FINAL DRAFT

COMMENTS BY THE EUROPEAN COMPETITION LAWYERS FORUM ON THE COMMISSION'S DRAFT CONSOLIDATED JURISDICTIONAL NOTICE

A. INTRODUCTION

1. This Paper is submitted on behalf of the ECLF whose members comprise competition lawyers from about 75 law firms practising in Europe (current active membership listed at **Annex 1**).[1]

2. The ECLF congratulates the Commission for producing a draft Notice which achieves its stated objectives:

   - *Consolidation and simplification*: By consolidating the four old Notices (the Concentration Notice, the Full-function Joint Venture Notice, the Undertakings Concerned Notice and the Turnover Notice) into one new Notice, the Commission has provided business and the legal community with considerably more user-friendly guidance;

   - *Taking account of changes introduced by the new Merger Regulation*: The draft Notice satisfactorily takes account of the legislative changes introduced in 2004 by the new Merger Regulation. It would have been preferable if updated guidance had been published at the time the new rules came into force (well over two years ago). That said, we accept that it is "better late than never";

   - *Reflecting recent judgments of the Community Courts and changing Commission practice*: Moreover, the delay in publication means the draft Notice provides statements on Commission policy on jurisdictional issues which are compatible with recent case-law and in line with current Commission practice.

3. The ECLF accordingly fully supports the draft Notice and urges the Commission to proceed to adopt it formally in substantially its current form, as soon as possible after expiry of the public consultation period on 1 December 2006.

4. In the remainder of this Paper we provide some specific observations, and make some minor suggestions for improvement. We do this by reference to the draft Notice's three-part structure, a structure which we consider to be logical and user-friendly (and a marked improvement on the old Notices where guidance on jurisdictional issues was dispersed among four distinct Notices). We provide at **Annex 2**, a suggested mark-up of extracts from the draft Notice, reflecting our comments and a number of other minor corrections.

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[1] All members of the ECLF have had an opportunity to comment on this Paper. However, the comments made do not necessarily reflect the views of each member.

B. THE CONCEPT OF "CONCENTRATION"

General observations

5. Part B of the draft Notice addresses the concept of "concentration" under Article 3 of the Merger Regulation, including the notions of "sole control", "negative control", "joint control" and changes in the "quality of control". It also specifically deals with joint ventures and the concept of "full-functionality". Generally speaking, we consider that this Part of the Notice has successfully consolidated and updated the guidance that was previously provided in the Concentration Notice and Full-function JV Notice.

6. In particular, we welcome:

- the new guidance on the application of the Merger Regulation to acquisitions by investment funds (Part B.II, Section 1.2, point 19);[2]
- the new guidance on the application of the Merger Regulation to outsourcing arrangements (Part B.II, Section 1.3, points 23-25);
- the new guidance on the provision in Article 3(1) that the concept of a concentration only applies to operations bringing about a "lasting change" in the control of the undertakings concerned (Part B.II, Section 1.4, points 26-32);
- the improved guidance on the application of the Merger Regulation to interrelated transactions (Part B.II, Section 1.5, points 33-43), taking account *inter alia* of the *Cementbouw* judgment;
- the improved guidance on the concepts of "sole control", "joint control" and changes in the quality of control (Part B.II, Sections 2 to 4), subject however to the need for some further clarification of the concept of negative control - as considered at paras. 8-11 below;
- the incorporation into the draft Notice (at Part B.VI) of the Commission's 2005 Information Note on the criteria necessary to satisfy the Commission that the parties have abandoned a transaction which is subject to review in Phase II proceedings; and
- the new guidance on changes in transactions after they have been approved by the Commission (Part B.VII).

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[2] There would be scope to further clarify at point 19 of the draft Notice that where an investment company's control over various funds derives from "contractual arrangements" those arrangements should be sufficiently durable to result in a structural change in the market. This could be achieved by adding a cross-reference to the principles set out at point 15 of the draft Notice.

Potential for confusion regarding the assignment or licensing of intangible rights (Part B.II, Section 1.3)

7. Point 22 (fourth and fifth sentences) describes the circumstances in which transactions that are limited to the transfer of intangible rights (such as a customer portfolio, know-how or patent rights) can constitute concentrations. We have some concerns that the current drafting could be interpreted as expanding the boundaries of the concept of a concentration significantly beyond the Commission and Community Courts' established definition of a concentration. We have provided suggested amendments in **Annex 2** with a view to making clearer that transfers of intangible rights can constitute a concentration only when they carry with them customer relationships and a clear revenue stream from third parties. This also includes an example referring to real estate businesses which we consider could be a useful addition.

Potential for confusion in use of concept of "negative control" (Part B.II, Sections 2 to 4; and Part B.III)

8. The draft Notice seeks to bring greater clarity to the circumstances in which an undertaking which increases its pre-existing level of interest or influence in another undertaking may need to notify the operation as giving rise to a concentration. This is an area where there is still some scope for confusion and where we would encourage the Commission to introduce additional explanations and increase legal certainty. Much of this uncertainty derives from the concept of "negative control".

9. It is generally understood that in some circumstances a minority shareholder (or a person with equivalent contractual rights) may have sufficient veto rights to be able to exercise *de facto* control on its own, i.e. "sole control". It is also generally understood that this situation may arise in different circumstances:

   (a) At one level, this arises where the undertaking's veto rights actually give it a positive unilateral ability to impose its will (taking account of the limited rights held by other shareholders). This is generally described, including in the Notice, as "sole control", although the situation could be further sub-categorised as "positive" or "full" sole control;

   (b) At a "lower" level, this arises where the undertaking's veto rights give a less obvious but still effective ability to determine the other undertaking's strategic policy, because its rights are such that it cannot be ignored. This situation is described in the Notice as "negative control", and is generally also treated as giving the undertaking concerned the individual ability to exercise control, such that it can be treated as giving rise to "sole control". This situation could therefore be further sub-categorised as "negative sole control".

10. However, the draft Notice currently suggests that "negative control" might fall at a level below "sole control", at least to the extent that the latter term might be restricted to describing the situation at (a) above. We consider that the Notice should be revised to describe "negative control" as a category of "sole control". This would be in line with recent Commission case-law which proceeds on the basis that a move from negative

control in the hands of one undertaking ("negative sole control") to positive control in the hands of the same undertaking ("positive sole control" or "full sole control") may in some cases give rise to a change in the nature of control and therefore a new concentration. This can be seen as an exception to the general principle that a move from one level of sole control to another level of sole control does not give rise to a concentration, e.g. a move from *de facto* to *de jure* sole control, or where a 51% shareholder (with no other shareholder having veto rights conferring joint control) moves to 60% or even 100%. We consider that it would be preferable that the Notice refer to such situations as exceptional (i.e. a situation where the nature of the "sole control" is so materially different that the step-change should be treated as a new concentration), rather than introduce the concept of a third level of control ("negative control") which falls short of "sole control" or "joint control". In our view, the term "sole" should be applied to all situations where control is exercised by one person or undertaking (as distinct from "joint" control where its exercised by two or more persons or undertakings). Currently, the Notice risks limiting the established concept of "sole control" to situations where the shareholder can impose its will (i.e. the sub-category at (a) above) and confusing the business and legal Community by introducing a distinct lower level of "negative control" (i.e. the sub-category at (b) above).

11. If the Commission is sympathetic to our concern,[3] this would require a number of changes to the current language of the draft Notice (points 50, 56, 57 and 79-83) along the lines of those suggested in **Annex 2**.

More extensive explanation of de facto joint control (Part B.II, Section 4.3)

12. We also encourage the Commission to expand the guidance set out in points 72-76 on the factors that can give rise to *de facto* joint control. We appreciate that the existence (or otherwise) of *de facto* joint control is heavily dependent on the particular circumstances of a given transaction. Even so, we think it would be helpful for the Notice to provide a more extensive explanation of the circumstances in which mutual dependency can arise, and to quote further examples of the Commission's recent case law in this area. By way of illustration, it would be helpful if the Notice were to refer to cases such as Case M.3556 *Fortis/BCP* (19 January 2005) to illustrate how minority shareholders in a joint venture can be considered as exercising decisive influence even though they do not have governance rights in relation to the usual indicia of control (budget and business plan).

Transactions resulting in joint ventures which are not full-function (Part B.IV)

13. At point 88 (last two sentences) the draft Notice addresses a hypothetical situation where two or more undertakings acquire joint control of a pre-existing undertaking (with a market presence) in circumstances where it will subsequently cease to be full-function

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[3] The fact that footnote 63 already refers to the concept of "negative sole control" suggests that it should be.

because the parents will cause the joint venture to sell its output exclusively to its parents. We do symphasise with the Commission's depiction of such a transaction as being "structural" such that it can be viewed as already falling under Article 3(1).[4] However, we do have some concerns that such an interpretation of the concept of "concentration" under Community law may not be widely accepted. Furthermore, such an interpretation could theoretically catch innocuous transactions,[5] whereas any such transaction raising appreciable spillover effects could in any event be subject to review under Article 81.

14. Given the relative novelty of the concept, and the absence of any relevant case-law (so far as we are aware), we consider that useful to encourage debate and discussion of these issues, so as to increase awareness of the Commission's interpretation.

C. THE CONCEPT OF "COMMUNITY DIMENSION"

15. Part C of the draft Notice deals with the concept of "Community dimension" which depends on the turnovers of the undertakings concerned. It clarifies the interpretation of the concept of "undertakings concerned" under Articles 1 and 5 of the Merger Regulation, and provides guidance on practical issues associated with the calculation of turnover for Merger Regulation purposes. We consider that this Part of the Notice has successfully consolidated and updated the guidance which was previously provided in the Undertakings Concerned Notice and the Turnover Notice.

D. ANALYSIS OF DIFFERENT CATEGORIES OF CONCENTRATIONS

16. Part D of the draft Notice provides practical guidance on identifying the undertakings concerned in certain categories of concentrations and explains how the jurisdictional criteria are to be applied. We consider that there may be some scope to link these practical examples more tightly into the more detailed general guidance at Parts B and C of the draft Notice. This can be achieved by increasing cross-referencing within the Notice (as proposed in the mark-up at **Annex 2**).

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[4] Indeed, it is worth noting that such a change in control would be characterised as a merger under some national merger control regimes (which have not simply adopted the Community law concept of "concentration"), e.g. in the UK and Germany.

[5] For example if two companies sharing a building which contains a restaurant or other third party business agree to acquire it jointly to convert it into a common staff canteen.

E. CONCLUSION

17. The ECLF welcomes this opportunity to put these written comments to the Commission ahead of the 1 December 2006 deadline. Some of its members may also be submitting additional comments of their own.

30 November 2006

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ANNEX 1

LAW FIRMS REPRESENTED IN THE ECLF

The ECLF aims to be the principal interface between specialist competition lawyers and the European Commission's Directorate General for Competition. It provides a forum through which members may express views on a range of policy and practice issues. Its current active membership includes competition specialists from the following firms:

A&L Goodbody
Addleshaw Goddard
Akin Gump Strauss Hauer & Feld LLP
Allen & Overy
Andreas Neocleous & Co
Ashurst
Baker & McKenzie
Beachcroft LLP
Berwin Leighton Paisner LLP
Bird & Bird
Bonelli Erede Pappalardo Studio Legale
Brick Court Chambers
Bredin Prat
Camilleri Preziosi
Čechová & Partners
Cleary Gottlieb Steen & Hamilton LLP
Clifford Chance
Coutrelis & Associés
Covington & Burling LLP
De Brauw Blackstone Westbroek
Dechert LLP
DLA Piper
Dr. Georg Legat
Eversheds LLP
Foley & Lardner LLP
Freshfields Bruckhaus Deringer
Gleiss Lutz
Gorrissen Federspiel Kierkegaard
Hengeler Mueller
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Howrey LLP
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Kromann Reumert
Latham & Watkins LLP
Linklaters
Lovells
Luostarinen, Mettälä Räikkönen

Mannheimer Swartling
McCann FitzGerald
McDermott Will & Emery/Stanbrook LLP
Monckton Chambers
Morrison & Foerster LLP
NautaDutilh
Norton Rose
Olswang
O'Melveny & Myers LLP
Panagopoulos, Vainanidis, Schina Economou
Plesner Svane Grønborg
PLMJ
Procopé & Hornborg
Richards Butler LLP
RoschierRaidla
Salans
Schulte Riesenkampff
Shearman & Sterling LLP
Sidley Austin LLP
Simmons & Simmons
SJ Berwin LLP
Skadden, Arps, Slate, Meagher & Flom LLP
Slaughter and May
Stibbe
Sullivan & Cromwell
Thommessen Krefting Greve Lund AS
Thompson Hine LLP
Uría Menéndez
Van Bael & Bellis
Vieira de Almeida & Associados
Vinge
Wardyński & Partners
White & Case LLP
Wilmer Cutler Pickering Hale & Dorr LLP

ANNEX 2

MARK-UP OF EXTRACTS FROM THE DRAFT NOTICE

PART A - INTRODUCTION

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 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 Part B; the identification of undertakings concerned and the calculation of their turnover as relevant for the second condition are dealt with under Part C. The application of these concepts in practice to different types of operations is explained in Part D.

PART B - THE CONCEPT OF CONCENTRATION

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.

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22. The Merger Regulation provides in Article 3(1)(b) and (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. For example, the acquisition of real estate property will not generally be considered a concentration, in contrast to the acquisition of a real estate business which is actively engaged in managing a portfolio of properties. 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 is likely to lead to the transfer of turnover-generating activity. A transaction consisting of the grant or transfer of licences, without additional assets, will bring about a concentration only if it is exclusive at least in a certain territory and is likely to lead to the transfer of turnover-generating activity to the licensee as a result of the licensee's use of the licensed rights as the basis for commercial activities with third parties. For non-exclusive licences it can be excluded that they may constitute on their own a business to which a market turnover (i.e. with third parties) is attached. Similarly, the granting of exclusive licences that do not immediately lead to the licensee acquiring turnover-generating activity with third parties does not constitute a concentration.

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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.

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

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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 (see also point 196 at Part D of this Notice). 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]

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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] These issues are considered further at Part D, points 214-216 below.

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50. Sole control is normally acquired on a legal basis where an undertaking acquires a majority of the voting rights of a company. Such a simple majority will generally confer the positive ability to impose strategic decisions, i.e. full sole control. In the absence of other elements, an acquisition which does not include a majority of the voting rights does not normally confer sole 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 will normally not be sufficient to confer sole control, unless exceptionally it is regarded as conferring negative sole control (see points 56-57 below); however, in some circumstances the acquisition of a simple majority may lead to a scenario of joint control (see points 58 *et seq.* below).

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3. Negative Control – sole control exercised via veto rights

56. A situation also conferring sole 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 of negative sole control 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 full sole control on a *de facto* basis: see point 53 above), 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]

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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. Such a shareholder does not enjoy the positive powers which are normally conferred on an undertaking with full 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 meaning of Article 3(2) and therefore control within the meaning of the Merger Regulation.

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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.

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

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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; Case M.2066 Dana/GETRAG of 7 November 2000; Case M.3556 Fortis/BCP of 19 January 2005.

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79. The Merger Regulation covers operations resulting in the acquisition of sole or joint control, including operations leading to changes in the quality of control. A 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 or joint control. Second, a change in the quality of sole control, resulting in a concentration, occurs where an undertaking which enjoys negative sole control moves to a position of full sole control; by contrast where an undertaking's level of control is reduced from full to negative sole control, this will not result in a concentration (as it is more comparable to a deconcentration). Third, a change in the quality of joint control, resulting in a concentration, occurs 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.

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80. These changes in the quality of control will be discussed in two broad categories: first, a change in the quality of sole control from negative to full control; second, changes in the quality of joint control. For the latter one can in turn distinguish two categories: first an entrance of one or more new controlling shareholders irrespective of whether or not they replace existing controlling shareholders; second, a reduction of the number of controlling shareholders.

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Change in quality of sole control - from negative to full (positive) control

81. Depending on the surrounding circumstances, a change in the quality of control may occur, where an operation leads to a change from negative to full (positive) sole control. The possibility to determine strategic decisions on its own can be of a different quality from 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 full sole control therefore may in certain cases constitute a notifiable concentration.[76]

Entry of controlling shareholders - resulting in, or otherwise changing quality of joint control

82. An entry of new controlling shareholders leading to a joint control scenario can either result from a change from sole (positive 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 to joint control is considered a notifiable operation as this changes the quality of control of the undertaking. 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 into 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 determine the strategic behaviour of the controlled undertaking alone (in the case of sole control) and was not forced to take into account the interests of specific other shareholders and , 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 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

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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 - from joint to sole control

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]

Reduction in the number of shareholders - continuation of joint control

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 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.

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 67, (judgment of 23 February 2006).

79 Case IV/JV.12 – Ericsson/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.

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96. These issues frequently arise with regard to outsourcing agreements, where an undertaking creates a joint venture with a service provider[89] which will carry out functions that so far were dealt with by the undertaking in-house. The JV typically 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.

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109. The exceptions do not apply to typical investment fund structures (see point 19 above). 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]

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110. 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 concentration[98]. 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.

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PART C - COMMUNITY DIMENSION

127. An analysis of the undertakings concerned in specific types of transactions is included in Part D of this Notice below.

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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.

PART D - DETAILED ANALYSIS OF DIFFERENT TYPES OF CONCENTRATIONS

192. In a merger, as mentioned at point 124 above, the undertakings concerned are each of the merging entities.

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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 sole control and for a change from negative to full sole control (see points 50-57 for further explanation of these concepts).

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196. The second subparagraph of Article 5(2) includes a special provision on staggered operations or follow-up deals (as considered at points 45-46 above). 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.

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201. The acquisition of a company with a view to immediately split up the assets is, as explained at point 43 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 acquisition of sole control, undertakings concerned are the acquiring undertakings and the acquired parts in each of the transactions.

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202. A notifiable concentration may arise, as explained at points 82-87 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 at point 87 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 remaining shareholders since, as set out at point 87 above, they enlarge their rights and powers concerning the controlled undertaking and the structure of joint control as such is changed significantly.

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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 at point 87 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.

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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 at point 43 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]

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214. As described at point 48 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.
