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Commission Notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings

(Text with EEA relevance)

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I. INTRODUCTION

1. The purpose of this notice is to provide guidance as to how the Commission interprets Article 3 of Council Regulation (EEC) No 4064/89<sup>1</sup> as last amended by Regulation (EC) No 1310/97<sup>2</sup> (hereinafter referred to as the Merger Regulation) in relation to joint ventures<sup>3</sup>.
2. This Notice replaces the Notice on the distinction between concentrative and cooperative joint ventures. Changes made in this Notice reflect the amendments made to the Merger Regulation as well as the experience gained by the Commission in applying the Merger Regulation since its entry into force on 21 September 1990. The principles set out in this Notice will be followed and further developed by the Commission's practice in individual cases.
3. Under the Community competition rules, joint ventures are undertakings which are jointly controlled by two or more other undertakings<sup>4</sup>. In practice joint ventures encompass a broad range of operations, from merger-like operations to cooperation for particular functions such as R&D, production or distribution.
4. Joint ventures fall within the scope of the Merger Regulation if they meet the requirements of a concentration set out in Article 3 thereof.
5. According to recital 23 to Council Regulation (EEC) No 4064/89 it is appropriate to define the concept of concentration in such a manner as to cover only operations bringing about a lasting change in the structure of the undertakings concerned.
6. The structural changes brought about by concentrations frequently reflect a dynamic process of restructuring in the markets concerned. They are permitted under the Merger Regulation unless they result in serious damage to the structure of competition by creating or strengthening a dominant position.
7. The Merger Regulation deals with the concept of full-function joint ventures in Article 3(2) as follows:

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<sup>1</sup> OJ L 395, 30.12.1989, p. 1, corrected version OJ No L 257, 21.9.1990, p.13.

<sup>2</sup> OJ L 180, 9.7.1997, p. 1.

<sup>3</sup> The Commission intends, in due course, to provide guidance on the application of Article 2(4) of the Merger Regulation. Pending the adoption of such guidance, interested parties are referred to the principles set out in paragraphs 17 to 20 of Commission Notice on the distinction between concentrative and cooperative joint ventures, OJ C 385, 31.12.1994, p. 1.

<sup>4</sup> The concept of joint control is set out in the Notice on the concept of concentration.

“The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b).”

## II. JOINT VENTURES UNDER ARTICLE 3 OF THE MERGER REGULATION

8. In order to be a concentration within the meaning of Article 3 of the Merger Regulation, an operation must fulfil the following requirements:

1. Joint control

9. A joint venture may fall within the scope of the Merger Regulation where there is an acquisition of joint control by two or more undertakings, that is, its parent companies (Article 3(1)(b)). The concept of control is set out in Article 3(3). This provides that control is based on the possibility of exercising decisive influence over an undertaking, which is determined by both legal and factual considerations.

10. The principles for determining joint control are set out in detail in the Commission's Notice on the concept of concentration<sup>5</sup>.

2. Structural change of the undertakings

11. Article 3(2) provides that the joint venture must perform, on a lasting basis, all the functions of an autonomous economic entity. Joint ventures which satisfy this requirement bring about a lasting change in the structure of the undertakings concerned. They are referred to in this Notice as “full-function” joint ventures.

12. Essentially this 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 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<sup>6</sup>.

13. 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

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<sup>5</sup> Paragraphs 18 to 39.

<sup>6</sup> Case IV/M.527 - Thomson CSF/Deutsche Aerospace, of 2 December 1994 (paragraph 10) - intellectual rights, Case IV/M.560 EDS/Lufthansa of 11 May 1995 (paragraph 11) - outsourcing, Case IV/M.585 - Voest Alpine Industrieanlagenbau GmbH/Davy International Ltd, of 7 September 1995 (paragraph 8) - joint venture's right to demand additional expertise and staff from its parent companies, Case IV/M.686 - Nokia/Autoliv, of 5 February 1996 (paragraph 7), 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, (paragraph 9) joint venture's intended assets will be transferred to leasing company and leased by joint venture.

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 venture<sup>7</sup>.

14. 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 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 question<sup>8</sup>.

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. In this respect the relative proportion of these sales compared with the total production of the joint venture is an important factor. Another factor is whether sales to the parent companies are made on the basis of normal commercial conditions<sup>9</sup>.

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. 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

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<sup>7</sup> Case IV/M.102 - TNT/Canada Post etc. of 2 December 1991 (paragraph 14).

<sup>8</sup> Case IV/M.560 - EDS/Lufthansa of 11 May 1995 (paragraph 11); Case IV/M.686 Nokia/Autoliv of 5 February 1996 (paragraph 6); to be contrasted with Case IV/M.904 - RSB/Tenex/Fuel Logistics of 2 April 1997 (paragraph 15-17) and Case IV/M.979 - Preussag/Voest-Alpine of 1 October 1997 (paragraph 9-12). A special case exists where sales by the joint venture to its parent are caused by a legal monopoly downstream of the joint venture (Case IV/M.468 - Siemens/Italtel of 17 February 1995 (paragraph 12), or where the sales to a parent company consist of by-products, which are of minor importance to the joint venture (Case IV/M.550 - Union Carbide/Enichem of 13 March 1995 (paragraph 14).

<sup>9</sup> Case IV/M.556 - Zeneca/Vanderhave of 9 April 1996 (paragraph 8); Case IV/M.751 - Bayer/Hüls of 3 July 1996 (paragraph 10).

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 sources<sup>10</sup>.

15. 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 companies<sup>11</sup>. 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 where this period is sufficiently long in order to bring about a lasting change in the structure of the undertakings concerned<sup>12</sup>, or where the agreement provides for the possible continuation of the joint venture beyond this period. 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.

### III. FINAL

16. The creation of a full-function joint venture constitutes a concentration within the meaning of Article 3 of the Merger Regulation. Restrictions accepted by the parent companies of the joint venture that are directly related and necessary for the implementation of the concentration (“ancillary restrictions”), will be assessed together with the concentration itself<sup>13</sup>.

Further, the creation of a full-function joint venture may as a direct consequence lead to the coordination of the competitive behaviour of undertakings that remain independent. In such cases Article 2(4) of the Merger Regulation provides that those cooperative effects will be assessed within the same procedure as the concentration. This assessment will be made in accordance with the criteria of Article 85(1) and (3) of the Treaty with a view to establishing whether or not the operation is compatible with the common market.

The applicability of Article 85 of the Treaty to other restrictions of competition, that are neither ancillary to the concentration, nor a direct consequence of the creation of the joint venture, will normally have to be examined by means of Regulation No 17.

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<sup>10</sup> Case IV/M.788 - AgrEVO/Marubeni of 3 September 1996 (paragraphs 9 and 10).

<sup>11</sup> Case IV/M.891 - Deutsche Bank/Commerzbank/J.M. Voith of 23 April 1997 (paragraph 7).

<sup>12</sup> Case IV/M.791 - British Gas Trading Ltd/Group 4 Utility Services Ltd of 7 October 1996, (paragraph 10); to be contrasted with Case IV/M.722 - Teneo/Merill Lynch/Bankers Trust of 15 April 1996 (paragraph 15).

<sup>13</sup> See Commission Notice regarding restrictions ancillary to concentrations, OJ No C 203, 14.8.1990, p. 5.

17. The Commission's interpretation of Article 3 of the Merger Regulation with respect to joint ventures is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.