EUROPEAN COMMISSION
Competition DG

CASE COMP/39736

(Only the English text is authentic)

ANTITRUST PROCEDURE

Council Regulation (EC) 1/2003

Article 9 Regulation (EC) 1/2003

Date: 18/06/2012

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EUROPEAN COMMISSION

Brussels, 18/06/2012
SG-Greffe
C(2012) 4028 FINAL

PUBLIC VERSION

COMMISSION DECISION

of 18/06/2012

addressed to:

Areva SA
Siemens AG

relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement

(COMP/39736 - SIEMENS/AREVA)

(Only the English text is authentic)

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relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to 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[1], in particular Article 9(1) thereof,

Having regard to the Commission decision of 21 May 2010 to initiate proceedings in this case,

Having expressed concerns in the Preliminary Assessment of 16 December 2011,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003 on the commitments offered to meet those concerns,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer,

Whereas:

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[1] OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. For the purposes of this decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". Where the meaning remains unchanged, the terminology of the TFEU will be used throughout this Decision.

1. SUBJECT MATTER

(1) This Decision is addressed to Areva SA and Siemens AG and concerns a non-compete obligation and a confidentiality obligation agreed between Siemens AG and Areva SA in a broad field of products within the field of civil nuclear technology.

(2) In 2001, Siemens AG ("Siemens") and Framatome SA ("Framatome"), the predecessor of Areva SA ("Areva"), created the full-function joint venture Areva NP SAS ("Areva NP" or "the JV"), in which they combined their respective business activities in relation to nuclear power plants ("NPPs"). The Shareholders' Agreement[2] between the parent companies of the JV includes a non-compete obligation ("NCO"). This NCO not only covers the lifetime of the JV but, in its original form, was to continue for a period of 8 to 11 years after Siemens' loss of joint control of the JV ("post-JV NCO"). The post-JV duration of the NCO was later reduced by an arbitral award to approximately four years.[3] The Shareholders' Agreement also contains a confidentiality clause which has the same duration as the NCO.

(3) In its Preliminary Assessment of 16 December 2011, the Commission came to the provisional conclusion that the post-JV NCO, and the post-JV confidentiality obligation in so far as it has the same effects as a non-compete obligation, raised concerns as to their compatibility with Article 101 TFEU, due to their broad scope and duration.

2. THE PARTIES

(4) **Siemens** is a German public limited company and the ultimate parent of the Siemens group, which is active in, inter alia, the sectors of information technology, healthcare, industry and energy with the latter comprising the manufacturing of power generation, transmission and distribution, and oil and gas devices.

(5) **Areva** is a French public limited company and a worldwide provider of power generation solutions. It is controlled by the French Atomic Energy Commission (*Commissariat à l'énergie atomique et aux énergies alternatives* – CEA - holding 79% of the shares of Areva) which in turn is controlled by the French State.[4] In the nuclear sector, the products and services offered by Areva cover all stages of the nuclear fuel cycle with the exception of final waste disposal. Some of those activities are carried out by its subsidiary Areva NC (formerly Cogema) while others are carried out by Areva NP.

(6) **Areva NP** was established in 2001 as a full-function joint venture (originally called Framatome ANP), in which Siemens and Areva (at that time Framatome) combined

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[2] The Shareholders' Agreement relating to Areva NP, as submitted by Siemens in its complaint of 16 October 2009, annex 1, is hereinafter referred to as the "Shareholder's Agreement" without any further reference to the file.

[3] Arbitral award of 16 May 2011, International Chamber of Commerce.

[4] See Areva's Reference Document 2009, page 227.

their respective activities in relation to NPPs. The acquisition of joint control of the JV by Siemens and Framatome was notified to the Commission under Council Regulation (EC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [5] on 7 July 2000 and declared compatible with the internal market on 6 December 2000.[6] Siemens has been a minority shareholder with 34% in Areva NP, while Areva has held the remaining 66% and the industrial leadership.[7] The Shareholders' Agreement provides for a put-option whereby Siemens has a right to sell to Areva its shares in Areva NP for a price to be determined. On 27 January 2009, Siemens gave notice of termination of the JV to Areva. All assets, know-how and personnel that were contributed by Siemens to Areva NP at its creation as well as all assets, know-how and personnel that Areva NP gained during its lifetime remain with Areva NP.

(7) Areva NP is active in the design and construction of the nuclear island ("NI") for nuclear power plants (as well as certain corresponding components), engineering, safety instrumentation and control, modernisation, maintenance and repair services as well as the design and manufacture of nuclear fuel assemblies.

3. PROCEDURAL STEPS UNDER REGULATION (EC) NO 1/2003

(8) On 16 October 2009, Siemens filed a complaint with the Commission, followed by a supplementary complaint on 17 February 2010, in relation to Article 101 TFEU and Article 53 of the EEA Agreement. The complaints were later withdrawn by Siemens.

(9) On 21 May 2010 the Commission opened proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003 and on 16 December 2011 adopted a Preliminary Assessment as referred to in Article 9(1) of Regulation (EC) No 1/2003 which set out the Commission's competition concerns. Those concerns related to the contractual restrictions as regards a broad field of products within the field of civil nuclear technology, agreed between Siemens and Areva in the framework of their former joint venture Areva NP.

(10) On 16 February 2012, Areva and Siemens submitted commitments ("the Commitments") to the Commission in reaction to the Preliminary Assessment.

(11) On 14 March 2012 a notice was published in the *Official Journal of the European Union* pursuant to Article 27(4) of Regulation (EC) No 1/2003, summarising the case and the Commitments and inviting interested third parties to submit their observations on the Commitments within one month of publication.

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[5] OJ L 395, 30.12.1989, p. 1. That Regulation has been replaced by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1). In this Decision, references to the "Merger Regulation" will be to either Regulation (EC) No 4064/89 or Regulation (EC) No 139/2004, whichever is applicable.

[6] See Commission Decision of 6 December 2000 in Case COMP/M.1940 – Framatome/Siemens/Cogéma/JV.

[7] […]. See notification in the case COMP/M.5481 Areva SA/Areva NP, pages 22-24. See also Siemens' complaint of 16 October 2009, pages 6, 7.

(12) The Commission informed Areva, on 17 April 2012, and Siemens, on 18 April 2012, of the outcome of the market test following the publication of the notice. On 6 June 2012 the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 8 June 2012 the Hearing Officer issued his final report.

4. PRELIMINARY ASSESSMENT

4.1. Relevant markets

(13) The Commission's preliminary conclusion is that the post-JV NCO mainly prevents Siemens from competing against Areva NP in its core business, namely NIs and nuclear services, as well as nuclear fuel assemblies. The post-JV NCO also extends to components for the NI, and the conventional island ("CI"), preventing the supply of such components by Siemens to Areva's competitors. The Commission takes the preliminary view that the markets for the individual components should be considered in their role as inputs to the mainly affected markets, namely NIs and nuclear services.

4.1.1. Nuclear islands

(14) The Commission's preliminary view is that the two principal parts of a complete NPP, that is to say, the NI and the CI, form two distinct relevant product markets. The NI is the nuclear part of a reactor, whereas the CI consists mainly of the turbo generator set and its auxiliary system. This approach is consistent with the Commission's past decision practice.[8] It is also considered that it is not necessary to distinguish further between reactor types[9] or reactor generations for the NI.

(15) As considered in the Decisions *Areva NP/MHI/ATMEA* and *Toshiba/Westinghouse,* the geographic market for the supply of NI to utilities in the EEA could be worldwide, potentially excluding suppliers from a number of countries with export restrictions or an exclusive focus on their home countries leading to a reduced worldwide or "accessible" market. However, the exact delineation of the geographic market can be left open in this case as it does not change the outcome of the analysis.

4.1.2. Conventional islands for NPPs

(16) The Commission considers that CIs for NPPs form a distinct relevant product market. Although many components of the CI are also integrated in non-nuclear

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[8] See Decision in Case COMP/M.1940 Framatome/Siemens/Cogema/JV; see also Commission Decision of 19 September 2006 in Case COMP/M.4153 Toshiba/Westinghouse.

[9] The two main types of reactors are Pressurised Water Reactors (PWRs, the most common reactor type world-wide and in particular in the EEA) and Boiling Water Reactors (BWRs). Both types are also referred to as so-called Light Water Reactors (LWRs) and account for almost 88% of the world's commercial reactors. Other main reactor types include gas-cooled reactors (GCRs), pressurised heavy water reactors (PHWRs), fast breeders and so-called VVER's (the Russian version of the PWR). See Decision in Case COMP/M.4153 Toshiba/Westinghouse, paragraphs 15, 16 and 17.

power plants, the Commission takes the preliminary view that there is no use for CIs specifically engineered for NPPs outside of NPPs.

(17) The Commission has previously left open the geographic market definition in relation to steam turbines, considering a worldwide and an EEA-wide market.[10] For the purpose of this case, the exact geographic market delimitation can again be left open.

4.1.3. Nuclear services

(18) According to the Preliminary Assessment, a market for nuclear services has to be considered. Utilities buy nuclear services for their NPPs from NI suppliers or from specialised service providers. That market not only comprises services such as inspection, maintenance, engineering and repair, but also the supply of the related components, since the service companies usually also replace components in the framework of their activity. For this market level, it is not necessary to look at individual components markets, but rather at the overall nuclear service covering any components which might be needed for the supply of the relevant services. Utilities are likely to want to receive all services and components in the framework of maintenance or repairs from one source. This view is in line with the results of the investigation in the *Toshiba/Westinghouse* case. No further distinction according to reactor types was supported by the market investigation in that case.[11]

(19) With respect to the geographic market definition, the Commission decision in *Toshiba/Westinghouse* left open the question of whether the market is worldwide or smaller (excluding some countries, such as Japan, or EEA-wide).[12] The Commission takes the preliminary view that the geographic scope of the market for nuclear services is similar to the one for NIs, since the suppliers of NIs usually also supply nuclear services and the same export restrictions as well as other geographic limitations will apply. For the purpose of this case, the exact market delimitation can again be left open.

4.1.4. Components for NIs

(20) Components (or "subassemblies") are sold by component producers to NI suppliers who integrate them into a new NI, which they then sell to utilities and to companies providing nuclear services. Those markets for the individual components will be referred to in the following as "the markets for components for NIs". They are segmented for individual components since a vessel producer, for example, is usually not able to supply a reactor coolant pump set, and an NI producer demanding, for instance, a vessel (either as an input into a new NI or as a necessary component for the provision of nuclear services) cannot substitute this with a coolant pump.

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[10] See Commission Decision of 10 July 2003 in Case COMP/M.3148 Siemens/Alstom gas and steam turbines, paragraph 21.

[11] See Decision in Case COMP/M.4153 Toshiba/Westinghouse, paras 27, 28 and 29.

[12] See Decision in Case COMP/M.4153 Toshiba/Westinghouse, para. 45.

(21) Areva contends that utilities have recently also sourced services and components separately.[13] Any such component sales directly to utilities can be included into the different markets for NI components, since those utilities will face the same market structure as NI producers searching for suppliers of specific individual components to be integrated into a new NI.

(22) For the purpose of this Decision, it is not necessary to define each specific relevant component market.

4.1.5. Nuclear fuel assemblies

(23) Fuel assemblies ("FAs") are used as the delivery device for the integration of nuclear fuel into the core of the nuclear reactor.[14] According to the Commission decision in *Framatome/Siemens/Cogema/JV*, PWR FAs and BWR FAs belong to different product markets. Furthermore, MOX (mixed oxide fuel) FAs for light water reactors was considered as a separate market (without making any distinction between MOX fuel for PWRs and BWRs).[15] The relevant geographic market for both PWR FAs and BWR FAs was considered to be EEA-wide, whereas for MOX FAs it was left open whether the geographic market is EEA-wide or comprises a larger area.[16]

(24) In this case, the exact delineation of the relevant market can be left open since it does not change the outcome of the analysis.

4.2. Position of the parties on the relevant market

4.2.1. Market shares on the market for NIs

(25) Taking into consideration the installed base, which provides indications on the history of a supplier's market position, the Commission considers, on the basis of the *Toshiba/Westinghouse* decision, that Areva's market share would be 65% on an EEA-wide market. On a worldwide market, Areva's own estimates on the basis of installed units of [20-30%] is consistent with the *Toshiba/Westinghouse* decision, where Areva's market share on a global NI market (installed base for the main reactor types BWR and PWR) was 27%.

(26) Taking into consideration the reactors under construction in the period 1998 to 2008, which rather illustrates the current market conditions, the market shares in the EEA would be [30-40%] for Areva and [60-70%] for Rosatom. When adding the orders awarded and the NIs commissioned in the past 10 years to the reactors under

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[13] See Areva's reply to the Commission's request for information of 25 January 2010, questions 5 and 6, page 19, paragraph 88.

[14] See Decision in Case COMP/M.1940, Framatome/Siemens/Cogema/JV, para.19.

[15] See Decision in Case COMP/M.1940 Framatome/Siemens/Cogema/JV, para. 26.

[16] See Decision in Case COMP/M.1940 Framatome/Siemens/Cogema/JV, paras 32 and 33.

construction, the market shares would be Areva [30-40%], Rosatom [40-50%] and AECL [10-20%][17] in the EEA.

(27) On the basis of NPPs under construction, averaged over several years, Areva's worldwide market share would be lower, since in Areva's main region of activity – the EEA - not many new orders have been awarded in recent years, especially in comparison to China, a market until now mainly served by the Chinese industry. According to Areva's estimates Areva's position on a worldwide market for NIs would be [5-10%], while Rosatom's market share would be [20-30%], the Chinese state owned industry [20-30%], and Toshiba/Westinghouse [10-20%]. As indicated above (see paragraph (15)), some suppliers of NIs are not likely to be viable alternatives for European utilities, since they have so far not become very active outside of their respective home countries or specific regions. Areva's market shares on such an accessible worldwide market would range between the EEA-wide and the worldwide market shares.

4.2.2. Market shares on the market for CIs for NPPs

(28) Siemens estimates its market shares for CIs for NPPs, calculated by reference to its installed base (number of steam turbine generators, including known orders), at [20-30%] in the EEA and [20-30%] worldwide.[18]

4.2.3. Market shares on the nuclear services market

(29) Areva estimates its market share on the nuclear services market as [30-40%] in the EEA and [20-30%] worldwide.[19] In *Toshiba/Westinghouse*, the *worldwide* combined market share for nuclear services of Areva was estimated at [15-25]%. In the EEA, Areva was, however, estimated to be the market leader with a share of [70-80]%.[20] The precise market shares can be left open since it does not change the outcome of the analysis.

4.2.4. Market shares on the markets for nuclear fuel assemblies

(30) In its merger notification for the dissolution of the JV, Areva estimated its (volume based) worldwide share of light water reactor FAs to be [30-40%], and its EEA-wide market share to be [60-70%].[21] This is largely confirmed by a 2008 OECD report on Market Competition in the Nuclear Industry which gives Areva a world-leading 32% market share for all light water reactor FAs for 2007.[22] Specifically, in relation to PWR FAs, Areva's 2006 market shares were stated as [70-80]% in Europe, [20-30]%

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[17] See Areva's reply to the Commission's request for information of 4 November 2010 questions 11 and 12, Exhibit 2.

[18] See Siemens reply to the Commission's request for information of 4 June 2010, question 4, paragraph 14.

[19] See Areva's reply to Commission's request for information of 4 November 2010, question 13, page 20.

[20] See Decision in Case COMP/M.4153 Toshiba/Westinghouse, paras 63 and 64.

[21] See Areva's notification in case COMP/M.5481 Areva SA/Areva NP, Section 7.

[22] See 2008 OECD report on Market Competition in the Nuclear Industry, page 72.

in the USA and [10-20]% in Asia, and, in relation to BWR FAs, [30-40]% in Europe, [20-30]% in the USA and [0-10]% in Asia.[23] As regards MOX fuel, Areva is the only large scale producer in the world.[24]

4.3. Practices raising concerns

(31) The Commission's investigation concerns a non-compete obligation and a confidentiality obligation agreed between Siemens and Areva. Those clauses were included in the Shareholders' Agreement concluded by the two companies when they created their joint venture Areva NP, in 2001.

(32) The Commission has reached the preliminary conclusion that those clauses cannot be considered ancillary to the creation of Areva NP, and can only be considered partially ancillary to the acquisition by Areva of sole control over Areva NP. In so far as they cannot be considered ancillary to the latter operation, the Commission takes the preliminary view that the clauses fall within the scope of Article 101(1) TFEU and do not meet the conditions of Article 101(3) TFEU.

4.3.1. Nature, scope and duration of the clauses subject of the investigation

4.3.1.1. The post-JV NCO

(33) The NCO contained in the Shareholders' Agreement not only covers the lifetime of the joint venture ("pre-termination NCO") but, in its original form, was to continue for a period of 8 to 11 years after Siemens' loss of joint control over the JV (the post-JV NCO). Its duration was reduced by the award of an arbitral tribunal to approximately 4 years. In the merger control procedure regarding the creation of the JV, the pre-termination NCO was notified to and expressly accepted by the Commission as ancillary to the creation of the JV, but limited to a maximum of 30 years during the lifetime of the JV. Only the post-JV NCO starting from the date at which Siemens lost joint control over Areva NP (16 October 2009), but not the pre-termination NCO, was the subject of the investigation and the Preliminary Assessment.

(34) The definition of the product scope of the post-JV NCO is included in the Shareholders' Agreement. Contrary to its duration, its product scope was not later reduced by the arbitral award. Based on the wording of the Shareholders' Agreement, the post-JV NCO binds Siemens with regard to the exclusive scope of the JV. That exclusive scope covers the part of the overall scope of the activities of Areva NP which is related to the NI of an NPP, and which includes the overall engineering with a transverse function of an entire NPP. The exclusive scope also extends to other activities, which include, among others, nuclear fuel assemblies, waste management and handling of spent fuel assemblies.

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[23] See Areva NP's 2008 Strategy Action Plan ("SAP"), as submitted by Areva in its reply to the Commission's request for information of 10 May 2010, question 5, Exhibit 2.1.7, page 166.

[24] See 2008 OECD report on Market Competition in the Nuclear Industry, page 89.

(35) On the basis of all relevant facts[25], the Commission takes the preliminary view that the post-JV NCO applies:

- in relation to the NI as a whole;
- to all components for the NI;
- to all systems covering the whole NI and/or NPP;
- to conventional products (including the CI) if they are sold in a package with a competing NI, strengthen the competing offer and/or affect Areva's interests (in particular, if Siemens does not supply the competing NI producer on an ad hoc basis but through a long-term cooperation);
- to nuclear services;
- to nuclear fuel assemblies;
- to other products or services falling within the exclusive scope of the former JV.

(36) With respect to NI components, Siemens identified a number of components in its portfolio which are mainly affected by the post-JV NCO: diesel generators, transformers, low and medium voltage switchgears, building technology systems, plants management systems, industrial water treatment solutions, conventional motors, variable frequency drives ("VFDs"), operational I&C systems[26] and reactor coolant pump ("RCP") motors. During the JV lifetime, Areva NP had given its consent to Siemens to supply […]. Siemens was sole supplier for Areva only in respect of a few of those components.

(37) In addition, Siemens is prevented by the post-JV NCO from acquiring (solely or jointly) a controlling stake in any company that offers NIs or components for NIs, as well as from having a non-controlling shareholding in any such company, from providing support in any other form to such a company and from forming certain partnerships. A breach of the post-JV NCO leads, according to the Shareholders' Agreement, to financial penalties. The NCO applies worldwide.

4.3.1.2. The confidentiality clause

(38) In Article 7 of the Shareholders' Agreement, Siemens and Areva undertake not to disclose or use any confidential information regarding the JV or the other Party. Confidential information means all information having a technical, financial or

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[25] See in particular Areva's reply to the Commission's request for information of 25 January 2010, questions 5 and 6.

[26] Siemens and Areva concluded an agreement at the creation of the JV and a subsequent one after the termination of the JV regarding a co-operation between the two companies specifically in the field of safety I&C and operational I&C. Those co-operation agreements are not subject to the investigation in this case. In this Decision, no further reference will therefore be made to operational I&C.

commercial nature, in particular on the cost and price structure of products, production processes, name of equipment, materials, parts, components, semi-products, suppliers, markets and customers. The confidentiality obligation applies for the same period as the NCO. The arbitral award reduced the duration of the confidentiality obligation to the same extent as the post-JV NCO.

4.3.2. The applicability of Article 101 TFEU to the post-JV NCO

4.3.2.1. General principles

(39) Any contractual provision that is ancillary to a concentration authorised by the Commission under the Merger Regulation would be covered by that decision, and hence, fall outside Article 101 TFEU. With respect to the JV, two concentrations were notified to and authorised by the Commission under the Merger Regulation[27]:

(i) the **creation of the joint venture Areva NP** by Siemens and Areva in 2000

(ii) the following **acquisition of sole control** over Areva NP by Areva in 2009

(40) Even though it was possible according to the applicable law[28] and the Commission's practice prevailing at the time of the creation of Areva NP to notify ancillary restraints, the parties notifying the creation of the JV did not raise the post-JV NCO with the Commission, but only the NCO applicable during the lifetime of the JV. However, even in the absence of such a notification[29], a contractual provision may still be covered by a merger decision if it is ancillary to the concentration.[30]

(41) The Commission has published three Notices on the issue of ancillary restraints in 2005 ("2005 Notice")[31], 2001 ("2001 Notice")[32] and 1990 ("1990 Notice")[33]. The creation of Areva NP was notified to the Commission on 10 July 2000 and cleared on 6 December 2000[34] when the draft 2001 Notice was in public consultation.[35] Areva's

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[27] The notion of "dissolution of the JV" does not refer to the dissolution of Areva NP as a company, but to the loss of joint control by Siemens, Areva NP thereby losing its characteristics of a joint venture and becoming a solely controlled subsidiary of Areva.

[28] See Case T-251/00 *Lagardère e.a. v Commission* [2002] ECR II-4825.

[29] Prior to 2004, this applied to restraints that were not notified as ancillary to the concentration. Since 2004, this applies to all restraints, since such requests are no longer possible.

[30] As expressly clarified by recital 23 in the preamble to Regulation (EC) No 139/2004.

[31] See Commission Notice on restrictions directly related and necessary to concentrations (OJ C56, 5.3.2005, p. 24).

[32] See Commission Notice on restrictions directly related and necessary to concentrations (OJ C188, 4.7.2001, p. 5.

[33] See Commission Notice regarding restrictions ancillary to concentrations (OJ C203, 14.8.1990, p. 5.

[34] See Decision in Case COMP/M.1940 Framatome/Siemens/Cogéma/JV.

[35] The notifying parties also referred to the draft 2001 Notice in their notification in the case COMP/M.1940 Framatome/Siemens/Cogéma/JV, page 19, footnote 6, as re-submitted in Siemens' complaint of 16 October 2009, Annex 2.

acquisition of sole control over Areva NP was notified on 11 May 2009 and cleared by decision dated 12 June 2009.[36] The Notices do not differ significantly from each other as regards the main criteria for the assessment of ancillarity.

(42) A restriction is ancillary to a concentration when it is directly related and necessary to its implementation. In the event and to the extent that a restriction cannot be considered ancillary to a previously authorised operation, it remains to be seen whether it falls within the scope of Article 101(1) TFEU, and whether it meets the conditions of Article 101(3) TFEU.

4.3.2.2. The ancillary nature of the post-JV NCO at the creation of Areva NP

(43) The Commission takes the preliminary view that the post-JV NCO cannot be regarded as directly related to the creation of Areva NP.

(44) For contractual provisions to be considered directly related to a concentration, they should be intended to allow a smooth transition to the changed company structure after the concentration.[37] The Commission Notices on ancillary restraints clearly rule out the possibility that non-compete obligations between the parent undertakings and a joint venture extending beyond the lifetime of the joint venture could be regarded as directly related and necessary to the implementation of the concentration.[38]

(45) Non-compete obligations applicable during the lifetime of the joint venture aim at protecting the individual parent companies' investments, which are "locked in" the joint venture during its lifetime. If the parent companies started to compete against their own joint venture, this could effectively eliminate the existence of the joint venture as such. Only one parent company starting to compete against the own joint venture would increase that parent company's share of profits to the detriment of the other joint venture partner. With the acquisition of sole control over the joint venture by one of its parents, the value of such investments is, however, no longer locked into the joint venture but "re-distributed" between the parent companies. Therefore, such protection then becomes obsolete.

(46) The fact that some parent companies might subjectively consider a post-JV NCO as so important that they make it a condition for their decision to create a joint venture does not contradict this approach. A restriction is ancillary if it is directly related and

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[36] See Decision in Case COMP/M.5481 Areva SA/Areva NP.

[37] The 2001 Notice explains that for a restriction to be considered "directly related", it must be closely linked to the concentration. It is not sufficient that the agreement has been entered into at the same time or in the same context as the concentration (see paragraph 7 of the 2001 Notice). The 2005 Notice further clarifies that the restriction has to be "*economically related to the main transaction and intended to allow a smooth transition to the changed company structure after the concentration*" (see paragraph 12 of the 2005 Notice).

[38] See the 2001 Notice, paragraph 36: "*non-competition obligations between the parent undertakings and a joint venture extending beyond the lifetime of the joint venture may never be regarded as directly related and necessary to the implementation of the concentration*".

See also the 2005 Notice, paragraph 36: "*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*" [emphasis added].

necessary to the *implementation*[39] of a concentration, that is to say, the process of transferring an undertaking from the seller to the acquirer or the establishment of a joint venture, which is considered to be a step that comes after a decision on the concentration has been taken. It is in this respect irrelevant whether the parents themselves consider the post-JV NCO as important or even necessary for their decision to at all form a joint venture.[40]

(47) The assessment of ancillarity is also unrelated to the question of the point in time at which an assessment of a post-JV NCO has to be made.[41] The companies entering into an NCO need to assess the legality of the NCO before they agree on it, even if it is directly related only to a potential future acquisition of sole control by one of the parent companies when terminating the joint venture.[42]

(48) In conclusion, the Commission takes the preliminary view that the post-JV NCO cannot be regarded as directly related to the creation of Areva NP. In any event, the preliminary view of the Commission is also that the post-JV NCO cannot be regarded as objectively necessary for the creation of the JV. Post-JV non-compete obligations are, in principle, not necessary for the creation of a joint venture, but they may be necessary for its dissolution, as such clauses regulate the relationship between the former parents once dissolution takes place. Thus, it will be assessed below (see section 4.3.2.3) whether the post-JV NCO is ancillary to the concentration resulting from the dissolution of the JV.

4.3.2.3. The ancillary nature of the post-JV NCO at the acquisition by Areva of sole control over Areva NP

(49) The Commission takes the preliminary view that the post-JV NCO is not ancillary to the acquisition of sole control by Areva over Areva NP at the termination of the JV for its full product scope and duration.

(50) The main reason for an NCO being potentially considered as ancillary in the case of acquisition of an undertaking is that the purchaser might need protection against competition from the seller of the undertaking in order to obtain the full value of the assets transferred. Protection might be needed in order for the purchaser to have time to gain the loyalty of customers and to assimilate and exploit know-how and goodwill.[43] As the Court of Justice stated in the *Remia* judgment and the General Court in the *Métropole télévision* judgment[44], a transaction can be rendered

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[39] See 2005 Notice, paragraph 13.

[40] See Case T-112/99, *Métropole télévision*, [2001] ECR II-2459 paragraph 109.

[41] See the 2005 Notice, paragraph 11.

[42] Commission Decision of 29 August 2000 in Case COMP/M.1913 Lufthansa/Menzies/LGS/JV, , paragraph 18; Commission Decision of 2 February 2000 in Case COMP/M. 1786 General Electric/Thomson CSF, , paragraph 23.

[43] See 2005 Notice, paragraph 18.

[44] See Case T-112/99, *Métropole télévision*, paragraph 110 and Case 42/84 – *Remia BV v Commission*, [1985] ECR I-2545 paragraph 19.

ineffective by the seller who may – for example, due to his customer relationships - easily win back the clients of the sold undertaking. The acquirer would thereby not get a chance to effectively take possession of the whole value of the undertaking.

(51) The Notices therefore allow for an NCO in the case of an acquisition of an undertaking, for a certain period of time, during which the seller is prevented from competing against the acquirer in the relevant market of the acquired business. The 2001 and the 2005 Notices indicate a period of up to three years, and two years if only goodwill but no know-how is transferred. In its decisional practice, the Commission has, in a number of cases, accepted an NCO of up to 3 years,[45] and in a few cases, an NCO of up to 5 years.[46]

(i) Direct relation to the acquisition of sole control by Areva over Areva NP

(52) A post-JV NCO might allow a smooth transition to the changed company structure after the acquisition of sole control[47], that is to say, to a situation where the purchasing parent acquires the full value of the previously jointly controlled company. A post-JV NCO may objectively regulate this situation, by ensuring that the seller is not in a position to compromise the transfer of the full value of the undertaking concerned, for example on the basis of know-how acquired during the life-time of the joint venture. It is therefore the Commission's preliminary view that the post-JV NCO providing protection against competition after the loss of joint control can be considered as directly related to this subsequent acquisition of sole control by Areva over Areva NP.

(ii) Objective necessity for the acquisition of sole control by Areva over Areva NP

(53) In its Preliminary Assessment, the Commission took the view that the post-JV NCO is, in principle, objectively necessary for the acquisition of sole control by Areva over Areva NP. However, as will be explained later (see paragraph (63)), it also considered that the post-JV NCO is not proportionate in relation to the full scope of products covered and the duration as originally agreed between Siemens and Areva and as later reduced by the arbitral tribunal.

(54) According to the General Court in the *Métropole télévision* case[48], the assessment of objective necessity is a "relatively abstract" analysis which requires neither an assessment of the competitive effects, which can take place only in the framework of Article 101(3) TFEU, nor an analysis of the indispensability of the restriction to the economic success of the main operation in the context of the competitive conditions

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[45] See, for example: Commission Decision of 2 April 1998 in Case COMP/M.1127 Nestlé/Dalgety; Commission Decision of 30 July 1998 in Case COMP/M.1245 Valeo/ITT Industries, or Commission Decision of 20 March 2001 in Case COMP/M.2227 Goldman Sachs/Messer Griesheim.

[46] See, for example: Commission Decision of 1 September 2000 in Case COMP/M.1980 Volvo/Renault VI.

[47] See 2005 Notice, paragraph 12.

[48] Case T-112/99, *Métropole télévision*.

on the relevant market.[49] As regards the requirement of proportionality, which will be assessed in the next section (see paragraph (63)), both the General Court in the *Métropole télévision* case and the Court of Justice in *Remia*[50] have explained that the restriction must be - in both scope and duration - strictly limited to what is necessary to implement the transaction.

(55) Areva maintains that the post-JV NCO was necessary in order to obtain the full value of the assets transferred, since it was a prerequisite for it to assimilate the goodwill and know-how relating to the assets transferred. Areva also argued that protection against competition by Siemens was necessary on that basis, due to Siemens' privileged access to confidential information of the (former) JV.

(56) **As to assimilation of know-how**, the Commission's preliminary view is that the post-JV NCO is not objectively necessary for the assimilation of Areva NP's know-how by Areva. Areva has been a controlling parent of Areva NP and has - as the industrial leader within the JV - contributed to the development of the know-how of Areva NP. The Commission therefore concluded in its Preliminary Assessment that Areva had already successfully assimilated the know-how of Areva NP during the lifetime of the JV.

(57) The fact that the Commission Decision authorising the creation of Areva NP accepts a NCO for a period of 30 years during the lifetime of the JV cannot be used in order to define the time necessary for the assimilation of the know-how contributed by the parent companies to the JV.[51] Apart from the fact that that argument would relate not to the acquisition of sole control of Areva NP by Areva, but to the creation of the JV, the justification for the period is not limited to the aspect of assimilation of know-how. The decision clearing the merger also refers in its justification of the period of 30 years to the protection of the parent companies' investments into the JV during its lifetime. The 30 years therefore cannot be assumed to define the period necessary or indispensable for the assimilation of know-how and goodwill contributed by the parents to the JV in this case. It is also considered on the basis of the Preliminary Assessment that in any case the eight years of Areva NP's lifetime have been sufficient for Areva NP to assimilate the know-how contributed by its parents.

(58) **As to assimilation of good-will, including customers' loyalty**, the Commission's preliminary view is that the post-JV NCO is not objectively necessary to allow for the assimilation of Areva NP's goodwill, including customers' loyalty, by Areva in the specific context of Areva's purchase of Siemens' shares in Areva NP. The

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[49] See Case T-112/99, *Métropole télévision*, paragraphs 107 and 109: "*It is not a question of analysing whether, in the light of the competitive situation on the relevant market, the restriction is indispensable to the commercial success of the main operation but of determining whether, in the specific context of the main operation, the restriction is necessary to implement that operation.*"

[50] See Case T-112/99, *Métropole télévision*, paragraphs 106 and 113, and Case 42/84 – *Remia BV v Commission*, paragraph 20: "[…] *such clauses must be necessary to the transfer of the undertaking concerned and their duration and scope must be strictly limited to that purpose*."

[51] See Areva's reply to the Commission's request for information of 10 May 2010, question 6, paragraphs 50, 51 and 52.

Commission considers that the name of the JV as well as its reputation have always been closely related to Areva, as the industrial leader in the JV, and only to a much lesser extent to Siemens. From that perspective, no specific process of assimilation can be considered as objectively necessary post-JV. The Commission's preliminary view is that Areva NP's customers are also not likely to be inclined to immediately[52] switch back from the acquirer (Areva) to Siemens after the transaction. Having withdrawn from Areva NP, Siemens no longer has its own nuclear business. A loyal Siemens client wanting a Siemens product would in the coming years stay with Areva NP, which sells NIs that were developed jointly with Siemens and which are produced by former Siemens engineers transferred to Areva NP. Even if Siemens entered into an industrial partnership with an NI-producer, the product would not immediately become a Siemens technology.

(59) **As to the protection of Areva against facilitated competition by Siemens**, the Commission concluded in its Preliminary Assessment that the post-JV NCO is objectively necessary to achieve this aim.[53]

(60) It should be noted that Areva NP can evidently not require protection from competition *as such* which would be merely added to the market by Siemens ("incremental competition").[54] The fact that a situation with less competition might be more profitable for Areva NP than a situation with more competition cannot serve as a justification for a post-JV NCO. It is only competition by Siemens on a "facilitated basis" – that is to say, competition where Siemens exploits Areva's confidential information to which it previously had access within Areva NP – that could possibly justify a certain protection ("facilitated competition"). Otherwise Areva would not obtain the full value of the acquired undertaking.

(61) The Commission concluded in its Preliminary Assessment that no confidential technological know-how was obtained by Siemens, either via its presence in Areva NP's Board of Directors, in its role of supplier, or in other instances (such as common working groups), to such an extent and a magnitude that could serve as the basis for facilitated competition by Siemens against Areva NP, putting at risk the transfer of the full value of (Siemens' shares in) Areva NP to Areva. Moreover, as will be shown below (see paragraph (63)), adequate protection could, and actually was, provided through confidentiality rules, which means that a post-JV NCO would in that regard have been in any event disproportionate.[55] As a result, the Commission's preliminary conclusion is that the post-JV NCO cannot be considered objectively necessary to guarantee the transfer of the full value of (Siemens' shares in) Areva NP to Areva, to the extent that it relates to the protection of technological know-how obtained by Siemens in the course of its co-operation with Areva NP.

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[52] See Case T-112/99, *Métropole télévision*, paragraph 110.

[53] However, as will be explained in the next section (see paragraph (63)), the Commission considers that the post-JV NCO was not proportionate for the full scope of products covered and the duration as originally agreed between Siemens and Areva and as later reduced by the arbitral tribunal.

[54] See Areva's observations, dated 9 November 2009, section III.3, paragraph 64.

[55] See section (iii).

(62) The Commission, however, concluded in its Preliminary Assessment – on the basis of an analysis of the main strategic documents of Areva NP (in particular the Strategic Action Plan of 2008 ("2008 SAP")) and the topics discussed on the Board of Directors – that Siemens, as a co-controlling shareholder of the JV, had access to some confidential business information of Areva NP, which could allow for facilitated competition by Siemens putting at risk the transfer of the full value of (Siemens' shares in) Areva NP to Areva.

(iii) Proportionality

(63) The Commission analysed in its Preliminary Assessment whether a less restrictive measure could achieve the same result as the post-JV NCO, and whether the agreed clause is strictly limited to what is necessary in terms of product scope, geographic scope and duration.

(64) **Least restrictive means.** Confidential information can generally be protected by confidentiality clauses which may cover obligations not to disclose and/or to use the relevant information.

(65) With respect to confidential business information, the Commission found in its Preliminary Assessment that a non-disclosure obligation would prevent Siemens from disclosing that information to third parties, but would not prevent Siemens from relying on it when determining its own strategy on the market. In theory, a non-use and non-disclosure obligation could be sufficient to prevent this, but in practice, Siemens would, when determining its own commercial strategy, not be able to avoid taking account of (and therefore using) the confidential business information it obtained from the JV. A non-use obligation regarding confidential business information, therefore, effectively equals a post-JV NCO and does not represent a less restrictive means.

(66) With respect to confidential technological know-how of the JV, the Preliminary Assessment concluded that Siemens did not have access to technological know-how of the JV to an extent that would allow for facilitated competition. Even if Siemens had obtained access to such technological know-how, the Commission finds on the basis of the Preliminary Assessment that the post-JV NCO is not the least restrictive means for the protection of Areva NP. As opposed to non-use obligations for confidential business information, non-use clauses regarding technological know-how do not inherently prevent a company from competing on the market. A competitor bound by such clauses can still enter into competition with an alternative technology. Confidentiality clauses in the form of non-disclosure obligations and non-use obligations with respect to technological know-how, therefore, represent a less restrictive means for the prevention of facilitated competition on this basis. Article 7 of the Shareholders' Agreement contains a confidentiality clause by which each party undertakes not to disclose or use for its benefit any confidential information regarding Areva NP which may (have) come into its possession. This provision, which applies to confidential technological know-how, binds the Parties even after Siemens' loss of joint control over Areva NP for the same duration as defined for the post-JV NCO.

(67) **Product scope.** The post-JV NCO mainly covers the market for NIs, the market for CIs for NPPs, the market for nuclear services, the markets for components for NIs and the markets for nuclear fuel assemblies. Due to the large number of existing components for NIs, the NI components identified by Siemens as the main ones in its portfolio affected by the post-JV NCO (as indicated above - see paragraph (36)) were analysed in the Preliminary Assessment.

(68) Areva NP has been active on the markets for NIs, nuclear services, and nuclear fuel assemblies (as well as certain NI components). Out of the eleven identified NI component markets, Areva NP has produced only one, namely RCP motors. Areva NP has not at all been active on the market for CIs.

(69) The Commission found in its Preliminary Assessment that with regard to the markets on which Areva NP has been active, in particular for NIs, nuclear services and nuclear fuel assemblies, the confidential business information obtained by Siemens would allow it to enter into direct facilitated competition against Areva NP. On the basis of the information it obtained, Siemens would, for instance, be in a position to specifically target Areva NP's customers and take advantage of its knowledge of any weaknesses of Areva NP or its cost structures in order to design its own competing offers. This would affect the ability of Areva to obtain the full value of Areva NP when acquiring sole control over Areva NP. In the Commission's Preliminary Assessment, a post-JV NCO is therefore to be considered objectively necessary and - as far as this product scope is concerned - proportionate.

(70) In contrast, the same reasoning cannot apply in relation to the market for CIs for NPPs nor to those NI component markets in which Areva NP was not active itself but – if at all - only as a reseller of Siemens' products. The Commission concluded in its Preliminary Assessment that it neither affects Areva NP's revenues nor therefore the full value of the acquired undertaking, if Siemens sells those NI components, given that Areva is not active on those component markets itself and thus cannot be harmed by facilitated competition. The Commission therefore concluded in its Preliminary Assessment that the post-JV NCO is not proportionate insofar as it extends to markets in which Areva NP was not active with its own products, such as CIs for NPPs and different NI components.

(71) **Geographical scope.** Areva NP's geographic scope of activity was unlimited[56] and covered all potential orders of NIs, nuclear services and nuclear fuel assemblies worldwide. Areva NP would typically participate in tenders on a global basis. The Commission therefore concluded in its Preliminary Assessment that the worldwide geographic scope of the post-JV NCO meets the condition of proportionality of the ancillarity test.

(72) **Duration.** The Commission found in its Preliminary Assessment that the post-JV NCO exceeds the period of time necessary to ensure protection of Areva against facilitated competition by Siemens on the basis of Siemens' access to Areva NP confidential business information. The post-JV NCO can only be justified as long as

[56] See Article 2.1 of the Shareholders' Agreement.

the confidential business information is not outdated, too uncertain to be of value, or in the public domain. The Commission found in its Preliminary Assessment that in this case those conditions were fulfilled for a period not exceeding three years from Siemens' loss of joint control in Areva NP for those markets in which Areva NP was active, in particular the markets for NI, for nuclear services and for nuclear fuel assemblies.

(73) The analysis of the most forward-looking confidential and most comprehensive strategy documents that were discussed at board level in Areva NP, namely the SAPs, shows that the information mainly relates to projections for the coming years (for example, projected income and margins, projected nuclear fuel sales, projected sales, projected annual revenue and margins for individual projects, projected spending on R&D, projected capital expenditure). Such a projection in the 2008 SAP covering a period until 2020 does, however, not mean that a competitor having had access to this information can be sure of knowing what the company will do until 2020. The projections are only a snapshot of expectations and intentions at a certain point in time.

(74) The same considerations apply to actual data contained in the SAP. Information on actual costs and margins is only of value for an undertaking when it provides reliable information on the competitor's current competitive strength. It will not be of use to that undertaking to know the costs and margins which a competitor's products had several years ago. Areva itself indicates that costs tend to vary on a yearly basis in line with variations of material costs, labour costs, construction costs, etc.[57]

(75) The SAP is revised by Areva NP approximately every two years. A comparison of the SAPs shows that a large proportion of business information changes from one SAP to the next.[58] Comparing the (projected) sales of the first overlapping year of two subsequent SAPs (2008 SAP and 2006 SAP) reveals deviations of up to 30%. Similar deviations can be found when comparing the projected gross margin for the plants segment. Even if no changes occur in the SAPs within a couple of years, the competitor knowing only the older SAP would still be totally uncertain as to whether that information was still relevant or might have been changed in the new SAP.

(76) The Commission, therefore, concluded on a preliminary basis that a duration of three years for a post-JV NCO can be considered as fully sufficient to ensure the adequate protection of Areva NP against facilitated competition from Siemens' side on the basis of the access to Areva NP's confidential business information which Siemens had until its loss of joint control over Areva NP in October 2009.

(iv) Conclusion on the ancillary nature of the Post-JV NCO

(77) The Commission concluded in its Preliminary Assessment that it is only in so far as the post-JV NCO would prevent Siemens from being active on the markets for NIs, nuclear services and nuclear fuel assemblies, on a worldwide basis and for a period

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[57] See Areva's reply to the Commission's request for information of 10 May 2010, question 5, paragraph 85.

[58] See 2008 SAP as submitted by Areva in its observations of 9 November 2009, exhibit 3, page 124.

of three years that it could be considered ancillary to the acquisition, by Areva, of sole control over Areva NP, and in this respect then falls outside the scope of Article 101(1) TFEU.

(78) Conversely, the post-JV NCO cannot on the basis of the Commission's Preliminary Assessment be considered as ancillary to the acquisition of sole control by Areva over Areva NP, and therefore falls within the scope of Article 101(1) TFEU, in so far as it applies to markets where Areva NP was not active with own products. In particular, the post-JV NCO is not ancillary to the acquisition of sole control by Areva over Areva NP for CIs for NPPs, and NI components[59] where Areva NP was not active with own products, such as variable frequency drives, diesel generators, conventional motors, transformers, medium voltage switchgears, low voltage switchgears, building management technology, plant management technology and water treatment solutions.

4.3.2.4. The application of Article 101(1) and the analysis of the conditions of Article 101(3) TFEU in relation to the post-JV NCO

(i) Application of Article 101(1) TFEU to the post-JV NCO

(79) Areva and Siemens entered into a Shareholders' Agreement on 30 January 2001 regarding their joint venture Areva NP, which the Commission authorized upon notification under the rules of the Merger Regulation. Within the general framework of the Shareholders' Agreement, the parties initially agreed on a post-JV NCO applicable for up to 11 years from Siemens' notice of termination, which was later reduced to approximately 4 years by the arbitral award. The Commission takes the preliminary view that the post-JV NCO constitutes itself an agreement in the sense of Article 101(1) TFEU. The two parties qualify as distinct undertakings in the sense of Article 101(1) TFEU. The Commission concluded in its Preliminary Assessment that the post-JV NCO therefore qualifies as an agreement between undertakings in the sense of Article 101(1) TFEU.

(80) The wording of Article 3.1 of the Shareholders' Agreement expressly excludes competition by Siemens against Areva NP (as solely owned subsidiary of Areva) in relation to certain specified activities. In the context in which the post-JV NCO was agreed, it is clear that it serves no alternative purpose or aim other than to prevent Siemens from competing with Areva NP. In the light of the above, it was concluded in the Preliminary Assessment that the post-JV NCO is a restriction by *object* in the sense of Article 101(1) TFEU, restricting competition which would have existed in the absence of the agreement in the markets for NIs, nuclear services, nuclear fuel assemblies, different NI components and CIs. Given the position of the parties on the relevant markets (see section 4.2) and the importance of their business activities in

[59] Out of the eleven NI component markets identified by Siemens on which the latter was active and which were covered by the post-JV NCO, Areva has only been active with an own product on one market, namely RCP-motors. It should be noted that on this market Areva NP allowed Siemens during the lifetime of the JV to sell its own Siemens RCP-motors on the basis of an own specific design (or according to clients' specifications).

terms of value[60], the Commission also concluded that the post-JV NCO has an appreciable effect on these markets.

(ii) Analysis of the conditions of Article 101(3) TFEU in relation to the post-JV NCO

(81) The provisions of Article 101(1) TFEU may be declared inapplicable to an agreement fulfilling the four cumulative conditions of Article 101(3) TFEU.

(82) The Commission found in its Preliminary Assessment that insofar as the post-JV NCO was not considered ancillary to the acquisition of sole control by Areva of Areva NP and therefore caught by Article 101(1) TFEU, no efficiencies were generated by it. All efficiency gains invoked by Areva are linked to the creation and operation of the JV and do not relate to the post-JV NCO, but to another agreement (on the creation of the JV) which was already cleared by the Commission in 2001. Pursuant to the Commission's Guidelines on the application of Article 81(3) [now: 101(3) TFEU] of the Treaty[61], it is the efficiencies generated by the agreement under review that are to be considered, and there must be a sufficient causal link between the efficiencies and this restrictive agreement.[62] The Commission therefore concluded that, to the extent that it falls within the scope of Article 101(1) TFEU, the post-JV NCO does not meet the conditions set out in Article 101(3) TFEU since the agreement does not contribute to improving the production or distribution of goods or to promoting technical or economic progress.

(83) Even assuming that the absence of a post-JV NCO would have led to the JV generating a lower level of efficiencies, that loss of efficiencies would have resulted mainly from the fact that the parents would have co-operated less closely in the absence of a sufficient protection of the JV's confidential business information. Areva could have feared the risk of facilitated competition from Siemens after the lifetime of the JV on the basis of an exploitation of confidential business information. The reasoning developed above under ancillarity (see section 4.3.2) therefore also applies here. It is the Commission's preliminary view that in this case the analysis of any such efficiencies of the JV would not lead to a different result. The clause could not be considered indispensable for the achievement of efficiencies for a duration or scope exceeding the limits set out in the ancillarity assessment above (see section 4.3.2.3 (iii)).

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[60] See in particular Areva's reply to the Commission's request for information of 4 November 2010, question 8, paragraph 2; Areva's reply to the Commission's request for information of 4 November 2010, question 13, paragraph 4; Areva's reply to the Commission's request for information of 10 May 2010, question 5, Exhibit 2.1.7, page 172. See also Siemens' reply to the Commission's request for information of 4 November 2009, questions 3a and 4, page 4.

[61] OJ C 101, 27.04.2004, p. 97, see section 3.2 of the guidelines.

[62] See paragraph 53 of the guidelines.

4.3.3. The applicability of Article 101 TFEU to the confidentiality clause

(84) Article 7 of the Shareholders' Agreement contains a confidentiality obligation by which Siemens and Areva undertake not to disclose or use any confidential information regarding the JV or the other party. According to that Article, confidential information means all information having a technical, financial or commercial nature, in particular the cost and price structure of products, production processes, names of equipment, materials, parts, components, semi-products, suppliers, markets and customers. It has the same duration as the NCO.

(85) The Commission has concluded in its Preliminary Assessment that insofar as the confidentiality clause amounts to a non-compete obligation it can be considered as ancillary to the acquisition of sole control by Areva over Areva NP, and is therefore covered by the decision authorising that concentration under the Merger Regulation (and, hence, not caught by Article 101 TFEU), to the same extent as the post-JV NCO.

(86) The 2005 Notice sets out - both in relation to the acquisition of an undertaking and in relation to joint ventures - that non-solicitation and confidentiality clauses have a comparable effect and are therefore evaluated in a similar way to non-compete clauses.[63]

(87) The confidentiality clause amounts to a non-compete obligation insofar as it includes a non-use obligation of confidential business information. In contrast, the Commission considered in its Preliminary Assessment, that a non-disclosure obligation does not amount to a non-compete obligation. An undertaking bound by a non-disclosure obligation is not effectively prevented from competing just because it is not allowed to disseminate confidential business information of a competitor. As a result, the non-disclosure obligation resulting from the post-JV confidentiality clause stated in the Shareholders' Agreement cannot be used to prevent competition by Siemens. The Commission, therefore, considered in its Preliminary Assessment that a non-disclosure obligation does not amount to a non-compete obligation and does not fall under Article 101(1) TFEU[64], regardless of whether it can be considered ancillary to the acquisition by Areva of sole control over Areva NP.

(88) With regard to the non-use obligation included in the post-JV confidentiality clause, another distinction needs to be made between confidential business information and confidential technological know-how. In relation to confidential technological know-how, the non-use element of the confidentiality clause would normally not restrict competition, but rather ensure that competition will take place on the merits. As opposed to confidential business information, the exiting parent can refrain from using the confidential technological know-how of its former joint-venture and can

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[63] See 2005 Notice, paragraphs 26 and 41.

[64] However, if the non-disclosure obligation would actually be interpreted by one of the parties as preventing the other party from competing, the assessment would instead be similar to the assessment below in relation to the non-use obligation.

still compete on the market with its own new technology.[65] The Commission therefore concluded in its Preliminary Assessment that in so far as it does not prevent an undertaking from being active on the market, a non-use obligation relating to confidential technological know-how does not amount to a non-compete obligation, and is therefore not caught by Article 101(1) TFEU, regardless of the question of whether it is ancillary to a concentration previously authorised by the Commission.

(89) The Commission, however, found in its Preliminary Assessment that the confidentiality clause amounts to a non-compete obligation insofar as it includes a non-use obligation for confidential business information since Siemens would, when determining its own commercial strategy, not be able to avoid taking account of (and therefore using) the confidential business information it obtained from the JV.

(90) The Commission therefore concluded on a preliminary basis that the confidentiality clause amounts to a non-compete obligation insofar as it represents a non-use obligation with respect to Areva NP's confidential business information. The analysis of the ancillary nature of this non-use obligation relating to confidential business information, as well as the analysis regarding Articles 101(1) and 101(3) TFEU in this respect, are similar to the analysis of the post-JV NCO above (see section 4.3.2.4).

(91) It follows from the Preliminary Assessment of the Commission that the non-use obligation relating to confidential business information of Areva NP is ancillary to the acquisition of sole control by Areva over Areva NP for the duration of three years after that acquisition with respect to the markets in which Areva NP has been active with own products, in particular NI, nuclear services and nuclear fuel assemblies. To the extent that it is not considered ancillary, the non-use obligation relating to confidential business information of Areva NP is caught by Article 101(1) TFEU and does not fulfil the conditions of Article 101(3) TFEU for the same reasons set out above in respect of the post-JV NCO (see section 4.3.2.4).

4.3.4. Conclusion

(92) The Commission takes the preliminary view that the post-JV NCO can be considered ancillary to the acquisition of sole control by Areva over Areva NP, and therefore falls outside the scope of Article 101(1) TFEU, only in so far as the post-JV NCO prevents Siemens from being active worldwide on a certain number of specified markets (essentially NI, nuclear services and nuclear fuel assemblies), and only for a limited duration of three years following Areva's acquisition of sole control over Areva NP. For the duration exceeding those three years, the post-JV falls therefore under Article 101(1) TFEU.

(93) Moreover, the Commission takes the preliminary view that the post-JV NCO was not ancillary to the acquisition of sole control by Areva over Areva NP, and therefore

[65] See, for example, Commission Decision of 30 April 1992 in Case COMP/M.197 Solvay-Laporte/Interox, paragraph 50.

may fall within the scope of Article 101(1) TFEU, in so far as it applies to markets where Areva NP was not active with own products.

(94) Finally, the Commission comes to the preliminary conclusion that, to the extent it falls within the scope of Article 101(1) TFEU, the post-JV NCO does not meet the conditions set out in Article 101(3) TFEU.

(95) The preliminary conclusion of the Commission is that the post-JV confidentiality clause[66], insofar as it relates to the use of Areva NP's confidential business information by Siemens, amounts to a non-compete obligation which can be considered ancillary to the acquisition by Areva of sole control over Areva NP to the same extent and within the same limits as the post-JV NCO as described above (see section 4.3.2.3 (iii)).

(96) To the extent that the post-JV confidentiality clause relating to the use of Areva NP's confidential business information is not ancillary, the Commission considers preliminarily that it would represent a restriction of competition between Siemens and Areva that would fall under the prohibition of Article 101(1) TFEU, and would not fulfil the conditions of Article 101(3) TFEU. The restriction would cover the same markets as the post-JV NCO.

4.4. Effect on trade between Member States

(97) The Commission concluded in its Preliminary Assessment that the agreement would have a direct actual and potential influence on the pattern of trade. The direct consequence of the agreement would be to remove one actual competitor of Areva NP (or potential competitor, depending on the products concerned) on a number of markets for a period of up to 4 years (originally 8 to 11 years).[67] The agreement would also prevent Siemens from supplying components to Areva NP's competitors. Areva NP is active in the whole of the EEA, and before the creation of the JV, Siemens was active in several Member States. The markets for the supply of NIs, nuclear services, nuclear fuel assemblies, CIs and the NI components are all wider than national. The post-JV NCO and the confidentiality clause would cover a significant part of an overall NPP, which would represent considerable economic value both worldwide and within the EEA.

(98) The Commission therefore considered in its Preliminary Assessment that the post-JV NCO and the confidentiality clause insofar as it amounts to a post-JV NCO would have an appreciable effect on trade between Member States.

5. PROPOSED COMMITMENTS

(99) The key elements of the Commitments offered by Areva and Siemens on 16 February 2012 were as follows:

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[66] As defined and agreed upon by Siemens and Areva in their Shareholders' Agreement.

[67] Following the reduction of the post-JV NCO duration to 4 years by the arbitral award.

– The Parties commit to set aside the post-JV NCO as it was agreed in the Shareholders' Agreement and modified following the arbitral award, and to implement the following rules as regards the possibility for Siemens to compete with Areva NP after Areva's acquisition of sole control over Areva NP.

– The Parties commit to allow Siemens to compete against Areva NP, without any restriction, as from the date at which Siemens lost joint control over Areva NP (16 October 2009), with the exception of activities directly related to the nuclear island of NPPs ("Areva NP Core Products and Core Services") which are specified in an exhaustive list.

– Competition by Siemens against Areva NP will only be prevented in relation to Areva NP Core Products and Core Services for a duration of three years following Areva's acquisition of sole control over Areva NP, and more precisely until 16 October 2012.

– Until 16 October 2012 Siemens will be prevented from using any confidential information in relation to Areva NP Core Products and Core Services to which it may have had access during the lifetime of the JV; Siemens will, however, remain bound by a non-disclosure obligation in relation to Areva NP's corporate constitution and administration documents also beyond that date; in relation to Areva NP's confidential written technical information, Siemens is bound by both a non-use and non-disclosure obligation even beyond October 2012.

6. COMMISSION NOTICE PURSUANT TO ARTICLE 27(4) OF REGULATION (EC) NO 1/2003

(100) In response to the publication on 14 March 2012 of a Notice pursuant to Article 27(4) of Regulation (EC) No 1/2003, the Commission received no responses from interested third parties arguing for a modification of the Commitments.

(101) Therefore, there is no need for the Commission to reconsider its position as expressed in the Preliminary Assessment. In view of the results of the market test, the Commission maintains the view that it took in the Notice pursuant to Article 27(4)of Regulation (EC) No 1/2003, namely that the Commitments are adequate to meet the competition concerns expressed in the Preliminary Assessment.

7. PROPORTIONALITY OF THE COMMITMENTS

(102) The Commitments are sufficient to address the concerns identified by the Commission in its Preliminary Assessments without being excessive.

(103) The Commitments are sufficient since they fully address the Commission's concerns as set out in its Preliminary Assessment both with respect to the product scope covered by the post-JV NCO and the confidentiality obligation as well as with respect to the duration of the clauses. The Commission had concluded that at

maximum a duration of three years could be acceptable for a post-JV NCO under Article 101 TFEU for the markets in which Areva NP has been active with own products, in particular the markets for NIs, nuclear services and nuclear fuel assemblies. The same assessment applied to the confidentiality clause insofar as it amounts to a post-JV NCO. The definition of "Areva NP Core products and Core services" corresponds to that product scope. The Commitments reduce the duration of the clauses concerned, that is to say, the post-JV NCO and the post-JV confidentiality clause containing a non-use obligation for confidential business information, to three years after Siemens' loss of joint control over Areva NP. The Commitments therefore fully address the concerns identified by the Commission in its Preliminary Assessment.

(104) The Commitments are not excessive since there is no less restrictive means for addressing the Commission's concerns than to lift the clauses insofar as they apply to product markets and for a duration that exceeds what can be accepted as ancillary or covered by Article 101(3) of the Treaty. The reduced scope and duration of the NCO (and the confidentiality clause to the extent it has the same effect) as a result of the Commitments continue to ensure a sufficient protection for Areva against facilitated competition by Siemens. Protection is still applicable in relation to Areva NP Core Products and Services until 16 October 2012. It is for those products and services, and for that duration, that protection of Areva NP's confidential business information is warranted in order to protect Areva against facilitated competition by Siemens that could threaten the acquisition of the full value of Areva NP by Areva. In addition, protection against disclosure of Areva NP's corporate constitution and administration documents is maintained beyond 16 October 2012, as well as a protection against disclosure and use of Areva NP's confidential technological know-how.

(105) The Commitments will be made binding on Siemens and Areva.

8. CONCLUSION

(106) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes the Commitments, offered by the undertakings concerned to meet the Commission’s concerns expressed in its Preliminary Assessment, binding upon them. Recital 13 of the Preamble to Regulation (EC) No 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement. The Commission’s assessment of whether the Commitments offered are sufficient to meet its concerns is based on its Preliminary Assessment, representing the preliminary view of the Commission based on the initial investigation, and an analysis of the observations received from third parties following the publication of a Notice pursuant to Article 27(4) of Regulation (EC) No 1/2003.

(107) In the light of the Commitments offered, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings in this case should therefore be brought to an end.

(108) The Commission retains full discretion to investigate and open proceedings under Article 101 of the Treaty and Article 53 of the EEA Agreement as regards practices that are not the subject matter of this Decision.

HAS ADOPTED THIS DECISION:

Article 1

The Commitments in the Annex shall be binding on Areva SA and Siemens AG.

Article 2

There are no longer grounds for action in this case as regards the post-JV NCO and the confidentiality clause agreed between Areva SA and Siemens AG in the Shareholders' Agreement of 2001 on the creation of Areva NP.

Article 3

This Decision is addressed to:

Siemens AG

Otto-Hahn-Ring 6

81739 München

D - Germany

Areva SA

33 rue La Fayette

F - 75 442 - Paris cedex 09

France

Done at Brussels,

[SIGNED]
For the Commission
Joaquín ALMUNIA
Vice-President