GUIDELINES ON CASES CONSIDERED AS A MERGER OR AN ACQUISITION AND THE CONCEPT OF CONTROL

1. INTRODUCTION

(1) Article 7 of the Act no 4054 on the Protection of Competition (the Act) prohibits merger by one or more undertakings, or acquisition by any undertaking or person from another undertaking, except by way of inheritance, of its assets or all or a part of its partnership shares, or of means which confer thereon the power to hold a managerial right, with a view to creating a dominant position or strengthening its / their dominant position, which would result in significant lessening of competition in a market for goods or services within the whole or a part of the country and states that the Board shall declare, via communiqués to be issued by it, the types of mergers and acquisitions which have to be notified to the Board and for which permission has to be obtained, in order them to become legally valid.

(2) The cases considered as a merger or an acquisition are specified in article 5 of the Communiqué no 2010/4 Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board (the Communiqué). Accordingly, a merger by two or more undertakings or the acquisition of direct or indirect control over all or part of one or more undertakings by one or more undertakings or by one or more persons who currently control at least one undertaking, through the purchase of shares or assets, through a contract or through any other means shall be considered a merger or an acquisition within the scope of article 7 of the Act, provided there is a lasting change in control.

(3) The main factor in accepting a case as a merger or an acquisition is the lasting change in the control of the undertaking. Intra-group transactions and other transactions which do not lead to a change in control such as transfer of securities granting minority rights are not considered as mergers or acquisitions specified in article 5 of the Communiqué. Similarly, according to article 6 of the Communiqué, undertakings whose ordinary operations involve transactions with securities on their own behalf or on behalf of others; temporarily holding securities purchased for resale purposes, provided that the voting rights from those securities are not used to affect the competitive policies of the undertaking which issued the securities in question; acquisition of control by a public institution or organization by operation of law and due to divestment, dissolution, insolvency, suspension of payment, bankruptcy, privatization or a similar reason and the transfer of control as a result of inheritance fall outside the scope of article 7 of the Act.

(4) Cases considered as a merger or an acquisition as per article 7 of the Act are respectively given below.

2. MERGER BY TWO OR MORE UNDERTAKINGS

(5) A merger within the scope of Article 7 of the Act occurs when two or more independent undertakings amalgamate into a new undertaking by terminating their legal entities. A merger within the scope of the Act may also occur where an undertaking is included in its entirety under the body of another undertaking in which case the legal personality of one undertaking is terminated whereas the other's legal personality is kept.

(6) A merger within the meaning of article 7 of the Act may also occur where the combining of the activities of previously independent undertakings results in the creation of a single economic unit although the undertakings do not amalgamate into a single legal entity. This is the case, for instance, where two or more undertakings, while retaining their individual legal personalities, establish a common economic management contractually. In another words, a transaction resulting in a de facto amalgamation of the undertakings concerned under a single economic unit is regarded as a merger within the scope of the Act. A prerequisite for the determination of such a de facto merger is the existence of a permanent, single economic management. Whereas these mergers having the nature of de facto amalgamation may be solely based on contractual arrangements, they can also be reinforced by cross-shareholdings between the parties.

3. ACQUISITION OF CONTROL

3.1. The concept of Acquisition and Control

(7) The acquisition of direct or indirect control over all or part of one or more undertakings by one or more undertakings or by one or more persons who currently control at least one undertaking, through the purchase of shares or assets, through a contract or through any other means are considered an acquisition within the scope of article 7 of the Act. Article 5(2) of the Communiqué regulates how control may occur and who may acquire control. According to the Communiqué, control may be acquired through rights, contracts or other instruments which, separately or together, allow de facto or de jure exercise of decisive influence over an undertaking. As per the Communiqué, in particular, these instruments consist of right of ownership or right of use, which can be operated, over all or part of the assets of an undertaking, and those rights or contracts granting decisive influence over the structure or decisions of the bodies of an undertaking. Moreover, control may be acquired by right holders, or by those persons or undertakings who have been empowered to exercise such rights in accordance with a contract, or who, while lacking such rights and powers, have de facto strength to exercise such rights.

3.1.1. Person or Undertaking Acquiring Control

(8) It is stated in the Communiqué that control must be acquired in order for an acquisition within the scope of article 7 of the Act to be realized. Control may be acquired by one or more undertakings.

(9) Control may also be acquired by a person or several persons who already control at least one undertaking. Acquisitions of control by natural persons are only considered mergers if those natural persons carry out other economic activities on their own account or if they control at least one other undertaking.

(10) 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. It is possible to specify these cases as direct control. Moreover, there are also situations where the formal holder of the instruments conferring control differs from the person or undertaking exercising the rights resulting from those instruments in reality. For example, if an undertaking acquires a controlling interest in the target firm through a firm or a person, it has the power to exercise the rights conferring control through the person or undertaking concerned. In fact, the company or the person who officially realizes the acquisition is used only as a vehicle for the acquisition although it is the

owner of the rights. In such a situation, control is acquired by the undertaking which in reality is behind the transaction and has the power to control the target undertaking[1]. It is possible to refer to indirect control by the undertaking having the power of control on the target undertaking in such transactions. From this point of view, as commercial companies comply in any event with the decisions of the shareholders, control held by those companies can be attributed to their exclusive shareholder, their majority shareholders or to those jointly controlling the companies. To be assessed on a case-by-case basis, factors such as shareholdings, contractual relations, source of financing or family links may be used to determine indirect control.

3.1.2. Means of Control

(11) It is stated in the Communiqué that control is provided by instruments which grant decisive influence on an undertaking. With respect to acquiring control, it is not necessary to show that the decisive influence is or will be actually exercised but having the ability to exercise that influence is sufficient. According to the Communiqué, the possibility of exercising decisive influence on an undertaking can be obtained through rights, contracts or other means, either separately or in combination, and can exist on a legal and de facto basis. In addition, control may take the form of sole or joint control, and extend to the whole or parts of one or more undertakings.

Control by the Acquisition of Shares or Assets

(12) Whether control is acquired in a transaction depends on a number of legal and/or factual elements. The most common means for the acquisition of control is the acquisition of shares or assets. Besides, a shareholders' agreement is important for the determination of control in cases of joint control.

Control through a Contract

(13) Control may be acquired by means of a contract. In order to confer control through a contract, the contract concerned must lead to a similar control over the target firm as in the case of acquisition of shares or assets[2]. It is expected that such contracts have very long duration and it is not possible for the party granting the contractual rights to terminate the contract early because only long term contracts can result in a structural change in the market. Examples are contracts in the form of lease agreements, giving the acquirer control over the management and the resources despite the fact that property rights or shares are not transferred[3]. Article 5 of the Communiqué clearly puts forward that control can be conferred by right of use which can be operated on the assets of an undertaking. Contracts may also lead to control by granting veto rights over strategic business decisions.

Other Means of Control

[1] See Decision dated 03.05.2007 and numbered 07-37/393-153.

[2] For instance, the case that is the subject of the Decision dated 20.02.2013 and numbered 13-11/163-85, "Agreement on Common Offers" was accepted as an acquisition as it lead to a change in control despite the lack of transfer of shares.

[3] 7-year lease agreement in the decision dated 14.08.2008 and numbered 08-50/721-281 as well as 5-year lease agreements in the decision dated 0.09.2012 and numbered 12-43/1323-436 and the decision dated 30.10.2008 and numbered 08-61/998-390 are considered an acquisition.

(14) Economic relations may have a decisive role in the acquisition of control. For instance, a situation of economic dependence may lead to control on a de facto basis where, very long-term supply agreements concerning an essential component for undertaking's business, or credits provided by suppliers or customers, when coupled with structural links such as shareholding and/or management, confer decisive influence. In this case the Board analyzes whether such economic links, combined with other links, are sufficient to lead to a change of control on a lasting basis.

(15) There may be an acquisition of control even if it is not the declared intention of the parties. In some circumstances, control may be transferred if the acquirer is only in a passive position and the acquisition of control is triggered by the action of third parties. For instance, this is the case where the exit of a shareholder triggers a change of control, in particular a change from joint to sole control. Article 5 of the Communiqué covers such situations by expressing clearly that control may also be acquired "by any other means".

Franchise Agreements

(16) In line with the explanations above, franchise agreements do not normally confer control over the franchisee's business on the franchisor. Even if essential parts of the assets belong to the franchisor, the franchisee usually use those resources on its own account.

3.1.3. The Object of Control

(17) Article 5 states that control may concern all or part of one or more undertakings. In this sense, the undertaking as a whole or its subsidiary or a part of its assets may be the object of control. The acquisition of control over assets can only be considered a merger if those assets constitute a part of an undertaking, which a market turnover can be attributed[4]. The transfer of the client base of a business can fulfill this requirement if this is sufficient to transfer a business line to which turnover can be attributed. A transfer limited to elements within intellectual property rights such as brands, patents, designs or copyrights may also be considered to be a transaction under the scope of article 7 if they constitute a business with a market turnover[5]. The transfer of licenses related to intellectual property rights can only be considered under the scope of article 7 if the licenses are exclusive at least in one particular territory and the transfer of such licenses allow for transfer the activity which the turnover can be attributed to.

(18) Specific issues arise in cases where an undertaking purchases in-house activities, such as the provision of services or the manufacturing of products, from a service provider (outsourcing). A typical case is the outsourcing of IT services to specialized IT companies. Whereas outsourcing contracts can take several forms; their common characteristic is that the outsourcing service supplier shall provide those services to the customer which it has performed in-house before. Generally outsourcing does not involve any transfer of assets of the customer to the outsourcing service suppliers, but the assets are retained under the body of the customer. Such an outsourcing contract is basically similar to a normal service contract and even if the outsourcing service supplier acquires a right to direct assets and business of the customer, no transaction

[4] See decisions 15.05.2013 and no 13-28/390-177 and dated 23.05.2012 and numbered 12-27/801-228

[5] The transfer of brand in decisions dated 25.8.2009 and numbered 09-38/925-218 and dated 06.05.2009 and numbered 09-21/439-10, the transfer of customer lists and employees in the decision dated 27.09.2012 and numbered 12-46/1395-468 were deemed as acquisitions within the scope of article 7 of the Act.

as per article 7 of the Act arises, provided that the assets concerned will be used exclusively to service the customer.

(19) However, the situation is different if a service related to a certain activity which was previously provided internally is given to the outsourcing service supplier through the transfer of associated assets or personnel. A transaction as per article 7 of the Act only arises in case the assets transferred constitute business which is favorable for operating in the market. In order for a transaction to fall under the scope of the Act, it is required that the assets previously dedicated to in-house activities of the undertaking that purchased the outsourcing service 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. The same condition applies to the transfer of an internal business unit or a subsidiary already engaged in the provision of services to third parties, which is considered under the scope of article 7 of the Act. If goods or services are not provided to third parties before the transaction, the assets transferred should contain at least basic elements which will enable the acquirer to be permanent in the market within a period of time that is similar to the start-up period for joint ventures as set out under paragraph 85. As in the case of joint ventures, the Board will take account of confirmed business plans and general market features for this assessment.

(20) If the assets transferred do not allow the purchaser to operate in the market, it is likely that they will be used for providing services to the outsourcing customer. In this case, the outsourcing contract will resemble to a typical service contract that will not result in a lasting change in the market structure and will not be considered under the scope of article 7 of the Act.

3.1.4. Lasting Change in Control

(21) According to article 5 of the Communiqué, article 7 of the Act covers only mergers and acquisitions which result in a lasting change in control because such transactions lead to a lasting change in the market structure. Therefore, article 7 of the Act does not cover transactions resulting in a temporary change in control. However, the agreements made for a definite period of time may lead to a lasting change in control if they are renewable. If the period envisaged for the agreement is sufficiently long to lead to a lasting change in the control of the undertakings concerned, a transaction within the scope of article 7 of the Act may arise even if the agreements provide for an expiry date.

(22) It is worth mentioning some circumstances related to the question whether a transaction which is transitory in nature but occurs in short-term time intervals may result in a lasting change in the market structure.

(23) In one case, several undertakings come together for the purpose of acquiring another firm on the basis of an agreement to divide up the acquired assets according to a pre-existing plan after the transaction is completed. In such cases, in the first step, the acquisition of the entire target firm is carried out by one or several undertakings. In the second step, the acquired assets are divided among several undertakings. At this point, the question whether the first or the second transaction will be dealt with according to article 7 of the Act arises. Is the first transaction a separate one, involving an acquisition of sole control in the case of a single purchaser, or of joint control in the case of a joint purchase of the entire target undertaking? Or, regarding the second transaction in which the assets are divided, should only the acquisitions in this step

where each of the acquiring undertakings acquires its relevant part of the target undertaking be assessed according to article 7?

(24) It is possible to conclude that the first transaction does not constitute a concentration and it can be assessed taking into account the acquisitions of control by the ultimate purchasers, provided a number of conditions are met. First, the division of assets after closing must be agreed between different acquirers 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 period after the first transaction. Maximum one year time frame for the division of the assets is acceptable.

(25) In case both conditions are met, the first transaction do not lead to a lasting change in control. There is no acquisition leading to a lasting change in the market 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 division of the acquired assets. In those transactions, only the acquisitions of the different parts of the undertaking in the second step will be assessed under the scope of article 7 of the Act and each of these transactions related to the acquisitions of different parts will constitute a separate acquisition. Whether the first acquisition is carried out by only one undertaking or jointly by the undertakings which are also involved in the second step is not important.

(26) If these conditions are not met, in particular if it is not certain that the second step will be performed within a short time-frame after the first acquisition, the first transaction will be regarded as a separate acquisition under the scope of the Act, involving the entire target undertaking.

(27) In the second case, the transaction will convert a joint control over the target company for a transition period to sole control by one of the shareholders according to legally binding agreements. As the joint control does not result in a lasting change in control, the whole transaction can be considered to be an acquisition of sole control. In such successive transactions, it is expected that the period will not exceed one year and the joint venture is temporary in nature so that the effects of joint venture on the market structure are not ignored. The fact that the joint venture lasts for a short time reduces the possibility that it may create an appreciable effect on the market structure, which is accepted to make no change on the control structure.

(28) In the third case, the target firm is held by an interim buyer, often a bank, until its sale to the ultimate acquirer on the basis of an agreement. The interim buyer acquires shares on behalf of the ultimate acquirer, which bears the most part of the economic risks and may also be granted specific rights. 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. Contrary to the situation in the first case in paragraphs 24 to 27, the target firm does not change in successive transactions, there is no other ultimate acquirer and the sequence of transactions is initiated alone by the ultimate acquirer. In such transactions, the acquisition of control by the ultimate acquirer as provided for in the agreements made by the parties regarding the target firm will be taken as a basis. The Board will consider the transaction by which the interim buyer acquires control as the first step of a single concentration involving the lasting acquisition of control by the ultimate buyer.

3.1.5. Interrelated Transactions

Interdependent Transactions According to Article 5 of the Communiqué

(29) According to article 5(4) of the Communiqué, closely related transactions as they are tied via conditions shall be considered as single transactions. Interdependency of transactions means that considering the reason underlying the transaction and the economic aim of the parties, the transactions are interdependent in such a way that one transaction cannot be realized without the other. These transactions change the market structure together. On the other hand, if different transactions are not interdependent and if the parties would proceed with one transaction without other ones, they will be assessed individually according to the Communiqué.

(30) Different transactions, even if they are conditional upon each other, control should be acquired by the same undertaking(s) so that they can be treated as a single concentration. Therefore, division of different parts of joint ventures between parent companies is not treated as a single transaction. The same applies to asset swaps in transactions where two (or more) companies share assets. Although the parties will normally consider those transactions as interdependent, the Communiqué requires that the results of each transaction should be assessed separately since different undertakings acquire control of different assets and thus the effect of each of those acquisitions on the market should be analyzed separately.

(31) The acquisition of joint control of one part of an undertaking and sole control of another part is regarded as two separate concentrations under the Communiqué. However, those transactions constitute one concentration if they are interdependent and if the undertaking acquiring sole control is also acquiring joint control[6].

Requirement of conditionality of transactions

(32) The requirement of conditionality means that none of the transactions would take place without the others and they therefore constitute a single transaction[7]. This is the case where the transactions are de jure and mutually linked. Moreover, if de facto mutual conditionality can be satisfactorily demonstrated, it may also suffice for treating the transaction as a single concentration. This requires an economic assessment of whether realization of each of the transactions necessarily depends on the conclusion of the others. Statements of the parties or the simultaneous conclusion of the relevant agreements may be an indication that different transactions are interdependent. It is difficult to reach a decision that there is de facto interconditionality between different transactions if they are not concluded simultaneously. Interdependence between transactions that are legally conditional upon each other will be dubious if they have not been concluded simultaneously.

(33) 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 by the same person(s) or undertaking(s). First, this may be the case if a single business or undertaking is acquired via several legal transactions. Second, several transactions which may constitute concentrations in themselves can be interrelated in such a way that they constitute a single concentration. However, since the Communiqué covers only transactions resulting a change in control, it is not possible to link those transactions to the acquisition of other assets, such as minority shares. It would not be in line with the general purposes of the Communiqué if different transactions, linked by conditionality, were assessed as a whole if only some of these lead to a change in control of the given target.

[6] See Decision dated 09.08.2012 and numbered 12-41/1245-401.
[7] See Decision dated 31.05.2012 and Numbered 12-29/849-249.

Parallel and serial acquisitions of sole control

(34) Parallel acquisition of control means that undertaking A acquires control of undertaking B and C in parallel from different sellers and A is not obliged to buy either and neither seller is obliged to sell, unless both transactions proceed. Serial acquisition of control means that undertaking A acquires control of undertaking B conditional on B's prior or simultaneous acquisition of undertaking C.

Serial acquisition of joint control

(35) If undertaking B agrees to acquire first sole control of the target undertaking C, with a view to directly sell a part of the acquired stake in undertaking C to undertaking A, and as a result of serial transactions joint control of A and B is established over C and if both acquisitions are inter-conditional, the two transactions are accepted as one concentration. Only the acquisition of joint control, as the final result of such serial transactions, will be assessed by the Board.

Serial Transactions in Securities

(36) Article 5(4) of the Communiqué states that closely related transactions which are realized in series through securities within a short period of time shall be considered as single concentrations under the scope of that article. The concentration in these circumstances is not limited to the acquisition of the "one and decisive" share, but will cover all the securities acquired in the reasonably short period of time[8].

Considering several transactions as a single transaction for the purposes of calculating the turnover

(37) Article 8(5) of the Communiqué states that two or more transactions under paragraph 2 of this Article, carried out between the same persons or parties within a period of two years, shall be considered as a single transaction for the calculation of turnovers listed in Article 7 of the Communiqué. It is sufficient that the transactions take place between firms belonging to the same groups even if they are not realized between the same firms. The same condition applies for two or more transactions simultaneously realized between the same persons or undertakings. Whenever they lead to the acquisition of control by the same undertaking, such simultaneous transactions between the same parties form a single concentration even if they are not conditional upon each other. However, the provision in article 8(5) of the Communiqué does not apply to different transactions at least one of which involves an undertaking concerned which is different from the common seller(s) and buyer(s). In this respect, in cases involving two transactions where one transaction results in sole control and the other in joint control, unless the other jointly controlling parent(s) in the second transaction are the seller(s) of the solely controlling stake in the first transaction, article 8(5) does not apply.

3.1.6. Restructuring and Concentrations involving State-owned undertakings

(38) According to the Communiqué, a merger or an acquisition within the meaning of article 7 of the Act is limited to change in control. Therefore, restructuring in a group of companies does not constitute a concentration as it is an intra-group transaction. The cases where both the acquiring and acquired undertakings are companies owned by the state or by the same public institution are exceptional. In this case, whether the transaction is regarded as an internal restructuring depends on the question whether

[8] See the Decision dated 20.09.2012 and numbered 12-44/1353-456.

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 transaction will be deemed to constitute a concentration and not an internal restructuring. If the different economic units will maintain their independent power of decision after the transaction, it is regarded as an internal restructuring, even if a single entity, such as a holding company has the shares of the undertakings, constituting different economic units.

(39) However, the privileges of a state organ acting as a public institution rather than as a shareholder do not constitute control within the meaning of the Communiqué to the extent that they are limited to the protection of the public interest and have neither the aim nor the effect of enabling that organ to exercise a decisive influence over the activity of the undertaking

3.2. Sole Control

(40) Sole control is the case where one undertaking alone have decisive influence on an undertaking. Two general situations in which an undertaking has sole control can be described. First, the undertaking that has sole control enjoys the right to determine the strategic commercial decisions of the other undertaking. This right is generally achieved by the acquisition of a majority of voting rights in a company. Second, 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 their own to take such decisions (negative sole control). In this case, only one shareholder has the power to block the adoption of strategic decisions[9]. In contrast to the situation in a jointly controlled company, as there are not any other shareholders enjoying the same power in negative sole control, the shareholder enjoying negative sole control does not necessarily have to cooperate with specific other shareholders in determining the strategic behavior of the undertaking. Since this shareholder can produce a deadlock situation in the undertaking, the shareholder has decisive influence within the meaning of article 5 of the Communiqué.

(41) Sole control can be acquired on a de jure and/or de facto basis.

3.2.1. De jure Sole Control

(42) Generally, acquisition of a majority of the voting rights of a company leads to de jure acquisition of sole control. In the absence of other elements, an acquisition which does not include a majority of the voting rights may not confer control even majority of the company capital is acquired. Where the master agreement requires a supermajority for strategic decisions, the acquisition of a simple majority of the voting rights may not confer the power to determine strategic decisions, but may be sufficient to confer a blocking right on the acquirer and therefore negative control.

(43) Minority shares together with specific rights attached to those shares may confer de jure sole control. These may be preferential shares to which special rights are attached enabling the minority shareholder to determine the strategic behavior of the target company, such as the power to appoint more than half of the members of the administrative board. A minority shareholder who has the right to manage the activities of the company and to determine its business policy has also sole control.

[9] The expression "negative control" was not used in the decision dated 29.03.2012 and numbered 12-14/445-127 but it was concluded that although the acquirer was not able to take strategic decisions on its own, it has the right to block the adoption of such decisions and there was a change in control.

(44) The case where one shareholder holds 50 % in an undertaking while other shareholders hold remaining 50 % (assuming this does not lead to positive sole control on a de facto basis), or where there is a supermajority requirement for strategic decisions and only one shareholder has a veto right, irrespective of whether it is a majority or a minority shareholder, is a typical negative sole control situation[10].

3.2.2. De facto Sole Control

(45) A minority shareholder may also be deemed to have sole control on a de facto basis in certain situations. De facto sole control occurs where the minority shareholder is highly likely to achieve a majority at the shareholders' meetings, given the amount of shares owned and the participation levels of shareholders in the shareholders' meetings in previous years. In this case, the Board carries out a prospective analysis based on the past voting pattern in shareholders' meetings and take into account foreseeable changes of the shareholders' presence which might arise in future after the transaction. The Board further analyzes the position of other shareholders and assess their role. In such an assessment whether the remaining shares are widely dispersed among different shareholders, 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 are among the criteria to be taken into account and they will be assessed on a case-by-case basis. In case, depending on its shareholding, the voting pattern at past shareholders' meetings and the position of other shareholders, a minority shareholder is likely to have a stable majority of the votes at the shareholders' meeting, then that minority shareholder is deemed to have de facto sole control[11]

(46) An option to purchase or convert shares cannot confer sole control unless the option will be exercised in the near future according to legally binding agreements. However, in exceptional circumstances, the existence of such options, together with other elements, may lead to the conclusion that there is de facto sole control.

Sole Control Acquired by Other Means than Voting Rights

(47) Apart from the acquisition of sole control on the basis of voting rights, it is possible to acquire sole control through the purchase of assets mentioned in section 2.1.2 by contract, or by any other means.

3.3. Joint Control

(48) 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 means the power to block actions which determine the strategic commercial behavior of an undertaking. Unlike sole control, which confers the power to determine the strategic decisions in an undertaking to a specific shareholder, the characteristic of joint control is the possibility of a deadlock situation resulting from the power of two or more parent companies to reject proposed strategic decisions. The shareholders enjoying joint control must reach a common understanding in determining the commercial policy of the joint venture and cooperate. Joint control occurs if the shareholders (parent companies) must reach an agreement for important decisions regarding the controlled undertaking (joint venture).

[10] For instance, in a company where 70% majority is required for adopting decisions, if the shareholding structure is as follows: 35%, 25%, 20% and 20%, the shareholder which owns 35% of the shares has negative sole control.
[11] See the decision dated 17.4.2008 and numbered 08-29/359-118

(49) Joint control can be acquired on a de facto or de jure basis. Joint control particularly occurs in the cases listed below:

3.3.1. Equality in Voting Rights or Appointment to Decision-making Bodies

(50) Joint control exists, in the clearest way, where there are two parent companies which share equally the voting rights in the joint venture. In this case, it is not necessary that an agreement exist between them. However, if there is an agreement, it must be consistent with the principle of equality between the parent companies in order to consider joint control[12]. Equality is also achieved where both parent companies have the right to appoint an equal number of members to the decision-making bodies of the joint venture.

3.3.2. Veto Rights

(51) Joint control may also exist 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. Joint control may occur where minority shareholders have rights which allow them to veto decisions which are essential for the strategic commercial behavior of the joint venture[13]. Veto rights may be set out in the master agreement of the joint venture or shareholders' agreement between the parent companies. The veto rights may be used by means of quorums required for decisions in the shareholders' meetings or by means of the board of directors to the extent that the parent companies are represented in the board of directors.

(52) It is necessary that the veto rights allowing to exercise decisive influence be related to strategic decisions on the business policy of the joint venture and go beyond the veto rights normally granted to minority shareholders in order to protect financial interests of investors. Veto rights over decisions such as changes in the master agreement of the joint venture, an increase or decrease in the capital or liquidation are rights towards the protection of financial interests of the minority shareholders. A veto right which prevents the sale or liquidation of the joint venture does not confer joint control on the minority shareholder concerned.

(53) Veto rights which confer joint control typically include decisions such as the budget, the business plan, major investments or the appointment of senior management. However, the acquisition of joint control does not require that the acquirer has the right to exercise decisive influence on the day-to-day running of an undertaking. The important point is that the veto rights grant the ability to exercise decisive influence on the strategic business behavior of the joint venture. Moreover, it is not necessary to demonstrate that the acquirer of joint control of the joint venture will actually make use of its decisive influence. The existence of such ability and possibility is sufficient.

(54) In order to possess joint control, it is not necessary for a minority shareholder to have all the veto rights mentioned above. Some or even one such right may be sufficient. The sufficiency of those rights to acquire joint control depends on the precise content of the veto right and the importance of this right within the context of the joint venture's field of activity.

(55) Some of the important veto rights are explained below.

[12] For instance, each of the parent companies has the same number of representatives in the management bodies and that none of the members has a casting vote alone.

[13] See decisions dated 23.02.2012 and numbered 12-08/225-56 and dated 19.01.2012 and numbered 12-02/67-13

Appointment of senior management and determination of budget

(56) The veto rights concerning the appointment and dismissal of the senior management and the approval of the budget are very important with respect to decisive influence. The power to determine the senior management, such as the members of the board, together usually confers on the right holder the power to exercise decisive influence on the commercial policy of an undertaking. The same applies with respect to the budget since the budget determines the precise framework of the activities of the joint venture and, in particular, the investments it will make.

Business plan

(57) The business plan normally specifies the aims of a company as well as the measures to be taken in order to achieve those aims. A veto right on this type of business plan may be sufficient to confer joint control even in the absence of any other veto right. However, a veto right related to a business plan that contains general declarations concerning the business aims of the joint venture is not sufficient to confer joint control.

Investments

(58) The importance of a veto right related to investments depends, first, on the level of investments which is subject to the approval of the parent companies. Where the parent companies have veto rights related to decisions concerning very high level of investments, this veto right may be closer to the 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. The extent to which investments constitute an essential feature of the market in which the joint venture is active is taken into account while assessing the veto rights over investments. While the investment policy of an undertaking is generally an important element in assessing whether or not there is joint control, there may be some markets where investment does not play a significant role in the market behavior of an undertaking.

Market-specific Rights

(59) Apart from the typical veto rights mentioned above, there may be other veto rights which are important in the context of the market where the joint venture is active. Where technology is important for the joint venture's activities, a decision on the technology to be used by the joint venture is an example of such cases. Another example relates to markets where the degree of product differentiation and innovation is high. 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.

Assessing Veto Rights

(60) While assessing the importance of veto rights, when there is more than one veto right, these rights should not be treated in isolation since the determination of whether or not joint control exists is based on an assessment of these rights as a whole. However, it is difficult to regard a veto right which does not relate to strategic commercial policy, to the appointment of senior management or to the business plan as giving joint control to its holder.

3.3.3. Joint Exercise of Voting Rights

(61) Two or more undertakings acquiring minority shares in the target undertaking may obtain joint control even without specific veto rights. Where the minority shareholders together have a majority of the voting rights and act together in exercising these voting rights and thus control the target undertaking, the minority shareholders may enjoy joint control. Such joint control may result from a legally binding agreement made to this effect[14], or it may be established on a de facto basis.

(62) In case the common interests of the minority shareholders is so strong that they would not act against each other in exercising their rights in relation to the joint venture, de facto collective action may occur. However, the greater the number of parent companies involved in such a joint venture is, it is less likely that this situation will arise.

(63) A high degree of mutual dependency between the parent companies to reach the strategic objectives of the joint venture may be an indication for such a commonality of interests. This is in particular the case when each parent company provides essential elements for the activities of the joint venture (e.g. specific technologies, know-how or supply agreements). In these circumstances, the parent companies may be able to block the strategic decisions of the joint venture and, thus, they can take the strategic decisions related to the joint venture only through mutual agreement even if there is no express provision for veto rights. Therefore, the parent companies must cooperate. Moreover, decision making procedures which are prepared in such a way as to allow the parent companies to exercise joint control may allow collective action.

(64) This situation may occur not only when two or more minority shareholders jointly control an undertaking on a de facto basis, but also when a majority shareholder is highly dependent on a minority shareholder. The minority shareholder may enjoy joint control without any veto rights in case the joint venture economically and financially depends on the minority shareholder or if only the minority shareholder has the required know-how for the operation of the joint venture whereas the majority shareholder is a mere financial investor. In this case, the majority shareholder will not be able to act on its own and the minority shareholder in the joint venture may be able to block strategic decisions so that both parent undertakings will have to cooperate permanently. Thus, a situation of de facto joint control which goes beyond a pure de jure assessment according to which the majority shareholder could have been considered to have sole control.

(65) These criteria apply to the formation of a new joint venture as well as to acquisitions of minority shares conferring joint control. There is a higher probability of a commonality of interests if the shares are acquired by means of common action by the acquirers. However, an acquisition by way of a common action is not alone sufficient for establishing de facto joint control. In general, a common interest of financial investors (or 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.

(66) If there is no stable majority in the decision-making procedure and the majority can be reached through any of the various combinations among the minority shareholders on each occasion (changing alliances[15]), it cannot be assumed that the minority shareholders (or a certain group thereof) will jointly control the undertaking. For example, in the case of a joint venture where decisions are taken on the basis of simple

[14] For instance, a holding company (jointly controlled) to which the minority shareholders transfer their rights or an agreement according to which they commit to act together.
[15] See the decision dated 29.03.2007 and numbered 07-29/268-98.

majority, three shareholders each of which owns one-third of the share capital and elects one-third of the members of the board of directors cannot be deemed to have joint control.

3.3.4. Other factors related to joint control

Unequal Role of the Parent Companies

(67) Joint control may occur if one of the parent companies enjoys specific knowledge and experience in the business area of the joint venture. In such a case, the other parent company does not have a role or has a limited role in the daily management of the joint venture where it involves due to a financial, long-term-strategy, brand image or general policy considerations. On the other hand if this parent undertaking always retains the real possibility of objecting to 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, this may refer to joint control. Otherwise, it means that the other parent company has sole control.

Casting vote

(68) For joint control to exist, the casting vote should not belong to only one parent company as this would lead to sole control of the company enjoying the casting vote. Nevertheless, there can be joint control if the importance and effectiveness of this casting vote is in practice limited. There is joint control 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 sales option implying a serious financial burden or if the mutual interdependence of the parent companies would make the exercise of the casting vote impossible.

4. CHANGES IN THE QUALITY OF CONTROL

(69) The Communiqué covers transactions resulting in the acquisition of sole or joint control, including also transactions leading to changes in the quality of control. A change in the quality of control, resulting in a concentration occurs firstly if there is a change between sole and joint control. Secondly, a change in the quality of control occurs between joint control structures before and after the transaction if there is an increase in the number or a change in the identity of controlling shareholders.

(70) Changes only in the level of shares 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 are not notifiable. Similarly, there is no change in the quality of control, if a change from negative to positive sole control occurs.

(71) The changes in the quality of control will be discussed in two categories: first, an entrance of one or more new controlling shareholders irrespective of whether or not they replace existing controlling shareholders and, second, a reduction of the number of controlling shareholders.

4.1. Entry of New Controlling Shareholders

(72) The entry of new controlling shareholders leading to a joint control results in a change in the quality of control through a change from sole to joint control first. Second, there may be a change in the quality of control through the entry of a new shareholder or a replacement of an existing shareholder in an already jointly controlled undertaking.

(73) A move from sole control to joint control is considered a notifiable transaction[16] as this changes the quality of control of the joint venture[17]. First, there is an acquisition of control with respect to the shareholder entering the controlled undertaking in such transactions. Second, the new acquisition of control turns the controlled undertaking into a joint venture, which changes also the situation for the other controlling undertaking under the Communiqué certainly. That is to say, the old shareholder will have to take into account the interests of one or more other controlling shareholder(s) in the future and it will be obliged to cooperate permanently with the new shareholder(s).

(74) The entry of a new shareholder[18] in a jointly controlled undertaking - either in addition[19] to the already controlling shareholders or in replacement of one of them - also constitutes a notifiable transaction, although the undertaking is jointly controlled before and after the transaction. First, also in such transactions 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. Due to the nature of joint control, since each shareholder alone has a blocking right concerning strategic decisions, the jointly controlling shareholders have to take into account each other's interests and cooperate for the determination of the strategic behavior of the joint venture. Therefore, the nature of joint control is determined by the identity and the composition of the jointly controlling shareholders. One of the most obvious examples 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 behavior of the other shareholder. Therefore, the replacement of a controlling shareholder or the entry of a new shareholder in a jointly controlled undertaking constitutes a change in the quality of control[20].

(75) However, in case new shareholders enter but one or several shareholders would not have sole or joint control by virtue of the transaction, the transaction is not notifiable. The entry of new shareholders may lead to a situation where joint control can be established neither on a de jure basis nor on a de facto basis due to changing coalitions between minority shareholders.

4.2. A Reduction in the Number of Shareholders

(76) A reduction in the number of controlling shareholders may constitute a change in the quality of control. If the exit of one or more controlling shareholders results in a change from joint to sole control, it is considered as a concentration[21]. Decisive

[16] In order to be notifiable, it should exceed the turnover thresholds specified in the Communiqué. Hereafter, it is assumed that the turnover thresholds are exceeded for the situations where the transaction is said to be notifiable.
[17] See the Decision dated 29.03.2012 and numbered 12-14/410-121.
[18] See the Decision dated 21.03.2012 and numbered 12-13/384-113.
[19] See the Decision dated 03.08.2011 and numbered 11-44/975-325.
[20] Generally, the Board will not assess as a separate concentration the indirect replacement of a controlling shareholder in a joint control scenario which takes place via an acquisition of control of one of its parent undertakings. The Board will assess any changes occurring in the competitive situation of the joint venture in the framework of the overall acquisition of the control of its parent undertaking. Therefore, in those circumstances, the concentration which relates to the parent undertaking will not concern other controlling shareholders.
[21] See the Decision dated 20.09.2012 and numbered 12-44/1343-448.

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.

(77) If the transaction involves a reduction in the number of jointly controlling shareholders but does not lead to a change from joint to sole control, it is assumed that the transaction will not lead to a notifiable concentration.

5. JOINT VENTURES - THE CONCEPT OF FULL-FUNCTIONALITY

(78) Article 5(1) provides that the case where control is acquired by one or more undertakings of the whole or parts of another undertaking is a transaction under the scope of article 7 of the Act. Therefore, the acquisition of another undertaking by several undertakings to establish joint control constitutes a concentration under the Act. As in the case of the acquisition of sole control of an undertaking, the acquisition of joint control will lead to a structural change in the market even if, according to the plans of the acquiring undertakings, the acquired undertaking would no longer be considered full-function after the transaction. Thus, a transaction involving several undertakings acquiring joint control of whole or parts of another undertaking, fulfilling the criteria set out in paragraph 17, from third parties will constitute a concentration within the scope of the Act according to the Communiqué without it being necessary to consider the full-functionality criterion.

(79) Besides, Article 5(3) provides for that formation of a joint venture which would permanently fulfill all of the functions of an independent economic entity (full-function joint ventures) shall constitute an acquisition under article 5(1)(b) of the Communiqué. Therefore, the full-functionality criterion is the basic requirement for the application of the Communiqué to joint ventures established by the parties in cases where the joint venture is created as a "greenfield operation" or the parties contribute assets to the joint venture which they previously owned individually. In other words, in these circumstances, the joint venture must fulfill the full-functionality criterion in order to constitute a transaction under the scope of article 7 of the Act.

(80) While it is required that an undertaking should have economic autonomy from an operational viewpoint, it does not mean that it is autonomous from the parent company 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 5(3) would never be complied with. It is therefore sufficient for the fulfillment of the full-functionality criterion if the joint venture is autonomous in operational respect.

(81) In order to be considered full-function, a joint venture must have the following characteristics:

5.1. Sufficient Resources to Operate Independently

(82) Full functioning essentially means that a joint venture must operate in a market, performing the functions normally carried out by undertakings operating in 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.[22] The personnel do not necessarily need to be employed by the joint venture itself. If it is standard

[22] See the Decision dated 12.01.2012 and numbered 12.01/6-3.

practice in the industry where the joint venture is operating, it may be sufficient if third parties envisage the staffing under an operational agreement or if the staff is assigned by an interim employment agency. The secondment of personnel by the parent companies may also be sufficient if this is done only for a start-up period or if the joint venture deals with the parents companies in the same way as with third parties. The joint venture should deal with the parents on the basis of normal commercial conditions and be free to recruit its own employees or obtain staff via third parties so that secondment by the parent companies does not negatively affect the full-functionality.

5.2. Making Activities beyond One Specific Function for the Parents

(83) A joint venture is not deemed full-function if it is established to take over only one specific function within the parent companies' activities without its own access to or presence on the market[23]. This is the case, for example, for joint ventures limited to R&D or production. Such joint ventures provides assistance to their parent companies' business activities. This is also the case where the joint venture's activities are essentially limited to the distribution or sales of its parent companies' products and thus 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 prevent it from being considered as full-function as long as the parent companies acts only as agents of the joint venture.

(84) Similarly a joint venture which is operating in a limited way for the purposes of acquisition and/or holding of certain real estate for the parents and based on financial resources provided by the parents will not usually be considered to be full-function, as it does not carry out an autonomous, long term business activity on the market and typically lacks the necessary resources to operate independently. Joint ventures that are actively managing a real estate portfolio and acting on their own behalf on the market are full-function and those have to be distinguished from the type mentioned above.

5.3. Independence from the Parent Companies in Sale and Purchase Activities

(85) The strong presence of the parent companies in upstream or downstream markets of the joint venture is a factor to be taken into consideration in assessing the full-function nature of a joint venture where this presence results in substantial sales or purchases between the parent companies and the joint venture. The fact that, the joint venture depends almost entirely on sales to or purchases from its parent companies only for an initial start-up period does not normally affect its full-function nature. Such relation may be necessary in order to establish the joint venture on a market. However, the period should normally not exceed a period of three years, depending on the specific conditions of the market in question.

5.3.1. Sales to Parent Companies

(86) Where sales from the joint venture to the parent companies are lasting in nature, whether the joint venture has the necessary hardware to play an active role in the market and can be considered economically autonomous from an operational viewpoint, regardless of these sales, should be assessed. In this assessment, the proportion of sales made by the joint venture to its parent companies to the total production of the joint venture is an important factor. Due to the particularities of each

[23] Decision dated 06.02.2013 and numbered 13-09/119-65.

case, it is impossible to define a specific turnover ratio which distinguishes full-function from other joint ventures. If the joint venture achieves more than 50 % of its turnover from sales to third parties, this will typically be an indication of full-functionality. If the ratio is under 50%, a case-by-case analysis is required and for the finding of operational autonomy, it is expected that the relationship between the joint venture and its parents must be truly commercial in character. In this case, it should 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 deal with its parents' companies on the basis of normal commercial conditions. Under these circumstances, i.e. if the joint venture will treat its parent companies in the same way as third parties, it may be sufficient that 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 to the parents, the greater will be the need for clear evidence of the commercial character of the relationship. The market structure will also be taken into account in the assessment[24].

(87) For the determination of the proportion between sales to the parents and to third parties, the Board will take past accounts and confirmed business plans into account. However, in case especially substantial third-party sales cannot be easily foreseen, the Board will base its finding on the general market structure.

(88) These issues may arise with regard to outsourcing agreements, where an undertaking creates a joint venture with a service provider which will carry out functions that were previously dealt with by the undertaking in-house[25]. A joint venture which provides its services exclusively to the parent company that is the client and which is dependent on input from the service provider for those services cannot be deemed full-function. The fact that the joint venture's business plan does prevent the joint venture from providing 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 parent undertaking. However, if significant third-party sales are foreseen and if the relationship between the joint venture and its parent will be truly commercial in character, in other words if the joint venture deals with its parents on the basis of normal commercial conditions, this may qualify the joint venture as full-function.

5.3.2. Purchases from the Parent Companies

(89) In the assessment of the purchases made by the joint venture from its parent companies, the added value that the joint venture provides to the products concerned is important. The full-function character of the joint venture is questionable if little value is added to the products or services concerned purchased by the joint venture. In such a situation, the joint venture may be similar to a joint sales agency.

(90) However, if 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 a sales agency but a full-function joint venture. Such markets are characterized by the existence of companies which specialize in the selling and distribution of products without being vertically integrated in addition to those which are integrated, and there are different sources of supply available for the products in question. In addition, many trade markets may require operators to invest in specific facilities such as outlets,

[24] Decision dated 19.08.2009 and numbered 09-47/1161-295.

[25] Under what conditions an outsourcing arrangement will be qualified as a concentration is discussed in paragraphs 18-20 of the guidelines.

warehouses, depots, transport fleets and sales and service 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 sources.

5.4. Operation on a Lasting Basis

(91) In order to constitute a full-function joint venture, it must be intended to operate on a lasting basis. Normally, provision of the resources described above to the joint venture by the parents demonstrates that this is the case. In addition, agreements setting up a joint venture often include provisions for risks such as the failure of the joint venture or fundamental disagreement as between the parent companies. 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 are laid down towards such risks. However, this kind of provision does not prevent the joint venture from being considered as operating on a lasting basis. The same applies in cases where the agreement specifies a period for the duration of the joint venture and this period is sufficiently long in order to bring about a lasting change in the structure of the undertakings concerned or where the agreement provides for the possible continuation of the joint venture beyond this period.

(92) In contrast, the joint venture will not be considered to operate on a lasting basis where it is established for a short finite duration. For example, this is the case where a joint venture is established in order to construct a specific project such as a power plant, but it will not be operated once the construction of the plant has been completed.

(93) It can be assumed that a joint venture lacks the sufficient operations on a lasting basis at a stage where the decisions that are essential for starting the joint venture's business activity are taken by third parties. Only decisions that go beyond mere formalities and the result of which is uncertain may be assessed within this context. Examples are the award of a contract (e.g., in public tenders), licenses (e.g., in the telecommunications sector) or access rights to property (e.g., exploration rights for oil and gas). While the decision on such factors is pending, 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 favor of the joint venture in question, this criterion is fulfilled and a concentration arises[26].

5.5. Changes in the Activities of the Joint Venture

(94) The parents may decide to enlarge the scope of the activities of the joint venture in the course of its lifetime. In case this enlargement entails the acquisition of the whole or part of another undertaking from the parents if that acquisition is assessed isolation, it qualifies as a concentration to which turnover can be attributed as explained in paragraph 17 of this Guidelines, a notifiable transaction arises according to the Communiqué.

(95) The parent companies may transfer significant additional assets, contracts, know-how or other rights to the joint venture after it starts operating. If these assets and rights enable the 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, a notifiable transaction

[26] Subject to the other criteria mentioned in this chapter of the Guidelines.

may arise. 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 5(3) of the Communiqué[27].

(96) If the scope of a joint venture is enlarged without additional assets, contracts, know-how or rights being transferred, no concentration will be deemed to arise.

(97) A concentration arises if a change in the activity of an existing non-full-function joint venture occurs so that a full-function joint venture within the meaning of Article 5(3) is created. A change of the organizational structure of a joint venture so that it fulfills the full functionality criterion; a joint venture that used to supply only the parent companies, which subsequently starts a significant activity on the market; or as described in paragraph 93 above, the cases where a joint venture can only start its activity on the market once it has essential input (such as a license for a joint venture in the telecommunications sector) are examples of such situations. Once the decision is taken that leads to the joint venture meeting the full functionality criterion, a concentration arises.

[27] The triggering event for the notification in such a case will be the agreement or other legal act underlying the transfer of the assets, contracts, know-how or other rights.