Commission Notice on restrictions directly related and necessary to concentrations

(2005/C 56/03)

(Text with EEA relevance)

I. INTRODUCTION

1. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) ([1]) provides in Article 6(1)(b), second subparagraph, in Article 8(1), second subparagraph and in Article 8(2), third subparagraph that a decision declaring a concentration compatible with the common market *'shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration'*.

2. The amendment of the rules governing the assessment of restrictions directly related and necessary to the implementation of the concentration (hereinafter also referred to as 'ancillary restraints') introduces a principle of self-assessment of such restrictions. This reflects the intention of the legislature not to oblige the Commission to assess and individually address ancillary restraints. The treatment of ancillary restraints under the EC Merger Regulation is further explained in recital 21 in the preamble to the EC Merger Regulation, which states that *'Commission decisions declaring concentrations compatible with the common market in application of this Regulation should automatically cover such restrictions, without the Commission having to assess such restrictions in individual cases'*. While the Recital envisages that the Commission will exercise a residual function with regard to specific novel or unresolved issues giving rise to genuine uncertainty, it is in all other scenarios the task of the undertakings concerned to assess for themselves whether and to what extent their agreements can be regarded as ancillary to a transaction. Disputes as to whether restrictions are directly related and necessary to the implementation of the concentration, and thus automatically covered by the Commission's clearance decision, may be resolved before national courts.

3. The Commission's residual function is addressed in recital 21 of the Merger Regulation, where it is stated that the Commission should, at the request of the undertakings concerned, expressly assess the ancillary character of restrictions if a case presents *'novel and unresolved questions giving rise to genuine uncertainty'*. The Recital subsequently defines a 'novel or unresolved question giving rise to genuine uncertainty' as a question that is *'not covered by the relevant Commission notice in force or a published Commission decision.'*

4. In order to provide legal certainty to the undertakings concerned, this Notice provides guidance on the interpretation of the notion of ancillary restraints. The guidance given in the following sections reflects the essence of the Commission's practice, and sets out principles for assessing whether and to what extent the most common types of agreements are deemed to be ancillary restraints.

5. However, cases involving exceptional circumstances that are not covered by this Notice may justify departing from these principles. Parties may find further guidance in published Commission decisions ([2]) as to whether their agreements can be regarded as ancillary restraints or not. To the extent that cases involving exceptional circumstances have been previously addressed by the Commission in its published decisions ([3]), they do not constitute 'novel or unresolved questions' within the meaning of recital 21) of the Merger Regulation.

([1]) OJ L 24, 29.1.2004, p. 1.

([2]) For the purpose of this Notice, a decision is considered to be published when it is published in the *Official Journal of the European Union* or when it is made available to the public on the Commission's web site.

([3]) See for example Commission Decision of 1 September 2000 (COMP/M.1980 – *Volvo/Renault V.I.*, paragraph 56) - *high degree of customer loyalty*; Commission Decision of 23 October 1998 (IV/M.1298 – *Kodak/Imation*, paragraph 73) - *long product life cycle*; Commission Decision of 13 March 1995 (IV/M.550 – *Union Carbide/Enichem*, paragraph 99) – *limited number of alternative producers*; Commission Decision of 30 April 1992 (IV/M.197 – *Solvay-Laporte/Interox*, paragraph 50) – *longer protection of know-how required*.

6. Accordingly, a case presents a 'novel and unresolved question giving rise to genuine uncertainty' if those restrictions are not covered by this Notice and have not been previously addressed by the Commission in its published decisions. As envisaged in recital 21 of the Merger Regulation, the Commission will, at the request of the parties, expressly assess such restrictions in these cases. Subject to confidentiality requirements, the Commission will provide adequate publicity as regards such assessments that further develop the principles set out in this Notice.

7. To the extent that restrictions are directly related and necessary to the implementation of the concentration, Article 21(1) of the Merger Regulation provides that this Regulation alone applies, to the exclusion of Council Regulations (EC) No 1/2003 ([1]), (EEC) No 1017/68 ([2]) and (EEC) No 4056/86 ([3]). By contrast, for restrictions that cannot be regarded as directly related and necessary to the implementation of the concentration, Articles 81 and 82 of the EC Treaty remain potentially applicable. However, the mere fact that an agreement or arrangement is not deemed to be ancillary to a concentration is not, as such, prejudicial to the legal status thereof. Such agreements or arrangements are to be assessed in accordance with Article 81 and 82 of the EC Treaty and the related regulatory texts and notices ([4]). They may also be subject to any applicable national competition rules. Hence, agreements which contain a restriction on competition, but are not considered directly related and necessary to the implementation of the concentration pursuant to this notice, may nevertheless be covered by those provisions.

8. The Commission's interpretation of Article 6(1)(b), second subparagraph, and Article 8(1), second subparagraph, and (2), third subparagraph, of the Merger Regulation is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.

9. This Notice replaces the Commission's previous Notice regarding restrictions directly related and necessary to concentrations ([5]).

II. **GENERAL PRINCIPLES**

10. A concentration consists of contractual arrangements and agreements establishing control within the meaning of Article 3(2) of the Merger Regulation. All agreements which carry out the main object of the concentration ([6]), such as those relating to the sale of shares or assets of an undertaking, are integral parts of the concentration. In addition to these arrangements and agreements, the parties to the concentration may enter into other agreements which do not form an integral part of the concentration but can restrict the parties' freedom of action in the market. If such agreements contain ancillary restraints, these are automatically covered by the decision declaring the concentration compatible with the Common Market.

([1]) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p 1; Regulation as last amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

([2]) Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway, OJ L 175, 23.7.1968, p. 1; Regulation as last amended by Regulation (EC) No 1/2003 .

([3]) Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 81 and 82 of the Treaty to maritime transport, OJ L 378, 31.12.1986, p. 4; Regulation as last amended by Regulation (EC) No 1/2003.

([4]) See, for example, for licence agreements Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ L 123, 27.4.2004, p. 11; see for supply and purchase agreements e.g. Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336, 29.12.1999, p. 21.

([5]) OJ C 188, 4.7.2001, p. 5.

([6]) See e.g. Commission Decision of 10 August 1992 (IV/M.206 – *Rhône-Poulenc/SNIA*, paragraph 8.3); Commission Decision of 19 December 1991 (IV/M.113 – *Courtaulds/SNIA*, paragraph 35); Commission Decision of 2 December 1991 (IV/M.102 – *TNT/Canada Post/DBP Postdienst/La Poste/PTT Poste & Sweden Post*, paragraph 46).

11. The criteria of direct relation and necessity are objective in nature. Restrictions are not directly related and necessary to the implementation of a concentration simply because the parties regard them as such.

12. For restrictions to be considered 'directly related to the implementation of the concentration', they must be closely linked to the concentration itself. It is not sufficient that an agreement has been entered into in the same context or at the same time as the concentration ([1]). Restrictions which are directly related to the concentration are economically related to the main transaction and intended to allow a smooth transition to the changed company structure after the concentration.

13. Agreements must be 'necessary to the implementation of the concentration' ([2]), which means that, in the absence of those agreements, the concentration could not be implemented or could only be implemented under considerably more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably greater difficulty ([3]). Agreements necessary to the implementation of a concentration are typically aimed at protecting the value transferred ([4]), maintaining the continuity of supply after the break-up of a former economic entity ([5]), or enabling the start-up of a new entity ([6]). In determining whether a restriction is necessary, it is appropriate not only to take account of its nature, but also to ensure that its duration, subject matter and geographical field of application does not exceed what the implementation of the concentration reasonably requires. If equally effective alternatives are available for attaining the legitimate aim pursued, the undertakings must choose the one which is objectively the least restrictive of competition.

14. For concentrations which are carried out in stages, the contractual arrangements relating to the stages before the establishment of control within the meaning of Article 3(1) and (2) of the Merger Regulation cannot normally be considered directly related and necessary to the implementation of the concentration. However, an agreement to abstain from material changes in the target's business until completion is considered directly related and necessary to the implementation of the joint bid ([7]). The same applies, in the context of a joint bid, to an agreement by the joint purchasers of an undertaking to abstain from making separate competing offers for the same undertaking, or otherwise acquiring control.

15. Agreements which serve to facilitate the joint acquisition of control are to be considered directly related and necessary to the implementation of the concentration. This will apply to arrangements between the parties for the joint acquisition of control aimed at implementing the division of assets in order to divide the production facilities or distribution networks among themselves, together with the existing trademarks of the undertaking acquired jointly.

16. To the extent that such a division involves the break-up of a pre-existing economic entity, arrangements that make the break-up possible under reasonable conditions are to be considered directly related and necessary to the implementation of the concentration, under the principles set out below.

([1]) Likewise, a restriction could, if all other requirements are fulfilled, be 'directly related' even if it has not been entered into at the same time as the agreement carrying out the main object of the concentration.

([2]) See European Court of Justice, Case 42/84 (*Remia*), [1985] ECR 2545, paragraph 20; Court of First Instance, Case T-112/99 (*Métropole Télévision – M6*), [2001] ECR II-2459, paragraph 106.

([3]) Commission Decision of 18 December 2000 (COMP/M.1863 – *Vodafone/BT/Airtel JV*, paragraph 20).

([4]) Commission Decision of 30 July 1998 (IV/M.1245 – *VALEO/ITT Industries*, paragraph 59); Commission Decision of 3 March 1999 (IV/M.1442 – *MMP/AFP*, paragraph 17); Commission Decision of 9 March 2001 (COMP/M.2330 – *Cargill/Banks*, paragraph 30); Commission Decision of 20 March 2001 (COMP/M.2227 – *Goldman Sachs/Messer Griesheim*, paragraph 11).

([5]) Commission Decision of 25 February 2000 (COMP/M.1841 – *Celestica/IBM*, paragraph 21).

([6]) Commission Decision of 30 March 1999 (IV/JV.15 – *BT/AT&T*, paragraphs 207-214); Commission Decision of 22 December 2000 (COMP/M.2243 – *Stora Enso/Assidoman/JV*, paragraphs 49, 56 and 57).

([7]) Commission Decision of 27 July 1998 (IV/M.1226 – *GEC/GPTH*, paragraph 22); Commission Decision of 2 October 1997 (IV/M.984 – *Dupont/ICI*, paragraph 55); Commission Decision of 19 December 1997 (IV/M.1057 – *Terra Industries/ICI*, paragraph 16); Commission Decision of 18 December 1996 (IV/M.861 – *Textron/Kautex*, paragraphs 19 and 22); Commission Decision of 7 August 1996 (IV/M.727 - *BP/Mobil*, paragraph 50).

III. PRINCIPLES APPLICABLE TO COMMONLY ENCOUNTERED RESTRICTIONS IN CASES OF ACQUISITION OF AN UNDERTAKING

17. Restrictions agreed between the parties in the context of a transfer of an undertaking may be to the benefit of the purchaser or of the vendor. In general terms, the need for the purchaser to benefit from certain protection is more compelling than the corresponding need for the vendor. It is the purchaser who needs to be assured that she/he will be able to acquire the full value of the acquired business. Thus, as a general rule, restrictions which benefit the vendor are either not directly related and necessary to the implementation of the concentration at all ([1]), or their scope and/or duration need to be more limited than that of clauses which benefit the purchaser ([2]).

A. Non-competition clauses

18. Non-competition obligations which are imposed on the vendor in the context of the transfer of an undertaking or of part of it can be directly related and necessary to the implementation of the concentration. In order to obtain the full value of the assets transferred, the purchaser must be able to benefit from some protection against competition from the vendor in order to gain the loyalty of customers and to assimilate and exploit the know-how. Such non-competition clauses guarantee the transfer to the purchaser of the full value of the assets transferred, which in general include both physical assets and intangible assets, such as the goodwill accumulated or the know-how ([3]) developed by the vendor. These are not only directly related to the concentration but are also necessary to its implementation because, without them, there would be reasonable grounds to expect that the sale of the undertaking or of part of it could not be accomplished.

19. However, such non-competition clauses are only justified by the legitimate objective of implementing the concentration when their duration, their geographical field of application, their subject matter and the persons subject to them do not exceed what is reasonably necessary to achieve that end ([4]).

20. Non-competition clauses are justified for periods of up to three years ([5]), when the transfer of the undertaking includes the transfer of customer loyalty in the form of both goodwill and know-how ([6]). When only goodwill is included, they are justified for periods of up to two years ([7]).

21. By contrast, non-competition clauses cannot be considered necessary when the transfer is in fact limited to physical assets (such as land, buildings or machinery) or to exclusive industrial and commercial property rights (the holders of which could immediately take action against infringements by the transferor of such rights).

22. The geographical scope of a non-competition clause must be limited to the area in which the vendor has offered the relevant products or services before the transfer, since the purchaser does not need to be protected against competition from the vendor in territories not previously penetrated by the vendor ([8]). That geographical scope can be extended to territories which the vendor was planning to enter at the time of the transaction, provided that he had already invested in preparing this move.

([1]) Commission Decision of 27 July 1998 (IV/M.1226 – *GEC/GPTH,* paragraph 24).

([2]) See, for example, for a clause aiming at the protection of a part of the business remaining with the vendor: Commission Decision of 30 August 1993 (IV/M.319 - *BHF/CCF/Charterhouse,* paragraph 16).

([3]) As defined in Article 1(1)(i) of Regulation (EC) No 772/2004 .

([4]) See European Court of Justice, Case 42/84 (*Remia*), [1985] ECR 2545, paragraph 20; Court of First Instance, Case T-112/99 (*Métropole Télévision – M6*), [2001] ECR II-2459, paragraph 106.

([5]) See for exceptional cases in which longer periods may be justified e.g. Commission Decision of 1 September 2000 (COMP/M.1980 – *Volvo/Renault V.I.,* paragraph 56); Commission Decision of 27 July 1995 (IV/M.612 – *RWE-DEA/Enichem Augusta,* paragraph 37); Commission decision of 23 October 1998 (IV/M.1298 – *Kodak/Imation,* paragraph 74).

([6]) Commission Decision of 2 April 1998 (IV/M.1127 – *Nestlé/Dalgety,* paragraph 33); Commission Decision of 1 September 2000 (COMP/M.2077 – *Clayton Dubilier & Rice/Iteltel,* paragraph 15); Commission Decision of 2 March 2001 (COMP/M.2305 – *Vodafone Group PLC/EIRCELL,* paragraphs 21 and 22).

([7]) Commission Decision of 12 April 1999 (IV/M.1482 – *KingFisher/Grosslabor,* paragraph 26); Commission Decision of 14 December 1997 (IV/M.884 – *KNP BT/Bunzl/Wilhelm Seiler,* paragraph 17).

([8]) Commission Decision of 14 December 1997 (IV/M.884 – *KNP BT/Bunzl/Wilhelm Seiler,* paragraph 17); Commission Decision of 12 April 1999 (IV/M.1482 – *KingFisher/Grosslabor,* paragraph 27); Commission Decision of 6 April 2001 (COMP/M.2355 – *Dow/Enichem Polyurethane,* paragraph 28); Commission Decision of 4 August 2000 (COMP/M.1979 – *CDC/Banco Urquijo/JV,* paragraph 18).

23. Similarly, non-competition clauses must remain limited to products (including improved versions or updates of products as well as successor models) and services forming the economic activity of the undertaking transferred. This can include products and services at an advanced stage of development at the time of the transaction, or products which are fully developed but not yet marketed. Protection against competition from the vendor in product or service markets in which the transferred undertaking was not active before the transfer is not considered necessary ([1]).

24. The vendor may bind herself/himself, her/his subsidiaries and commercial agents. However, an obligation to impose similar restrictions on others would not be regarded as directly related and necessary to the implementation of the concentration. This applies, in particular, to clauses which would restrict the freedom of resellers or users to import or export.

25. Clauses which limit the vendor's right to purchase or hold shares in a company competing with the business transferred shall be considered directly related and necessary to the implementation of the concentration under the same conditions as outlined above for non-competition clauses, unless they prevent the vendor from purchasing or holding shares purely for financial investment purposes, without granting him/her, directly or indirectly, management functions or any material influence in the competing company ([2]).

26. Non-solicitation and confidentiality clauses have a comparable effect and are therefore evaluated in a similar way to non-competition clauses ([3]).

B. **Licence agreements**

27. The transfer of an undertaking or of part of it can include the transfer to the purchaser, with a view to the full exploitation of the assets transferred, of intellectual property rights or know-how. However, the vendor may remain the owner of the rights in order to exploit them for activities other than those transferred. In these cases, the usual means for ensuring that the purchaser will have the full use of the assets transferred is to conclude licensing agreements in his/her favour. Likewise, where the vendor has transferred intellectual property rights with the business, she/he may still want to continue using some or all of these rights for activities other than those transferred; in such a case the purchaser will grant a licence to the vendor.

28. Licences of patents ([4]), of similar rights, or of know-how ([5]), can be considered necessary to the implementation of the concentration. They may equally be considered an integral part of the concentration and, in any event, need not be limited in time. These licences can be simple or exclusive and may be limited to certain fields of use, to the extent that they correspond to the activities of the undertaking transferred.

([1]) Commission Decision of 14 December 1997 (IV/M.884 – *KNP BT/Bunzl/Wilhelm Seiler*, paragraph 17); Commission Decision of 2 March 2001 (COMP/M.2305 – *Vodafone Group PLC/EIRCELL*, paragraph 22); Commission Decision of 6 April 2001 (COMP/M.2355 – *Dow/Enichem Polyurethane*, paragraph 28); Commission Decision of 4 August 2000 (COMP/M.1979 – *CDC/Banco Urquijo/JV*, paragraph 18).

([2]) Commission Decision of 4 February 1993 (IV/M.301 – *Tesco/Catteau*, paragraph 14); Commission Decision of 14 December 1997 (IV/M.884 – *KNP BT/Bunzl/Wilhelm Seiler*, paragraph 19); Commission Decision of 12 April 1999 (IV/M.1482 – *Kingfisher/Grosslabor*, paragraph 27); Commission Decision of 6 April 2000 (COMP/M.1832 – *Ahold/ICA Förbundet/Canica*, paragraph 26).

([3]) Accordingly, confidentiality clauses on customer details, prices and quantities cannot be extended. By contrast, confidentiality clauses concerning technical know-how may exceptionally be justified for longer periods, see Commission Decision of 29 April 1998 (IV/M.1167 – *ICI/Williams*, paragraph 22); Commission Decision of 30 April 1992 (IV/M.197 – *Solvay-Laporte/Interox*, paragraph 50).

([4]) Including patent applications, utility models, applications for registration of utility models, designs, topographies of semiconductor products, supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained and plant breeder's certificates (as referred to in Article 1(1)(h) of Regulation (EC) No 772/2004.

([5]) As defined in Article 1(1)(i) of Regulation (EC) No 772/2004.

29. However, territorial limitations on manufacture reflecting the territory of the transferred activity are not necessary to the implementation of the operation. As regards licences granted by the seller of a business to the buyer, the seller can be made subject to territorial restrictions in the licence agreement under the same conditions as laid down for non-competition clauses in the context of the sale of a business.

30. Restrictions in licence agreements going beyond the above provisions, such as those which protect the licensor rather than the licensee, are not necessary to the implementation of the concentration ([1]).

31. Similarly, in the case of licences of trademarks, business names, design rights, copyrights or similar rights, there may be situations in which the vendor wishes to remain the owner of such rights in relation to activities retained, but the purchaser needs those rights in order to market the goods or services produced by the undertaking or part of the undertaking transferred. Here, the same considerations as above apply ([2]).

C. **Purchase and supply obligations**

32. In many cases, the transfer of an undertaking or of part of it can entail the disruption of traditional lines of purchase and supply which have existed as a result of the previous integration of activities within the economic unity of the vendor. In order to enable the break-up of the economic unity of the vendor and the partial transfer of the assets to the purchaser under reasonable conditions, it is often necessary to maintain, for a transitional period, the existing or similar links between the vendor and the purchaser. This objective is normally attained by purchase and supply obligations for the vendor and/or the purchaser of the undertaking or of part of it. Taking into account the particular situation resulting from the break-up of the economic unity of the vendor, such obligations can be recognised as directly related and necessary to the implementation of the concentration. They may be in favour of the vendor as well as the purchaser, depending on the particular circumstances of the case.

33. The aim of such obligations may be to ensure the continuity of supply to either of the parties of products necessary for carrying out the activities retained by the vendor or taken over by the purchaser. However, the duration of purchase and supply obligations must be limited to a period necessary for the replacement of the relationship of dependency by autonomy in the market. Thus, purchase or supply obligations aimed at guaranteeing the quantities previously supplied can be justified for a transitional period of up to five years ([3]).

34. Both supply and purchase obligations providing for fixed quantities, possibly with a variation clause, are recognised as directly related and necessary to the implementation of the concentration. However, obligations providing for unlimited quantities ([4]), exclusivity or conferring preferred-supplier or preferred-purchaser status ([5]), are not necessary to the implementation of the concentration.

35. Service and distribution agreements are equivalent in their effect to supply arrangements; consequently the same considerations as above shall apply.

([1]) To the extent that they fall within Article 81(1) of the EC Treaty, such agreements may nevertheless fall under Regulation (EC) No 772/2004, or other Community legislation.

([2]) Commission Decision of 1 September 2000 (COMP/M.1980 – *Volvo/Renault V.I.*, paragraph 54).

([3]) Commission Decision of 5 February 1996 (IV/M.651 – *AT&T/Philips*, VII.); Commission Decision of 30 March 1999 (IV/JV.15 – *BT/AT&T*, paragraph 209; see for exceptional cases Commission Decision of 13 March 1995 (IV/M.550 – *Union Carbide/Enichem*, paragraph 99); Commission Decision of 27 July 1995 (IV/M.612 – *RWE-DEA/Enichem Augusta*, paragraph 45).

([4]) In line with the principle of proportionality, obligations providing for fixed quantities with a variation clause are, in these cases, less restrictive on competition, see e.g. Commission Decision of 18 September 1998 (IV/M.1292 – *Continental/ITT*, paragraph 19).

([5]) Commission Decision of 30 July 1998 (IV/M.1245 – *VALEO/ITT Industries*, paragraph 64); see for exceptional cases (e.g. absence of a market) Commission Decision of 13 March 1995 (IV/M.550 – *Union Carbide/Enichem*, paragraphs 92 to 96); Commission Decision of 27 July 1995 (IV/M.612 – *RWE-DEA/Enichem Augusta*, paragraphs 38 et seq.).

IV. PRINCIPLES APPLICABLE TO COMMONLY ENCOUNTERED RESTRICTIONS IN CASES OF JOINT VENTURES WITHIN THE MEANING OF ARTICLE 3(4) OF THE MERGER REGULATION

A. Non-competition obligations

36. A non-competition obligation between the parent undertakings and a joint venture may be considered directly related and necessary to the implementation of the concentration where such obligations correspond to the products, services and territories covered by the joint venture agreement or its by-laws. Such non-competition clauses reflect, *inter alia*, the need to ensure good faith during negotiations; they may also reflect the need to fully utilise the joint venture's assets or to enable the joint venture to assimilate know-how and goodwill provided by its parents; or the need to protect the parents' interests in the joint venture against competitive acts facilitated, *inter alia*, by the parents' privileged access to the know-how and goodwill transferred to or developed by the joint venture. Such non-competition obligations between the parent undertakings and a joint venture can be regarded as directly related and necessary to the implementation of the concentration for the lifetime of the joint venture ([1]).

37. The geographical scope of a non-competition clause must be limited to the area in which the parents offered the relevant products or services before establishing the joint venture ([2]). That geographical scope can be extended to territories which the parent companies were planning to enter at the time of the transaction, provided that they had already invested in preparing this move.

38. Similarly, non-competition clauses must be limited to products and services constituting the economic activity of the joint venture. This may include products and services at an advanced stage of development at the time of the transaction, as well as products and services which are fully developed but not yet marketed.

39. If the joint venture is set up to enter a new market, reference will be made to the products, services and territories in which it is to operate under the joint venture agreement or by-laws. However, the presumption is that one parent's interest in the joint venture does not need to be protected against competition from the other parent in markets other than those in which the joint venture will be active from the outset.

40. Additionally, non-competition obligations between non-controlling parents and a joint venture are not directly related and necessary to the implementation of the concentration.

41. The same principles as for non-competition clauses apply to non-solicitation and confidentiality clauses.

B. Licence agreements

42. A licence granted by the parent undertakings to the joint venture may be considered directly related and necessary to the implementation of the concentration. This applies regardless of whether or not the licence is an exclusive one and whether or not it is limited in time. The licence may be restricted to a particular field of use which corresponds to the activities of the joint venture.

([1]) Commission Decision of 15 January 1998 (IV/M.1042 - *Eastman Kodak/Sun Chemical*, paragraph 40); Commission Decision of 7 August 1996 (IV/M.727 - *BP/Mobil*, paragraph 51); Commission Decision of 3 July 1996 (IV/M.751 - *Bayer/Hüls*, paragraph 31); Commission Decision of 6 April 2000 (COMP/M.1832 - *Ahold/ICA Förbundet/Canica*, paragraph 26).

([2]) Commission Decision of 29 August 2000 (COMP/M.1913 - *Lufthansa/Menzies/LGS/JV*; paragraph 18); Commission Decision of 22 December 2000 (COMP/M.2243 - *Stora Enso/Assidoman/JV*, paragraph 49, last sentence).

43. Licences granted by the joint venture to one of its parents, or cross-licence agreements, can be regarded as directly related and necessary to the implementation of the concentration under the same conditions as in the case of the acquisition of an undertaking. Licence agreements between the parents are not considered directly related and necessary to the implementation of a joint venture.

C. **Purchase and supply obligations**

44. If the parent undertakings remain present in a market upstream or downstream of that of the joint venture, any purchase and supply agreements, including service and distribution agreements are subject to the principles applicable in the case of the transfer of an undertaking.