

2

THE MEANING OF THE CONCEPT OF CONCENTRATION

A. Introduction	2.01	The concept of Community control: essential defining features	2.29
B. Community Concentrations: Essential Elements		D. Need for Change in Control	2.73
Temporal element: permanent nature of the change	2.05	Mergers and acquisitions of control by some undertakings of others when the former did not exercise, prior to the concentration, any type of control over the latter: Introduction of a new actor	2.75
Element of change: the need for structural change	2.12	Changes in the nature of control that the undertakings concerned enjoyed prior to the operation: Change in the situation of the previous actors	2.78
Substantive element: legal and economic autonomy of the new business structure	2.15		
C. The Concept of Control			
Introduction	2.22		

A. Introduction

Recital 20 of Regulation 139/2004 defines concentrations in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market. **2.01**

The principle of Recital 20 is explained and developed in the five paragraphs of Article 3 of the new Merger Regulation. Paragraph 1 distinguishes between two general methods of concentration: mergers and takeovers. Paragraph 4 deals with joint ventures, and states that those that carry out the functions of an independent economic entity on a permanent basis are concentrations. Paragraphs 2 and 3 define the concept of control. Finally, paragraph 5 expressly excludes certain types of operation from the scope of the Merger Regulation, considering that, while similar, they do not come within the meaning of ‘concentration’ as defined in the Merger Regulation. **2.02**

* Working drafts of this Chapter were prepared by Andrés Font.

- 2.03** On 2 March 1998 the Commission published four Notices interpreting fundamental concepts contained in the previous Merger Regulation in the light of Commission decisions since it had come into force.¹ Subsequently, on 26 July 2000 a Commission Notice on a simplified procedure for treatment of certain concentrations was adopted.² On 21 December 2000 a Commission Notice on commitments submitted to the Commission was also adopted.³ Finally, on 4 July 2001 a Commission Notice on restrictions directly related to and necessary for concentrations was published.⁴
- 2.04** The Notices, an exercise in transparency, provide details of the views of the Commission in its daily application of the Merger Regulation. One of these Notices⁵ deals specifically with the concept of concentration. Nevertheless, it should be read in conjunction with the others, particularly the Notice concerning the concept of full-function joint ventures.

B. Community Concentrations: Essential Elements

Temporal element: permanent nature of the change

- 2.05** The amendment of the structure of the undertakings concerned must be permanent. The concept of permanence is referred to in paragraph 4 of Article 3, when referring to joint ventures that carry out on a permanent basis the functions of an independent economic entity. It is also implicit in paragraph 5 of the same Article in excluding from the definition of concentration certain operations by credit agencies and other financial entities or insurance companies.
- 2.06** It is not possible to say exactly what time period is necessary for an operation to be deemed to be 'permanent'. In its decisions, the Commission has not given a definitive answer. This would appear to be logical, given the complexity and

¹ Commission Notice on the concept of full-function joint ventures [1998] OJ C66/1. Commission Notice on the concept of concentration [1998] OJ C66/5. Commission Notice on the concept of undertakings concerned [1998] OJ C66/14. Commission Notice on calculation of turnover [1998] C66/25. On the same date, the Commission adopted a fifth Notice concerning alignment of procedures for processing mergers under the ECSC and EC Treaties [1998] OJ C66/36. All of these Notices are contained in the annexes of this book. These notices may be revised pursuant to the adoption of Regulation 139/2004. In relation to their latest status please refer to the Companion Website.

² [2000] OJ C217/32. This notice may be revised pursuant to the adoption of Regulation 139/2004. In relation to its latest status please refer to the Companion Website.

³ [2001] OJ C68/3. This notice may be revised pursuant to the adoption of Regulation 139/2004. In relation to its latest status please refer to the Companion Website.

⁴ [2001] OJ C188/5. This notice may be revised pursuant to the adoption of Regulation 139/2004. In relation to its latest status please refer to the Companion Website.

⁵ [1998] OJ C66/5. This notice may be revised pursuant to the adoption of Regulation 139/2004. In relation to its latest status please refer to the Companion Website.

B. Community Concentrations: Essential Elements

singular nature of the operations analysed, and in particular the specific nature of the different economic sectors in which an operation can take place. Such factors can lead to different conclusions as regards the minimum time period necessary in order for permanence to exist. Nevertheless, it is possible to reach certain conclusions as to what the Commission considers to be an operation of a permanent nature from an examination of its practice.

While the operation does not have to create a change of structure for an indefinite⁶ or extremely long period of time,⁷ a period of one year does not appear to be sufficient. Article 3 paragraph 5 (a) of the Merger Regulation, although referring to the specific case of acquisitions by financial entities for the purpose of reselling them, provides some guidance in this context. Periods of five,⁸ six,⁹ seven¹⁰ or ten years¹¹ agreed by the parties as the duration of the operation have not prevented it from having the necessary degree of permanence. **2.07**

An analogy can be drawn with situations where the existence of joint or sole control of a joint venture is contested in order to clarify the application of Article 5 paragraph 2 of the Merger Regulation or the role of options to purchase and sell shares (put and call options) between participating undertakings, normal during the period when the operations are being set up. In such cases, the Commission appears to consider three years to be insufficient for the purpose of the permanent nature of control.¹² **2.08**

In addition, it should be noted that the Commission normally states that the transitional or start-up period on the market for a joint venture should not exceed three years. During the start-up period the joint venture may largely depend on sales to or purchases from the parent companies.¹³ It is arguable that once this period has ended the joint venture has a permanent nature. **2.09**

Equally, it should be pointed out that a period of more than five years from the creation of a joint venture, a moment when the possibility of exercising the options would cast doubt on the co-decision-making power of one of the partners, has been considered sufficient when determining the existence of a permanent **2.10**

⁶ *Ericsson/Hewlett-Packard* (Case IV/M292)(1993); *BP/Mobil* (Case IV/M727) (1996); *ACS/Sonera/Vivendi/Xfera* (Case COMP/M1954) (2000).

⁷ *Elf Atochem/Rhom & Haas* (Case IV/M160) (1992): joint venture established for 99 years with very limited possibility of early dissolution, subject to very restrictive conditions. *Valinox/Timet* (Case IV/M917) (1997): 99 years.

⁸ *British Gas Trading Ltd/Group Utility Services Ltd* (Case IV/M791) (1996).

⁹ *Generali/Comit/R. Flemings* (Case IV/M586) (1995). *British Airways/TAT* (Case IV/M259) (1992): six-and-a-half years.

¹⁰ *BSN-Nestlé/Cokoladovny* (Case IV/M090) (1992); *Saint Gobain/Wacker Chemie/Nom* (Case IV/M774) (1996) [1997] OJ L247/1; *Smith & Nephew/Beiersdorf/JV* (Case COMP/JV54) (2001).

¹¹ *Voest Alpine Industrieanlagenbau/Davy* (Case IV/M585) (1995).

¹² *BS/BT* (Case IV/M425) (1994); *GE/ENI/Nuovo Pignone (II)* (Case IV/M440) (1994); *Albacom* (Case IV/M604) (1995); *Teneol/Merrill Lynch/Bankers Trust* (Case IV/M722) (1996).

¹³ Commission Notice on the concept of full-function joint ventures [1998] OJ C66/1, point 14. See also note 1 above.

structural change in control.¹⁴ The Commission does not generally take into account the existence of such options except at the time when they are actually exercised.

- 2.11** In conclusion, the question of permanence is inextricably linked to the assessment of the foreseeable autonomy of the undertaking created by the operation, in particular when classifying joint ventures as undertakings with full functions.¹⁵

Element of change: the need for structural change

- 2.12** The objective of the Merger Regulation is to prevent certain business restructurings that could cause irreparable harm to competition and the internal market. Therefore, in order for a Community concentration to exist there must be a change in the structure of the undertakings concerned.¹⁶ Any analysis of a Community concentration must begin by comparing the situation of undertakings before and after the operation in question. A significant change in the structure of the undertakings concerned as a direct result of the operation is thus needed to establish the existence of a concentration within the meaning of the Merger Regulation.
- 2.13** This structural change will, in many cases, mean a change in the structure of the control of shares of the company.¹⁷ Nevertheless, other possibilities also exist, such as the transformation of a pre-existing joint venture of a non-structural nature into a joint venture with a concentrative structure or, in the terminology existing prior to Merger Regulation 1310/97, which preceded Regulation 139/2004, the step from a cooperative joint venture to a concentrative joint venture.¹⁸

¹⁴ *Elf Atochem/Rütgers* (Case IV/M442) (1994). Contrast with the importance attributed to the existence of a sales option in *KLM/Air UK* (Case IV/M967) (1997).

¹⁵ In this same context, when determining the lasting nature of the concentration, permanent withdrawal from the market by the parent companies may be a relevant factor when assessing the irreversible nature of the new situation created by the concentration. This assessment will take into account both legal and economic factors. Prior to Regulation 1310/97, which preceded Regulation 139/2004, this was the key test for determining the probability of coordination between parent companies and, therefore, where relevant, the cooperative character of a concentration with the consequence of its possible analysis under Regulation 17 in the application of Art 81 of the Treaty. Nevertheless, this aspect has disappeared, at least expressly, from the Notice on the concept of full-function joint ventures [1998] OJ C66/1.

¹⁶ In fact, what is ultimately relevant is not the structural changes to undertakings themselves or by themselves but rather business restructurings that affect the structure of the market, although this latter aspect will logically be evaluated when analysing whether the concentration creates or reinforces a dominant position.

¹⁷ *Tate & Lyle/Amylum* (Case COMP/M2029) (2000): one of the notified transactions was not a concentration because there was no change in control.

¹⁸ *Cummins/Wärtsilä* (Case IV/M1015) (1997); *The Coca-Cola Company/Nestlé/JV* (Case COMP/M2276) (2001).

B. Community Concentrations: Essential Elements

The practice of the Commission concerning this need for change will be examined later, when the concepts of control and change in the control of undertakings are analysed. **2.14**

Substantive element: legal and economic autonomy of the new business structure

The operation that leads to a permanent structural change in the undertaking(s) concerned must also result in the appearance on the market of a viable independent economic entity, distinct from the undertakings that created it both as regards its legal personality and its economic activity. In other words, it must not be merely an instrument for the coordination of the competitive activity of the undertakings that created it. **2.15**

This substantive element of autonomy on the market of the concentrative entity has been developed in great detail as regards the distinction between concentrative and cooperative joint ventures that was based on the previous wording of Article 3 of the Merger Regulation. Nevertheless, under the present system provided for in Regulation 139/2004, the concept of autonomy continues to be relevant with respect to the definition of an undertaking with full functions. **2.16**

This element of autonomy is present *per se* in other types of concentrations such as mergers,¹⁹ takeovers²⁰ and acquisitions of sole control. In these cases, as a result of the operation an undertaking will exist on the market with a new legal personality. Alternatively, it will maintain its previous personality, albeit with substantial structural changes, that will naturally remain independent of previous legally distinct entities. **2.17**

The concept of autonomy is an intrinsic part of the concept of concentration as a permanent structural change in the undertakings concerned and of the objective of the Merger Regulation to control operations that, as a result of the process of business restructuring, could create or reinforce a dominant position in the common market. However, as will be seen in the context of joint ventures, an inherent tension often exists between the concepts of autonomy and control. **2.18**

Only the assessment of autonomous undertakings on the market—the result of operations that suppose the lasting appearance of new forces that could create imbalances in the existence of competition on a given market—would come within **2.19**

¹⁹ *Meritor/Arvin* (Case COMP/M1959) (2000); *Ocean Group/Exel* (Case COMP/M1895) (2000); *Glaxo Wellcome/Smithkline Beecham* (Case COMP/M1846) (2000); *Granada/Compass* (Case COMP/M1972) (2000).

²⁰ *Preussag/Thomson* (Case COMP/M2002) (2000); *Sara Lee/Courtaulds* (Case COMP/M1892) (2000); *Alcoa/Cordant* (Case COMP/M1919) (2000); *BP Amoco/Castrol* (Case COMP/M1891) (2000).

the scope of the Merger Regulation. Other types of operations that would simply mean maintaining the *status quo* on the market or that would constitute for the participating undertakings a simple vehicle enabling them to take concerted action on the market would fall outside the scope of the Merger Regulation. In some cases these latter operations could be examined in the light of Article 81 or 82. Determining the autonomy of an undertaking resulting from an operation can thus become a key factor, with respect to deciding both which competition rules apply and which authorities are entrusted with ensuring that they are complied with.

- 2.20** The Commission defines autonomy in objective terms of a legal and economic nature that show, in particular, the lack of probability of a return to the situation existing before the operation in question.
- 2.21** It is important to point out that the control of Community concentrations will apply only to operations of real substance which have an impact on the market. In other words, behind the legal form there must be genuine structural change. Accordingly, joint ventures with no direct activity on the market and therefore no autonomy, mere legal vehicles used as an instrument in the acquisition of control of another undertaking, are not considered to be concentrations in themselves, even though at first sight they could formally appear to be so.²¹

C. The Concept of Control

Introduction

- 2.22** Once the essential intrinsic features of all concentrations have been defined one must examine the different types of concentration which the Commission has analysed. In order to do so, it is first necessary to study in detail a concept that constitutes an indispensable instrument in defining, in practice, the existence of permanent structural change on the market as a result of a business operation. This key concept is control. The essential defining elements of the concept of Community control will be analysed, in particular the elements that determine the acquisition of joint or sole control by undertakings. Secondly, those situations that allow the Commission to state that there has been a change of control will be examined. Finally, the concept of joint control will be taken as the starting point for the constitution of joint ventures, to analyse the doctrine developed by the Commission concerning the distinction between joint ventures analysed as concentrations and joint ventures analysed as agreements under Article 81.
- 2.23** It is useful to refer initially to the legislation on which the concept of Community control can be established.

²¹ *Askol/Jacobs/Adia* (Case IV/M082) (1991).