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Commission for Protection of Competition according to article 28 (3) in connection with article 12 of the Law on Protection of Competition (Official Gazette No. 145/10 and 136/11) on a session held on 29.03.2012 has adopted the fallowing

Guidelines on the concept of concentration

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A. **INTRODUCTION**

(1) The purpose of this Guidelines is to provide guidance on issues related to arise of concentration in accordance with article 12 of the Law on Protection of the Competition (LPC) (Official Gazette No. 145/10 and 136/11), which appraisal is under jurisdiction of the Commission for Protection of Competition (CPC).

(2)Chapter three of the LPC – concentrations –only applies to operations that satisfy two conditions. First, there must be a concentration of two or more undertakings within the meaning of Article 12 of the LPC and second, participants in the concentration has to fulfill the turnover thresholds in terms of turnover or market shares set out in article 14 (1) of the LPC.

(3)This Guidelines closely defines the term concentration (including the specific requirements for the joint venture to be consider a concentration).

(4) The CPC addresses the question of its jurisdiction over a concentration in decisions according to the LPC.

THE CONCEPT OF CONCENTRATION

(5)According to Article 12(1) of the LPC, a concentration only covers operations where a change of control in the undertakings concerned occurs on a lasting basis. The concept of concentration is intended to relate to operations which bring about a lasting change in the structure of the market. Because the test in Article 12 of the LPC is centred on the concept of control, the existence of a concentration is to a great extent determined by qualitative rather than quantitative criteria.

(6) Article 12(1) of the CPC defines two categories of concentrations:
— those arising from a merger between previously independent undertakings (point (1));
— those arising from an acquisition of control (point (2)).
These are treated respectively in Sections I and II below.

I. MERGERS BETWEEN PREVIOUSLY INDEPENDENT UNDERTAKINGS

(7)A merger within the meaning of Article 12(1) 1) of the CPC occurs when two or more independent undertakings amalgamate into a new undertaking and cease to exist as separate legal entities. A merger may also occur when an undertaking is absorbed by another, the latter retaining its legal identity while the former ceases to exist as a legal entity.

(8)A merger within the meaning of Article 12(1) 1) of the CPC may also occur where, in the absence of a legal merger, the combining of the activities of previously independent undertakings results in the creation of a single economic unit[1]. This may arise in particular

[1] In determining the previous independence of undertakings, the issue of control may be relevant as the merger might otherwise only be an internal restructuring within the group. In this specific context, the assessment of control also

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

II. ACQUISITION OF CONTROL

1. Concept of control

1.1. ***Person or undertaking acquiring control***

(9)Article 12 (1) 2) of the LPC provides that a concentration occurs in the case of an acquisition of control. Such control may be acquired by one undertaking acting alone or by several undertakings acting jointly.

Person controlling another undertaking

(10)Control may also be acquired by a person in circumstances where that person already controls (whether solely or jointly) at least one other undertaking or, alternatively, by a combination of persons (which control another undertaking) and undertakings. The term 'person' in this context extends to public bodies and private entities, as well as natural persons. Acquisitions of control by natural persons are only considered to bring about a lasting change in the structure of the undertakings concerned if those natural persons carry out further economic activities on their own account or if they control at least one other undertaking.

Acquirer of control

(11)Control is normally acquired by persons or undertakings which are the holders of the rights or are entitled to rights conferring control under the contracts concerned (Article 12(3) 1) of the LPC). However, there are also situations where the formal holder of a controlling interest differs from the person or undertaking having in fact the real power to exercise the rights resulting from this interest. This may be the case, for example, where an undertaking uses another person or undertaking for the acquisition of a controlling interest and has the power to exercise the rights conferring control through this person or undertaking, i.e. the latter is formally the holder of the rights, but acts only as a vehicle. In such a situation, control is acquired by the undertaking which in reality is behind the operation and in fact enjoys the power to control the target undertaking (Article 3(3) 2) of the LPC). This is also a case where control held by commercial companies can be attributed to their exclusive shareholder, their majority shareholders or to those jointly controlling the companies since these companies comply in any event with the decisions of those shareholders. A controlling shareholding which is held by different entities in a group is normally attributed to the undertaking exercising control over the

follows the general concept set out below and includes *de jure* as well as *de facto* control.

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different formal holders of the rights. In other cases, the evidence needed to establish this type of indirect control may include, either separately or in combination and to be assessed on a case-by-case basis, factors such as shareholdings, contractual relations, source of financing or family links.

Acquisition of control by investment funds

(12)Specific issues may arise in the case of acquisitions of control by investment funds. The CPC will analyse structures involving investment funds on a case-by-case basis, but some general features of such structures can be set out.

(13)Investment funds are often set up in the legal form of limited partnerships, in which the investors participate as limited partners and normally do not exercise control, either individually or collectively. The investment funds usually acquire the shares and voting rights which confer control over the portfolio companies. Depending on the circumstances, control is normally exercised by the investment company which has set up the fund as the fund itself is typically a mere investment vehicle; in more exceptional circumstances, control may be exercised by the fund itself. The investment company usually exercises control by means of the organisational structure, *e.g.* by controlling the general partner of fund partnerships, or by contractual arrangements, such as advisory agreements, or by a combination of both. This may be the case even if the investment company itself does not own the company acting as a general partner, but their shares are held by natural persons (who may be linked to the investment company) or by a trust. Contractual arrangements with the investment company, in particular advisory agreements, will become even more important if the general partner does not have any own resources and personnel for the management of the portfolio companies, but only constitutes a company structure whose acts are performed by persons linked to the investment company. In these circumstances, the investment company normally acquires indirect control within the meaning of Article 12(1) 2) and 12(3) 2) of the LPC, and has the power to exercise the rights which are directly held by the investment fund.

1.2. ***Means of control***

(14)Control is defined by Article 12(2) of the LPC as the possibility of exercising decisive influence on an undertaking. It is therefore not necessary to show that the decisive influence is or will be actually exercised. However, the possibility of exercising that influence must be effective. Article 12(2) of the LPC further provides that the possibility of exercising decisive influence on an undertaking can exist on the basis of rights, contracts or any other means, either separately or in combination, and having regard to the considerations of fact and law involved. A concentration therefore may occur on a legal or a *de facto* basis, may take the form of sole or joint control, and extend to the whole or parts of one or more undertakings (cf. Article 12(1) 2)of the LPC).

Control by the acquisition of shares or assets

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

Control on a contractual basis

(16)Control can also be acquired on a contractual basis. In order to confer control, the contract must lead to a similar control of the management and the resources of the other undertaking as in the case of acquisition of shares or assets. In addition to transferring control over the management and the resources, such contracts must be characterised by a very long duration (ordinarily without a possibility of early termination for the party granting the contractual rights). Only such contracts can result in a structural change in the market. Examples of such contracts are organizational contracts under national company law or other types of contracts, *e.g*. in the form of agreements for the lease of the business, giving the acquirer control over the management and the resources despite the fact that property rights or shares are not transferred. In this respect, Article 12(2) 1) of the LPC specifies that control may also be constituted by a right to use the assets of an undertaking. Such contracts may also lead to a situation of joint control if both the owner of the assets as well as the undertaking controlling the management enjoy veto rights over strategic business decisions.

Control by other means

(17)In line with these considerations, franchising agreements as such do not normally confer control over the franchisee's business on the franchisor. The franchisee usually exploits the entrepreneurial resources on its own account even if essential parts of the assets may belong to the franchisor . Furthermore, purely financial agreements, such as sale-and-lease-back transactions with arrangements for a buyback of the assets at the end of the term, do not normally constitute a concentration as they do not change control over the management and the resources.

(18)Furthermore, control can also be established by any other means. Purely economic relationships may play a decisive role for the acquisition of control. In exceptional circumstances, a situation of economic dependence may lead to control on a *de facto* basis where, for example, very important long-term supply agreements or credits provided by suppliers or customers, coupled with structural links, confer decisive influence. In such a situation, the CPC will carefully analyse whether such economic links, combined with other links, are sufficient to lead to a change of control on a lasting basis.

(19)There may be an acquisition of control even if it is not the declared intention of the parties or if the acquirer is only passive and the acquisition of control is triggered by action of third parties. Examples are situations where the change of control results from the inheritance of a shareholder or where the exit of a shareholder triggers a change of control, in particular a change from joint to sole control . Article 12(1) 2) of the LPC covers such scenarios in specifying that control may also be acquired ‘by any other means’.

Control and national company law

(20)Other laws in Republic of Macedonia, or other national legislations may provide specific rules on the structure of bodies representing the organization of decision-making within an undertaking. While such legislation may confer some power of control upon persons other than the shareholders, in particular on representatives of employees, the concept of control under

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the LPC is not related to such a means of influence as the LPC focuses on decisive influence enjoyed on the basis of rights, assets or contracts or equivalent *de facto* means. Restrictions in the articles of association or in general law concerning the persons eligible to sit on the board, such as a provisions requiring the appointment of independent members or excluding persons holding office or employment in the parent companies, do not exclude the existence of control as long as the shareholders decide the composition of the decision making bodies. Similarly, despite provisions of national law foreseeing that decisions of a company must be taken by its company organs in its interests, those persons holding the voting rights have the power to adopt those decisions and therefore have the possibility to exercise decisive influence on the company.

Control in other areas of legislation

(21) The concept of control under the LPC may be different from that applied in specific areas of Community and national legislation concerning, for example, prudential rules, taxation, air transport or the media. The interpretation of 'control' in other areas is therefore not necessarily decisive for the concept of control under LPC.

1.3. ***Object of control***

(22) The LPC provides in Article 12(1)2), (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. The acquisition of control over assets can only be considered a concentration if those assets constitute the whole or a part of an undertaking, *i.e.* a business with a market presence, to which a market turnover can be clearly attributed. The transfer of the client base of a business can fulfill these criteria if this is sufficient to transfer a business with a market turnover. A transaction confined to intangible assets such as brands, patents or copyrights may also be considered to be a concentration if those assets constitute a business with a market turnover. In any case, the transfer of licences for brands, patents or copyrights, without additional assets, can only fulfill these criteria if the licences are exclusive at least in a certain territory and the transfer of such licences will transfer the turnover-generating activity[2] For non-exclusive licences it can be excluded that they may constitute on their own a business to which a market turnover is attached.

(23) Specific issues arise in cases where an undertaking outsources in-house activities, such as the provision of services or the manufacturing of products, to a service provider. Typical cases are the outsourcing of IT services to specialised IT companies. Outsourcing contracts can take several forms; their common characteristic is that the outsourcing service supplier shall provide those services to the customer which the latter has performed in-house before. Cases of simple outsourcing do not involve any transfer of assets or employees to the outsourcing service suppliers, but it is usually the case that any assets or employees are retained by the customer. Such an outsourcing contract is akin to a normal service contract and even if the outsourcing service supplier acquires a right to direct those assets and employees of the customer, no concentration arises if the assets and employees will be used exclusively to service the customer.

(24) The situation may be different if the outsourcing service supplier, in addition to taking over a certain activity which was previously provided internally, is transferred the associated assets

[2] In addition, the granting of licences and the transfer of patent licences will only constitute a concentration if this is done on a lasting basis. In this respect, similar considerations as set out above in paragraph 18 for the acquisition of control by (long-term) agreements apply

and/or personnel. A concentration only arises in these circumstances if the assets constitute the whole or part of an undertaking, i.e. a business with access to the market. This requires that the assets previously dedicated to in-house activities of the seller will enable the outsourcing service supplier to provide services not only to the outsourcing customer but also to third parties, either immediately or within a short period after the transfer. This will be the case if the transfer relates to an internal business unit or a subsidiary already engaged in the provision of services to third parties. If third parties are not yet supplied, the assets transferred in the case of manufacturing should contain production facilities, the product know-how (it is sufficient if the assets transferred allow the build-up of such capabilities in the near future) and, if there is no existing market access, the means for the purchaser to develop a market access within a short period of time (e.g. including existing contracts or brands) . As regards the provision of services, the assets transferred should include the required know-how (e.g. the relevant personnel and intellectual property) and those facilities which allow market access (such as, *e.g.*, marketing facilities). The assets transferred therefore have to include at least those core elements that would allow an acquirer to build up a market presence in a time-frame similar to the start-up period for joint ventures as set out below under paragraphs 95 and 98. As in the case of joint ventures, the CPC will take account of substantiated business plans and general market features for assessing this.

(25) If the assets transferred do not allow the purchaser to at least develop a market presence, it is likely that they will be used only for providing services to the outsourcing customer. In such circumstances, the transaction will not result in a lasting change in the market structure and the outsourcing contract is again similar to a service contract. The transaction will not constitute a concentration. The specific requirements under which a joint venture for the provision of outsourcing services is qualified as a concentration are assessed in the present Guidelines in the section on full-function joint ventures.

1.4. *Change of control on a lasting basis*

(26) Article 12(1) of the LPC defines the concept of a concentration in such a manner as to cover operations only if they bring about a lasting change in the control of the undertakings concerned and in the structure of the market. The LPC therefore does not deal with transactions resulting only in a temporary change of control. However, a change of control on a lasting basis is not excluded by the fact that the underlying agreements are entered into for a definite period of time, provided those agreements are renewable. A concentration may arise even in cases in which agreements envisage a definite end-date, if the period envisaged is sufficiently long to lead to a lasting change in the control of the undertakings concerned[3].

(27) The question whether an operation results in a lasting change in the market structure is also relevant for the assessment of several operations occurring in succession, where the first transaction is only transitory in nature. Several scenarios can be distinguished in this respect.

(28) In one scenario, several undertakings come together solely for the purpose of acquiring another company on the basis of an agreement to divide up the acquired assets according to a pre-existing plan immediately upon completion of the transaction. In such circumstances, in

[3] The acquisition of control by the acquisition of shares or assets is not normally confined to a definite period of time and is therefore assumed to lead to a change of control on a lasting basis. Only in the scenarios set out in paragraphs 27 ff., will an acquisition of control by shares or assets be exceptionally considered to be transitory in nature and thus not to lead to a lasting change in the control of the undertakings concerned.

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a first step, the acquisition of the entire target company is carried out by one or several undertakings. In a second step, the acquired assets are divided among several undertakings. The question is then whether the first transaction is to be considered as a separate concentration, involving an acquisition of sole control (in the case of a single purchaser) or of joint control (in the case of a joint purchase) of the entire target undertaking, or whether only the acquisitions in the second step constitute concentrations, whereby each of the acquiring undertakings acquires its relevant part of the target undertaking.

(29) CPC considers that the first transaction does not constitute a concentration, and examines the acquisitions of control by the ultimate acquirers, provided a number of conditions are met: First, the subsequent break-up must be agreed between the different purchasers in a legally binding way. Second, there must not be any uncertainty that the second step, the division of the acquired assets, will take place within a short time period after the first acquisition. CPC considers that normally the maximum time-frame for the division of the assets should be one year.

(30) If both conditions are met, the first acquisition does not result in a structural change on a lasting basis. There is no effective concentration of economic power between the acquirer(s) and the target company as a whole since the acquired assets are not held in an undivided way on a lasting basis, but only for the time necessary to carry out the immediate split-up of the acquired assets. In those circumstances, only the acquisitions of the different parts of the undertaking in the second step will constitute concentrations, whereby each of these acquisitions by different purchasers will constitute a separate concentration. This is irrespective of whether the first acquisition is carried out by only one undertaking or jointly by the undertakings which are also involved in the second step. In any case, it must be noted that the scope of a clearance decision will only allow for a takeover of the entire target if the break-up can proceed within a short time-frame afterwards and the different parts of the target undertaking are directly sold on to the respective ultimate buyer.

(31) However, if these conditions are not fulfilled, in particular if it is not certain that the second step will proceed within a short time-frame after the first acquisition, CPC will consider the first transaction as a separate concentration, involving the entire target undertaking. This, *e.g.*, is the case if the first transaction may also proceed independently of the second transaction or if a longer transitory period is needed to divide up the target undertaking .

(32) A second scenario is an operation leading to joint control for a starting-up period but, according to legally binding agreements, this joint control will be converted to sole control by one of the shareholders. As the joint control situation may not constitute a lasting change of control, the whole operation may be considered to be an acquisition of sole control. The period should, in general,not exceed one year and the joint control period should be only transitory in nature. Only such a relatively short period will make it unlikely that the joint control period will have a distinct impact on the market structure and can therefore be considered as not leading to a change in control on a lasting basis.

(33) In a third scenario, an undertaking is 'parked' with an interim buyer, often a bank, on the basis of an agreement on the future onward sale of the business to an ultimate acquirer. The interim buyer generally acquires shares 'on behalf' of the ultimate acquirer, which often bears the major 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 described in

the first scenario in paragraphs 28-31, no other ultimate acquirer is involved, the target business remains unchanged, and the sequence of transactions is initiated alone by the sole ultimate acquirer. From the date of the adoption of this Guidelines, CPC will examine the acquisition of control by the ultimate acquirer, as provided for in the agreements entered into by the parties. CPC will consider the transaction by which the interim buyer acquires control in such circumstances as the first step of a single concentration comprising the lasting acquisition of control by the ultimate buyer.

1.5. *Interrelated transactions*

1.5.1. *Relation between Article 12 and Article 16 (5) of the LPC*

(34) Several transactions can be treated as a single concentration under the LPC either according to the general rule of Article 12 — as the transactions are interdependent — or according to the specific provision of Article 16(5) of the LPC.

(35) Article 16(5)of the LPC governs a different question from that referred to by Article 12 of the LPC. Article 12 of the LPC defines the existence of a 'concentration' in general and material terms, but does not directly determine the question of the CPC's competence in respect of concentrations. Article 16 intends to specify the scope of the LPC, in particular by defining the turnover to be taken into account for the purpose of determining whether a concentration meets the thresholds defined in article 14 (1) point 1) and 2) of the LPC, and Article 16(5) allows the CPC in this respect to consider two or more concentrative transactions to constitute a single concentration for the purposes of calculating the turnover of the undertakings concerned. The assessment whether, in application of Article 12 of the LPC, a number of transactions give rise to a single concentration or whether those transactions must be regarded as giving rise to a number of concentrations, is thereby logically precedent to the question addressed in Article 16 (5) of the LPC.

1.5.2. *Interdependent transactions under Article 12 of the LPC*

(36) The general and teleological definition of a concentration set out in Article 12(1) of the LPC — the result being control of one or more undertakings — implies that it makes no difference whether control was acquired by one or several legal transactions, provided that the end result constitutes a single concentration. Two or more transactions constitute a single concentration for the purposes of Article 12 of the LPC if they are unitary in nature. It should therefore be determined whether the result leads to conferring one or more undertakings direct or indirect economic control over the activities of one or more other undertakings. For the assessment, the economic reality underlying the transactions is to be identified and thus the economic aim pursued by the parties. In other words, in order to determine the unitary nature of the transactions in question, it is necessary, in each individual case, to ascertain whether those transactions are interdependent, in such a way that one transaction would not have been carried out without the other.

(37) In this respect it is appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition.

(38) This general approach reflects, on the one hand, that under the LPC transactions which stand or fall together according to the economic objectives pursued by the parties should also be analysed in one procedure. In these circumstances, the change of the market structure is

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brought about by these transactions together. On the other hand, if different transactions are not interdependent and if the parties would proceed with one of the transactions if the other ones would not succeed, it seems appropriate to assess these transactions individually under the LPC.

(39) However, several transactions, even if linked by condition upon each other, can only be treated as a single concentration, if control is acquired ultimately by the same undertaking(s). Only in these circumstances two or more transactions can be considered to be unitary in nature and therefore to constitute a single concentration for the purposes of Article 12 of the LPC[4] . This excludes de-mergers of joint ventures by which different parts of an undertaking are split between its former parent companies. The CPC will consider those transactions as separate concentrations. The same applies to transactions where two (or more) companies exchange assets in transactions involving de-mergers of joint ventures or assets swaps. Although the parties will normally consider those transactions as interdependent, the purpose of the LPC requires a separate assessment of the results of each of the transactions: Several undertakings acquire control of different assets; a separate combination of resources takes place for each of the acquiring undertakings; and the impact on the market of each of those acquisitions of control needs to be analysed separately under the LPC.

(40) The acquisition of different degrees of control (for example joint control of one business and sole control of another business) raises specific questions. An operation involving the acquisition of joint control of one part of an undertaking and sole control of another part is in principle regarded as two separate concentrations under the LPC. Those transactions constitute only one concentration if they are interdependent and if the undertaking acquiring sole control is also acquiring joint control. In any case, such a scenario is considered to constitute one concentration where a corporate entity is acquired to which both the solely controlled and the jointly controlled undertaking belong. On the basis of the interpretation in recital 20, the situation where the same undertaking acquires sole and joint control of other undertakings based on interdependent agreements is not to be treated differently. These transactions, if they are interdependent, therefore constitute a single concentration.

Requirement of conditionality of transactions

(41) The required conditionality implies that none of the transactions would take place without the others and they therefore constitute a single operation. Such conditionality is normally demonstrated if the transactions are linked *de jure*, *i.e.* the agreements themselves are linked by mutual conditionality. If *de facto* conditionality can be satisfactorily demonstrated, it may also suffice for treating the transactions as a single concentration. This requires an economic assessment of whether each of the transactions necessarily depends on the conclusion of the others. Further indications of the interdependence of several transactions may be the statements of the parties themselves or the simultaneous conclusion of the relevant agreements. A conclusion of *de facto* interconditionality of several transactions will be difficult to reach in the absence of their simultaneity. A pronounced lack of simultaneity of legally interconditional transactions may likewise put into doubt their true interdependence.

(42) 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

[4] This also covers situations where an undertaking sells a business to a purchaser and then acquirers the seller including the business sold

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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, also the acquisition of control of several undertakings — which could constitute concentrations in themselves — can be linked in such a way that it constitutes a single concentration. However, it is not possible under the LPC to link different legal transactions which only partly concern the acquisition of control of undertakings, but partly also the acquisition of other assets, such as non-controlling minority stakes in other companies. It would not be in line with the general framework and the purpose of the LPC if different transactions, linked by conditionality, were assessed as a whole under the LPC if only some of these transactions lead to a change in control of a given target.

Acquisition of a single business

(43) A single concentration may therefore exist if the same purchaser(s) acquire control of a single business, *i.e.* a single economic entity, via several legal transactions if those are inter-conditional. This is the case irrespective of whether the business is acquired in a corporate structure, consisting of one or several companies, or whether various assets are acquired which form a single business, *i.e.* a single economic entity managed for a common commercial purpose to which all the assets contribute. Such a business may comprise majority and minority stakes in companies as well as tangible and intangible assets. If several legal transactions which are interdependent are required to transfer such a business, these transactions constitute one concentration.

Parallel and serial acquisitions of control

(44) For the treatment of several acquisitions of control as a single concentration, several scenarios exist. One such scenario is a parallel acquisition of control, i.e. undertaking A acquires control of undertaking B and C in parallel from separate sellers on condition that A is not obliged to buy either and neither seller is obliged to sell, unless both transactions proceed. Another scenario is a serial acquisition of control, i.e. undertaking A acquires control of undertaking B conditional on B's prior or simultaneous acquisition of undertaking C.

Serial acquisition of sole/joint control

(45) As in the serial acquisition of control in the same case is where, in a serial transaction, an undertaking agrees to acquire first sole control of a target undertaking, with a view to directly selling on parts of the acquired stake in the target to another undertaking, finally resulting in joint control of both acquirers over the target company. If both acquisitions are inter-conditional, the two transactions constitute a single concentration and only the acquisition of joint control, as the final result of the transactions, will be considered by CPC.

1.5.3. ***Series of transactions in securities***

(46) Single concentration will also arise in cases where control over one undertaking is acquired by a series of transactions in securities from one or several sellers taking place within a reasonably short period of time. The concentration in these scenarios is not limited to the acquisition of the 'one and decisive' share, but will cover all the acquisitions of securities which take place in the reasonably short period of time.

1.5.4. ***Article 16 (5) of the LPC***

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(47) Article 16(5) of the LPC provides a specific rule which allows the CPC to consider successive transactions occurring in a fixed period of time a single concentration for the purposes of calculating the turnover of the undertakings concerned. The purpose of this provision is to ensure that the same persons do not break a transaction down into series of sales of assets over a period of time, with the aim of avoiding the legal obligation for submission of notification on concentration to CPC.

(48) If two or more transactions (each of them bringing about an acquisition of control) take place within a two-year period between the same persons or undertakings, they shall be qualified as a single concentration, irrespective of whether or not those transactions relate to parts of the same business or concern the same sector. This does not apply where the same persons or undertakings are joined by other persons or undertakings for only some of the transactions involved. It is sufficient if the transactions, although not carried out between the same companies, are carried out between companies belonging to the same respective groups. The provision also applies to two or more transactions between the same persons or undertakings if they are carried out simultaneously. Whenever they lead to acquisitions 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, Article 16 (5) of the LPC would not appear to apply to different transactions at least one of which involves an undertaking concerned which is distinct from the common seller(s) and buyer(s). In situations involving two transactions where one transaction results in sole control and the other in joint control, Article 16(5) of the LPC therefore does not apply unless the other jointly controlling parent(s) in the latter transaction are the seller(s) of the solely controlling stake in the former transaction.

1.6. *Internal restructuring*

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

1.7. *Concentrations involving State-owned undertakings*

(50) 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. However, where the different economic units will continue to have an independent power of decision also after the operation, the operation is only to be regarded as an internal restructuring, even if the shares of the undertakings, constituting different economic units, should be held by a single entity, such as a pure holding company.

(51) However, the prerogatives exercised by a State acting as a public authority rather than as a shareholder, in so far as they are limited to the protection of the public interest, do not constitute control within the meaning of the LPC to the extent that they have neither the aim

nor the effect of enabling the State to exercise a decisive influence over the activity of the undertaking.

2. Sole control

(52) Sole control is acquired if one undertaking alone can exercise decisive influence on an undertaking. Two general situations in which an undertaking has sole control can be distinguished. First, the solely controlling undertaking enjoys the power to determine the strategic commercial decisions of the other undertaking. This power is typically achieved by the acquisition of a majority of voting rights in a company. Second, 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 (the so-called negative sole control). 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, there are no other shareholders enjoying the same level of influence and the shareholder enjoying negative sole control does not necessarily have to cooperate with specific other shareholders in determining the strategic behavior of the controlled undertaking. Since this shareholder can produce a deadlock situation, the shareholder acquires decisive influence within the meaning of Article 12(2) of the LPC.

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

De jure sole control

(54) Sole control is normally acquired on a legal basis where an undertaking acquires a majority of the voting rights of a company. In the absence of other elements, an acquisition which does not include a majority of the voting rights does not normally confer control even if it involves the acquisition of a majority of the share capital. Where the company statutes require a supermajority for strategic decisions, the acquisition of a simple majority of the voting rights may not confer the power to determine strategic decisions, but may be sufficient to confer a blocking right on the acquirer and therefore negative control.

(55) Even in the case of a minority shareholding, sole control may occur on a legal basis in situations where specific rights are attached to this shareholding. These may be preferential shares to which special rights are attached enabling the minority shareholder to determine the strategic commercial behaviour of the target company, such as the power to appoint more than half of the members of the supervisory board or the administrative board. Sole control can also be exercised by a minority shareholder who has the right to manage the activities of the company and to determine its business policy on the basis of the organisational structure (e.g. as a general partner in a limited partnership which often does not even have a shareholding).

(56) A typical situation of negative sole control occurs where one shareholder holds 50 % in an undertaking whilst the remaining 50 % is held by several other shareholders (assuming this does not lead to positive sole control on a *de facto* basis), or where there is a supermajority required for strategic decisions which in fact confers a veto right upon only one shareholder, irrespective of whether it is a majority or a minority shareholder.

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De facto sole control

(57) A minority shareholder may also be deemed to have sole control on a *de facto* basis. This is in particular the case where the shareholder is highly likely to achieve a majority at the shareholders' meetings, given the level of its shareholding and the evidence resulting from the presence of shareholders in the shareholders' meetings in previous years. Based on the past voting pattern, the CPC will carry out a prospective analysis and take into account foreseeable changes of the shareholders' presence which might arise in future following the operation. The CPC will further analyse the position of other shareholders and assess their role. Criteria for such an assessment are in particular whether the remaining shares are widely dispersed, whether other important shareholders have structural, economic or family links with the large minority shareholder or whether other shareholders have a strategic or a purely financial interest in the target company; these criteria will be assessed on a case-by-case basis. Where, on the basis of its shareholding, the historic voting pattern at the shareholders' meeting and the position of other shareholders, a minority shareholder is likely to have a stable majority of the votes at the shareholders' meeting, then that large minority shareholder is taken to have sole control.

(58) An option to purchase or convert shares cannot in itself confer sole control unless the option will be exercised in the near future according to legally binding agreements. However, in exceptional circumstances an option, 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

(59) Apart from the acquisition of sole control on the basis of voting rights, the considerations outlined in section 1.2 concerning the acquisition of sole control by purchase of assets, by contract, or by any other means also apply.

3. Joint control

4.

(60) Joint control exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking. Decisive influence in this sense normally means the power to block actions which determine the strategic commercial behaviour of an undertaking. Unlike sole control, which confers upon a specific shareholder the power to determine the strategic decisions in an undertaking, joint control is characterized by the possibility of a deadlock situation resulting from the power of two or more parent companies to reject proposed strategic decisions. It follows, therefore, that these shareholders must reach a common understanding in determining the commercial policy of the joint venture and that they are required to cooperate.

(61) As in the case of sole control, the acquisition of joint control can also be established on a *de jure* or *de facto* basis. There is joint control if the shareholders (the parent companies) must reach agreement on major decisions concerning the controlled undertaking (the joint venture).

3.1. ***Equality in voting rights or appointment to decision-making bodies***

(62) The clearest form of joint control exists where there are only two parent companies which share equally the voting rights in the joint venture. In this case, it is not necessary for a formal agreement to exist between them. However, where there is a formal agreement, it must be

consistent with the principle of equality between the parent companies, by laying down, for example, that each is entitled to the same number of representatives in the management bodies and that none of the members has a casting vote . Equality may also be achieved where both parent companies have the right to appoint an equal number of members to the decision-making bodies of the joint venture.

3.2. ***Veto rights***

(63) Joint control may exist even where there is no equality between the two parent companies in votes or in representation in decision-making bodies or where there are more than two parent companies. This is the case where minority shareholders have additional rights which allow them to veto decisions which are essential for the strategic commercial behaviour of the joint venture. These veto rights may be set out in the statute of the joint venture or conferred by agreement between its parent companies. The veto rights themselves may operate by means of a specific quorum required for decisions taken at the shareholders' meeting or by the board of directors to the extent that the parent companies are represented on this board. It is also possible that strategic decisions are subject to approval by a body, e.g. supervisory board, where the minority shareholders are represented and form part of the quorum needed for such decisions.

(64) These veto rights must be related to strategic decisions on the business policy of the joint venture. They must go beyond the veto rights normally accorded to minority shareholders in order to protect their financial interests as investors in the joint venture. This normal protection of the rights of minority shareholders is related to decisions on the essence of the joint venture, such as changes in the statute, an increase or decrease in the capital or liquidation. A veto right, for example, which prevents the sale or winding-up of the joint venture does not confer joint control on the minority shareholder concerned.

(65) In contrast, veto rights which confer joint control typically include decisions on issues such as the budget, the business plan, major investments or the appointment of senior management. The acquisition of joint control, however, does not require that the acquirer has the power to exercise decisive influence on the day-to-day running of an undertaking. The crucial element is that the veto rights are sufficient to enable the parent companies to exercise such influence in relation to the strategic business behaviour of the joint venture. Moreover, it is not necessary to establish that an acquirer of joint control of the joint venture will actually make use of its decisive influence. The possibility of exercising such influence and, hence, the mere existence of the veto rights, is sufficient.

(66) In order to acquire joint control, it is not necessary for a minority shareholder to have all the veto rights mentioned above. It may be sufficient that only some, or even one such right, exists. Whether or not this is the case depends upon the precise content of the veto right itself and also the importance of this right in the context of the specific business of the joint venture.

Appointment of senior management and determination of budget

(67) Very important are the veto rights concerning decisions on the appointment and dismissal of the senior management and the approval of the budget. The power to co-determine the structure of the senior management, such as the members of the board, usually confers upon the holder the power to exercise decisive influence on the commercial policy of an undertaking. The same is true with respect to decisions on the budget since the budget determines the

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precise framework of the activities of the joint venture and, in particular, the investments it may make.

Business plan

(68) The business plan normally provides details of the aims of a company together with the measures to be taken in order to achieve those aims. A veto right over this type of business plan may be sufficient to confer joint control even in the absence of any other veto right. In contrast, where the business plan contains merely general declarations concerning the business aims of the joint venture, the existence of a veto right will be only one element in the general assessment of joint control but will not, on its own, be sufficient to confer joint control.

Investments

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

Market-specific rights

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

Overall context

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

3.3. ***Joint exercise of voting rights***

(72) Even in the absence of specific veto rights, two or more undertakings acquiring minority shareholdings in another undertaking may obtain joint control. This may be the case where the minority shareholdings together provide the means for controlling the target undertaking. This means that the minority shareholders, together, will have a majority of the voting rights; and they will act together in exercising these voting rights. This can result from a legally binding agreement to this effect, or it may be established on a *de facto* basis.
(73) The legal means to ensure the joint exercise of voting rights can be in the form of a (jointly controlled) holding company to which the minority shareholders transfer their rights, or an agreement by which they undertake to act in the same way (pooling agreement).

(74) Very exceptionally, collective action can occur on a *de facto* basis where strong common interests exist between the minority shareholders to the effect that they would not act against each other in exercising their rights in relation to the joint venture. The greater the number of parent companies involved in such a joint venture, however, the more remote is the likelihood of this situation occurring.

(75) Indicative for such a commonality of interests is a high degree of mutual dependency as between the parent companies to reach the strategic objectives of the joint venture. This is in particular the case when each parent company provides a contribution to the joint venture which is vital for its operation (e.g. specific technologies, local know-how or supply agreements). In these circumstances, the parent companies may be able to block the strategic decisions of the joint venture and, thus, they can operate the joint venture successfully only with each other's agreement on the strategic decisions even if there is no express provision for any veto rights. The parent companies will therefore be required to cooperate. Further factors are decision making procedures which are tailored in such a way as to allow the parent companies to exercise joint control even in the absence of explicit agreements granting veto rights or other links between the minority shareholders related to the joint venture.

(76) Such a scenario may not only occur in a situation where two or more minority shareholders jointly control an undertaking on a de facto basis, but also where there is high degree of dependency of a majority shareholder on a minority shareholder. This may be the case where the joint venture economically and financially depends on the minority shareholder or where only the minority shareholder has the required know-how for, and will play a major role in, the operation of the joint undertaking whereas the majority shareholder is a mere financial investor. In such circumstances, the majority shareholder will not be able to enforce its position, but the joint venture partner may be able to block strategic decisions so that both parent undertakings will be required to cooperate permanently. This leads to a situation of *de facto* joint control which prevails over a pure *de jure* assessment according to which the majority shareholder could have been considered to have sole control.

(77) These criteria apply to the formation of a new joint venture as well as to acquisitions of minority shareholdings, together conferring joint control. In case of acquisitions of shareholdings, there is a higher probability of a commonality of interests if the shareholdings are acquired by means of concerted action. However, an acquisition by way of a concerted action is not alone sufficient for the purposes of establishing *de facto* joint control. In general, a common interest as 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.

(78) In the absence of strong common interests such as those outlined above, the possibility of changing coalitions between minority shareholders will normally exclude the assumption of

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

3.4. ***Other considerations related to joint control***

Unequal role of the parent companies

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

Casting vote

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

III. CHANGES IN THE QUALITY OF CONTROL

(81) The LPC n covers operations resulting in the acquisition of sole or joint control, including operations leading to changes in the quality of control. First, such a change in the quality of control, resulting in a concentration, occurs if there is a change between sole and joint control. Second, a change in the quality of control occurs between joint control scenarios before and after the transaction if there is an increase in the number or a change in the identity of controlling shareholders. However, there is no change in the quality of control if a change from negative to positive sole control occurs. Such a change affects neither the incentives of the negatively controlling shareholder nor the nature of the control structure, as the controlling shareholder did not necessarily have to cooperate with specific shareholders at the time when it enjoyed negative control. In any case, 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 are not a notifiable concentration.

(82) These 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.

1. **Entry of controlling shareholders**

(83) An entry of new controlling shareholders leading to a joint control scenario can either result from a change from sole to joint control, or from the entry of an additional shareholder or a replacement of an existing shareholder in an already jointly controlled undertaking.

(84) A move from sole control to joint control is considered a notifiable operation as this changes the quality of control of the joint venture. First, there is a new acquisition of control for the shareholder entering the controlled undertaking. Second, only the new acquisition of control makes the controlled undertaking to a joint venture which changes decisively also the situation for the remaining controlling undertaking: In the future, it has to take into account the interests of one or more other controlling shareholder(s) and it is required to cooperate permanently with the new shareholder(s). Before, it could either determine the strategic behaviour of the controlled undertaking alone (in the case of sole control) or was not forced to take into account the interests of specific other shareholders and was not forced to cooperate with those shareholders permanently.

(85) The entry of a new shareholder in a jointly controlled undertaking — either in addition to the already controlling shareholders or in replacement of one of them — also constitutes a notifiable concentration, although the undertaking is jointly controlled before and after the operation. 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 for the determination of the strategic behaviour of the joint venture. The nature of joint control therefore does not exhaust itself in a pure mathematical addition of the blocking rights exercised by several shareholders, but is determined by the composition of the jointly controlling shareholders. One of the most obvious scenarios leading to a decisive change in the nature of the control structure of a jointly controlled undertaking is a situation where in a joint venture, jointly controlled by a competitor of the joint venture and a financial investor, the financial investor is replaced by another competitor. In these circumstances, the control structure and the incentives of the joint venture may entirely change, not only because of the entry of the new controlling shareholder, but also due to the change in the behaviour of the remaining shareholder. The replacement of a controlling shareholder or the entry of a new shareholder in a jointly controlled undertaking therefore constitutes a change in the quality of control[5] .

[5] Generally, it should be noted that the CPC 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 CPC will assess any changes occurring in the competitive situation of the joint venture in the framework of the overall acquisition of control of its parent undertaking. In those circumstances, the other controlling shareholders in the joint venture will therefore not be undertakings concerned by the concentration which relates to its parent undertaking.

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(86) However, the entry of new shareholders only results in a notifiable concentration if one or several shareholders acquire sole or joint control by virtue of 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.

2. **Reduction in the number of shareholders**
3.

(87) 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.

(88) 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 lead to a notifiable concentration.

IV. JOINT VENTURES — THE CONCEPT OF FULL-FUNCTIONALITY

(89) Article 12(1) 2)of the LPC provides that a concentration shall be deemed to arise where control is acquired by *one or more* undertakings of the whole or parts of another undertaking. The new acquisition of another undertaking by several jointly controlling undertakings therefore constitutes a concentration under the LPC. As in the case of the acquisition of sole control of an undertaking, such an 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 (*e.g.* because it will sell exclusively to the parent undertakings in future). Thus, a transaction involving several undertakings acquiring joint control of another undertaking or parts of another undertaking, fulfilling the criteria set out in paragraph 22, from third parties will constitute a
concentration according to Article 12(1) of the LPC without it being necessary to consider the full-functionality criterion[6].

(90) Article 12(4) of the LPC provides in addition that the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity (so called full-function joint ventures) shall constitute a concentration within the meaning of the LPC. The full-functionality criterion therefore delineates the application of the LPC for the creation of joint ventures by the parties, irrespective of whether such a joint venture is created as a 'greenfield operation' or whether the parties contribute assets to the joint venture which they previously owned individually. In these circumstances, the joint venture must fulfill the full-functionality criterion in order to constitute a concentration.

[6] These considerations do not apply to Article 17(5) of the LPC in the same way. Whereas the interpretation of Article 12, paragraphs (1) and (4) relates to the applicability of the LPC to joint ventures, Article 2(4) relates to the substantive analysis of joint ventures. The 'creation of a joint venture constituting a concentration pursuant to Article 12',as provided for in Article 17(5) of the LPC, comprises the acquisition of joint control according to Article 12, paragraphs (1) and (4).

(91) The fact that a joint venture may be a full-function undertaking and therefore conomically autonomous from an operational viewpoint does not mean that it enjoys autonomy as regards the adoption of its strategic decisions. Otherwise, a jointly controlled undertaking could never be considered a full-function joint venture and therefore the condition laid down in Article 12(4) of the LPC would never be complied with. It is therefore sufficient for the criterion of full-functionality if the joint venture is autonomous in operational respect.

1. **Sufficient resources to operate independently on a market**

(92) Full function character essentially means that a joint venture must operate on a market, performing the functions normally carried out by undertakings operating on the same market. In order to do so the joint venture must have a management 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 (86). The personnel do not necessarily need to be employed by the joint venture itself. If it is standard practice in the industry where the joint venture is operating, it may be sufficient if third parties envisage the staffing under an operational agreement or if staff is assigned by an interim employment agency. The secondment of personnel by the parent companies may also be sufficient if this is done either only for a start-up period or if the joint venture deals with the parent companies in the same way as with third parties. The latter case requires that the joint venture deals with the parents at arm's length on the basis of normal commercial conditions and that the joint venture is also free to recruit its own employees or to obtain staff via third parties.

2. **Activities beyond one specific function for the parents**

(93) A joint venture is not full-function if it only takes over one specific function within the parent companies' business activities without its own access to or presence on the market. This is the case, for example, for joint ventures limited to R&D or production. Such joint ventures are auxiliary to their parent companies' business activities. This is also the case where a joint venture is essentially limited to the distribution or sales of its parent companies' products and, therefore, acts principally as a sales agency. However, the fact that a joint venture makes use of the distribution network or outlet of one or more of its parent companies normally will not disqualify it as 'full-function' as long as the parent companies are acting only as agents of the joint venture.

(94) A frequent example where this question arises are joint ventures involved in the holding of real estate property, which are typically set up for tax and other financial reasons. As long as the purpose of the joint venture is limited to the acquisition and/or holding of certain real estate for the parents and based on financial resources provided by the parents, it will not usually be considered to be full-function, as it lacks an autonomous, long term business activity on the market and will typically also lack the necessary resources to operate independently. This has to be distinguished from joint ventures that are actively managing a real estate portfolio and who act on their own behalf on the market, which typically indicates full-functionality.

3. **Sale/purchase relations with the parents**

(95) 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

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

Sales to the parents

(96) Where sales from the joint venture to the parent companies are intended to be made on a lasting basis, the essential question is whether, regardless of these sales, the joint venture is geared to play an active role on the market and can be considered economically autonomous from an operational viewpoint. In this respect the relative proportion of sales made to its parents compared with the total production of the joint venture is an important factor. Due to the particularities of each individual case, it is impossible to define a specific turnover ratio which distinguishes full-function from other joint ventures. If the joint venture achieves more than 50 % of its turnover with third parties, this will typically be an indication of full-functionality. Below this indicative threshold, a case-by-case analysis is required, whereby, for the finding of operational autonomy, the relationship between the joint venture and its parents must be truly commercial in character. For this purpose, it is to be demonstrated that the joint venture will supply its goods or services to the purchaser who values them most and will pay most and that the joint venture will also deal with its parents' companies at arm's length on the basis of normal commercial conditions (90). Under these circumstances, *i.e.* if the joint venture will treat its parent companies in the same commercial way as third parties, it may be sufficient 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.

(97) For the determination of the proportion between sales to the parents and to third parties, the CPC will take past accounts and substantiated business plans into account. However, especially where substantial third-party sales cannot be readily foreseen, the CPC will base its finding also on the general market structure. This may be a relevant factor as well for the assessment whether the joint venture will deal with its parents on an arm's length basis.

(98) These issues frequently arise with regard to outsourcing agreements, where an undertaking creates a joint venture with a service provider[7] which will carry out functions that were previously 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

[7] The question under which circumstances an outsourcing arrangement qualifies as a concentration is dealt with in paragraphs 23ff. of thisGuidelines

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and if the relationship between the joint venture and its parent will be truly commercial in character and if the joint venture deals with its parents on the basis of normal commercial conditions.

Purchases from the parents

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

Trade markets

(100) 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 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.

4. **Operation on a lasting basis**

(101) 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. 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, or where the agreement provides for the possible continuation of the joint venture beyond this period.

(102) 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.
(103) A joint venture also lacks the sufficient operations on a lasting basis at a stage where there are decisions of third parties outstanding that are of an essential core importance for starting the joint venture's business activity. Only decisions that go beyond mere formalities and the award of which is typically uncertain qualify for these scenarios. Examples are the award of a contract (*e.g.*, in public tenders), licenses (*e.g.*, in the telecoms sector) or access rights to property (*e.g.*, exploration rights for oil and gas). Pending the decision on such

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factors, it is unclear whether the joint venture will become operational at all. Thus, at that stage the joint venture cannot be considered to perform economic functions on a lasting basis and consequently does not qualify as full function. However, once a decision has been taken in favor of the joint venture in question, this criterion is fulfilled and a concentration arises[8].

5. Changes in the activities of the joint venture

(104) The parents may decide to enlarge the scope of the activities of the joint venture in the course of its lifetime. This will be considered as a new concentration that may trigger a notification requirement if this enlargement entails the acquisition of the whole or part of another undertaking from the parents that would, considered in isolation, qualify as a concentration as explained in paragraph 22 of this Guidelines.

(105) A concentration may also arise if the parent companies transfer significant additional assets, contracts, know-how or other rights to the joint venture and these assets and rights constitute the basis or nucleus of an extension of the activities of the joint venture into other product or geographic markets which were not the object of the original joint venture, and if the joint venture performs such activities on a full-function basis. As the transfer of the assets or rights shows that the parents are the real players behind the extension of the joint venture's scope, the enlargement of the activities of the joint venture can be considered in the same way as the creation of a new joint venture within the meaning of Article 12(4) of the LPC [9].

(106) 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.

(107) 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 12(4) of the LPC is created. The following examples may be given: a change of the organizational structure of a joint venture so that it fulfils 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 scenarios, as described in paragraph 103 above, where a joint venture can only start its activity on the market once it has essential input (such as a licence for a joint venture in the telecoms sector). Such a change in the activity of the joint venture will frequently require a decision by its shareholders or its management. Once the decision is taken that leads to the joint venture meeting the full functionality criterion, a concentration arises.

V. EXCEPTIONS
VI.

(108) Article 12(5) of the LPC sets out three exceptional situations where the acquisition of a controlling interest does not constitute a concentration under the LPC.

(109) First, the acquisition of securities by companies whose normal activities include transactions and dealing in securities for their own account or for the account of others is not deemed to constitute a concentration if such an acquisition is made in the framework of these

[8] Subject to the other criteria mentioned in this chapter of the Guidelines.
[9] 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.

businesses and if the securities are held on only a temporary basis (Article 12(5) 1)of the LPC). In order to fall within this exception, the following requirements must be fulfilled:
— the acquiring undertaking must be a credit or other financial institution or insurance company the normal activities of which are described above;
— the securities must be acquired with a view to their resale;
— the acquiring undertaking must not exercise the voting rights with a view to determining the strategic commercial behaviour of the target company or must exercise these rights only with a view to preparing the total or partial disposal of the undertaking, its assets or the securities;
— the acquiring undertaking must dispose of its controlling interest within one year of the date of the acquisition, that is, it must reduce its shareholding within this one-year period at least to a level which no longer confers control. This period, however, may be extended by the CPC where the acquiring undertaking can show that the disposal was not reasonably possible within the one year period.

(110) Second, there is no change of control, and hence no concentration within the meaning of the LPC , where control is acquired by an office-holder relating to liquidation, winding-up, insolvency, cessation of payments, compositions or analogous proceedings (Article 12(5) 2)of the LPC);

(111) Third, a concentration does not arise where a financial holding acquires capital interest in an undertaking under condition such companies to exercise the voting rights in the other undertakings only to maintain the full value of those investments and not to determine directly or indirectly the strategic commercial conduct of the controlled undertaking. The notion of 'financial holding company' is thus limited to companies whose sole purpose it is to acquire holdings in other undertakings without involving themselves directly or indirectly in the management of those undertakings, the foregoing without prejudice to their rights as shareholders. Such investment companies must be further structured in a way that compliance with these limitations can be supervised by an administrative or judicial authority. Article 12 (5) 3) of the LPC provides for an additional condition for this exception to apply: such companies may exercise the voting rights in the other undertakings only to maintain the full value of those investments and not to determine directly or indirectly the strategic commercial conduct of the controlled undertaking.

(112) The exceptions under Article 12(5) of the LPC only apply to a very limited field. First, these exceptions only apply if the operation would otherwise be a concentration in its own right, but not if the transaction is part of a broader, single concentration, in circumstances in which the ultimate acquirer of control would not fall within the terms of Article 12(5) of the LPC (see e.g. paragraph 32 above). Second, the exceptions under Article 12(5) 1) and 3) of the LPC only apply to acquisitions of control by way of purchase of securities, not to acquisitions of assets.

(113) The exceptions do not apply to typical investment fund structures. According to their objectives, these funds usually do not limit themselves in the exercise of the voting rights, but adopt decisions to appoint the members of the management and the supervisory bodies of the undertakings or to even restructure those undertakings. This would not be compatible with the requirement under both Article 12(5) 1) and 3) of the LPC that the acquiring companies do not exercise the voting rights with a view to determine the competitive conduct of the other undertaking.

(114) The question may arise whether an operation to rescue an undertaking before or from insolvency proceedings constitutes a concentration under the LPC. 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. 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 12(5) 1) of the LPC 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 behavior 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.

VII. ABANDONMENT OF CONCENTRATIONS

(115) A concentration ceases to exist and the LPC ceases to be applicable if the undertakings concerned abandon the concentration.

(116) In this respect, the LPC introduced a provision related to the closure of procedures concerning the control of concentrations without a final decision after the CPChas initiated proceedings under Article 19(1) 3) of the LPC, last sentence " During the procedure referred to in this paragraph, the CPC may adopt a decision pursuant to Article 20 of this Law, unless the participants have demonstrated that they have abandoned the concentration". Prior to the initiation of proceedings, such requirements do not apply.

(117) As a general principle, the requirements for the proof of the abandonment must correspond in terms of legal form, intensity etc. to the initial act that was considered sufficient to make the concentration notifiable. In case the parties proceed from that initial act to a strengthening of their contractual links during the procedure, for example by concluding a binding agreement after the transaction was notified on the basis of a good faith intention, the requirements for the proof of the abandonment must correspond also to the nature of the latest act.

(118) In line with this principle, in case of implementation of the concentration prior to a CPC's decision, the re-establishment of the *status quo ante* has to be shown. The mere withdrawal of the notification is not considered as sufficient proof that the concentration has been abandoned in the sense of Article 19(1) 3) of the LPC. Likewise, minor modifications of a concentration which do not affect the change in control or the quality of that change, cannot be considered as an abandonment of the original concentration .
— Binding agreement: proof of the legally binding cancellation of the agreement in the form envisaged by the initial agreement (i.e. usually a document signed by all the parties) will be required. Expressions of intention to cancel the agreement or not to implement the notified concentration, as well as unilateral declarations by (one of) the parties will not be considered sufficient.
— Good faith intention to conclude an agreement: In case of a letter of intent or memorandum of understanding reflecting such good faith intention, documents proving that this basis for the good faith intention has been cancelled will be required. As for possible

other forms that indicated the good faith intention, the abandonment must reverse this good faith intention and correspond in terms of form and intensity to the initial expression of intent.
— Public announcement of a public bid or of the intention to make a public bid: a public announcement terminating the bidding procedure or renouncing to the intention to make a public bid will be required. The format and public reach of this announcement must be comparable to the initial announcement.
— Implemented concentrations: In case the concentration has been implemented prior to a CPC decision, the parties will be required to show that the situation prevailing before the implementation of the concentration has been re-established.

(119) It is for the parties to submit the necessary documentation to meet these requirements in due time.

VIII. CHANGES OF TRANSACTIONS AFTER A CPC AUTHORISATION DECISION

(120) In some cases, parties may wish not to implement the concentration in the form foreseen after authorisation of the concentration by the CPC. The question arises whether the CPC's authorisation decision still covers the changed structure of the transaction.

(121) Broadly speaking, if, before implementation of the authorised concentration, the transactional structure is changed from an acquisition of control, falling under Article 12(1) 2), of the LPC to a merger according to Article 12(1) 1), or *vice versa*, then the change in the transactional structure is considered a different concentration under the LPC and a new notification is required[10]. However, less significant modifications of the transaction, for example minor changes in the shareholding percentages which do not affect the change in control or the quality of that change, changes in the offer price in the case of public bids or changes in the corporate structure by which the transaction is implemented without effects on the relevant control situation under the LPC, are considered as being covered by the CPC's authorisation decision.

[10] In such circumstances, the identity of the notifying parties changes, as both parties to a merger must notify, whereas only the party acquiring control must do so. However, if the parties implement an acquisition of control over a target company and only *subsequently* decide to merge with the newly acquired subsidiary, this would be regarded as an internal restructuring that does not give rise to a change in control and would thus not fall within the terms of Article 12 of the LPC.