent undertakings (point (a));
 - those arising from an acquisition of control (point (b)).

These are treated respectively in Sections I and II below.

I. Mergers between previously independent undertakings

8. A merger within the meaning of Article 3(1)(a) of the Merger Regulation occurs when two or more independent undertakings amalgamate into a new undertaking and cease to exist as separate legal entities. A merger may also occur when an undertaking is absorbed by another, the latter retaining its legal identity while the former ceases to exist as a legal entity.⁸
9. A merger within the meaning of Article 3(1)(a) may also occur where, in the absence of a legal merger, the combining of the activities of previously independent undertakings results in the creation of a single economic unit⁹. This may arise in particular where two or more undertakings, while retaining their individual legal

8 See, for example, Case COMP/M. 1673 – Veba/VIAG of 13 June 2000; Case COMP/M.1806 – AstraZeneca/Novartis of 26 July 2000; Case COMP/M.2208 - Chevron/Texaco of 26 January 2001; and Case IV/M.1383 - Exxon/Mobil of 29 September 1999. A merger in the meaning of Article 3(1)(a) is not deemed to occur if a target company is merged with a subsidiary of the acquiring company to the effect that the parent company acquires control of the target undertaking under Article 3(1)(b), see Case COMP/M.2510 – Cendant/Galileo of 24 September 2001.

9 In determining the previous independence of undertakings, the issue of control may be relevant as the merger might otherwise only be an internal restructuring within the group. In this specific context, the assessment of control also follows the general concept set out below and includes *de jure* as well as *de facto* control.

personalities, establish contractually a common economic management¹⁰ or the structure of a dual listed company.¹¹ If this leads to a *de facto* amalgamation of the undertakings concerned into a single economic unit, the operation is considered to be a merger. A prerequisite for the determination of a common economic unit is the existence of a permanent, single economic management. Other relevant factors may include internal profit and loss compensation or a revenue distribution as between the various entities within the group, and their joint liability or external risk sharing. The *de facto* amalgamation may be solely based on contractual arrangements¹², but it can also be reinforced by cross-shareholdings between the undertakings forming the economic unit.

II. Acquisition of control

1. Concept of control

1.1 Person or undertaking acquiring control

10. Article 3 (1)(b) provides that a concentration occurs in the case of an acquisition of control. Such control may be acquired by one undertaking acting alone or by several undertakings acting jointly.
11. Control may also be acquired by a person in circumstances where that person already controls (whether solely or jointly) at least one other undertaking or, alternatively, by a combination of persons (which control another undertaking) and undertakings. The term "person" in this context extends to public bodies¹³ and private entities, as well as natural persons. Acquisitions of control by natural persons are therefore only considered to bring about a lasting change in the structure of the undertakings concerned if those natural persons carry out further economic activities on their own account or if they control at least one other undertaking.¹⁴
12. Control is normally acquired by persons or undertakings which are the holders of the rights or are entitled to rights conferring control under the contracts concerned (Article 3(3)(a)). However, there are also situations where the formal holder of a controlling interest differs from the person or undertaking having in fact the real power to exercise the rights resulting from this interest. This may be the case, for example, where an undertaking uses another person or undertaking for the acquisition of a controlling interest and has the power to exercise the rights conferring control through this person or undertaking, i.e. the latter is formally the holder of the rights, but acts

¹⁰ This could apply for example in the case of a "Gleichordnungskonzern" in German law, certain "Groupements d'Intérêt Economique" in French law, and the amalgamation of partnerships, as in Case IV/M.1016 – Price Waterhouse/Coopers&Lybrand of 20 May 1998.

¹¹ Case IV/M.660 - RTZ/CRA of 7 December 1995; Case COMP/M.3071 – Carnival Corporation/P.O Princess II of 24 July 2002.

¹² See Case IV/M.1016 – Price Waterhouse/Coopers&Lybrand of 20 May 1998; Case COMP/M.2824 – Ernst & Young/Andersen Germany of 27 August 2002.

¹³ Including the State itself, e.g. Case IV/M.157 - Air France/Sabena, of 5 October 1992 in relation to the Belgian State, or other public bodies such as the Treuhandanstalt in Case IV/M.308 - Kali und Salz/MDK/Treuhand, of 14 December 1993.

¹⁴ Case IV/M.82 – Asko/Jakobs/Adia of 16 May 1991 including a private individual as undertaking concerned.; Case COMP/M3762 - Apax/Travelex of 16 June 2005 in which a private individual acquiring joint control was not considered an undertaking concerned.

only as a vehicle. In such a situation, control is acquired by the undertaking which in reality is behind the operation and in fact enjoys the power to control the target undertaking (Article 3(3)(b)). The Court of First Instance concluded from this provision that rights conferring control held by commercial companies can be attributed to their exclusive shareholders, their majority shareholders or to those jointly controlling the companies since these companies comply in any event with the decisions of those shareholders.¹⁵ A controlling shareholding which is held by different entities in a group is normally attributed to the undertaking exercising control over the different formal holders of the rights. In other cases, the evidence needed to establish this type of indirect control may include, either separately or in combination and to be assessed on a case-by-case basis, factors such as shareholdings, contractual relations, source of financing or family links.¹⁶

1.2 Means of control

13. Control is defined by Article 3(2) of the Merger Regulation as the possibility of exercising decisive influence on an undertaking. It is therefore not necessary to show that the decisive influence is or will be actually exercised; however, the possibility of exercising that influence must be effective.¹⁷ Article 3(2) further provides that the possibility of exercising decisive influence on an undertaking can exist on the basis of rights, contracts or any other means, either separately or in combination, and having regard to the considerations of fact and law involved. These criteria include considerations of both law and fact and a concentration therefore may occur on a legal or a *de facto* basis. It may take the forms of sole or joint control, and extends to the whole or parts of one or more undertakings (cf. Article 3(1)(b)).

Control by the acquisition of shares or assets

14. Whether an operation gives rise to an acquisition of control therefore depends on a number of legal and/or factual elements. The most common means for the acquisition of control is the acquisition of shares, possibly combined with a shareholders' agreement in cases of joint control, or the acquisition of assets.

Control on a contractual basis

15. Control can also be acquired on a contractual basis. In order to confer control, the contract must lead to a similar control of the management and the resources of the other undertaking as in the case of acquisition of shares or assets. In addition to transferring control over the management and the resources, such contracts must be characterised by a very long duration (without a possibility of early termination for the party granting the contractual rights). Only long-term contracts can result in a structural change in the market.¹⁸ Examples of such contracts are organisational contracts under national

¹⁵ CFI, Case T-282/02 *Cementbouw v Commission* (not yet reported), paragraph 72 (judgment of 23 February 2006).

¹⁶ See Case M.754 – *Anglo American Corporation/Lonrho* of 23 April 1997.

¹⁷ CFI, Case T-282/02 *Cementbouw v Commission* (not yet reported), paragraph 58 (judgment of 23 February 2006).

¹⁸ In Case COMP/M.3858 – *Lehman Brothers/SCG/Starwood/Le Meridien* of 20 July 2005 the management agreements had a duration of 10-15 years; in Case COMP/M.2632 – *Deutsche Bahn/ECT International/United Depots/JV* of 11 February 2002 the contract had a duration of 8 years.

company law¹⁹ or other types of contracts, *e.g.* in the form of agreements for the lease of the business, giving the acquirer control over the management and the resources despite the fact that property rights or shares are not transferred. In this respect, Article 3(2)(a) specifies that control may also be constituted by a right to use the assets of an undertaking.²⁰ Such contracts may also lead to a situation of joint control if both the owner of the assets as well as the undertaking controlling the management enjoy veto rights over strategic business decisions.²¹

Control by other means

16. In line with these considerations, franchising agreements as such do not normally confer control on the franchisor over the franchisee's business. The franchisee usually exploits the entrepreneurial resources on its own account even if essential parts of the assets may belong to the franchisor.²² Furthermore, purely financial agreements, such as sale-and-lease-back transactions with arrangements for a buyback of the assets at the end of the term, do not normally constitute a concentration as they do not change control over the management and the resources.
17. Furthermore, control can also be established by any other means. Purely economic relationships may play a decisive role for the acquisition of control. In exceptional circumstances, a situation of economic dependence may lead to control on a *de facto* basis where, for example, very important long-term supply agreements or credits provided by suppliers or customers, coupled with structural links, confer decisive influence.²³ In such a situation, the Commission will carefully analyse whether such economic links, combined with other links, are sufficient to lead to a change of control on a lasting basis.²⁴
18. There may be an acquisition of control even if it is not the declared intention of the parties or if the acquirer is only passive and the acquisition of control is triggered by action of third parties. Examples are situations where the change of control results from

19 Examples of such specific contracts under national company law are the "Beherrschungsvertrag" in German law or the "*Contrato de subordinação*" in Portuguese law; such contracts may not be admissible in all Member States.

20 See Case COMP/M.2060 – Bosch/Rexroth of 12 January 2001 concerning a control contract (Beherrschungsvertrag) in combination with a business lease; Case COMP/M.3136 – GE/Agfa NDT of 5 December 2003 concerning a specific contract to transfer control over entrepreneurial resources, management and risks; Case COMP/M.2632 – Deutsche Bahn/ECT International/United Depots/JV of 11 February 2002 concerning a business lease.

21 Case COMP/M.3858 – Lehman Brothers/SCG/Starwood/Le Meridien of 20 July 2005; see also case IV/M.126 – Accor/Wagon-Lits of 28 April 1992 in the context of Article 5(4)(b) of the Merger Regulation.

22 Case M.940 – UBS/Mister Minit, in the context of Article 5(4)(b) of the Merger Regulation. For the treatment of franchising relationships in the competitive assessment, see Case COMP/M.4220 – Food Service Project/ Tele Pizza of 6 June 2006. From franchising agreements, the situation in Case IV/M.126 – Accor/Wagon-Lits of 28 April 1992 has to be distinguished. In this case, again in the context of Article 5(4)(b), the hotel company had a right to manage also hotels in which it only owned a minority stake as it had entered into hotel management agreements giving it influence over the day-to-day operations of these hotels, including decisions on budgetary matters.

23 See Case IV/M.794 – Coca-Cola/Amalgamated Beverages GB of 22 January 1997; Case IV/ESCS.1031 – US/Sollac/Bamesa of 28 July 1993; Case IV/M.625 – Nordic Capital/Transpool of 23 August 1995; for the criteria see also Case IV/M.697 - Lockheed Martin Corporation/Loral Corporation, of 27 March 1996.

24 See Case IV/M.258 - CCIE/GTE, of 25 September 1992 where the Commission did not find control due to the temporary nature of the commercial agreements involved.

the inheritance of a shareholder or where the exit of a shareholder triggers a change of control, in particular a change from joint to sole control.²⁵ Article 3(1)(b) comprises such scenarios in specifying that control may also be acquired “by any other means”. Moreover, the Merger Regulation clearly defines control as entailing “the possibility of exercising decisive influence” rather than the actual exercise of such influence.

Acquisition of control by investment funds

19. Specific issues concerning the means of control may arise in the case of acquisitions of control by investment funds. The Commission will analyse structures involving investment funds on a case-by-case basis, but some general features of such structures can be set out on the basis of the Commission’s past experience. If there is a multitude of investors in the fund, the investors normally do not exercise control, neither individually nor collectively, but control is typically exercised by the fund itself or the investment company which has set up the fund. The investment company usually exercises control by means of the organisational structure, *e.g.* by controlling the general partner of funds organised as limited partnerships, or by contractual arrangements. These considerations also apply if an investment company sets up several investment funds which intend to invest in different portfolio undertakings. The different funds are normally linked together by their relations with the investment company. An investment company which operates the different funds under a common brand, combined with a common organisational structure for the control of those funds or with contractual arrangements, in particular advisory agreements, which lead to a common management of the funds, are indicators of a common control structure exercised by the investment company over all the different funds. Further indicators are a general partner without any own resources, only constituting a company structure whose acts are performed by persons linked to the investment company. Via the general partner, the investment company may therefore acquire indirectly the possibility to exercise decisive influence over the portfolio companies held by the funds.²⁶ This may be the case even if the investment company itself does not own the companies acting as general partners of the different funds, but their shares are held by natural persons (who may be linked to the investment company) or by a trust.

Control and national company law

²⁵ See Case COMP/M.3330 – RTL/M6 of 12 March 2004; Case COMP/M.452 - Avesta (II) of 9 June 1994.
²⁶ In the same way, the 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). This may lead to the result that the turnover of all portfolio companies held by different funds is taken into account for the purpose of assessing whether the turnover thresholds in Article 1 are met.

20. National legislation within a Member State may provide specific rules on the structure of bodies representing the organization of decision-making within an undertaking. While such legislation may confer some power of control upon persons other than the shareholders, in particular on representatives of employees, the concept of control under the Merger Regulation is related only to the means of influence normally enjoyed by the owners of an undertaking. Also restrictions in the articles of association concerning the persons eligible to sit on the board, such as a provisions foreseeing that no representatives of the parent companies may sit on the board, do not exclude the existence of control as long as the shareholders retain the power to appoint the members of the board, even if the choice of persons is restricted.²⁷ Similarly, despite provisions of national law foreseeing that decisions of a company must be taken by its company organs in its interests, those persons holding the voting rights have the power to adopt those decisions and therefore have the possibility to exercise decisive influence on the company.²⁸

Control in other areas of legislation

21. The concept of control under the Merger Regulation may be different from that applied in specific areas of legislation concerning, for example, prudential rules, taxation, air transport or the media. The interpretation of “control” in other areas is therefore not necessarily decisive for the concept of control under the Merger Regulation.

1.3 Object of control

22. The Merger Regulation provides in Article 3(1)(b), (2) that the object of control can be one or more, or also parts of, undertakings which constitute legal entities, or the assets of such entities, or only some of these assets.²⁹ The acquisition of control over assets can only be considered a concentration if those assets constitute the whole or a part of an undertaking, i.e. a business with a market presence, to which a market turnover can be clearly attributed. The transfer of the client base of a business can be deemed a concentration.³⁰ A transaction confined to intangible assets such as brands, patents or copyrights may also be considered to be a concentration if they are the basis for an existing economic activity and the assignment of these intellectual property rights seems sufficient for also transferring the turnover-generating activity. The grant or transfer of licences, without additional assets, will normally only bring about a concentration if they are exclusive at least in a certain territory; for non-exclusive licences it can be excluded that they may constitute on their own a business to which a market turnover is attached.

²⁷ CFI, Case T-282/02 Cementbouw v Commission (not yet reported), paragraphs 70, 73, 74 (judgment of 23 February 2006).

²⁸ CFI, Case T-282/02 Cementbouw v Commission (not yet reported), paragraphs 79 (judgment of 23 February 2006).

²⁹ Case IV/M.286 - Zürich/MMI, of 2 April 1993.

³⁰ Case COMP/M.2857 – ECS/IEH of 23 December 2002.

23. Specific issues arise in cases where an undertaking outsources in-house activities, such as the provision of services or the manufacturing of products, to a service provider. Typical cases are the outsourcing of IT services to specialised IT companies. Outsourcing contracts can take several forms; their common characteristic is that the outsourcing service supplier shall provide those services to the customer which the latter has performed in-house before. Cases of simple outsourcing do not involve any transfer of assets or employees to the outsourcing service suppliers, but, as the case may be, any assets or employees are retained by the customer. Such an outsourcing contract is akin to a normal service contract and even if the outsourcing service supplier acquires a right to direct those assets and employees of the customer, no concentration arises if the assets and employees will be used exclusively to service the customer.
24. The situation may be different if the outsourcing service supplier, in addition to taking over a certain activity which was previously provided internally, is transferred the associated assets and/or personnel. A concentration only arises in these circumstances if the assets constitute the whole or part of an undertaking, i.e. a business with access to the market. This requires that the assets previously dedicated to in-house activities of the seller will enable the outsourcing service supplier to provide services not only to the outsourcing customer but also to third parties, either immediately or within a short period after the transfer. This will be the case if the transfer relates to an internal business unit or a subsidiary already engaged in the provision of services to third parties. If third parties are not yet supplied, the assets transferred in the case of manufacturing should contain production facilities, the product know-how (it is sufficient if the assets transferred allow the build-up of such capabilities in the near future) and, if there is no existing market access, the means for the purchaser to develop a market access within a short period of time (e.g. including existing contracts or brands).³¹ As regards the provision of services, the assets transferred should include the required know-how (e.g. the relevant personnel and intellectual property) and those facilities which allow market access (such as, e.g., marketing facilities).³² The assets transferred therefore have to include at least those core elements that would allow a market presence or the acquiring undertaking must be able to complement them with its own assets to build up a market presence. The time-frame in which the acquirer should be able to build up a market presence is similar to the start-up period for joint ventures as set out below under points 93, 96. As in the case of joint ventures, the Commission will take account of substantiated business plans and general market features for assessing this.
25. If the assets transferred do not allow the purchaser to at least develop a market access, it is likely that they will be used only for providing services to the outsourcing customer. In such circumstances, the transaction will not result in a lasting change in the market structure and the outsourcing contract is again similar to a service contract. The transaction will not constitute a concentration. The specific requirements under which a joint venture for the provision of outsourcing services is qualified as a concentration are assessed in the present Notice in the section on full function joint ventures.

³¹ See Case COMP/M.1841 – Celestica/IBM of 25 February 2000; Case COMP/M.1849 – Solectron/Ericsson of 29 February 2000; Case COMP/M.2479 – Flextronics/Alcatel – of 29 June 2001; Case COMP/M.2629 – Flextronics/Xerox of 12 November 2001.

³² See, in the context of joint ventures, Case IV/M.560 – EDS/Lufthansa of 11 May 1995; Case COMP/M.2478 - IBM Italia/Business Solutions/JV of 29 June 2001.

1.4 Change of control on a lasting basis

26. Article 3(1) of the Merger Regulation defines the concept of a concentration in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and, as recital 20 adds, in the structure of the market. The Merger Regulation therefore does not deal with transactions resulting only in a temporary change of control. However, a change of control on a lasting basis is not excluded by the fact that the underlying agreements are entered into for a definite period of time, provided those agreements are renewable. A concentration may arise even in cases in which agreements foresee a definite end-date, if the period envisaged is sufficiently long to lead to a lasting change in the control of the undertakings concerned.³³
27. The question whether an operation results in a lasting change in the market structure is also relevant for the assessment of several operations occurring in succession, where the first transaction is only transitory in nature. Several scenarios can be distinguished in this respect.
28. In one scenario, several undertakings come together solely for the purpose of acquiring another company on the basis of an agreement to divide up the acquired assets according to a pre-existing plan immediately upon completion of the transaction. In such circumstances, in a first step, the acquisition of the entire target company is carried out by one or several undertakings. In a second step, the acquired assets are divided among several undertakings. The question is then whether the first transaction is to be considered as a separate concentration, involving an acquisition of sole control (in the case of a single purchaser) or of joint control (in the case of a joint purchasing) of the entire target undertaking, or whether only the acquisitions in the second step constitute concentrations, whereby each of the acquiring undertakings acquires its relevant part of the target undertaking.
29. The Commission considers that the first transaction does not constitute a concentration, provided a number of conditions are met: First, the subsequent break-up must be agreed between the different purchasers in a legally binding way. Second, there must not be any uncertainty that the second step, the division of the acquired assets, will take place within a short time-frame after the first acquisition. As regards regulatory uncertainties, the second condition will normally require that the first acquisition can only proceed if merger-control clearance for all concentrations resulting from the split-up of the assets has been obtained.³⁴

³³ See, in cases of joint ventures, Case COMP/M.2903 – DaimlerChrysler/Deutsche Telekom/JV of 30 April 2003 where a period of 12 years was considered sufficient; Case COMP/M.2632 – Deutsche Bahn/ECT International/United Depots/JV of 11 February 2002 with a contract duration of 8 years. In Case COMP/M.3858 Lehman Brothers/Starwood/Le Meridien of 20 July 2005, the Commission considered a minimum period of 10-15 years sufficient, but not a period of three years.

³⁴ This is in line with the requirements of the stand-still provision in Article 7(1) of the Merger Regulation. The first acquisition can only be implemented once it is clear that it does not result in a concentration as it will not occur on a lasting basis. This will only be the case if all the concentrations resulting from the division of the acquired assets have obtained any obligatory merger-control clearance and it can therefore be foreseen that they will proceed within a short time-frame after the implementation of the first acquisition, in accordance with the agreements between the parties. Nevertheless, all concentrations resulting from the division of the assets can be notified simultaneously.

30. If both conditions are met, the first acquisition does not result in a change of control on a lasting basis and there is no effective concentration of economic power between the acquirer(s) and the target company as a whole since the acquired assets are not held in an undivided way on a lasting basis, but only for the time necessary to carry out the immediate split-up of the acquired assets. In those circumstances, only the acquisitions of the different parts of the undertaking in the second step will constitute concentrations, whereby each of these acquisitions by different purchasers will constitute a separate concentration. This is irrespective of whether the first acquisition is carried out by only one undertaking³⁵ or jointly by the undertakings which are also involved in the second step.³⁶ In any case, it must be noted that the scope of a clearance decision will only allow for a takeover of the entire target if the break-up can proceed within a short time-frame afterwards and the different parts of the target undertaking are directly sold on to the respective ultimate buyer.
31. However, if these conditions are not fulfilled, in particular if there is uncertainty that the second step will proceed within a short time-frame after the first acquisition, the Commission will consider the first transaction as a separate concentration, involving the entire target undertaking. This, *e.g.*, is the case if the first transaction may also proceed independently of the second transaction³⁷ or if a longer transitory period is needed to dismantle the target undertaking.³⁸
32. A second scenario is an operation leading to joint control for a starting-up period but, according to legally binding agreements, this joint control will be converted to sole control by one of the shareholders. As the joint control situation may not constitute a lasting change of control, the whole operation may be considered to be an acquisition of sole control. In the past, the Commission accepted that such a start-up period could last up to three years.³⁹ Such a period seems to be too long to exclude that the joint control scenario has an impact on the structure of the market. The period therefore should, in general, not exceed one year and there should be clear indications that the joint control period is only transitory in nature.⁴⁰ Only such a relatively short period will make it unlikely that the joint control period will have a distinct market impact and can therefore be considered as not leading to a change in control on a lasting basis.

1.5 Interrelated transactions

33. Several transactions can be qualified as a single concentration under the Merger Regulation either according to the general rule of Article 3 – as the transactions are

³⁵ For a first acquisition by only one undertaking see Case COMP/M.3779 – Pernod Ricard/Allied Domecq of 24 June 2005 and Case COMP/M.3813 – Fortune Brands/Allied Domecq/Pernod Ricard of 10 June 2005; Case COMP/M.2060 – Bosch/Rexroth of 12 January 2001.

³⁶ For a joint acquisition see Case COMP/M.1630 – Air Liquide/BOC of 18 January 2000; Case COMP/M.1922 – Siemens/Bosch/Atecs of 11 August 2000; Case COMP/M.2059 – Siemens/Dematic/VDO Sachs of 29 August 2000.

³⁷ See Case COMP/M.2498 – UPM-Kymmene/Haindl of 21 November 2001 and Case COMP/M.2499 – NorkeSkog/Parenco/Walsum of 21 November 2001.

³⁸ Case COMP/M.3372 – Carlsberg/Holsten of 16 March 2004.

³⁹ Case IV/M.425 – British Telecom/Santander of 28 March 1994.

⁴⁰ See Case M.2389 – Shell/DEA of 20 December 2001 where the ultimate acquirer of sole control had a strong influence in the operational management during the joint control period; Case M.2854 – RAG/Degussa of 18 November 2002 where the transitional period was designed to facilitate internal post-merger restructuring.

interdependent - or according to the specific provision of Article 5(2) second subparagraph.

34. Article 5(2)(2) governs a different question from that referred to by Article 3 of the Merger Regulation. Article 3 defines the existence of a “concentration” in general and material terms, but does not directly determine the question of the Commission’s competence in respect of concentrations. Article 5 intends to specify the scope of the Merger Regulation, in particular by defining the turnover to be taken into account for the purpose of determining whether a concentration has Community dimension, and Article 5(2) second subparagraph allows the Commission in this respect to consider two or more concentrative transactions to constitute a single concentration for the purposes of calculating the turnover of the undertakings concerned. The assessment whether, in application of Article 3, a number of transactions notified to the Commission give rise to a single concentration or whether those transactions must be regarded as giving rise to a number of concentrations, is thereby logically precedent to the question addressed in Article 5(2) second subparagraph.⁴¹

Transactions linked by conditionality

35. The general and teleological definition of a concentration set out in Article 3(1) – the result being control of one or more undertakings – implies that it makes no difference whether control was acquired by one or several legal transactions, provided that the end result constitutes a single concentration. Two or more transactions constitute a single concentration for the purposes of Article 3 if they are unitary in nature. It should therefore be determined whether those transactions are interdependent in such a way that none of them would be carried out without the others and that the result leads to conferring one or more undertakings direct or indirect economic control over the activities of one or more other undertakings. For the assessment the economic reality underlying the transactions is to be identified and thus the economic aim pursued by the parties.⁴²
36. Recital 20 explains in this respect that it is appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition. The requirement that the transactions are interdependent as set out by the Court of First Instance in the *Cementbouw* judgment⁴³ thereby corresponds to the explanation set out in recital 20 that the transactions are linked by condition.
37. This general approach reflects, on the one hand, that under the Merger Regulation transactions which stand or fall together according to the economic objectives pursued by the parties should also be analysed in one procedure. In these circumstances, the change of the market structure is brought about by these transactions together. On the other hand, if different transactions are not interdependent and if the parties would proceed with one of the transactions if the other ones would not succeed, it seems appropriate to assess these transactions individually under the Merger Regulation.

⁴¹ CFI, Case T-282/02 *Cementbouw v Commission* (not yet reported), paragraphs 113-119 (judgment of 23 February 2006).

⁴² CFI, Case T-282/02 *Cementbouw v Commission* (not yet reported), paragraphs 104-109 (judgment of 23 February 2006).

⁴³ CFI, Case T-282/02 *Cementbouw v Commission* (not yet reported), paragraphs 106-109 (judgment of 23 February 2006).

38. The required conditionality is two-way: From the viewpoint of the parties, none of the transactions would take place without the others and they therefore constitute a single operation.⁴⁴ Such conditionality is normally deemed to be demonstrated if the transactions are linked *de jure*, *i.e.* the agreements themselves are linked by mutual conditionality. However, if *de facto* conditionality can be satisfactorily demonstrated, it is also sufficient for qualifying the transactions as a single concentration. Decisive in this respect is an economic assessment of the interdependence between the transactions according to the economic aim pursued by the parties.⁴⁵ An indication for interdependence of several transactions may further be the statements of the parties themselves or the simultaneous conclusion of the relevant agreements; in any case, a conclusion of *de facto* interconditionality of several transactions will be difficult to reach in the absence of their simultaneity. A pronounced lack of simultaneity of legally inter-conditional transactions may likewise put into doubt their true interdependence.
39. The principle that several transactions can be treated as a single concentration under the mentioned conditions only applies if the result is that control of one or more undertakings is acquired. First, this may be the case if a single business or undertaking is acquired via several legal transactions. Second, also the acquisition of control of several undertakings – which could constitute concentrations in themselves - can be linked in such a way that it constitutes a single concentration. However, it is not possible under the Merger Regulation to link different legal transactions which only partly concern the acquisition of control of undertakings, but partly also the acquisition of other assets, such as non-controlling minority stakes in other companies. It would not be in line with the general framework and the purpose of the Merger Regulation if different transactions, linked by conditionality, were assessed as a whole under the Merger Regulations if only some of these transactions lead to a change in control of a given target.
40. A single concentration may therefore exist if the same purchaser(s) acquire control of a single business, *i.e.* a single economic entity, via several legal transactions if those are inter-conditional. This is the case irrespective of whether the business is acquired in a corporate structure, consisting of one or several companies, or whether various assets are acquired which form a single business, *i.e.* a single economic entity managed for a common commercial purpose to which all the assets contribute. Such a business may comprise majority and minority stakes in companies as well as tangible and intangible assets. If several legal transactions which are interdependent are required to transfer such a business, these transactions constitute one concentration.⁴⁶

⁴⁴ CFI, Case T-282/02 *Cementbouw v Commission* (not yet reported), paragraphs 127 et seq. (judgment of 23 February 2006).

⁴⁵ CFI, Case T-282/02 *Cementbouw v Commission* (not yet reported), paragraphs 131 et seq. (judgment of 23 February 2006).

⁴⁶ See Case IV/M.470 – *Gencor/Shell* of 29 August 1994; COMP/M.3410 – *Total/Gaz de France* of 8 October 2004; Case IV/M.957 – *L’Oreal/Procasa/Cosmetique Iberica/Albesa* of 19 September 1997; Case IV/M.861 – *Textron/Kautex* of 18 December 1996 where all the assets were also used in the same product market. The same considerations apply if a joint venture is created by several companies, forming a single business, see Case M.4048 - *Sonae Industria/Tarkett* of 12 June 2006 where the interdependence of transactions establishing, respectively, a production and a distribution joint venture was necessary in order to demonstrate that there was a single concentration that would create a full-function joint venture.

41. For the treatment of several acquisitions of control as a single concentration, several scenarios have arisen in the Commission's past decisional practice. One such scenario is a parallel acquisition of control, i.e. undertaking A acquires control of undertaking B and C in parallel from separate sellers on condition that A is not obliged to buy either and neither seller is obliged to sell, unless both transactions proceed.⁴⁷ Another scenario is a serial acquisition of control, i.e. undertaking A acquires control of undertaking B conditional on B's prior acquisition of undertaking C before, as assessed in the Kingfisher case.⁴⁸
42. In the same way as the Kingfisher scenario, the Commission approaches cases where, in a serial transaction, an undertaking agrees to acquire first sole control of a target undertaking, with a view to directly selling on parts of the acquired stake in the target to another undertaking, finally resulting in joint control of both acquirers over the target company. If both acquisitions are inter-conditional, the two transactions constitute a single concentration and only the acquisition of joint control, as the final result of the transactions, will be considered by the Commission.⁴⁹
43. However, several transactions, linked by condition upon each other, can only be treated as a single concentration, if, from the viewpoint of the final situation, control is acquired ultimately by the same undertaking(s). Only in these circumstances two or more transactions can be considered to be unitary in nature and therefore to constitute a single concentration for the purposes of Article 3. This excludes de-mergers of joint ventures by which different parts of an undertaking are split between its former parent companies. The Commission will consider those transactions as separate concentrations.⁵⁰ The same applies to transactions where two (or more) companies exchange assets, regardless of whether or not these constitute legal entities. Although the parties will normally consider the transactions in case of both de-mergers of joint ventures and assets swaps as interdependent, the purpose of the Merger Regulation requires a separate assessment of the results of each of the transactions: Several undertakings acquire control of different assets, a separate combination of resources takes place for each of the acquiring undertakings, and the impact on the market of each of those acquisitions of control needs to be analysed separately under the Merger Regulation. The situation is different for the acquisition of joint control of one business and sole control of another business. Those transactions constitute only one concentration if they are closely linked as they are interdependent and if the undertaking acquiring sole control is also the one acquiring joint control. This scenario is any case considered to constitute one concentration where a corporate entity is acquired to which both the solely controlled and the jointly controlled undertaking belong. On the basis of the interpretation foreseen in recital 20, the situation where the same undertaking acquires sole and joint control of other undertakings based on interdependent agreements is not to be treated differently.

Series of transaction in securities

⁴⁷ Case COMP/M.2926 – EQT/H&R/Dragoco – of 16 September 2002; the same considerations apply to the question when several mergers constitute one concentration in the meaning of Article 3(1)(a), Case COMP/M. 2824 – Ernst & Young/Andersen Germany of 27 August 2002.

⁴⁸ Case IV/M.1188 - Kingfisher/Wegert/ProMarkt of 18 June 1998; case COMP/M.2650 – Haniel/Cementbouw/JV (CVK) of 26 June 2002;

⁴⁹ Case COMP/M.2420 – Mitsui/CVRD/Caemi of 30 October 2001.

⁵⁰ See parallel cases COMP/M.3293 – Shell/BEB and COMP/M.3294 – ExxonMobil/BEB of 20 November 2003; case IV/M.197 – Solvay/Laporte of 30 April 1992.

44. Recital 20 of the recast Merger Regulation further explains that a single concentration will also arise in cases where control over one undertaking is acquired by a series of transactions in securities from one or several sellers taking place within a reasonably short period of time. The concentration in these scenarios is not limited to the acquisition of the “one and decisive” share, but will cover all the acquisitions of securities which take place in the reasonably short period of time.⁵¹

Article 5(2) subparagraph 2

45. Article 5(2) subparagraph 2 provides a specific rule which allows the Commission. to consider successive transactions occurring in a fixed period of time a single concentration for the purposes of calculating the turnover of the undertakings concerned. The purpose of this provision is to ensure that the same persons do not break a transaction down into a number of serial sales of assets over a period of time, with the aim of avoiding the competence conferred on the Commission by the Merger Regulation.⁵²
46. If two or more transactions (each of them bringing about an acquisition of control) take place within a two-year period between the same persons or undertakings, they shall be qualified as a single concentration.⁵³ This provision does not apply where the same persons or undertakings are joined by other persons or undertakings for only some of the transactions involved. It is sufficient if the transactions, although not carried out between the same companies, are carried out between companies belonging to the same group, *i.e.* if there is a relationship of control between them. The provision also applies to two or more transactions between the same persons or undertakings if they are carried out simultaneously. Such transactions form a single concentration even if they are not conditional upon each other.⁵⁴ This also applies to joint ventures which are simultaneously set up between the same parties⁵⁵ (to the extent that they are not in any case inter-conditional and thus would not be considered to constitute a single concentration on that basis). However, it does not appear appropriate to apply Article 5(2) subparagraph 2 to different transactions in cases involving an undertaking concerned which is distinct from the identical seller(s) and buyer(s). In situations involving two transactions where one transaction results in sole control and the other in joint control, Article 5(2) subparagraph 2 therefore does not apply unless the other jointly controlling parent(s) in the latter transaction are the seller(s) of the jointly controlling stake.

⁵¹ This may be in particular relevant as regards to the dissolution of the concentration according to Article 8 (4) of the Merger Regulation.

⁵² CFI, Case T-282/02 *Cementbouw v Commission* (not yet reported), paragraph 118 (judgment of 23 February 2006).

⁵³ See Case COMP/M.3173 – E.ON/Fortum Burghausen/Smaland/Endenderry of 13 June 2003. This also applies to situations where sole control is acquired whereby only parts of the undertaking were previously jointly controlled by the acquiring undertaking, case COMP/M. 2679 – EdF/TXU/ Europe/24 Seven of 20 December 2001.

⁵⁴ Case IV/M.1283 – Volkswagen/RollsRoyce/Cosworth of 24 August 1998.

⁵⁵ See Case COMP/M.2868 – Linde/Sonatrach/JV treating two joint ventures as a single concentration; Case COMP/M.2478 – IBM/Business Solutions/JV – of 29 June 2001.

1.6 Internal Restructuring

47. A concentration within the meaning of the Merger Regulation is limited to changes in control. An internal restructuring within a group of companies does not constitute a concentration. This applies, e.g., to increases in shareholdings not accompanied by changes of control or to restructuring operations such as a merger of dual listed company into a uniform company or a merger of subsidiaries. A concentration could only arise if the operation leads to a change in the quality of control of one undertaking and therefore is no longer purely internal.

1.7 Concentrations involving State-owned undertakings

48. An exceptional situation exists where both the acquiring and acquired undertakings are companies owned by the same State (or by the same public body or municipality). In this case, whether the operation is to be regarded as an internal restructuring depends in turn on the question whether both undertakings were formerly part of the same economic unit. Where the undertakings were formerly part of different economic units having an independent power of decision, the operation will be deemed to constitute a concentration and not an internal restructuring.⁵⁶
49. However, the prerogatives exercised by a State acting as a public authority rather than as a shareholder, in so far as they are limited to the protection of the public interest, do not constitute control within the meaning of the Merger Regulation to the extent that they have neither the aim nor the effect of enabling the State to exercise a decisive influence over the activity of the undertaking.⁵⁷

⁵⁶ Case IV/M.097 - P echiney/Usinor, of 24 June 1991; Case IV/M.216 - CEA Industrie/France Telecom/SGS-Thomson, of 22 February 1993; Case IV/M.931 - Neste/IVO of 2 June 1998. See also recital 22 of the Merger Regulation.

⁵⁷ Case IV/M.493 - Tractebel/Distrigaz II, of 1 September 1994.

2. Sole control

50. Sole control is normally acquired on a legal basis where an undertaking acquires a majority of the voting rights of a company. In the absence of other elements, an acquisition which does not include a majority of the voting rights does not normally confer control even if it involves the acquisition of a majority of the share capital. Where the company statutes require a supermajority for strategic decisions, the acquisition of a simple majority of the voting rights may not be sufficient to confer sole control. In such cases, the acquisition of a simple majority may lead to a scenario of negative or joint control.
51. Sole control may also be acquired in the case of a "qualified minority". This can be established on a legal and/or *de facto* basis.
52. On a legal basis it can occur where specific rights are attached to the minority shareholding. These may be preferential shares to which special rights are attached enabling the minority shareholder to determine the strategic commercial behaviour of the target company, such as the power to appoint more than half of the members of the supervisory board or the administrative board. Sole control can also be exercised by a minority shareholder who has the right to manage the activities of the company and to determine its business policy on the basis of the organisational structure (e.g. as a general partner in a limited partnership which often does not even have a shareholding).
53. A minority shareholder may also be deemed to have sole control on a *de facto* basis. This is in particular the case where the shareholder is highly likely to achieve a majority at the shareholders' meeting, given the level of its shareholding and the evidence resulting from the presence of shareholders in the shareholders' meeting in previous years.⁵⁸ In analysing the voting pattern, the Commission will carry out a prospective analysis and take into account foreseeable changes of the shareholders' presence which might arise following the operation in future. The Commission will further analyse the position of other shareholders and assess whether they are likely to support the position of the large minority shareholder or whether they could be able to destabilise it. Criteria for such an assessment are in particular whether the remaining shares are widely dispersed, whether other important shareholders have structural, economic or family links with the large minority shareholder or whether other shareholders have a strategic or a purely financial interest in the target company; these criteria will be assessed on a case-by-case basis.⁵⁹ Where, on the basis of its shareholding, the historic voting pattern at the shareholders' meeting and the position of other shareholders, a minority shareholder is likely to have a stable majority of the votes at the shareholders' meeting or can count on the shares of other shareholders to

⁵⁸ Case IV/M.343 - Société Générale de Belgique/Générale de Banque, of 3 August 1993; Case COMP/M.3330 - RTL/M6 of 12 March 2004 ; Case IV/M.159 - Mediobanca/Generali of 19 December 1991.

⁵⁹ Case IV/M.754 - Anglo American/Lonrho of 23 April 1997; Case IV/M.025 - Arjomari/Wiggins Teape, of 10 February 1990.

achieve such a majority, then the large minority shareholder is taken to have sole control.⁶⁰

54. An option to purchase or convert shares cannot in itself confer sole control unless the option will be exercised in the near future according to legally binding agreements⁶¹. However, in specific circumstances an option can be taken into account as an additional element, in particular if the option is easily and quickly exercisable. In such circumstances, the option, together with other elements such as an already existing shareholding, may lead to the conclusion that there is *de facto* sole control.⁶²
55. Apart from the acquisition of sole control on the basis of voting rights, the considerations outlined in the general section on control acquired by the rights, contracts or any other means apply to the acquisition of sole control by purchase of assets, by contract, or by any other means.

3. Negative Control – control exercised via veto rights

56. A situation also conferring control exists where only one shareholder is able to veto strategic decisions in an undertaking, but this shareholder does not have the power, on his own, to impose such decisions. This situation can occur where one shareholder holds 50% in an undertaking whilst the remaining 50% is held by several other shareholders (if this does not lead to sole control on a *de facto* basis), or where there is a supermajority required for strategic decisions which in fact confers a veto right upon only one shareholder, irrespective of whether it is a majority or a minority shareholder.⁶³
57. In these circumstances, a single shareholder possesses the same level of influence as that usually enjoyed by an individual shareholder which jointly-controls a company, *i.e.* the power to block the adoption of strategic decisions. In contrast to the situation in a jointly controlled company, the shareholder exercising negative control does not have to take into account the interests of other shareholders enjoying the same level of influence and to necessarily cooperate with them in determining the strategic behaviour of the controlled undertaking. Compared to a solely controlled undertaking, such a shareholder does not enjoy the powers which are normally conferred on an undertaking with sole control, *i.e.* the power to impose strategic decisions. Since this shareholder can produce a deadlock situation, the shareholder acquires decisive influence within the

⁶⁰ See also Case COMP/M.2574 – Pirelli/Edizione/Olivetti/Telecom Italia of 20 September 2001; Case IV/M.1519 – Renault/Nissan of 12 May 1999.

⁶¹ Judgment in Case T 2/93, *Air France v Commission* [1994] ECR II-323. Even though an option does normally not in itself lead to a concentration, it can be taken into account for the substantive assessment in a related concentration, see Case COMP/M.3696 – E.ON/MOL of 21 December 2005, at paragraphs 12-14, 480, 762 et subseq.

⁶² Case IV/M.397 – Ford/Hertz of 7 March 1994; see also Case IV/M.794 - Coca-Cola/Amalgamated Beverages GB.

⁶³ See consecutive Cases COMP/M.3537 – BBVA/BNL of 20 August 2004 and M.3768 – BBVA/BNL of 27 April 2005; Case M.3198 – VW-Audi/VW-Audi Vertriebszentren of 29 July 2003; Case COMP/M.2777 – Cinven Limited/Angel Street Holdings of 8 May 2002; Case IV/M.258 - CCIE/GTE, of 25 September 1992. In Case COMP/M.3876 – Diester Industrie/Bunge/JV of 30 September 2005, there was the specific situation that a joint venture held a stake in a company by which it had negative sole control over this company.

meaning of Article 3 (2) and therefore control within the meaning of the Merger Regulation.⁶⁴

4. Joint Control

58. Joint control exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking. Decisive influence in this sense normally means the power to block actions which determine the strategic commercial behaviour of an undertaking. Unlike sole control, which confers upon a specific shareholder the power to determine the strategic decisions in an undertaking, joint control is characterized by the possibility of a deadlock situation resulting from the power of two or more parent companies to reject proposed strategic decisions. It follows, therefore, that these shareholders must reach a common understanding in determining the commercial policy of the joint venture and that they are required to cooperate permanently.⁶⁵
59. As in the case of sole control, the acquisition of joint control can also be established on a legal or *de facto* basis. There is joint control if the shareholders (the parent companies) must reach agreement on major decisions concerning the controlled undertaking (the joint venture).

4.1 Equality in voting rights or appointment to decision-making bodies

60. The clearest form of joint control exists where there are only two parent companies which share equally the voting rights in the joint venture. In this case, it is not necessary for a formal agreement to exist between them. However, where there is a formal agreement, it must be consistent with the principle of equality between the parent companies, by laying down, for example, that each is entitled to the same number of representatives in the management bodies and that none of the members has a casting vote⁶⁶. Equality may also be achieved where both parent companies have the right to appoint an equal number of members to the decision-making bodies of the joint venture.

4.2 Veto rights

61. Joint control may exist even where there is no equality between the two parent companies in votes or in representation in decision-making bodies or where there are more than two parent companies. This is the case where minority shareholders have additional rights which allow them to veto decisions which are essential for the strategic commercial behaviour of the joint venture⁶⁷. These veto rights may be set out in the statute of the joint venture or conferred by agreement between its parent companies. The veto rights themselves may operate by means of a specific quorum required for decisions taken at the shareholders' meeting or by the board of

⁶⁴ Since this shareholder is the only undertaking acquiring a controlling influence, only this shareholder is obliged to submit a notification under the Merger Regulation.

⁶⁵ See also CFI, Case T-282/02 *Cementbouw v Commission* (not yet reported), paragraphs 42, 52, 67 (judgment of 23 February 2006)..

⁶⁶ Case COMP/M.3097 – *Maersk Data/Eurogate IT; Global Transport Solutions JV* of 12 March 2003; Case IV/M.272 - *Matra/CAP Gemini Sogeti*, of 17 March 1993.

⁶⁷ Case T 2/93, *Air France v Commission* [1994] ECR II-323.. Case IV/M.010 - *Conagra/Idea*, of 3 May 1991.

directors to the extent that the parent companies are represented on this board. It is also possible that strategic decisions are subject to approval by a body, e.g. supervisory board, where the minority shareholders are represented and form part of the quorum needed for such decisions.

62. These veto rights must be related to strategic decisions on the business policy of the joint venture. They must go beyond the veto rights normally accorded to minority shareholders in order to protect their financial interests as investors in the joint venture. This normal protection of the rights of minority shareholders is related to decisions on the essence of the joint venture, such as changes in the statute, an increase or decrease in the capital or liquidation. A veto right, for example, which prevents the sale or winding-up of the joint venture does not confer joint control on the minority shareholder concerned⁶⁸.
63. In contrast, veto rights which confer joint control typically include decisions on issues such as the budget, the business plan, major investments or the appointment of senior management. The acquisition of joint control, however, does not require that the acquirer has the power to exercise decisive influence on the day-to-day running of an undertaking. The crucial element is that the veto rights are sufficient to enable the parent companies to exercise such influence in relation to the strategic business behaviour of the joint venture. Moreover, it is not necessary to establish that an acquirer of joint control of the joint venture will actually make use of its decisive influence. The possibility of exercising such influence and, hence, the mere existence of the veto rights, is sufficient.
64. In order to acquire joint control, it is not necessary for a minority shareholder to have all the veto rights mentioned above. It may be sufficient that only some, or even one such right, exists. Whether or not this is the case depends upon the precise content of the veto right itself and also the importance of this right in the context of the specific business of the joint venture.

Appointment of senior management and determination of budget

65. Very important are the veto rights concerning decisions on the appointment and dismissal of the senior management and the approval of the budget. The power to co-determine the structure of the senior management, normally the members of the board, confers upon the holder the power to exercise decisive influence on the commercial policy of an undertaking. The same is true with respect to decisions on the budget since the budget determines the precise framework of the activities of the joint venture and, in particular, the investments it may make.

Business plan

66. The business plan normally provides details of the aims of a company together with the measures to be taken in order to achieve those aims. A veto right over this type of business plan may be sufficient to confer joint control even in the absence of any other veto right. In contrast, where the business plan contains merely general declarations concerning the business aims of the joint venture, the existence of a veto right will be

⁶⁸ Case IV/M.062 - Eridania/ISI, of 30 July 1991.

only one element in the general assessment of joint control but will not, on its own, be sufficient to confer joint control.

Investments

67. In the case of a veto right on investments, the importance of this right depends, first, on the level of investments which are subject to the approval of the parent companies and, secondly, on the extent to which investments constitute an essential feature of the market in which the joint venture is active. In relation to the first criterion, where the level of investments necessitating approval of the parent companies is extremely high, this veto right may be closer to the normal protection of the interests of a minority shareholder than to a right conferring a power of co-determination over the commercial policy of the joint venture. With regard to the second, the investment policy of an undertaking is normally an important element in assessing whether or not there is joint control. However, there may be some markets where investment does not play a significant role in the market behaviour of an undertaking.

Market-specific rights

68. Apart from the typical veto rights mentioned above, there exist a number of other possible veto rights related to specific decisions which are important in the context of the particular market of the joint venture. One example is the decision on the technology to be used by the joint venture where technology is a key feature of the joint venture's activities. Another example relates to markets characterized by product differentiation and a significant degree of innovation. In such markets, a veto right over decisions relating to new product lines to be developed by the joint venture may also be an important element in establishing the existence of joint control.

Overall context

69. In assessing the relative importance of veto rights, where there are a number of them, these rights should not be evaluated in isolation. On the contrary, the determination of whether or not joint control exists is based upon an assessment of these rights as a whole. However, a veto right which does not relate either to strategic commercial policy, to the appointment of senior management or to the budget or business plan cannot be regarded as giving joint control to its owner⁶⁹.

4.3 Joint exercise of voting rights

70. Even in the absence of specific veto rights, two or more undertakings acquiring minority shareholdings in another undertaking may obtain joint control. This may be the case where the minority shareholdings together provide the means for controlling the target undertaking. This means that the minority shareholders, together, will have a majority of the voting rights; and they will act together in exercising these voting rights. This can result from a legally binding agreement to this effect, or it may be established on a *de facto* basis.

⁶⁹ Case IV/M.295 - SITA-RPC/SCORI, of 19 March 1993.

71. The legal means to ensure the joint exercise of voting rights can be in the form of a (jointly controlled) holding company to which the minority shareholders transfer their rights, or an agreement by which they undertake to act in the same way (pooling agreement).
72. Very exceptionally, collective action can occur on a *de facto* basis where strong common interests exist between the minority shareholders to the effect that they would not act against each other in exercising their rights in relation to the joint venture. The greater the number of parent companies involved in such a joint venture, however, the more remote is the likelihood of this situation occurring.
73. Indicative for such a commonality of interests is a high degree of mutual dependency as between the parent companies to reach the strategic objectives of the joint venture. This is in particular the case when each parent company provides a contribution to the joint venture which is vital for its operation (e.g. specific technologies, local know-how or supply agreements).⁷⁰ In these circumstances, the parent companies may be able to block the strategic decisions of the joint venture and, thus, they can operate the joint venture successfully only with each other's agreement on the strategic decisions even if there is no express provision for any veto rights. The parent companies will therefore be required to cooperate permanently.⁷¹ Further factors are decision making procedures which are tailored in such a way as to allow the parent companies to exercise joint control even in the absence of explicit agreements granting veto rights or other links between the minority shareholders relevant for the joint venture.⁷²
74. Such a scenario may not only occur in a situation where two or more minority shareholders jointly control an undertaking on a *de facto* basis, but also where there is high degree of dependency of a majority shareholder on a minority shareholder. This may be the case where the joint venture economically and financially depends on the minority shareholder or where only the minority shareholder has the required know-how for, and will play a major role in, the operation of the joint undertaking whereas the majority shareholder is a mere financial investor.⁷³ In such circumstances, the majority shareholder will not be able to enforce its position, but the joint venture partner may be able to block strategic decisions so that both parent undertakings will be required to cooperate permanently. This leads to a situation of *de facto* joint control which prevails over a pure *de jure* assessment according to which the majority shareholder could have been considered to have sole control.
75. These criteria apply to the formation of a new joint venture as well as to acquisitions of minority shareholdings, together conferring joint control. In case of acquisitions of shareholdings, there is a higher probability of a commonality of interests if the shareholdings are acquired by means of concerted action. However, an acquisition by way of a concerted action is not alone sufficient for the purposes of establishing *de facto* joint control and, in general, a common interest as financial investors (or

⁷⁰ Case COMP/JV.55 Hutchinson/RCPM/ECT of 3 July 2001; see also Case IV/M.553 – RTL/Veronica/Endemol of 20 September 1995.

⁷¹ CFI, Case T-282/02 Cementbouw v Commission (not yet reported), paragraphs 42, 52, 67 (judgment of 23 February 2006).

⁷² Case COMP/JV.55 Hutchinson/RCPM/ECT of 3 July 2001. See also Case IV/M.553 – RTL/Veronica/Endemol of 20 September 1995.

⁷³ Case IV/M. 967 - KLM/Air UK of 22 September 1997; Case COMP/M.4085 – Arcelor/Oyak/Erdemir of 13 February 2006.

creditors) of a company in a return on investment does not constitute a commonality of interests leading to the exercise of *de facto* joint control.

76. In the absence of strong common interests such as those outlined above, the possibility of changing coalitions between minority shareholders will normally exclude the assumption of joint control. Where there is no stable majority in the decision-making procedure and the majority can on each occasion be any of the various combinations possible amongst the minority shareholders, it cannot be assumed that the minority shareholders (or a certain group thereof) will jointly control the undertaking.⁷⁴ In this context, it is not sufficient that there are agreements between two or more parties having an equal shareholding in the capital of an undertaking which establish identical rights and powers between the parties, where these fall short of strategic veto rights. For example, in the case of an undertaking where three shareholders each own one-third of the share capital and each elect one-third of the members of the Board of Directors, the shareholders do not have joint control since decisions are required to be taken on the basis of a simple majority.

4.4 Other considerations related to joint control

Unequal role of the parent companies

77. Joint control is not incompatible with the fact that one of the parent companies enjoys specific knowledge of and experience in the business of the joint venture. In such a case, the other parent company can play a modest or even non-existent role in the daily management of the joint venture where its presence is motivated by considerations of a financial, long-term-strategy, brand image or general policy nature. Nevertheless, it must always retain the real possibility of contesting the decisions taken by the other parent company on the basis of equality in voting rights or rights of appointment to decision making bodies or of veto rights related to strategic issues. Without this, there would be sole control.

Casting Vote

78. For joint control to exist, there should not be a casting vote for one parent company only as this would lead to sole control of the company enjoying the casting vote. However, there can be joint control when this casting vote is in practice of limited relevance and effectiveness. This may be the case when the casting vote can be exercised only after a series of stages of arbitration and attempts at reconciliation or in a very limited field or if the exercise of the casting vote triggers a put option implying a serious financial burden or if the mutual interdependence of the parent companies would make the exercise of the casting vote unlikely.⁷⁵

III. Changes in the quality of control

79. The Merger Regulation covers operations resulting in the acquisition of sole, negative or joint control, including operations leading to changes in the quality of control. A

⁷⁴ Case IV/JV.12 – Ericsson/Nokia/Psion/Motorola of 22 December 1998.

⁷⁵ Case COMP/M.2574 – Pirelli/Edizione/Olivetti/Telecom Italia of 20 September 2001; Case IV/M.553 – RTL/Veronica/Endemol of 20 September 1995; Case IV/M.425 - British Telecom/Banco Santander, of 28 March 1994.

change in the quality of control is the decisive element in assessing whether a change in a given control structure of a company is considered an acquisition of control. First, a change in the quality of control, resulting in a concentration, occurs if there is a change between sole, negative or joint control. Second, a change in the quality of control occurs between joint control scenarios before and after the transaction if there is an increase in the number or a change in the identity of controlling shareholders or, in certain situations, if there is a reduction of the number of controlling shareholders. In any case, it should be noted that mere changes in the level of shareholdings of the same controlling shareholders, without changes of the powers they hold in a company and of the composition of the control structure of the company, do not constitute a change in the quality of control and therefore not a notifiable concentration.

80. These changes in the quality of control will be discussed in three categories: first, a change from negative to sole control; second, an entrance of one or more new controlling shareholders irrespective of whether or not they replace existing controlling shareholders; third, a reduction of the number of controlling shareholders.

Negative control to sole control

81. A change in the quality of control occurs if an operation leads to a change from negative to sole control. Similar to a change from joint to sole control, the possibility to determine strategic decisions on its own is of a different quality than the mere possibility to veto strategic decisions. In the latter case, the shareholder having negative control has to take into account the interests of the other shareholders. A move from negative to sole control therefore constitutes a notifiable concentration.⁷⁶

Entry of controlling shareholders

82. An entry of new controlling shareholders leading to a joint control scenario can either result from a change from sole or negative to joint control, or from the entry of an additional shareholder or a replacement of an existing shareholder in an already jointly controlled undertaking.
83. A move from sole or negative control to joint control is considered a notifiable operation as this changes the quality of control of the joint venture. First, there is a new acquisition of control for the shareholder entering the controlled undertaking. Second, only the new acquisition of control makes the controlled undertaking to a joint venture which changes decisively also the situation for the remaining controlling undertaking under the Merger Regulation: In the future, it has to take into account the interests of one or more other controlling shareholder(s) and it is required to cooperate permanently with the new shareholder(s). Before, it could either determine the strategic behaviour of the controlled undertaking alone (in the case of sole control) or was not forced to take into account the interests of specific other shareholders and was not forced to cooperate with those shareholders permanently.
84. The entry of a new shareholder in a jointly controlled undertaking – either in addition to the already controlling shareholders or by replacing one of them – also constitutes a notifiable concentration, although the undertaking is jointly controlled before and after

⁷⁶ See Case M.3768 – BBVA/BNL of 27 April 2005; Case M.3198 – VW-Audi/VW-Audi Vertriebszentren of 29 July 2003.

the operation.⁷⁷ First, also in this scenario there is a shareholder newly acquiring control of the joint venture. Second, the quality of control of the joint venture is determined by the identity of all controlling shareholders. It lies in the nature of joint control that, since each shareholder alone has a blocking right concerning strategic decisions, the jointly controlling shareholders have to take into account each others interests and are required to cooperate permanently for the determination of the strategic behaviour of the joint venture.⁷⁸ The nature of joint control therefore does not exhaust itself in a pure mathematical addition of the blocking rights exercised by several shareholders, but is determined by the composition of the jointly controlling shareholders. One of the most obvious scenarios leading to a decisive change in the nature of the control structure of a jointly controlled undertaking is a situation where in a joint venture, jointly controlled by a competitor of the joint venture and a financial investor, the financial investor is replaced by another competitor. In these circumstances, the control structure and the incentives of the joint venture may entirely change, not only because of the entry of the new controlling shareholder, but also due to the change in the behaviour of the remaining shareholder. The replacement of a controlling shareholder or the entry of a new shareholder in a jointly controlled undertaking therefore constitutes a change in the quality of control.

85. However, the entry of new shareholders only results in a notifiable concentration if the company is controlled after the operation. The entry of new shareholders may lead to a situation where joint control can neither be established on a *de jure* basis nor on a *de facto* basis as the entry of the new shareholder leads to the consequence that changing coalitions between minority shareholders are possible.⁷⁹

Reduction in the number of shareholders

86. A reduction in the number of controlling shareholders constitutes a change in the quality of control and is thus to be considered as a concentration if the exit of one or more controlling shareholders results in a change from joint to sole control. Decisive influence exercised alone is substantially different from decisive influence exercised jointly, since in the latter case the jointly controlling shareholders have to take into account the potentially different interests of the other party or parties involved.⁸⁰
87. Where the operation involves a reduction in the number of jointly controlling shareholders, without leading to a change from joint to sole control, the transaction will normally not be presumed to lead to a notifiable concentration. However, the situation may be different if the number of jointly controlling shareholders is reduced to two and if the operation gives the remaining controlling shareholders additional veto rights or considerable more weight in the decision-making process (apart from a numerical increase of their voting rights). Such a reduction to two controlling shareholders and a simultaneous acquisition of new controlling powers by them changes the powers of the shareholders individually and the incentives and the nature of the joint control structure

⁷⁷ See, e.g., Case COMP/M.3440 – ENI/EDP/GdP of 9 December 2004.

⁷⁸ CFI, Case T-282/02 *Cementbouw v Commission* (not yet reported), paragraph 62 (judgment of 23 February 2006).

⁷⁹ Case IV/JV.12 – *Ericson/Nokia/Psion/Motorola* of 22 December 1998.

⁸⁰ See Case IV/M023 – *ICI/Tioxide*, of 28 November 1990; see also paragraph 5 (d) of the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004.

to such an extent that this constitutes a change in the quality of control.⁸¹ If more than two controlling shareholders remain, however, the shareholders will normally not gain sufficiently more weight in the decision-making process to change the quality of control.

IV. Joint Ventures – the concept of full-functionality

88. The acquisition of joint control of another undertaking, which has a market presence, constitutes a concentration under the Merger Regulation. Article 3(1)(b) foresees that a concentration shall be deemed to arise where control is acquired by *one or more* undertakings of the whole or parts of another undertaking. Article 3(4) provides in addition that also the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity (so called full-function joint ventures) shall constitute a concentration within the meaning of the Merger Regulation. The full-functionality criterion therefore delineates the application of the Merger Regulation for the creation of joint ventures by the parties, irrespective of whether such a joint venture is created as a “greenfield operation” or whether the parties contribute assets to the joint venture which they previously owned individually. The full-functionality criterion is therefore not required for the acquisition of joint control of an undertaking (with a market presence) from third parties.⁸² As in the case of the acquisition of sole control of an undertaking, such an acquisition of joint control will fall already under Article 3(1) as it will in any case lead to a structural change in the market, as set out in recital 20, even if it should be envisaged that the acquired undertaking will no longer be full-function after the transaction (e.g. because it will sell exclusively to the parent companies).
89. The fact that a joint venture may be a full-function undertaking and therefore economically autonomous from an operational viewpoint does not mean that it enjoys autonomy as regards the adoption of its strategic decisions. Otherwise, a jointly controlled undertaking could never be considered a full-function joint venture and therefore the condition laid down in Article 3(4) would never be complied with.⁸³ It is therefore sufficient for the criterion of full-functionality if the joint venture is autonomous in operational respect.

1. Sufficient resources to operate independently on a market

90. Full function character essentially means that a joint venture must operate on a market, performing the functions normally carried out by undertakings operating on the same market. In order to do so the joint venture must have a management

⁸¹ Case M.1889 CLT-UFA/Canal+/VOX of 21 March 2000; Case M.1863 Vodafone/BT/Airtel of 18 December 2000 pointing to the acquisition of considerably more weight in the decision making process; Case IV/M.993 Bertelsmann/Kirch/Premiere of 27 May 1998 focussing on the transfer of additional assets.

⁸² These considerations do not apply to Article 2(4) in the same way. Whereas the interpretation of Article 3(1) and (4) relates to the Commission’s jurisdiction for joint ventures under the Merger Regulation, Article 2(4) relates to the substantive analysis of joint ventures. The “creation of a joint venture constituting a concentration pursuant to Article 3”, as provided for in Article 2(4), comprises the acquisition of joint control according to Article 3(1) and (4).

⁸³ CFI, Case T-282/02 Cementbouw v Commission (not yet reported), paragraph 62 (judgment of 23 February 2006).

dedicated to its day-to-day operations and access to sufficient resources including finance, staff, and assets (tangible and intangible) in order to conduct on a lasting basis its business activities within the area provided for in the joint-venture agreement.⁸⁴ The personnel do not necessarily need to be employed by the joint venture itself. If it is standard practice in the industry where the joint venture is operating, it may be sufficient if third parties provide for the staffing under an operational agreement or if staff is assigned by an interim employment agency. The secondment of personnel by the parent companies 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. The latter case requires that the joint venture deals with the parents at arm's length on the basis of normal commercial conditions and that the joint venture is also free to engage its own employees or to obtain staff via third parties.

2. Activities beyond one specific function for the parents

91. A joint venture is not full-function if it only takes over one specific function within the parent companies' business activities without access to the market. This is the case, for example, for joint ventures limited to R&D or production. Such joint ventures are auxiliary to their parent companies' business activities. This is also the case where a joint venture is essentially limited to the distribution or sales of its parent companies' products and, therefore, acts principally as a sales agency. However, the fact that a joint venture makes use of the distribution network or outlet of one or more of its parent companies normally will not disqualify it as 'full-function' as long as the parent companies are acting only as agents of the joint venture⁸⁵.
92. A frequent example where this question arises are joint ventures involved in the holding of real estate property, which are typically set up for tax and other financial reasons. As long as the purpose of the joint venture is limited to the acquisition and/or holding of certain real estate for the parents and based on financial resources provided by the parents, it typically cannot be considered to be full-function, as it lacks an autonomous, long term business activity on the market. This has to be distinguished from joint ventures that are actively managing a real estate portfolio and who act on their own behalf on the market, which typically indicates full-functionality.⁸⁶

3. Sale/purchase relations with the parents

93. The strong presence of the parent companies in upstream or downstream markets is a factor to be taken into consideration in assessing the full-function character of a

⁸⁴ Case IV/M.527 - Thomson CSF/Deutsche Aerospace, of 2 December 1994 -intellectual rights, Case IV/M.560 EDS/Lufthansa of 11 May 1995 - outsourcing, Case IV/M.585 - Voest Alpine Industrieanlagenbau GmbH/Davy International Ltd, of 7 September 1995 - joint venture's right to demand additional expertise and staff from its parent companies, Case IV/M.686 - Nokia/Autoliv, of 5 February 1996 , joint venture able to terminate "service agreements" with parent company and to move from site retained by parent company, Case IV/M.791 - British Gas Trading Ltd/Group 4 Utility Services Ltd, of 7 October 1996, joint venture's intended assets will be transferred to leasing company and leased by joint venture.

⁸⁵ Case IV/M.102 - TNT/Canada Post etc. of 2 December 1991.

⁸⁶ See Case IV/M.929 – DIA/Veba Immobilien/Deutschbau of 23 June 1997; Case COMP/M. 3325 - Morgan Stanley/Glick/Canary Wharf of 23 January 2004.

joint venture where this presence leads to substantial sales or purchases between the parent companies and the joint venture. The fact that the joint venture relies almost entirely on sales to its parent companies or purchases from them only for an initial start-up period does not normally affect the full-function character of the joint venture. Such a start-up period may be necessary in order to establish the joint venture on a market. It will normally not exceed a period of three years, depending on the specific conditions of the market in question⁸⁷.

Sales to the parents

94. Where sales from the joint venture to the parent companies are intended to be made on a lasting basis, the essential question is whether, regardless of these sales, the joint venture is geared to play an active role on the market and can be considered economically autonomous from an operational viewpoint. In this respect the relative proportion of these sales compared with the total production of the joint venture is an important factor. Due to the particularities of each individual case, it is impossible to define a fixed third party turnover ratio which distinguishes full-function from other joint ventures. If the joint venture achieves more than 50% of its turnover with third parties, this will typically be an indication of full-functionality. Below this indicative threshold, a case-by-case analysis is required, whereby, for the finding of operational autonomy, the relationship between the joint venture and its parents must be truly commercial in character. For this purpose, it is to be demonstrated that the joint venture will supply its goods or services to the purchaser who values them most and will pay most and that the joint venture will also deal with its parents' companies at arm's length on the basis of normal commercial conditions.⁸⁸ Under these circumstances, *i.e.* if the joint venture will treat its parent companies in the same commercial way as third parties, it may be sufficient if at least 20% of the joint venture's predicted sales will go to third parties. However, the greater the proportion of sales likely to be made by the parents, the greater will be the need for clear evidence of the commercial character of the relationship.
95. For the determination of the proportion between sales to the parents and to third parties, the Commission will take past accounts and substantiated business plans into account. However, especially where substantial third-party sales cannot be readily foreseen, the Commission will base its finding also on the general market structure. This may be a relevant factor as well for the assessment whether the joint venture will deal with its parents on an at arm's length basis.
96. These issues frequently arise with regard to outsourcing agreements, where an undertaking creates a joint venture with a service provider⁸⁹ which will carry out functions that so far were dealt with by the undertaking in-house. The JV typically

⁸⁷ Case IV/M.560 - EDS/Lufthansa of 11 May 1995 ; Case IV/M.686 Nokia/Autoliv of 5 February 1996 ; to be contrasted with Case IV/M.904 - RSB/Tenex/Fuel Logistics of 2 April 1997 and Case IV/M.979 - Preussag/Voest-Alpine of 1 October 1997. A special case exists where sales by the joint venture to its parent are caused by a legal monopoly downstream of the joint venture, see Case IV/M.468 - Siemens/Italtel of 17 February 1995, or where the sales to a parent company consist of by-products, which are of minor importance to the joint venture, see Case IV/M.550 - Union Carbide/Enichem of 13 March 1995.

⁸⁸ Case IV/M.556 - Zeneca/Vanderhave of 9 April 1996; Case IV/M.751 - Bayer/Hüls of 3 July 1996.

⁸⁹ The question under which circumstances an outsourcing arrangement qualifies as a concentration is dealt with in points 23ff. of this Notice.

cannot be considered to be full-function in these scenarios: it provides its services exclusively to the client undertaking, and it is dependent for its services on input from the service provider. The fact that the joint venture's business plan often at least does not exclude that the joint venture can provide its services to third parties does not alter this assessment, as in the typical outsourcing setup any third party revenues are likely to remain ancillary to the joint venture's main activities for the client undertaking. However, this general rule does not exclude that there are outsourcing situations where the joint venture partners, for example for reasons of economies of scale, set up a joint venture with the perspective of significant market access. This could qualify the joint venture as full function if significant third-party sales are foreseen and if the relationship between the joint venture deals and its parent will be truly commercial in character and if the joint venture deals with its parents on the basis of normal commercial conditions.

Purchases from the parents

97. In relation to purchases made by the joint venture from its parent companies, the full-function character of the joint venture is questionable in particular where little value is added to the products or services concerned at the level of the joint venture itself. In such a situation, the joint venture may be closer to a joint sales agency.

Trade markets

98. However, in contrast to this situation where a joint venture is active in a trade market and performs the normal functions of a trading company in such a market, it normally will not be an auxiliary sales agency but a full-function joint venture. A trade market is characterised by the existence of companies which specialise in the selling and distribution of products without being vertically integrated in addition to those which are integrated, and where different sources of supply are available for the products in question. In addition, many trade markets may require operators to invest in specific facilities such as outlets, stockholding, warehouses, depots, transport fleets and sales personnel. In order to constitute a full-function joint venture in a trade market, an undertaking must have the necessary facilities and be likely to obtain a substantial proportion of its supplies not only from its parent companies but also from other competing sources⁹⁰.

4. Operation on a lasting basis

99. Furthermore, the joint venture must be intended to operate on a lasting basis. The fact that the parent companies commit to the joint venture the resources described above normally demonstrates that this is the case. In addition, agreements setting up a joint venture often provide for certain contingencies, for example, the failure of the joint venture or fundamental disagreement as between the parent companies⁹¹. This may be achieved by the incorporation of provisions for the eventual dissolution of the joint venture itself or the possibility for one or more parent companies to withdraw from the joint venture. This kind of provision does not prevent the joint venture from being considered as operating on a lasting basis. The same is normally true where the agreement specifies a period for the duration of the joint venture

⁹⁰ Case IV/M.788 - AgrEVO/Marubeni of 3 September 1996.

⁹¹ Case IV/M.891 - Deutsche Bank/Commerzbank/J.M. Voith of 23 April 1997.

where this period is sufficiently long in order to bring about a lasting change in the structure of the undertakings concerned⁹², or where the agreement provides for the possible continuation of the joint venture beyond this period.

100. By contrast, the joint venture will not be considered to operate on a lasting basis where it is established for a short finite duration. This would be the case, for example, where a joint venture is established in order to construct a specific project such as a power plant, but it will not be involved in the operation of the plant once its construction has been completed.
101. A joint venture also lacks the sufficient operations on a lasting basis at a stage where there are decisions of third parties outstanding that are of an essential core importance for starting the joint venture's business activity. Only decisions that go beyond mere formalities and the award of which is typically uncertain qualify for these scenarios. Examples are the award of a contract (*e.g.*, in public tenders), licences (*e.g.*, in the telecoms sector) or access rights to property (*e.g.*, exploration rights for oil and gas). Pending the decision on such factors, it is unclear whether the joint venture will become operational at all. Thus, at that stage the joint venture cannot be considered to perform economic functions on a lasting basis and consequently does not qualify as full function. However, once a decision has been taken in favour of the joint venture in question, this criterion is fulfilled and a concentration arises.⁹³

5. Changes in the activities of the joint venture

102. The parents may decide to enlarge the joint venture's activities in the course of its lifetime. This will be considered as a new concentration that may trigger a notification requirement if this enlargement entails the transfer of additional assets from the parents to the joint venture or the acquisition of the whole or part of another undertaking that would, considered in isolation, qualify as a concentration as explained in point 22 of this Notice.⁹⁴
103. The enlargement of the joint venture will also be considered to constitute a new concentration (even without a transfer of assets from the parents) if the enlargement would qualify as the creation of a full function joint venture when considered in isolation and if there are elements that demonstrate that the parent companies are in fact the real players behind this operation. This is not the case if the enlargement of the joint venture's activities is to be considered as organic growth of the joint venture. The criteria to be applied are the same as for the decision whether the parents or the joint venture are undertakings concerned in the case of a transaction where a full-function joint venture acquires control of another company. These criteria are set out in point 208 below and include elements such as the significant involvement of the parents in the initiation, organisation and financing of the operation.

⁹² See Case COMP/M.2903 – DaimlerChrysler/Deutsche Telekom/JV of 30 April 2003 where a period of 12 years was considered sufficient; Case COMP/M.2632 – Deutsche Bahn/ECT International/United Depots/JV of 11 February 2002 with a contract duration of 8 years. In Case COMP/M.3858 Lehman Brothers/Starwood/Le Meridien of 20 July 2005, the Commission considered a minimum period of 10-15 years sufficient, but not a period of three years.

⁹³ Subject to the other criteria mentioned in this chapter of the Notice.

⁹⁴ See Case COMP/M.3039 – Soprol/Céréol/Lesieur of 30 January 2003.

104. Similarly, a concentration arises if a change in the activity of an existing joint venture occurs that makes it full function. Examples are joint ventures that change their organisational structure so that it fulfils the full functionality criterion⁹⁵, joint ventures that used to supply only the parent companies, but start a considerable activity on the market or scenarios, as described in the Section on the operation on a lasting basis, where a joint venture can only start its activity on the market once it has essential input such as a licence for a joint venture in the telecoms sector. Such a change in the activity of the joint venture will frequently require a decision by its shareholders or its management. Once the decision is taken that leads for the joint venture to meeting the full functionality criterion, a concentration arises.

V. Exceptions

105. Article 3(5) sets out three exceptional situations where the acquisition of a controlling interest does not constitute a concentration under the Merger Regulation.
106. First, the acquisition of securities by companies whose normal activities include transactions and dealing in securities for their own account or for the account of others is not deemed to constitute a concentration if such an acquisition is made in the framework of these businesses and if the securities are held on only a temporary basis (Article 3(5)(a)). In order to fall within this exception, the following requirements must be fulfilled:
- the acquiring undertaking must be a credit or other financial institution or insurance company the normal activities of which are described above;
 - the securities must be acquired with a view to their resale;
 - the acquiring undertaking must not exercise the voting rights with a view to determining the strategic commercial behaviour of the target company or must exercise these rights only with a view to preparing the total or partial disposal of the undertaking, its assets or the securities;
 - the acquiring undertaking must dispose of its controlling interest within one year of the date of the acquisition, that is, it must reduce its shareholding within this one-year period at least to a level which no longer confers control. This period, however, may be extended by the Commission where the acquiring undertaking can show that the disposal was not reasonably possible within the one-year period.
107. Second, there is no change of control, and hence no concentration within the meaning of the Merger Regulation, where control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding-up, insolvency, cessation of payments, compositions or analogous proceedings (Article 3(5)(b));
108. Third, a concentration does not arise where a financial holding company within the meaning of the Fourth Council Directive 78/660/EEC⁹⁶ acquires control. Already this

⁹⁵ Case COMP/M.2276 – The Coca-Cola Company/Nestlé/JV of 27 September 2001.

⁹⁶ OJ L 222, 14.8.1978, p. 11, as last amended by Directive 2003/51/EC of 18 June 2003, OJ L 178, 17.7.2003, p.16. Article 5(3) of this Directive defines financial holding companies as "those companies the

Company Law Directive limits the application to companies whose sole purpose it is to acquire holdings in other undertakings without involving themselves directly or indirectly in the management of those undertakings, the foregoing without prejudice to their rights as shareholders. Such investment companies must be further structured in a way that compliance with these limitations can be supervised by an administrative or judicial authority. The Merger Regulation limits the scope of application further and provides that such companies may exercise the voting rights in the other undertakings only to maintain the full value of those investments and not to determine directly or indirectly the strategic commercial conduct of the controlled undertaking.

109. Fourth, the exceptions do not apply to typical investment fund structures. According to their objectives, these funds usually do not limit themselves in the exercise of the voting rights, but adopt decisions to appoint the members of the management and the supervisory bodies of the undertakings or to even restructure those undertakings. This would not be compatible with the requirement under both Article 3(5)(a) and (c) that the acquiring companies do not exercise the voting rights with a view to determine the competitive conduct of the other undertaking.⁹⁷
110. Fifth, the question may arise whether an operation to rescue an undertaking before or from insolvency proceedings constitutes a concentration under the Merger Regulation. Such a rescue operation typically involves the conversion of existing debt into a new company, through which a syndicate of banks may acquire joint control of the company concerned. Where such an operation meets the criteria for joint control, as outlined above, it will normally be considered to be a concentration⁹⁸. Although the primary intention of the banks is to restructure the financing of the undertaking concerned for its subsequent resale, the exception set out in Article 3(5)(a) is normally not applicable to such an operation. In a similar way as set out for investment funds, the restructuring programme normally requires the controlling banks to determine the strategic commercial behaviour of the rescued undertaking. Furthermore, it is not normally a realistic proposition to transform a rescued company into a commercially viable entity and to resell it within the permitted one-year period. Moreover, the length of time needed to achieve this aim may be so uncertain that it would be difficult to grant an extension of the disposal period.

VI. Abandonment of concentrations

111. A concentration ceases to exist and the Commission loses jurisdiction under the Merger Regulation if the undertakings concerned abandon the concentration.
112. In this respect, the revised Merger Regulation 139/2004 introduced a new provision related to the closure of procedures concerning the control of concentrations without a final decision after the Commission has initiated proceedings under Article 6(1)(c)

sole objective of which is to acquire holdings in other undertakings, and to manage such holdings and turn them to profit, without involving themselves directly or indirectly in the management of those undertakings, the foregoing without prejudice to their rights as shareholders. The limitations imposed on the activities of these companies must be such that compliance with them can be supervised by an administrative or judicial authority".

⁹⁷ Case IV/M.669 – Charterhouse/Porterbrook, of 11 December 1995.

⁹⁸ Case IV/M.116 - Kelt/American Express, of 28 August 1991.

1st sentence. That sentence reads as follows: “Without prejudice to Article 9, such proceedings shall be closed by means of a decision as provided for in Article 8(1) to (4), unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration”. Prior to the initiation of proceedings, such requirements do not apply.

113. As a general principle, the requirements for the proof of the abandonment must correspond in terms of legal form, format, intensity etc. to the initial act that was considered sufficient to make the concentration notifiable. In case the parties proceed from that initial act to a strengthening of their contractual links during the procedure, for example by concluding a binding agreement after the transaction was notified on the basis of a good faith intention, the requirements for the proof of the abandonment must correspond also to the latest act.
114. In line with this principle, in case of implementation of the concentration prior to a Commission decision, the re-establishment of the *status quo ante* has to be shown. In other cases, the mere withdrawal of the notification is not considered as sufficient proof that the concentration has been abandoned in the sense of Article 6(1)c. Likewise, minor modifications of a concentration, for example as regards the agreed time of implementation or minor changes in the shareholding percentages which do not affect the change in control or the quality of that change, cannot be considered as an abandonment of the original concentration.⁹⁹
- Binding agreement: proof of the legally binding cancellation of the agreement in the form envisaged by the initial agreement (i.e. usually a document signed by all the parties) will be required. Expressions of intention to cancel the agreement or not to implement the notified concentration, as well as unilateral declarations by the parties will not be considered sufficient.
 - Good faith intention to conclude an agreement: In case of a letter of intent or memorandum of understanding reflecting such good faith intention, documents proving that this basis for the good faith intention has been cancelled will be required. As for possible other forms that indicated the good faith intention, the abandonment must reverse this good faith intention and correspond in terms of form and intensity to the initial expression of intent.
 - Public announcement of a public bid or of the intention to make a public bid: a public announcement terminating the bidding procedure will be required. The format and public reach of this announcement must be comparable to the initial announcement.
 - Implemented concentrations: In case the concentration has been implemented prior to a Commission decision, the parties will be required to show that the situation prevailing before the implementation of the concentration has been re-established.

⁹⁹ The qualification of a modification as “minor” in the sense of this paragraph does not prejudice the assessment whether the modification requires submitting additional information to the Commission under Art. 5 (3) Reg. 802/2004.

115. It is for the parties to submit the necessary documentation to meet these requirements.

VII. Changes of transactions after a Commission authorisation decision

116. In some cases, parties may wish not to implement the concentration in the form foreseen after authorisation of the concentration by the Commission. The question arises whether the Commission's authorisation decision still covers the changed structure of the transaction.
117. Broadly speaking, if, before implementation of the authorised concentration, the transactional structure is changed from an acquisition of control, falling under Article 3(1)(b), to a merger according to Article 3(1)(a), or *vice versa*, then the change in the transactional structure is considered a different concentration under the Merger Regulation and a new notification is required.¹⁰⁰ However, less significant modifications of the transaction, for example minor changes in the shareholding percentages which do not affect the change in control or the quality of that change, changes in the offer price in the case of public bids or changes in the corporate structure by which the transaction is implemented without effects on the relevant control situation under the Merger Regulation, are considered as being covered by the Commission's authorisation decision.

¹⁰⁰ See cases COMP/M.2706 – Carnival Corporation/P&O Princess of 11 April 2002 and COMP/M.3071 - Carnival Corporation/P&O Princess of 10 February 2003. In such circumstances, the identity of the notifying parties changes, as both parties to a merger must notify, whereas only the party acquiring control must do so. However, if the parties implement an acquisition of control over a target company and only subsequently decide to merge with the newly acquired subsidiary, this would be regarded as an internal restructuring that does not give rise to a change in control and would thus not fall within the terms of Article 3 of the Merger Regulation.

C. Community Dimension

I. Thresholds

118. The Merger Regulation has a two fold test for Commission jurisdiction. The first test is that the transaction must be a concentration within the meaning of Article 3. The second comprises the turnover thresholds contained in Article 1, designed to identify those transactions which have an impact upon the Community and can be deemed to be of "Community interest". Turnover is used as a proxy for the economic resources being combined in a concentration, and is allocated geographically in order to reflect the geographic distribution of those resources.
119. Two sets of thresholds are set out in Article 1 to establish whether the transaction has a Community dimension. Article 1(2) sets out three different criteria: The worldwide turnover threshold is intended to measure the overall dimension of the undertakings concerned; the Community turnover threshold seek to determine whether the concentration involves a minimum level of activities in the Community; and the two-thirds rule aims to exclude purely domestic transactions from Community jurisdiction.
120. This second set of thresholds, contained in Article 1(3), is designed to tackle those transactions which fall short of achieving Community dimension under Article 1(2), but would have a substantial impact in at least three Member States leading to multiple notifications under national competition rules of those Member States. For this purpose, Article 1(3) provides for lower turnover thresholds, both worldwide and Community-wide, and for a minimum level of activities of the undertakings concerned, jointly and individually, in at least three Member States. Similarly to Article 1(2), Article 1(3) also contains a two-thirds rule, which aims to identify purely domestic transactions.¹⁰¹
121. The thresholds as such are designed to establish jurisdiction and not to assess the market position of the parties to the concentration nor the impact of the operation. In so doing they include turnover derived from, and thus the resources devoted to, all areas of activity of the parties, and not just those directly involved in the concentration. The thresholds are purely quantitative, since they are only based on turnover calculation instead of market share or other criteria. They pursue the objective to provide a simple and objective mechanism that can be easily handled by the companies involved in a merger in order to determine if their transaction has a Community dimension and is therefore notifiable.
122. Whereas Article 1 sets out the numerical thresholds to establish jurisdiction, the purpose of Article 5 is to explain how turnover should be calculated to ensure that the resulting figures are a true representation of economic reality.

¹⁰¹ A concentration is further deemed to have Community dimension if it is referred to the Commission under Article 4(5) of the Merger Regulation. These cases are dealt with in the Commission Notice on Case Referral in respect of concentrations, OJ C 56, 05.03.2005, p. 2.

II. Notion of undertaking concerned

123. From the point of view of determining jurisdiction, the undertakings concerned are the participants in a concentration, i.e. a merger or an acquisition of control as foreseen in Article 3(1). The individual and aggregate turnover of such undertakings will be decisive in determining whether the thresholds are met.
124. In the case of a merger, the undertakings concerned are the merging undertakings.
125. In the remaining cases, it is the concept of "acquiring control" that will determine which are the undertakings concerned. On the acquiring side, there can be one or more undertakings acquiring sole or joint control. On the acquired side, there can be one or more undertakings as a whole or parts thereof. As a general rule, each of these undertakings will be an undertaking concerned within the meaning of the Merger Regulation.
126. In cases of acquisition of sole or joint control of pre-existing companies or parts of them, there is an important party to the agreement that gives rise to the operation who is to be ignored when identifying the undertakings concerned: the seller. Although it is clear that the transaction cannot proceed without the seller's consent, its role ends when the transaction is completed. Where the seller retains joint control with the acquiring undertaking(s), it will be considered to be one of the undertakings concerned as the acquisition of joint control changes the quality of control for all undertakings involved, including the undertaking(s) remaining as controlling shareholder(s) in the controlled undertaking.
127. An analysis of the undertakings concerned in specific types of transactions is included in chapter D of this Notice below.
128. Once the undertakings concerned have been identified in a given transaction, their turnover for the purposes of determining jurisdiction is to be calculated according to the rules set out in Article 5. Article 5(4) sets out detailed criteria to identify undertakings whose turnover may be attributed to the undertaking concerned because of certain direct or indirect links with the latter. It appears to have been the legislator's intention to lay down concrete rules which, seen together, can be taken to establish the notion of a "group" for the purposes of the turnover thresholds in the Merger Regulation. The term "group" will be used in the following sections exclusively to refer to the collection of undertakings whose relations with an undertaking concerned come within the terms of one or more of the sub-paragraphs of Article 5(4) of the Merger Regulation.
129. It is important, when referring to the various undertakings which may be involved in a procedure, not to confuse the concept of "undertakings concerned" under Articles 1 and 5 with the terminology used elsewhere in the Merger Regulation and in Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (hereinafter referred to as the "Implementing Regulation")¹⁰² referring to the various undertakings which may be involved in a procedure. This terminology refers to the

¹⁰² OJ L 133, 30 April 2004, p. 1.

notifying parties, other involved parties, third parties and parties who may be subject to fines or periodic penalty payments, and they are defined in Chapter IV of the Implementing Regulation, along with their respective rights and duties.

III. Turnover

1. The concept of turnover

130. The concept of turnover as used in Article 5 of the Merger Regulation comprises "the amounts derived from the sale of products and the provision of services". Those amounts generally appear in company accounts under the heading "sales". In the case of products, turnover can be determined without difficulty, namely by identifying each commercial act involving a transfer of ownership.
131. In the case of services, the method of calculating turnover in general does not differ from that used in the case of products: the Commission takes into consideration the total amount of sales. However, the calculation of the amounts derived from the provision of services may be more complex as this depends on the exact service provided and the underlying legal and economic arrangements in the sector in question. Where one undertaking provides the entire service directly to the customer, the turnover of the undertaking concerned consists of the total amount of sales for the provision of services in the last financial year.
132. In other areas, this general principle may have to be adapted to the specific conditions of the service provided. In certain sectors of activity (such as package holidays and advertising), the service may be sold through intermediaries. Even if the intermediary invoices the entire amount to the final customer, the turnover of the undertaking acting as an intermediary consists solely of the amount of commissions. For package holidays, the entire amount paid by the final customer is then allocated to the tour operator which uses the travel agency as distribution network. In the case of advertising, only the amounts received (without the commission) are considered to constitute the turnover of the TV channel or the magazine since media agencies, as intermediaries, do not constitute the distribution channel for the sellers of advertising space, but are chosen by the customers, *i.e.* those undertakings wishing to place advertising.
133. The examples mentioned show that, due to the diversity of services, many different situations may arise and the underlying legal and economic relations have to be carefully analysed. Similarly, specific situations for the calculation of turnover may arise in the areas of credit, financial services and insurance. These issues will be dealt with in Section VI.

2. Ordinary activities

134. Article 5(1) provides that the amounts to be included in the calculation of turnover should correspond to the "ordinary activities" of the undertakings concerned. This is the turnover achieved from the sale of products or the provision of services in the normal course of the business. It generally excludes those items which are listed under the headers "financial income" or "extraordinary income" in the company's accounts. Such extraordinary income may be derived from the sale of businesses or of fixed assets. However, company accounts do not necessarily delineate the revenues derived from ordinary activities in the way required for the purposes of turnover calculation under the Merger Regulation. In some cases, the qualification of the items in the accounts may have to be adapted to the requirements of the Merger Regulation.¹⁰³
135. The revenues do not necessarily have to be derived from the customer of the products or services. With regard to aid granted to undertakings by public bodies, any aid has to be included in the calculation of turnover if the undertaking is itself the recipient of the aid and if the aid is directly linked to the sale of products and the provision of services by the undertaking. The aid is therefore an income of the undertaking from the sale of products or provision of services in addition to the price paid by the consumer.¹⁰⁴
136. Specific issues have arisen for the calculation of turnover of a business unit which only had internal revenues in the past. This may in particular apply for transactions involving the outsourcing of services by transfer of a business unit. If such a transaction constitutes a concentration on the basis of the considerations outlined in points 23 ff. of this Notice, the Commission's practice is that the turnover should normally be calculated on the basis of the previously internal turnover or of publicly quoted prices where such prices exist (e.g. in the oil industry). Where the previously internal turnover does not appear to correspond to a market valuation of the activities in question (and, thus, to the expected future turnover on the market), the forecasted revenues to be received on the basis of an agreement with the former parent may be a suitable proxy.

3. "Net" turnover

137. The turnover to be taken into account is "net" turnover, after deduction of a number of components specified in the Regulation. The aim is to adjust turnover in such a way as to enable it to reflect the real economic weight of the undertaking.

3.1 Deduction of rebates and taxes

138. Article 5(1) provides for the "deduction of sales rebates and of value added tax and other taxes directly related to turnover". "Sales rebates" mean all rebates or discounts which are granted by the undertakings to their customers and which have a direct influence on the amounts of sales.

¹⁰³ In Case IV/M.126 - Accor/Wagons-Lits, of 28 April 1992, the Commission decided to consider certain income from car-hire activities as revenues from ordinary activities although they were included as "other operating proceeds" in Wagons-Lits' profit and loss account.

¹⁰⁴ See Case IV/M.156 - Cereol/Continentale Italiana of 27 November 1991. In this case, the Commission excluded Community aid from the calculation of turnover because the aid was not intended to support the sale of products manufactured by one of the undertakings involved in the merger, but the producers of the raw materials (grain) used by the undertaking, which specialized in the crushing of grain.

139. As regards the deduction of taxes, the Merger Regulation refers to VAT and "other taxes directly related to turnover". The concept of "taxes directly related to turnover" refers to indirect taxation linked to turnover, such as, for example, taxes on alcoholic beverages or cigarettes.

3.2 The treatment of "internal" turnover

140. The first subparagraph of Article 5(1) states that "the aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4", *i.e.* the group to which the undertaking concerned belongs. The aim is to exclude the proceeds of business dealings within a group so as to take account of the real economic weight of each entity in the form of market turnover. Thus, the "amounts" taken into account by the Merger Regulation reflect only the transactions which take place between the group of undertakings on the one hand and third parties on the other.
141. Article 5(5)(a) of the Merger Regulation applies the principle that double counting is to be avoided specifically to the situation where two or more undertakings concerned in a concentration jointly have the rights or powers listed in Article 5(4)(b) in another company. According to this provision, the turnover resulting from the sale of products or the provision of services between the joint venture and each of the undertakings concerned (or any other undertaking connected with any one of them in the sense of Article 5(4)) should be excluded. As regards joint ventures between undertakings concerned and third parties, insofar as their turnover is taken into account according to Article 5(4)(b) as set out in point 157 below, the turnover generated by sales between the joint venture and the undertaking concerned (as well as undertakings linked to the undertaking concerned in accordance with the criteria set out in Article 5(4)) is not taken into account according to Article 5(1).

4. Turnover calculation and financial accounts

4.1 The general rule

142. The Commission seeks to base itself upon the most accurate and reliable figures available. Generally, the Commission will refer to accounts which relate to the closest financial year to the date of the transaction and which are audited under the standard applicable to the undertaking in question and compulsory for the relevant financial year.¹⁰⁵ An adjustment of the audited figures should only take place if this is required by the provisions of the Merger Regulation, including the cases explained in more detail in paragraph 145.
143. The Commission is reluctant to rely on management or any other form of provisional accounts in any but exceptional circumstances.¹⁰⁶ Where a concentration takes place within the first months of the year and audited accounts are not yet available for the

¹⁰⁵ See Case COMP/M.3986 – Gas Natural/Endesa of 15 November 2005; confirmed by judgment of the CFI, Case T-417/05, *Endesa v Commission* (not yet reported), paragraphs 106, 132 (judgment of 14 July 2006).

¹⁰⁶ See Case COMP/M.3986 – Gas Natural/Endesa of 15 November 2005; confirmed by judgment of the CFI, Case T-417/05, *Endesa v Commission* (not yet reported), paragraphs 146, 176 (judgment of 14 July 2006).

most recent financial year, the figures to be taken into account are those relating to the previous year. Where there is a major divergence between the two sets of accounts, due, for example to verifiable external economic events, and in particular, when the final draft figures for the most recent year have been approved by the board of management, the Commission may decide to take those figures into account.

144. Despite the general rule, in cases where major differences between the Community's accounting standards and those of a non-member country are observed, the Commission may consider it necessary to restate these accounts in accordance with Community standards in respect of turnover.

4.2 Adjustments after the date of the last audited accounts

145. Notwithstanding the foregoing paragraphs, an adjustment must always be made to account for acquisitions or divestments which are not or not fully reflected in the audited accounts. Such permanent changes in the economic reality of the undertakings concerned have to be taken into account in order to identify the true resources being concentrated. Those adjustments are only selective in nature and do not endanger the principle that there should be a simple and objective mechanism to determine the Commission's jurisdiction as they do not require a complete revision of the audited accounts.¹⁰⁷ First, this applies to acquisitions or divestments subsequent to the date of the audited accounts. This is relevant if a company closes a transaction concerning the divestment and closure of part of its business at any time before the relevant date for establishing jurisdiction (see the following Section) or where such a divestment or closure of a business is a pre-condition for the operation.¹⁰⁸ In this case, the turnover to be attributed to that part of the business must be subtracted from the turnover of the notifying party as shown in its last audited accounts. If an agreement for the sale of part of its business is signed, but the closing of the sale (in other words, its legal implementation and the transfer of the legal title to the shares or assets acquired) has not yet occurred, such a change is not taken into account.¹⁰⁹ Conversely, the turnover of those businesses whose acquisition has been closed subsequent to the preparation of the most recent audited accounts, but before the relevant date for establishing jurisdiction, must be added to a company's turnover for notification purposes.

146. Second, an adjustment may also be necessary for acquisitions or divestments which have taken place during the financial year for which the audited accounts are drawn up. If acquisitions or divestments within this period are made, the changes in the economic resources may only partly be reflected in the audited accounts of the undertaking concerned. As the turnover of the businesses acquired may be included in the accounts only from the time of their acquisition, this may not reflect the full annual turnover of the acquired business. Conversely, the turnover of the businesses divested may still be included in the audited accounts up to the point in time of their actual divestment. In these cases, adjustments have to be made to remove the turnover generated by the

¹⁰⁷ CFI, Case T-417/05, *Endesa v Commission* (not yet reported), paragraphs 132, 179 (judgment of 14 July 2006).

¹⁰⁸ See Judgment of the CFI in Case T-3/93, *Air France v Commission*, [1994] ECR II-121 paragraphs 100 et seq. in relation to Case IV/M.278 – *British Airways/Dan Air*; Case IV/M.588 – *Ingersoll-Rand/Clark Equipment*.

¹⁰⁹ Case IV/M.632 – *Rhône Poulenc Rorer/Fisons* of 21 September 1995; Case COMP/M.1741 – *MCI Worldcom/Sprint* of 28 June 2000.

divested businesses from the audited accounts until the time of de-consolidation and to add the turnover which the acquired businesses have generated in the year until the time they have been consolidated in the accounts. As a result, no turnover of the businesses divested and the full annual turnover of the businesses acquired has to be taken into account.

147. Other factors that may affect turnover on a temporary basis such as a decrease in orders for the product or a slow-down in the production process within the period prior to the transaction will be ignored for the purposes of calculating turnover. No adjustment to the definitive accounts will be made to incorporate them.

4.3 Relevant date for establishing jurisdiction

148. The relevant date for establishing the Commission's jurisdiction is the date of the conclusion of the binding legal agreement, the announcement of a public bid or the acquisition of a controlling interest or the date of the first notification, whichever date is earlier. Regarding the date of notification, a notification to either the Commission or to a Member State authority is relevant. If acquisitions or divestitures are closed before such date, the accounts of the undertaking concerned are to be adjusted according to the principles outlined above.

149. The legal situation for establishing the Commission's jurisdiction has been changed under the recast Merger Regulation. Under the former Merger Regulation, the relevant date was the triggering event for a notification according to Article 4(1) of this Regulation – the conclusion of a final agreement or the announcement of a public bid or the acquisition of a controlling interest – or, at the latest, the time when the parties were obliged to notify (i.e. one week after a triggering event for a notification).¹¹⁰

150. Under the recast Merger Regulation, there is no longer an obligation for the parties to notify within a certain time-frame (provided the parties do not implement the planned concentration before notification). Moreover, according to Article 4(1) second subparagraph, the undertakings concerned can already notify the transaction on the basis of a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid. At the time of the notification at the latest, the Commission – as well as national competition authorities – must be able to determine their jurisdiction. Article 4(1) subparagraph 1 of the Merger Regulation foresees that, generally, concentrations shall be notified following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. The dates of these events are therefore still decisive under the recast Merger Regulation in order to determine the relevant date for establishing jurisdiction, if a notification does not occur before such events on the basis of a good faith intention or an announced intention.¹¹¹

5. Attribution of turnover under Article 5(4)

110 See Case COMP/M.1741 – MCI Worldcom/Sprint of 28 June 2000.

111 The alternative possibility that turnover should be defined on the latest date when the relevant parties are obliged to notify (seven days after the “triggering event” under the former Merger Regulation) cannot be retained under the recast merger Regulation, because there is no deadline for notification.

5.1 Identification of undertakings whose turnover is taken into account

151. When an undertaking concerned by a concentration belongs to a group, not only the turnover of the undertaking concerned is considered, but the Merger Regulation requires to also take into account the turnover of those undertakings with which the undertaking concerned has links within the meaning of Article 5(4) in order to determine whether the thresholds contained in Article 1 of the Merger Regulation are met. The aim is again to capture the total volume of the economic resources that are being combined through the operation irrespective of whether the economic activities are carried out directly by the undertaking concerned or whether they are undertaken indirectly via companies and undertakings with which the undertaking concerned possesses the links described in Article 5(4).

152. The Merger Regulation does not delineate the concept of a group in a single abstract definition, but sets out in Article 5(4)(b) certain means by which commonly control over an undertaking can be exercised. If an undertaking concerned directly or indirectly has such links with other companies, those are to be regarded as part of its group for purposes of turnover calculation under the Merger Regulation.

153. Article 5(4) of the Merger Regulation provides the following:

"Without prejudice to paragraph 2 [acquisitions of parts], the aggregate turnover of an undertaking concerned within the meaning of Article 1(2) and (3) shall be calculated by adding together the respective turnovers of the following:

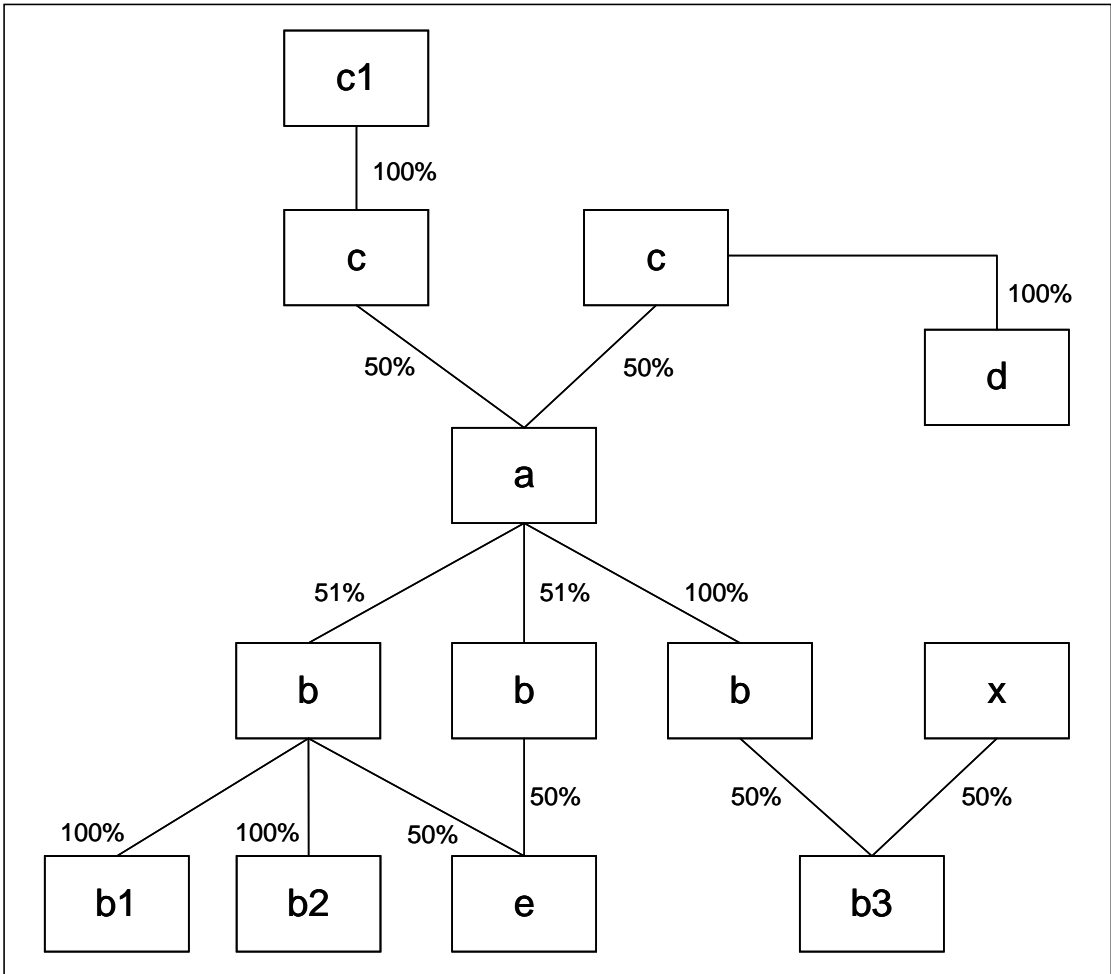
- (a) the undertaking concerned;
- (b) those undertakings in which the undertaking concerned directly or indirectly:
 - (i) owns more than half the capital or business assets, or
 - (ii) has the power to exercise more than half the voting rights, or
 - (iii) has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or
 - (iv) has the right to manage the undertaking's affairs;
- (c) those undertakings which have in an undertaking concerned the rights or powers listed in (b);
- (d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);
- (e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b)."

An undertaking which has in another undertaking the rights and powers mentioned in Article 5(4)(b) will be referred to as the "parent" of the latter in the present section of

this Notice dealing with the calculation of turnover, whereas the latter is referred to as “subsidiary” of the former. In short, Article 5(4) therefore foresees that the turnover of the undertaking concerned by the concentration (point (a)) should include its subsidiaries (point (b)), its parent companies (point (c)), the other subsidiaries of its parent companies (point (d)) and any other subsidiary jointly held by two or more of the companies identified under (a)-(d) (point (e)).

154. A graphic example is as follows:

The undertaking concerned and its group:



- a: The undertaking concerned
- b: Its subsidiaries, jointly controlled companies together with third parties (b3) and their own subsidiaries (b1 and b2)
- c: Its parent companies and their own parent companies (c1)
- d: Other subsidiaries of the parent companies of the undertaking concerned
- e: Companies jointly held by two (or more) companies of the group
- x: Third party

Note: the letters a – e correspond to the relevant points of Article 5(4). Percentages set out in the graph relate to the percentage of voting rights held by the respective parent company.

155. The means for exercising influence contained in Article 5(4)(b)(i)-(iii) can be applied in a rather straightforward way as they refer to quantitative thresholds. These thresholds are fulfilled if the undertaking concerned owns more than half of the capital or business assets of other undertakings, has more than half of the voting rights or has legally the power to appoint more than half of the board members in other undertakings. However, the thresholds are also met if the undertaking concerned *de facto* has the power to exercise more than half of the voting rights in the shareholders’

assembly or the power to appoint more than half of the board members in other undertakings.¹¹²

156. The provision contained in Article 5(4)(b)(iv), the right to manage the undertaking's affairs, focuses more on the substantive relationship between the undertaking concerned and the subsidiary. Such a right to manage exists under company law in particular on the basis of organisational contracts such as a "*Beherrschungsvertrag*" under German law, on the basis of business lease agreements or on the basis of the organisation structure for the general partner in a limited partnership.¹¹³ However, the "right to manage" is not confined to such, more exceptional situations. It may also be based on the holding of voting rights (alone or in combination with contractual arrangements, such as a shareholders' agreement) which allow, on a *de jure* basis, determining the strategic behaviour.
157. The right to manage also covers situations in which the undertaking concerned jointly has the right to manage an undertaking's affairs together with third parties.¹¹⁴ The underlying consideration is that the undertakings exercising joint control have jointly the right to manage the controlled undertakings' affairs even if each of them individually may have those rights only in a negative sense, *i.e.* in the form of veto rights. In the example, the undertaking (b3) which is jointly controlled by the undertaking concerned (a) and a third party (x) is taken into account as both (a) and (x) have veto rights in (b3) on the basis of their equal shareholding in (b3). Different from the discussion about joint control set out above, under Article 5(4)(b)(iv) account is taken only of those joint ventures in which the undertaking concerned and third parties have such influence on the basis of *de jure* rights that give rise to a clear-cut right to manage. Thereby, the inclusion of joint ventures is limited to situations where the undertaking concerned and third parties have a joint right to manage on the basis of an agreement, *e.g.* a shareholders' agreement, or in where the undertaking concerned and a third party have an equality of voting rights to the effect that they have the right to appoint an equal number of members to the decision-making bodies of the joint venture. The inclusion of the turnover of undertakings in which an undertaking concerned has a right to manage jointly with third parties is coherent with the general approach of the Merger Regulation towards joint ventures and corresponds in particular to the general principle that the turnover calculation should as accurately as possible reflect the economic strength of the undertakings involved in the concentration.
158. In the same way, where two or more companies jointly control the undertaking concerned in the sense that the agreement of each and all of them is needed in order to manage the undertaking affairs, the turnover of all of them is included. In the example, the two parent companies (c) of the undertaking concerned (a) would be taken into account as well as their own parent companies (c1 in the example). This interpretation results from the referral from Article 5(4)(c), dealing with this case, to Article 5(4)(b), which is applicable to jointly controlled companies as set out in the preceding paragraph. It is further underlined by the text of Article 5(4)(c), which uses the plural when referring to the parent companies.

¹¹² Case IV/M.187 – Ifint/Exor of 2 March 1992; Case IV/M.062 – Eridania/ISI of 30 July 1991.

¹¹³ Case IV/M.126 – Accor/WagonLits of 28 April 1992.

¹¹⁴ Case COMP/M.1741 – MCI Worldcom/Sprint; Case IV/ M. 187 – Ifint/Exor; Case IV/ M.1046 – Ameritech/Tele Danmark.

159. When any of the companies identified on the basis of Article 5(4) also has links as defined in Article 5(4) with other undertakings, these should also be incorporated into the calculation. In the example, one of the subsidiaries of the undertaking concerned a (called b) has in turn its own subsidiaries b1 and b2 and one of the parent companies (called c) has its own subsidiary (d).
160. Article 5(4) sets out specific criteria for identifying undertakings whose turnover can be attributed to the undertaking concerned. The “group” resulting from the application of these provisions, including the test of having the right to manage the undertaking's affairs, does not automatically correspond to the results of the application of the test of control in Article 3(2). The differences are most apparent in the field of *de facto* control. Whereas under Article 3(2) even a situation of economic dependence may lead to control on a *de facto* basis (see in detail above), a solely controlled subsidiary is only taken into account on a *de facto* basis under Article 5(4)(b) if it is clearly demonstrated that the undertaking concerned has the power to exercise more than half of the voting rights or to appoint more than half of the board members. Concerning joint control scenarios, Article 5(4)(b)(iv) covers those scenarios where the controlling undertakings jointly have a right to manage on the basis of individual veto rights. However, Article 5(4) would not cover situations where joint control occurs on a *de facto* basis due to strong common interests between different minority shareholders of the joint venture company on the basis of shareholders' attendance. The difference is reflected in the fact that Article 5(4)(b)(iv) refers to the *right* to manage, and not a *power* (as in subparagraph (b)(ii) and (iii)) and may be explained by the need for criteria in determining jurisdiction that can be easily established and verified. Under Article 3(3), however, the question whether a concentration arises can be much more comprehensively investigated. In addition, situations of negative sole control would only exceptionally be covered if the conditions of Article 5(4)(b)(i)-(iii) were met in the specific case; Article 5(4)(b)(iv), the “right to manage”, would not cover negative control scenarios.

5.2 Allocation of turnover of the undertakings identified

161. In general, as long as the test under Article 5(4)(b) is fulfilled, the whole turnover of the subsidiary in question will be taken into account regardless of the actual shareholding which the undertaking concerned holds in the subsidiary. In the chart, the whole turnover of the subsidiaries called b of the undertaking concerned a will be taken into account.
162. However, the Merger Regulation provides for specific rules for joint ventures. Article 5(5)(b) foresees for joint ventures between two or more undertakings concerned that the turnover of the joint venture (as far as the turnover is generated from activities with third parties as set out above in point 141) should be apportioned equally amongst the undertakings concerned, irrespective of their share of the capital or the voting rights.
163. The principle contained in Article 5(5)(b) is followed by analogy for the allocation of turnover for joint ventures between undertakings concerned and third parties if their turnover is taken into account according to Article 5(4)(b) as set out above in point 157. The Commission's practice has been to allocate to the undertaking concerned the turnover of the joint venture on a per capita basis according to the number of

undertakings exercising joint control. In the example, half of the turnover of b3 is taken into account.

IV. Geographic allocation of turnover

164. The thresholds concerning Community-wide and Member State turnover in Article 1(2) and (3) select cases which have sufficient turnover within the Community in order to be of Community interest and which are primarily cross-border in nature. They require turnover to be allocated geographically to the Community and to Member States. Since audited accounts often do not provide a geographical breakdown as required by the Merger Regulation, the Commission will rely on the best figures available provided by the undertakings. The second subparagraph of Article 5(1) provides that the location of turnover is determined by the location of the customer at the time of the transaction:

"Turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State as the case may be."

General rule

165. The Merger Regulation does not discriminate between "products sold" and "services provided" for the geographic allocation of turnover. For both cases, the general rule is that turnover should be attributed to the place where the customer is located. This is an expression of the underlying principle that turnover should be allocated to the location where competition with alternative suppliers takes place. This location is normally also the place where the characteristic action under the contract in question is to be performed, *i.e.* where the service is actually provided and the product is actually delivered. In the following, the sale of goods and the provision of services are dealt with separately as they exhibit certain different features in terms of allocation of turnover.

Sale of goods

166. For the sale of goods, particular situations may arise in situations in which the place where the customer was located at the time of concluding the purchase agreement is different from the billing address and/or the place of delivery. In these situations, the place where the purchase agreement was entered into and the place of delivery are more important than the billing address. As the delivery is in general the characteristic action for the sale of goods, the place of delivery may even be prevailing over the place where the customer was located at the time when the purchase agreement was concluded. This will depend on whether the place of delivery is to be considered the place where competition takes place for the sale of goods or whether competition rather takes place at the residence of the customer. In the case of a sale of mobile goods, such as a motor car, to a final consumer, the place where the car is delivered to the customer is decisive even if the agreement was concluded via the phone or the Internet before.

167. A specific situation arises in cases where a multinational corporation has a Community buying strategy and sources all its requirements for a good from one location. As a central purchasing organisation can take different forms, it is necessary to consider its

concrete form since this may determine how to allocate the turnover. Where goods are purchased by and delivered to the central purchasing organisation and are subsequently re-distributed internally to different plants in a variety of Member States, turnover is allocated only to the Member State where the central purchasing organisation is located. In this case, competition takes place at the location of the central purchasing organisation and this is also the place where the characteristic action under the sales contract is performed. The situation is different in case of direct links between the seller and the different subsidiaries. This comprises the case where the central purchasing organisation concludes a mere framework agreement, but the individual orders are placed by and the products are directly delivered to the subsidiaries in different Member States as well as the case where the individual orders are placed via the central purchasing organisation, but the products are directly delivered to the subsidiaries. In both cases, turnover is to be allocated to the different Member States in which the subsidiaries are located, irrespective of whether the central purchasing organisation or the subsidiaries receive the bills and effect the payment. The reason is that in both cases competition with alternative suppliers takes place for the delivery of products to the different subsidiaries even though the contract is concluded centrally. In the first case, in addition, the subsidiaries actually decide upon the quantities to be delivered and on an element essential for competition on their own.

Provision of services

168. For services, the Merger Regulation foresees that the place of their provision to the customer is relevant. Services containing cross-border elements can be considered to fall into three general categories. The first category comprises cases where the service provider travels, the second category cases where the customer travels. The third category comprises those cases where a service is provided without either the service provider or the customer having to travel. In the first two categories, the turnover generated is to be allocated to the place of destination of the traveller, *i.e.* the place where the service is actually provided to the customer. In the third category, the turnover is generally to be allocated to the location of the customer. For the central sourcing of services the above outlined principles for the central purchasing of goods apply in an analogous way.
169. An example of the first category would be a situation where a non-European company provides special airplane maintenance services to a carrier in a Member State. In this case, the service provider travels to the Community where also competition for this service takes place. If a European tourist hires a car or books a hotel directly in the United States, this falls into the second category as the service is provided outside the Community and also competition takes place between hotels and rental car companies at the location chosen. However, the case is different for package holidays. For this kind of holiday, the service starts with the sale of the package through a travel agent at the customer's location and competition for the sale of holidays through travel agents takes place locally, as with retail shopping, even though the service may be provided in a number of distant locations. The case therefore falls into the third category and the turnover generated is to be allocated to the customer's location. The third category also comprises cases like the supply of software or the distribution of films which are made outside the Community, but are supplied to a customer in a Member State.

170. Air transport cases fall outside the categories set out above as the service consists in enabling the customer to travel. The turnover generated by air transport 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. This is normally the country where the ticket was bought. Similar considerations apply to sea transport cases where the turnover is allocated to the location of the customer, irrespective of whether or not the concrete route starts or ends in a Member State. In telecom cases, the qualification of call termination services may raise problems. Although call termination would appear to fall into the third category, there are reasons to treat it differently. Call termination services are provided, e.g., in situations where a call, originating from a European operator, is being terminated in the United States. Although neither the European nor the US operator travels, the signal travels and the situation is akin to the “leasing” of the US network by the European operator to reach the person to be called. This is also the place where competition takes place (if any). The turnover is therefore to be considered as non-Community turnover.

Specific sectors

171. Certain sectors do, however, pose very particular problems with regard to the geographical allocation of turnover. These will be dealt with in Section VI below.

V. Conversion of turnover into EURO

172. When converting turnover figures into Euro great care should be taken with the exchange rate used. The annual turnover of a company should be converted at the average rate for the twelve months concerned. This average can be obtained via DG COMP’s website.¹¹⁵ The audited annual turnover figures should be converted as such and not be broken down into quarterly or monthly figures which would then be converted individually.
173. When a company has sales in a range of currencies, the procedure is no different. The total turnover given in the consolidated audited accounts and in that company's reporting currency is converted into Euros at the yearly average rate. Local currency sales should not be converted directly into Euros since these figures are not from the consolidated audited accounts of the company.

VI. Provisions for credit and other financial institutions and insurance undertakings

1. Scope of application

174. Due to the specific nature of the sector, Article 5(3) contains specific rules for the calculation of turnover of credit and other financial institutions as well as insurance undertakings.

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See http://europa.eu.int/comm/competition/mergers/others/exchange_rates.html#footnote_1. The website makes reference to the European Central Bank’s Monthly Bulletin.

175. In order to define the terms "credit institutions and other financial institutions" under the Merger Regulation, the Commission in its practice has consistently adopted the definitions provided in the applicable European regulation in the banking sector. The Directive on the taking up and pursuit of the business of credit institutions foresees that¹¹⁶:

- "Credit institution shall mean an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account."

- "Financial institution shall mean an undertaking other than a credit institution, the principal activity of which is to acquire holdings or to carry on one or more of the activities listed in points 2 to 12 of Annex I."

176. Financial institutions within the meaning of Article 5(3) of the Merger Regulation are, accordingly, on the one hand holding companies and, on the other hand, undertakings which perform on a regular basis as a principal activity one or more activities expressly mentioned in points 2 to 12 of the Annex of the banking Directive. These activities include, *inter alia*, lending (comprising activities such as such as consumer credit, mortgage credit, factoring), financial leasing, money transmission services, issuing and managing instruments of payment, guarantees and commitments, trading for own account or for account of customers, participation in securities issues and the provision of services related to such issues.

2. Calculation of turnover

177. Article 5(3) of the Merger Regulation sets out the methods of calculation of turnover for credit and other financial institutions and for insurance undertakings. In the following Section, some supplementary questions related to turnover calculation for the abovementioned types of undertakings are addressed.

2.1 Calculation of turnover of credit and financial institutions (other than financial holding companies)

2.1.1 General

178. There are normally no particular difficulties in applying the banking income criterion for the definition of the worldwide turnover to credit institutions and other kinds of financial institutions.

179. For the allocation of turnover to the Community and to individual Member States, first the general principle set out in Article 5(1) of the Merger Regulation applies. Therefore, the turnover achieved by all customer-related activity, such as income generated by lending to customers, by trading in securities for account of customers or by money transmission, is to be attributed to the place where the customer is located. In case of interbank lending, the income is to be allocated to the location of the borrowing bank branch as the branch is to be considered as the customer in these

¹¹⁶ The definitions are to be found in Article 1 (1) and (5) of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ L 126, 26.5.2000, p. 1).

circumstances.¹¹⁷ Second, where the banking business is not carried out for a direct customer (e.g. in case of trading for own account or income from shares and other variable yield securities), Article 5(3)(a) of the Merger Regulation provides that the turnover is to be allocated to the branch or division of the financial institution which receives this income.

2.1.2 Turnover of leasing companies

180. There is a fundamental distinction to be made between financial leases and operating leases. Basically, financial leases are made for longer periods than operating leases and ownership is generally transferred to the lessee at the end of the lease term by means of a purchase option included in the lease contract. Under an operating lease, on the contrary, ownership is not transferred to the lessee at the end of the lease term and the costs of maintenance, repair and insurance of the leased equipment are included in the lease payments. A financial lease therefore functions as a loan by the lessor to enable the lessee to purchase a given asset.
181. As already mentioned above, a company performing as its principal activity financial leasing is a financial institution within the meaning of Article 5(3)(a) and its turnover is to be calculated according to the specific rules set out in this provision. All payments on financial leasing contracts, except for the redemption part, are to be taken into account; a sale of future leasing payments at the beginning of the contract for re-financing purposes is not relevant.
182. Operational leasing activities are, however, not considered to be carried out by financial institutions, and therefore the general turnover calculation rules of Article 5(1) apply¹¹⁸.

2.2 Insurance undertakings

183. In order to measure the turnover of insurance undertakings, Article 5(3)(b) of the Merger Regulation foresees that gross premiums written are taken into account. The gross premiums written are the sum of received premiums, including any received reinsurance premiums if the undertaking concerned has activities in the field of reinsurance. Outgoing or outward reinsurance premiums, *i.e.* all amounts paid and payable by the undertaking concerned to get reinsurance cover, are only costs related to the provision of insurance coverage and are not to be deducted from the gross premiums written.
184. The premiums to be taken into account are not only related to new insurance contracts made during the accounting year being considered but also to all premiums related to contracts made in previous years which remain in force during the period taken into consideration.
185. In order to constitute appropriate reserves allowing for the payment of claims, insurance undertakings, usually hold a portfolio of investments in shares, interest-bearing securities, land and property and other assets providing annual revenues. Those revenues are also to be taken into account when calculating the turnover of

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Case IV/M.213 – Hong Kong & Shanghai Bank/Midland of 21 May 1992.
See Case IV/M.234 - GECC/Avis Lease, 15 July 1992.

insurance companies. For those revenues, not the specific rules for insurance undertakings according to Article 5(3)(b), but the general rules apply.

186. In this respect, a distinction has to be made between pure financial investments, which do not confer the rights and powers specified in Article 5(4) to the insurance undertaking in the undertakings in which the investment has been made, and those investments leading to the acquisition of an interest which meets the criteria specified in Article 5(4)(b). In the latter case, Article 5(4) of the Merger Regulation applies, and the turnover of this undertaking has to be added to the turnover of the insurance undertaking for the determination of the thresholds laid down in the Merger Regulation¹¹⁹.

2.3 Financial holding companies

187. As an “other financial institution” within the meaning of Article 5(3)(a) of the Merger Regulation, the turnover of a financial holding company has to be calculated according to the specific rules set out in this provision. However, in the same way as mentioned above for insurance undertakings, Article 5(4) applies to those participations which meet the criteria specified in Article 5(4)(b). Thus, the turnover of a financial holding is to be basically calculated according to Article 5(3), but it may be necessary to add turnover of undertakings falling within the categories set out in Article 5(4) (“Art. 5(4) companies”).¹²⁰
188. In practice, the turnover of the financial holding company (non-consolidated) must first be taken into account. Then the turnover of the Art. 5(4) companies must be added, whilst taking care to deduct dividends and other income distributed by those companies to the financial holdings. The following provides an example for this kind of calculation:

	<u>EURO Million</u>
1. Turnover related to financial activities (from non-consolidated P&L)	3 000
2. Turnover related to insurance Art. 5(4) companies (gross premiums written)	300
3. Turnover of industrial Art. 5(4) companies	2 000
4. Deduct dividends and other income derived from Art. 5(4) companies 2 and 3	<u><200></u>
 Total turnover financial holding and its group	 5 100

189. In such calculations different accounting rules may need to be taken into consideration. Whilst this consideration applies to any type of undertaking concerned by the Merger Regulation, it is particularly important in the case of financial holding companies¹²¹ where the number and the diversity of enterprises controlled and the degree of control

¹¹⁹ See Case IV/M.018 - AG/AMEV, of 21 November 1990.

¹²⁰ The principles for financial holding companies may to a certain extent be applied to fund management companies.

¹²¹ See for example Case IV/M.166 - Torras/Sarrió, of 24 February 1992.

the holding holds on its subsidiaries, affiliated companies and other companies in which it has shareholding requires careful examination.

190. Turnover calculation for financial holding companies as described above may in practice prove onerous. Therefore a strict and detailed application of this method will be necessary only in cases where it seems that the turnover of a financial holding company is likely to be close to the Merger Regulation thresholds; in other cases it may well be obvious that the turnover is far from the thresholds of the Merger Regulation, and therefore the published accounts are adequate for the establishment of jurisdiction.

D. Detailed analysis of different types of concentrations

191. In the following, the undertakings concerned in different types of operations and rules which are specific to such situations will be explained.

Mergers

192. In a merger, as mentioned earlier, the undertakings concerned are each of the merging entities.

Acquisition of sole control

193. Acquisition of sole control of the whole undertaking is the most straightforward case of acquisition of control. The undertakings concerned will be the acquiring undertaking and the target undertaking in the configuration at the relevant date for assessing jurisdiction, as explained above. The same rule applies for the acquisition of negative control and for a change from negative to sole control.

194. Where the target undertaking is acquired by a group through one of its subsidiaries, the undertakings concerned are the acquiring subsidiary and the target undertaking. However, even though the subsidiary is the undertaking concerned for the purpose of calculating turnover, Article 5(4) of the Merger Regulation provides that the turnover of all undertakings with which the undertaking concerned has the links as specified in Article 5(4) shall be included in the threshold calculations. In this respect, the group is considered to be a single economic unit and the different companies belonging to the same group cannot be considered as different undertakings concerned for jurisdictional purposes under the Merger Regulation. The actual notification can be made by the subsidiary concerned or by its parent company.

Acquisition of parts of an undertaking and staggered operations – Article 5(2)

195. The first subparagraph of Article 5(2) of the Merger Regulation provides that when the operation concerns the acquisition of parts of one or more undertakings, only those parts which are the subject of the transaction shall be taken into account with regard to the seller. The possible impact of the transaction on the market will depend only on the combination of the economic and financial resources that are the subject of the transaction with those of the acquirer and not on the remaining business of the seller. In

this case, the undertakings concerned will be the acquirer(s) and the acquired part(s) of the target undertaking.

196. The second subparagraph of Article 5(2) includes a special provision on staggered operations or follow-up deals. The previous transactions (within two years) involving the same parties become (re)notifiable with the most recent transaction if the thresholds are met whether for one or more of the transactions taken in isolation or cumulatively. In this case, the undertakings concerned are the acquirer(s) and the different acquired part(s) of the target company taken as a whole.

Change from joint to sole control

197. If the acquisition of control occurs by way of a change from joint control to sole control, one shareholder normally acquires the stake previously held by the other shareholder(s). In this situation, the undertakings concerned are the acquiring shareholder and the joint venture. As is the case for any other seller, the "exiting" shareholder is not an undertaking concerned.¹²²
198. In order to avoid double counting of the turnover of the joint venture, the rules provided for in Article 5(4) have to be adapted to this situation. Even if the acquiring undertaking has rights or powers in the joint venture which satisfy the requirements of Article 5(4), the turnover of the acquiring shareholder has to be calculated without the turnover of the joint venture, and the turnover of the joint venture has to be taken without the turnover of the acquiring shareholder.

Acquisition of joint control

199. In the case of acquisition of joint control of a newly-created undertaking, the undertakings concerned are each of the companies acquiring control of the newly set-up joint venture (which, as it does not yet exist, cannot be considered to be an undertaking concerned and moreover, as yet, has no turnover of its own). The same rule applies where one undertaking contributes a pre-existing subsidiary or a business (over which it previously exercised sole control) to a newly created joint venture. In these circumstances, each of the jointly-controlling undertakings is considered an undertaking concerned whereas any company or business contributed to the joint venture is not an undertaking concerned, and its turnover is part of the turnover of the initial parent company.
200. The situation is different in the case of acquisition of joint control of a pre-existing undertaking or business. The undertakings concerned are each of the undertakings acquiring joint control on the one hand, and the pre-existing acquired undertaking or business on the other.
201. The acquisition of a company with a view to immediately split up the assets is, as explained above, normally not considered as an acquisition of joint control of the entire target company, but as the acquisition of sole control by each of the ultimate acquirers of the respective parts of the target company. In line with the considerations for the

122 Case IV/M.023 - ICI/Tioxide, of 28 November 1990.

acquisition of sole control, undertakings concerned are the acquiring undertakings and the acquired parts in each of the transactions.

Changes of controlling shareholders in cases of joint control of an existing joint venture

202. A notifiable concentration may arise, as explained above, where a change in the quality of control occurs in a joint control structure due to a reduction of the number of controlling shareholders or the entrance of new controlling shareholders, irrespective of whether or not they replace existing controlling shareholders.
203. If a reduction of the number of controlling shareholders in a joint control scenario leads to a change in the quality of control in the circumstances as explained above, the undertakings concerned will be the remaining, jointly controlling shareholders and the joint venture. The change in the quality of control is considered to be an acquisition of control by the two remaining shareholders since, as set out above, they enlarge their rights and powers concerning the controlled undertaking and the structure of joint control as such is changed significantly.
204. In the case where one or more shareholders acquire control, either by entry or by substitution of one or more shareholders, in a situation of joint control both before and after the operation, the undertakings concerned are the shareholders (both existing and new) who exercise joint control and the joint venture itself.¹²³ On the one hand, similar to the acquisition of joint control of an existing company, the joint venture itself can be considered as an undertaking concerned as it is an already pre-existing undertaking. On the other hand, as set out above, the entry of a new shareholder is not only in itself a new acquisition of control, but also leads to a change in the quality of control for the remaining controlling shareholders as the quality of control of the joint venture is determined by the identity and composition of the controlling shareholders and therefore also by the relationship between them. Furthermore, the Merger Regulation considers a joint venture as a combination of the economic resources of the parent companies, together with the joint venture if it already generates turnover on the market. For these reasons, the newly entering controlling shareholders are undertakings concerned alongside with the remaining controlling shareholders. Due to the change of the quality in control, all of them are considered to undertake an acquisition of control.
205. As Article 4(2) 1st sentence of the Merger Regulation foresees that all acquisitions of joint control shall be notified jointly by the undertakings acquiring joint control, existing and new shareholders have to notify concentrations arising from such changes in joint control scenarios jointly.

123 See Case IV/M.376 - Synthomer/Yule Catto, of 22 October 1993.

Acquisition of control by a joint venture

206. In transactions where a joint venture acquires control of another company, the question arises whether or not the joint venture should be regarded as the undertaking concerned (the turnover of which would include the turnover of its parent companies), or whether each of its parent companies should individually be regarded as undertakings concerned. This question may be decisive for jurisdictional purposes.¹²⁴ Whereas, in principle, the undertaking concerned is the joint venture as the direct participant in the acquisition of control, there may be circumstances where companies set up "shell" companies and the parent companies will individually be considered as undertakings concerned. In this type of situation, the Commission will look at the economic reality of the operation to determine which are the undertakings concerned.
207. Where the acquisition is carried out by a full-function joint venture, with the features set out above, and already operates on the same market, the Commission will normally consider the joint venture itself and the target undertaking to be the undertakings concerned (and not the joint venture's parent companies).
208. Conversely, where the joint venture can be regarded as a mere vehicle for an acquisition by the parent companies, the Commission will consider each of the parent companies themselves to be the undertakings concerned, rather than the joint venture, together with the target company. This is the case in particular where the joint venture is set up especially for the purpose of acquiring the target company or has not yet started to operate, where an existing joint venture has no full-function character as referred to above or where the joint venture is an association of undertakings. The same applies where there are elements which demonstrate that the parent companies are in fact the real players behind the operation. These elements may include a significant involvement by the parent companies themselves in the initiation, organisation and financing of the operation. In those cases, the parent companies are regarded as undertakings concerned.

124 Assume the following scenario: The target company has an aggregate Community turnover of less than EUR 250 million, and the acquiring parties are two (or more) undertakings, each with a Community turnover exceeding EUR 250 million. If the target is acquired by a "shell" company set up between the acquiring undertakings, there would only be one undertaking (the "shell" company) with a Community turnover exceeding ECU 250 million, and thus one of the cumulative threshold conditions for Community jurisdiction, namely, the existence of at least two undertakings with a Community turnover exceeding EUR 250 million, would not be fulfilled. Conversely, if instead of acting through a "shell" company, the acquiring undertakings acquire the target undertaking themselves, then the turnover threshold would be met and the Merger Regulation would apply to this transaction. The same considerations apply to the national turnover thresholds referred to in Article 1(3).

Break-up of joint ventures and exchange of assets

209. When two (or more) undertakings break up a joint venture and split the assets (i.e. businesses) between them, this will normally be considered as more than one acquisition of control, as explained above. For example, undertakings A and B form a joint venture and subsequently split it up, in particular with a new asset configuration. The break-up of the joint venture involves a change from joint control over the joint venture's entire assets to sole control over the divided assets by each of the acquiring undertakings.¹²⁵
210. For each break-up operation, and in line with the consideration to the acquisition of sole control, the undertakings concerned will be, on the one hand, the acquiring party and, on the other, the assets that this undertaking will acquire.
211. Similar to the break-up scenario is the situation where two (or more) companies exchange assets constituting a business on each side. In this case, each acquisition of control is considered an independent acquisition of sole control. The undertakings concerned will be, for each transaction, the acquiring companies and the acquired undertaking or assets.

Acquisitions of control by natural persons

212. Control may also be acquired by natural persons, within the meaning of Article 3 of the Merger Regulation, if those persons themselves carry out further economic activities (and are therefore classified as economic undertakings in their own right) or if they control one or more other economic undertakings. In such a situation, the undertakings concerned are the target undertaking and the individual acquirer (with the turnover of the undertaking(s) controlled by that natural person being included in the calculation of the natural person's turnover to the extent that the terms of Article 5(4) are satisfied).¹²⁶
213. An acquisition of control of an undertaking by its managers is also an acquisition by natural persons, and the above is applicable here. However, the managers may pool their interests through a "vehicle company", so that it acts with a single voice and also to facilitate decision-making. Such a vehicle company may be, but is not necessarily, an undertaking concerned. The general guidance given above on acquisitions of control by a joint venture also applies here.

Acquisition of control by a State-owned undertaking

214. As described above, a merger or an acquisition of control arising between two undertakings owned by the same State (or the same public body) may constitute a concentration if the undertakings were formerly part of different economic units having an independent power of decision. If this is the case, both of them will qualify as undertakings concerned although both are owned by the same State.

¹²⁵ See parallel cases COMP/M.3293 – Shell/BEB and COMP/M.3294 – ExxonMobil/BEB of 20 November 2003; Case IV/M.197 – Solvay/Laporte of 30 April 1992.

¹²⁶ See Case IV/M.082 - Asko/Jacobs/Adia, of 16 May 1991 where a private individual with other economic activities acquired joint control of an undertaking and was considered an undertaking concerned.

215. As regards the calculation of turnover of State-owned undertakings, Article 5(4), which sets out the general method for determining the economic grouping to which an undertaking concerned belongs for the purpose of calculating turnover, should be read in conjunction with recital 22 of the Merger Regulation. This recital declares that, in order to avoid discrimination between the public and private sectors, "in the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them".¹²⁷ This recital clarifies that Member States (or other public bodies) are not considered as "undertakings" under Article 5(4) simply because they have interests in other undertakings which satisfy the conditions of Article 5(4). Therefore, for the purposes of calculating turnover of State-owned undertakings, account is only taken of those undertakings which belong to the same economic unit, having an independent power of decision.
216. Thus, where a State-owned company is not subject to any coordination with other State-controlled holdings, it should be treated as independent for the purposes of Article 5, and the turnover of other companies owned by that State should not be taken into account. Where, however, a Member State's interests are managed together or where for other reasons it is clear that State-owned companies form part of an "economic unit with an independent power of decision", then the turnover of those businesses should be considered part of the group of the undertaking concerned for the purposes of Article 5.

127 See also Case IV/M.216 - CEA Industrie/France Telecom/Finmeccanica/SGS-Thomson, of 22 February 1993.