Commission adopts Jurisdictional Notice under the Merger Regulation

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I. Introduction

On 10 July 2007, the Commission adopted the Commission Consolidated Jurisdictional Notice under the Merger Regulation (the “Jurisdictional Notice” or the “Notice”) (2). The Jurisdictional Notice replaces the four previous Notices dealing with jurisdictional issues under the Merger Regulation, all adopted by the Commission in 1998 under the previous Merger Regulation 4064/89. These are (i) the Notice on the concept of concentration (3), (ii) the Notice on the concept of full-function joint ventures (4), (iii) the Notice on the concept of undertakings concerned (5) and (iv) the Notice on calculation of turnover (6).

The Jurisdictional Notice covers all issues relevant for the Commission’s jurisdiction under the Merger Regulation, with the exception of referrals (7). The rationale of the consolidation of the four previous Notices in one document was to make the Jurisdictional Notice more user-friendly and to allow notifying parties to establish more easily whether the Commission is competent for an envisaged transaction. This consolidation also removes the overlaps between four notices and thus eliminates the possibility of conflicting interpretations.

However, the adoption of the Jurisdictional Notice was not only an exercise of consolidation, but the guidance given in the previous Notices has been reviewed in the light of the developments which have occurred in the meantime. Three general sources have been used for the amendments incorporated in the Jurisdictional Notice:

- First, the Jurisdictional Notice takes into account the changes introduced by the new Merger Regulation in relation to jurisdictional issues.
- Second, it also incorporates recent jurisprudence. For example a number of issues arising from the judgments of the Court of First Instance (“CFI”) in the cases Cementbouw (8) and Endesa (9) are, for instance, included in the Jurisdictional Notice.
- Third, the developments in the Commission’s decisional practice in recent years, are reflected in the Jurisdictional Notice.

The Commission carried out a public consultation on a draft of the Jurisdictional Notice from September to December 2006. Overall, 30 comments were received, among them 14 from law firms, 6 from industry organisations, 2 from undertakings directly and further comments from associations of competition lawyers (10). In the consultation, in particular the consolidation of the different previous Notices in one document was welcomed by all the respondents.

II. The structure of the Jurisdictional Notice

Two basic conditions have to be fulfilled for the Merger Regulation to apply to a given concentration: First, there must be a concentration of two or more undertakings within the meaning of Article 3. Second, the turnover of the undertakings concerned, calculated in accordance with Article 5, must satisfy the thresholds set out in Article 1 of the Regulation. The Jurisdictional Notice follows this basic structure and sets out, in the first part, the notion of a concentration (dealing with the issues previously explained in the Notices on the concept of concentration and on the concept of full-function joint ventures), followed, in the second part, by explanations

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(3) OJ C 66, 2.3.1998, p. 5.


(7) For referrals, see Commission Notice on Case Referral in respect of concentrations, OJ C 56, 5.3.2005, p. 2.


(10) The comments can be found on the European Commission Competition website: http://ec.europa.eu/competition/mergers/legislation/draft_jn.html.
as regards to the Community dimension of the concentration (containing issues previously dealt with in the Notices on the concept of undertakings concerned and on calculation of turnover).

III. Main new features of the Jurisdictional Notice

In the following, the main changes introduced in the Jurisdictional Notice (as compared to the four previous Notices) are discussed.

I. New features in the section on the concept of concentration

Acquisition of control by investment funds

The Jurisdictional Notice clarifies how acquisitions of control by investment funds are treated. In the section on the concept of concentration (11), the Notice explains that, normally, the investment company which has set up the investment fund acquires indirectly — via the fund company, often a limited partnership — control of the target undertaking. The investment company will generally have the power to exercise the rights directly held by the fund company so that such an acquisition, usually, fulfills the requirements for an indirect acquisition of control provided for in Article 3(1)(b) and 3(3)(b).

The Jurisdictional Notice sets out that the investment company is also considered to indirectly fulfill the requirements provided in Article 5(4)(b) in relation to the undertakings directly held by the investment funds. Taking the most important criterion of Article 5(4)(b), the investment company will normally have the power to indirectly exercise the voting rights held by the fund in the portfolio companies (13). Consequently, the turnover of all the portfolio companies, even if held by several investment funds set up by the same investment company, is to be taken into account when one of the funds is involved in an acquisition.

Control on a contractual basis

The Jurisdictional Notice extends the explanations on the acquisition of control on a contractual basis (12). Generally, in order to acquire control on a contractual basis, first, the contract must lead to a similar control of the management and resources of the other undertaking as in the case of acquisition of shares and assets and, second, such agreements, in order to bring about an acquisition of control, must be long-term contracts. The Commission had a number of cases concerning the acquisition of control based on agreements in recent years, such as acquisition of control via long-term hotel management contracts (14).

Object of control

As regards the object of control, the Notice clarifies under which circumstances assets, in particular brands and licences, constitute a part of an undertaking (15). This is the case when the assets form a business with a market presence to which a market turnover can be attributed. The Notice explains further that, for a transfer of a license to constitute a concentration, it is a necessary (but not sufficient) requirement that the licence is exclusive at least in certain territories.

Applying the same principles, the Notice clarifies the circumstances under which a concentration arises under the Merger Regulation if a company out-sources the provision of services or the production of goods, previously performed in-house, to a third party. Essentially, a concentration arises if assets are transferred which can also be used to supply to third parties and therefore allow for a market presence of the acquirer and outsourcing provider at least after a start-up period (16).

Split-up of assets

Under the heading "Change of control on a lasting basis", the Notice deals with the situation where several undertakings acquire a target company in order to immediately divide the assets between them (17). In such a scenario, in a first step, the acquisition of the entire target company is carried out by one or several undertakings and, in a second step, the acquired assets are divided among several undertakings. Several concentrations with the ultimate purchasers of the respective parts of the target occur in these circumstances if, first, the break-up is agreed between the different purchasers in a legally binding way and, second, if there is no uncertainty that the division of the acquired assets will take place within a short period of time after the first acquisition. The Notice explains that normally the maximum time-frame for the division of the assets should be one year. If these conditions are not met, the Commission will consider the first transaction as a separate concentration, involving the entire target undertaking, and the other transactions which might follow as separate concentrations.

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(11) Point 15 of the Jurisdictional Notice.
(12) See points 189 ff. of the Jurisdictional Notice.
(13) Point 18 of the Jurisdictional Notice.
(14) See, e.g., Case COMP/M.3858 — Lehman Brothers/SCG/Starwood/Le Meridien of 20 July 2005.
(15) Point 24 of the Jurisdictional Notice.
(16) Points 25 ff. of the Jurisdictional Notice.
(17) Points 30 ff. of the Jurisdictional Notice.
Parking transactions

Following comments of many respondents in the public consultation, the Notice also clarifies the treatment of so-called “parking transactions”, whereby an ultimate acquirer arranges for a business to be temporarily acquired by an interim buyer, often a financial institution, while, in many cases, already taking on a significant part of the financing costs and related commercial risks and also gaining certain rights (18). In such circumstances, the first transaction is only undertaken to facilitate the second transaction and the first buyer is directly linked to the ultimate acquirer.

The Notice explains that the Commission will consider the transaction by which the interim buyer acquires control in such circumstances only as the first step of a single concentration comprising the lasting acquisition of control by the ultimate buyer. In a corresponding section, the Notice clarifies that this scenario also does not fall under the exceptions in Article 3(5) of the Merger Regulation (20).

Interrelated transactions

Under the header “Interrelated transactions”, the Notice clarifies the circumstances when several transactions are to be considered a single concentration under Article 3 (which is distinct from the question whether several transactions are considered a single concentration under Article 5(2)(2)). In drafting this section of the Notice, use was made of the clarifications which were brought about by the recent Cementbouw judgment and recital 20 of the new Merger Regulation (29).

Essentially, the line set out in the draft Notice is that several transactions may be considered a single concentration if they are unitary in nature. In order to determine the unitary nature of the transactions in question, it is necessary, in each individual case, to ascertain whether those transactions are interdependent, in such a way that one transaction would not be carried out without the other (24). This will be the case if, assessed on the basis of the economic aims of the parties, those transactions are either de jure or de facto interconditional. If transactions are, however, not interdependent and the parties would proceed with one of the transactions if the others were not to succeed, the transactions have to be assessed individually.

It has to be underlined that several transactions, even if linked by conditions, can only be treated as a single concentration if ultimately control is acquired by the same undertakings. Therefore, assets swaps or de-mergers of JVs, involving several acquirers, are not considered a single concentration, even if the parties consider them interdependent. As several undertakings acquire control of different assets and a separate combination of resources takes place for each of the acquiring undertakings, the impact on the market of each of those acquisitions of control needs to be analysed separately under the Merger Regulation.

In addition, several transactions can only be combined to one concentration if each of them could constitute a concentration in itself. 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 is not in line with the general framework and the purpose of the Merger Regulation if also transactions, which do not lead to a change in control of a given target, were assessed as under the Merger Regulation.

Examples of cases in which several transactions were considered a single concentration are the acquisition of control over one business, consisting of different companies and requiring several transactions or parallel inter-conditional acquisitions of different targets, as in the EQT/H&R/Dragocase (22), or the serial acquisition of different companies, as in the Kingfisher case (23).

Sole and joint control

In the section dealing with sole control, the Notice expands on the concept of “negative control”. Negative control is considered only as a sub-category of sole control, not a separate quality of control in addition to sole and joint control. The consequence is that a change from negative to positive sole control is not considered a concentration (26). In relation to the establishment of de facto sole control scenarios, the Notice sets out that this will be analysed on the basis of historic voting patterns at company general meetings, the position of the other shareholders, and in particular by making a prospective analysis, taking into account foreseeable changes in the future (25).

(18) See point 35 of the Jurisdictional Notice.
(19) See point 114 of the Jurisdictional Notice.
(20) See points 36 ff. of the Jurisdictional Notice.

(24) See points 54, 83 of the Jurisdictional Notice.
(25) See point 59 of the Jurisdictional Notice.
The Notice extends the guidance given on de facto joint control scenarios. A commonality of interests, leading to joint control, exists if there is a high degree of mutual dependency, such as the situation when each parent provides a contribution to the JV which is vital for its operation. The same result may occur in situations with a majority shareholder: if there is a high degree of dependency on a minority shareholder which has the required know-how whereas the majority shareholder is a mere financial investor \(^{(26)}\).

The Notice further clarifies that a mere reduction of the number of shareholders in a joint control scenario, without a new shareholder acquiring joint control, will not be considered a concentration. This does not affect the consideration that a concentration exists if an operation involves a reduction in the number of shareholders from joint to sole control \(^{(27)}\).

**Joint Ventures**

In the section of the Notice on joint ventures and the concept of full-functionality, two changes should be highlighted.

First, the draft Notice sets out the dividing line between the application of Article 3(1) and Article 3(4), the requirement that a joint venture is full-function. Generally, the joint acquisition of control of another undertaking already falls under Article 3(1)(b). Only the creation of a joint venture by the parties, irrespective of whether the joint venture is created as a “greenfield operation” or whether the parties contribute assets to the joint venture, falls under Article 3(4) and therefore requires that the joint venture is considered full-function. The main difference lies in the consideration that, in order to fall under Article 3(1)(b), the target — qualifying as an object of control as discussed above — must have a current market presence, whereas the qualification as “full-function” undertaking requires a more forward-looking assessment on the basis of the criteria set out in the Notice. If joint control of an undertaking is acquired, a concentration (and a structural change in the market) arises even if, for the future, the full-functionality criterion were not to be met as the new parent companies intended to remove the target from the market.

Second, the draft Notice sets out the circumstances when changes in the activities of a joint venture are considered to constitute a concentration \(^{(28)}\). First, this is the case if a joint venture acquires additional assets, constituting a business, from its parents. Second, a concentration may also arise if the parent companies transfer significant additional assets, contracts, know-how or other rights to the joint venture and these assets and rights constitute the basis for an extension of the activities of the joint venture into other product or geographic markets which were not the object of the original joint venture, and if the joint venture performs such activities on a full-function basis. As the transfer of the assets or rights shows that the parents are the real players behind the extension of the joint venture’s scope, the enlargement of the activities of the joint venture can be considered in the same way as the creation of a new joint venture within the meaning of Article 3(4).

Third, a concentration arises if a change in the activity of an existing joint venture occurs that makes it full-function.

**Abandonment of concentrations**

As regards the abandonment of concentrations, the Notice generally reiterates the guidance given in the DG COMP Information Note on this issue which was published in 2005 on DG COMP’s web-site. Essentially, the line is that, after initiating proceedings, the requirements for the proof of the abandonment, as a general principle, must correspond in terms of legal form, intensity etc. to the initial act that was considered sufficient to make the concentration notifiable \(^{(29)}\).

**Changes of transactions after a Commission authorisation decision**

The Notice also deals with the situation when parties may wish not to implement the concentration in the form foreseen after authorisation of the concentration by the Commission. In such circumstances, the Commission’s authorisation decision does not cover the changed structure of the transaction 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. The consequence is that a new notification is required. 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 or changes in the corporate structure

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\(^{(27)}\) See point 90 of the Jurisdictional Notice.

\(^{(28)}\) See points 106 ff. of the Jurisdictional Notice.

\(^{(29)}\) See points 117 ff. of the Jurisdictional Notice.
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.

2. New features in the section on Community dimension

The second main section of the Consolidated Notice deals with the Community dimension of the concentration. In the following, only major amendments will be discussed.

Relevant date for establishing the Commission’s jurisdiction

The Jurisdictional Notice includes a section on the relevant date for establishing the jurisdiction of the Commission (or of National Competition Authorities) (30). This is particularly relevant in order to decide the moment in time at which acquisitions or divestitures are taken into account for the calculation of turnover of the undertakings concerned (see below).

The legal situation for establishing the Commission’s jurisdiction has changed under the new Merger Regulation as parties can now notify earlier, i.e. on the basis of a good faith intention to conclude an agreement or where they have publicly announced an intention to make such a bid. The Notice explains that the relevant date for establishing the Commission’s jurisdiction is now either the date of the first notification or the date of the conclusion of the binding legal agreement or the announcement of a public bid, whichever date is earlier. Regarding the date of notification, a notification to either the Commission or to a Member State authority is relevant. These considerations will provide legal certainty for notifications to the Commission as well as for those to national competition authorities.

Turnover calculation and audited accounts

Following the Endesa judgment (31), the Notice stresses that, for the calculation of turnover, the audited accounts of the most recent financial year are normally relevant. Generally, the Commission will refer to accounts which relate to the most recent 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 (32).

Adjustments have to be made only in case of permanent changes in the economic reality of the undertakings concerned. This would only be the case if acquisitions or divestitures have been closed or closures of parts of its business have occurred before the relevant date for establishing jurisdiction and are not or not fully taken into account in the latest accounts.

Geographic allocation of turnover

The Notice further clarifies and gives more examples for the geographic allocation of turnover. For the sale of goods, the Notice explains that, if the place of delivery differs from the place where the customer was located at the time when the purchase agreement was concluded, the place of delivery may prevail. The delivery is in general the characteristic action for the sale of goods. In particular for the case of a sale of mobile goods, the place of delivery will be decisive even if the agreement was concluded by telephone or Internet.

For services, the Notice explains that 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 Notice explains that 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.

IV. Conclusions

Some nine years after the previous four notices on jurisdictional issues under the Merger Regulation had been adopted, it was time to adapt the guidance given on jurisdictional issues, taking into account the developments which have occurred in the meantime. These developments are not only of a legal nature, such as legislative changes or decisions of the European Courts, but are also new developments in relation to the legal structures chosen by parties to accomplish their transactions or the organisational structure of the undertakings concerned. The Jurisdictional Notice now gives up-to-date guidance on how the Commission will deal with these developments.

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(30) Points 154 ff. of the Jurisdictional Notice.
(32) See points 169 ff. of the Jurisdictional Notice.