



Department of Law

JOINT VENTURES AT THE INTERSECTION OF COLLABORATION AND CONSOLIDATION:

Conceptualisation of Joint Ventures in EU Competition Law as Compared to the Approach in the United States

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ABSTRACT

This dissertation compares the approaches adopted in the EU competition law and the U.S. antitrust law towards joint ventures. The question is two-fold, including (i) the study of the specific problems raised by the strict conceptualisation of joint ventures under the EU policy, as compared to the U.S; and (ii) the possible insights the U.S. experience could offer in this area.

This study demonstrates that the categorical approach in the EU has involved, over time, a number of specific issues that have been avoided in the U.S.. These relate, in particular, to the concepts employed to make the jurisdictional distinction between the mutually exclusive rules for mergers and horizontal agreements, which have caused a number of complications and led to unnecessary forum shopping. These differences are explained and their implications analysed in an attempt to help understand the approaches chosen and to explore how the EU policy could be further developed.

It emerges from this comparison that some of the highly technical issues concerning the legal characterization of joint ventures have reflected more fundamental differences in the enforcement attitude towards industrial cooperation between competitors as compared to mergers, including a different understanding of their effects on competition. This concerns, in particular, the controversial European "concentration privilege" favoring mergers and concentrative joint ventures over more limited cooperative alliances, whereas the U.S. enforcers have normally treated full integrations more suspect than partial ones.

Inspiring from the insights learned by studying the US approach, this dissertation concludes with a recommendation to revisit and clarify the EU approach to joint ventures in two specific areas. First, it calls for an explanation on how the substantive analysis of joint ventures under Article 101 TFEU compares with that of mergers, particularly in relation to the assessment of market power. Second, it suggests that the fate of Article 2(4) EUMR concerning the treatment of spill-over collusion be reconsidered in the current framework, including a clarification of its current function and purpose, if any.

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ACRONYMS

ABA	American Bar Association
BMI	Broadcast Music Inc.
DOJ	Department of Justice
EC	European Community
EEC	European Economic Community
EU	European Union
EUMR	Merger Regulation of European Union
FTC	Federal Trade Commission
GM	General Motors
HHI	Herfindahl-Hirschmann Index
HSR	Hard-Scott-Rodino Act
JV	Joint Venture
NCRA	National Cooperative Research Act
NCRPA	National Cooperative Research and Production Act
OECD	Organisation of Economic Cooperation and Development
R&D	Research and development
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
U.S.	United States

INTRODUCTION

1 Research problem

Cooperation between competitors is an exception to the general principle that market actors must determine independently their behaviour and policies which they intend to adopt on the market. Whilst the old postulate of Adam Smith¹ that competitors seldom meet for any good purpose can no longer be endorsed in today's economic complexity in which the social benefits of industrial cooperation have been widely recognized, alliances between competitors raise particularly complex antitrust issues. The trend towards creative joint venture arrangements together with technological and economic progress and globalisation has been described as a “new chapter in the development of capitalism”.² Whereas the evolution of the use of cooperative strategies in the economy depends on industrial and commercial developments and considerations, the attitude of public authorities and their way of thinking about industrial and enterprise organization has an influence on the frequency of cooperation as well as on the form it takes.

From the economic perspective, the problem is to determine whether consumer welfare is best enhanced by collective performance of competitors or by their individual performances in full competition. From the legal perspective, the key question is to determine when antitrust intervention is necessary and desirable and when not, as well as choosing the appropriate instruments and methodology for doing so. A well designed antitrust policy avoids unnecessary deterring of efficiency-enhancing activities while creating disincentives to anticompetitive behaviour within otherwise efficient joint ventures. It therefore needs to be able to distinguish “good” cooperation from “bad” one so that firms have sufficient freedom to collaborate in a globalised market place, while at the same time minimising the risk of agreements that are harmful to industry and to consumers. By the same token, regulators and

¹ADAM SMITH, *An Inquiry Into The Nature And Causes Of The Wealth Of Nations*, in Edwin Cannan ed., University of Chicago Press 1976, at 144-145 (“*People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.*”).

²See YODER, S & ZACHARY, G.P., *Digital Media Business Takes Form as a Battle of Complex Alliances*, WALL ST. J., July 14, 1993, at A1 (quoted in PIRAINO, T. *Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures*. 35 *Wm. & Mary L. Rev.* 871, at 874 (1994).

law-makers have to find the right balance between the desire to provide flexible norms that allow case-by-case analysis and the need to provide legal certainty with predictable norms.³

Neither the U.S. nor the EU competition law provides for a specific legal standard or instrument for joint ventures but they are assessed under the same conventional methodologies as any other business arrangements, be that under the rules concerning horizontal cooperation or mergers. Both systems have comparable basic tools to prevent distortion of competition by private restraints, making a crucial distinction between rules targeted against coordinated action by two or more firms (Section 1 of Sherman Act⁴ and Article 101 TFEU), unilateral conduct by a dominant firm (Section 2 of the Sherman Act and Article 102 TFEU), as well as mergers and acquisitions (Section 7 of Clayton Act⁵ and the EU Merger Regulation⁶). These rules have different objects of control, since the first two are destined to channel firms' behaviour towards rivalry by sanctioning their current and past anticompetitive conduct on the market, whereas the latter seek to ensure ex ante that market structures remain competitive so that rivalry will result more or less automatically. Joint ventures may breach any of these laws. They may face challenges under the rules for horizontal agreements, as they typically involve collaboration between competitors, or under the rules for mergers where the effect is substantial harm to competition due to the increased market concentration involved in mergers. When functioning as separate entities on the market, they may also be caught for abuse of market power or cartel behaviour with other firms, as any ordinary firms.

The evolution and proliferation of joint venture activity in recent decades suggests that antitrust law is generally favourable - or at least not excessively deterring - towards this kind of cooperation. While few joint ventures have been prohibited either in the EU or the United States, a great number of them are subjected to antitrust control in one way or another. This has not occurred without difficulty. Analytical confusion and a general lack of a consistent

³In this regard, the school of Law and Economics highlights the importance to adopt a “*legal process according to which the desire to minimize cost is a dominant consideration in the choice between precision and generality in the formulation of legal rules and standards*”. See EHRLICH, and POSNER, R. *An Economic Analysis of Legal Rulemaking*. Vol 3-4. *The Journal of Legal Studies* 257 (1974-75). HIRSH, W. *Law and Economics - An Introductory Analysis*. 2nd ed., Boston, 1991 («*Rule formulation seeks to maximize or minimize some specified goal, often allocative efficiency. ... but justice and fairness, which relate to distributional issues, must also be considered. ... The formulation of prudent legal rules would have to proceed by considering both goals, not just allocative efficiency - a formidable task.* »).

⁴ 15 U.S.C. § 1.

⁵ 15 U.S.C. § 18.

⁶Council Regulation (EEC) No. 4064/89 of December 21, 1989 on the control of concentrations between undertakings, [1989] OJ L395/1, as rectified by [1990] OJ L257/13.

approach to joint ventures have, at times, been lamented on both sides of the Atlantic. In the 1980's and early 1990's, the EU policy was described in terms such as a "nightmare" and "metaphysics" to criticize the cumbersome and complex legal classifications to determine the jurisdictional distinction between concentrative and cooperative joint ventures, which preceded the substantive analysis of the cases.⁷ In the EU, it has, indeed, been primarily the categorical legal approach that has attracted an abundant body of critical literature. In recent years, this debate has faded in response to the number of improvements introduced gradually in both the law and administrative guidance.

In the United States, in turn, the antitrust status of joint ventures was characterized by a prominent scholar in the mid 1970's as "the darkest corner" of antitrust law,⁸ and still in the latter half of the 1990's, joint ventures were identified by a number of leading professionals and academics as the most problematic and uncertain portion of the US antitrust policy.⁹ Yet, the reason for this criticism was different from that in the EU, as it related mainly to the lack of clear guidance on how antitrust methodology applied to this kind of cooperation and where the borderline between the per se rule and the rule of reason should be drawn, not to the quality of the approach as such. Rather than legal classification between the different statutes, in the U.S. the main focus of the debate has been on the substantive merits of the cases, the relevant questions being how the various forms of joint ventures, with the plethora of different agreements they involve, affect competition and whether any given collaboration is anticompetitive on balance.

Much of the difficulty about defining a rational legal approach towards joint ventures appears to have resulted from uncertainties and confusion about their competitive effects, in particular

⁷ See e.g. HAWK, B and HUSER, H. A bright line shareholding test to end the nightmare under the EEC Merger Regulation. 30 *C.M.L.Rev.* 1155, 1158 (1993); HAWK, B. Joint Venture under EEC Law. 1991 *Fordham Corp. L. Inst* 604 (B. Hawk ed. 1992); HAWK, B. Concentrative/Cooperative Joint Ventures : Metaphysics and the Law. EC Commission, Ostend, September 12, 1990; VENIT, J. Oedipus Rex : Recent Developments in the Structural Approach to Joint Ventures Under Competition Law. 14 *World Competition* 5 (1991).

⁸ BRODLEY, J. The Legal Status of Joint Ventures Under the Antitrust Laws : A Summary Assessment. 21 *Antitrust Bull.* 453 (1976).

⁹ This was the response given by a majority of the participants in the 1996 FTC hearings on global and innovation-based competition. See Opening Statement by Robert Pitofsky, June 2, 1997, initiating the Joint Venture Project in view of issuance of guidelines concerning competitor collaborations; available on the Website : www.ftc.gov/opp/jointvent/index.htm. Arguably, these uncertainties deterred transactions that might have been legal and efficient. See Jorde, T. & Teece, D, Innovation, Cooperation and Antitrust, 4 *HIGH TECH. L.J.* 1, at 36 (1989); PIRAINO, T. Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures. 35 *William & Mary Law Review* 871, at 878 (1994). For a different view, see EISEN, J., Antitrust Reform for Joint Production Ventures, 30 *JURIMETRICS J.* 253, 261 (1990) ("The antitrust laws are remarkably flexible in permitting joint activity.... The antitrust laws ... are not a large barrier to consortia formation.").

as compared to full integrations of economic activity through mergers and acquisitions. This confusion is further fuelled by the fact that in American antitrust commentary, joint ventures are mostly treated as less suspect than mergers because of their capability of achieving efficiencies without restricting competition as completely as mergers,¹⁰ whereas a number of European commentators¹¹ have considered joint ventures more suspect than mergers due to their less certain efficiency gains and their propensity to facilitate collusion between the parent firms. On the other hand, many antitrust specialists, including both economists and lawyers, agree that where the parties' goal is superior efficiency, they should have their proper incentives to choose the most adapted organizational form - be that a combination of firms through a merger, an integrated joint venture or a looser-knit cooperation agreement - and that antitrust policy should avoid affecting these incentives by favoring one method over the other.¹² From the legal perspective, the problem is hence which rules to choose to address the various aspects of joint ventures and how to define their treatment in comparison to mergers, without creating forum shopping incentives and thereby affecting the form the parties will give to their collaboration. The crucial legal question is therefore to determine the basis for distinction between the different modes of analysis and the appropriate legal instruments to deal with the various effects that joint ventures may have on competition.

Towards this background, it is thus both interesting and legitimate to study how the antitrust approach to joint ventures has evolved in the European Union and the United States. The research question is two-fold: (i) what kind of specific problems the conceptualisation of joint ventures under the EU competition law has involved over time as compared to the approach under the U.S. antitrust rules; and (ii) considering the causes and consequences of these differences, could useful insights and inspiration be drawn from the U.S. experience for the

¹⁰See e.g. PIRAINO (1997), at 643 n. 26 ("Joint ventures are less anticompetitive than mergers. They allow their partners to access each other's resources without eliminating all competition among the partners"). HAWK, B and HUSER, H. A bright line shareholding test to end the nightmare under the EEC Merger Regulation. 30 *C.M.L.Rev.* 1155, 1158 (1993).

¹¹See, in particular, VOGEL, L. Filiales communes et droit communautaire de la concurrence. *JCP* 1993, éd. E I, 254 ; VAN DER ESCH, B. Joint ventures under the competition rules of the EEC Treaty. In *Exploiting the Internal Market : co-operation and competition towards 1992*, 77 (1988) ; KLEENMANN, *Fordham Corp. L. Inst.*, 623, 631; JONES, 1990 *Fordham Corp. L. Inst.* 385, 397 at 401; and FAULL, J and NIKPAY, A. (eds) *The EC Law of Competition*. New York, Oxford University Press, 1999, at 83. GONZALEZ DIAZ, F.E. Horizontal Co-operation agreements, Chapter 7 in Faull and Nikpay, *The EC Law of Competition*, 2nd edition, Oxford University Press 2007, p. 667.

¹²CHANG, H., EVANS, D. and SCHMALENSEE, R. Some Economic Principles for Guiding Antitrust Policy Toward Joint Ventures. *Columbia Business Law Review* 223, 263 (1998); see also GELLHORN, E and KOVACIC W. *Antitrust Law and Economics in a nutshell*. West Publishing Co. 1994 (4th ed.), at 254; and implicitly NEVEN, D, PAPANDROPOULOS, P. and SEABRIGHT, P. *Trawling for Minnows*. Centre for Economic Policy Research, 1998, at 102-103. pp. 81-93 ; and BRODLEY (1982), pp. 1538-39.

purpose of legal policy formulation in the EU in this area. The starting point is thus to explain the complexities of the EU system and thereafter contrast them to the approach under the U.S. antitrust rules. Whilst any general developments in antitrust law and economics naturally affect the way in which joint ventures are treated under competition rules, the focus of this study will be on issues that are specific to joint ventures, notably the legal approach to the pooling of competitors' activities and the resulting behavioural issues. From this perspective, it is essential to know how the legal solutions function and what their implications are rather than how individual cases are assessed in their specific factual circumstances. The objective is to show that, although the ambiguities and complexities of the joint venture phenomenon are the same on both sides of the Atlantic, in the EU they have raised a number of legal and doctrinal issues that have been absent in the U.S.. Regardless of the systemic differences and several successive reforms in the EU, the argument is that the dogmatic conceptualisation of joint ventures based on their structural and behavioural features, together with the categorical legal classification that it entails, has resulted in unnecessarily complex rules and policy, which still leaves scope for improvement and clarification. This study concludes, accordingly, with a proposal for a revision of the EU Merger Regulation and for a clarification of the policy towards efficiency-enhancing horizontal agreements as compared to mergers.

The question chosen for this research dictates the method used to seek replies to it. This dissertation uses the comparative method (i) to help understand the legal solutions opted for in the EU in their specific historical and political context in which legal classifications have been the central theme; and (ii) to gain insights from the U.S. system which has followed a markedly different approach of reaching directly to the substantive merits of the cases, without strictly defined legal concepts. The examination of different legal solutions indeed increases awareness of the problems and of the variety of options, and thus widens the range of potential solutions to be considered.¹³ The comparison will thus serve as a basis for suggesting potential further improvements that could be undertaken in the EU competition law, without, however, losing sight of the limits of transplantation of legal concepts and solutions across borders.

¹³On the methods and functions of comparative law, see generally ZWEIGERT, K., KÖTZ, H. *An Introduction to Comparative Law*. 3rd revised ed. Oxford, Clarendon Press, 1998 (« legislators all over the world have found that on many matters good laws cannot be produced without the assistance of comparative law »), I:15. Even where the direct transplantation of a foreign solution is not anticipated or considered, comparative law may be used to bring a critical perspective to help towards improvement. For a more skeptical view of the role of comparative law in law reforms, see HILL, J. *Comparative Law, Law Reform and Legal Theory. Oxford Journal of Legal Studies*, Vol. 9 No 1, 100 (1989), where the author takes a critical view over the problems relating to the criteria of evaluation in « better solution » comparative law of Zweigert and Kötz.

In a comparative study, the systems of reference are perforce those considered the most capable of proposing a valid model. In the field of antitrust law, the U.S. system is a natural choice, as it has the longest tradition of antitrust enforcement and has influenced - to a varying degree - other systems, including the EU. The EU, itself largely influenced by both German and American antitrust traditions, has also developed a sophisticated body of competition law and represents an alternative model for national antitrust regimes as well as international attempts towards harmonization.¹⁴

Besides being an interesting exercise because of the different conceptual approaches, the motivation for this research stems from the absence of a comprehensive up-to-date comparative study in this area. While joint ventures have been at the heart of several topics of long-standing academic interest, ranging from dogmatic and doctrinal questions to more fundamental debates over the goals of antitrust laws, most of the comparative references to the U.S. system are found in critical articles concerning the EU policy in the early 1990's.¹⁵ At that time there was a strong call for a revision of the legal classification of joint ventures under the EU competition law. Since a number of successive reforms undertaken in the EU in the late 1990's and early 2000's concerning joint ventures, the topic has attracted much less of specialised literature, apart from a number of articles dealing with some specific interpretational issues. In recent years, comparative literature has focused primarily on areas in which a major reform has been perceived necessary, such as substantive merger standards, collective dominance, consideration of efficiencies, and the abuse of market power in its different forms.¹⁶ This does not, nevertheless, mean that a comparative research into certain

¹⁴Other nations often look to both the US and the EU for models in order to learn from their experiences in different areas of antitrust law, including joint ventures. For example, China examined the experiences gained in the US, EU and Japan in the formulation of its policy towards production and research joint ventures. See CHENG, C. et al. (eds.). *International Harmonization of Competition Laws*. Kluwer Academic Publishers, 1995, at 36.

¹⁵Comparative remarks concerning specifically joint ventures are found mostly in articles published in the early 1990's, following the introduction of the EU Merger Regulation, by professor Barry Hawk. See, e.g. HAWK, B. Les filiales communes selon le droit antitrust communautaire et américain. 63 *Revue d'économie industrielle* 148 (1^{er} trimestre 1993), p. 155; HAWK, B and HUSER, H. A bright line shareholding test to end the nightmare under the EEC Merger Regulation. 30 *C.M.L.Rev.* 1155 (1993); HAWK, B. Joint Venture under EEC Law. 1991 *Fordham Corp. L. Inst* 604 (B. Hawk ed. 1992); HAWK, B. Concentrative/Cooperative Joint Ventures : Metaphysics and the Law. EC Commission, Ostend, September 12, 1990.

¹⁶For instance, a collection of articles devoted to comparison of antitrust in the U.S. and the EU is found in The Antitrust Bulletin, Vol. XLIX, Nos. 1 & 2/Spring-Summer 2004, entitled "Antitrust in the U.S. and the EU: Converging or Diverging Paths?". For more recent publications, see e.g. VIALARD Virginie, Le critère d'appréciation substantielle des concentrations. Etude comparée des droits communautaire et américain, éditions Dalloz, nouvelle bibliothèque de thèses, volume 67, Paris, 2007 ; FOX, E. The *Competition Law of the European*

aspects of joint venture law and policy would not be useful or timely. To the contrary, besides filling the gap in the existing comparative literature, it is hoped that this work would shed some light on the appropriate antitrust treatment of this complex business arrangement.

2 Typology

The level of challenge of studying joint ventures from antitrust perspective has been rightly described by the former FTC Chair Pitofsky: “*Probably the most serious difficulty associated with analyzing the law in this area stems from the sheer number of different types of joint ventures which may occur and the proliferation and complexity of relevant factors necessary to describe their competitive impact.*”¹⁷ Things have not changed in this respect. Modern vehicles for cooperative arrangements in today’s economy – often referred to by a generic label of strategic alliances¹⁸ - range from loose-knit to close-knit arrangements including anything from technology swaps and cross-licensing to integrated joint subsidiaries. Terms « strategic alliances », « consortia » and « traditional joint venture » used in the contemporary antitrust literature may all refer to joint ventures.¹⁹ The first two are generally considered much broader in scope than a joint subsidiary. In literature, different views have been expressed on whether the generic category should be joint ventures or strategic alliances, one including the other.²⁰ In practice, however, it appears to be a distinction without a meaningful difference, since for antitrust purposes the borderline between a joint venture, technical cooperation, a strategic alliance, and other forms of partial economic integration is largely

Union in Comparative Perspective, Cases and Materials, [FOX Eleanor M., American Casebook series, West, Thomson Reuters 2009.](#)

¹⁷PITOFSKY (1969), at 1016.

¹⁸For definition see JORDE, T and TEECE, D. Innovation and Cooperation : Implications for Competition and Antitrust. 4(3) *Journal of Economic Perspectives* 75, 86 (1990) (« ... By definition, a strategic alliance can never have one side receiving cash alone ; it is not a unilateral exchange transaction. Nor do strategic alliances include mergers because alliances by definition cannot involve acquisition of another firm’s assets or controlling interest in another firm’s stock. Alliances need not involve equity swaps or investments, although they often do. ... Equity alliances can take many forms, including minority equity holdings, consortia, joint ventures. ... »).

¹⁹ See e.g. COMPTON, C. Cooperation, Collaboration, and Coalition : a perspective on the types and purposes of technology joint ventures. 61 *Antitr.L.J.* 861, 866 (1993) (« traditional joint ventures » referred to as those in which the partners each contribute certain assets and share in the profits and losses of a newly created, separate entity, whereas « strategic alliances » are considered the broadest form of inter-firm relationships typically involving technology swaps, joint R&D, and/or sharing of complementary assets). See also BALTO, D. Emerging Antitrust Issues in Electronic Commerce. A paper presented in 1999 Antitrust Institute. Distribution Practices: Antitrust Counseling in the New Millennium, November 12, 1999, Columbus, Ohio, pp. 22-24.

²⁰See KHEMANI, S. WAVERMAN, L. (1997), at 127-128 (highlighting that strategic alliances are the broader category); and KOLASKY, W. Antitrust Enforcement Guidelines For Strategic Alliances, 1063 *PLI/Corp* 499 (1998) (treating the two “virtually synonymous” and defining joint ventures broadly to cover any collaborative agreement).

irrelevant.²¹ Therefore, attempts to differentiate joint ventures coherently from other cooperative alliances – other than outright cartels - may create a false problem, as elaborate definitions and borderlines risk being overly formalistic for antitrust purposes.

In industrial organization literature, a joint venture is viewed as a functionally specific form of organization, distinct from an outright merger or an ad hoc agreement or a long-term supply contract.²² It is generally placed somewhere between these other forms of inter-firm organization, as it creates and promotes certain common interests between the parties but leaves intact a number of diverging interests.²³ It differs from a conventional contract and resembles a firm in that it substitutes a governance mechanism allocating control, ownership and profits for ad hoc market dealings or ex ante contractual determination of prices and outputs.²⁴ Moreover, unlike an ordinary contract, a joint venture partially integrates the parents by placing control of some of their resources and assets in a separate entity. On the other hand, joint ventures differ from complete integration through merger in that each parent normally retains significant control over its contribution through a veto power, and the parents normally compete or deal at arms' length outside the limited sphere of their venture.²⁵

Legal literature typically offers more detailed and elaborated definitions than economic scholarship. At its broadest, the concept includes also arrangements that do not involve the creation of a separate business entity, but instead consists of one or more agreements which obligate the parties to provide various operations or services on an long-term basis while retaining ownership of the tangible assets which are needed to achieve the objectives of the

²¹See e.g. KATTAN, J. Contemporary Antitrust Analysis of Joint Ventures : Why It Makes Sense to Stay the Course. Federal Trade Commission's Hearings on Joint Venture Project. June 5, 1997 (available at : www.ftc.gov/opp/jointvent) (stating that «the definitional failure is no failure at all »).

²² It has also been seen as « an arrangement lying on the continuum somewhere between a firm and a contract, and as closely related to various other forms of long-term contractual relationships ». From this point of view, the existence of a governance structure separate from that of the contracting parties would include also the process of interaction and negotiation involved in a long-term contractual relationship See KITCH, 53 *Antitr.L.J.* 957, 960 (1985).

²³ This is the general approach in the industrial organization literature. For a different view, see KAY, N, ROBE, J-P and ZAGNOLI, P. An Approach to the Analysis of Joint Ventures. *EUI Working Paper No. 87/313*. Florence, European University Institute, 1987.

²⁴ WILLIAMSON, O. Transaction-cost economics : the governance of contractual relations. 22 *Journal of Law and Economics* 233 (1979).

²⁵ Joint ventures may thus be closer to relational contracts in which the firms make long-term commitments and save many decisions for later negotiation. See WILLIAMSON, O. *Economic Institutions of Capitalism : Firms, Markets, Relational Contracting*. New York. Free Press, 1985. The joint venture may also be viewed as an example of "neoclassical" contracting, in which the firms make long- term, open ended commitments that provide opportunities for future exercises of discretion. See Ian MacNeil, Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law, 72 *Nw. U. L. Rev.* 854 (1978).

relationship.²⁶ At the narrower end, a separate business entity and new enterprise capacity are considered essential elements of a joint venture, like in the frequently quoted definition offered by professor Brodley²⁷ in his seminal article published in 1982: «*An integration of operations between two or more separate firms in which the following conditions are present : (i) the JV is under the joint control of the parent firms, which are not under related control ; (ii) each parent makes a substantial contribution to the JV ; (iii) the JV exists as a business entity separate from its parents ; (iv) the JV creates significant new enterprise capability in terms of new productive capacity, new technology, a new product or entry into a new market.* ».²⁸

Joint ventures can be formed using a variety of legal techniques with different degrees of parental involvement. These techniques are, in view of their economic consequences, rather alike, while their legal forms can range from entering into a simple contract to operate certain assets jointly to the setting up of a new joint subsidiary or the acquisition of shares in an existing subsidiary.²⁹ The latter two, i.e. so-called equity joint ventures, exist as separate legal entities whose stock is shared by two or more partners, each expecting a proportional share of profits. The choice of the legal form will depend on the economic objectives pursued. For instance, a corporate form provides a solid framework for management and a governance structure with sufficient autonomy to promote cooperation in long term, particularly when this cooperation requires substantial investments and risks. Non-equity joint ventures, in turn, do not involve creation of a new corporate entity. In such case the agreements and rules between

²⁶ GUTTERMAN (1997), at 148. An earlier definition highlighted the temporary character of the venture by referring to "an association of two or more natural or juridical persons to carry on as co-owners an enterprise, venture, or operation for the duration of that particular transaction or series of transactions for a limited time". TAUBMAN, What Constitutes a Joint Venture? 41 *Cornell L. Q.* 640, 641 (1956).

²⁷ BRODLEY, J. Joint Ventures and Antitrust Policy. 95 *Harv. L. Rev.* 1523, 1526 (1982). A similar definition has been provided by Sullivan and Grimes, involving: 1) an undertaking between parent firms that maintain their own identities separate from that of the venture; 2) integration of resources, operations, and/or management; 3) a constitutive form (whether tight or loose) entailing more structure than a purely contractual arrangement; and 4) ongoing business activities by the venture as an entity. SULLIVAN & GRIMES (2000), at 648.

²⁸ BRODLEY, J. Joint Ventures and Antitrust Policy. 95 *Harv. L. Rev.* 1523, 1526 (1982); SULLIVAN & GRIMES (2000), at 648.

²⁹ See, generally e.g. LANGEFELD-WIRTH, K. *Les Joint Ventures Internationales*. Paris, Joly Editions, 1992 ; BAPTISTA, O. and DURAND-BARTHEZ, P. *Les associations d'entreprises (Joint Ventures) dans le commerce international*. Paris, L. G.D.J, 1991 ; HENNESSY, J. *Basic Forms and Terms of US Joint Ventures*. In FORRY and JOELSON, (1988) ; SIERRALTA RIOS, A. Joint venture internacional. Lima, Fondo Editorial de la Pontificia Universidad Catolica del Peru, 1997. NEVEN has identified the various contractual techniques as follows: (i) agreements to operate assets together, while the assets remain under the control of their original owners ; (ii) agreements to operate assets together, with some transfer of ownership between the parties ; (iii) the formation of a new firm to operate the assets, the ownership of which is transferred to the new firm and equity in the firm is owned jointly by the two parent firms ; or (iv) a common agency agreement, in which assets owned by a third party are operated together with the assets of the two cooperating firms.

the parties govern the allocation of tasks, costs and revenues.

Based on the functions joint ventures perform, they can be roughly classified into four categories: (i) joint production of goods and services ; (ii) joint distribution or marketing ; (iii) joint purchasing ; (iv) and joint research and development (« R&D »).³⁰ The joint decision making and parental involvement may vary significantly from one venture to another and reach to different stages : the parents combine only one sole activity, i.e. R&D, manufacture or purchasing, and sell the products independently;³¹ the parents combine both R&D and manufacture (R&D&P) but sell the products independently;³² or finally the joint venture contemplates the R&D and/or production and marketing and prohibits the participants from competing with it. In the first two cases joint decision-making is limited to the output of the venture, whereas in the third case it may extend to the price of the output, when the parties further agree that the venture will sell the output, either to themselves or to any buyer.³³ The latter type of venture acts as an ordinary market participant when it purchases raw materials from third parties or sets a price for sales to third parties not sold to parents.

In this study the term joint venture is employed to cover situations in which competitors integrate some assets to undertake a common economic activity, for instance R&D, production, distribution or purchasing, or a combination of these. The element of joint activity by two or more competitors distinguishes joint ventures from common interest groups, such as trade associations, which provide a forum to set quality standards for industry or to collect industry statistics but do not normally involve any common commercial activity by the members. It also makes the difference to other types of inter-firm links, such as licensing and supply agreements, in which the parties agree on the terms of their unilateral transaction, or cross-licensing, patent pools and cross-supply agreements, which involve asset swaps rather than performing joint functions as such.

³⁰See e.g. OECD (1986), at 12-18, where further categories of natural resource exploration and exploitation, as well as engineering and construction have been distinguished. It must be recognized, however, that in practice joint ventures often combine several functions so that strict classifications do not always correspond to reality. This is particularly true for R&D and production ventures which often extend to each other's functions and involve marketing stage as well.

³¹This kind of alliance can be implemented through use of the assets of their existing businesses or through joint-ownership in a new entity or an existing subsidiary. See e.g. CORREIA, 66 *Antitr.L.J.* 737, 756 (1998).

³²Sometimes there is no bright line between development and production, which is particularly true for high technology industries where development engineers and production engineers work together, because innovation in manufacturing processes may be necessary to produce the product. See CLAPES, A. Blinded by the light : Antitrust analysis of computer industry alliances. 61 *Antitr.L.J.* 899, 916-917 (1993).

³³HOVENKAMP (1994), at 239.

3 Theoretical insights

There is no generally accepted theory that would provide a framework within which to assess the implications of joint ventures for social welfare. They have attracted favorable attention from economists who have interested themselves in the influence of transaction costs on legal and economic conduct and structures.³⁴ Transaction cost economics explains the relationship between hierarchies (firms) and markets (price), which are two distinct and alternative mechanisms of coordinating the activities of factors of production.³⁵ Typically, a firm purchases inputs to obtain products to be sold in the marketplace. In choosing its production and marketing strategy, it may have recourse to the market, develop cooperative agreements or proceed by internal organization to carry out this process. Firms will thus choose the alternative mode of organization that has superior efficiency properties based on a comparative assessment of markets and hierarchies.³⁶ If integration is preferred over market procurement, there must be some compelling reasons, such as transaction cost savings, the magnitude of which depends on how different transactions are assigned to governance structures.³⁷ The focus is on the motivation of cooperative strategies, i.e. operational advantages and efficiencies, which are increased by a reduction in transaction costs.

The theory of the firm, as developed by Coase and Williamson,³⁸ can thus be usefully connected to joint ventures. In the United States, such connection has been explicitly drawn

³⁴Economic thought informing about business strategies is known as transaction cost economics based on the proposition that economic institutions of capitalism have the main purpose and effect of economizing on transaction costs. WILLIAMSON, O. *Economic Institutions of Capitalism: Firms, Markets, Relational Contracting*. New York. Free Press, 1985, at 17. The problem of economic organization is seen as a problem of contracting which involves both ex ante costs (drafting, negotiating and safeguarding an agreement by e.g. common ownership) (id. at 20), and ex post cost (including e.g. dispute settlement, haggling costs to correct misalignments and bonding costs of effecting secure commitments) (id. at 21). For a discussion of this theory in joint venture context, see e.g. GELLHORN 257 and EC study.

³⁵ WILLIAMSON, O. Transaction-cost economics. In SCHMALENSEE, R. and WILLIG, R (eds.). *Handbook of Industrial Organization*. Volume I. Elsevier Science Publishers, 1989, 135, 150-59; Markets and Hierarchies.

³⁶ Id. at 88.

³⁷ Id. at 103 (contending that transaction costs are the main factor responsible for vertical integration, although various other factors, such as strategic purposes, scale economies and externalities may play a supporting role).

³⁸See COASE, R.H. The Nature of the Firm, 4 *Economica* (n.s.) 386 (1937); COASE, R.H. The Firm, the Market, and the Law (1988); The Nature of the Firm: Origins, Evolution, and Development (Oliver E. Williamson & S. Winter, eds. 1991); HOVENKAMP, H. Market Efficiency and the Domain of the Firm, [18 J. Corp. L. 173 \(1993\)](#).

by Hovenkamp³⁹ and Gellhorn & Miller⁴⁰ and in Europe by Neven⁴¹. This theory explains that when making decisions about production and distribution a firm weighs the incremental costs and benefits of purchase on the market against the incremental costs and benefits of internal production, selecting the alternative that promises to be most profitable. Using the market is itself costly, since one must seek out the optimal supplier, trust the supplier to produce efficiently at low cost, and negotiate a contract specifying all desired terms. A firm will be likely to opt for self-production, if it does not have sufficient certainty about other firms. More generally speaking, if the costs of dealing with another firm, including uncertainty costs, exceed the costs of making the input for oneself, the firm will organize this activity inside the firm, rather than purchasing from the market.⁴²

The relevance of these theories in the study of joint ventures lies in the fact that a joint venture allows to internalize and thus reduce transaction costs. For instance, in a high technology industry, collaborative R&D is seen as a solution to spread the risk of investment and eliminate appropriability problems and duplication of efforts.⁴³ Consideration of transaction cost allows to draw a number of assumptions about the firms' behavior and the necessity to cooperate. The same factors can be considered to guide the partners when they decide to create a joint venture, including the choice of its structure and scope. As pointed out by Hovenkamp, the situation is more complex than that of a simple firm in that participation in a joint venture typically involves elements of both self- production and contracting.⁴⁴ For instance, a production joint venture typically requires inputs and assets from the parent firms and the latter have to agree upon a number of issues to make the venture function. For any given input, the cost of joint production with one or more other firms is compared to the cost of purchase on the market and that of self-production, risk being one of the many costs that must be counted. On the one hand, the formation of a joint venture involves similar costs as recourse to the market, such as locating proper trading partners and trusting them, negotiating

³⁹HOVENKAMP, H. Exclusive Joint Ventures and Antitrust Policy, 1995 *Colum. Bus. L. Rev.* 1. See also HOVENKAMP, H. Market Efficiency and the Domain of the Firm, [18 J. Corp. L. 173 \(1993\)](#).

⁴⁰GELLHORN & MILLER, *Antitr.Bull.* 1997, 851, 854-855.

⁴¹NEVEN, D, PAPANDROPOULOS, P. and SEABRIGHT, P (1998), *Trawling for Minnows*, p. 81-93.

⁴²COASE, supra footnote 48; WILLIAMSON, O. Markets and Hierarchies: Analysis and Antitrust Implications (1975); WILLIAMSON, O. Economic Institutions of Capitalism: Firms, Markets, Relational Contracting (1982).

⁴³The school of Industrial Economics explain joint ventures by the need to overcome market imperfections. For example, Ordover and Baumol (1988) have shed light in the virtues of research JVs as solving market failures relating to the dissemination of knowledge, when it is an essential market asset, in industries involving high technology and sophisticated innovation.

⁴⁴HOVENKAMP, H. Exclusive Joint Ventures and Antitrust Policy, 1995 *Colum. Bus. L. Rev.* 1.

detailed contracts and creating the proper incentives.⁴⁵ On the other hand, joint ventures may also involve problems of internal organization (hierarchy), since their production can be considered "internal" to the joint venture itself, although it is carried out jointly with other firms. In line with transaction cost economics, the profit-maximizing prospective partners will choose the joint venture format, when the combined costs of bargaining and organizing a joint venture are less than the costs of either a pure market purchase or of pure self-production.

What can be derived from the transaction cost economics is, hence, that the pursuit of the parties' private benefits dictates that joint ventures are calculated to reduce the costs or increase the revenues of participants. If this is not done only to increase the parties' market power for instance in a joint sales agency used as a sham for a cartel without an efficiency justification, joint ventures can be considered presumptively efficient. Transaction cost economies are most obvious in vertical joint ventures, e.g. those producing an input for the parents. Hierarchical or managerial integration is substituted for market transactions, and thus the costs associated with managerial decision-making are substituted for those of gathering market information and executing purchases and sales. In such case, an efficiency gain results from lower managerial costs than the cost that would be caused by a market linkage.⁴⁶

The approach of transaction cost economics is also instructive with regard to the collateral agreements that typically accompany the formation of a joint venture.⁴⁷ Any cooperative activity entails difficult transactional problems because the participants bring differing capabilities, firm cultures, and management styles to bear on the governance and operation of the collaboration. Moreover, one participant may seek to take a free ride on the other participants' efforts and investments in R&D, marketing or other areas of activity. For instance, when a participant in a distribution joint venture engages in extensive marketing of the product, the other participants would benefit freely from its efforts if they could sell the product without limitation in the same territory. Such opportunistic behavior can be

⁴⁵See WILLIAMSON, O. Transaction-Cost Economics: the Governance of Contractual Relations, 22 J.L. & Econ. 233 (1979).

⁴⁶ WILLIAMSON, O. The Vertical Integration of Production: Market failure Considerations. 61 *Am. Econ. Rev.* 112 (1971);

⁴⁷Much of the academic scholarship that demonstrates how collateral restrictions can serve legitimate ends in a joint venture began to emerge in 1960's. GELLHORN, p. 256-257, with references to WILLIAMSON, O. *Economic Institutions of Capitalism : Firms, Markets, Relational Contracting*. New York. Free Press, 1985, at 17. The problem of economic organization is seen as a problem of contracting which involves both ex ante costs (drafting, negotiating and safeguarding an agreement by e.g. common ownership) (id. at 20), and ex post cost (including e.g. dispute settlement, haggling costs to correct misalignments and bonding costs of effecting secure commitments) (id. at 21).

effectively discouraged by introducing appropriate contractual restrictions into joint ventures, for instance by assigning each party certain customers or exclusive sales territories, which is normally strictly forbidden under cartel rules. If, however, these restrictions allow to avoid free-rider concerns, they increase the efficiency of the collaboration and thereby reduce transaction costs.⁴⁸ This way, customer and territorial restrictions as well as vertical integration may operate to economize transaction costs. Collateral restraints can thus increase the efficiency and serve legitimate ends in a joint venture. Free rider considerations have been largely taken into account in the modern U.S. antitrust law, whereas the EU approach has been less permissive towards free rider arguments in connection with territorial restrictions, due to the traditional market integration goal pursued by the Treaty.

Besides offering interesting insights into business strategies, the above described theories are relevant for this study in that they explain the motivations for which parties normally decide to engage in collaborative activity. In the specific context of joint ventures, Gellhorn and Miller⁴⁹ have argued, drawing on Coase's⁵⁰ and Williamson's⁵¹ works, that the structure or degree of integration of the joint venture does not provide any useful information on the future competitive behavior of the parties, i.e. on their purpose, the likelihood of other entry or the benefits or harms that can be expected to result. Rather, in terms of transaction cost economics the structure can often be better explained by a search for efficiencies, a response to legal requirements or tax consequences. The degree of integration depends thus generally on what form the parties judge as best adapted to achieve their objectives and does not prejudge their competitive strategies nor the possible efficiency gains. In terms of policy implications, this suggests that the structure, form or degree of integration of the joint venture would not form a valid basis for distinguishing agreements with a legitimate purpose from those that can be considered illegal at the outset without need to examine their effects, such as cartels. In concrete terms, this means drawing the borderline between the per se prohibition and the rule of reason, or their equivalents. The relevant parts of this work will explore how this distinction is drawn in the EU and the US, respectively.

⁴⁸ WILLIAMSON, O. *Economic Institutions of Capitalism : Firms, Markets, Relational Contracting*. New York. Free Press, 1985, at 19 and 85-130 (discussing vertical integration); see also quotations in GELLHORN, p. 256-257.

⁴⁹ GELLHORN & MILLER, *Antitr.Bull.* 1997, 851, 854-855.

⁵⁰ COASE, R. The Nature of the Firm. 4 *Economica* 386 (1937),

⁵¹ WILLIAMSON, O. Transaction-cost economics. In SCHMALENSEE, R. and WILLIG, R (eds.). *Handbook of Industrial Organization*. Volume I. Elsevier Science Publishers, 1989, 135, 150-59.

4 Effects on competition and social welfare

The legal approaches adopted in the EU and the U.S. can only be understood against the effects that joint ventures have on competition and social welfare in general, which as such has been abundantly documented and analyzed since the 1960s.⁵² The private benefits pursued by the partners through their cooperation may also result in social benefits through efficiency gains, when such gains are passed on to the consumers in lower prices or better products. Apart from the socially harmful acquisition of market power and elimination of competition, the potential social benefits resulting from joint ventures mostly relate to the realization of legitimate business purposes.⁵³

Efficiencies

By expanding the parents' capabilities, integration through joint ventures enhances economic welfare and increases competition, as compared with cartel-like coordination which simply raises prices by restricting output. When the result is new competition by companies that may not have entered the market on their own, or an increase in the productive capacity and output in the marketplace, the joint venture clearly has the effect of promoting competition.⁵⁴ Consumers and buyers normally also benefit from enhanced choices of available products, where the venture is involved in developing or manufacturing a new product or providing new

⁵²For comprehensive studies, see MEAD, W. The Competitive Significance of joint ventures, *The Antitrust Bulletin*, Fall 1967, Vol. XII, pp. 819-849; BRODLEY, 95 *Harv.L.R.* 1523 (1982); PITOFSKY, 74 *Geo. Law Journal* 1605 (1986); DUNCAN, L. Impacts of New Entry and Horizontal Joint Ventures on Industrial Rates of Return. 64 *Review of Economics and Statistics* 120 (1982); PFEFFER, J. and NOWAK, P. Joint Ventures and Interorganizational Interdependence. 21 *Administrative Science Quarterly* 398 (1976), see also SHAPIRO and WILLIG, 4(3) *J. Econ. Perspectives* 115, 116-118 (1990); WERDEN, G. 66 *Antitr.L.J.* 701, 703-4 (1998); MCFALLS, M. The Role and Assessment of Classical Market Power in Joint Venture Analysis. 66 *Antitr.L.J.* 651 (1998); CORREIA, 66 *Antitr.L.J.* 737 (1998). Although most of these contributions are rather old, they still appear to be valid as to the type of competitive risks involved in joint ventures.

⁵³These motivations have been thoroughly discussed in: DOZ, Y., HAMEL, G. and PRAHALAD, C. Collaborate with Your Competitors - and Win. 67 *Harvard Business Review* 133 (1989); BOYLE, S. The Joint Subsidiary: an Economic Appraisal. 5 *Antitrust Bulletin* 303 (1960) at 20-23; COMPTON, 61 *Antitr.L.J.* 861 (1993); and in OECD (1986).

⁵⁴OECD (1986), at 22.

services.⁵⁵

The possible efficiency gains may result in their three general forms, i.e. allocative, productive and dynamic efficiency. As discussed in subsection 3 above, transaction cost economics indeed explains that joint ventures are calculated to reduce the costs of participants, and these efficiency gains ideally benefit both the participants and their customers. A joint venture can orient productive activity to correspond to consumers' needs and desires so that appropriate quantities of desired products are produced (allocative efficiency, i.e. prices will be equal to costs, with an appropriate return on capital); it can reduce the production costs by allowing to limit excess in supplies as well as by promoting economies of scale (productive efficiency); and finally, it can promote innovation by facilitating and speeding the inception of new products or more powerful technologies and by directing investment to adequate uses (dynamic efficiency).⁵⁶ These efficiencies benefit society by reducing costs, facilitating or speeding the introduction of product and process improvements, and eventually increasing output and lowering prices, depending upon the circumstances.⁵⁷

These efficiencies can be achieved in various ways the most important of which coincide with the business objectives of joint venture arrangements.⁵⁸ The benefits of *spreading the risks* associated with investment in a new product or in a new geographic area are well-known.⁵⁹ A classic example is a situation in which firms are unable or unwilling to assume the entire risk

⁵⁵ On the other hand, if two rivals decide to form a horizontal joint venture in the same market in which they both manufacture a homogenous product by combining existing capacity, the market does not benefit from a new entry regardless of a new unit in the market. SULLIVAN & GRIMES (2000), at 655-656; KWOKA & WHITE, p. 56.

⁵⁶ GLAIS, *Revue d'économie industrielle*. No. 76, 1996, at 7. For elaborated discussions, see WESTON J. and ORNSTEIN S. Efficiency Considerations in Joint Ventures. 53 *Antitr.L.J.* 85 (1985); BRODLEY, J. Proof of Efficiencies in Mergers and Joint Ventures. 64 *Antitr.L.J.* 575 (1996).

⁵⁷ ABBOTT, A. Joint Production Ventures : The Case for Antitrust Reform. 58 *Antitr.L.J.* 715, 716-719 (1989).

⁵⁸ This format appears in all stages of the development, production and marketing of products and services in most industrial and commercial sectors. Sectoral distribution of joint ventures shows that there has been a trend away from their traditional focus in the energy, chemicals, and metal industries, towards areas where the technological development is rapid and pressure for constant product development is strong, such as telecommunications, media, financial services industries, electronic components and computers. They are also frequently used in other fields, such as automobile and aerospace industries which are typified by high entry costs, globalisation and substantial operating risks. See e.g. OECD (1996); GARRETTE and DUSSAUGE (1995), at 69; also discussed in CONTRACTOR, F. and LORANGE, P. *Cooperative Strategies in International Business*. Lexington Books, 1988., at 105-106.

⁵⁹ See e.g. CONTRACTOR and LORANGE (1988), at 11-12 and the literature cited there; also discussed in OECD (1986), at 23. Practical examples of risk sharing are found in ABBOTT, 58 *Antitr.L.J.* 715, 716-717 (1989); for a more specific discussion in high technology industries, see also KATTAN, 61 *Antitr.L.J.* 937, 939-940 (1993).

of a project but where each is willing to enter the market with partners who will share the risk, which in turn is likely to spur innovation. Motivations relating to *sharing costs* are closely linked to the risk sharing. The increasing pace of innovation in many industries forces companies to invest heavily on product and process development, which eventually benefits consumers in terms of cheaper or better products and thereby enhances social welfare. The required investments may be beyond many firms' reach, particularly small competitors, unless they can share the costs and financial burdens.⁶⁰ Even if the parties are able to enter the market separately, joint participation may permit operation at an earlier date or on a more efficient scale.⁶¹

Achievement of *synergies by combining or pooling complementary assets* is another legitimate business objective pursued by cooperative strategies where companies lack in particular competences or resources to secure gains through links with others possessing complementary skills or assets.⁶² Efficiencies result for instance when, by pooling resources, such as know-how and patents, firms may be able to produce a superior product, or one partner may cede the rights to partially developed process to another firm which refines it further, with the fruits of the development to be shared in a joint venture. Formation of a joint venture can also permit the realization of *economies of scale or scope*,⁶³ by combining manufacturing operations of the participants, or by jointly developing and promoting a new brand. This way their facilities are coordinated and dedicated to a larger aggregate volume of output than would otherwise be achieved.⁶⁴ Another traditional justification for joint ventures is that they can enable two or more firms working together to perform an activity at *minimum efficient scale*, while a single firm acting alone could not.⁶⁵ On the other hand, they may allow to *avoid unnecessary social waste caused by duplication of efforts*, as competitors may

⁶⁰If cooperation is not pursued, prohibitive costs may discourage investments and thereby reduce the rate of innovation to the detriment of economic welfare. ABBOTT, 58 *Antitr.L.J.* 715, 718-719 (1989).

⁶¹PITOFISKY, 74 *Geo. Law Journal* 1605, 1607 (1986); CONTRACTOR and LORANGE (1988), 9-15.

⁶²For examples in practice, see CONTRACTOR and LORANGE (1988), at 13; see also COMPTON, 61 *Antitr.L.J.* 861 (1993); and GARRETTE and DUSSAUGE (1995), at 51-74.

⁶³I.e. expansion of the product line by carrying over the investment in one product to benefit operations in a related product or field.

⁶⁴Ibid. 717-718 (1989). See also statement of Chairman James C. Miller, III, Commissioners George W. Douglas, and Terry Calvani concerning proposed GM/Toyota joint venture, 48 Fed. Reg. 57, 314 at 57, 315 (Dec. 29, 1983) (« ... daily accumulation of knowledge regarding seemingly minor details is a more important source for increased efficiency than a broad but shallow understanding of Japanese methods. Such in depth knowledge appears to be achieved only through the kind of close relationship the venture will allow. »).

⁶⁵HOVENKAMP (1994), at 187.

otherwise in large part duplicate their R&D and production activities in an attempt to be the first to develop a commercially successful product and process improvement.⁶⁶

Finally, as explained in the preceding section describing the approach of transaction cost economics, joint ventures may allow the *internalization of externalities*. In a normal course of their business, firms incur a number of expenses that may be captured by other market participants as free riders without participating in the cost (i.e. externalized). Such expenses result particularly from marketing or R&D activities. For instance, forceful advertising by an input manufacturer to promote its product benefits all the firms using this input in their final products (e.g. Intel's microchips in computers).⁶⁷ Similarly, investment in R&D may result in product or process improvements which other firms on the market may imitate without participating in the cost. Sometimes incentives to invest in these kinds of activities can be rationalized more efficiently through vertical integration by a merger or a joint venture rather than adjusting these externalities through the market.⁶⁸

Anticompetitive harm

Hence, there is no doubt that joint ventures are often a very attractive strategy for businesses to reduce the costs and risks or expanding current capacity, entering new markets, or developing new products. While these business impacts generally reflect social benefits as well, private and public benefits do not always coincide. Obviously, the formation of a joint venture that significantly reduces competition by creating excessive market power enhances private benefits at the expense of public interest by reducing output, raising prices or deterring innovation. Even presumptively effective joint ventures may pose competitive threats or they may not invariably be the most efficient alternative or less damaging to competition than other alternatives. As pointed out by Hovenkamp, the reason for possible inefficiencies is that although profit-maximizing firms decide whether to participate in joint ventures by weighing the costs and benefits of the venture against the costs and benefits of alternative forms of organization or contract, firms are concerned only with private costs and benefits, not with

⁶⁶Unlike independent rivals, members of such a venture may have an incentive to diversify their R&D activities, since the better the innovative product that is ultimately developed, the higher are the financial returns that the parents are to share. See ABBOTT, 58 *Antitr.L.J.* 715, 718 (1989).

⁶⁷The example in parenthesis comes from SULLIVAN & GRIMES (2000), at 657 (e.g. Intel's advertising convinces buyers that its microchip is superior and thus benefits also computer manufacturers, such as IBM and Compaq, that are known to use Intel chips).

⁶⁸Economic literature concerning primarily vertical mergers is vast. See e.g. RIORDAN and SALOP. Evaluating Vertical Mergers: A Post-Chicago Approach. 63 *Antitr. L. J.* 513, at 529 (with bibliographical references).

social cost or gain.⁶⁹

Professor Brodley has distinguished three main types of anticompetitive risks with regard to joint ventures: collusion, loss of potential competition, and market exclusion.⁷⁰ To these, other commentators have added the use of collateral restrictions⁷¹, a stifling effect (i.e. the capacity of the parents to block the joint venture from expanding into their fields),⁷² elimination of competition between the parents and the joint venture, as well as increases in entry barriers.⁷³ The typical restrictions of competition between the parties or with regard to third parties may result explicitly or implicitly from the relationships with the parties or from the mere existence of the joint venture. First, the joint venture would be likely to cause the parties to compete less vigorously among themselves since competition would harm their joint venture interest. Second, the existence of the joint venture may facilitate collusion among the parties, as it allows easier monitoring and detection of possible deviation.⁷⁴ The freedom of action left to the parents may vary significantly from one venture to another. At one extreme they may choose to retain complete freedom to engage in all the functions which the joint venture itself carries out ; at the other extreme they may accept restrictions against any activity in the relevant market either by way of legal obligation contained in their agreements, or as the calculated unilateral choice of an undertaking unwilling to compete with its own subsidiary.⁷⁵

Joint ventures affect markets by creating economic units or groups acting together rather than independently in competition with each other. Joint activity may reduce uncertainties concerning the competitive strategies of the parent firms (behavioral aspects) and affect the level of output as well as the number of actual or potential competitors in the market (structural aspects). Structural effects depend on how the collaboration is situated in the market in relation to its parents (horizontal, vertical or conglomerate) and whether it creates a

⁶⁹HOVENKAMP, H. Exclusive Joint Ventures and Antitrust Policy, 1995 *Colum. Bus. L. Rev.* 1, 15-16. For example, although the cartel is socially costly, the firm will participate if it calculates that private benefits exceed private costs and risks, including the risk of detection and prosecution for antitrust violations.

⁷⁰BRODLEY, 95 *Harv.L.R.* 1523, 1530-34 (1982); see also OECD (1986), at 24-26.

⁷¹See e.g. WESTON and ORNSTEIN, 53 *Antitr.L.J.* 85 (1985), and PITOFISKY, 74 *Geo. Law Journal* 1605, 1614-15 (1986).

⁷²PITOFISKY, 74 *Geo. Law Journal* 1605, 1612-13 (1986).

⁷³Discussed in HAWK (1987), at 301 et s.

⁷⁴KITCH, 53 *Antitr. L.J.* 957, 961-962 (1985).

⁷⁵GOYDER (1998), at 430 ; see also KITCH (« As a legal matter, it is a reasonable implication from the existence of a joint venture that the parties owe a fiduciary duty to each other not to engage in competition that would harm the venture » even in the absence of an express obligation).

new competitive force on the market (deconcentrating effect) or replaces two or more parent firms on the market by one (concentration effect). Assessment of market power in connection with joint ventures may be a very complex undertaking. McFalls has identified specific factors to be taken into account in this context as potentially mitigating market power concerns, such as: (i) competition among the parents outside the joint venture; (ii) competition between the parents on price and output within the joint venture; and (iii) competition by the participants against the joint venture through other joint ventures.⁷⁶

Obviously, where the parent firms remain competitors, they are also capable of restricting this remaining competition. The possibility to restrain competition in markets outside the joint venture (spill-over effect), is potentially present in joint venture scenarios in which the parents remain independent competitors in vertically related or neighbouring markets.⁷⁷ A risk of anticompetitive conduct may arise from the information exchanges and other contacts between the parties, which may spill over to their own activities and facilitate collusion on prices, output or other competitively sensitive variables. For instance a pure R&D or production joint venture may involve a danger that the cooperation will lead to collusion in the product market.

5 Intersection of collusion, collaboration and concentration

Whilst joint ventures affect competition the same way on both sides of the Atlantic, the perception of these effects has not been without controversy and confusion, particularly as compared to mergers. To highlight their particular nature, legal professionals have often used a spectrum where collaborations are placed somewhere in between the two anchoring points, cartels and mergers.⁷⁸ In this continuum cartels – joint ventures – mergers, at the cartel end, competitors fix prices and/or output level or share markets without integrating any of their

⁷⁶MCFALLS, M. The Role and Assessment of Classical Market Power in Joint Venture Analysis. 66 *Antitr.L.J.* 651 (1998); CORREIA, 66 *Antitr.L.J.* 737, 755-759 (1998); see also US *Antitrust Guidelines for Collaborations Among Competitors* Issued by the FTC and DOJ on April 2000, at section 1.3. (available at : www.ftc.gov/opp/joint_vent/).

⁷⁷It is assumed that if the parents are competitors in markets that have no connection to the joint venture activity, their possible collusion in those markets would not directly result from the existence of the joint venture and would thus be a separate issue. In other words, although a collusion risk may exist, it is not the joint venture that makes anticompetitive communication “inevitable” or “reasonably likely”, as there are normally other ways for such communication. This kind of risk should therefore not affect the validity of the joint venture itself but should be assessed and remedied separately. See WERDEN, at 716 n. 60; 65.

⁷⁸See e.g. AREEDA and KAPLOW (1988), at 270; PITOFISKY, R. 74 *Geo. L. J.* 1605 (1986); HAWK, 63 *Rev. d'éc. industrielle* 148 (1993); HAWK, B. Concentrative/Cooperative Joint Ventures : Metaphysics and the Law. EC Commission, Ostend, September 12, 1990.

assets or functions and with the sole aim to eliminate rivalry over each others' customers in order to increase their own profits and market power to the detriment of consumers.⁷⁹ Consequently, having little or no potential to serve useful social purposes and to achieve economic efficiencies, cartels are considered the most dangerous form of competitor collaboration.⁸⁰ The theoretical and empirical economic basis for challenging cartel behaviour per se is well known and documented.⁸¹

Mergers, in turn, imply full integration of the parties and loss of their independence in the market.⁸² In fact, mergers are functionally similar to cartels in that they eliminate competition between the parties, since two or more competitors merge into one.⁸³ On the other hand, mergers differ from cartels in that they normally have a legitimate objective to achieve certain efficiencies, such as economies of scale and synergies, to reduce costs. Moreover, the terms of a merger do not tell what the future conduct of the merged firm will be on the market. The effects of a merger are therefore structural rather than behavioral, since it affects directly the number of sellers and buyers in the market. A merger between competitors necessarily increases market concentration, as the formed entity substitutes for the previously independent parties in certain market.⁸⁴ By combining their forces, the parties may be able to

⁷⁹In a normal competitive environment the driving force is uncertainty of the competitors' behavior and reactions, and the purpose of a cartel is to reduce these uncertainties. If no material deviation occurs, prices will be kept artificially high and/or output restricted.

⁸⁰Being so blatantly illegal, cartels normally operate in the conditions of utmost secrecy, which makes their detection and finding evidence often very difficult. This is why many jurisdictions have introduced leniency programs by which antitrust authorities grant either full immunity from fines or a reduction of fines to cartel members that disclose their own infringement.

⁸¹ See, e.g., F. M. SCHERER & DAVID ROSS, *Industrial Market Structure And Economic Performance* 235-48 (3d ed. 1990).

⁸²For antitrust purposes, the concept of merger itself requires a departure from theories of corporate law, as it catches a wider range of inter-corporate relations including acquisitions of control, and it is generally irrelevant whether either or both corporations survive as a matter of corporate law. In corporation law the concept refers to the amalgamation of two or more undertakings to form a new corporation or the acquisition of all assets in one corporation, which implies that one partner of the transaction is always eliminated. See e.g. MESTMÄCKER, E.-J. The concept of Merger in Merger Control Legislation. In *International Harmonization of Competition Laws*. (CHENG, C.-J. et al., ed. 1995), at 27 ; see also AREEDA and KAPLOW (1988), at 793 (defining the merger concept as « a permanent union of previously separate enterprises »). In antitrust literature, terms merger and acquisition are generally used interchangeably to cover any methods by which firms legally unify ownership of assets formerly subject to separate control. GELLHORN, E and KOVACIC W. *Antitrust Law and Economics in a nutshell*. West Publishing Co. 1994 (4th ed.), at 348.

⁸³See e.g. *Chicago Prof'l Sports*, 95 F.3d at 606 (The “common element for both coordinated activity and mergers is that both deprive the marketplace of the independent centers of decision making that competition assumes and demands. Two or more entities that previously pursued their own interests separately are combining to act as one, which not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction.”).

⁸⁴ The term « concentration » associated with mergers can also be characterized either by the concentration of assets or concentration of power, i.e. acquisition of control of another undertaking. See VOGEL, L. *Droit de la concurrence et concentration économique*. Paris, Economica, 1988, at 364 et s.

increase their market power. If a merger leads to undue concentration of market power, it may raise the risk of collusion among the remaining firms in the relevant market (coordinated effect) or lead to price leadership and unilateral abuse of that power (unilateral effect). Mergers among firms with substantial market shares also reduce overall competition in a market and limit the pressure on the remaining firms to improve and innovate.

From the perspective of this study, the critical question is how joint ventures compare with cartels and mergers on this spectrum, as they typically combine both behavioral and structural elements. In joint ventures, the parents act as a single unit for the purposes of the venture but retain their independent existence for other purposes without entirely abandoning their independent corporate structure, which justifies their qualification as “partial mergers”.⁸⁵ Unlike outright cartels, genuine joint ventures are typically accomplished by integration of productive facilities and assets, and they normally pursue and achieve legitimate business advantages and efficiencies. They are normally not operated in secrecy like cartels but are frequently announced in press, often after antitrust clearance.⁸⁶ This is true for any kind of legitimate cooperation agreements whether or not they involve the establishment of a separate business entity. In this context, it is useful to recall that the concept of joint venture as such can be broadly construed to include any kind of efficiency-enhancing horizontal agreement involving some degree of economic integration. For the purpose of this study, the term was defined in subsection 2 above as including horizontal agreements involving some degree of integration of assets to undertake a common economic activity.⁸⁷ Therefore, while for instance asset swaps, patent pools and cross-supply agreements, which do not involve performance of joint functions as such, may involve similar issues from antitrust perspective, they are not specifically tackled in this work.

Whilst the distinction between cartels and joint ventures is rather simple, it is less obvious in relation to mergers.⁸⁸ As opposed to mergers, joint ventures normally achieve their objectives without the complete or permanent disappearance of one or more previously independent firms from the market. Each parent normally retains significant control over its contribution through a veto power, and the parents normally compete or deal at arms’ length outside the limited sphere of their venture. Another relevant difference with regard to mergers is that the

⁸⁵AREEDA, P. and TURNER, D. F. *Antitrust Law - An Analysis of Principles and Their Application*. Boston, Little Brown, Vol. IV, 1980 ; Vol. VII, 1986.

⁸⁶For the distinction between joint ventures and cartels, see HOVENKAMP p. 1160; see also BORK, p. 264.

⁸⁷See above p. 14.

⁸⁸The effects of limited joint ventures with regard to mergers have been well described in specialized literature. See e.g; AREEDA and KAPLOW (1988), at 270.

latter are by definition permanent, whereas joint ventures are often formed for a limited duration, leaving the participants thus at least potential competitors in the joint activity with the possibility of future competition between them. Moreover, while horizontal mergers necessarily reduce the number of competitors in the market (market exit situations), joint ventures penetrating new product or geographic markets introduce new competition (new entry situations).

Clearly, a fully integrated joint venture in which the parent firms combine their operations in a particular market, withdrawing themselves from that market, can be assimilated to a merger with respect to the product in question. In such event, the parties completely fuse their market power and can be considered to form one competitor the same way as in a merger scenario. As in a full merger, a single entity (the joint venture) takes the place of the former competitors in the relevant market. The result may be undue concentration of market power, which may deteriorate the market structure sufficiently to facilitate oligopolistic collusion with the other firms in the relevant market (coordinated effect) or price leadership (unilateral effect) the same way as a traditional merger. Complete integrations among firms with substantial market shares may also reduce overall competition in a market and limit the pressure on the remaining firms to improve and innovate. When the parents are no longer competitors, there is no potential for behavioural restraints between them. From the legal perspective, this justifies an identical treatment of fully integrated joint ventures and mergers.

When the integration is not complete, the remaining competition between the parent firms may reduce competition concerns when compared to full integration, which can be illustrated as follows:

1. <u>Joint R&D</u>		2. <u>Joint R&D&P</u>		3. <u>Full integration</u>
R&D	(joint)	R&D	(joint)	R&D (joint)
Production	(competition)	Production	(joint)	Production (joint)
Sales	(competition)	Sales	(competition)	Sales (joint)

The scope for competition reduces from left to right and, correspondingly, the restriction of competition between the parties increases from left to right. For instance, cooperation in R&D reduces the number of independent approaches to technological challenges and thereby limits competition at that level, whereas the parents using the technology resulting from their

common efforts still compete in keeping their production costs low and in selling the final product in competitive terms.⁸⁹ In the case of a joint venture involving production – with or without R&D - the parent firms sell the products independently. The parents' joint decision-making is thus limited to the output of the venture and it will not remove price competition between the parents. If the integration is deeper, conferring also the sales function to the common undertaking, such price competition would be eliminated as well.

Besides fully integrated joint ventures, total fusion of market power may occur in downstream marketing ventures in which competition on price and output between the partners is totally eliminated. There is, indeed, a general assumption that joint ventures acting in the market for the final products (e.g. sales and distribution ventures) involve greater risk to competition than those operating one or more steps away from such market (e.g. R&D or production).⁹⁰ It is logical that collaborations leaving the most potential for competition and discretion in marketing decisions would be less of concern than those eliminating competition at the marketing stage. Common sales agencies appear the most suspect since the cooperation touches directly the sales level and thus prices without preceding cooperation in productive activities. In such case, the parties would have to convince antitrust regulators about a legitimate purpose and positive efficiency effects of their collaboration to avoid challenge over cartelization. As pointed out by Neven et al⁹¹, the potential for collusion present in certain marketing joint ventures, corroborated by the fact that the joint venture may allow easier detection of possible deviations, may result in similar effect as elimination of competition through a merger.⁹²

Moreover, there is a risk that the information exchanges and other contacts between the parties within the joint venture may spill over to anticompetitive behavior in their own

⁸⁹ ORDOVER, J. and BAUMOL, W. (1988).

⁹⁰ See e.g. PITOFKY, R. A Framework for Antitrust Analysis of Joint Ventures. 74 *Geo. Law Journal* 1605 (1986).; TEMPLE LANG, J. Joint Ventures under the EEC Treaty Rules on Competition. *The Irish Jurist* 15, 31 (1977).

⁹¹ NEVEN et al. (1998), pp. 81-86, at 86 (« Whether a joint venture allows for collusion between the parents will ... depend in considerable detail on whether the terms of the contracts between the parents and the joint venture allow internalization of the pricing externality. Marketing and distribution joint ventures and cross-ownership of subsidiaries are two significant ways of doing so. »).

⁹² See however NYE, W. Can a Joint Venture Lessen Competition More Than a Merger ? 40 *Econ. Letters* 487 (1992) (concluding that in *Renault/Volvo* mutual partial equity interests and mutual majority interests arising in a cross-shareholding structure embodied in the joint venture may have produced greater anticompetitive effects than a merger). Note however that this analysis did not concern a traditional joint venture scenario but a specific case of cross-shareholding.

activities. This differs from a conventional merger scenario in which competition is eliminated only in the market in which the acquisition occurs, and other markets are generally not affected. Between the fully integrated and functionally limited joint ventures, there are other variations involving more complex structural and behavioral implications. The parents may decide not to withdraw from the relevant market but instead retain sufficient assets there to be able to compete within the same market in which the output of their joint venture is sold (a horizontal joint venture). If the parents participate in the price setting of the venture, this cooperation will inevitably have an influence on the prices that each parent sets for the same products. According to Sullivan & Grimes⁹³, this reduction of competitive incentives would be likely to occur regardless of how effectively the venture seeks to insulate against direct parental involvement in price decisions.

Antitrust approach to joint ventures is naturally not determined only on the basis of harmful effects to competition. Another relevant question is, how potential efficiency gains compare to those achieved through mergers and how direct the relationship between the degree of integration and efficiencies is. While similar efficiencies may often be achieved through different forms of collaborations, some concerns have been expressed about the lesser certainty of these gains in joint venture context. As Pitofsky pointed out in 1969, "*the assumption that higher levels of integration are likely to be associated with more substantial efficiencies ... is a premise underlying all of antitrust.*"⁹⁴ Furthermore, although there is no evidence that mergers are always efficient, some commentators agree that mergers may lead to more efficiency-enhancing integration than joint ventures.⁹⁵ The pro-competitive effects of a joint venture are normally maximized when the parties integrate their resources to create a new competitive entity with capabilities beyond those of the individual partners. When partners contribute few resources to joint ventures or assume little of the risk of a venture's success or failure, they are more likely to be acting for their own competitive benefit than to enhance economic efficiency. For instance, unintegrated marketing joint ventures may do little more than enhance the parties' ability to coordinate their pricing decisions and raise their profit margins. Without a combination of their partners' distribution networks, marketing

⁹³ SULLIVAN & GRIMES (2000), at 655-656; 661-662.

⁹⁴ Robert Pitofsky, Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of Penn-Olin, 82 HARV.L.REV. 1007, 1018 (1969), at 1623.

⁹⁵ See e.g. WERDEN, at 716; GONZALEZ DIAZ, F.E. Horizontal Co-operation agreements, Chapter 7 in Faull and Nikpay, The EC Law of Competition, 2nd edition, Oxford University Press 2007, p. 667.

alliances cannot offer customers a broader product line or enhance delivery or point-of-sale services.⁹⁶

It is notably in view of the net effects of joint ventures that the relevance of the continuum “cartel – joint venture – merger” faces some limits. Although it can be helpful in illustrating the variation of the degree of economic integration involved in joint ventures, it can be misleading if it is understood to reflect a continuum from a more harmful (cartel) to less harmful (merger). It would, indeed, be too simplistic to conclude that joint ventures involving limited functions and thus less integration than mergers would be more harmful in their overall effects on competition than fully integrated ventures that are closer to the merger end. In other words, while agreements may be placed on this spectrum on the basis of the degree of economic integration involved (i.e. the deeper the integration in terms of assets and functions the closer the arrangement would be to a merger, and vice versa), this placement does not necessarily indicate the net social costs and benefits of different types of joint ventures. This is because towards the merger end there is total elimination of competition between the parties whereas looser-knit agreements still leave scope for competition in activities that are not subject to cooperation. In fact, the net effects of joint ventures depend on a number of specific factors which cannot be derived from their respective position on this spectrum.

Overall, it appears thus fair to avoid oversimplifying the situation by any affirmative and absolute statement about joint ventures being generally less harmful or more harmful to competition than mergers and vice versa.⁹⁷ Categorical arguments indeed fail to take into account the fact-specificity of joint ventures and their effects, which do not warrant a general conclusion that this would be generally the case across the board. From the policy perspective, hence, the most reasonable instruction to be drawn from the relevant economic studies would be to avoid categorical solutions that generally either handicap or favor partial integrations through joint ventures over full mergers. This dissertation will explore how well

⁹⁶ PIRAINO, p. 918. As an example, the author mentions an agreement under which firms agree to coordinate their buying decisions which may enhance the profitability of the participants but if they do not share warehousing, ordering services, or means of transportation, inventory may be no more readily available to customers than if the parties had continued to purchase supplies separately.

⁹⁷ CHANG, H., EVANS, D. and SCHMALENSEE, R. Some Economic Principles for Guiding Antitrust Policy Toward Joint Ventures. *Columbia Business Law Review* 223, 263 (1998) (stating to be unaware of any evidence that, as a general matter, joint ventures would be more likely to result in net consumer harm than alternative forms of enterprise organization, such as mergers); see also GELLHORN, E and KOVACIC W. *Antitrust Law and Economics in a nutshell*. West Publishing Co. 1994 (4th ed.), at 254; and implicitly NEVEN et al. (1998), pp. 81-93; and BRODLEY (1982), pp. 1538-39.

the approaches chosen in the competition laws of the European Union and the United States reflect this basic consideration. Part I will indeed demonstrate that the initial EU approach to joint ventures was a prime example of creating forum shopping incentives and distortion of the firms' organizational choices by favoring fully integrated joint ventures over looser-knit collaborations. By comparison, as will be shown in Part II, such interference has arguably not occurred in the US.

PART 1 - CONCEPTUALISATION OF JOINT VENTURES UNDER THE EU COMPETITION LAW

Competition rules were included in the Treaty establishing the European Economic Community (EEC) in 1957, i.e. Articles 85 EEC and 86 EEC, which were renumbered by the Amsterdam Treaty establishing the European Community (EC) as Articles 81 EC and 82 EC and again by the Treaty of Lisbon Treaty as Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).⁹⁸ The EU Competition law system was characterised by the late arrival of merger control, as, unlike the European Steel and Coal Treaty,⁹⁹ the EEC Treaty of 1957 did not provide for merger control. It was not until 1990 that a proper statute (the “Merger Regulation” or EUMR)¹⁰⁰ entered into force and introduced a prior notification system to regulate large-scale merger activity at the Community level. The previously existing legal vacuum had disturbed the functioning of the competition law system for decades, as the political will to control mergers in the Community was frustrated by the insufficiency of the available means. The classical competition rules, i.e. Articles 101 and 102 TFEU, were primarily designed to catch market conduct and agreements already made and implemented rather than *ex ante* control of market concentration. Although this legal vacuum was partially filled by broad interpretation of the classical rules, many mergers and full integrations of economic activity escaped the EU rules and thereby control by the European Commission until the introduction of the Merger Regulation.

This is the legal context in which the approach to joint ventures developed. The outer limits of the merger concept had to be carefully drawn to avoid that a large number of them escape antitrust challenges under the classical rules. It will become apparent along with this dissertation that the resulting dogmatic separation of structural and behavioural aspects of joint ventures has marked all the subsequent developments in this area. These developments occurred by a number of successive amendments of both legal and policy instruments. Apart

⁹⁸As such, the Treaty of Lisbon is not a treaty in its own right but is composed of a series of amendments to the existing treaties (the Treaty on European Union, introduced by the Maastricht Treaty in 1992, and the Treaty establishing the European Community, introduced by the Treaty of Rome in 1957) and is the successor to the Treaties of Amsterdam and Nice. For the sake of clarity, as only the numbering of the basic Articles for competition has changed, not their wording, references to the constituting Treaties will be to these provisions as numbered in the Treaty of the Functioning of the European Union (TFEU).

⁹⁹ Articles (66)1 and 66(5).

¹⁰⁰Council Regulation (EEC) No. 4064/89 of December 21, 1989 on the control of concentrations between undertakings, [1989] OJ L395/1, as rectified by [1990] OJ L257/13.

form the introduction of the Merger Regulation in 1990 and the severely criticised distinction between concentrative and cooperative joint ventures, the main legal reforms affecting joint ventures intervened in 1998¹⁰¹ (the "1998 Amendment") and 2004¹⁰² (the "2004 Amendment") when its revisions entered into force. The former replaced the concentrative-cooperative dichotomy by the concept of a full-function joint venture and it is the latest change in the conceptual framework concerning joint ventures in the EU competition law. In this context, the EU leaned on the German doctrine concerning the full-function concept rather than on the U.S. approach or the American-oriented critical literature. The 2004 Amendment, in turn, did not specifically affect these concepts but revised the substantive merger test, which – as will be argued in this study – has rendered the legal approach to spill-over collusion (i.e. the parties' collusive behaviour outside the joint venture) largely redundant. Moreover, the merger regime cannot be studied in isolation, as Article 101 TFEU remains relevant for many joint ventures. The relevant developments under that provision will therefore be studied in parallel, including the gradual breakthrough of economic analysis and the modernisation of the implementation framework by Regulation 1/2003, as well as the evolution of the decisional practice of the European Commission.

The interest of the specific developments and legal solutions adopted in the past is not merely historical. They are important not only to understand the current approach but also to track down the origins and reasoning behind these solutions, which will later make the comparison with the US system more meaningful. We will therefore identify and analyze the specific implications and problems encountered in the EU system within the evolving legal framework. Whilst several successive reforms have changed the treatment of joint ventures, the typical feature of the EU approach has been – and still is – that it emphasises lasting structural changes as a positive factor and makes a categorical separation between structural and behavioural aspects of joint ventures (Chapter 1.1). This approach has survived throughout the decades of application of competition rules but its implications have significantly changed within the evolving legal and policy framework (Chapter 1.2.). Finally, the impact of the revision of the substantive standard for mergers has to be separately

¹⁰¹Council Regulation (EC) No. 1310/97 of June 30, 1997 amending Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings, [1997] OJ L180/1.

¹⁰²Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, [2004] OJ L 24/1; see the results of the public consultation exposed on the website of DG Competition.

addressed to argue that certain solutions adopted in the past may no longer find a proper purpose and function in the current framework (Chapter 1.3).

1.1 DOGMATIC SEPARATION OF STRUCTURAL AND BEHAVIOURAL ASPECTS

In the European Union, fitting joint ventures into the frames of the competition rules has proved particularly problematic. The characteristic feature of the EU approach over time has been to classify them into strict categories which fall under the mutually exclusive regimes of merger control or Article 101 TFEU based on their structural and behavioural features. For this purpose, different conceptual tools have been employed, raising a number of interpretative issues and complications to the extent that the analytical emphasis has sometimes been on the operation of these legal classifications rather than the competitive effects of the transactions.¹⁰³ The issue is far from being purely conceptual, as it has had some more or less significant procedural, substantive and political implications over time. Most significantly, it has favoured mergers and merger-like joint ventures over more limited efficiency-enhancing cooperation between competitors, which has been customarily referred to as a "concentration privilege". It reflected the underlying idea that mergers, in view of their potential for economic benefits, should be prohibited only exceptionally when excessive market power is created and effective competition thereby impeded, whereas horizontal agreements should be subject to an *a priori* prohibition.

This Chapter will explain the doctrinal origins of the basic classifications prior to Merger Regulation (Section 1.1.1.), followed by the main features and implications of the distinction between concentrative and cooperative joint ventures (Section 1.1.2).

1.1.1 Origins

The doctrinal origins of the European approach must be traced down to the early years of antitrust enforcement within the Community during the era preceding the introduction of merger control, when the European Commission defined a narrow and restrictive concept of mergers which mostly remained outside the scope of the classic competition rules. Much of the early debate with regard to the approach towards mergers and joint ventures was concerned about the possibility to apply the behavioural rules of Article 101 TFEU to

¹⁰³ See CALVET, H. and BERLIN, D. *Semaine Juridique. Cahiers de Droit de l'Entreprise*, No. 47, 23.11.1995, p. 459 (« l'accessoire commande le principal »); HAWK & HUSER, 30 *C.M.L.Rev.* 1155, 1164 (1993) (calling this a « cart before the horse » dilemma).

structural transactions (1.1.1.1). The Commission attempted to overcome the deficiency of available tools to control mergers by construing the merger concept narrowly and, a contrario, scope of Article 101 broadly to cover practically all joint ventures, with the consequence that limited cooperation that left considerable scope for competition between the parties were under stricter scrutiny than those eliminating all competition between them. This was the case even though the vast majority of joint ventures received an exemption under Article 101(3), as they were still found to violate Article 101(1) and had to go through an onerous and time-consuming exemption procedure whereas mergers escaped such control (1.1.1.2).

1.1.1.1 Initial doctrinal developments

In the early decades of the enforcement of competition rules in the Community, when there was no specific instrument covering acquisitions and corporate restructurings, the crucial question was whether Article 101 TFEU could be applied to mergers and joint ventures. The Commission defined its initial position as early as 1966 in the Memorandum on industrial concentration (the “1966 Memorandum”)¹⁰⁴, concluding that the wording of Article 101 would in principle allow the inclusion of concentrations within the scope of Article 101(1) in so far as they were based on agreements between undertakings.¹⁰⁵ It adopted, however, a categorical approach that Article 101 only applied to agreements between companies that remained independent after the agreement had come into effect, which was not the case in a merger. Based on this distinction, Article 101 covered only arrangements whose purpose was “*no permanent change in the ownership, but a coordination of the market behavior of firms remaining economically independent*”.¹⁰⁶ The basic distinction between structural and behavioural arrangements was thereby established: concentrations changed the structure of companies in a permanent manner, whereas cartels altered the behaviour of independent undertakings.¹⁰⁷ The reasons for not applying Article 101 to concentrations pertained primarily to legal technicalities, such as the unsuitability of the sanction of nullity and the

¹⁰⁴ Commission of the European Communities : Competition Series No. 3 : The Problem of Industrial Concentration in the Common Market (1966), part III.

¹⁰⁵ Paragraph 5 of the 1966 Memorandum. The term “concentration” itself was defined as “*agreements limited to the total or partial acquisition of undertakings or to the redistribution of the ownership of undertakings by means of mergers, or the purchase of shareholdings or assets*”.

¹⁰⁶ The 1966 Memorandum, para. 15.

¹⁰⁷ “Whereas a cartel can be defined as an agreement between enterprises that remain independent, relative to certain market practices, the term ‘concentration of enterprises’ is used where several enterprises are brought together under a single economic management at the expense of their economic independence in a manner that indicates permanence. A cartel creates an obligation with regard to practices, whereas a concentration of enterprises brings about a modification of the internal structure of the enterprises.” Ibid. paragraph 31.

mechanism of exemptions with validity limited in time and the possibility of withdrawal, which were considered unsuitable for mergers involving significant investments and human resources.¹⁰⁸

As to joint ventures, specifically, the initial problem was how to fit joint ventures into this logic, as they are typically capable of bringing about structural changes in the participating firms and the market but involve, by the same token, behavioural aspects affecting the market conduct of the parties. The Commission had to decide whether they should benefit from the same immunity as total integration of economic activities through mergers, which required a clear definition of the merger concept. Some joint ventures, at least the fully integrated ones, are undoubtedly like mergers to any meaningful extent, and it would therefore not have been justified to treat them differently from mergers. The 1966 Memorandum did not explicitly define joint ventures that would qualify as concentrations, but made a primary distinction between market behaviour and a change in the ownership of the firms, as follows:

*“If after the concentration process, several independent enterprises continue to exist (for example, in the case of joint ventures), it will be necessary to examine carefully whether, apart from changes in ownership, the participating enterprises did not enter into agreements or concerted practices within the meaning of article 85... Article 85(1) continues to be applicable if the agreement does not result in a permanent change in ownership but only a co-ordination of the market behavior of firms remaining economically independent. In such circumstances, the arguments that militate against an application of Article 85 to concentrations **are** without force. The situation in such a case is actually that of a cartel, and not that of a reorganization of ownership.”¹⁰⁹*

This formulation spells out the general attitude of the Commission that has characterized the enforcement policy regarding joint ventures throughout the subsequent decades. It could actually be understood as addressing the main question surrounding a joint venture once it is functioning and as such subject to an ex post assessment, i.e. whether the parties' behavior on the market must be seen as joint conduct of a group of competitors or as unilateral conduct by a single entity. Yet, the enforcement practice of the European Commission developed through

¹⁰⁸Ibid, paragraphs 19-21. These problems and the contents of the 1966 Memorandum have been thoroughly discussed in BANKS, 11 *Fordh. Int.L.J.* 232, at 258-263 (1988); and VOGEL (1988), at 231-237 (discussing this principle as a theory of « double standard »).

¹⁰⁹ The 1966 Memorandum, para. 36.

exemption decisions in a notification procedure of Regulation 17/62, involving an ex ante assessment of the likely effects at the formation of joint ventures.

In the mid-1970's, the annual reports of the Commission indicated that problems of characterization of joint ventures as mergers or horizontal agreements arose primarily in situations where joint ventures operated as “genuine” and “independent” economic entities with all the characteristics of a company in itself.¹¹⁰ Such characteristics were not deemed to exist when joint arrangements amounted to cooperation agreements although they were organized in a form of a corporate entity, which was typically the case in joint buying and selling organizations, joint R&D as well as joint production ventures.¹¹¹ The very first cases under Article 101 TFEU involved joint ventures that provided such auxiliary functions on behalf of the parent companies.¹¹² The major difficulty for the Commission was to deal with the formation of joint ventures acting as independent economic entities, where the existence of the joint venture could affect the remaining competitive relationship between the parents by inducing them to engage in restrictive agreements or concerted practices with regard to that remaining competition.

To establish the dividing line between joint ventures qualifying as concentrations and those subject to cartel rules, the Commission established a doctrine of “partial concentrations” in the cornerstone decision *SHV-Chevron*¹¹³ which was to have a major influence on the following developments. In this case, the parents transferred their distribution networks for certain petroleum products and all related assets to their joint undertaking for a minimum of 50 years. Both parents ceased to retail the products covered and gave non-compete covenants to that effect, remaining, however competitors in the neighbouring product market. SHV kept the activities of extracting the raw materials but could not be considered a potential competitor, since it did not have access to the necessary refinery capacity to refine the raw

¹¹⁰Fourth Report on Competition Policy (1974), points 37-42 ; Sixth Report on Competition Policy (1976), points 53-57.

¹¹¹Fourth Report on Competition Policy (1974), point 42. As to joint production specifically, the Commission clarified that in industries where the investment expenditure was considerable a joint venture could not be considered a concentration if the joint production capacity remained below the capacity of each founding party and the joint production was to be sold separately by the sales departments of each parent.

¹¹²See e.g. *Cobelaz*, [1968] OJ L 276/13 (joint sales) ; *Henkel/Colgate*, [1972] OJ L 14/14 (joint R&D with, however, the venture's right to license to third parties), both exempted under Article 85(3). See Fourth Report on Competition Policy (1974), p. 26, for a list of ten joint venture cases decided under Article 85, and pp. 25-27 for a general discussion on the extent to which it was considered appropriate to apply the said article to joint ventures.

¹¹³*SHV-Chevron* [1975] OJ L38/14.

materials. All the relevant assets were pooled in the joint venture in the same way as in a traditional merger by permanently eliminating all actual and future competition between the parties in that field. Yet, *SHV/Chevron* escaped antitrust challenge since it could not be dealt with as a restrictive agreement under the behavioral analysis of Article 101 TFEU.¹¹⁴ The reasoning was based simultaneously on the irreversible nature of the change in the *internal structure of the founders* and the irreversible change in the *market structure* resulting from the definitive withdrawal of the founders from the joint venture market. On this basis, the Commission considered that the parents had lost their economic independence on the markets concerned as they could only act there through their joint subsidiaries.

This basic idea of the partial concentration doctrine, i.e. emphasizing both the means of the realization of the arrangement and its effects on the market structure, has retained relevance throughout the subsequent developments. Another case in which the Commission applied this theory was *Zip Fasteners*¹¹⁵. Two of the largest Community producers of zip fasteners, IMI and Heilmann, combined their interests to face competition from third country manufacturers and established a joint management company to hold the capital and to coordinate their activities in their jointly owned subsidiaries. According to the Commission the parents had « merged into a single economic entity » and could thus not infringe Article 101. There was thus no future scope for coordination of the parents' competitive behaviour within the joint venture's market because such competition - even potential - had been definitely eliminated in the same way as in case of full mergers or acquisitions of control. Moreover, the Commission considered that there was no a real risk of spillover effects in other markets on which the parent firms remained competitors, when such markets were “*technically and economically distinct from the market in which the joint venture operated and independent of that market*”.¹¹⁶

SHV/Chevron and *Zip Fasteners* were the only cases in which the Commission was officially ready to accept that a joint venture amounted to a concentration. In its subsequent practice, the

¹¹⁴ The parents transferred their distribution networks for certain petroleum products and all related assets for a minimum of 50 years. Both parents ceased to retail the products covered and gave non-compete covenants to that effect, remaining, however competitors in the neighboring product market. *SHV* kept the activities of extracting the raw materials, but could not be considered a potential competitor, since it did not have access to the necessary refinery capacity to refine the raw materials.

¹¹⁵ Reported in VIIth Report on Competition Policy (1977), paras. 29-32. A detailed discussion of this case is found in FINE (1989), at 8-9.

¹¹⁶ Sixth Report on Competition Policy (1976) (para. 55); *Zip Fasteners* (reported in VIIth Report on Competition Policy (1977), paras. 29-32.

test of irreversible market exit was systematically not met, and thus the Commission considered that the parties could coordinate their competitive behaviour since they remained actual or at least potential competitors in the joint venture's market, allowing thus intervention under Article 101 TFEU. This was illustrated in *De Laval-Stork*¹¹⁷ where the parents remained active in the closely related product and geographic markets, which meant that they had the possibility to step out of the joint undertaking and return independently to its market. Moreover, the parents' exit from that market could not be considered definitive in view of the limited duration of the joint venture, initially five years.¹¹⁸

The European Court of Justice was called to take position on the issue concerning firms that remain independent in connection with the acquisition of a minority equity interest in a competitor in *Philip Morris*.¹¹⁹ It confirmed that there was no obstacle to the application of Article 101 in cases where a competitor obtained legal or de facto *possibility* of influencing the competitive behaviour of another company be it by a shareholding or through subsidiary clauses. By analogy, this ruling was interpreted as the legal basis to support the application of Article 101 to joint ventures involving a situation where two or more competitors create or obtain control over the commercial conduct of another company.¹²⁰

Finally, it should be noted that mergers and partial concentrations did not fall in a complete legal vacuum. To catch mergers, the only remaining tool available for the Commission was Article 102 TFEU, but it was limited to cases where a merger could be viewed as an abuse of a dominant position of the parties or one of them and could not be used when such a position was only created.¹²¹ With regard to the formation of joint ventures, the Commission considered Article 102 TFEU in principle an appropriate instrument, provided that the effect was to strengthen the pre-existing dominant position of the founders or one of them.¹²² In

¹¹⁷*De Laval-Stork*, OJ L215/11 (1977).

¹¹⁸See para. 4 of the decision *De Laval Stork*.

¹¹⁹*British-American Tobacco Company, Ltd. v. Commission*, Joined Cases 142 and 156/84, Nov. 17, 1987; in literature referred to as the « Philip Morris » case.

¹²⁰See e.g. VAN DER ESCH, B. Joint ventures under the competition rules of the EEC Treaty. In *Exploiting the Internal Market : co-operation and competition towards 1992*. Kluwer Law and Taxation Publishers, 1988, 77, at 81.

¹²¹*Continental Can* [1972] OJ L7/25. The ECJ confirmed the Commission's decision in *Europemballage Corp. v. Commission*, Case 6/72 [1973] ECR 215, [1973] CMLR 199. Teleological interpretation of Article 86 in the light of the general objectives of the Community allowed to apply the said article to an acquisition of control.

¹²²In cases *SHV/Chevron* and *Kaiser-Estel*, op. cit., the Commission stated that Article 86 could have been, in principle, applied to both cases, but because of the limited size of the market shares in question no abuse of the dominant position had occurred. See the *Ninth Report on Competition Policy* (1980), at 91. It is also to be noted

reality, in the majority of cases the participants in joint ventures did not have a dominant position in the market, which explains the absence of any decisions condemning the formation of a joint venture as an abuse of a dominant position. Accordingly, Article 102 TFEU was not an efficient means to control mergers and partial concentrations which thus enjoyed a practical immunity from antitrust enforcement at the Community level.

1.1.1.2 Implications

The formal interpretation of the scope of Article 101 TFEU led to paradoxical outcomes in individual cases. It implied that permanent elimination of competition through an irreversible joint venture, in which the parent firms definitively withdrew from the market in question, was immune from scrutiny and challenge under Article 101 TFEU, whereas those in which some scope for competition remained, either because of the venture's limited duration or limited activities, were easily found as violating the first paragraph of that article. This implied that the parties had the onerous burden to show that the conditions for exemption were fulfilled to legalize the agreement under Article 101(3). The early approach in the EU thus clearly favoured permanent elimination of competition through mergers over temporary or otherwise more limited restriction of competition through cooperative activity.

Easy finding of an infringement

This can be illustrated by contrasting the Commission's cases *Henkel/Golgate*¹²³, decided in 1971, and *SHV/Chevron*¹²⁴, decided in 1975. In the former, a research joint venture - admittedly between two important competitors in the final product market which was oligopolistic - was considered to violate Article 101 on the grounds that the parents remained potential competitors in the venture's market and their agreement thus necessarily limited their freedom to conduct individual research. The joint venture was established for a limited period of time and its scope of activities was limited to research, an activity not involving production and sales of the final product and as such remote from the product market.¹²⁵ The

that the acquisition of a dominant position was not subject to Article 86, in line with the case law of the ECJ. See case *Continental Can*, op. cit.

¹²³ [1971] OJ L14.

¹²⁴ *SHV-Chevron* [1975] OJ L38/14.

¹²⁵ It is generally considered that joint ventures acting in the market for the final products (e.g. distribution ventures) involve greater risk to competition than those operating one or more steps away from such market (e.g.

parents continued to compete on the product market and even the competition for research activity was restricted only during the short period of the existence of the joint venture, implying that the parents regained rivalry after its termination. So in terms of antitrust economics such a case should have been treated more leniently than a full merger or a concentrative joint venture. As, however, at that time concentrative scenarios were not challenged under Article 101, the parties could have validly eliminated all competition between themselves without an antitrust challenge whereas here the parties were found to have committed an infringement of Article 101(1) and therefore needed an exemption which was granted for an initial 5-year period under Article 101(3).

In *SHV/Chevron*, by contrast, all the relevant assets were pooled in the joint venture in the same way as in a traditional merger by permanently eliminating all competition between the parties in that field. Hence, unlike in the case of a limited joint venture such as *Henkel/Colgate* and many other cases decided in the 1970's, the loss of competition and damage to market structure was permanent and therefore greater than in cases leaving scope for actual or future competition. Yet, *SHV/Chevron* escaped antitrust challenge since it could not be dealt with as a restrictive agreement under the behavioral analysis of Article 101. The reasoning in *De Laval-Stork* (1977)¹²⁶ is also interesting in this respect, since to bring the case under Article 101 and hence to find a violation of its first paragraph the Commission relied on the following factors: 1) the parent companies continued to operate as independent companies in their own markets and were not transformed into mere holding companies; 2) the parents remained active in the closely related product and geographic markets, which meant that they had the possibility to step out of the joint undertaking and return independently to its market; and 3) the joint venture was formed for a period of five years only.¹²⁷ Under the basic assumptions of the antitrust economics, as outlined in the introduction of this study, it appears clear that these factors should normally play in favour of the agreement in question. In this case, however, the fact that the possible restriction of competition was limited in time and the parties could return to compete thereafter turned

R&D or production). See e.g. PITOFISKY, R. A Framework for Antitrust Analysis of Joint Ventures. 74 *Geo. Law Journal* 1605 (1986); TEMPLE LANG, J. Joint Ventures under the EEC Treaty Rules on Competition. *The Irish Jurist* 15, 31 (1977).

¹²⁶*De Laval-Stork*, OJ L215/11 (1977).

¹²⁷See para. 4 of the decision: « Before considering whether competition within the common market is .. restricted .., it should first be considered whether the two undertakings were and remain actual or at least potential competitors in the various relevant markets ».

against the parties, since these elements allowed to find a violation of Article 101(1) and thus a formal exemption had to be obtained to validate the agreement.

In this context, it is important to recall that the threshold of intervention under Article 101(1) was defined by the European Court of Justice by reference to an appreciable restriction of competition without, however, imposing any quantitative test or proxy.¹²⁸ The European Commission clarified the limit by a *de minimis* principle under which agreements of minor importance, i.e. those involving market shares not exceeding 5 % were generally tolerated except for naked horizontal price fixing and market sharing.¹²⁹ This concept did thus not require a substantial impact on market conditions in terms of market power nor balancing of the competitive harms and benefits, but these were analysed in connection with the conditions of an exemption in the second stage of the competitive assessment. True, hence, at the time this provision was broadly construed across the board, including for instance also vertical restraints, but there was also a unique aspect in the specific context of joint ventures. It was notably by questionable findings that the parties were “potential competitors” that the Commission stretched the scope of this provision even further. This occurred in two ways. Either the founders were found to be potential competitors in the joint venture’s market prior to its formation or, in case they were actual competitors that withdrew from the market in question, they were considered to remain potential competitors during the life of the venture. The Commission found that in both scenarios potential competition could be restricted within the meaning of Article 101, i.e. when the founders could, in the first place, have individually undertaken the joint activity in question, or when they were likely to return to the market after the termination of their joint venture.¹³⁰

¹²⁸The standard of an « appreciable » restriction requires that it be examined within the context of the relevant product and geographic markets. It was defined by the European Court of Justice in Case 5/69, *Völk v. Vervaecke*, [1969] ECR 295, at 302 (appreciable effects are lacking if the agreement, although its object is restrictive of competition, « has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market »).

¹²⁹See Notice on Agreements of Minor Importance which do not fall under Article 85(1) of the Treaty establishing the European Community, [1986] OJ C 231, which also contained reference to turnover figures (ECU 300 million). This notice has been subsequently modified several times to increase the market share thresholds. Note that the Commission notices are not binding on national authorities nor the European Courts.

¹³⁰See e.g. cases *Henkel/Golgate* [1971] OJ L14; *Wano Schwartzpulver*, [1978] OJ L 322; *KEWA* [1976] OJ 51/15; *Vacuum-Interrupters II* [1977] OJ L48/32. Note, however that except for *Wano Schwartzpulver* each of these cases was exempted for a determined period of time under Article 101(3).

The interpretation appeared particularly broad in the 1970's,¹³¹ which led to increasing criticism in the specialized literature.¹³² Responding to this criticism, the Commission announced that it would make the assessment of potential competition «in the most realistic way possible», emphasizing not only the capability of undertaking the joint activity separately but also examining whether a separate entry or re-entry was a commercially realistic alternative.¹³³ In the late 1980's, there were, indeed, some signs of a more realistic approach and in a series of cases decided in the latter half of the 1980's, the parties were not considered potential competitors where a partner had no prior experience in the manufacture of the relevant product or had not engaged in any research and development concerning the relevant product or had not succeeded in it alone.¹³⁴ Where no competitive relationship between the parties could be established, like in cases *Elopak-Metalbox-Odin*¹³⁵ and *Konsortium ECR 900*¹³⁶, both of which were decided at the eve of the entry into force of the Merger Regulation, the Commission granted negative clearances stating that the agreements raised no concerns under Article 101. In the former, the parents were not considered actual or potential competitors in the joint venture's activity, since their individual entry was considered unlikely because neither party could have realistically developed the new product and entered the market individually in a short term, without the full and active participation of its partner who shared the required risks and financial burden.¹³⁷ In the same line of reasoning, in *Konsortium ECR 900* a negative clearance was granted to the joint venture between AEG, Alcatel and

¹³¹ See cases cited in the preceding footnote.

¹³² See e.g. VAN UTVANCK. Problèmes relatifs aux filiales communes. *Cahiers du Droit Européen* 1979, p. 25, 32 ; GLAIS & LAURENT, RMC (1979), at 495; BANKS, K. Mergers and Partial Mergers under EEC Law. 11 *Fordham International Law Journal* 232 (1988). ILIOPOULOS, C. *Gemeinschaftsunternehmen im EGKS und EWG Kartellrecht*. Baden-Baden, Nomos Verlagsgesellschaft, 1986.

¹³³ *Thirteenth Report on Competition Policy* (1983), point 55. For production joint ventures the relevant questions concerned (i) the financial and technical capacities of the partners, as well as the access to the sources of supply («input of the joint venture»); (ii) familiarity with the process technology and the access to the production facilities («production of the joint venture»); (iii) the actual and potential demand of the product and the access to the distribution channels for the joint venture's product («sales by the joint venture»); and the capacity to bear alone the technical and financial risk associated with the production of the product in question (the «risk factor»). In the context of joint R&D the analysis focused on a reasonable likelihood that the parties could undertake the effort independently and that they already possessed the essential background know-how to do so.

¹³⁴ *Optical Fibres* [1986] OJ L236/30; *Mitchel Cotts/Sofitra* [1987] OJ L41/31; *Iveco/Ford* [1988] L230/39; *Olivetti/Canon* [1988] OJ L52/51. For instance, in *Olivetti/Canon* the Commission explicitly stated that even though one of the partners was capable of developing the expertise necessary to manufacture one of the products conferred to the joint venture, it could not, in reality, assume the financial risks involved in such a rapidly evolving market (laser printers). For a detailed discussion of these cases see FINE (1989), 63-66.

¹³⁵ *Elopak/Metal Box-Odin* [1990] OJ L 208/15. The case was apparently controversial, since four years lapsed between the notification ([1987] O.J. L41/31) and the decision.

¹³⁶ *Konsortium ECR 900* [1990] OJ L228.

¹³⁷ Para. 36 of the decision. The joint venture was to carry out the research and development of a new product (a carton container for certain semi-solid foods) and the related machinery, and if successful, undertake production and distribution of the new products. The technology was new and involved contributions of existing know-how from both parents.

Nokia to develop, manufacture and distribute a pan-European digital cellular mobile telephone system (GSM).¹³⁸ On the other hand, the Commission seemed to revert to its earlier broad interpretation at least in *Cecacan*¹³⁹ in which one of the two parents lacked the technology contributed to the joint venture by the other but it was deemed a potential competitor in the relevant field since it would have merely needed “*to acquire the requisite know-how and make the necessary investments or, alternatively, link up with a firm in possession of such know-how*”.¹⁴⁰

Generous exemption policy

Overall, the Commission's policy under Article 101 remained unclear. The broad scope of the prohibition of Article 101(1) was moderated by a generous policy in granting exemptions under the third paragraph, and notified joint ventures received almost systematically an exemption for a determined period of time. The only prohibited case was *Wano Schwartzpulver*¹⁴¹ in which the Commission found an infringement of Article 101 TFEU without regard to the fact that the operation was “irreversible” in any realistic terms. In this case, one of the participants - the British ICI - closed its own production unit for blackpowder as a result of an explosion and decided to abandon this activity, reserving it to a joint venture to be formed with its German competitor. The Commission found however that the parties remained potential competitors in view of ICI's possibility to return to that market and prohibited the joint venture because it would have eliminated competition in a substantial part of the Common Market.¹⁴²

¹³⁸The consortium was to respond to calls for tender to these systems and the related equipment, and the Commission concluded that none of the parties would have been able to comply with the strict time-frame set in the tender documents if they were to proceed individually. Given the degree of financial expenditure and risks involved and the human resources required for the development and manufacture of the GSM system, no single party would have been able to proceed with the project alone and bear the financial risk involved. This was corroborated by the fact that the demand was restricted to national telecommunications monopolies who were the only purchasers of the systems and the parties would have been able to amortize their high development costs only if they were awarded a tender. It is also worth noticing that no restriction was found at the level of distribution either, as none of the parties could have produced the system individually, the Commission concluded that none of them would have been in the position to distribute it individually. The inclusion of the joint distribution in the joint venture did thus not change the approach. See *Konsortium ECR 900* [1990] OJ L228.

¹³⁹ [1990] OJ L299/64.

¹⁴⁰Criticism expressed e.g. in KIRKBRIDE, (1998) 23 E.L.Rev. 37, 41 ; and FUNKE, L-C. *Kooperative Joint Ventures in der Europäischen Union*. Peter Lang, 1997, at 146.

¹⁴¹[1978] OJ L 322.

¹⁴²In this case, the Commission also had warned the parties that the implementation of the joint venture agreement could have amounted to an abuse of ICI's dominant position in the UK blackpowder market. The Eight Report on Competition Policy (1979), para. 136. For criticism of this case, see e.g. GLAIS & LAURENT, RMC (1979), at 495.

The Commission indicated publicly that its approach to joint ventures and other forms of industrial cooperation was designed “*to ensure that the right balance is struck between the need for coordination of industrial effort in order to increase the competitiveness of European industry and to create a single market, and the necessity of ensuring that competition in the common market is not distorted and allowed to fulfill its function of bringing about a more efficient allocation of resources.*”¹⁴³ Industrial policy considerations, such as the benefits of joint ventures to the competitiveness of Community industry in general, were frequently mentioned in the assessment of the criterion of technical and economic progress, by reference to the value of technological transfers from outside the Community to European businesses, increasing the ability of European industry to compete more effectively in Europe and elsewhere and thus strengthening the competitiveness of Community producers relative to outside producers.¹⁴⁴

Regardless of the generous exemption policy, the treatment of joint ventures under Article 101 was still considered strict, particularly as compared to mergers, since there was in each case a finding of violation of the first paragraph of that provision and the agreement thus had to be validated in the cumbersome and time-consuming exemption proceedings. Moreover, exemption decisions were always limited in time and could be withdrawn. The excessive regulatory burden was then reduced by the relevant block exemptions issued by the Commission in 1985.¹⁴⁵ As block exemptions did not require prior notification, they provided a partial remedy by exempting whole categories of qualifying agreements based on the experience the Commission had acquired in issuing individual exemptions.¹⁴⁶ Those relevant in the joint venture context were the block exemptions concerning cooperation on research

¹⁴³Sixteenth Report on Competition Policy (point 32). See also CASPARI, M. Joint Ventures - The Intersection of Antitrust and Industrial Policy in the EEC. *Fordham Corporate Law Institute*, 1985, p. 449.

¹⁴⁴Case Ansac, 1991 OJ, L 152, 54; and the earlier mentioned De Laval, OpticalFibres, Olivetti/Canon, Philips/Sagem/Thomson. See also White Paper on «growth, competitiveness and employment». The challenges and ways forward into the 21st Century, COM(93) 700 final, 5 December 1993, stressing the need to improve the overall competitiveness of the European economy and reduce unemployment. In 1985, the Commission had identified a number of «general economic objectives» to which joint ventures could contribute, including :« (i) integration of the internal market, especially by means of cross-border cooperation ; (ii) facilitation of risky investments ; (iii) promotion of innovation and transfer of technology ; (iv) development of new markets ; (v) improvement of the competitiveness of Community industry ; (vi) strengthening the competitive position of small and medium-sized firms ; (vii) elimination of structural overcapacity. » Fifteenth Report on Competition Policy (1985), point 26.

¹⁴⁵Until the entry into force of Regulation 1/2003, the Commission had an exclusive power to grant individual exemptions and block exemptions on the basis of the Council Regulation No 19/65EEC on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices, OJ 36, 533/65.

¹⁴⁶Block exemptions were originally introduced in response to the Commission’s excessive work load resulting from notifications for individual exemptions and the considerable delays and uncertainty due to the invalidity of the agreements while parties were waiting for the Commission’s approval.

and development (the « R&D Block Exemption »)¹⁴⁷, specialization (the « Specialization Block Exemption »)¹⁴⁸, and technology transfer agreements (the « Technology Transfer Exemption »)¹⁴⁹. However, these regulations only covered joint ventures between two parties with limited market shares and were often criticised for their dirigiste and over-regulatory character as they required the parties to include certain clauses (so-called “white list”) to their agreements to qualify for the exemption, further to excluding agreements which included hard-cord restrictions (“black list”).¹⁵⁰

1.1.2 The Dichotomy Between Concentrative And Cooperative Joint Ventures

As a result of the adoption of the Merger Regulation in 1989, the categorical approach of the previously applied partial merger doctrine was codified in a dichotomy distinguishing between "concentrative" joint ventures, subject to merger control, and "cooperative" ones, subject to classical competition rules. This distinction was far from being merely conceptual, since it determined which of the mutually exclusive sets of rules applied to any given case, with different procedures and substantive standards. Significantly, the Merger Regulation provided a more efficient procedure and more lenient substantive test than Article 101 TFEU. As such, the conceptual divide, together with its rationale and consequences, has undoubtedly been one of the most criticized areas of EU competition law. Contrarily to the expectations of the Commission,¹⁵¹ the first years of the operation of the concentrative-cooperative dichotomy showed that it was an inefficient legal device, since it led to forum shopping by the parties, increased their transaction costs and wasted administrative resources of the Commission without offsetting gains in legal certainty or accuracy of the analysis. This was

¹⁴⁷Commission Regulation (EEC) No 418/85 on the application of Article 85(3) of the Treaty to categories of research and development agreements, [1985] OJ L53/5, subsequently amended by Commission Regulation (EEC) No 151/93 of 23 December 1992 amending Regulations No. 417/85, No. 418/85, No. 2349/84 and No. 556/89 on the application of Article 85(3) of the Treaty to categories of specialization agreements, research and development agreements, patent licensing agreements and know-how licensing agreements, [1993] OJ L21/8 (« Regulation No 151/93 »). The latter extended the exemption to cover also operations including marketing stage.

¹⁴⁸Commission Regulation (EEC) No 417/85 on the application of Article 85(3) of the Treaty to categories of specialization agreements, [1985] OJ L53/ 1, as amended by Regulation No 151/93.

¹⁴⁹Commission Regulation No 240/96 on the application of Article 85(3) of the Treaty to certain categories of technology transfer agreements, 11.1.1996, OJ 1996 L31/2.

¹⁵⁰These problems were recognized by the Commission e.g. in *Green Paper on Vertical Restraints*, [1997] 4 C.M.L.R. at 530.

¹⁵¹Certain Commission officials believed that with the time there would be « a widespread understanding and acceptance of the distinction ». See JONES, 1990 *Fordham Corp. L. Inst.* 385, 402 (« [i]n two years we shall observe that our initial investment in time and effort in attempting to make economics, law and reality meet, has paid off »).

due to the overall complexity of the concepts, which as such were a moving target (1.1.2.1). Yet, the major problem was the differential treatment of joint ventures without regard to their net effects, and the resulting "concentration privilege, which reflected a positive policy choice in favour of concentration over more limited cooperation (1.1.2.2).

1.1.2.1 The complexity of the jurisdictional division

Before the adoption of the Merger Regulation in 1989, one of the major concerns among professionals was the extent of the merger category in relation to joint ventures, and many commentators hoped that all genuine joint ventures, as opposed to disguised cartels, would be saved from the cumbersome mechanism of Article 101.¹⁵² On the other hand, the draftsmen were concerned that including a broad range of joint ventures within merger control would allow too many competitor collaborations escape control under Article 101 - and Community control altogether - in view of the originally high thresholds of application of the Merger Regulation.¹⁵³ As originally drafted, the Merger Regulation confirmed a narrow concept of a concentrative joint venture by imposing two cumulative criteria in its Article 3(2) : (i) it had to perform on a lasting basis all the functions of an autonomous economic entity, i.e. a *full function entity* (the positive condition), and (ii) it was *not to give rise to coordination of the competitive behavior* of the parties amongst themselves or between them and the joint venture (the negative condition). A third condition resulting from the concept of joint venture itself was that of joint control which implied that the founders had to agree on the major decisions concerning the joint venture's activity. Joint ventures characterized as « cooperative », in turn, were included within operations having as their « *object or effect the coordination of the competitive behavior of undertakings which remain independent* » which did not amount to concentration and, as such, could only be reviewed under classical competition rules.¹⁵⁴ Whilst mutual exclusivity of these sets of rules was confirmed by Article 22(1), the Commission clarified that where the structural change could be separated from the

¹⁵²See e.g. VENIT, J. The Merger Control Regulation : Europe Comes of Age... or Caliban's Dinner. 27 *Common Market Law Review* 7 (1990) ; PATHAK, 3 *E.C.L.R.* 119 (1990) ; HAWK & HUSER, 30 *C.M.L.Rev.* 1172 (1993); KIRKBRIDE & XIONG, 23 *E.L.Rev.* 37, 39 (1998). For a contrary view, see VAN DER ESCH, B. Joint ventures under the competition rules of the EEC Treaty. In *Exploiting the Internal Market : co-operation and competition towards 1992*. Kluwer Law and Taxation Publishers, 1988, 77.

¹⁵³The Community dimension was defined in Article xx by reference to the worldwide turnover. See discussion on the motivation in HAWK, B. Les filiales communes selon le droit antitrust communautaire et américain. 63 *Revue d'économie industrielle* 148 (1^{er} trimestre 1993), p. 155.

¹⁵⁴Article 3(2) of the 1989 Merger Regulation (emphasis added).

coordination aspect the former was to be assessed under the Merger Regulation and the latter under Regulation 17, to the extent it did not amount to an ancillary restriction.¹⁵⁵

The conceptual divide was not an innovation of EU competition law, but it was imported from the conceptually developed German competition law where it had been applied to distinguish between joint ventures analyzed under merger standards and those reviewed under cartel rules or both.¹⁵⁶ This dichotomy was transplanted in EU competition law with a different function within the respective legal framework,¹⁵⁷ since it does not fulfil the same jurisdictional function in German competition law as in the EU. The German *Bundeskartellamt* operates it as part of the substantive analysis after the notification (based on a 25 per cent shareholding test) has already occurred, and in contrast to EU law, the relevant German regimes are not mutually exclusive.¹⁵⁸

The first interpretative notice issued by the Commission (the « 1990 Interface Notice »)¹⁵⁹ confirmed the strict interpretation followed thus far. It retained the irreversible market exit requirement concerning *all* parents from the joint market and from vertically related and neighboring markets, based on the logic that no foreseeable post-closing coordination or spill-over effects could be perceived if the parents were neither actual nor potential competitors in their remaining activities.¹⁶⁰ Drawing the borderline between the two categories raised a number of conceptual inconsistencies which the Commission attempted to eliminate by flexible interpretation of certain parts of the test. The uncertainties concerned, among others,

¹⁵⁵The 1990 Interface Notice, .

¹⁵⁶The German approach is further discussed e.g. in MESTMAECKER, E.-J. *Gemeinschaftsunternehmen im deutschen und europäischen Konzern- und Kartellrecht*, in MESTMAECKER, E.-J., BLAISE, J.-B., and DONALDSON, D.T. *Gemeinschaftsunternehmen (Joint Venture - Filiale commune) im Konzern- und Kartellrecht*. Alfred Metzner Verlag GMBH, Frankfurt am Main, 1979, pp.9-45, at 30-39; and AXTER, O. *Joint Ventures and Antitrust with Particular Emphasis on the Development of German antitrust Theory and Practice*. *Fordham Corporate Law Institute*, 1991, Ch. 24, p. 599, 605-606.

¹⁵⁷For a discussion of methods of comparative law and transplantation of foreign legal concepts into different systems, see ZWEIGERT, K., KÖTZ, H. *An Introduction to Comparative Law*. 3rd revised ed. Oxford, Clarendon Press, 1998 ; and CONSTANTINESCO, L.-J. *Traité de droit comparé* (tome II), la méthode comparative. Librairie de Droit et de Jurisprudence 1974.

¹⁵⁸AXTER, *Fordh. Corp. L. Inst.*, 1991, 602 ; see also HAWK & HUSER, 30 *C.M.L.Rev.* 1155, 1162 (1993) (making a contrast to German and U.S. systems in which the jurisdictional issue is normally solved without a major investment of time and effort).

¹⁵⁹Notice regarding the concentrative and co-operative operations under Council Regulation (EEC) No. 4064/89 of December 21, 1989 on the control of concentrations between undertakings, [1990] OJ C203/10.

¹⁶⁰See JONES, 1990 *Fordham Corp. L. Inst.* 385, 397. The Commission considered the presence of only *one parent* in the joint venture's field an obstacle to its concentrative nature by presuming a collusion risk between the joint venture and the parent in question. See e.g. *DuPont/Merck* (reported in ECLR 4/1991, 117) in which the presence of one of the partners (Merck) in the joint venture's market excluded its concentrative nature, because it was deemed to lead to a necessary harmonization of the conduct of Merck and the joint venture.

the interpretation of the market exit requirement, the analysis of potential competition, and the relevance of parent-to-venture restrictions as part of the jurisdictional test. For instance, where only one parent was competing in the field of the joint venture, it could be assumed that a parent firm would not compete with its progeny in which it shared the profit, and a collusion between the parents in such case was unlikely as long as the non-horizontal partner did not have its own commercial interest within that market.¹⁶¹ Furthermore, it was questionable whether the ownership links between the entities made it theoretically inappropriate to apply Article 101 to parent-to-venture restrictions, as the venture could not remain independent from its parents in view of their joint control.¹⁶² Moreover, the notion of joint control and the extent of parental involvement in the joint venture caused certain analytical problems with regard to the criterion of the autonomy, as these criteria appeared to mutually exclude one another.¹⁶³ It was particularly the condition requiring that the venture act independently according to its own economic interests that was difficult to conciliate with the notion of joint control which, in turn, required that the parents agreed on major decisions concerning the venture's activities (i.e. exercise jointly «a decisive influence») and it was hard to see how the joint venture could then exercise its own commercial policy and independent decision-making.¹⁶⁴ In the Commission's subsequent decisional practice, this conflict was resolved by highlighting the functional autonomy established by a long-term economic self-sufficiency resulting from human and material resources (e.g. financial resources, industrial property

¹⁶¹See e.g. VENIT, *World Competition* (1991), at 26 (a joint venture being an extension of its parents, a restriction between one parent and the joint venture cannot be presumed only because the parent has decided to act through the joint venture and not by itself in the relevant market) ; such a possibility has also been rejected by HAWK, *Fordh.Corp.L.Inst.* (1991), at 633. See also BRODLEY, 95 *Harv. L. Rev.* 1573 (1982); and TEMPLE LANG, *The Irish Jurist* (1977), at 21.

¹⁶²The Commission adopted a doctrine of « industrial leadership » which meant that where one parent stayed in the joint venture's market and assumed a « leading role » in the management of the venture, the latter could still be treated as a merger (the venture was considered to be part of the economic group of the « leading » parent with little prospect for competition between them). Although the overall responsibility of the leading parent appeared to be in conflict with the basic idea of joint control, this doctrine emerged after a number of cases in which the marginal presence of the parent in the joint venture market was not considered sufficient to give rise to coordination. See e.g. *Thomson/Pilkington* [1991] OJ C279/19; *Toyota Motor Corp./Walter Frey/Toyota France*, Case No. IV/M.326 (1.7.1993); *Linde/Fiat* [1992] OJ C258/14, [1992] 5 C.M.L.R. 298, and *Ericsson/Kolbe* [1993] OJ C27/14, [1992] 4 C.M.L.R. 81 ; and *Air France/Sabena*, Case No IV/M.157 (5.10.1992) (a parent with only a 37.58% interest was considered the leading parent in a two-parent joint venture). For a critical view, see in KIRKBRIDE & XIONG, 23 *E.L.Rev.* 37, 43-44 (1998) and NEVEN, NUTTFAL & SEABRIGHT (1993), 87-89.

¹⁶³The 1990 Interface Notice specified the criteria concerning the autonomy of the venture in terms of its (i) functions (independent supplier and buyer in the market), (ii) resources and duration (sufficient resources to carry out its activity independently on a lasting basis without depending on the parents for necessary input or output) and (iii) decision-making independence (exercises its own commercial policy).

¹⁶⁴Article 3(3) ECMR; the 1990 Interface Notice, paragraph 16. The incoherence of the relevant concepts has been highlighted in CALVET, H. and BERLIN, D. *L'entreprise commune et le contrôle de la concurrence... ou l'accessoire commande le principal. Semaine Juridique. Cahiers de Droit de l'Entreprise*, No. 47, 23.11.1995, p. 459.

rights and know-how), and the reference to the decision-making autonomy disappeared in practice.¹⁶⁵

Finally, the 1990 Interface Notice proved too complex and too restrictive in its interpretative criteria.¹⁶⁶ In an attempt to solve these problems the Commission issued a new notice in 1994 (the « 1994 Interface Notice »)¹⁶⁷ to redraw the distinction between concentrative and cooperative joint ventures. As to the tension between the notions of autonomy and joint control, the focus was to be on the lasting change in the structure of the undertakings concerned and the full-function character of the joint venture (i.e. that it had sufficient resources to act as a buyer and a seller on the market) rather than on its commercial and decisional independence. The new Notice also abolished the relevance of vertical coordination in parent-to-venture relationship from the jurisdictional criteria so that only a coordination risk perceived between the parents - which had to be sufficiently real to be caught by Article 101 - remained determinant. A « high probability » of coordination was deemed to exist where two or more parents retained significant activities in the same product and geographic market or remained potential competitors within that market, which could, however, normally be ruled out when the parents transferred their activities to the venture or invested substantially in it, making it unlikely that they would individually return to the joint venture's market.¹⁶⁸ Furthermore, when the parents did not remain competitors in the joint venture's market the Commission considered the possibility that the collaboration within the joint venture could spill over to vertically related or neighbouring markets in which they

¹⁶⁵See e.g. *Mitsubishi/UCAR* [1991] OJ C5/7 (the joint venture was responsible for its own commercial policy and required its parents' consent only for certain matters related to the need to protect the value of the shareholders' investment); *Sanofi/Sterling Drug* [1991] OJ C156/10 (the joint venture had the necessary human and material resources, consisting of finance, assets and intellectual property rights to conduct its business independently); compare with *Baxter/Nesle/Salvia* [1992] OJ C37/11 (no functional autonomy was deemed to exist because the joint venture remained dependent on its parents' technology due to the limited duration of the exclusive industrial property rights).

¹⁶⁶See e.g. BURNSIDE & MACKENZIE, 3 *E.C.L.R.* 138 (1995) (« much of the notice soon became a dead letter for most practical purposes »); for a critical view over the 1990 Interface Notice see also HAWK, B. Concentrative/Cooperative Joint Ventures : Metaphysics and the Law. EC Commission, Ostend, September 12, 1990; and VOGEL, L. Filiales communes et droit communautaire de la concurrence. *JCP* 1993, éd. E I, 254.

¹⁶⁷ Notice on the distinction between concentrative and co-operative joint ventures under Council Regulation (EEC) No. 4064/89 of December 21, 1989, on the control of concentrations between undertakings, [1994] OJ C358/1.

¹⁶⁸The 1994 Interface Notice, paragraph 18 and note 19. See also Commission's decision in *MSG/Media Service*, [1994] OJ L 364/1 (the joint venture penetrated a distinct market of digital infrastructure for pay-TV but the parents remained active in closely related markets for media and telecommunications services; potential competition was not restricted as individual entry would have been « economically unjustifiable » in view of the parents' investments in the joint venture).

remained active.¹⁶⁹ In such circumstances, the Commission was concerned that the parents' downstream activities as acquirers of the joint venture's products would be coordinated where the joint venture was their main supplier and the parents added relatively little value to the products.¹⁷⁰ Similar concerns were deemed to arise when the parents competed in an upstream market as suppliers to the joint venture, and the joint venture was their main customer. If the parents competed in the same product market but in different geographic markets the Commission focused on the interaction between those markets and foreseeable developments in the emergence of wider geographic markets.¹⁷¹

Evaluation of the coordination risk required thus complex substantive assessments concerning the relevant market and potential competition, which unnecessarily complicated the determination of the jurisdictional issue. The more flexible interpretation adopted in the 1994 Interface Notice and in the Commission's decisional practice however meant that more cases than before qualified as concentrative joint ventures. For instance, in 1995 only three out of some 50 joint ventures notified under the Merger Regulation fell outside its scope because of the coordination risk between the parents.¹⁷² The fact remained, nevertheless, that in practice the overall cooperative category remained relatively large, as it included not only full-function entities with coordination risk but also alliances performing one or more functions for their parents such as R&D, production or purchasing, and therefore many joint ventures were still subject to the stricter enforcement mechanism of Article 101, provided that the constitutive elements of an agreement of a concerted practice restricting competition and affecting trade between Member States were met.

¹⁶⁹ See e.g. *Lucas/Eaton*, Case No. IV/M.149 (9.12.1991), in which the spill-over risk was considered irrelevant due to the different conditions of competition and technological differences between the neighboring product markets (Lucas produces car brakes and the joint venture heavy-duty breaking systems). See discussion in NEVEN, NUTTALL & SEABRIGHT (1993), at 87 (calling for a clarification of the concept « neighboring markets »).

¹⁷⁰ The 1994 Interface Notice, paragraph 18.

¹⁷¹ For a detailed description of a number of relevant cases, see SNELDERS, R. Developments in E.C. Merger Control in 1995, (1996) 21 *E.L.Rev.* Checklist No 2, p. 66, at 75-76. See also *Mitsubishi/UCAR* ([1991] OJ C 5/7) (no coordination risk because Mitsubishi withdrew from the European market but remained active in the Japanese market).

¹⁷² See SNELDERS, R. Developments in E.C. Merger Control in 1995. (1996) 21 *E.L.Rev.* Checklist No 2, p. 66, at 74.

1.1.2.2 Confirmation of the Concentration privilege

The Merger Regulation entailed a number of advantages, both procedural and substantive, as compared to the then applicable Article 101 TFEU framework. The most obvious procedural advantage was the legal certainty resulting from a speedy procedure of clearance with definitive decisions binding throughout the Community. The parties received a view on their proposed merger within one month after notification, or if serious doubts were raised, formal proceedings were opened and had to be completed within four months.¹⁷³ In contrast, until the modernization of the antitrust rules within the EU in 2004, agreements found contrary to Article 101(1) had to be notified for a validation in the exemption proceedings of Regulation 17/62. Although notification was optional, it was a necessary condition for an exemption under Article 101(3) unless the agreement fell within a block exemption.¹⁷⁴ Unlike in the merger proceedings, the Commission did not have a fixed time frame to reach a decision, and an in depth analysis of the merits of each case often took several months or even years, even where the transaction would not have raised serious concerns under the EUMR.¹⁷⁵ Furthermore, while an exemption could be renewed, it could also be withdrawn at any time if the situation changed with regard to an essential element of the decision. More importantly, an exemption could be issued only for a limited period of time, reflecting the idea of a continuous control of restrictive agreements.¹⁷⁶

There were also certain institutional aspects that further emphasized the significance of legal classification to a merger category or to that of horizontal agreements. The vertical division of powers between the Community and its Member States was based on different criteria under

¹⁷³ Under Article 6 of the original Merger Regulation, the Commission had to examine the notification as soon as it was received to decide the jurisdictional issue, i.e. whether the merger fell within the Merger Regulation (Article 6(1)(a) decision). In the subsequent first stage proceedings the Commission had to decide normally within one month whether the merger raised serious doubts as to its compatibility with the Common Market (Article 6(1)(b) decision). If not, the merger was cleared and it could be implemented subject to possible conditions imposed by the Commission. When the merger raised serious doubts about its compatibility with the Common Market, second stage proceedings involving detailed examination were initiated (Article 6(1)(c) decision) and had to be completed within four months (Article 10(3)) by a decision governed by Article 8(2-5). Only some 5 % of notified cases proceeded to the second stage.

¹⁷⁴ Regulation No 17, Article 4(1).

¹⁷⁵ See, in particular, a production-only JV *Ford/Volkswagen* OJ [1993] L 20/14, 4 CMLR 543 (exemption procedure of over two years). Clearly, certain joint ventures that would have been likely to be cleared within one month under the Merger Regulation, such as *Exxon/Shell*, *Fujitsu/AMD* and *Fiat/Hitachi* which involved relatively modest market shares of slightly over 20 per cent, were subject to long waiting periods from more than one year to over two years.

¹⁷⁶ See Article 8 of Regulation No 17/62. Sometimes parties appealed the Commission decision even where they had received an exemption. See e.g. *Night Services* in which the parties complained about the short duration of the exemption and argued that their agreement should have been cleared instead of exempted.

the Merger Regulation and the classical competition rules. The latter focussed on the effect on trade between Member States, whereas jurisdiction over mergers was determined by the "European dimension" based on turnover criteria. Moreover, while the first two paragraphs of Article 101 could be enforced in the Member States' courts and competition authorities (direct applicability),¹⁷⁷ the power to grant exemptions under Article 101(3) was, until the modernisation in 2004, centralized exclusively to the European Commission.¹⁷⁸ This situation changed radically along with the introduction of Regulation 1/2003 which replaced the notification system by an automatically applicable legal exception.

The concentration privilege did not consist only of procedural advantages, although in most respects the Commission regarded the difference between joint venture cases dealt with under the Merger Regulation and cases under Regulation 17/62 as merely procedural. For the Commission, the determination of the cooperative character of a joint venture had "no substantive legal effects".¹⁷⁹ Yet, some scholars and professionals were not convinced by the Commission's assertion in this regard. As originally drafted and construed, the substantive tests of the Merger Regulation and Article 101, respectively, were different. Reflecting the underlying idea that mergers, in view of their potential for economic benefits, should be prohibited only exceptionally when excessive market power is created and effective competition thereby impeded, the Merger Regulation provided for higher threshold of intervention and more lenient substantive test than Article 101. In the latter framework, there was no market power threshold to find a violation at that time, once the low *de minimis* limits were met and provided that the restriction of competition was "appreciable", whereas mergers were subject to the much higher standard of dominance. In practice, this difference was attenuated by the virtually systematic exemption practice in which the ultimate prohibition threshold was the last condition of exemption under Article 101(3), i.e. elimination of competition for a substantial part of the relevant products which as such reminds the dominance test.

¹⁷⁷Case 123/73, *Belgian Radio and Television v. SABAM*, [1974] ECR 313, 2 CMLR 238.

¹⁷⁸ Regulation No 17 of the Council of 6 February 1962 implementing Articles 85 and 86 of the Treaty, OJ [1962] 13/204, as amended. The Commission has also an exclusive power to promulgate block exemptions which apply automatically to entire categories of agreements without a notification requirement. Council Regulation No 19/65EEC on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices, OJ 36, 533/65 ; and Regulation 2821/71, [1971] OJ L285/46.

¹⁷⁹ Notice concerning the assessment of cooperative joint ventures pursuant to Article 85 of the EEC Treaty, OJ C 43, 16.2.1993, p. 2 (93/C 43/02), point 11.

As already outlined in the previous section, the early approach towards joint ventures under Article 101 involved a number of major deficiencies. One of these was undoubtedly the generally broad scope of the concept of appreciable restriction of competition and thereby of the prohibition imposed in the first paragraph of Article 101. There was no in depth assessment of the significance of the restriction under the test once the relatively low *de minimis*-threshold was passed. A finding that the parent firms could have individually undertaken the joint activity was often enough to find violation of Article 101(1).¹⁸⁰ An appreciable restriction of competition was hence basically inferred from the competitive relationship between the parent firms, without regard to the significance of the restriction or their possibility to enhance market power. Moreover, the analysis of whether the parents were potential competitors in the first place lacked coherence and the concept of potential competition was often construed very largely.¹⁸¹ The analysis was often limited to a blunt statement relating to the possibility of individual entry, which blurred the finding of a competitive relationship with that of an appreciable restriction of competition. A number of agreements that had no significant adverse effects on competition or were even clearly pro-competitive on balance were considered to violate the law, albeit eventually exempted for a fixed period of time based, whereas under the Merger Regulation they would most likely have been cleared in the first Phase inquiry within one month.

The notification requirement was burdensome for firms, since – even though an exemption was rarely denied – they had to do a substantial filing to receive an exemption and the procedure was very time-consuming.¹⁸² It required an onerous showing that the four conditions for exemption were met, i.e. that it helped to improve production or distribution of goods or promotion of technical or economic progress, provided that consumers were allowed a fair share of the resulting benefit, that the agreement's restrictive features were

¹⁸⁰ Pleas for the adoption of a market power filter into Article 101(1) were first presented in connection with the analysis of vertical restraints. For counterarguments see SCHRÖTER, H. Vertical Restrictions under Article 85 EC : Towards a Moderate Reform of Current Competition Policy. In GORMLEY, L. (ed.) *Current and Future Perspectives on EC Competition Law*. Kluwer Law International, 1997, at 19-20 (arguing that such a market power screen at the level of Article 101(1) would be inconsistent with the structure and contents of Article 101). The basis for a market power screen is found in the standard economic theory dictating that unless economic actors possess and exercise market power, they are unable to affect competition adversely; see e.g. BISHOP, S. and WALKER, M. *Economics of E.C. Competition Law : Concepts, Application and Measurement*. Sweet & Maxwell, 1999, at 78, 27 (defining market power as « the ability of a firm or group of firms to raise price, through the restriction of output, above the level that would prevail under competitive conditions and thereby enjoy increased profits from the action »).

¹⁸¹ See e.g. cases discussed in section 1.1.2 above.

¹⁸² Notification was a necessary condition for obtaining an exemption. In other words, a non-notified agreement falling within the scope of Article 101(1) was considered illegal even if it met the criteria of an exemption.

indispensable to obtain the efficiencies identified, and it did not give the possibility of eliminating competition in respect of a substantial part of the goods or services in question. While it was only normal that firms had the burden to prove the positive effects and other conditions of an exemption, the problem here was that this obligation was triggered even when the competition authority had no showing of a real harm to competition.

Let us illustrate this point by a concrete example. One of the most interesting case in this respect was *Ford/Volkswagen*¹⁸³. In that case the parties had the burden to justify that the conditions for an exemption under Article 101(3) were met, and the Commission took over two years to investigate the case and adopt an exemption decision, even though it was difficult to see what competition was restricted in the first place. Ford and Volkswagen set up a single-function production joint venture for an initial period of 10 years in Portugal to develop and manufacture a new model of a multipurpose passenger vehicle to compete against a competitor (Renault) holding more than 50 per cent of the relevant market. The Commission found a restriction of potential competition on the grounds that both parties had the « financial, technical and research capacities for individual entry ».¹⁸⁴ It was however arguable whether any competition was restricted at all, since the large minimum efficient scale for the production in question was too high for each of the parents to enter individually.¹⁸⁵ In other words, if - in realistic terms - the parties could not have produced those cars separately, they were not potential competitors and thus unable to restrict competition on that market. By combining their forces they were able to bring a new model to compete against the market leader. Considering also that the parents sold the outcome products (two differentiated competing products) separately in competition against each other, the joint production agreement arguably increased competition rather than restricted it. Moreover, the general vehicle market in which the parents were actual competitors was competitive, so there was no foreseeable risk of spillover collusion. Had an appropriate analysis of the restriction of competition been undertaken under Article 101(1), the whole controversy around the case and its social policy considerations would have been unnecessary (see the discussion on non-competition justifications later in this subsection).

¹⁸³OJ [1993] L 20/14, 4 CMLR 543. The case itself was highly contentious and severely opposed by certain competitors, such as Renault, but an exemption was granted for 10 years.

¹⁸⁴Paragraph 19 of the decision. To support its conclusion, the Commission further indicated that it considered this restriction serious because product development is a key element of competition in the car industry. Paragraph 20 of the decision.

¹⁸⁵For criticism of this case, see FOX, E. Panel discussion in EHLERMANN, C.D. and LAUDATI, I (eds.). *European Competition Law Annual 1997 : Objectives of Competition Policy*. The Robert Schuman Centre at the European University Institute. Hart Publishing (1998), at 480 ; see also NEVEN et al. (1998), at 98.

Another substantive difference related to the efficiency defence which was explicitly available under Article 101(3) but not under the Merger Regulation. Any joint venture falling within Article 101(1) could in principle benefit from an exemption under the third paragraph of that provision if it produced efficiencies and fulfilled the other criteria for exemption. This contrasted with the EU merger policy which had traditionally been hesitant to allow any form of efficiency defence, regardless of the original wording of Article 2(1) of the Merger Regulation suggesting that factors such as technical and economic progress may be taken into account in the assessment of the legality of a merger.¹⁸⁶ The criteria was narrow and competition-based, geared towards the effect on competition in terms of market structure and choices available for consumers and suppliers, as well as their access to sales and supplies, and there was no place for an efficiency defence in this logic.¹⁸⁷ Moreover, the justifications that have traditionally been available under the test of economic balance of Article 101(3) EC have been broader than strict pro-competitive efficiency considerations. Expressions of various other Community policy concerns, in principle unrelated to the protection of competition, have often entered into the analysis of joint ventures under Article 101(3). This is because the multi-goal structure of the Treaty implies that it cannot be excluded that goals pursued by other Treaty provisions be taken into account to the extent that they can be subsumed under the four conditions of Article 101(3), as explicitly stated in the 2004 Exception Guidelines.¹⁸⁸ One can therefore never entirely rule out non-competition criteria from that methodology in so far as they can be justified as promoting the broadly worded goal of technological or economic progress and do not result in the elimination of competition.

In particular, the benefits of joint ventures to the competitiveness of Community industry in general were, at least until the mid-1990's, frequently mentioned in the assessment of the criterion of technical and economic progress, for instance were a joint venture allowed for technological transfers from outside the Community to European businesses or otherwise

¹⁸⁶Rather, at the beginning of the merger enforcement, arguments pertaining to efficiency were sometimes interpreted against mergers as pointing to a potential creation or strengthening of a dominant position. See e.g. AT&T/NCR, Case IV/M50, [1991] OJ C 16/20 (« potential advantages flowing from synergies may create or strengthen a dominant position »). For an in depth analysis see JENNY, F. EEC Merger Control : Economies as an Antitrust Defense or an Antitrust Attack ? In *International Antitrust Law and Policy* (B. Hawk, ed.) (1992) Fordham Corp. L. Inst. 591.

¹⁸⁷This kind of approach has been referred to as « competitive-structure approach » which means that mergers found to have adverse effects on the competitive structure of the market are prohibited regardless of efficiency arguments. See CHIPLIN, B. and WRIGHT, M. *The Logic of Mergers*. Institute of Economic Affairs, London, 1987, at 78.

¹⁸⁸Commission Notice Guidelines on the application of Article 101(3) of the Treaty (2004/C 101/08), paragraph 42. See to that effect implicitly paragraph 139 of the Matra judgment and Case 26/76, Metro (I), [1977] ECR 1875, paragraph 43.

increased the ability of European industry to compete more effectively relative to outside producers.¹⁸⁹ This was the case in *Lufthansa/SAS*¹⁹⁰, involving the second and third largest European airlines, in which - besides the need for the restructuring of the European air transport industry - one of the factors mentioned in the decision was that the alliance gave the parties a more efficient worldwide network which enabled them to compete more effectively against other, notably non-European, airlines. Apart from industrial policy, many joint venture cases exempted under Article 101(3) in the proceedings of Regulation 17/62 contain explicit references to other policy concerns, such as restructuring of industries and rationalization of production,¹⁹¹ social and regional policy concerns,¹⁹² energy policy¹⁹³ and environmental policy¹⁹⁴. It should be noted however, that these cases were ultimately decided on competition grounds.¹⁹⁵

A particularly interesting case also in this respect was the above discussed *Ford/Volkswagen*¹⁹⁶ involving a joint venture established in a distressed region in Portugal to develop and manufacture a new model of a multipurpose passenger vehicle. The joint venture was estimated to lead to creation of a significant number of new jobs and attract new investment in the supply industry, thereby reducing regional disparities in conformity with Article 130A of the EC Treaty. The Commission exempted the joint venture for 10 years but recognized that the maintenance of employment and regional policy concerns « *would not be enough to make an exemption possible unless the conditions of Article 85(3) were fulfilled,*

¹⁸⁹ Joint venture cases with explicit references to the competitiveness of the European industry in the 1990's include *Ansac*, 1991 OJ, L 152, 54; *Philips/Sagem/Thomson*; *LH/SAS* [1996] L054/28. See also White Paper on « growth, competitiveness and employment ». The challenges and ways forward into the 21st Century, COM(93) 700 final, 5 December 1993 (stressing the need to improve the overall competitiveness of the European economy); Fifteenth Report on Competition Policy (1985), point 26; Sixteenth Report on Competition Policy (point 32); and the discussion in CASPARI, M. Joint Ventures - The Intersection of Antitrust and Industrial Policy in the EEC. *Fordham Corporate Law Institute*, 1985, p. 449.

¹⁹⁰ *LH/SAS*, OJ [1996] L054/28; see also XXVIth Competition Report, at 71.

¹⁹¹ *Enichem/ICI*, OJ L50/18 (1988), [1989] 4 CMLR 54; see also *PBB/Shell*, OJ C189/2 (1984), reported in XVIIth Competition Report 1988, at para. 74 ; and *Montedison/Hercules* (Himont), XVIIth Competition Report 1988, at para. 69; *Stichting Baksteen* reported in XXIVth Competition Report 1994, at 111. For a detailed discussion of these cases see FINE (1994), pp. 378-383.

¹⁹² *Ford/Volkswagen* OJ [1993] L 20/14, 4 CMLR 543.

¹⁹³ *Carbon Gas Technologie* OJ [1983] L 376/17.

¹⁹⁴ *Philips/Osram* OJ [1994] L378/37. In this case, among other things to justify the exemption, the Commission stated that the « joint venture will result in lower total energy usage and a better prospect of realizing energy reduction and waste emission programmes » (paragraph 25). Moreover, the consumer benefit was not considered to result only in the downward pressure on lamp prices likely to be caused by the cost advantages of the cooperation but also in the direct and indirect benefits of less air pollution.

¹⁹⁵ See dissertation defended at EUI by Bouterse.

¹⁹⁶ See footnote 183 above.

*but is an element which the Commission has taken into account ».*¹⁹⁷ The Commission made thus clear that the geographical location was not the main reason for the exemption which was primarily based on the intrinsic merits of the case consisting of reduction of production costs and technical improvements brought about. On appeal brought by *Matra Hachette SA*,¹⁹⁸ the Court of First Instance upheld the decision acknowledging that the above “exceptional circumstances” were taken into consideration “supererogatorily”; the operative part of the decision would have been the same even if these circumstances were not referred to. This clearly implies that non-competition concerns could not be relied on to save joint ventures that would otherwise be anticompetitive on balance.

In reality, hence, these apparent substantive divergences were not as significant as may have appeared at first glance. It is notably the last condition of Article 101(3) that sets the ultimate limit to any defence, implying that if an agreement would lead to the elimination of competition in respect of a substantial part of the goods or services in question, it could not be saved on any grounds, be that related to efficiency arguments or to industrial policy or other considerations of public interest. The Commission in fact indicated that in practice it treated the last criterion of Article 101(3)(b) like the test of dominance in the merger context, and tried to ensure that similar results were reached under both regimes.¹⁹⁹ One could therefore expect that once the threshold of dominance was overstepped, no efficiency defence or other arguments would have been available under either regime, and the final outcome would have been prohibition under either set of rules. The difference in the treatment of individual cases was, nevertheless, that in the merger regime efficiencies were presumed up to the limit of dominance and they did therefore not need to be proved in individual cases, whereas in the Article 101 framework, as applied at that time, the parties had the onerous burden to justify their agreement and demonstrate efficiencies once the much lower standard of “appreciable” restriction of competition was met.

One more observation, which has not received sufficient attention in the critical literature, must be made in relation to the “concentration privilege”. The criticism related primarily to the analysis of restriction of competition under Article 101(1), whereas in the assessment of

¹⁹⁷Paragraph 36 of the Commission Decision.

¹⁹⁸ Case T-17/93 *Matra Hachette SA v Commission* [1994] ECR II-595, para. 139. Note that the main competitor, Renault, holding a 50 % share in the relevant market, severely opposed to the joint venture. For an analysis of the rationale of the case see AMATO, G. *Il potere e l'antitrust*. Il Mulino, 1998, pp. 59-62.

¹⁹⁹Commission’s document found at : Europa/Competition/Antitrust law - Innovation, p. 2.

the conditions for exemption under the third paragraph of this provision the Commission did give credit to the limited nature of joint ventures and to the fact that they left scope for competition between the participants. These were taken into account as positive factors that mitigated the market power assessment under the last condition of Article 101(3) which concerns the absence of elimination of competition for a substantial part of the relevant products.²⁰⁰ In a number of cases,²⁰¹ the Commission examined, in particular, whether the cooperation extended to all the parameters of competition (R&D, production and marketing) or whether it left to the parties the possibility of individual marketing and pricing.²⁰² This question was particularly relevant in the context of production joint ventures that also took up sales functions and thereby limited the parents' competition further downstream than pure production cooperation.²⁰³ On the other hand, when the parties continued competing at the crucial stages of competition, such as marketing and pricing, high market shares alone did not preclude exemption. This has at least implicitly been acknowledged in several Commission decisions exempting joint R&D,²⁰⁴ joint production²⁰⁵ and joint purchasing²⁰⁶. The Commission has indeed recognized that when the cooperation is limited to these functions and does not extend to marketing, substantial areas of competition, such as price competition, normally remain unaffected.²⁰⁷ For instance, an agreement including virtually all the competitors in a particular market may have been exempted where price competition was not affected,²⁰⁸ whereas clearly an industry-wide merger involving all those firms would not have passed muster under the Merger Regulation.

²⁰⁰ In the assessment of the fourth and last criterion of Article 101(3), the Commission naturally also looks at what happens in the market in relation to third parties. The more inter-party competition is restricted or eliminated, the greater attention will be paid to the intensity of both actual and potential third-party competition, based, *inter alia*, on the market structure and other factors that are normally relevant in the assessment of a dominant position under Article 82. See, e.g. RITTER (2005), p. 157, with references.

²⁰¹ *Exxon/Shell*, Decision of the Commission of 18 May 1994, [1994] OJ L144/20. See also *GEAE/P&W*, Decision of the Commission of 19 September 1999 [2000] OJ 58/16; and *IFPI – Simulcasting*, Decision of the Commission of 8 October 2002, [2003] OJ 107/58, point 120.

²⁰² Provided, naturally, that there was sufficient third party competition in the market to constrain effectively the parties to behave independently.

²⁰³ See e.g. *Rockwell/Ivaco* 1983.

²⁰⁴ See e.g. *Henkel/Colgate*, Decision of the Commission of 23 December 1971, [1972] OJ L 14/14, 17; *Beecham/Parke Davis*, Decision of the Commission of 17 January 1979, [1979] OJ L 70/11, 20; *Alcatel/ANT*, Decision of the Commission of 12 January 1990, [1990] OJ L 32/19.

²⁰⁵ See e.g. *VW/MAN*, Decision of the Commission of 5 December 1983, [1983] OJ L 376/11, 15; *Ford-Volkswagen*, Decision of the Commission of 23 December 1992, [1993] OJ L 20/14, at paragraphs 37-38, aff'd CFI [1994] ECR II-595.

²⁰⁶ *National Sulphuric Acid Association II*, Decision of the Commission of 9 June 1989, [1989] OJ L 190/22, 24.

²⁰⁷ See e.g. *Matra/Ford-Volkswagen*, CFI [1995] ECR II-595, paragraph 155.

²⁰⁸ This was the case in *Synthetic Fibers II*, Decision of the Commission of 4 July 1984, [1984] OJ L 207/17.

Be that as it may, the consequences of the differential treatment are well-known. It created forum shopping incentives to structure collaborations so that they fulfil the criteria to be treated under the Merger Regulation. An empirical survey carried out by *Neven, Nutfall and Seabright*²⁰⁹ provided some evidence that certain firms had indeed changed the form of their transactions so that they could be covered by the Merger Regulation and avoid either Article 101 procedures or investigation by national authorities. Due to the convenience of the EU merger regime with regard to possible multiple and sometimes stricter national reviews, firms arguably also had incentives to structure their arrangements in the form of a joint venture by providing for veto rights to establish de facto joint control rather than sole control.²¹⁰ All this distorted private transactions and the organizational choices towards concentrative operations, thereby interfering with the structural and commercial decisions of the organizations involved. Moreover, it incited firms to organize their collaboration in a way which was, under a traditional economic approach, more detrimental to competition than cooperation that was limited in time and/or function.²¹¹

²⁰⁹See NEVEN, D, NUTTFALL, R. and SEABRIGHT, P. *Merger in Daylight. The Economics and Politics of European Merger Control*. Centre for Economic Policy Research, 1993, at 6-7, ch. 3, at 79. Antitrust practitioners have also been in a key position to witness such a phenomenon ; see e.g. HAWK & HUSER, 30 *C.M.L.Rev.* 1155, 1163 (1993) (« *A core principle of a market economy is that private transactions ... should not be altered by government regulations unless there is some public interest justifying regulatory intervention. No public interest is served by the forum shopping strategies that arise from the Byzantine legal complexities created by the [concentrative/cooperative] distinction* ».).

²¹⁰ This was because in a traditional acquisition of sole control the turnovers of the acquirer and the target company (and not its other shareholders) were counted, whereas formation of a jointly controlled subsidiary allowed to take into account the turnovers of all parents sharing the control. The finding of joint control sometimes meant that the transaction fell within the Community jurisdiction, while it would have been examined by national authorities should it have been treated as an acquisition of sole control where the worldwide turnovers of the acquirer and the target company were less than the required thresholds. This may have been the case, for example, in *Varta/Bosch* which would have fallen outside the scope of the Merger Regulation, if Varta's 65 % interest in the joint subsidiary had been characterized as « sole control » instead of joint control with Bosch, since the worldwide turnover thresholds would not have been met without counting Bosch's turnover. It has been submitted that the parties might have included veto rights to establish joint control in order to avoid review by German authorities. As reported in NEVEN, NUTTFALL & SEABRIGHT (1993), *Merger in Daylight*, at 82. The situation has actually not changed upon the amendment of the Merger Regulation but similar issues may still rise. 1998 Notice on the concept of undertakings concerned ; compare III.2 (acquisition of sole control) with III.3 (acquisition of joint control).

²¹¹The emphasis on the permanent withdrawal of the parents from the joint venture's market, for instance, encouraged the parties to enter into indefinite non-competition agreements to evidence such a withdrawal, although non-competition clauses could normally be qualified as ancillary restraints only when they were strictly limited in time and scope. See the discussion on « corruption of substantive principles » in HAWK & HUSER, 30 *C.M.L.Rev.* 1155, 1163-1167, citing examples of the Commission's policy of e.g. encouraging the parties to enter into indefinite non-competition agreements to allow the characterization of the joint venture as « concentrative ». See e.g. Cases *Pechiney/VIAG*, Case No. IV/M.198 (10.8.1992), para. 15 ; and *Steetley/Tarmac*, Case No. IV/M.180 (12.2.1992), para. 15 (indefinite non-competition clauses treated as ancillary restrictions).

Overall, the concentrative/cooperative dichotomy gave rise to a great deal of frustration among companies and professionals.²¹² Significant amount of time was often required to resolve the jurisdictional issue both on the private side and at the Commission, which involved substantial costs and waste of administrative resources. The complexity of the test itself caused difficulties to the joint venture parties and their counsel having to cope with the issue of identifying the appropriate regime, which involved a number of complex substantive issues to be assessed at the first step of the regulatory process. While the jurisdictional test lent itself to manipulation and forum shopping by the parties, it also constrained the Commission to redefine and shift the borderline by interpreting flexibly the elements of the test in order to attenuate the disparities in the treatment of the different categories of joint ventures.²¹³ As a consequence, the dichotomy proved an inefficient device, as it increased the transaction costs of the parties and wasted administrative resources of the Commission without offsetting gains in legal certainty or accuracy of the analysis.

²¹²The most reasoned criticism against the dichotomy was expressed in HAWK, B and HUSER, H. A bright line shareholding test to end the nightmare under the EEC Merger Regulation. 30 *C.M.L.Rev.* 1155 (1993). As the principal flaws of the jurisdictional test, they indicated: (i) an unsound theory about the competitive harms and benefits of joint ventures ; (ii) the failure to operate as a speedy, inexpensive and predictable notification and jurisdictional test ; (iii) the corruption of substantive analysis ; and (iv) the unnecessary promotion of forum shopping and restructuring of private transactions. For other critical views, see also CALVET, H. and BERLIN, D. *Semaine Juridique. Cahiers de Droit de l'Entreprise*, No. 47, 23.11.1995, p. 459; and KIRKBRIDE, J. and XIONG, T. The European Control of Joint Ventures : An Historic Opportunity or a Mere Continuation of Existing Practice ? 23 *European Law Review* (1988), 37.

²¹³This kind of lax enforcement was believed to entail a loss of credibility for the Commission and the certainty for the firms. This way e.g. NEVEN, NUTTALL & SEABRIGHT (1993), at 80, 90.

1.2 EVOLVING CONTENT AND IMPLICATIONS OF THE DUAL STANDARD

The joint venture problem was one of the major issues to be solved in connection with the first revision of the Merger regulation in the latter half of the 1990's. The Council Regulation (EC) No. 1310/97 amending Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings (the "1997 Amendment")²¹⁴ finally extended the scope of the merger proceedings to include all full-function joint ventures and introduced new rules for the assessment of the coordination aspects under the criteria of Article 101 TFEU but within the merger proceedings. The major implication was that more joint ventures could benefit from the relatively favourable treatment under the EUMR, leaving out only those performing "partial" or auxiliary functions for the parent firms. An improvement of the approach to joint ventures and the impact of a change in the merger rules would, however, have been only partial if adjustments were not made in the framework of Article 101. There were indeed a number of successive developments in that framework which have gradually remedied the most flagrant consequences of the dual standard and removed much of the essence of the "concentration privilege". With the improvement of economic analysis under Article 101 since the early 2000's and, in particular, the abolishment of the prior notification system by Regulation 1/2003 in 2004, the content and implications of the dual standard have indeed drastically changed.

What follows is therefore an analysis of these changes, which reflect the current state of law and policy in this area. These concern the extension of the scope of the merger proceedings to cover all full-function joint ventures in 1998 (1.2.1), and the reform of the framework concerning horizontal agreements by substantive policy developments in 2001 and by the abolishment of the exemption system of Regulation 17/62 in 2004 (1.2.2).

²¹⁴Council Regulation (EC) No. 1310/97 of June 30, 1997 amending Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings, [1997] OJ L180/1.

1.2.1 Extension of the scope of the merger proceedings

The 1998 Amendment did not end the conceptual exercise of classifying joint ventures into different categories based on their structural and behavioural features. The crucial contribution of that reform was to simplify the jurisdictional test by removing substantive criteria from that test and to change the function of the coordination test from a jurisdictional to a substantive one (1.2.1.1). Interestingly, whilst the economic rationale behind the previous dichotomy and the "concentration privilege" has been severely contested, the full-function concept no longer appears to entail – at least not explicitly - a favourable attitude as compared to more limited joint ventures (1.2.1.2).

1.2.1.1 Simplification of the jurisdictional test

The Commission had sought an appropriate solution for the joint venture problem in its 1996 Green Paper on the Review of the Merger Regulation,²¹⁵ setting out options ranging from pure procedural solutions to extending the scope of merger rules to cover all joint ventures with the European dimension.²¹⁶ To the deception of those who had been pleading for a global inclusion of all joint ventures within the merger regime,²¹⁷ the solution finally opted for was in fact a mixture between a procedural and a substantive one. The Council Regulation (EC) No. 1310/97 amending Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings (the "1997 Amendment")²¹⁸ extended the scope of the merger proceedings to include all full-function joint ventures and introduced new rules for the assessment of the coordination aspects under the criteria of Article 101 TFEU but within the

²¹⁵COM(96) 19 final, January 31, 1996. The Green Paper initiated a broad consultation process aiming primarily at the revision of the thresholds of application and the status of joint ventures.

²¹⁶ See the Green Paper, paras. 107-120. These included the possibility of enacting a new procedural regulation for the treatment of cooperative full-function joint ventures; or subjecting cooperative full-function joint ventures to the procedures of the Merger Regulation, leaving the substantive tests separate; and finally extending the scopes of block exemptions dealing with horizontal cooperation to cover a wider range of joint ventures. Other alternatives involving both substantive and procedural treatment included the possibility of extending the scope of the Merger Regulation to all full-function joint ventures, including those involving cooperation aspects, or extending it to cover all joint ventures with the only exception of shams for cartel behaviour. These alternatives have been further analyzed in PARMENTIER, L. and GRANT, C. EC Merger Control Regulation. From the Notices to the Green Paper. *International Business Law Journal*, No. 4, 1996, p. 469.

²¹⁷ See e.g. HAWK B. Concentrative/Cooperative Joint Ventures : Metaphysics and the Law. EC Commission, Ostend, September 12, 1990; see also HAWK & HUSER, 30 *C.M.L.Rev.* 1155; and PARMENTIER, L. and GRANT, C. EC Merger Control Regulation. From the Notices to the Green Paper. *International Business Law Journal*, No. 4, 1996, p. 469.

²¹⁸ Council Regulation (EC) No. 1310/97 of June 30, 1997 amending Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings, [1997] OJ L180/1.

merger proceedings. In the current framework, classifications are thus still necessary to distinguish between: (i) concentrative full-function entities subject to merger rules only, (ii) cooperative full-function entities which may be subject to a double review under the merger test and the Article 101 test in the merger procedure (Article 2(4) EUMR), and finally (iii) single or partial function joint ventures subject to Article 101 TFEU only. As a result, the 1997 Amendment did not end the conceptual exercise of classifying joint ventures into different categories based on their structural and behavioural features, but simplified the test by reducing the amount of substantive market analysis at the stage of the jurisdictional issue.

The concept of a full-function joint venture was not a novelty as such, since it was previously known as one of the constituent elements of a concentrative joint venture. It was neither an original concept of EU competition law. Rather, it derives from German doctrine, where joint subsidiaries making use of all normal business means for the realization of their goals are identified as "*Vollfunctionen*" ("full function") and generally distinguished from those performing auxiliary functions on behalf their parent firms, identified as "*Teilfunctionen*" ("partial function").²¹⁹ However, this dichotomy was transplanted in the EU competition law to fulfil a different function than in the German merger doctrine under which it does not determine the notification requirement but is used in the substantive analysis. In the EU , by contrast, this concept draws the borderline between the mutually exclusive regimes for mergers and horizontal agreements, respectively.

The Commission gave elaborate guidance on the jurisdictional test in the Notice on the concept of full-function joint ventures (the « Full-Function Notice »)²²⁰, with cross-references to the Notice on the Concept of Concentration²²¹ which contained a definition for joint control. In 2007, these and other jurisdictional notices were finally simplified and combined into one global set of guidelines by Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings

²¹⁹See discussion in BOS, P., STUYCK, J. and WYTINCK, P. *Concentration Control in the European Economic Community*. London, Graham & Trotman, 1992, at 48-49, with references to the relevant German literature.

²²⁰Commission notice on the concept of full-function joint ventures under Council Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings, [1998] OJ C66/1.

²²¹Commission notice on the concept of concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, [1998] OJ C66, which replaces the preceding Notice on the concept of concentration [1994] OJ C385/5.

(the "Consolidated Notice").²²² The principles of interpretation derive from the Commission's decisional practice that has emerged and evolved since the early cases examined under the Merger Regulation, the essential elements being the autonomy of the joint entity and the exercise of joint control by parent firms.²²³

To be an autonomous entity, a joint venture must (i) perform all the normal business functions by other entities operating in the same relevant market ; (ii) bring about a lasting change in the structure of the undertakings concerned; (iii) have sufficient resources and a management dedicated to its day to day operations to operate on a lasting basis ; and (iv) operate in the market as an ordinary competitor without being dependent on its parents for necessary input purchases or output sales. To assess whether the joint venture is autonomous the Commission examines primarily the functions and resources²²⁴ vested to it, the nature of its relationships with the parents and its role in the market as well as its duration²²⁵. The bottom-line is that the joint entity has to be functionally autonomous in terms of market access, supplies, management and assets in order to be able to make operational decisions on competitive issues, such as pricing, production volumes, sources of supply. In other words, these firms are fully-fledged market actors that buy and sell products on the market in their own right, contracting rights and obligations for their own account, and have sufficient own assets and

²²² Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, available on DG COMP's web-site under http://ec.europa.eu/comm/competition/mergers/legislation/draft_jn.html.

²²³ Article 3(3) ECMR defines control by reference to “rights, contracts or any other means “ which, either separately or in combination and having regard to the considerations of fact and or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by ownership or the right to use all or part of the assets of an undertaking, as well as rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking. The “joint” character of such control is defined in detail in the Consolidated Notice. It does not necessarily require the parents’ equal financial interests but the concept refers to both legal and *de facto* considerations on a case-by-case basis. It may result, in particular, from equality in voting rights or appointment to decision-making bodies, or from veto rights allowing minority shareholders to block decisions which are “essential for the strategic commercial behaviour of the joint venture” (paragraphs 20 and 21 of the Notice).

²²⁴ The joint entity does not necessarily have to be the owner of the resources ; what counts is that they are made available to it although the parents may retain the ownership rights over the resources. See e.g. Case M/JV-19, *KLM/Alitalia*, Decision of 11.8.1999, paragraph 16 (KLM and Alitalia integrated their scheduled passenger network, sales and cargo business through a contractual long-term alliance which runs and markets its parents’ air carrier services so that the latter supplies the necessary assets, including aircrafts with crews, and production capacity).

²²⁵ The requirement of a lasting basis has been assessed in terms of an unlimited or very long duration, which is flexibly interpreted. A joint venture established for a fixed period can still meet the criterion of a lasting basis where the period is sufficiently long in order to bring about a lasting change in the structure of the undertakings concerned or where there are provisions for the continuation of the joint venture after the expiry of such period. See e.g. Case COMP/M.2982, *Lazard/Intesa BCI/JV*, Decision of 4 February 2003 (a joint venture established for an initial term of five years, subject to renewal of successive five-year terms until express termination by one of the joint venture's parents was sufficiently long to result in a lasting change in the structure of the undertakings concerned).

management dedicated to their day-to-day operations to operate in a long term basis. The concept is not limited to corporate arrangements but it may also cover contractual joint ventures without creation of a separate entity, as was the case at issue in *KLM/Alitalia*²²⁶.

To avoid an apparent contradiction between the requirements of autonomy and joint control, the former is defined in terms of functional - not decision-making - autonomy, whereas joint control refers to strategic decision-making, such as appointment of the board members and management, rather than to day-to-day operation of the business.²²⁷ In this regard, the Consolidated Jurisdictional Notice specifies that "[t]he fact that a joint venture may be a full-function undertaking and therefore economically autonomous from an operational viewpoint does not mean that it enjoys autonomy as regards the adoption of its strategic decisions. Otherwise, a jointly controlled undertaking could never be considered a full-function joint venture and therefore the condition laid down in Article 3(4) would never be complied with. ... It is therefore sufficient for the criterion of full-functionality if the joint venture is autonomous in operational respect."²²⁸

The requirement of functional autonomy – as such rejected by *Hawk*²²⁹ as irrelevant in terms of economics of competition policy – still requires some substantive assessment of the venture's trade links with its parents to determine whether it will depend on the parent for necessary input purchases or output sales. The Commission has highlighted that the economic independence will not be contested merely because the parents reserve to themselves the right to make certain decisions that are important to the development of the venture or because, for an initial start-up period (normally not more than three years), the parents are key suppliers or customers of the venture. When the joint venture retains one parent as a major customer,²³⁰ the Commission may also take into account the existence of other major customers to diminish the concerns over the dependence. If the contractual links between the joint venture

²²⁶Case M/JV-19, Decision of 11 August 1999; paragraph 16. KLM and Alitalia integrated their scheduled passenger network, sales and cargo business through a contractual long-term alliance which runs and markets its parents' air carrier services so that the latter supplies the necessary assets, including aircrafts with crews, and production capacity.

²²⁷ Case No IV/JV.14, *PanAgora/DG Bank*, 26 November 1998, paragraphs 8 to 10.

²²⁸Paragraph 93.

²²⁹ HAWK, B. Concentrative/Cooperative Joint Ventures : Metaphysics and the Law. EC Commission, Ostend, September 12, 1990 ; see also HAWK & HUSER, 30 *C.M.L.Rev.* 1155, 1157-1161.

²³⁰*Telia/Eriksson*, Reported in XXVIIIth Report on Competition Policy, paragraph 187, at 68. See also *PanAgora/DG Bank*, Case No IV/JV.14, 26.11.1998 (DG Bank was the first customer of the joint venture set up to offer asset management services in certain European countries but the joint venture seeks actively mandates from other institutions).

and its parents are of a minor economic importance with regard to the operation as a whole they do not call into question the full-function character. For instance, the Commission has considered that a joint venture's obligation to buy between 70 per cent and 80 per cent of a certain type of raw material needed for production from or via its parent companies does not alter the full functional nature of the joint venture.²³¹ What the Commission particularly looks for is an active role that the joint venture must play on the market in terms of sales to third parties even if it continuously sells some of its production to the parents.²³²

The 1997 Amendment was, overall, well received and welcomed by many professionals as a simpler and easier jurisdictional test than its predecessor.²³³ It reduced the amount of complex substantive assessments relating to the coordination risk, such as market definition and relationship of potential competition between the parties, at the preliminary stage of determining the applicable regime. Since the reform, there has been much less criticism in the specialized literature, at least in so far as the jurisdictional divide is concerned.²³⁴ Some commentators have, nevertheless, lamented that this reform increased complexity and shifted the uncertainties from the jurisdictional issue to the substantive assessment.²³⁵ The application

²³¹ Case No. COMP/M.3578 – BP/Nova Chemicals/JV of 1 July 2005; see also Case No. COMP/M.3099 – Areva/Ureco/ETC JV.

²³²The Court of First Instance has taken position on the criterion of autonomy only once, in Case T-87/96, *Assicurazioni Generali and Unicredito vs. Commission*, paragraphs 77-83, ECR [1999]. Although the original version of the Merger Regulation was applied to the facts of the case, the analysis of the CFI concerning the joint venture's autonomy is still interesting. This case highlighted the importance to take into account the specific characteristics of the market to appreciate the parents' influence to the functional autonomy of the joint venture. The Italian parent firms, an insurance company (Assicurazione Generali SpA) and a financial institution (Unicredito SpA), established a joint venture (Casse e Generali Vita SpA) which was to be involved in selling individual insurance policies under its own brand name but through Unicredito's agency network, yet with the possibility of using other distribution channels. Unicredito's banks were to provide also all the life insurance coverage and manage the funds and assets of the joint venture. Generali, in turn, committed to provide assistance to the venture in a number of domains, such as procedures of emission, computing services, accounting and medical risk evaluation. The agreement provided that the joint venture was to become autonomous progressively along with the increase of its business volume, but this was not sufficient to consider it autonomous. See also the Commission Decision in Case IV/M.711, *Generali/Unicredito*, decision of 25 March 1996 (paras. 13-17; 21-22).

²³³ ZONNEKEYN [1998] 7 *E.C.L.R.* 414; SALQUE, C. La stratégie industrielle des groupe européens de l'aéronautique, de l'espace et de la défense face à la concurrence internationale : Création d'entreprises communes et respect du droit communautaire de la concurrence. *Revue du Marché Unique Européen* 4/1999, 45; NOUVEL, L. The New European Treatment of Joint Ventures : A Shift towards a more Economic Approach. *IBLJ*, No 5, 2002, p. 511-556.

²³⁴The Commission's interpretation of the full-function concept has, however, occasionally been criticized for some inconsistencies and uncertainties, see e.g. RADICATI DI BROZOLO, L.G. and GUSTAFSSON, M. Full-function Joint Ventures under the Merger Regulation: the Need for Clarification, [2003] *E.C.L.R.*, Issue 11, p. 571, at 578-579.

²³⁵See, e.g. AHLBORN & TURNER [1998] 4 *E.C.L.R.* 249 and NEVEN, PAPANDROPOULOS & SEABRIGHT (1998), at 90-92; GÖTZ & JONES, (eds): *EU Competition Law, Volume II, Mergers and Acquisitions*, Claeys & Casteels, 2006, p. 405-414.

of Articles 2(4) and 2(5) ECMR – and thus Article 101 criteria - indeed raises a number of issues and peculiarities that now need to be addressed.

1.2.1.2 Change in the economic and legal rationale?

The first Chapter of this dissertation already explained how the so-called “concentration privilege” came about and what appeared to be the reasoning behind it. To recall, a thesis has been presented that the initial concentration privilege, as implied already in the 1966 Memorandum on Concentrations, was motivated by a positive economic policy choice in favour of mergers and concentrative joint ventures over cooperative agreements. This occurred during a period when European markets were still fragmented and industrial policy concerns advocated for larger size of European firms to face competition from elsewhere.²³⁶ This approach did not, however, seem to be embedded on an appropriate comparison of the net effects on the social welfare, which has been highlighted in the critical literature contesting the economic rationale behind the “concentration privilege”.²³⁷ In the original version of the EU Merger Regulation of 1989, the relatively favourable approach towards mergers was expressed by welcoming corporate reorganizations in so far as they were “*in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry*”.²³⁸ The structural changes involved in mergers and concentrative joint ventures were considered to “*reflect a dynamic process of restructuring in the markets concerned*” and for this reason they were to be permitted unless serious damage to the structure of competition was caused by the market dominance they could lead to. Cooperative joint ventures, in turn, did not in principle involve a lasting change in the structure of the undertakings but could provide the parents a possibility to coordinate their competitive behaviour, which was considered to justify a stricter treatment under the rules of Article 101 in terms of the 1994 Interface Notice.²³⁹ The Commission thus considered more appropriate

²³⁶VOGEL (1988), at 231-237 (discussing this principle as a theory of « double standard »). See also BANKS, 11 *Fordh. Int.L.J.* 232, at 258-263 (1988).

²³⁷HAWK, B and HUSER, H. A bright line shareholding test to end the nightmare under the EEC Merger Regulation. 30 *C.M.L.Rev.* 1155 (1993); see also AHLBORN & TURNER [1998] *E.C.L.R.* 249. For a divergent view justifying the differential treatment by the uncertainty of efficiencies in the cooperative scenario as compared to mergers and acquisitions, see FAULL, J and NIKPAY, A. (eds) *The EC Law of Competition*. New York, Oxford University Press, 1999, at 83; see also e.g. JONES, 1990 *Fordham Corp. L. Inst.* 385, 397. CONZALES-DIAZ 1999.

²³⁸The 1989 Merger Regulation, Recitals 2 to 5.

²³⁹ Notice on the distinction between concentrative and co-operative joint ventures under Council Regulation (EEC) No. 4064/89 of December 21, 1989, on the control of concentrations between undertakings, [1994] *OJ* C358/1, para 6.

to subject cooperative ventures to the broadly construed prohibition of Article 101(1) with the possibility of an exemption only when the conditions of Article 101(3) were met.²⁴⁰

The above-referenced Notices clearly suggested that cooperative joint ventures, regardless of the fact that they preserve some form of competition between the parent firms, were considered more likely to result in net competitive harm than concentrative ones that totally eliminated such competition. This also appears to have been the understanding of a number of commentators in European legal literature.²⁴¹ While it has not been officially pronounced, the underlying idea may also have been that in mergers and concentrative joint ventures efficiencies could be presumed, whereas in cooperative joint ventures efficiencies were considered less certain and had to be individually justified once the threshold of appreciable restriction of competition had been overstepped.²⁴² This translated into a favorable attitude towards market concentration over more limited cooperative activity, since concentrative joint ventures involving typically the parents' permanent market exit by definition reduced the number of competitors in the relevant market. In practice this implied for instance that industrial cooperation limited to joint R&D and/or production was easily found to violate Article 101 and required exemption in a time-consuming procedure, even where it did not restrict competition in the downstream product market in which the parents sold the products in competition with each other. At the same time, joint ventures involving elimination of competition between the parties also at the marketing stage and thus more serious restriction of competition than mere R&D and/or production alliances, were easily cleared under the quick merger procedure as not posing serious doubts about their compatibility with the competition rules in so far as they did not lead to dominance.

²⁴⁰Ibid, para 6.

²⁴¹See, in particular, VOGEL, L. Filiales communes et droit communautaire de la concurrence. *JCP* 1993, éd. E I, 254 ; VAN DER ESCH, B. Joint ventures under the competition rules of the EEC Treaty. In *Exploiting the Internal Market : co-operation and competition towards 1992*, 77 (1988) ; KLEENMANN, *Fordham Corp. L. Inst.*, 623, 631 (justifying the disparity of treatment by the fact that « restrictive agreements are seen as harmful to competition per se unless they fulfill the requirements of an exemption under Article 85(3). In contrast, concentrations frequently reflect a dynamic process of restructuring.»); JONES, 1990 *Fordham Corp. L. Inst.* 385, 397 (submitting that if the distinction reflects the Commission's chosen economic basis, then one « should only criticize that test once it is found that the economic basis itself is flawed ») at 401; and FAULL, J and NIKPAY, A. (eds) *The EC Law of Competition*. New York, Oxford University Press, 1999, at 83. In contrast, certain American authors strongly disagreed with this premise, as powerfully expressed in HAWK, B and HUSER, H. A bright line shareholding test to end the nightmare under the EEC Merger Regulation. 30 *C.M.L.Rev.* 1155 (1993). ADD CONZALES DIAZ.

²⁴²See e.g. FAULL, J and NIKPAY, A. (eds) *The EC Law of Competition*. New York, Oxford University Press, 1999, at 83.

The positive connotation given to the “lasting change” of the company structures and the market structure in the legal instruments and official policy documents has survived throughout the legal and policy developments in the EU.²⁴³ There is, however, an interesting difference in the wording of the recitals of the interpretative notices. In contrast to the 1994 Interface Notice, the now superseded Full-Function Notice and its successor Consolidated Jurisdictional Notice no longer mention the necessity to subject cooperative joint ventures to the stricter rules of Article 101.²⁴⁴ Whether this can be understood as a deliberate change in the enforcement attitude and an implicit acceptance that cooperative joint ventures do not necessarily merit stricter treatment than mergers is, however, not clear.

There are indeed a number of inconsistencies in the relevant legal instruments, policy guidelines and administrative practice. On the one hand, the full-function concept encouraged firms to contribute to their alliance a full range of activities, including sales. This was because until 2004, when the exemption system of Regulation 17/62 was removed, merger proceedings ensured a faster clearance with greater legal certainty than the framework of Article 101 TFEU. Moreover, under the Merger Regulation market shares not exceeding 25% could normally be considered an indication that no adverse effect on competition existed,²⁴⁵ whereas for partial function R&D or specialization agreements (with or without the production function) the safe harbours provided by the then applicable block exemptions were lower at 20%.²⁴⁶ On the other hand, when the relevant block exemptions were extended to cover R&D and specialisation joint ventures that also included sales or distribution functions (i.e. possibly full-function) by Regulation 151/93, it was notably the fully integrated ventures that were subject to lower market share safe harbours of 10 %; partial function entities limited to R&D or specialization continued to benefit from a 20 % market share. The Commission reasoned this as follows:

²⁴³Notice on the concept of full-function joint ventures, paragraphs 5 and 6, confirming the long-standing position that lasting structural changes should be allowed insofar as they do not result in serious damage to competition by creating or strengthening a dominant position..

²⁴⁴ Although no reasoning has been presented for this omission, it may have been done purposefully to avoid the kind of criticism that the Commission was subject to because of the disparities of treatment between concentrative and cooperative joint ventures.

²⁴⁵Notice on the concept of full-function joint ventures, paragraphs 5 and 6; Recital 13 of the ECMR.

²⁴⁶Distribution function was excluded from the scope of these regulations until the adoption of the Regulation No 151/93 amending the above block exemptions. Note that no block exemption has been enacted for pure production functions.

*« As cooperation also includes distribution, the Commission has to take special care in assessing individual cases that no position of market power will be created or strengthened by entrusting the JV with all the functions of an undertaking, combined with the placing at its disposal of all the existing resources of the parents. .. If the said threshold [10%] is exceeded, an exemption will be considered only after a careful examination of each individual case ».*²⁴⁷

So in practice this meant that to benefit from the lenient merger test and fast merger proceedings, it was better to vest the joint venture with all the functions, including distribution and sales, but if the agreement did not qualify under the Merger Regulation, it was better to limit the functions and exclude sales from the scope of the joint venture. This illustrates the overall lack of coherence of the Commission's approach, which depended on the regulatory context and made it difficult to understand the rationale behind it. It is notably the difference in the safe harbours provided for in the relevant block exemptions that suggests that the Commission did not systematically regard full-function entities as a lesser harm to competition than more limited ones, but even to the contrary.

Another divergence between the different sets of rules was that, during the first years of application of the 1997 Amendment, structural remedies were not provided for in Regulation 17/62, the then applicable implementing regulation of Article 101 TFEU which provided for behavioural remedies only. By contrast, Article 2(4) allowed to set structural remedies in case of breach of Article 101 TFEU criteria. For instance, the divestitures set in BT/AT&T and Fujitsu/Siemens would not have been available under Regulation 17/62 at that time, and therefore application of Article 2(4) could lead to harsher remedies in some cases.²⁴⁸

This led to a confusing situation, all the more so as prominent critical literature argued that it was notably those ventures performing limited functions (such as R&D and/or production) that raised less market power concerns,²⁴⁹ whereas in certain circumstances marketing joint

²⁴⁷Emphasis added. See the 1993 Joint Venture Guidelines, para. 64. Compare with Notice on the concept of full-function joint ventures, paras. 5 and 6, and Recital 13 of the Merger Regulation stating that market shares not exceeding 25% may normally be considered an indication that no adverse effect on competition exists.

²⁴⁸Regulation 1/2003 filled this lacuna by providing in Article 7(1) the possibility to fix structural remedies where no equally effective behavioural remedy is available or, even if such remedy were be available, it would be more burdensome for the undertaking than a structural one. While merger remedies are not limited by such conditions, this reduces the divergences between the two regimes.

²⁴⁹See e.g. HAWK & HUSER, 30 *C.M.L.Rev.* 1155, 1158 (« *Most joint ventures - especially those with a limited duration or only partial contribution of their parents' operations - (i) typically create lower (and certainly not greater) risks of competitive harm than full mergers and acquisitions involving the same parties; and (ii) are often equally likely to involve economic efficiencies and other competitive benefits*»). This way also BRODLEY,

ventures and cross shareholdings could result in similar or even greater market power than full mergers.²⁵⁰ In this regard, *Neven et al.*²⁵¹ argued specifically that it would not be useful to make general classifications of joint venture types based on whether they were full-function or performed limited functions on behalf of their parents. The case of cooperative full-function joint ventures merits some further attention in this context. At least on paper the substantive test for them still appears stricter than that for mergers and concentrative ventures in so far as they have to pass two different standards instead of one. In other words, even if a joint venture would pass the merger test under Articles 2(2) and 2(3), it may be declared incompatible with the Common Market under Article 2(4), if it has as its object or effect the coordination of the participants' competitive behaviour contrary to Article 101 TFEU. This has, however, never occurred in practice.

The question of whether or not this kind of a horizontal joint venture (i.e. one active in the same market as its parents, thus typically involving potential coordination concerns) may be more harmful to competition than a full horizontal merger by the same parties, has been somewhat contentious in the European legal literature. In particular, *Gonzalez-Diaz*²⁵² has pointed out that the presence of the parent firms in the same market may indeed have implications in terms of lesser efficiencies, thus justifying for a stricter treatment than for mergers and concentrative joint ventures. This view appears to be shared with *Temple-Lang*.²⁵³ However, other commentators, such as *Hawk and Huser*²⁵⁴, have argued, focusing on the net effects on the market, that the risk of collusion between the parents in the joint venture's market should be considered a potentially lesser harm to competition than a complete elimination of that competition through a merger or a concentrative joint venture. Whilst the purpose of this dissertation is not to solve this debate, it is useful to note that the

95 *Harv. L. Rev.* 1521, 1528-29, 1538-39; and U.S. Department of Justice, *International Antitrust Guidelines* (1988), paragraph 3.42. For a less absolute view, see NYE, W. Can a Joint Venture Lessen Competition More Than a Merger? 40 *Econ. Letters* 487 (1992) (arguing that in *Renaul/Volvo* a cross-shareholding structure embodied in the joint venture may have allowed to reduce output more than a merger).

²⁵⁰See, however, NEVEN et al. (1998), pp. 81-86, at 86 (« *Whether a joint venture allows for collusion between the parents will ... depend in considerable detail on whether the terms of the contracts between the parents and the joint venture allow internalization of the pricing externality. Marketing and distribution joint ventures and cross-ownership of subsidiaries are two significant ways of doing so.* »). The effect of collusion on the market power may be similar to elimination of competition through a merger.

²⁵¹*Ibid.* p. 92.

²⁵²GONZALEZ DIAZ, F.E. Horizontal Co-operation agreements, Chapter 7 in Faull and Nikpay, *The EC Law of Competition*, 2nd edition, Oxford University Press 2007, p. 667.

²⁵³TEMPLE LANG, J. International joint ventures under Community law, 2000 *Fordham Corp. L. Inst.* 381 (B. Hawk, ed. 2000).

²⁵⁴HAWK, B and HUSER, H. A bright line shareholding test to end the nightmare under the EEC Merger Regulation. 30 *C.M.L.Rev.* 1155 (1993);

U.S. approach and much of the economic literature reviewed in Sections 4 and 5 of the Introduction appear to agree rather with the latter.

1.2.2 Attenuation of differential treatment under Article 101 TFEU

We have already seen that the traditional approach towards joint ventures under Article 101 TFEU involved a number of major deficiencies, including in particular the generally broad construction of the scope of the prohibition imposed in its first paragraph, which required an onerous showing that the conditions of Article 101(3) TFEU were met to be exempted even where there was little or no real harm to competition. Gradually, however, the developments in the area of the mergers influenced also the treatment of joint ventures under Article 101 TFEU, which has undergone significant changes particularly in the past decade. Since the first years of application of the Merger Regulation, the Commission had attempted to attenuate the much criticised stricter treatment of joint ventures under Article 101 by more flexible interpretation of Article 101(1) in some cases, by extending the coverage of block exemptions and by introducing an informal fast track procedure for structural joint ventures. These efforts did not, however, prove sufficient. The framework of Article 101 and its implementing Regulation 17/62 remained stricter, procedurally more cumbersome and legally less certain than the Merger Regulation. It was not until the first years of the 2000s that the situation changed remarkably. This occurred through the improvement of economic analysis under Article 101(1) (so-called “new approach”) and the abolishment of the notification system by Regulation 1/2003.

This chapter will demonstrate that, in the current situation, the traditional “concentration privilege” has lost much of its meaning. First, proving the anticompetitive harm now requires more rigorous economic analysis than in the past, following an improved methodology (1.2.2.1) and substantive assessment closer to that of mergers (1.2.2.2). Second, the removal of a pre-screening mechanism from the enforcement of Article 101 and the resulting reliance on the parties’ self-assessment has removed the regulatory burden on non-full function joint ventures (1.2.2.3).

1.2.2.1 Improvement of the theory on potential competition

In the past, the analysis of whether the parents were potential competitors in the first place lacked coherence and the concept of potential competition was construed very widely. A finding that the parent firms could have individually undertaken the joint activity was often enough to find violation of Article 101(1) without in depth analysis of the significance of the effect on competition (see discussion above in subsections 1.1.1.2 and 1.1.2.2). The approach to these issues has gradually evolved. The increasing penetration of economic thinking in the Commission's legal policy is expressed in the economic concepts introduced to determine whether the undertakings can be considered actual or potential competitors in the first place. Towards 1990, at the event of the entry into force of the Merger Regulation, there had already been concrete signs of a less interventionist approach with regard to subjecting joint ventures to Article 101. This was illustrated in a series of cases in which the Commission granted negative clearances and showed that joint ventures not qualifying as concentrations were not necessarily caught by Article 101.²⁵⁵ The reason for the negative clearances was that the Commission could not identify any actual or potential competitive relationship between the parties at the formation of the joint venture - be it parent-to-parent or parent-to-venture - neither in the joint venture's market nor in other markets. Finally, both the 1997 Market Definition Notice²⁵⁶ and the 2001 Guidelines on Horizontal Agreements define actual and potential competitors by reference to the concept "*small and permanent increase in relative prices*" ("SPIRP"). This concept requires a detailed analysis of the entry conditions and the short-term ability of a producer to switch its production resources from one product to another, if the price of one product increases with regard to the other and becomes thereby more attractive to manufacture and sell.²⁵⁷ The origin of this concept is not indicated but it reminds closely the concept of "*small but significant and nontransitory increase in price*"

²⁵⁵ Elopak/Metal Box-Odin [1990] OJ L 208/15; see also footnote 9 of the 2001 Guidelines for Horizontal Agreements which refers to this case. The case was apparently controversial, since four years lapsed between the notification ([1987] O.J. L41/31) and the clearance. See also *Konsortium ECR 900* [1990] OJ L228.

²⁵⁶ Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5.

²⁵⁷ In response to such a price increase, firms that do not as of yet participate in the market still might do so through low-cost and rapid switching of resources, and for this reason these firms should be considered as participants in the relevant market. OJ C 372, 9.12.1997, paras. 20-23 (actual competitors), para 24 (potential competitors). Note that this concept refers supply-side substitutability after the market has been defined and it has therefore no bearing on the choice of the market definition which focuses on demand substitution factors.

(“SSNIP”) used in the US 1992 Merger Guidelines for measuring both the cross-elasticity of demand and for identifying the firms in the relevant market.²⁵⁸

The determination that joint venture parties are actual or potential competitors, which previously lacked coherence and economic soundness, has therefore clearly improved. Actual competitors include not only firms active on the same relevant market but also those imminent competitors who are able (without the joint venture) to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to a SPIRP (i.e. immediate supply-side substitutability).²⁵⁹ The notion of “*imminent competitor*” appears to be a rough counterpart to the US concept of an “*uncommitted entrant*” which includes as horizontal market participants also firms in the process of market entry or firms that are virtually certain future entrants.²⁶⁰ If the supply side response would require significant adjustments in the existing tangible and intangible assets, additional investments, strategic decisions or delays, the firm will be treated as a potential rather than actual competitor.²⁶¹ The concept of a potential competitor entails a situation in which the firm would, realistically speaking, undertake the necessary additional investments or other necessary changes to be able to enter the relevant market in response to a SPIRP.²⁶² The EU concept of potential competitor reminds the definition of a “*committed entrant*” in the US terminology, referring to a potential market participant whose entry or exit would require the expenditure of significant sunk cost.²⁶³

²⁵⁸US 1992 Merger Guidelines. In the demand side (§ 1.11), the agency chooses a narrowly defined hypothetical product market and asks whether consumers would switch to another product in response to the SSNIP. If a hypothetical monopolist would lose a sufficient number of customers to the next best substitute as a result of the SSNIP, such a consumer propensity to switch would limit the monopolist’s ability to extract a monopoly profit. Based on this the next best substitute would be added to the product market. To identify the firms in the relevant market, see § 1.32. Discussion in SULLIVAN & GRIMES (2000), p. 579-582; 589-590.

²⁵⁹EC Guidelines, note 3.

²⁶⁰Uncommitted entrants are defined by reference to a potential entrant that would likely enter the market “within one year and without the expenditure of significant sunk costs of entry and exit”, in response to SSNIP. It has been estimated that the US test for an uncommitted entrant is difficult to meet, as most firms entering new markets have to make considerable investments and thereby incur significant sunk costs. SULLIVAN & GRIMES (2000), p. 590. The term “uncommitted” is explained by a situation in which a firm’s willingness to transfer its productive resources to a new market will depend on whether those resources are already profitably and fully committed to another market. See also Brunswick corat, 94 F.T.C 1174, 1273-74 (1979), aff’d as modified sub. nom. Yamaha Motor Co. V. FTC. 657 F.2nd 971 (8th Cir. 1981), cert. denied, 456 U.S. 915 (1982), where the parents had previously attempted entry (cited in BRODLEY, 95 *Harv.L.R.* 1523, 1554-53 (1982)).

²⁶¹EU Guidelines, note 3.

²⁶²This assessment « *has to be based on realistic grounds, the mere theoretical possibility to enter a market is not sufficient* ». Ibid. note 4.

²⁶³See US 1992 Merger Guidelines, § 1.32. Note that in contrast to an “uncommitted entrant”, a “committed” entrant is not counted as a participant in the relevant market, but it is taken into consideration in the analysis of the ease of entry to counter otherwise likely anticompetitive effects (§ 3.0). Compare also with § 1.321 (the necessary resources of a “committed entrant” are already profitably and fully committed to another market).

In practice, the parties are considered potential competitors essentially when an individual R&D effort has already led to a successful outcome, for example a prototype.²⁶⁴ Occasionally, the Court of First Instance has reminded the Commission of the need to support its findings by appropriate evidence and a sound economic analysis, in particular to establish whether entry is impeded by barriers to entry and whether potential competition between the parents of a joint venture is more than a theoretical possibility. This was the case in *European Night Services v Commission*²⁶⁵ ("ENS"), involving a cooperative joint venture between four railway undertakings to provide and operate overnight passenger rail services between the United Kingdom and the Continent through the Channel Tunnel. The Commission took a broad view and considered that potential competition was restricted because each parent undertaking could set up subsidiaries in the Member States of the other parent undertakings and form (either with its own subsidiaries or with other railway undertakings established in the other Member States concerned) international groupings in direct competition with ENS. The CFI considered this to be a mere hypothesis unsupported by any evidence or any analysis of the structures of the relevant market from which it might be concluded that it represented a real, concrete possibility.

1.2.2.2 Emergence of market power analysis

Apart from the initial question of finding that the joint venture parties were actual or potential competitors, the other subject of criticism in the traditional approach was the lack of adequate economic analysis before the finding of violation of Article 101(1), which then required validation in exemption proceedings. The criterion of "appreciable restriction" was indeed very broadly construed, not requiring a substantial impact on market conditions, which conflicted with the standard economic theory dictating that unless economic actors possess and exercise market power, they are unable to affect competition adversely.²⁶⁶ Beyond the *de minimis* threshold, market power was analysed only in connection with the conditions of an

²⁶⁴ *Asahi/St Gobain* [1994] OJ L354/87.

²⁶⁵ Joint Cases T-374/94, T-375/94, T-384/94 and T-388/94 [1998] ECR II-3141.

²⁶⁶ For further reading, see e.g. BISHOP, S. and WALKER, M. *Economics of E.C. Competition Law : Concepts, Application and Measurement*. Sweet & Maxwell, 1999, at 78, 27 (defining market power as « the ability to of a firm or group of firms to raise price, through the restriction of output, above the level that would prevail under competitive conditions and thereby enjoy increased profits from the action »). Pleas for the adoption of a market power filter into Article 101(1) were first presented in connection with the analysis of vertical restraints. For counterarguments see SCHRÖTER, H. Vertical Restrictions under Article 85 EC : Towards a Moderate Reform of Current Competition Policy. In GORMLEY, L. (ed.) *Current and Future Perspectives on EC Competition Law*. Kluwer Law International, 1997, at 19-20 (arguing that such a notion would be inconsistent with the structure and contents of Article 101).

exemption in the second stage of the competitive assessment under Article 101(3). This implied that many agreements involving little or no antitrust harm were caught by the prohibition and had to be justified under the exemption criteria (see discussion above in subsections 1.1.1.2 and 1.1.2.2)..

In this context, one must recall that during the time when the Merger Regulation was introduced and started applying in 1990, in some occasional cases the Commission conducted a structural analysis of the market also under Article 101(1) before finding a violation, much the same way as was done for mergers. The first case of significance in this respect was *GEC-Siemens/Plessey*²⁶⁷ in which the Commission undertook a merger-type market analysis to conclude that the case raised no appreciable competition concern.²⁶⁸ In this case, the Commission found that the restrictions of competition were not appreciable where the markets were sufficiently competitive due to the presence of a large number of competitors in the relevant market, or where the purchasing power of governmental agencies buying the products in question counterweighted the restriction of competition. In certain other cases, such as *Lufthansa/SAS*, the Commission also proceeded with a detailed analysis of the relevant market under Article 101(1) before presuming that the airlines would coordinate their competitive behaviour and analyzed their combined market shares and potential entry barriers much the same way it did in merger cases in the same sector in cases *Sabena/Air France* and *Sabena/Swissair*.²⁶⁹

There was, however, no coherent change in the decisional practice, which was shown for instance in the controversial case *Ford/Volkswagen*²⁷⁰ in 1994. In this context, it is also useful to recall that there had been, since the beginning of the enforcement of Article 101, a vivid debate over the possibility to introduce an American-style rule of reason into the methodology

²⁶⁷*GEC-Siemens/Plessey* [1990] OJ C239/2.

²⁶⁸While the case *Siemens/Plessey* was cited for the proposition of a new approach to joint ventures between competitors under Article 101(1) (VENIT, J. Oedipus Rex : Recent Developments in the Structural Approach to Joint Ventures Under Competition Law. 14 *World Competition* 5 (1991), at 10-15), this conclusion later proved premature as it was not consistently followed in the subsequent practice. Note that this case was closed by rejecting the complaint of Plessey against its joint acquisition by Siemens and GEC. Although no formal decision granting a negative clearance was adopted, the Commission published the text of the letter it addressed to the complainant.

²⁶⁹This parallel was drawn in NEVEN et al. (1998), at 103; see also discussion of the case *Exxon/Shell* in which certain structural effects of the joint venture were found not to be appreciable for similar reasons that would be used as grounds for not opposing a merger.

²⁷⁰See above fn 183 and the accompanying text.

of Article 101(1).²⁷¹ Essentially, this would have implied an inquiry into the purpose, power and effect of an agreement before finding a violation of the first paragraph of Article 101, which would arguably have emptied the exemption provision of the third paragraph of its meaning. Although the European Courts²⁷² had called for the importance of placing the agreement in its legal and economic context before finding a violation of this provision, it remained unclear how much of economic analysis should have been conducted at the level of Article 101(1). This debate was further fuelled by the Court of First Instance's judgment in the case *European Night Services*²⁷³ ("ENS") in 1998 which suggested that a rule of reason was not necessarily excluded from this methodology at least insofar as "restrictions by effect" were concerned. In 2001, however, the CFI made it clear in case *M6*²⁷⁴ that the existence of a rule of reason in the application of Article 101(1) EU could not be upheld and that both the analysis of market power and the balancing of competitive effects remained within the assessment of the conditions for exemption under Article 101(3). Finally, this debate became largely superfluous – or at least rather theoretical - when the exemption system was abolished in 2004, and the analysis under the first and third paragraphs, albeit still technically separate, became an issue of self-assessment. Today, the concept of appreciable restriction plays a role of allocation the burden of proof. Once the Commission – or a national competition authority in an EU Member State as the case may be - has proved that an agreement involves an

²⁷¹This debate had been particularly lively in the 1980's and remained to some extent relevant until the modernization of the implementation of Article 101 TFEU in 2004. Not surprisingly, the most eager proponents of a rule of reason came from anglo-American legal culture. See e.g. HAWK, B. The American (Anti-trust) Revolution : Lessons for the EEC ? (1988) *ECLR* 53 ; KORAH, V. The Rise and Fall of Provisional Validity. The Need for a Rule of Reason in EEC Antitrust. 3 *Northwestern Journal of International Law & Business* 320 (1981) ; FORRESTER, I. and NORALL, C. The Laicization of Community Law : Self-Help and Rule of Reason : How competition is and could be Applied ? 21 *Common Market Law Review* 11, 1984 ; VENIT, J. Slouching Towards Betlehem : The Rule of Reason and Notification in EEC Antitrust. *International Comparative Law Review* 17 (1987). Also several continental commentators were in favour of the rule of reason, see e.g. JOLIET, R. *The Rule of Reason in Antitrust Law. American, German and Common Market Laws in Comparative Perspective*. Liège, Martinus Nijhoff, 1967 ; KOVAR. Le droit communautaire de la concurrence et la « règle de raison ». (1987) *RTDE* 237. Many continental scholars rejected a rule of reason approach. See e.g., FASQUELLE, D. *Droit américain et droit communautaire des ententes. Etude de la règle de raison*. Joly éditions, Paris 1993; SCHRÖTER, H. Vertical Restrictions under Article 85 EC : Towards a Moderate Reform of Current Competition Policy. In GORMLEY, L. (ed.) *Current and Future Perspectives on EC Competition Law*. Kluwer Law International, 1997 ; SCHRÖTER, H. and WAELBROECK, M. Antitrust Analysis Under Article 85(1) and 85(3). In HAWK (ed.) 1987 *Fordham Corporate Law Institute* 645. VERSTRYNGE. Current Antitrust Policy Issues in the EEC : Some Reflections on the Second Generation of EEC Competition Policy. In Hawk (ed.) 1984 *Fordham Corporate Law Institute* 673.

²⁷² Case 258/78, *Nungesser KG and Kurt Eisele v. Commission*, [1982] ECR 2015 [1983] 1 CMLR 278. In this case the ECJ quashed the Commission's decision that an exclusive license involving new technology necessarily infringed Article 85(1). See also Case C-234/89 *Delimitis v. Henninger* [1991] ECR I-935.

²⁷³ Joint Cases T-374/94, T-375/94, T-384/94 and T-388/94, *European Night Services v Commission* [1998] ECR II-3141, at 95.

²⁷⁴ See judgment of 18 September 2001 in case T-112/99, *M6 and Others v Commission*, para. 76; and the corresponding Commission Decision 1999/242/EC of 3 March 1999 relating to a proceeding pursuant to Article [81] of the EC Treaty (IV/36.237 – TPS) (OJ 1999 L 90, p. 6).

appreciable restriction of competition as required by Article 101(1), the burden of proof shifts on the defendant to show that the four conditions for exception under Article 101(3) are met but it does not trigger cumbersome exemption proceedings. This methodology thus reminds closely to the American rule of reason under which the plaintiff must show the anticompetitive harm and thereafter the defendant bears the burden to show that this harm is outweighed by efficiencies created by the transaction. It has recently been argued, however, that requiring market power as a condition for finding an anticompetitive harm under Article 101(1) should not be equated to a “rule of reason”, simply because the bifurcated analytical path under Article 101, including its first and third paragraphs, is not like the rule of reason under Section 1 of the Sherman Act.²⁷⁵

The main question concerning the rule of reason debate related to the threshold at which anticompetitive harm was considered to exist. In 1998, immediately after the extension of the scope of the Merger Regulation to cover all full-function joint ventures, the XXVIIth Report on Competition policy expressed concerns over the rigidity and outmoded nature of the instruments concerning horizontal cooperation, emphasizing the need for economic analysis in line with the way in which the vertical restraints were treated.²⁷⁶ Moreover, within the context Article 2(4) of the Merger Regulation which refers to Article 101 criteria for the assessment of coordination between the joint venture parties, the Commission had begun to require existence of market power before finding an “appreciable” restriction of competition. This policy would not have been coherent if similar analysis was not conducted in cases assessed exclusively under Article 101. Finally, the so-called “new approach” was put into effect by adopting the 2001 Guidelines on Horizontal Agreements²⁷⁷ and two new block exemptions, one covering specialization agreements²⁷⁸ and another one covering joint

²⁷⁵REINDL, A. P. Resale Price Maintenance and Article 101: Developing a More Sensible Analytical Approach, *Fordham International Law Journal*, Volume 33, Issue 4 (2011), Article 5, p. 1314-1315 («*References to the “rule of reason” are not helpful because the concept means different things to different people. ... Europe would be much better off if the debate about the proper analytical standards in article 101 TFEU stayed away from using the—unhelpful—“rule of reason” label*»)

²⁷⁶XXVIIth Report on Competition policy (1998), paragraphs 44-54. The relevant instruments were the 1993 Notice on cooperative joint ventures and the then applicable block exemptions on R&D and Specialization.

²⁷⁷[2001] OJ C3. Note that when reading the 2001 Guidelines on Horizontal Cooperation Agreements were drafted and issued when Regulation 17 with the ex ante notification mechanism was still in force. Some parts of the Notice appear to have relevance primarily when the assessment is done *ex ante* (i.e. collusion can only be predicted), not *ex post* when there is proof of actual collusion. Hence, for instance the analysis of the commonality of costs as an indicator of the likelihood of collusion (paragraphs 84, 88 in relation to production JVs) appears superfluous when the situation is looked at ex post.

²⁷⁸Regulation (EC) No 2658/2000 on the application of Article 101(3) of the Treaty to categories of specialization agreements, [2000] OJ L 304/3 (the “EC 2000 block exemption for specialization agreements”).

R&D²⁷⁹, followed by comprehensive Guidelines on the Application of Article 101(3). The 2001 Guidelines for Horizontal Agreements apply only to agreements which have a potential to generate efficiency gains, with no reference to integration of assets.²⁸⁰ As examples of such agreements the guidelines mention agreements on R&D, production, purchasing, commercialisation, standardisation and environmental agreements.²⁸¹ This can be read to mean that an efficiency defense may save an agreement from an *a priori* prohibition so that its effects (both negative and positive) on the market have to be analysed in order to reach a final conclusion on whether or not it violates Article 101.²⁸² This is typically the case for any genuine joint ventures.

One of the most significant novelties was that the 2001 Guidelines for Horizontal Agreements referred to market power as a key element of the assessment of the market impact under Article 101(1). They also made an explicit reference to the Herfindahl-Hirschmann Index (HHI)²⁸³, employed in the US Merger guidelines, which gave a proxy to assess market power along with other factors, such as the ease of entry. This reflected a less formalistic and more economics-based approach,²⁸⁴ and was in line with the pleas advocated by *Hawk*²⁸⁵ and *Venit*²⁸⁶ already in the early 1990's and thereafter by *Neven et al.*²⁸⁷. These guidelines did

²⁷⁹ Regulation (EC) No 2659/2000 on the application of Article 101(3) of the Treaty to categories of research and development agreements, [2000] OJ L 304/7 (the "EC 2000 block exemption for joint R&D").

²⁸⁰ 2001 Guidelines for Horizontal Agreements, para. 10.

²⁸¹ With regard to strategic alliances that combine "a number of different areas and instruments of cooperation in varying ways", the Commission feels that it is impossible to give general guidelines for their overall assessment due to their complexity. *Ibid*, para. 12.

²⁸² If, at the outset, the agreement is not of the nature to generate efficiencies, there is no reason to proceed with any further analysis to determine whether or not it should be prohibited. The methodology may thus roughly be described as involving a distinction between "per se" prohibited agreements and those that are subject to a "rule of reason".

²⁸³ The HHI is the sum of the squares of the market shares of every firm in the relevant market. This index allows to isolate markets in which collusion is a real problem, and it describes market structure and collusion dangers more accurately than market shares of individual firms. A distinction is made between unconcentrated markets (post-merger HHI less than 1,000), moderately concentrated markets (post-merger HHI between 1,000 and 1,800) and highly concentrated markets (post-merger HHI greater than 1,800).

²⁸⁴ See e.g. JEPHCOTT, Mark. *Horizontal Agreements and EU Competition Law*. Richmond Law & Tax Ltd. 2005, p. 82 ("This new approach undertaken by the Commission is so revolutionary that much of the earlier Community jurisprudence in relation to these types of agreements is of limited relevance"). See also Commission's XXXth Report on competition (2000), point 23 ("The new rules embody a shift from the formalistic regulatory approach underlying the current legislation towards a more economic approach in the assessment of horizontal cooperation agreements. The basic aim of this new approach is to allow collaboration between competitors where it contributes to economic welfare without creating a risk for competition.").

²⁸⁵ HAWK, B. Les filiales communes selon le droit antitrust communautaire et américain. *63 Revue d'économie industrielle* 148 (1^{er} trimestre 1993), at 167-171.

²⁸⁶ VENIT, J. Oedipus Rex : Recent Developments in the Structural Approach to Joint Ventures Under Competition Law. 14 *World Competition* 5 (1991).

²⁸⁷ NEVEN, D, PAPANDROPOULOS, P. and SEABRIGHT, P. *Trawling for Minnows*. Centre for Economic Policy Research, 1998, at 102-103.

not, however, contain any direct reference to a merger scenario as a benchmark, nor did they analyse how the analysis and effects of horizontal agreements compare with those of mergers.

This state of affairs has not changed in the new 2010 Guidelines on the applicability of Article 101 of the Treaty on the functioning of the European Union to horizontal co-operation agreements²⁸⁸ (the “2010 Guidelines on Horizontal Agreements”) and the two Block Exemption Regulations for R&D and for specialisation and joint production agreements, which entered into force in 2001. While these guidelines simplify and clarify the treatment of horizontal agreements by combining the analysis on both the first and third paragraph of Article 101 TFEU within one set of guidelines, their key novelties concern the analysis of information exchanges and standard setting systems which are beyond the scope of this study.²⁸⁹ The new Guidelines do not change the overall approach to market power, which is similar to that in the context of mergers, although the reference to HHI has been eliminated. The market power of the parties and other factors relating to the market structure are mentioned to form “*a key element of the assessment of the market impact likely to be caused by a horizontal co-operation agreement and, therefore, for the assessment under Article 101*”.²⁹⁰ The Guidelines further specify that market power is a question of degree so that the degree of market power required for the finding of an infringement under Article 101(1) in the case of restrictive agreements by effect is less than the degree of market power required for a finding of dominance under Article 102 TFEU.²⁹¹ There is no mention, however, on how it compares with the degree of market power required for the standard of significant

²⁸⁸ Available at: http://ec.europa.eu/competition/antitrust/legislation/horizontal_guidelines_en.pdf.

²⁸⁹ The scope of this study is delineated in sections 1 and 2 of the Introduction. According to the Guidelines, information exchange can be pro-competitive, e.g. when it enables companies to gather market data that allow them to become more efficient and better serve customers, but can also involve competition problems, e.g. when companies use sensitive information to align their prices. As to standard-setting organisations, the Guidelines promote an open and transparent system which thereby increases the transparency of licensing costs for intellectual property rights (IPRs) used in standards. The revised standardisation chapter sets out the criteria under which the Commission will not take issue with a standard-setting agreement ('safe harbour'). The chapter also gives detailed guidance on standardisation agreements that do not fulfil the safe harbour criteria, to allow companies to assess whether they are in line with EU competition law. Standard setting organisations may wish to provide for their members to unilaterally disclose, prior to setting a standard, the maximum rate that they would charge for their intellectual property rights if those were to be included in a standard. Such a system could enable a standard-setting organisation and the industry to take an informed choice on quality and price when selecting which technology should be included in a standard. The revised rules clarify that such a system would normally not infringe EU competition rules. See also Press Release IP/10/1702 of 14/12/2010, found at <http://europa.eu/rapid/pressReleasesAction>.

²⁹⁰ Ibid, paragraph 5. Definition of market power is found in paragraph 39: “*Market power is the ability to profitably maintain prices above competitive levels for a period of time or to profitably maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a period of time.* ».

²⁹¹ Ibid, paragraph 42.

impediment of competition under the Merger Regulation. Market shares are said to be the starting point. If the parties have a low combined market share, the agreement is unlikely to give rise to restrictive effects on competition within the meaning of Article 101(1) and, normally, no further analysis is required. No clear benchmark for “low combined market share” is provided, other than the specific safe harbours for different types of agreements later in the guidelines (15% for joint commercialisation, 20% for joint production and 25% for joint R&D) and the relevant block exemptions, as well as the *De Minimis* Notice. The different percentages for safe harbours based on the functions performed jointly appear to reflect the idea that the further the joint venture is situated from the marketing stage the less it is likely to affect competition on the product market. Moreover, if one of just two parties has only an insignificant market share and if it does not possess important resources, even a high combined market share normally cannot be seen as indicating a likely restrictive effect on competition in the market.²⁹²

The Commission also looks at the concentration ratio and the number of players in the market, as well as other dynamic factors, such as entry conditions and changing market shares.²⁹³ In the specific context of production joint ventures, the likelihood of spill-over effects is considered to depend on the parties’ market power as well as the characteristics of the relevant market. Collusive outcome may result, for instance, from the commonality of costs or exchanges of information within the joint venture.²⁹⁴ Remarkably for the comparative purpose of this work, the assessment of market shares as the starting point of the analysis does not – at least not explicitly - take account of the fact that for instance pure joint R&D or joint production does not typically end competition at the marketing stage when the parties sell the products in question in competition. Instead, the Commission appears to apply a single-share analysis to all joint ventures by simply adding up the parties’ market shares, without consideration of the parties’ ability and incentives to compete in the downstream market. In the first example given in the Guidelines for joint production, the Commission points out that in a joint venture involving the largest competitors on the market, with a combined market share of 60% (30 % each), the joint production is likely to directly limit competition between the parties to the agreement and lead them to agree on output levels, quality or other competitively important parameters, which would limit competition even though the parties

²⁹² Ibid, paragraph 44.

²⁹³ Ibid, paragraph 168.

²⁹⁴ Ibid, paragraphs 175-182.

will commercialise the products independently. The latter mention hints that in a different market situation the fact that the parties sell the products separately might be considered to mitigate market power concerns, although this is not spelled out anywhere in the Guidelines or in the other examples given. The part concerning the exception criteria under Article 101(3) TFEU does not address this either. In relation to the ultimate ceiling of market power in its fourth condition, the Guidelines merely state that the criteria for exception cannot be fulfilled if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products in question, which has to be analysed in the relevant product market and in possible spill-over markets.²⁹⁵

In this context it is, however, useful to recall that in its previous decisional practice, the Commission did take the remaining competition between the participants into account as a positive factor under the last condition of Article 101(3) and examined in particular, whether the cooperation extended to all the parameters of competition (R&D, production and marketing) or whether it left to the parties the possibility of individual marketing and pricing.²⁹⁶ When the parties continued competing at the crucial stages of competition, such as marketing and pricing, high market shares alone did not preclude exemption. This was at least implicitly acknowledged in several Commission decisions exempting joint R&D,²⁹⁷ joint production²⁹⁸ and joint purchasing²⁹⁹. The Commission has therefore clearly recognized that where a joint venture also takes up sales functions, it may limit the parents' competition further downstream than for instance pure production cooperation.

Based on the foregoing, it is regrettable that the Commission did not seize the opportunity to clarify its policy on these issues in the 2010 Guidelines on the application of Article 101 TFEU.

²⁹⁵ Ibid, see e.g. paragraphs 186, 220, 251.

²⁹⁶ See e.g. cases *Exxon/Shell*, Decision of the Commission of 18 May 1994, [1994] OJ L144/20. See also *GEAE/P&W*, Decision of the Commission of 19 September 1999 [2000] OJ 58/16; and *IFPI – Simulcasting*, Decision of the Commission of 8 October 2002, [2003] OJ 107/58, point 120. See also the discussion above on p. 55.

²⁹⁷ See e.g. *Henkel/Colgate*, Decision of the Commission of 23 December 1971, [1972] OJ L 14/14, 17; *Beecham/Parke Davis*, Decision of the Commission of 17 January 1979, [1979] OJ L 70/11, 20; *Alcatel/ANT*, Decision of the Commission of 12 January 1990, [1990] OJ L 32/19. See discussion in RITTER (2005), p. 156.

²⁹⁸ See e.g. *VW/MAN*, Decision of the Commission of 5 December 1983, [1983] OJ L 376/11, 15; *Ford-Volkswagen*, Decision of the Commission of 23 December 1992, [1993] OJ L 20/14, at paragraphs 37-38, affo'd CFI [1994] ECR II-595.

²⁹⁹ *National Sulphuric Acid Association II*, Decision of the Commission of 9 June 1989, [1989] OJ L 190/22, 24.

1.2.2.3 Available justifications

For typically efficiency-enhancing agreements, such as joint ventures, besides the timing of the market power analysis, the traditional analysis under Article 101 differed from that of mergers also in relation to the range of available justifications. The test of economic balance of Article 101(3) EU is textually broader than the narrow competition-based criteria under the Merger Regulation. Expressions of public policy concerns, in principle unrelated to the protection of competition, such as restructuring of industries and rationalization of production,³⁰⁰ social and regional policy concerns,³⁰¹ energy policy³⁰², environmental policy³⁰³, as well as competitiveness of the European industry³⁰⁴, can be found in many Commission decisions exempting joint venture cases at least until the mid-1990s even if they were ultimately decided on competition grounds. Still, the 2004 Guidelines for Article 101(3) explicitly stated that goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 101(3).³⁰⁵ One can therefore never entirely rule out non-competition criteria from that methodology in so far as they can be justified as promoting the broadly worded goal of technological or economic progress and do not result in the elimination of competition. It is notably the last condition of Article 101(3) that sets the ultimate limit to any defense, implying that if an agreement leads to the elimination of competition, it could not be saved on industrial policy grounds or other public interest grounds. It may therefore be assumed, as also the Court of First Instance implied in *Matra Hachette SA*,³⁰⁶ that an agreement that is anti-competitive on balance will

³⁰⁰*Enichem/ICI*, OJ L50/18 (1988), [1989] 4 CMLR 54; see also *PBB/Shell*, OJ C189/2 (1984), reported in XVIIth Competition Report 1988, at para. 74 ; and *Montedison/Hercules* (Himont), XVIIth Competition Report 1988, at para. 69; *Stichting Baksteen* reported in XXIVth Competition Report 1994, at 111.

³⁰¹*Ford/Volkswagen* OJ [1993] L 20/14, 4 CMLR 543.

³⁰²*Carbon Gas Technologie* OJ [1983] L 376/17.

³⁰³*Philips/Osram* OJ [1994] L378/37.

³⁰⁴Joint venture cases with explicit references to the competitiveness of the European industry in the 1990's include *Anzac*, 1991 OJ, L 152, 54; *Philips/Sagem/Thomson*; *LH/SAS* [1996] L054/28. In the latter case involving the second and third largest European airlines, besides the need for the restructuring of the European air transport industry, one of the factors influencing the decision was that the alliance gave the parties a more efficient worldwide network which enabled them to compete more effectively against other, notably non-European, airlines. See XXVIth Competition Report, at 71. See also White Paper on « growth, competitiveness and employment ». The challenges and ways forward into the 21st Century, COM(93) 700 final, 5 December 1993, stressing the need to improve the overall competitiveness of the European economy.

³⁰⁵Commission Notice Guidelines on the application of Article 101(3) of the Treaty (2004/C 101/08), paragraph 42. See to that effect implicitly paragraph 139 of the *Matra* judgment and Case 26/76, *Metro (I)*, [1977] ECR 1875, paragraph 43.

³⁰⁶Case T-17/93 *Matra Hachette SA v Commission* [1994] ECR II-595, para. 139. The Court of First Instance upheld the Commission decision which exempted the *Ford/Volkswagen* joint venture, acknowledging that the “exceptional circumstances” were taken into consideration “supererogatorily”; the operative part of the decision would have been the same even if these circumstances were not referred to.

be prohibited regardless of any other policy goals that it may promote. The difference with the merger rules is therefore not that significant in practice. Moreover, references to non-competition criteria in Commission Decisions under Article 101 have become rather rare after the first half of the 1990's, without however entirely disappearing.³⁰⁷

In the past, the Commission granted exemptions in joint venture cases involving firms with high market shares when they cooperated to develop and manufacture a new product in competition with existing products, provided that no spill-over effects resulted outside the joint venture.³⁰⁸ On the other hand, it has taken a strict approach in cases where the remaining competition, including potential competition, would not have been sufficient to outweigh the parties' strong position on the market.³⁰⁹ In general, Article 101(3) provides for a kind of a "sliding scale": the more competition is restricted by means of a cooperative agreement the higher the efficiency gains have to be in order to qualify for an exception. Efficiency benefits may save a joint venture only up to the limit where effective competition is eliminated of a substantial part of the products concerned. Thus, even if the parties can prove that an agreement would bring about high efficiency gains, these efficiencies are not able to justify an elimination of competition. The assessment of this condition calls for an extensive qualitative and quantitative analysis of the remaining sources of actual competition, including the assessment of entry conditions.³¹⁰ In this regard, both competition between the joint venture parties (inter-party competition) and competition with other firms on the market (third-party competition) are relevant.³¹¹ The more inter-party competition is restricted or eliminated, the greater attention will be paid to the intensity of both actual and potential third-party competition, based, *inter alia*, on the market structure and other factors that are normally relevant in the assessment of a dominant position under Article 102 TFEU.³¹² Although it appears that the Commission has sometimes treated the test of Article 101(3)(b) (elimination

³⁰⁷For further discussion on non-competition criteria, see MONTI, G, "Article 81 EC and Public Policy" (2002) 39 *Common Market Law Review* 1090, at 1059-1069, discussing the cases *GlaxoSmithKline* (C-501/06P), n.y.r. at [62]-[63] and *T-Mobile* (C-8/08), n.y.r. at [38]-[39] (confirming that in addition to the goal of consumer welfare, the goal of market integration is a core goal of competition law) and *CECED*, Commission Decision 24 January 1999, [2000] OJ L 187/47 (case on protection of the environment, in which the Commission came close to using a non-competition interest as a core argument in granting an exemption for a restrictive agreement).

³⁰⁸See e.g. *GEAE/P&W*, Decision of the Commission of 19 September 1999 [2000] OJ 58/16; and *Asahi/St.Gobain*, Decision of the Commission of 16 December 1994 [1994] OJ 354/87.

³⁰⁹*Austrian Airlines/Lufthansa*, Decision of the Commission of 5 July 2002 [2002] OJ 242/25; see in particular paragraphs 103 and 115.

³¹⁰Guidelines on the application of Article 101(3), points 107-109; 115.

³¹¹The terminology "inter-party" and "third party" competition used in Ritter (2005), p. 155-159.

³¹²RITTER (2005), p. 157, with references.

of competition) as a test of dominance,³¹³ the finding of elimination of competition does not necessarily require that the parties hold a dominant position.

1.2.2.4 Impact on legal certainty and regulatory burden

While the 1998 Amendment included more agreements within the more efficient and legally certain merger proceedings by covering all full-function joint ventures, it did not change the reality that a great number of joint ventures still remained in the cumbersome regime of article 101 TFEU and its implementing Regulation 17/62, even where such cooperation was capable of achieving significant efficiencies with lesser restriction of competition than more integrated entities. The Commission had earlier sought partial remedies to the differential treatment by issuing negative clearances in some cases and by extending the scope of certain existing, automatically applicable block exemptions. Whilst there was no block exemption covering globally horizontal joint ventures, those most relevant in joint venture context were the regulations concerning cooperation on research and development (the « R&D Block Exemption »)³¹⁴ and specialization (the « Specialization Block Exemption »).³¹⁵ Provided that the strict limits of these regulations were met, also production joint ventures involving significant R&D or specialization aspects were exempted if the parties' joint market share did not exceed 20 per cent. In their original wording, these regulations did not cover cooperative full-function joint ventures, i.e. those performing on a lasting basis all the functions of an undertaking including independent market access and sales functions. In 1993, as part of measures aimed at attenuating the differences in their assessment of cooperative joint ventures with regard to concentrative joint ventures, these exemptions were extended to cover also these full-function joint ventures, with a 10 per cent market share limit where joint or exclusive distribution rights were included.³¹⁶

³¹³ Commission's document found at : Europa/Competition/Antitrust law - Innovation, p. 2.

³¹⁴ Commission Regulation (EEC) No 418/85 on the application of Article 85(3) of the Treaty to categories of research and development agreements, [1985] OJ L53/5, as amended by Commission Regulation (EEC) No 151/93 of 23 December 1992 amending Regulations No. 417/85, No. 418/85, No. 2349/84 and No. 556/89 on the application of Article 85(3) of the Treaty to categories of specialization agreements, research and development agreements, patent licensing agreements and know-how licensing agreements, [1993] OJ L21/8 (« Regulation No 151/93 »). The latter extended the exemption to cover also operations including marketing stage.

³¹⁵ Commission Regulation (EEC) No 417/85 on the application of Article 85(3) of the Treaty to categories of specialization agreements, [1985] OJ L53/ 1, as amended by Regulation No 151/93.

³¹⁶ In practice, these market share thresholds have proved sometimes uncertain and difficult to determine since they depend on a market analysis. See BURNSIDE & MACKENZIE, 3 *E.C.L.R.* 138, 139 (1995).

In its White Paper on Modernisation of the implementing rules of 1999, the Commission had considered the issue of possibly extending the scope of the Merger Regulation to non-full function production joint ventures in order to ensure systematic screening of such operations. It emerged from the reflection and consultation process that the inclusion under the Merger Regulation did not seem appropriate. This view was confirmed in the public consultation following the Commission's Green Paper on Merger Review of December 2001. The reasons invoked in this context included the difficulties to draw the borderline as well as the then applicable test of dominance which was not well-suited for partial function joint ventures that do not act directly on the market and as such do not have market shares of their own. It was concluded that non-full function production joint ventures do not form a category that, as such, should be treated differently from other types of agreements and in particular not be singled out from the legal exception system.

Today, collaborations performing only one function or auxiliary functions for their parent firms, such as R&D, production, purchasing or sales only, without independent market access (also called "partial function" or "non-full function" joint ventures) remain outside the scope of the merger rules and may be subject to Article 101 TFEU. Their basic difference in relation to full-function entities is the absence of an integrated business entity that buys and sells products on the market independently from its parent firms. Some of them, such as typical manufacturing entities, involve significant integration of assets, whereas others may be set up to carry out punctual projects or activities and can easily be dissolved at the end of their term.

The formation of genuine productive joint ventures as such has never been prohibited per se under the EU competition law. Their economic effects were subject to a full analysis under Article 101(3) in the notification proceedings under Regulation 17/62. Until the modernisation of the implementation rules of Article 101 by Regulation 1/2003 in 2004, joint ventures between actual or potential competitors – provided that the restriction of competition was appreciable and trade between Member States was affected - had to be notified to the European Commission in order to be exempted (if no block exemption was applicable). In this bifurcated structure, a joint venture was first considered to violate Article 101(1) and then exempted. The procedure was time-consuming and required an onerous showing that the four conditions for exemption were met. Moreover, an exemption was always limited in time and could be withdrawn, which was detrimental from the perspective of legal certainty.

Following the Amendment of 1998 extending the merger proceedings to all full-function joint ventures, the Commission carried out a reflection concerning the enforcement under Article 101 TFEU. The consultation of European companies showed that industry regarded the existing block exemption Regulations as too focused on legal clauses, and that there was a need for clearer guidance on the assessment of those categories of co-operation which are not covered by any block exemption.³¹⁷ In 2001, as part of this wider review which was undertaken in order to reduce the regulatory burden weighing on companies under that provision, the Commission revised once more the existing block exemption regulations on R&D and specialisation and issued new guidelines to replace and complete the outmoded notices which no longer provided useful guidance on the Commission's evolving approach. This package included a new block exemption covering specialization agreements³¹⁸ and another one covering joint R&D³¹⁹, together with the 2001 Guidelines for Horizontal Agreements³²⁰ and Guidelines on Article 101(3).³²¹ The revised texts were designed to be more user-friendly, with greater clarity and an increased scope of application. The specifically exempted 'white list' clauses were removed, which gave greater contractual freedom to the parties of such agreements and removed the "strait-jacket" imposed by the old Regulations. The market share threshold for exemption of all parties to an agreement combined was set at 20% for specialisation agreements, and at 25% for R&D agreements. Similar thresholds were retained in the 2010 reform package discussed above.

The regulatory burden of joint ventures outside the scope of the merger rules was finally removed in 2004 when the exemption system of Regulation 17, which was based on a prior notification, was replaced by Regulation 1/2003 entailing a system of legal exception without

³¹⁷See Press release of 29 November 2000, IP/00/1376. The replaced block exemptions were Regulations No 417/85 and No 418/85, as amended by Regulation No 2236/97. The replaced guidelines were the Notice concerning agreements decisions and concerted practices in the field of cooperation between enterprises (OJ C 75, 29.7.1968, p. 3) which concerned certain types of cooperation agreements falling outside Article 101, and Notice concerning the assessment of co-operative joint ventures pursuant to Article 85 of the EEC Treaty (OJ C 43, 16.2.1993, p. 2). The Guidelines complement the block exemptions and apply to R&D and production agreements not covered by the latter, as well as some other types of cooperation, such as joint purchasing and joint commercialisation).

³¹⁸ Regulation (EC) No 2658/2000 on the application of Article 101(3) of the Treaty to categories of specialization agreements, [2000] OJ L 304/3 (the "EC 2000 block exemption for specialization agreements").

³¹⁹ Regulation (EC) No 2659/2000 on the application of Article 101(3) of the Treaty to categories of research and development agreements, [2000] OJ L 304/7 (the "EC 2000 block exemption for joint R&D").

³²⁰Commission Notice "Guidelines on the applicability of Article 101 of the EC Treaty to horizontal cooperation agreements", OJ [2001] C 3/02.

³²¹See also XXVIIth Report on Competition policy (1998), paragraphs 44-54.

a pre-screening mechanism.³²² In other words, agreements which are caught by Article 101(1) but satisfy the conditions of Article 101(3) are not illegal and no prior decision to that effect is required.³²³ Such agreements are valid and enforceable from the moment that the conditions of Article 101(3) are satisfied and for as long as that remains the case. By the same token, the exclusive power of the European Commission to grant exemptions under Article 101(3) was abolished so that the authorities of the Member States can now apply Article 101 in its full extent, including the conditions for exception of its third paragraph.

In the current system, in so far as the regulatory burden is concerned, mergers and full-function joint ventures have lost the procedural side of their “concentration privilege”. The situation has rather turned around and the regime for partial function joint ventures is now less burdensome than the merger proceedings. The parties no longer have similar forum shopping incentives as in the earlier framework to structure their agreements to fit within the Merger Regulation. To the contrary, firms may be tempted to structure joint ventures to fall outside the EUMR and avoid Commission investigation. This may have been the case in *T-Online*³²⁴ which was initially notified under the Merger Regulation and later restructured so that the Commission lost jurisdiction and abandoned its investigation under that regulation. However, the Commission later opened an investigation into the joint venture under Article 101. Consequently, if a joint venture raises competition concerns, the Commission will not hesitate to investigate it once it comes to its attention, even where it falls outside the Merger Regulation.

Nevertheless, the system of legal exceptions and self-assessment has raised some concerns in relation to legal certainty. It has been lamented that the “New approach” under Article 101 involves a considerable amount of legal uncertainty, not the least because of the complexity and considerable number of Commission decisions, case law and guidelines relating to the examination standard of article 101 EU.³²⁵ To this must be added the general unwillingness of the Commission to provide written guidance on cases under Article 101, although such a possibility is explicitly provided for in Article 10 of Regulation 1/2003. This is significant

³²²Council 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 1/2003”).

³²³Articles 1(1) and 1(2) of Regulation 1/2003.

³²⁴ Case COMP/M.2149 T-Online International, TUI/C&N Touristic, 19 March 2001; see *The Quest for Exclusive Content: The T Online Cases*, Competition Policy Newsletter (June 2002).

³²⁵WALTHER, M. AND BAUMGARTNER U. Joint venture review under the new EC Merger Regulation, *The European Antitrust Review* 2007, p. 22, available at: www.GlobalCompetitionReview.com.

because of the large investments involved in many joint ventures and the difficulty of undoing them once implemented. In merger proceedings, in turn, the clearance by the European Commission will eliminate any such uncertainty and the joint venture in question will then be immune also from any challenge under Member States' competition laws. As counter arguments to these concerns, one may, however, claim that a vast number of joint venture cases are covered by block exemptions and guidelines. In exceptional cases, where a genuinely unresolved question arises which fulfills the conditions of the Notice on requests for informal guidance, a guidance letter may be sought from the Commission.

1.3 SPECIFIC ISSUES CONCERNING HYBRID CASES

Whilst the conceptual framework concerning joint ventures has not changed since 1998, when the concept of full-function joint venture was introduced to make the jurisdictional allocation of cases between the Merger Regulation and Article 101 TFEU, any developments in the substantive standard for assessing the legality of mergers naturally affect joint ventures as well, in so far as they fall within the scope of the Merger Regulation. The substantive test of Articles 2(2) and 2(3) of the Merger Regulation was revised from that of dominance to that of significant impediment to effective competition (“SIEC”) by Council Regulation (EC) No 139/2004³²⁶ (the 2004 Amendment”), which refers to dominance as an example of a particular situation in which competition may be significantly impeded. This test addresses both coordinated and non-coordinated effects and reminds thus closely that of the substantial lessening of competition (“SLC”) employed in the U.S. merger law.³²⁷ In this context, no change was introduced to the specific substantive rules applicable to the hybrid category of cooperative full-function joint ventures under Articles 2(4) and 2(5) of the Merger Regulation. This means that coordination aspects may still be examined under the criteria of Article 101 TEU within the merger proceedings.

The Commission's recent decisional practice suggests, however, that similar substantive methodology is used regardless of whether or not Article 2(4) - and consequently the criteria of Article 101 TEU – is applied to coordination between the parties or whether only the general test of Article 2(3) is applied. Hence, this Chapter questions whether the specific provisions concerning cooperative full-function joint ventures still have a valid purpose and function in the current framework. Introduction of Article 101 criteria in the merger proceedings indeed raise a number of issues that complicate the substantive analysis of joint ventures (1.3.1). It is, however, possible to avoid these complications by not entering into the analysis of each condition of Article 101 TFEU in the coordination test of Article 2(4). Today, it may even be argued that in practice the current merger test has absorbed the

³²⁶Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, [2004] OJ L 24/1; see the results of the public consultation exposed on the website of DG Competition.

³²⁷These standards have been compared in several works, see e.g. VIALARD Virginie, *Le critère d’appréciation substantielle des concentrations. Etude comparée des droits communautaire et américain*, éditions Dalloz, nouvelle bibliothèque de thèses, volume 67, Paris, 2007 ; FOX, E. *The Competition Law of the European Union in Comparative Perspective*, Cases and Materials, [FOX Eleanor M., American Casebook series, West, Thomson Reuters 2009, 568 p.](#)

assessment of coordination under Article 2(4) and rendered the latter largely superfluous (1.3.2 and 1.3.3).

1.3.1 Initial issues raised by the coordination test

1.3.1.1 Suitability of Article 101 criteria in full-function cases

To recall, the 1997 Amendment of the EU Merger Regulation changed the function of the coordination test from a jurisdictional one to a substantive one. In practice, this means that the complex substantive assessments of the market overlaps and the parent firms' competitive relationships no longer determine the applicable statute and the filing requirement at the outset but are analysed as part of the substantive assessment.³²⁸ The novelty was that "cooperative full-function joint ventures" may be subject to a double review under both the merger test and the substantive criteria of Article 101 TFEU but within the merger proceedings. This is provided for in Article 2(4):

“To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 81(1) and (3) of the Treaty with a view to establishing whether or not the operation is compatible with the common market.

Neither the rationale nor the purpose of this provision has been explained in the relevant Commission Notices. It appears to reflect the long-term Commission policy to make a categorical separation between structural and behavioural effects, as outlined already in the 1966 Commission Memorandum on industrial concentration. Its incorporation in the Merger Regulation implies that a full-function joint venture may be prohibited under the criteria of Article 101 TFEU if it leads to coordination between the parties within or outside the joint venture, even where it would pass the merger test of Article 2(3). The criteria of the first indent of Article 2(5), which identifies the scenarios that may give rise to coordination, are essentially the same as those included already in the 1990 Concentrative/Cooperative Notice

³²⁸Note that this criterion has retained - at least on paper - a limited jurisdictional function with regard to full-function cooperative joint ventures below the Community dimension, as Article 101 remains applicable to them. It is possible that the formation of such an entity falls within national merger control and the coordination risk between the parents is caught by Article 101. See Article 22(1) EUMR.

and the 1994 Interface Notice relating to the previous dichotomy between concentrative and cooperative joint ventures. In this appraisal the Commission takes into account in particular (i) whether two or more parent companies *retain, to a significant extent, activities* in the same market as the joint venture, in an upstream or downstream market, or in a neighbouring market closely related to the market of the joint venture; and (ii) whether the coordination which is the *direct consequence of the creation of the joint venture* affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question. The latter introduces a requirement of a causal link between the joint venture and the coordination and repeats specifically the last criterion of exception of Article 101(3) to which particular attention will be paid in the assessment.

In sum, the typical and distinguishing feature of a cooperative full-function joint venture, as opposed to a fully integrated concentrative joint venture, is that the participating firms remain competitors, be that on the vertically related or neighbouring product markets or on the joint venture market. This implies that this competition is also capable of being restricted, i.e. the parents' cooperation within the joint venture may spill-over to those markets. Moreover, it is possible that the joint venture in essence does not significantly harm competition in its market because this market is competitive, but the parents remain competitors in related markets that are highly concentrated and collusion-prone. The wording of the Merger Regulation suggests that where the coordination between the parents would lead to elimination of competition in these other markets, it would result in prohibition of the entire joint venture regardless of the efficiencies it entails in its own market.

Conceptually, the rationale and functions of Articles 2(4) and 2(5) raise a number of questions in the current framework. As a matter of fact, the methodology of Article 101 TFEU does not appear to be well-suited to catch future effects of joint ventures on the market, even though in the past joint venture cases were examined at their formation in forward-looking proceedings of Regulation 17/62 before an exemption could be granted. Each stage of the conventional analytical path involves some issues that make its application more or less artificial. First, for restrictions “by object”(i.e. hard-core restraints, like cartels, the effects of which do not need to be analysed), the a priori prohibition applies without need to show effects on the market and therefore it does not involve a detailed market definition. To the extent the spill-over effects concern possible future conduct, which cannot be predicted without a careful analysis of the market, it differs drastically for instance from a cartel scenario in which hard evidence

is required ex post on the existence of the cartel. Where the markets concerned remain competitive, the formation of a joint venture would not increase the risk of collusion between the participants or with third parties, since customers could turn to other suppliers for instance in case of a price increase. An analytically more logical solution would therefore seem to be to consider that an increased risk of coordination could lead to a prohibition only where the market conditions were such that collusion would be the likely outcome, like in an ordinary merger analysis.

In cases thus far dealt with under Article 2(4) the Commission has never found that the joint venture would have had as its object the co-ordination of the parties' competitive behaviour in a certain activity.³²⁹ No indications have been given in the relevant guidance either about the situations in which this might apply. It would, in theory, appear that the formation of the joint venture with such an object would actually amount to a mere sham, in other words a disguised cartel, which would seem to be an unlikely scenario in case of a full-function joint venture. In any case, even where a full-function joint venture would have been cleared in merger proceedings, its members would have to comply with competition rules in their subsequent market behaviour. For instance, if they actually fix prices or share markets as separate undertakings during the functioning of the venture - be that in the joint venture's market on which they remain active or on vertically related or neighbouring markets - they could still be caught for cartel behaviour in an ex post intervention under Article 101 TFEU. Moreover, possible collateral agreements containing excessive hard-core restrictions that would not qualify as ancillary to the concentration would be examined separately under Article 101 in any case, even if they were part of the package proposed for a merger clearance.³³⁰

There have been a number of cases in which the Commission considered that the creation of a joint venture would have had the *effect* of coordinating the parties' competitive conduct on markets in which they remained competitors. In most cases, however, this has not raised concerns due to the limited economic interests of the parties to collude. In the rare cases in

³²⁹The Commission has used a mechanical standard formulation to state this. See e.g. *PanAgora/DG Bank* (at paragraph 31: “*There are no indications that would allow the conclusion that the creation of the joint venture has the object of co-ordinating the competitive behaviour of PanAgora and DG Bank on the markets concerned. It should therefore be examined whether the operation might have the effect of co-ordinating the competitive behaviour of the parents.*”); Case No IV/JV.7, *Telia/Sonera/Lithuanian Telecommunications*, Decision of 14.8.1998, paragraph 29.

³³⁰See e.g. case IV/M.1121 - *Alcatel / Thomson-SA - Thomson-CSF*, Commission Decision of 25 May 1998, paragraphs 19 and 49.

which the Commission has raised coordination concerns thus far, the parties have offered commitments to meet these concerns.³³¹ The application of Articles 2(4) and 2(4) EUMR - and hence the criteria of Article 101 TFEU in the merger proceedings – has never resulted in a prohibition of a joint venture. The vast majority of cases have been cleared at Phase I or in the simplified procedure.³³²

Also, the concept of “appreciable” restriction, which now shifts the burden from the Commission or national competition authority to the defendant to show that the criteria of exception of Article 101(3) are met, created uncertainties at the time of the 1997 Amendment. This threshold had traditionally been low and did not, in the absence of a market power criterion, require a substantial impact on market conditions for finding a violation of the first paragraph of Article 101. When the 1997 Amendment came into effect in 1998, the *de minimis* thresholds were still very low, 5 % for horizontal agreements and 10 % for vertical agreements.³³³ The presence or absence of market power was a factor to be taken into consideration primarily at the stage of assessing whether the arrangement in question qualified for an exemption under Article 101(3), once it had been found to violate the first paragraph.³³⁴ It was therefore uncertain how coordination aspects would be assessed under the amended Merger Regulation, raising some concerns that it could lead to two different standards of appreciable restriction depending on the applicable regime. The relevant Commission notices did not give guidance on any specific benchmarks or methodology for the purpose of assessing when coordination becomes a real risk and concern. The first cases decided under the amended rules nevertheless suggested that the concept of appreciable restriction was attached to the criterion of market power, implying thus a departure from the traditional Article 101 TFEU test in cases decided under Regulation 17/62. In other words, if the parties did not possess market power and the market structure was not conducive to

³³¹See second phase decisions BT/AT&T (1999), Bertelsmann (2005); and first phase decisions NC/Canal+/CDPQ/BankAmerica (1998) and Fujitsu/Siemens (1999).

³³²For instance, since the publication of the Consolidated Notice in July 2007 until January 2009, the Commission investigated over 40 joint ventures, all cleared at Phase I.

³³³See *Notice on Agreements of Minor Importance which do not fall under Article 85(1) of the Treaty establishing the European Community*, [1997] OJ C 372/13, which increased the market share threshold for vertical restraints and abolished reference to turnover figures (ECU 300 million) provided by the earlier notice on the subject ([1986] OJ C 231, 12.9.1986). Note that the Commission notices are not binding on national authorities nor the European Courts.

³³⁴Pleas for the adoption of a market power filter into Article 101(1) were first presented in connection with the analysis of vertical restraints. For counterarguments see SCHRÖTER, H. Vertical Restrictions under Article 85 EC : Towards a Moderate Reform of Current Competition Policy. In GORMLEY, L. (ed.) *Current and Future Perspectives on EC Competition Law*. Kluwer Law International, 1997, at 19-20 (arguing that such a notion would be inconsistent with the structure and contents of Article 101).

collusion, no appreciable restriction of competition was deemed to be present in parent-to-parent relationships. This was apparent in several cases with either explicit references to market power or the collusion-prone structure of the market as condition for finding coordination.³³⁵

Whilst in the cases dealt with under Article 2(4) EUMR the parties have so far been able to meet possible coordination concerns by commitments and the criteria of Article 101(3) have therefore never prevented a clearance of a joint venture,³³⁶ the application of the exception criteria in cooperative full-function scenarios raises some uncertainties. On the basis of the wording of Article 2(4) EUMR, it is not entirely clear to what extent all the requirements of the third paragraph of Article 101 are applied. While referring to the criteria of both paragraphs 1 and 3, Article 2(5) EUMR specifies that the Commission will take into account, in particular whether the coordination “*affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question*”, which is the last condition of Article 101(3). The other cumulative requirements pertaining to the improvement of production or distribution and promotion of technical or economic progress, indispensability as well as the consumers' benefit are not expressly mentioned. This omission has prompted some doubts about whether the balancing exercise of 101(3) was meant to be fully conducted or whether it was meant to be limited to the last condition relating to the elimination of competition.³³⁷ In cases where coordination concerns have been identified to arise, the balancing against efficiencies and other conditions has been avoided since the parties have given commitments to remove coordination concerns.

The case *Fujitsu/Siemens*³³⁸ is particularly interesting in this regard. In that case both parents remained active in a number of upstream markets (e.g. semiconductor chips) and downstream information technology markets (e.g. financial and retail workstations), as well as certain neighbouring services markets. With regard to the financial workstations market, the

³³⁵See e.g. Case No IV/JV.21, *Skandia/Storebrand/Pohjola*, Commission Decision of 17.8.1999. The analysis of coordination is found in paragraphs 32-47. References to the lack of incentive to collude due to relatively small market shares and the competitive nature of the market were also made in Case COMP/JV 57-TPS, *TF1/TPS/M6/Suez*, Decision of 30.04.2002; Case No IV/JV.14, *PanAgora/DG Bank*, Decision of 26.11.1998; Case No IV/JV.7, *Telia/Sonera/Lithuanian Telecommunications*, Decision of 14.8.1998.

³³⁶In most cases clearance has been granted in the first phase of merger assessment, although sometimes subject to conditions. In two notable cases (*BT/AT&T Case COMP/JV.15*, 30 March 1999 and *Hutchinson/RCPM/ECT Case COMP/JV.55*, 3 July 2001), the Commission proceeded to a Phase II investigation before granting clearance subject to conditions.

³³⁷VENIT, J. 2000 *Fordham Corp. L. Inst.* 465 (B. Hawk, ed. 2000), p. 479.

³³⁸Case No IV/JV.22 (30.9.1999).

Commission moved directly from the finding of an appreciable restriction to the criterion of elimination of competition. Holding that the coordination between the parent companies would be appreciable in view of their relatively high joint share of the market (20-40 %) and the fact that the biggest competitor, NCR, had a similar share (30-40%), it declared in the same paragraph that “[i]n light of almost symmetrical market shares of the two major groups in the financial workstations market and the resulting relationship of interdependence existing between NCR and Siemens/Fujitsu, taken as a group, any co-ordination between the parties appears likely to cause the elimination of competition in respect of a substantial part of the financial workstations market”.³³⁹ This was thus a typical scenario of oligopolistic interdependence between the joint venture participants and a third party. It differed from the concentrative case *Gencor/Lonhro*³⁴⁰ in that the eventual collective dominance would have resulted on a spill-over market outside the joint venture, i.e. on a market that was vertically related to the joint venture’s market, which would not have benefited from the potential efficiency gains in the venture’s market. As a result, Siemens undertook to sell its retail and banking systems business, which removed the incentive to coordinate its competitive behaviour with Fujitsu in that market and thus the competition concerns.

Moreover, the methodology of Article 101(3) appears ill-suited in the context of spill-over effects, since it involves following a strict path in which the parties have to show that the agreement promotes technological or economic progress, ensures passing the related benefits on to consumers, is indispensable to achieve the claimed benefits and does not result in elimination of competition on a substantial part of the Common Market. In those circumstances, an agreement benefits from a legal exception. The last condition serves as a safety net and where it appears, at the outset, that this condition is not met, it is not necessary to engage in a detailed analysis of the other three exception criteria. In other scenarios, however, each of the cumulative conditions should be met once the threshold of appreciable restriction has been overstepped. Assuming that coordination within the meaning of Article 2(4) of Merger Regulation refers to collusion on prices, territories or other competitively sensitive variables, eventual application of the exception criteria of Article 101(3) to a predicted future collusive behaviour of the parties would appear awkward, since it would imply that this potential harm could be offset with the pro-competitive virtues resulting from the joint venture itself on another market. The purpose of this provision could however hardly

³³⁹Case No IV/JV.22 (30.9.1999) (emphasis added).

³⁴⁰See footnotes 344 and 342 hereafter, with the accompanying text.

be to exempt future collusion but rather to assess its likelihood and to impose remedies in cases where cartel-like behaviour or abuse of collective dominance by the market participants would appear as a likely consequence of the joint venture. Moreover, if all the criteria of Article 101(3) were applied, an efficiency defence could be available to save a joint venture that would otherwise involve an appreciable restriction of competition on an outside market. Where the coordination aspects result in an increased risk of collusion between the joint venture participants and a third party outside the venture, like in *Fujitsu/Siemens*, the efficiencies created on the joint venture market would be balanced against a risk of cartel behaviour on other markets. Finally, the condition of indispensability raises the question on how possible future collusion on the spill-over market outside the joint venture could ever be judged indispensable for the joint venture. Besides the cases in which the parties settle with commitments, these complications perhaps explain why the Commission has never applied the entire balancing test of Article 101(3) in the context of Article 2(4).

It can be argued that in cases such as *Fujitsu/Siemens*, it would not have been necessary to rely on Article 2(4) at all but a similar analysis could have been conducted under the regular merger test of Article 2(3), notably under the doctrine of collective dominance. For analytical purposes, a number of later cases, which indeed suggest that the Commission has in practice shifted towards the merger test also in cooperative full-function cases, will be discussed later in Section 1.3.2 dealing with the interaction of the SIEC-test and the coordination test after the Amendment of the substantive merger standard in 2004.

1.3.1.2 Relevance of theories on oligopolistic interdependence

As originally drafted, the test of legality under the 1989 Merger Regulation was whether the merger led to a creation or enhancement of a dominant position as a result of which effective competition would have been significantly impeded in the Community market or in a substantial part of it. The concept of ‘collective dominance’ was then gradually integrated in the merger test in individual cases to address scenarios in which dominant position was held together with a third party, such as *Kali und Salz*³⁴¹, *Gencor/Lonhro*³⁴² and *Airtours*³⁴³. Under

³⁴¹Joint cases 68/94 and 30/95, 1998 ECR I-1375 (1998). The Commission had found that the concentrative joint venture between K&S (*Kali und Salz*) and MdK (*Mitteldeutsche Kali AG*) would have held a joint dominant position in the market for potash with the French producer SCPA (a third party), based on several factors, including (i) the increase in the combined market share of MdK GmbH and SCPA to ca. 60 % and the increase

this concept, several firms may be considered collectively to occupy a dominant position. Whilst the first cases required some structural or economic link among the firms in question, the Court of First Instance's decision in *Airtours* broadened the concept so that situations leading to tacit collusion were covered, regardless of whether or not there was any specific link between the firms. This refers to a situation in which the market structure causes firms to reach a 'consensus' on price and output rather than to compete, i.e. oligopolistic interdependence. In the early cases, the focus being on dominance and the market share controlled by the leading suppliers, the Commission raised objections primarily in cases leading to duopoly. In *Gencor/Lonrho*³⁴⁴, for instance, Gencor Ltd of South Africa and Lonrho plc proposed to acquire joint control of Impala Platinum Holdings Limited (Implats) and Lonrho Platinum Division (LPD). The proposed joint venture would have had the effect of reducing the number of producers of platinum group metals in South Africa from three to two, the other producer being Amplats, a company controlled by the Anglo American Corporation of South Africa's platinum operation. The two companies would have controlled approximately 90% of the world's reserves of platinum group metals, with Russia controlling most of the remaining 10%. The Commission held that the proposed joint venture would have created a collective dominant position, a duopoly, in the platinum and rhodium markets, consisting of Implats/LPD and Amplats, and was therefore incompatible with the Common Market. Having taken into account the characteristics of the market, such as weak competition from Russia, similar cost structures and a lack of competition in the past, the Commission concluded that Implats/LPD and Amplats would have had no incentive to compete. Although the parties had relatively low market shares in the EU, the Commission found that the anti-competitive effects of the joint venture would have been felt in the EU, since the market for platinum metals was global.³⁴⁵

in the degree of market concentration, (ii) commercial links between the parties (SCPA was the distributor for K&S in France, and they had both previously participated in an export cartel), and (iii) factors facilitating collusion (transparency of the market, homogeneity of the product, absence of innovation, prior infringements of competition rules). The ECJ rejected the Commission's findings on oligopolistic dominance. In the Court's view the combined market share of 60 % was not by itself sufficient to establish the existence of collective dominance. It held that the imbalance and asymmetries in terms of financial resources between the allegedly jointly dominant firms would reduce their incentives to collude. This was further corroborated by the fact that the market was in decline and there were competitive pressures from third country imports. As to the past links between K&S and SCPA, the Court considered that the Commission had not satisfactorily demonstrated that the structural links between these two entities were sufficient to establish joint dominance. The parties in collective dominant position must have both strong incentives to collude and the ability to do so for a meaningful period of time.

³⁴²Case T-102/96.

³⁴³Case [T-342/99](#) *Airtours plc v. Commission*, paragraph 59.

³⁴⁴Case IV/M.619 OJ 1997 L11/30.

³⁴⁵On appeal the Court of First Instance upheld the Commission decision in Case T-102/96 [1999] ECR 753.

The Court of First Instance has subsequently required a rigorous competitive analysis in cases involving collective dominance. An important case in this regard was *Sony/BMG-II*³⁴⁶, in which the Commission granted regulatory approval to a joint venture combining the recorded music businesses of Sony and Bertelsmann, after the Court of First instance had annulled the previous Commission decision of 2004.³⁴⁷ Even though the Commission considered that the reduction from five to four majors as a result of the Sony BMG merger could potentially be considered as an element facilitating coordination (since the fewer the number of remaining firms in a market, the easier, in principle, it is to find and/or maintain a consensus),³⁴⁸ it concluded after an in-depth investigation that the merger did not entail adverse horizontal coordinated effects between the recording music companies notably as regards their pricing behaviour. To reach this conclusion, the Commission analysed each of the requirements set forth in the Court of First Instance judgement in *Airtours*³⁴⁹ for the co-ordination to be sustainable, namely that (i) the coordinating firms must be able to monitor whether the terms of coordination are adhered to; (ii) discipline requires that there is some form of deterrent mechanism in case of deviations; and (iii) the reaction of outsiders, such a current and future competitors not participating in the coordination, as well as customers, should not be able to jeopardise the results expected from the coordination.³⁵⁰

It is noteworthy, in this context, that the above cases concerned concentrative full-function joint ventures in which there was no issue of coordination between the parent firms. Collective dominance was therefore created between the merged entity and one or more third parties. As to cases involving the assessment of coordination under Article 2(4) EUMR according to the criteria of Article 101 TFEU (i.e. cooperative full-function joint ventures), in turn, it is conceivable that the parents are found to hold dominant position collectively, not only through their obvious tangible structural link resulting from the venture in the joint market but also on other spill-over markets. There has, however, been some debate over whether or not the assessment of coordination should be connected to the theories of oligopolistic interdependence. Venit³⁵¹ understands the issues raised by oligopolistic

³⁴⁶Case COMP/M.3333 Sony/BMG-II Commission decision 3 October 2007

³⁴⁷Case COMP/M.333. Sony/BMG. 19 July 2004.

³⁴⁸*Ibid*, paragraph 96.

³⁴⁹Case [T-342/99](#) *Airtours plc v. Commission*, paragraph 59.

³⁵⁰According to the European Court of Justice, the assessment of the existence of these elements shall be supported by a sufficiently cogent and consistent body of evidence. See Joined Cases C-68/94 and C-30/95, *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission* (hereafter *.Kali & Salz.*), ECR 1998, I-1375, paragraph 228.

³⁵¹See VENIT, J. 2000 *Fordham Corp. L. Inst.* 465, 481 (B. Hawk, ed. 2000).

(collective) dominance and coordination as identical, and sees no meaningful analytic or economic difference between these two phenomena.³⁵² The relevant question in both cases is whether two or more economically and legally separate parties will be able to collude successfully in a given market. This position has been contested by Temple Lang³⁵³ who argues that the coordination resulting from the existence of the joint venture must be distinguished from oligopolistic interdependence which results from the market structure. In case of a horizontal joint venture (in which the parent firms compete in the market as the joint venture), the spill-over effect is, the argument goes, “*the rational and foreseeable policy of each parent company*” even without any communication between the parents.³⁵⁴ This argument assumes that reliance on a pure analysis of market structure would, in such circumstances, not be sufficient to conclude whether or not the parties have an incentive to collude.

In light of the antitrust economics and the Commission's recent decisional practice, however, one may argue that in a competitive market customers would be able to revert to other sources of supply and possible coordination between the joint venture parties would therefore have no adverse effects on the market. Should the joint venture participants possess market power, however, the situation would be different, as they would have no tangible competitive constraint and their customers would have limited choice of other suppliers, making it thus profitable to align prices and competitive conduct on the market without fear of losing customers.³⁵⁵ This line of reasoning is apparent in several Commission Decisions which highlight that even if the parent companies were to coordinate their behaviour, it would not amount to an appreciable restriction of competition where they had a modest combined market share and the market remained competitive.³⁵⁶ In such circumstances, there would be

³⁵²In his view, the fact that the Commission has analyzed the parties' market power in a number of cases to evaluate the coordination risk means an implicit acceptance that such a risk would be present only where there is a high likelihood of successful oligopolistic collusion. Ibid, at 481. Similar conclusion was reached by SINAN, I and UPHOFF, J. Review of joint ventures under the new EC Merger Regulation, The European Antitrust Review 2005, p. 36, available at: WWW.GLOBALCOMPETITIONREVIEW.COM. The relevant cases are further discussed in the next Chapter.

³⁵³TEMPLE LANG, J. International joint ventures under Community law, 2000 *Fordham Corp. L. Inst.* 381, 440 (B. Hawk, ed. 2000).

³⁵⁴Ibid, p. 440.

³⁵⁵See e.g. SULLIVAN & GRIMES (2000), p. for the proposition that no remedies would be efficient to avoid information flows in a horizontal case.

³⁵⁶Case No JV.1 - Telia/Telenor/Schibsted, Decision of 27 May 1998; Case No IV/JV.14, PanAgora/DG Bank, Decision of 26 November 1998. For more recent cases, see Case No. COMP/M.5394, Mauser Holding International/ Reyde/ JV, Commission Decision of 21 January 2009.

no reason for a competition authority to intervene ex ante but it could, of course, challenge the parties' actual cartel behaviour ex post, should they later engage in such conduct.

The reasoning in *Fujitsu/Siemens*³⁵⁷ is particularly instructive in this regard. In the semiconductor chips (DRAMs) market, in which both Siemens and Fujitsu continued to compete, the Commission qualified the market as concentrated but specified that only interdependence between the five major producers would allow the conclusion that coordination between Siemens and Fujitsu would have been sufficiently likely (which, however, was not the case here). The relevant question for the Commission was whether the characteristics of the DRAM market were conducive to such interdependence between the major suppliers. This suggests that the Commission relied on oligopoly theories in its analysis of the coordination issue and not on the fact whether the joint venture as such would have provided a facilitating device for collusion. It concluded that the features which usually militate in favor of assuming interdependence were not present in the market in question.³⁵⁸ The situation in the financial workstation market was, however, different. The Commission considered that this market displayed several structural characteristics for which coordination between the parents was likely: (i) the market was highly concentrated with NCR, Siemens and Fujitsu accounting for ca. 70 % of the total sales; (ii) all of these three firms had roughly symmetrical market shares; (iii) the market shares of the remaining competitors did not exceed 10 %; (iv) the technology for financial workstation was already relatively mature. Reaching the conclusion that coordination was likely, the Commission held that the coordination between the parent companies would also be “appreciable”, as both parties would jointly hold 20-40 % market share and will be the biggest competitor next to NCR holding a share between 30-40%. Due to Siemens’s commitments to divest certain activities, these concerns were finally eliminated.

In a number of later cases the Commission has followed a similar approach to structural effects on the market, as will be further discussed below in subsections 1.3.2.2 and 1.3.3.1

³⁵⁷Case No IV/JV.22 (30.9.1999).

³⁵⁸The Commission focused on the following factors, arguing that the biggest producers could not realistically anticipate on another’s behavior and immediately react to the others’ competitive actions: (i) the prices for DRAMs are not transparent (negotiated individually between producers and customers), (ii) most customers are major OEM manufacturers with significant countervailing bargaining power, (iii) overall price trends have been unpredictable, (iv) very short cycles of shortage and oversupply leading to price fluctuations and need to react immediately to changing conditions in the market, (v) supply and demand inter-react almost immediately, and finally (vi) rapid technological evolution in DRAMs and strong competition in innovation.

which aim at showing that the merger test and the coordination test have in practice largely converged.

1.3.2 Current interaction of the merger test and coordination test

1.3.2.1 Significant impediment to effective competition

The original substantive test of dominance – i.e. the capacity of a firm or a group of firms to act independently of its customers and competitors – was not based on market power and the overall market concentration but rather on the market share controlled by the leading suppliers. Putting emphasis on the position of single firms rather than the economic measure of concentration, this standard did not follow the thought of industrial economics focusing on the relationship between the size and number of firms in a market and the likelihood of collusion in that market.³⁵⁹ The 2004 Amendment to Merger Regulation defines the test of significant impediment of competition in following terms: “*a concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.*”³⁶⁰ This legal standard is generally more inclusive than its predecessor, as the creation or strengthening of a dominant position is referred to only as a particular example of a significant impediment to effective competition, not as the sole test like previously. It accommodates the case-law concerning collective dominance and can deal with both unilateral (or non-coordinated) and coordinated effects.³⁶¹ The SIEC-test places emphasis on inter-firm competitive dynamics and allows to better identify competition problems and associated remedies, especially in cases dealing with collective dominance. Apart from the codification of the doctrine of collective dominance, the revision of the standard was motivated by the need to address non-coordinated effects in

³⁵⁹See e.g. BRIONES ALONSO, J. Vertical aspects of mergers, joint ventures and strategic alliances. 1998 *Fordham Corp. L. Inst.* 129, 130 (B. Hawk, ed. 1998).

³⁶⁰See 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); Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings 2004/C31/03 (OJ C 31, 5.2.2004, p. 5). The EC merger reform has been comprehensively discussed in numerous documents found in the website of the DG Competition of the European Commission, at www.europa.eu.int, such as “Merger review package in a nutshell”, “New merger regulation – Frequently asked questions” and the Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM(2001) 745/6 final.

³⁶¹Note that in this context coordination refers to behaviour by the merged entity with other parties in the market, whereas coordination within the meaning of Article 2(4) of Merger Regulation refers to behaviour among the joint venture parties, not with third parties.

oligopoly markets, where the merged firm might have market power without necessarily having an appreciably larger market share than the next competitor. Whilst the current standard undoubtedly brings the EU merger control closer to that of the U.S. test of substantial lessening of competition (the “SLC-test”),³⁶² the SIEC-test is in fact a compromise and a hybrid of the dominance test and the SLC test.

The Commission’s 2004 Horizontal Merger Guidelines provide for structural safe-harbours and presumptions based on market shares and HHI. A merger is presumed not to impede effective competition if the new entity’s market share would not exceed 25%. This presumption does not apply to coordinated effects, where the merged entity would be collectively dominant with third parties. The guidelines rely on HHI levels not as firm cut-offs, but as points beyond which it is more, or less, likely that detailed analysis will be needed or that a competition issue will arise.³⁶³ The guidelines discuss in detail the theories of non-coordinated and co-ordinated anti-competitive effect. Where non-coordinated effects are the concern, an important indicator where products are differentiated can be the closeness of substitution between the merging firms’ products. For homogeneous products, the relative capacities of the merging firms and their rivals are looked at. A market share over 50% and a significant market share advantage over any rival may be a strong indication that the merger would create or strengthen a dominant position. Where co-ordinated effects are the concern, the guidelines describe the conditions for finding that a merger will create or strengthen a position of collective dominance.³⁶⁴ Countervailing factors include buyer power and entry. Whether significant entry is likely is determined by inquiring whether an entrant would find it profitable to do so in post-acquisition market conditions. Entry must not only be likely but also sufficient and timely. The measure of timeliness could vary in different product markets, but the normal test is two years. In 2006, Röller and de la Mano concluded that although dominance still plays a decisive role in the Commission’s analysis and is frequently based on

³⁶²For an in-depth study, see PhD dissertation: VIALARD Virginie, *Le critère d’appréciation substantielle des concentrations. Etude comparée des droits communautaire et américain*, éditions Dalloz, nouvelle bibliothèque de thèses, volume 67, Paris, 2007; see also KOKKORIS, Iannis. *Merger Simulation And Critical Loss Analysis*, [2006] E.C.L.R. 249; VEROUDEN, V., BENGTTSSON, C. and ALBAEK S. *The Draft EU Notice on Horizontal Mergers: A Further Step Toward Convergence*. XLIX ANTITRUST BULL. 2004, p. 243.

³⁶³The bottom line at post-merger HHI is at 1000. The line of greater scrutiny is drawn at post-merger HHI up to 2000, changing by less than 250 points, or over 2000, changing by less than 150 points. Regardless of the HHI-level, the guidelines point out that special attention will be paid if any party has a pre-merger share over 50%, or if there are obvious issues of potential or toe-hold entry, innovation, cross-shareholding, “maverick” market behaviour or indications of oligopoly behaviour in the industry.

³⁶⁴ The Commission’s current approach to analysing the likelihood of tacit collusion is set out in detail in paragraphs 39-60 of the Horizontal Merger Notice.

high market shares, the approach has evolved and less reliance has been placed on market share and other structural indicators, giving greater emphasis to evaluating the competitive characteristics of the market, the dynamics of competition between the merging parties, and the competitive effects of notified transactions.³⁶⁵

Out of the joint venture decisions adopted under Regulation No 139/2004, the analysis in *Bertelsmann/Springer*³⁶⁶ illustrates well the application of the revised test. In that case the joint venture was cleared without remedies after an in-depth investigation, even though the parties' combined market shares were above 50%. In that case, competitors within and outside Germany were able to exercise a competitive constraint on the venture, as they were able to shift, free or expand capacity. One of the rare joint venture cases in which the Commission has analysed both limbs of the SIEC- test (non-coordinated and coordinated) in the joint venture market was *LSG Lufthansa Service Holding/Gate Gourmet Switzerland*³⁶⁷. The case concerned the formation of a full-function joint venture in the field of airline food catering at the Paris Charles de Gaulle airport. Whilst the parent companies, LSG and Gate Gourmet, were both active in airline catering across Europe, the case raised no coordination concerns between the parent firms under Article 2(4) of the EUMR. Under the SIEC-test, the Commission first considered non-coordinated effects. In the period between 2003 and 2005, the combined market share of the parents in airline catering at Charles de Gaulle was between 40 and 55 per cent. The only significant competitor, Servair, had a similar market share (between 40 and 55 per cent). The Commission concluded that the joint venture would continue to face competition from Servair and that the transaction would not result in the emergence of an individually dominant firm. On the other hand, the Commission noted that the joint venture would result in a near duopoly at Charles de Gaulle, which might lead to rising prices. It found, however, that competitive pressure exercised by buyers (the airlines), as well as low barriers to entry in the in-flight catering market, acted as sufficient constraints

³⁶⁵See RÖLLER, L-H and DE LA MANO, M., The Impact of the New Substantive Test in European Merger Control, European Commission, 22 January 2006, available at http://ec.europa.eu/dgs/competition/economist/new_substantive_test.pdf. The authors conclude that competition concerns continue to be associated with the establishment of dominance in most cases and dominance, once established, appears sufficient to challenge a merger. On the other hand, dominance is often dismissed if firms are distant competitors even if market shares are very high. This suggests that dominance remains a sufficient condition, yet more than just high market shares are necessary to reach a finding of dominance and to challenge a merger - such as when merging firms sell distant products. The new test directs attention to the competitive effects of the proposed merger. Even though the Commission had gradually embraced an effects - based approach under the old test, the SIEC test has reinforced this trend.

³⁶⁶Case COMP/M.3178 – Bertelsmann Springer/JV, Commission decision of 3 May 2005.

³⁶⁷Case COMP/M.4170 LSG Lufthansa Service Holding/Gate Gourmet Switzerland, Commission Decision of 19 July 2006.

to prevent the joint venture from significantly impeding effective competition, and concluded that the joint venture would not cause anti-competitive non-coordinated effects. Next, the Commission analysed the possibility of coordination between the joint venture and Servair which was the remaining competitor on the market. The Commission found that the joint venture and Servair would face difficulties coordinating their behaviour because of significant asymmetries in the operations of the joint venture and Servair. The disparity included both production capability, where Servair derived benefits from larger economies of scale, and the proportion of free market competition in the players' operations. As for the latter consideration, Servair provided exclusive catering service to Air France - its owner - who accounted for 60 per cent of Servair's activities. The Commission further found that airline catering was not a homogenous product, noting that each airline had specific quality specifications, making meals not generally interchangeable. Moreover, the airlines did not face significant costs in switching caterers. For those reasons, the Commission held the possibility of co-ordination between the joint venture and Servair (a third party) to be remote.³⁶⁸

Apart from horizontal effects, the Commission also frequently analyses vertical aspects, i.e. whether the relationship between the parents and the newly created structure will result in market foreclosure. This occurs where actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the joint venture. The Commission will use a 25 per cent market share as a benchmark to assess whether a joint venture's parents have a significant presence on any market vertically related to that in which the joint venture is active. Below that threshold vertical issues are unlikely to arise while a more detailed assessment may be required where the market shares are higher. Several Commission Decisions have addressed the issue of vertical foreclosure. For example, in *Carlyle/Ineos*³⁶⁹, the parents overlapped in the production of chemical products and the joint venture was active in a number of downstream markets). Given that the parents' market share in the upstream market was only 30 to 40 % and considering that the entire demand for the upstream product in the relevant downstream market was only 2 % the parents and the joint venture would not be in a position to foreclose supply to the joint venture's competitors.

³⁶⁸In addition to the overall difficulty in coordination between the joint venture and Servair, the Commission concluded that such coordination would not be sustainable over time, in view of the possibility of new entry into the catering business as well as the ineffectiveness of retaliation due to the relatively long period of catering contracts (one to five years) and the staggering of contracts over time.

³⁶⁹Case COMP/M.4927 *Carlyle/Ineos/JV*, 20 December 2007.

Furthermore, the analysis under the Merger Regulation does not necessarily end with the anticompetitive aspects. The Commission's 2004 Horizontal Merger Guidelines set out for the first time an explicit analytical framework for assessing the impact of efficiencies in merger analysis. Efficiencies can mitigate market power concerns, if they are merger specific, timely, verifiable, and benefit consumers. The welfare standard is that of "consumer welfare" for determining whether likely efficiencies are such that they should be taken into account as a factor off-setting harm to competition that otherwise would seem likely to occur. Efficiencies are thus taken into account as part of the competitive assessment rather than accepting an efficiency defence which would allow to save an anticompetitive merger leading to higher prices. The guidelines disavow an efficiency "offence", implying that increases in productive efficiency which give the merged firm a cost advantage over rivals will not be a reason to reject a merger. The Merger Regulation and the guidelines do not call for considering policies other than effects on competition, although the issue has been debated in the past.³⁷⁰

In practice, however, efficiencies rarely appear to play a visible role in merger investigations.³⁷¹ Efficiency arguments may, nevertheless, affect the Commission's decision about whether or not to intervene in a given case. The reasoning in *Inco/Falconbridge*³⁷² is particularly interesting for the purpose of this study, even though it concerned a traditional merger scenario.³⁷³ Whilst the Commission considered that the efficiency claims were quantified, well-supported by several studies and likely to effectively materialise, it concluded that *"the parties did not demonstrate to the requisite standards that the efficiencies could not have been achieved by other means and would directly benefit end customers in the markets where competition concerns have been identified so as to offset the identified competition*

³⁷⁰ Although the Commission does not consider other policies explicitly, the merger regulation recognises that Member States may do so in defined circumstances. They may take "appropriate measures" to protect public security, media plurality and prudential financial rules, as long as those measures are compatible with Community law, concerning mergers that have a Community dimension. Member States could invoke these principles to block or regulate transactions that do not impede competition; however, they could not authorise a transaction that the Commission has blocked.

³⁷¹ A notable exception was *Procter&Gamble/Gillette*. In this case, the Commission acknowledged that *"enlarging the product portfolio might bring efficiencies to retailers and customers, for example benefits from having only one partner to negotiate with (one-stop-shop), suppliers having stronger innovation capacities, and economies of scale and scope"*. However, countervailing buyer power, rather than efficiencies tilted the balance against portfolio effects.

³⁷² Case M.4000. Commission Decision of 4 July 2006, available at : http://ec.europa.eu/competition/mergers/cases/decisions/m4000_20060704_20600_en.pdf.

³⁷³ The proposed merger was between two mining companies with assets based in close proximity (Sudbury Basin, Canada). It was claimed that integration of the parties' mines, mills, smelters and refineries would allow for optimisation of the capabilities of these assets, thereby increasing production and lowering cost on a sustainable basis over the longer term.

concerns".³⁷⁴ Significantly, the Commission noted that a joint venture confined to a pooling of the parties' production resources (where the bulk of the claimed efficiencies would be realised) would have been a viable alternative and that such a venture "*would allow the parties to capture much of the potential for synergies while being a less anti-competitive outcome than a full merger between Inco and Falconbridge.*"

The reasoning in this case clearly shows that the Commission would have viewed a pure production venture as a less harmful alternative than a full merger or acquisition of sole control. The policy has been stated in the Horizontal Merger Guidelines in the context of the assessment of whether the claimed efficiencies are merger-specific, so as to say 'direct consequence' of the notified concentration and not achievable by '*less anti-competitive, realistic and attainable alternatives*'. The Commission considers alternatives of both non-concentrative (such as licensing agreement or cooperative joint venture) and concentrative nature (such a concentrative joint venture or a differently structured merger) that are 'reasonably practical' in the parties' business situation.³⁷⁵ While this seems entirely logical in the light of the specialised literature reviewed in the Introduction and with the U.S. approach (see Part II) the attitude of the EU enforcers has not always been clear in this regard, as was demonstrated above in Section 1.1.2.2. The traditional "concentration privilege" indeed implied that joint ventures limited in functions and/or time were subject to a stricter treatment than full integrations between competitors. More recently, the situation appears to have changed to the contrary, even to suggest that the old concentration privilege would have transformed into a "cooperation privilege", at least in cases where a partial function joint venture would be an acceptable alternative to a problematic merger. At least the Inco/Falconbridge case and the Horizontal Merger Guidelines point to this direction, which is very much like the long-standing position under the U.S. antitrust rules viewing less intense form of efficiency-enhancing cooperation as a lesser harm to competition than a full merger.

³⁷⁴ As regards the question of whether benefit of the efficiencies would be passed to end consumers, the Commission pointed out that the efficiencies would be spread over all of the nickel and cobalt production of the merging parties, and not just in the relevant markets where competition concerns were identified. Indeed, given the very considerable market power which the merged entity would enjoy post-merger (a near-monopoly position in some markets), the Commission concluded that it was unlikely that the merged entity would have "sufficient incentives to pass on these efficiency gains to the relevant end customers due to the characteristics of the three relevant markets where competition concerns arise".

³⁷⁵ Horizontal Merger Guidelines, paragraph 85.

1.3.2.2 Reduced role of the coordination test in joint venture market

The above discussed two-fold SIEC-test, consisting of the analysis of both coordinated and non-coordinated effects, must be distinguished from the “coordination test” of Articles 2(4) and 2(5) of the Merger Regulation. The former refers to coordination on the market with third parties, whereas the latter concerns coordination between the joint venturers. In principle, even if a joint venture would pass the merger test under Articles 2(2) and 2(3) of Merger Regulation, it may still be declared incompatible with the Common Market under Articles 2(4) and 2(5) of Merger Regulation, if it has as its object or effect the coordination of the participants’ competitive behaviour contrary to Article 101.³⁷⁶ This is the scenario of a “cooperative full-function joint venture”, which is our specific focus in this Chapter. Whilst the term “coordination” has not been expressly defined, it has been understood to refer to collusion relating to prices or sharing markets or customers.³⁷⁷ Such collusion, also referred to as spill-over effects, may occur, without distinction, between the participants on either the joint venture’s market (horizontal scenarios) or other related markets in which the parents remain active (vertical or neighbouring scenarios).

The way in which the Commission analyses the coordination risk in these spill-over markets has evolved since the introduction of the double test in 1998 and, thereafter, since the revision of the merger test in 2004. As a matter of fact, the Commission's recent decisional practice suggests that the substantive assessment of coordination between joint venture participants under Article 101 TEU criteria, as provided for in Article 2(4) of Merger Regulation, has largely converged with the SIEC-test of Article 2(3) concerning coordinated effects between the merged entity and other firms in the market. Similar methodology indeed appears to be used to analyse both consolidation and coordination aspects of joint ventures, whether or not it is done by formal reference to Article 101 TEU criteria. The specific provision of Article 2(4) appears, thus, to have lost much of its practical meaning and significance.

The change in the analysis is most visible in horizontal cases in which the parent companies remain active in the same market as their joint venture. This scenario is covered by Article 2(5) of Merger Regulation which states that in the appraisal of coordination the Commission

³⁷⁶Today, the Commission has never made such a declaration, as the parties have removed potential concerns with structural or behavioural commitments.

³⁷⁷See VENIT, 2000 *Fordham Corp. L. Inst.* 465, 480 (B. Hawk, ed. 1998). This has been confirmed in the case JV-57 – TPS, Decision of 30 April 2002.

takes into account, inter alia, whether more than one parent companies *retain, to a significant extent, activities in the same market as the joint venture*. In this respect, Temple Lang³⁷⁸ has argued that there is no point in distinguishing between coordination within and outside the joint venture, since collusion is collusion whether it occurs between the parents in the joint venture market or on other markets. Besides the merger test, the assessment of a coordination risk under Article 2(4) - and thus under Article 101 criteria - on that market would be justified, the argument goes, by the fact that it is notably the existence of the joint venture structure and the participants' collaboration therein that may facilitate collusion between the participants, not the market characteristics. Based on the current antitrust economics, one may, however, question the validity of this argument to the extent that joint venture facilitation of collusion becomes an antitrust issue only if the parties possess sufficient market power to make collusion profitable and are thus capable of affecting competition adversely. Should that be the case, possible facilitation of such behaviour through the competitors' alliance would aggravate those concerns.

The Commission's decisional practice prior to the 2004 Amendment (the SIEC-test) applied Articles 2(4) and 2(5) rather mechanically following their wording. In a number of cases, the Commission assessed the loss of competition in the joint venture market under two different standards, first under the then applicable dominance test of Article 2(3) and thereafter under the criteria of Article 101 TFEU. This occurred, for instance in *Telia/Telenor/Schibsted*³⁷⁹ which was one of the first cooperative full-function cases decided after the 1997 Amendment. In one of the relevant markets (the website production market), the joint venture was to compete in the same market as two of the parent firms. The Commission first analyzed the market under the merger test, concluding that the case raised no serious doubts concerning dominance. Thereafter, it analysed the same market under Article 101 criteria, concluding that even if the parent companies were to coordinate their behaviour on this market, it would not amount to an appreciable restriction of competition in view of the modest combined market share of the parents and the venture.

³⁷⁸TEMPLE LANG, J. International joint ventures under Community law, 2000 *Fordham Corp. L. Inst.* 381, 440 (B. Hawk, ed. 2000).

³⁷⁹ Case No JV.1 - *Telia/Telenor/Schibsted*, Decision of 27 May 1998. The case has been summarised in DENNESS, J. Application of the new Article 2(4) of the Merger Regulation – a review of the first ten cases. Competition Policy Newsletter 1998 Number 3 October, p. 30-32.

Another illustrative case was *TF1/TPS/M6/Suez*³⁸⁰, which concerned acquisition by TF1, M6 and Suez of joint control in the satellite television TPS. Again, the Commission assessed each of the relevant markets first under the merger test to ensure that no dominant position was created or strengthened,³⁸¹ and thereafter analysed the effects on each of these markets under Article 101 to ensure that the acquisition did not result in coordination between the parties in those same markets. Similarly, in *PanAgora/DG Bank*³⁸² which was formed to offer asset management services, the same services offered by its parents in partially overlapping geographic areas,³⁸³ the Commission found that the parents were either actual or potential competitors to the joint venture, depending on the relevant geographic market chosen. These markets were then analysed under both Articles 2(3) and 2(4).³⁸⁴ Considering that the parents' combined global market share was relatively small, the Commission concluded that no dominant position would be created or strengthened on any market. It further considered that coordination between the parties was not likely either, given that the relevant markets were "very competitive" and the market shares of the parents were relatively small and they thus had no incentive to collude.³⁸⁵ One could argue that in all these cases the same conclusion could have been reached without the application of Article 2(4), based on the theory of oligopolistic interdependence that gradually emerged as part of the assessment of collective dominance within the merger test and particularly as part of the coordinated effects limb of the SIEC-test.

³⁸⁰ Case COMP/JV 57-TPS, Decision of 30 April 2002.

³⁸¹ The relevant markets were defined as the pay television, marketing and exploitation of theme channels, and acquisition of diffusion rights. In the assessment of dominance, the Commission added up the market shares of the parties to see what their accumulated position will be in each specific market.

³⁸² *PanAgora/DG Bank*, Case No IV/JV.14, Decision of 26 November 1998.

³⁸³ *PanAgora* was active in the United Kingdom and Switzerland, *DG Bank* in Germany, Austria and Switzerland, and the joint venture was to offer the services in question in Germany, Austria, Switzerland and certain Eastern European countries.

³⁸⁴ See also e.g. Case JV.44 *Hitachi/NEC – DRAM/JV*, Decision of 3 May 2000 (concluding that the market for DRAMs was not a candidate market for coordination in view of the parents' withdrawal from in after the start-up phase, after having examined the same market from the perspective of dominance by aggregating the parties' market shares). See also Case COMP/JV.51 – *Bertelsmann/Mondadori/BOL Italia*, Decision of 01.09.2000 (concluding that the operation will not lead to any co-ordination of the parents' competitive behaviour in the market of the joint venture, which was also examined under the dominance test). Other cases involving horizontal joint ventures include Case No IV/JV.7, *Telia/Sonera/Lithuanian Telecommunications*, Decision of 14 August 1998, paragraphs 30 and 31; and Case JV.42 – *Asahi Glass/Mitsubishi/F2 Chemicals*(21.3.2000), paras. 17-24.

³⁸⁵ See also e.g. Case JV.44 *Hitachi/NEC – DRAM/JV*, Decision of 3 May 2000 (concluding that the market for DRAMs was not a candidate market for coordination in view of the parents' withdrawal from in after the start-up phase, after having examined the same market from the perspective of dominance by aggregating the parties' market shares). See also Case COMP/JV.51 – *Bertelsmann/Mondadori/BOL Italia*, Decision of 01.09.2000 (concluding that the operation will not lead to any co-ordination of the parents' competitive behaviour in the market of the joint venture, which was also examined under the dominance test). Other cases involving horizontal joint ventures include Case No IV/JV.7, *Telia/Sonera/Lithuanian Telecommunications*, Decision of 14 August 1998, paragraphs 30 and 31; and Case JV.42 – *Asahi Glass/Mitsubishi/F2 Chemicals*, Decision of 21 March 2000, paras. 17-24.

In more recent decisions adopted after the 2004 Amendment, insofar as the joint venture market is concerned, the analysis of coordinated effects under Article 2(3) and that of the coordination between the joint venture participants under Article 2(4) appear to have largely converged. The loss of competition in the joint venture's market has been analysed primarily under the SIEC-test pursuant to Article 2(3), even where the parent firms remain active in that market. It may thus be that the approach to coordinated has in practice replaced the need for a separate analysis of coordination between the joint venture participants under Article 2(4) and the criteria of Article 101 TFEU.

There are recent cases in which the Commission did not separate the analysis of coordination aspects in the joint market from that of the SIEC test, whereas in other cases it did so. Example of the former situation was at issue in case *Mauser Holding International/Reyde*³⁸⁶, in which Mauser (Germany) and Reyde (Spain) intended to establish a full-function joint venture for the production and sale of intermediate bulk containers (“IBCs”) within the Iberian Peninsula and the South of France. Even though the Commission found that the parties' activities overlapped in the manufacturing of plastic IBCs (i.e. the joint venture's market), it did not separately analyse the coordination aspects under Article 2(4) but simply concluded that the transaction would not lead to a significant impediment to effective competition in view of the remaining competition on the market. In another recent case *Mubadala/Rolls-Royce*³⁸⁷, in turn, the Commission examined separately the cooperative effects of the joint venture to be established in United Arab Emirates between Mubadala (United Arab Emirates) and Rolls-Royce (UK), but did not explicitly refer to Articles 2(4) and 2(5) EUMR. The joint venture's activity concerned the supply of maintenance, repair and overhaul services for certain aircraft engines in the Middle East. Both Mubadala and Rolls-Royce provide such services, which as such is a world-wide market. The coordination between Mubadala and Rolls-Royce resulting from the operation of the joint venture was considered unlikely to allow them to affect competition on the relevant market, since the notifying parties performed these activities mostly in the EEA while the joint venture would not be active in this geographic area.

In general, it is difficult to assess the role of the coordination test under Article 2(4) of merger Regulation in the current policy, as the Commission decisions are often very brief and contain

³⁸⁶ Case No. COMP/M.5394 – Mauser Holding International/ Reyde/ JV, Commission Decision of 21 January 2009.

³⁸⁷ Case No COMP/M.5399 – Mubadala / Rolls-Royce, Commission Decision of 16 February 2009.

only rather conclusive statements regarding the market conditions and the parties' incentives to collude. What can be observed, nevertheless, is that direct references to Articles 2(4) and 2(5) and in particular the criteria of Article 101 TEU have become very rare, if not virtually disappeared. As a matter of fact, the most recent decisions do not make any references to specific provisions of the Merger Regulation in the substantive assessment nor do they explicitly mention the standard of "appreciability", which makes it difficult to explore the extent to which Article 2(4) is still relied on. At any rate, in substantive terms, the way in which the Commission has analysed collective dominance and subsequently coordinated effects under Article 2(3) and coordination under Articles 2(4) and 2(5) has been very similar in the past few years.³⁸⁸ A finding that the joint venture market is competitive is normally sufficient to conclude that the joint venture does not involve competition concerns; whether the formally applied provision is Article 2(3) alone or together with Article 2(4) appears largely irrelevant in the Commission's analysis. Apart from the tangible structural link between the joint venture parents, the market characteristics and the requirement of sustainability of a coordinated policy to predict the likelihood of coordination between the parents are the same as those used to assess coordinated effects under Article 2(3) EUMR.³⁸⁹

1.3.3 Remaining role of Article 101 TFEU criteria in Merger Regulation

Based on the foregoing, the coordination test of Article 2(4) EUMR no longer appears to play a meaningful role in horizontal cases in which the parent firms continue competing in the same market as their joint progeny, at least to the extent that it addresses the risk of future collusion between the parties. It remains to be examined whether the situation is any different in cases where coordination aspects concern vertically related or neighbouring markets outside the joint venture (1.3.3.1). Moreover, in this context it is also useful to take a look at how Article 2(4) EUMR articulates with the doctrine of ancillary restraints, and in particular whether it has a role in the assessment of non-ancillary restraints (1.3.3.2).

³⁸⁸ For articles describing these developments, see WALTHER, M. and BAUMGARTNER U., Joint venture review under the new EC Merger Regulation, *The European Antitrust Review* 2007, p. 22, available at: www.GlobalCompetitionReview.com; TYSON, N. Joint venture regulation under European competition laws. [2007] *European Law Journal*, Vol. 13, Issue 3, p. 408-423.

³⁸⁹ The market characteristics include various factors such as concentration, symmetry, product homogeneity, innovation, cost equivalence, degree of vertical integration. The possibility to sustain coordinated policy over time, in turn, refers essentially to transparency, deterrence, and inability of outsiders to defeat the coordinated policy. For further discussion, see DRAUZ, G, JONES, (eds): *EU Competition Law, Volume II, Mergers and Acquisitions*, Claeys&Casteels, 2006, p. 408-409.

1.3.3.1 Assessment of spill-over effects outside the joint venture

The situation of joint venture in which the parents continue to compete in vertically related or neighbouring markets outside their common venture, differs somewhat from that of a horizontal scenario described in the preceding sub-Section. As in the latter case, structural effects are primarily felt in the joint venture's market and therefore the merger test is applied to make sure that the loss of competition between the parties in that market does not result in excessive market power. As far as the spill-over markets outside the joint venture are concerned, however, the main operation of concentration does not take place on those markets. The EU has isolated spill-over markets from the conventional merger test under Merger Regulation, by providing in Article 2(4) of Merger Regulation that they may be examined in light of the criteria of Article 101 TEU.³⁹⁰ Article 2(5) provides that in assessing whether the creation of a joint venture has as its object or effect the coordination of undertakings that remain independent, the Commission takes into account in particular (i) whether two or more parent companies *retain, to a significant extent, activities* in the same market as the joint venture (i.e. a horizontal joint venture), in an upstream or downstream market (i.e. a vertical joint venture), or in a neighbouring market closely related to the market of the joint venture; and (ii) whether the coordination which is the *direct consequence of the creation of the joint venture* affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

A mere overlap of the parties' activities is not sufficient to trigger the application of Article 2(4), but other factors are needed to materially affect the parents' ability and incentives to coordinate their competitive behaviour within or outside the joint venture. The Commission examines whether the parties have a real possibility and an incentive to collude in view of the characteristics of the market, notably their market power. As previously discussed³⁹¹, Venit has argued that the fact that the Commission analyzes the parties' market power to evaluate the coordination risk means an implicit acceptance that such a risk would be present only

³⁹⁰As will be further highlighted in Part II of this dissertation, this is an interesting difference as compared to the scope of the U.S. merger rules which is not defined by reference to an operation of concentration and acquisition of control on a certain market but rather by reference to the nature of the transaction itself (i.e. stock or asset acquisition). Section 7 of the Clayton Act applies to all future effects of a merger or a joint venture, including its spill-over effects on other markets.

³⁹¹ See footnote 351 and the accompanying text.

where there is a high likelihood of successful oligopolistic collusion.³⁹² This has been apparent in several cases with explicit references to market power as condition for finding a risk of coordination. One of such cases was *Skandia/Storebrand/Pohjola*³⁹³ which concerned a joint venture established in Sweden to offer non-life insurance products in Norway, Sweden and Finland. The parent firms remained active in the neighbouring market (life insurance) which was thus qualified as the candidate market for coordination. The existence of such a risk was to be assessed, in Commission's terms, by determining whether the notifying parties "*together or separately have sufficient market power to make co-ordination worthwhile*". It did not find market power to be a concern, since in life insurance sector new entry was both possible and likely, and there were competitors of comparable size in each of the geographic territories in question.

Many cases have referred to the fact that the market was competitive, to conclude that no coordination would occur in spill-over markets, without much factual detail. In *TF1/TPS/M6/Suez*³⁹⁴ which concerned acquisition by TF1, M6 and Suez of joint control in the satellite television TPS, in the analysis of the effects on each of the candidate markets for coordination under Article 101, the Commission referred to the fact that the "market was competitive". Likewise, in *PanAgora/DG Bank*³⁹⁵ which was formed to offer asset management services, the same services were offered by its parents in partially overlapping geographic areas.³⁹⁶ In the assessment of the coordination risk, the Commission concluded that coordination was not likely, given that the relevant markets were "very competitive" and the market shares of the parents were relatively small and they thus had no incentive to collude.³⁹⁷ In *Telia/Sonera/Lithuanian Telecommunication*³⁹⁸ the Commission also referred

³⁹²VENIT, J. 2000 *Fordham Corp. L. Inst.* 465, 481 (B. Hawk, ed. 2000). Similar conclusion was reached more recently by SINAN, I and UPHOFF, J. Review of joint ventures under the new EC Merger Regulation, *The European Antitrust Review* 2005, p. 36, available at: WWW.GLOBALCOMPETITIONREVIEW.COM.

³⁹³Case No IV/JV.21, 17.8.1999. The analysis of coordination is found in paras. 32-47.

³⁹⁴Case COMP/JV 57-TPS, Decision of 30.04.2002 (available in Celex under no: 30J0057).

³⁹⁵*PanAgora/DG Bank*, Case No IV/JV.14, 26.11.1998.

³⁹⁶*PanAgora* was active in the United Kingdom and Switzerland, *DG Bank* in Germany, Austria and Switzerland, and the joint venture was to offer the services in question in Germany, Austria, Switzerland and certain Eastern European countries.

³⁹⁷See also e.g. Case JV.44 *Hitachi/NEC – DRAM/JV*, Decision of 3.5.2000 (concluding that the market for DRAMs was not a candidate market for coordination in view of the parents' withdrawal from in after the start-up phase, after having examined the same market from the perspective of dominance by aggregating the parties' market shares). See also Case COMP/JV.51 – *Bertelsmann/Mondadori/BOL Italia*, Decision of 01.09.2000 (concluding that the operation will not lead to any co-ordination of the parents' competitive behaviour in the market of the joint venture, which was also examined under the dominance test).

³⁹⁸Case No IV/JV.7, *Telia/Sonera/Lithuanian Telecommunications*, Decision of 14.8.1998,

to the modest market shares of the parties to exclude the likelihood of coordination.³⁹⁹ In other cases, the Commission has referred to a large number of competitors and relatively modest market shares of the parents to conclude that coordination of their competitive behaviour was not likely.⁴⁰⁰

The reference to the coordination being the “direct consequence” of the joint venture in Article 2(5) of Merger Regulation appears to imply that a spill-over effect cannot be simply inferred from an increased opportunity to collude that the joint venture may offer to the parties because of their close collaboration within it. The Commission looks for a *causal link* between the creation of the venture and the likelihood of coordination. The case *BskyB/KirchPayTV*⁴⁰¹ is interesting from this perspective. The Commission considered that there was no causal link between the creation of the joint venture and the coordination of the competitive behaviour of the parents, even though they remained active in the upstream market of pan-European sports events broadcasting rights. The Commission was concerned that the parties might jointly bid for pan-European sports rights, where they previously competed, and that they might preferentially sell the territorial rights to each other. It concluded, however, that the incentive to such behaviour did not necessarily result from the joint venture because “*some incentive to engage in such behaviour may exist separately from the concentration.*”

Another case in which the Commission considered that there was no causal link between the joint venture and any lack of competition was *Telefonica/Portugal Telecom/Medi Telecom*.⁴⁰² In that case the Spanish and Portuguese telecom companies acquired joint control of Medi Telecom, which was to operate a GSM cellular mobile telecommunications business in Morocco. The Commission examined the potential spill-over effects on the closely related geographic markets for telecommunication services in Spain and Portugal, where the parent companies held strong positions and had to be regarded as potential competitors in each others’ markets. The Commission found, however, that the cooperation within the joint venture would not determine the parties’ conduct on other markets, since the Moroccan operation was very small compared to the parents’ other activities and the parents had previously entered into a general cooperation agreement (cleared by the Commission in

³⁹⁹ Ibid. Paragraphs 30 and 31.

⁴⁰⁰ See e.g. JV.42 – Asahi Glass/Mitsubishi/F2 Chemicals(21.3.2000), paras. 17-24.

⁴⁰¹ Case JV/37. – BskyB/KirchPayTV, Decision 21.3.2000, point 91.

⁴⁰² Case No JV.23, 17.12.1999.

1997), which explained why the parties had not been competing strongly even before the formation of the joint venture and the latter did thus not cause the reduction of competition.

A causal link between the joint venture and the coordination was, in turn, found to exist in the cooperative full-function case BT/AT&T⁴⁰³. British Telecommunications (BT) and AT&T, two of the world's largest telecommunications operators, proposed to form a joint venture which would provide a variety of telecommunications services to multinational corporate customers and international carrier services to other carriers. After a preliminary examination the Commission found that certain co-ordination effects existed in relation to U.K. markets within the terms of Article 2(4) EUMR . These were coordination between ACC, a wholly-owned subsidiary of AT&T, between British Telecom and TeleWest, in which AT&T holds an indirect 22 per cent stake, and the distribution of AT&T/Unisource services in the U.K. Commission considered that, following the formation of the joint venture, each parent company would have an incentive to avoid competing directly with the companies associated with the other parent which are likely to use the joint venture to carry their traffic. Each parent would therefore have an incentive to ensure that its associated companies use the joint venture to carry their international traffic. In order to resolve these concerns AT&T offered to divest ACC in the U.K., to create a greater structural separation between AT&T and TeleWest and to appoint another distributor in addition to AT&T to distribute services in the U.K. The joint venture was finally approved based on Article 8 (2) EUMR and Article 2(4), with reference to 101 (3) EU.⁴⁰⁴

The Commission looks also at other factors, such as the small size of the joint activity or market in relation to the parents' activities. For instance, in *Bertelsmann/Springer*⁴⁰⁵, the Commission examined whether a joint venture between Bertelsmann and Springer for certain printing and print products in Germany would have spill-over effects on the parents' remaining activities in the downstream market for publishing of magazines. It concluded that such coordination was unlikely, since the parties' incentives to collude were rather limited due to the minor impact (5-15%) of the printing costs on the price of the magazines and the relatively low revenues expected from the joint venture's activity compared to the parents'

⁴⁰³Commission Decision of 30 March 1999, Case No IV/JV.15 ("BT/AT&T"), reported in 1998 Annual Report on Competition Policy, p. 198.

⁴⁰⁴Case No. IV/JV15 (March 30, 1999); European Commission, Press Release IP/99/209 (March 30, 1999).

⁴⁰⁵Case COMP/M.3178 - Bertelsmann/Springer/JV, decision of 3.5.2005.

revenues from the magazine publishing.⁴⁰⁶ Another case in which the Commission undertook a detailed analysis under Article 2(4) beyond market power and oligopolistic interdependence was *Amadeus/Sabre*⁴⁰⁷ in 2007. In that case, Amadeus (Spain) and Sabre (USA) acquired joint control of a newly created company, Moneydirect, which was to provide payment processing and clearing services for the travel industry. While neither Amadeus nor Sabre was active in this market within the EEA and the transaction hence did not result in any horizontal overlaps, they were competing in providing solutions to the travel industry to manage the distribution and selling of travel services via its Global Distribution System ("GDS"). The GDS markets, in which Amadeus has very strong market positions in the EU markets, were highly concentrated with only three providers active in the EU (Amadeus, Sabre and Galileo/Worldspan). Certain third parties therefore expressed concerns over the risk that the joint venture would be used as a vehicle to co-ordinate the competitive behaviour of Amadeus' and Sabre's GDS businesses and travel agency businesses through exchanges of information. The Commission, in turn, considered - while noting that any coordination of the competitive behaviour of Amadeus and Sabre in this market could be detrimental to competition because of the high concentration - that coordination was unlikely, given the very limited size of the JV in relation to the principal activities of the parent companies, and given the fact that GDS services were not closely related to payment transaction and clearing services and provided that the contractual arrangements limiting information flows between the JV and the parent companies were put in place and strictly adhered to.

Another interesting case was *LSG Lufthansa Service Holding/Gate Gourmet Switzerland*⁴⁰⁸ which concerned the formation of a full-function joint venture in the field of airline food catering at the Paris Charles de Gaulle airport. The parent companies, LSG and Gate Gourmet, were both active in airline catering across Europe, and the possibility of coordination between them was therefore assessed under Article 2(4) EUMR. The Commission found that preventative measures put in place by the parent companies would be sufficient to ensure that the joint venture would not serve as a conduit for information exchange or a forum to discuss operations outside the scope of the joint venture and that the parents would compete in bids involving Paris Charles de Gaulle and one or more other airports. It also noted that the market survey revealed a concern about further

⁴⁰⁶ Ibid, paragraphs 164-169.

⁴⁰⁷ Case COMP/M.4760 Amadeus/Sabre/JV, 12 September 2007.

⁴⁰⁸ Case COMP/M.4170 LSG Lufthansa Service Holding/Gate Gourmet Switzerland, Commission Decision of 19 July 2006.

collaborative efforts in airline catering between the parents at other airports. The Commission found, however, referring to the small size of the Paris market compared to the parties' total turnover, that the joint venture would have neither as its object or effect the coordination of the parties' competitive behaviour and cleared it at Phase I without undertakings.

Similar analysis was conducted in a recent decision issued in May 2010 in case *Total Holdings Europe Sas/ Erg Spa*⁴⁰⁹ involving the acquisition of joint control by Total Italia Spa and ERG Petroli Spa (“EGP”) of a newly created full-function joint venture to combine the refining and marketing activities of Total and ERG Group in Italy. In this case, the parent firms continued to operate individually and independently from the joint venture in the market for ex-refinery/cargo sales of oil products on a worldwide basis. The Commission did not consider this a competition concern, since the ERG group has a modest presence on the market for ex-refineries/cargo sales in the Mediterranean (0-5% of the total refining capacity) and Total's refineries in Europe represent more than six times the refining capacity of respectively ERG and the joint venture. The conclusion was based on the lack of any risk of coordination between the parties and the joint venture which could be reasonably be ruled out because of the modest market shares and the asymmetries between the parties' positions on the ex-refinery/cargo market. Whilst coordination between the joint venture participants was thus unlikely, the Commission further noted that even if the parties were to coordinate their activities on this spill-over market, it would not lead to any significant restriction of competition since the parties' market position was modest compared to that of other players such as ENI or Exxon and others.

The above discussed cases confirm, hence, that, the Commission links the risk of coordination between the parties to their inability to affect competition adversely due to the overall competitive situation of the market, without any reference to specific provisions in the Merger Regulation. In fact, whether the analysis of the spill-over affects is conducted as part of the conventional SIEC-test of Article 2(3) alone or under the coordination-test of Article 2(4) would not appear to make any difference in practice. The former might as well have been used as the only legal basis in these cases. In view of the improved economic analysis of the coordination aspects, it is therefore debatable whether Article 2(4) is still necessary to assess markets which are upstream or downstream from that of the joint venture or in closely related

⁴⁰⁹ Case No COMP/M.5781 -TOTAL HOLDINGS EUROPE SAS/ ERG SPA/ JV, Decision of 21 May 2010; analysis of coordination is found in paragraphs 77 to 80.

neighbouring markets.⁴¹⁰ The likelihood of such coordination may be taken into account in an assessment of vertical or conglomerate effects of the joint venture under articles 2(2) and 2(3) of Merger Regulation. Where the spill-over effect on other markets is really the direct and foreseeable consequence of the formation of a joint venture, there would not appear to be any legal obstacle to find that it would result in significant impediment of competition through the creation or strengthening of a collective dominant position to the benefit of its parents and possibly third parties outside the joint venture market. It is difficult to think of any compelling need to employ Article 2(4) and thus Article 101 TEU criteria in cases involving spill-over concerns. These concerns may be addressed simply under the merger rules as likely coordinated effects the same way as traditional scenarios of oligopolistic dominance with third parties.

The inclusion of Article 101 TFEU criteria into the merger rules seems, indeed, unnecessary and conceptually artificial, as explained in the Section 1.3.1 above. It seems that the complex analytical path to be followed in the assessment of coordination under the EU rules could be improved by simply eliminating the reference to Article 101 TFEU criteria from Article 2(4) and by replacing the test by the conventional merger test, which could be completed with indications of possible adjustments needed in the analysis relating to the parent companies' ability and incentives to compete in the spill-over markets. This would seem to improve the logic and coherence of Commission decisions. The parties would still have to comply with competition rules in their actions on the market, and should they later collude on any of the spill-over markets, their conduct could naturally be challenged and sanctioned under Article 101 TFEU.

As far as remedies are concerned, behavioural remedies are available also under the Merger Regulation, although structural ones are preferred because of the lesser monitoring cost they involve.⁴¹¹ It is difficult to see why reference to Article 101 TFEU criteria in Article 2(4)

⁴¹⁰ GOTZ p. 409.

⁴¹¹ According to Articles 6(2) and 8(2) of the Merger Regulation, if the Commission finds that, following modifications by the parties, the concentration no longer raises serious competition concerns, it shall clear it. Remedies are dealt with in detail in Commission *Notice on Remedies Acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004*¹ (the "Remedy Notice"). Remedies are designed by the parties and thereafter negotiated with the Commission. Divestitures are the most common structural remedy, whereas behavioral remedies (see paragraphs 62-69 of the Remedy Notice) include commitments on conduct of those who undertake the proscribed activity, be it due to the way in which they use their assets (e.g. granting access to key infrastructure or technology), compete, or contract with other parties or abstain from certain behaviour. See a profound discussion in KRATSAS, G. Structural or Not? A Critical

would be necessary to adopt behavioural remedies for instance in the form of Chinese walls to avoid the exchange of competitively sensitive information between the parties. There does not appear to be any legal obstacle to provide for this kind of remedies in the relevant Guidelines either, should explicit mention in this regard be necessary.

In conclusion, the specific rules for cooperative full-function joint ventures were designed in a legal situation that differed from the current framework in several relevant respects. In the latter half of the 1990's cooperative joint ventures were still examined under the ex ante notification proceedings of Article 101 TFEU and the merger standard was still based on dominance, not on market power. The test of dominance was not well-adapted to analyse the behaviour of joint venture parties that remained separate undertakings on the spill-over markets on which no operation of concentration occurred, unless the candidate market for coordination was that of the joint venture itself in a horizontal case. At that time it was not yet clear to what extent the theories of oligopolistic interdependence could be applied within the dominance test. Moreover, forward-looking predictions of the parties' future competitive behaviour were part of the normal assessment of the criteria of Article 101(3) in the exemption proceedings. Possible coordination between the participants had therefore always been predicted under Article 101 TFEU exemption proceedings at the formation of the joint venture. In 1997, when Article 2(4) EUMR was enacted, it may thus have appeared as a logical continuation of this practice to insert Article 101 TFEU criteria into Article 2(4) EUMR.

In both frameworks, things have since then evolved, in particular as regards the sophistication of economic analysis and the application of theories of oligopolistic interdependence in the market power analysis. More specifically, where the spill-over markets are competitive substantive analysis under the main merger test allows to conclude, without any specific analysis under Article 101 criteria, that there are no concerns of coordination between the participants. Facilitation of collusion by the joint venture structure would become an issue only if those markets were not competitive and even in such case there would seem to be no reason to apply any specific provisions further to Article 2(3) EUMR, such as the balancing test of Article 101 TFEU, other than to examine possible non-ancillary restraints.

Analysis of the Commission's New Notice on Remedies, *The Columbia Journal of European Law* (CJEL), V 15/no 3, 549-559 (2009).

1.3.3.2 Relationship with the doctrine of ancillary restraints

Further to the formation of joint ventures and possible coordination of the parents' competitive behaviour therein, various collateral agreements, such as territorial protection, purchase and supply arrangements, intellectual property licences and non-compete covenants, may also entail restriction of competition. To the extent that such restrictions are directly related and necessary to the implementation of the joint venture, they will be classified as ancillary restrictions which are assessed together with the concentration and will not be challenged for the term of the relevant restrictions.⁴¹² The 2004 Amendment confirmed a principle of self-assessment and relieved the Commission of the obligation to assess ancillary restraints in individual cases, which reflects the legislator's intention to simplify the assessment under the Merger Regulation.⁴¹³ Therefore, a Commission decision clearing a merger automatically covers any ancillary restrictions, without the necessity to assess such restrictions in individual cases. It does, however, envisage a residual role for the Commission with respect to ancillary restrictions. According to Recital 21, the Commission will, at the request of the parties, assess whether a particular restriction is ancillary in nature if the case raises novel or unresolved issues giving rise to genuine uncertainty, i.e., involves legal questions that have not been addressed before in a Commission notice or decision.⁴¹⁴

In general, to be treated as ancillary, restrictions must: (i) have a direct link to the establishment of the joint venture; (ii) be subordinate in importance to the main object of the joint venture; (iii) not constitute substantial restrictions wholly different in nature from those which result from the transaction itself; (iv) be necessary to the implementation of the joint venture (meaning that, in their absence, the venture could not be implemented or could only be implemented under more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably less probability of success); (v) be proportionate (meaning that their duration, subject matter and geographical field of application should not exceed what the implementation of the joint venture reasonably

⁴¹²The 2004 Amendment of Merger Regulation provides explicitly that the Commission's merger clearance decision "*shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration*". See Articles 6(1)(b) and 8(1)-(2) ECMR, and Commission Notice on restrictions directly related and necessary to concentrations. [2005] OJ C 56/24. This notice was adopted in July 2004 and it replaced the Commission previous Notice published in 2001, [2001] OJ C188/3; see also the first *Notice regarding restrictions ancillary to concentrations*, [1990] OJ C203/5.

⁴¹³See Recital 21 and Articles 6(1)(b) and 8(1)-(2)ECMR. This approach is not entirely new. In its previous Notice on ancillary restrictions of 2001, the Commission announced that it no longer intended to address and evaluate ancillary restraints in the context of a merger review. Companies were therefore invited to assess for themselves whether and to what extent their agreements qualified as ancillary to the notified transaction and so be covered by the merger clearance decision.

⁴¹⁴This reflects the position taken by the CFI in Case T-251/00 [2002] *Lagardère and Canal+ v Commission*, ECR II-4825.

requires). In practice, the Commission will also take into account industry practice in determining whether a particular collateral agreement is reasonable in the circumstances of the case. As a general rule, ancillary restraints limit the parties' own freedom of action in the market, as opposed to those concerning third parties. Restrictions to the detriment of third parties can be considered ancillary only where they are the inevitable consequence of the concentration itself and are not separable from it.⁴¹⁵ A further distinction must be made between restraints affecting the joint venture and those affecting the parents. Restrictions on the joint venture will usually be regarded as ancillary where they define the object of the joint venture (such as provisions which specify the product range or the location of production) or require the joint venture to purchase from or supply its parents (at least during the joint venture's start-up period), where the parents assign to the joint venture certain stages of the production or manufacture of certain products. Restrictions on the parents, in turn, will usually be regarded as ancillary where they prohibit the parents from competing with the joint venture, or from actively competing with it in its area of activity (at least during the start-up period of the joint venture) or impose a restriction on one or more of the parents, where the joint venture is granted an exclusive exploitation licence in respect of fields of technical application and product markets in which the parent company granting the licence is not active or is ceasing to be active.

Restrictions that will normally not be considered ancillary, include *inter alia* absolute territorial protection and export bans, as well as any additional restrictions relating to quantities, prices or customers, which will generally be regarded as going beyond what is required for the setting-up and operation of the joint venture. The Commission's position appears to have evolved in this regard, as in the 2010 Guidelines for Horizontal Agreements it explicitly states, in the context of a joint commercialisation agreement, that while an agreement involving price fixing means that Article 101(1) could apply, it may be indispensable to the promotion of a common brand and the success of the project.⁴¹⁶ Territorial restrictions are allowed only to the extent they do not confer absolute protection, in line with the well-established basic rule of the EU competition law having its roots in the market integration goal. For instance, in *PanAgora/DG Bank*⁴¹⁷ the Commission permitted the parents' agreement that they would not actively seek asset management business in the agreed territory using the same investment technology and techniques licensed to the joint venture. The reason behind was that the restriction ensured that the joint venture would focus its

⁴¹⁵See e.g. *Blackstone/CDPQ/Kabel Nordrhein-Westfalen* (Case COMP/JV.46, 19 June 2000).

⁴¹⁶See examples 1 and 2 under Section 6.5 of the 2010 Guidelines for Horizontal Agreements.

⁴¹⁷*PanAgora/DG Bank*, Case No IV/JV.14, 26.11.1998.

resources on the agreed territory, which the Commission considered to be best served by a German joint venture.

Non-competition clauses in the joint venture context entail a specific treatment, since such covenants given by the parent companies may be treated more liberally than similar covenants given by the parties to a merger or acquisition. At several occasions, the Commission has stressed that prohibition on the parent firms to compete with the joint venture expresses the reality of the lasting withdrawal of the parents from the market assigned to the joint venture.⁴¹⁸ This is why it considers that non-competition clauses are an integral part of the concentration. Such a clause is directly related and necessary to the implementation of the joint venture as long as the parent in question retains the joint control.⁴¹⁹ The 2004 Notice confirms that non-competition obligations between the parent undertakings and a joint venture can only be regarded as directly related and necessary to the implementation of a joint venture for the lifetime of the joint venture. Such commitments must be limited to the actual joint activity and any extension of the non-compete covenant to areas in which the joint venture may in the future decide to become active cannot be considered ancillary to the concentration.⁴²⁰ The Commission has also put limits to such restrictions where the non-competition agreement would remain valid even when the parties or their parent companies have only non-controlling interests in the joint venture and therefore in cases where these companies will not have any opportunity to exercise a decisive influence over the venture.⁴²¹

It is not always easy to distinguish between ancillary restrictions, spill-over effects and other restrictions. There has been some confusion and uncertainty as to how the Commission treats restrictions that do not qualify as ancillary in the context of cooperative full-function joint ventures and are thus separable from the concentration itself. The concept appears to imply, *a contrario*, that non-ancillary restrictions are not assessed together with the concentration and are thus not covered by the merger clearance. However, Ritter has suggested that Article 2(4) EUMR would have a role to play in the assessment of non-ancillary restraints so that they would not need to be separated from the merger proceedings.⁴²² Even though this may have been tempting especially before these restraints were brought within self-assessment, Article

⁴¹⁸ PanAgora/DG Bank, Case No IV/JV.14, 26.11.1998, point 38.

⁴¹⁹ Case COMP/JV.44 Hitachi/NEC-DRAM/JV, Decision of 3 May 2000.

⁴²⁰ Case IV/JV.22 Fujitsu/Siemens, Decision of 30 September 1999.

⁴²¹ Case No IV/M.1636 - MMS/DASA/Astrium, Commission Decision of 21 March 2000 (the non-competition agreement was considered directly related and necessary to the implementation of the notified concentration only to the extent that the parties or their parent companies had a controlling interest in Astrium or its parent companies).

⁴²² RITTER (2004), p. 617.

2(4) would not appear well-suited for this purpose. It may, indeed, be argued that non-ancillary restrictions that can be separated from the concentration (since they are not directly related or necessary for its implementation) would anyway not affect the validity of the joint venture as such and would thus not need to be cleared in the merger proceedings or, vice versa, should not cause the prohibition of the whole joint venture. If, for instance, the parties agree on hard-core restrictions, such as absolute export bans or non-compete obligations outside the joint venture, these clauses could be considered void at the outset whereas the joint venture itself could still be cleared. Other collateral agreements can be assessed in light of the block exemptions or the general criteria of Article 101(3). Non-ancillary restraints may therefore be subject to a separate examination and to self-assessment under Article 101 in the framework of Regulation 1/2003. This understanding finds support in the internal logic and wording of Article 2(4) EUMR, which prescribes that coordination is appraised in accordance with the criteria of Article 101(1) and (3) with a view to establishing *whether or not the operation is compatible* with the Common Market, not whether some of its elements or collateral agreements are compatible.

The Commission's decisional practice so far indeed suggests that Articles 2(4) and 2(5) concern situations in which a forward-looking assessment would show that the formation of the joint venture would change the market structure and incentives of the parties so that it would be profitable and thus likely for them to collude, which would justify the prohibition of the operation, the same way as the coordinated effects limb of the SIEC-test on the main market under Article 2(3). This is illustrated in case *Alcatel/Thomson-CSF-SCS*⁴²³, in which the Commission excluded the application of Article 2(4) in the absence of significant overlaps in the parties' activities, and referred the non-ancillary collateral agreements to a separate assessment under Article 101.⁴²⁴ It would therefore appear appropriate to make a distinction between non-ancillary restrictions that are included in the joint venture's collateral agreements and subject to a separate assessment under Article 101 TEU, on the one hand, and prediction of collusive behaviour (i.e.coordination) that is likely to result from its formation, which is examined together with the concentration in merger proceedings under Article 2(4) of Merger Regulation.

⁴²³IV/M.1121 - Alcatel / Thomson-SA - Thomson-CSF, Commission Decision of 25 May 1998, paragraphs 19 and 49.

⁴²⁴These included a general preferential clause given by Thomson-CSF to Alcatel for its purchases of civil telecommunications, which the Commission considered as likely to favour Alcatel to the detriment of other suppliers and not necessary for the implementation of the concentration. Ibid, paragraph 49.

PART 2 - COMPARISON WITH THE APPROACH UNDER THE U.S. ANTITRUST LAW

The multiplicity of different forms of collaboration and their various effects on competition are, of course, universal and do not lend themselves for easy and straight-forward solutions. Legal and doctrinal solutions on both sides of the Atlantic have thus been affected by the complexity of the issues that they are designed to address. The US legislator, courts and antitrust agencies have not escaped these challenges, which earlier prompted many to consider joint ventures as the most problematic and uncertain area of antitrust law and policy.⁴²⁵ Arguably, these uncertainties deterred transactions that might have been legal and efficient.⁴²⁶ This Part of the dissertation will highlight, with a number of illustrative cases, that the reason for these concerns was primarily the lack of comprehensive and coherent legal and administrative guidance about how antitrust rules and doctrine applied in different joint venture scenarios. Actually the biggest problem seems to have been the complexity of the effects of joint ventures on competition as such, not whether they should be addressed under the rules for horizontal agreements or mergers. The uncertainties under the U.S. antitrust law concerned thus different issues from those that created difficulties in the EU.

In the U.S. the main thread of case law has notably tackled the very basic borderline between legitimate collaboration between competitors, as opposed to cartel behaviour subject to a *per se* prohibition. In contrast to the EU where joint venture cases have been typically dealt with at their formation, in the U.S. difficulties have arisen notably during their functioning, i.e. to determine whether certain restraints and collateral agreements amount to disguised cartel behaviour or whether the joint venture's conduct amounts to a conspiracy among the parent firms rather than that of a single entity. The latter has given rise to cases in the Supreme Court

⁴²⁵This was the response given by a majority of the participants in the 1996 FTC hearings on global and innovation-based competition. See Opening Statement by Robert Pitofsky, June 2, 1997, initiating the Joint Venture Project in view of issuance of guidelines concerning competitor collaborations; available on the Website : www.ftc.gov/opp/jointvent/index.htm. See also BRODLEY, J. The Legal Status of Joint Ventures Under the Antitrust Laws : A Summary Assessment. 21 *Antitrust Bull.* 453 (1976) identifying joint ventures as the "darkest corner" of antitrust law..

⁴²⁶See JORDE, T. & TEECE, D. Innovation, Cooperation and Antitrust, 4 *HIGH TECH. L.J.* 1, at 36 (1989); PIRAINO, T. Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures. 35 *William & Mary Law Review* 871, at 878 (1994). For a different view, see EISEN, J., Antitrust Reform for Joint Production Ventures, 30 *JURIMETRICS J.* 253, 261 (1990) ("*The antitrust laws are remarkably flexible in permitting joint activity.... The antitrust laws ... are not a large barrier to consortia formation.*").

as recently as 2006 in *Texaco/Shell* and in 2010 in *American Needles*, which will be further discussed in Chapter 2 of this Part. These cases show very concretely that the approach to joint ventures is not always clear-cut, even where the mainstream commentary considers the position well-settled, and therefore borderline cases cannot be entirely avoided.

From a more theoretical perspective, there is a kind of a “dual standard” in the U.S. as well, making a basic distinction between naked horizontal agreements, such as cartels, that are prohibited *per se*, and consolidation and partial integration, prohibited only exceptionally when they result in creation of excessive market power. The common wisdom behind this fundamental distinction is that the former have as their sole purpose the elimination of competition between the parties whereas consolidation and partial integration of activities typically aim at achieving legitimate business purposes and efficiencies apt to intensify competition on the market. Yet, the following Chapters will demonstrate that the American dual standard developed in a different doctrinal context - that of a dichotomy between the *per se* rule and the rule of reason under Section 1 of the Sherman Act - and not by distinguishing merger-like joint ventures from others based on whether they are full-function or concentrative like in the EU system. It is therefore different in content and function than the past approach in the EU. It entails a lenient standard for both mergers and efficiency-enhancing horizontal agreements and a strict *per se* prohibition for cartels and other naked restraints, but does not make a categorical jurisdictional or substantive distinctions between different types of genuine joint ventures.

There are also a lot of similarities between these systems. At the outset, the basic choreography of both the EU and the U.S. antitrust laws indeed appears very similar.⁴²⁷ Like the EU competition law, the U.S. antitrust law has separate rules for coordinated action by two or more firms on the market (Section 1 of Sherman Act⁴²⁸) and mergers and acquisitions (Section 7 of Clayton Act⁴²⁹). Only mergers of a certain size are subject to regulatory filing

⁴²⁷The general differences and similarities between these systems have been abundantly covered by comparative literature. For recent studies, see a collection of articles devoted to these in *The Antitrust Bulletin*, Vol. XLIX, Nos. 1 & 2/Spring-Summer 2004, entitled “*Antitrust in the U.S. and the EU: Converging or Diverging Paths?*”; see also FOX, E. *The Competition Law of the European Union in Comparative Perspective*, Cases and Materials, [FOX Eleanor M., American Casebook series, West, Thomson Reuters 2009.](#) See also e.g. VIALARD, V. *Le critère d’appréciation substantielle des concentrations. Etude comparée des droits communautaire et américain*, éditions Dalloz, nouvelle bibliothèque de thèses, volume 67, Paris, 2007.

⁴²⁸ 15 U.S.C. § 1.

⁴²⁹ 15 U.S.C. § 18.

under Hard-Scott-Rodino Act⁴³⁰ like mergers in the EU, with the difference that the antitrust agencies – which is either the Federal Trade Commission (FTC) or the Department of Justice (DOJ) based on their expertise – do not themselves validate or invalidate any transaction but have to take the case to court if they wish to challenge any given merger. As to efficiency-enhancing horizontal agreements short of mergers, in turn, there are currently no systematic pre-screening mechanisms in either the U.S. or the EU and they are thus subject to self-assessment under a rule of reason-type of analysis in both systems.⁴³¹

In a nutshell, the U.S. approach to joint ventures includes essentially the following features: (i) per se prohibition for shams and disguised cartels under Section 1 of the Sherman Act, enforced ex post upon evidence of actual wrong-doing; (ii) a rule of reason analysis for efficiency-enhancing integrations and their ancillary restraints under Section 1 of the Sherman Act, applied normally to non-corporate loose knit joint ventures ex post without an obligatory filing with the government; (iii) the merger test of Section 7 of the Clayton Act for joint ventures formed through acquisitions of stock or assets, including also their spill-over effects and restraints ancillary to the merger, involving an ex ante obligatory filing proceedings under the HSR Act where the thresholds are met; (iv) possibility of a separate challenge under Section 1 of the Sherman Act against non-ancillary restraints in both cases. Whereas this basic architecture is close to the current EU framework which has a formal filing mechanism in merger proceedings only, with non-ancillary restrictions subject to a separate assessment under Article 101 TFEU, the U.S. merger analysis includes a much wider range of joint ventures, in particular corporate partial function joint ventures (e.g. typical joint R&D and joint production), and covers also the assessment of the spill-over collusion risk which in the EU may be subject to separate analysis under Article 101 TFEU criteria within the framework of the coordination test of Article 2(4) of the EU Merger Regulation.

This Part is structured to identify first the basic differences in the conceptual approach applied to joint ventures and thereafter explore the causes and consequences of these differences. Today, the most visible current difference between these systems lies, indeed, in the legal characterization and classification issues, which must first to be analysed more in depth

⁴³⁰ [15 U.S.C. § 18a](#).

⁴³¹ Note, however, that the NCRPA involves a voluntary notification for R&D and production joint ventures, which guarantees a rule of reason treatment to them in possible future litigation but does not as such validate or invalidate the venture in question. See also the procedure for Business Review Letters, as explained in subsection 2.2.2.2.

(Chapter 2.1). This difference can be explained partially by the different interaction of the basic rules, Section 1 of the Sherman Act and Section 7 of the Clayton Act, and partially by the different understanding of the competitive effects and risks involved in mergers as opposed to looser cooperation among competitors. Both limbs amount to an illustration of a fundamental contrast to the concentration privilege (Chapter 2.2) that was at the heart of the EU approach until the reforms gradually undertaken in the late 1990's and the first half of 2000's. These elements also help explain the reasons why the US legislator and antitrust enforcers have been much less concerned about drawing the borderline between mergers and cooperative horizontal agreements than their European counterparts, and why they have not encountered similar problems in defining a legal approach to joint ventures and making it operational.

2.1 CONTRAST WITH THE EU CONCEPTS AND DOGMATIC CLASSIFICATIONS

Generally speaking, the U.S. antitrust law appears less inclined towards defining strict legal concepts and categorisations than its EU counterpart. In contrast to the EU system, there are no predetermined criteria in the U.S. antitrust law and policy to assign different types of joint ventures to different legal categories to be assessed under either the merger rules or those for horizontal agreements. Joint ventures do not fall exclusively under Section 1 of the Sherman Act or Section 7 of the Clayton Act but can be challenged under either one of them, or both, depending on how they are formed. It is therefore not surprising that concepts such as concentrative and cooperative joint ventures or full-function joint ventures are unknown in the U.S. law. Absence in the U.S. of a conceptual framework comparable to that in the EU is indeed the most obvious difference in this area of antitrust law.

The key point this Chapter intends to make, as compared to the EU competition law, is that the U.S. antitrust law and doctrine towards joint ventures evolved in a different conceptual and doctrinal context in which the issue was to distinguish between acceptable and non-acceptable agreements within the conventional modes of analysis, not between mergers and horizontal agreements like in the EU. In the United States, the case law and doctrine have indeed focussed on defining a basis for distinction between the two basic modes of analysis, per se and the rule of reason, and distinguishing ancillary restraints from naked ones, not on distinguishing merger-like joint ventures from other cooperative agreements. (2.1.1). The merger statute, Section 7 of the Clayton Act, in turn, covers much more than full-function joint ventures within the meaning of the current EU terminology, not only in terms of types of joint ventures but also in terms of their behavioural aspects (2.1.2).

2.1.1 Different focus of legal characterisation

Unlike in the EU, where the policy towards joint ventures was essentially developed in exemption decisions under Article 101(3) EU at their formation, in the U.S. the formation of joint ventures has normally not been the issue under Section 1 of the Sherman Act. Rather, under this provision the U.S. Courts have been primarily concerned about the possibility for competitors to use the joint venture format in an attempt to cover their cartel behaviour and to

validate otherwise illegal collateral restraints. Unlike in the now superseded notification system under Article 101(3) TFEU, in the U.S. these issues have normally appeared before the courts when the joint venture was already functioning and not when it was being formed. The legal characterization between the two basic modes of analysis, rule of reason and per se, and the assessment of joint ventures under Section 1 of the Sherman Act can, in fact, be combined into a single definition of a genuine joint venture as opposed to shams and disguised cartels (2.1.1.1). Once a joint venture operates on the market, the crucial legal question is whether the actions of the venture can be viewed as its unilateral conduct or as products of agreements between its parents, a question that has not attracted specific attention in the EU (2.1.1.2).

2.1.1.1 Legal characterization embodied in the concept of a joint venture

Quite like under the EU competition law, the joint venture as such is not a homogenous legal concept which would have been defined in applicable U.S. statutes or case law. In principle, joint ventures can fit into any of the broad categories of contracts, combinations and conspiracies targeted by the wording of section 1 of the Sherman Act which declares illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations...”.⁴³² In the context of joint ventures, the characterisation exercise under Section 1 has essentially involved two issues over time. The first one has been to determine whether the joint venture in essence falls within the prohibition, and the second one whether its collateral agreements fall within the prohibition even where the venture as such is deemed lawful. In this respect, the basic legal issues are therefore in principle similar as in the EU practice under Article 101 but their articulation has been a lot more explicit in the U.S. case law. Moreover, while most of the precedents in the EU were set in the exemption decisions of the European Commission at the formation of the joint venture, the U.S. agencies and courts have mostly tackled these issues *ex post* when the alliance was already functioning. In this context, one must always keep in mind the traditional difference of the methodology that resulted from the bifurcation of Article 101 TFEU into its first paragraph containing the a priori prohibition of restrictive agreements and the third paragraph containing the exemption criteria. Any exempted

⁴³²See e.g. SULLIVAN 2000, at 663 (“Of their very nature all ventures are contracts, combinations or conspiracies.”) The term “combination” includes both mergers and joint ventures.

agreements were therefore deemed to violate the first paragraph. In the U.S., in turn, an agreement found “reasonable” under the rule of reason analysis is considered legal at the outset, not exempted.

Even though the concept of “joint venture” has never been explicitly defined in case-law, the definitions found in specialized literature derive from a number of notable rulings of the Supreme Court concerning the basis for distinction between the per se and the rule of reason approaches. Some of the most spectacular developments in the U.S. antitrust doctrine, indeed, emerged in cases involving competitor collaborations, whether or not they qualify as “genuine” joint ventures.

Relevant precedents

The very first antitrust cases decided by the Supreme Court already gave some indications on the legal characterisation issues involved. Once a rule of per se illegality had been formulated for price fixing among competitors in *Trans-Missouri*⁴³³, as early as 1897, a year later the Supreme Court recognized in *Joint Traffic Association* (1898)⁴³⁴ that “*the formation of corporations for business purposes has never ... been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership.*” In these cases the Supreme Court did not question the formation of the associations as such but only the actual price-fixing conduct within them. They involved railroads cartels between two competitors active in the same product market, which were condemned as illegal restraints of trade in the form of price-fixing schemes. It has been pointed out, however, that in these cases the parties did not merely agree on prices but also delegated to a committee of participants the power to determine a rate structure and appointed a sales agent to set prices and to make sales for the participants. Arguably, therefore, the collaborations at issue involved some, albeit very modest, degree of integration.⁴³⁵

⁴³³United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897). Although the case is usually cited for the proposition that simple price fixing is a per se violation of the Sherman Act, the Association has been discussed as a joint venture for the provision of through railroad services, see e.g. HOVENKAMP (1994), P... and KITCH (1985), p. 957.

⁴³⁴171 U.S. 505, 567 (1898).

⁴³⁵See discussion in FOX & SULLIVAN (1989), p. 295.

The rule of reason, in turn, emerged as an appropriate standard in the context of a merger in the famous case *Standard Oil*⁴³⁶ which involved combination of 37 oil corporations under common management and control through a holding company. The Courts also gradually developed a general functional distinction between “naked” restraints that have no other purpose but to restrict competition and “ancillary” restraints that are necessary to make viable a legitimate transaction. In *Addyston Pipe*⁴³⁷ judge Taft framed a rule of per se illegality for price-fixing but recognized that a *per se* rule would not do where integrations of economic activity occurred, suggesting that agreements eliminating rivalry within such an enterprise could be means of enhancing the firm's efficiency. In *Addyston pipe*, arguably no such integration occurred and the case was condemned as blatant price-fixing.

The early Supreme Court cases did not, however, provide sufficient guidance to determine what could be considered a legitimate main purpose of a collaboration and to what the restraint should be ancillary. The first case in which the Supreme Court hinted that promotion of efficiencies may save a horizontal agreement from the per se prohibition was *Appalachian Coals*⁴³⁸ in 1933. While the Court approved a joint selling agency among 137 coal producers, justified as a crisis cartel, it also assumed that the arrangement achieved some efficiencies by referring to “*better methods of distribution, intensive advertising and research, to achieve economies in marketing*”.⁴³⁹

⁴³⁶Standard Oil Co. V. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). Although condemned and ordered to be dissolved for monopolization under Section 2 of the Sherman Act, this case has been cited for introducing a rule of reason for mergers under Section 1, as its reasoning focuses on the distinction between undue restraints and reasonable restraints. See e.g. FOX & SULLIVAN (1989), 738-740. The development of the rule of reason has been discussed in depth e.g. in BORK, R. The Rule of Reason and the Per Se Concept : Price fixing and Market Division. I : 74 *Yale Law Review* 775 (1965) ; II : 75 *Yale Law Review* 373 (1966). See also SULLIVAN & GRIMES (2000), p. 192-199. In his comments during the congressional debates, Senator Sherman himself stated that the courts would have to “*distinguish between lawful combinations in aid of production and unlawful combinations to prevent competition and in restraint of trade.*” 21 CONG.REC. 2456 (1890) (statement of Sen. Sherman).

⁴³⁷The doctrine of ancillary restraints derives from the famous language of Judge Taft in *United States v. Addyston Pipe and Steel Co* 85 Fed. 271 (6th Cir. 1898), at 280: “[W]hen two men became partners in a business, although their union might reduce competition, this effect is only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community. Restrictions in the articles of partnership upon the business activity of the members, with a view of securing their entire efforts to the common enterprise, were, of course, only ancillary to the main end of the union, and were to be encouraged.”. Note that the doctrinal origins were found in the Common law tradition recognizing that a non-compete clause in connection with a transfer of business could be deemed legal *Mitchell v. Reynolds*, 1P. Wms 181 (Chancery 1711), discussed in *National Society of Professional Engineers v. United States*, 435 U.S. 689 (1978).

⁴³⁸ *Appalachian Coals*, 288 U.S. 344, 53 S.Ct. 471 (1933).

⁴³⁹ *Ibid*, at 359. Although it is clear that a public interest defense such as an economic crisis would not be accepted today, certain scholars are of the view that the otherwise criticized decision could be justified by the fact that it was unlikely that 137 coal producers could have engaged in price fixing, considering also that their

The doctrine of ancillary restraints can serve an important role in distinguishing legitimate cooperative activity from sham undertakings designed to disguise outright cartel behaviour and from attempts to validate illegal collateral restraints. Perhaps the most interesting of these cases was *Timken Roller Bearing Co. v. U.S.*⁴⁴⁰ (1951) in which Timken, a US manufacturer of roller bearings, acquired ownership of stock in a French and British manufacturer and entered into business operative agreements with these manufacturers providing for a territorial division of world markets for antifriction bearings. The Court found that under those agreements contracting parties allocated trade territories among themselves, fixed prices on products of one sold in the territory of the others, cooperated to protect each other's markets and to eliminate outside competition, and participated in cartels to restrict imports to, and exports from, the United States. The Court rejected Timken's claim that these operative agreements were only ancillary to their joint venture and condemned them under the per se rule finding that the dominant purpose of the parties was to avoid competition, with no need to look into the proof of purpose or effect:

*"Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling a project a 'joint venture.' Perhaps every agreement and combination to restrain of trade could be so labeled."*⁴⁴¹

The message was clear: common ownership or control of the contracting corporations did not liberate them from the impact of antitrust laws. It is, however, important to note that whilst the Supreme Court held the agreements on market sharing and price fixing between Timken and its British and French affiliates as per se illegal, it did not invalidate the joint ventures as such, concluding that *"the District Court should not have ordered the appellant to divest itself of the stockholdings and financial interests in the British and French companies"*. The Supreme Court thus limited this case, unlike the District court, to concern the legality of the collateral agreements rather than the joint venture in essence.

market shares were too small to warrant any conclusion that they could have formed an effective cartel. See HOVENKAMP, H. *Antitrust*. Black Letter Series, West Publishing, 1993 (2nd ed.), at 86.

⁴⁴⁰ *Timken Roller Bearing Co. v. US*, 341 US 593, 71 S. Ct. 971, 95 L. Ed. 1199 (1951)

⁴⁴¹ The dissenting opinion of Mr. Justice Frankfurter did not view the arrangements as a naked restraint that would have merited a per se treatment: *"Timken did not sit down with competitors and divide an existing market between them. It has at all times, in all places, had powerful rivals. It was not effectively meeting their competition in foreign markets, and so it joined others in creating a British subsidiary to go after business best reachable through such a concern and a French one to exploit French markets. Of course, in doing so, it allotted appropriate territory to each and none was to enter into competition with the other or with the parent."*

The Timken-rule has been strictly applied in lower courts as well, when the arrangement has served merely as a device to fix prices or allocate customers, without productive cooperation or other meaningful integration, despite the defendants' arguments that they were engaged in a "joint venture".⁴⁴² In general, the absence of integration has led to strict application of the per se rule.⁴⁴³ Another interesting case reaching the Supreme Court in this respect was the case in *Topco*⁴⁴⁴, involving a group of small supermarket chains that combined into a joint purchasing venture and created a private label to obtain efficiencies enjoyed by larger competitors, but without permanently merging into a larger firm. While these activities and the formation of the joint venture itself were not challenged, the Supreme Court condemned, under the per se rule, the territorial restrictions which prohibited each member from selling the Topco brand products outside the territory licensed to it. The Supreme Court's characterization did not apprehend that the territorial restrictions were ancillary to the venture's legitimate aims, but appeared to be based on the absence of any economic integration:

*"Each of the member chains operates independently; there is no pooling of earnings, profits, capital, management, or advertising resources. ... The association does not itself own any manufacturing, processing, or warehousing facilities, and items that it procures for members are usually shipped directly from the packer or manufacturer to the members."*⁴⁴⁵

⁴⁴²See *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F. 2d 1, 11 (1st Cir. 1979) ("The talisman of 'joint venture'" could not save "an agreement otherwise inherently illegal" where the parties divided the markets by prohibiting the foreign participant from manufacturing in North America and the U.S. participant from manufacturing outside North America.); *United States v. Columbia Pictures Indus.*, 507 F. Supp. 412, 430 (SDNY 1980) (a joint venture enjoined among competing motion picture companies to establish and operate a pay television network; pricing restraints were considered "hardly ancillary" to a lawful arrangement but rather the "heart of the joint venture and its reason for being").

⁴⁴³ See e.g., *Arizona v. Maricopa County Medical Society* 457 U.S. 332 (1982).

⁴⁴⁴ *United States v. Topco Associates, Inc.* 405 U.S. 596 (1972).

⁴⁴⁵*Ibid.*, at 598. Chief Justice Burger dissented, stating that the joint endeavor of the small grocery chains had "an unquestionably lawful principal purpose: in pursuit of that purpose they have mutually agreed to certain minimal ancillary restraints that are fully reasonable in view of the principal purpose". Many scholars, particularly those belonging the Chicago School, agree with the dissenting opinion and would have reviewed the case under the rule of reason. See POSNER, R. and EASTERBROOK, H. *Antitrust Cases, Economic Notes and Other Materials* (2nd ed.). West Publishing, 1981, at 248-49; and BORK, R. *The Antitrust Paradox: A Policy at War with Itself*. New York, Basic Book Inc., 1978, at 274-70. Similar observations have been expressed also in: LOUIS, M. *Restraints Ancillary to Joint Ventures and Licensing Agreements: Do Sealy and Topco Logically survive Sylvania and Broadcast Music?* 66 *Va.L.Rev.* 879 (1980); HOVENKAMP (1993), at 87; and GELLHORN & KOVACIC (1994), at 200-201 and 254-257. Indeed, the territorial restraint did not appear to be boldly naked, as it had a procompetitive purpose in bringing a new private label brand to the market and the territorial division arguably enabled the small chains to compete more vigorously against larger national and regional chains and avoid free rider problems. Without territorial protection, Topco firms' reluctance to make these efforts would have resulted in less vigorous competition. Five years later, the Supreme Court accepted a free rider defense in connection with vertical territorial division in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549 (1977).

Even though Topco has never been explicitly overruled, subsequent case law beginning in late 1970's, along with the ascendancy of the Chicago School, suggests a more permissive approach, and indeed, has prompted many to consider Topco as no longer valid law.⁴⁴⁶ *Broadcast Music, Inc. v. CBS*⁴⁴⁷ (BMI) was such a case. It involved a joint selling organization with functional integration of sales of performance rights to copyrighted musical compositions through a non-exclusive blanket license scheme, which gave the right to perform any of the compositions owned by the members as often as the licensees desire. BMI blanket license was not considered a naked restraint of trade, because it accompanied the integration of sales and monitoring against unauthorized copyright use, which resulted in a substantial lowering of transaction costs by avoiding thousands of individual negotiations and provided the user with greater choice of musical material and immediate use of the covered compositions, without the delay of prior individual negotiations. In these circumstances, a joint sales venture could be efficient enough to increase sellers' aggregate output and thus be procompetitive, even if the participants were literally fixing prices.⁴⁴⁸

Today, it appears well-established that efficiency-enhancing joint ventures involving genuine economic integration do not fall within the per se prohibition but benefit from a more lenient treatment under the rule of reason. Still, if the purpose and effect is the elimination of competition by fixing prices or restricting output, then labelling that combination a "joint

⁴⁴⁶Significantly, in 1996 the former Assistant Attorney General of the Antitrust Division expressed a view that if the DOJ were to have a case like Topco now it would inquire "*whether there is a procompetitive justification rather than condemn the challenged restraint as a per se violation as the Supreme Court did*" and that in "*condemning the restraint as per se illegal, the Supreme Court employed a formalistic approach that ignored the crucial point that the territorial restriction might have been legitimately ancillary to a procompetitive arrangement.*" See KLEIN, J. A stepwise Approach to Antitrust Review of Horizontal Agreements. Address Before the American Bar Association's Antitrust Section Semi-Annual Fall Policy Program (November 7, 1996), at 5 (available at www.usdoj.gov/atr/public/speeches/jikaba.htm). See also BORK,

⁴⁴⁷*Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

⁴⁴⁸The Supreme Court held that "[w]hen two partners set the price of their goods or services they are literally 'price fixing', but they are not per se in violation of the Sherman Act". Although in BMI the Court did not explicitly treat the pricing arrangement as an ancillary restraint, the analysis suggests that it considered the restraint as ancillary to the main aim which consisted of joint marketing of the product through integration of the sales activity in order to lower transaction costs and market the product more efficiently. BMI is, together with *After Appalachian Coal*, the only case in which Supreme Court has dealt with a joint sales agency. It involved a joint selling organization with functional integration of sales of performance rights to copyrighted musical compositions through a non-exclusive blanket license scheme. Based on these two precedents, sales joint ventures have been considered to be subject to rule of reason, in so far as they hold the promise of reducing aggregate selling costs without reducing output or raising prices at least when competitors utilizing the joint venture may hold, in the aggregate, only a small share of the relevant market and continue to face effective competition from others. See SULLIVAN & GRIMES (2000), p. 262. The same authors warn, however, about cartel facilitation in joint sales ventures ("If any appreciable market share is involved and if the agent is exclusive, the arrangement is tantamount to cartelization as soon as the agent sets the price"), p. 262 and fn. 43.

venture" will not help to bring the project under the rule of reason but will be deemed a cartel and as such prohibited.

Definitions in literature and administrative guidance

Hence, while the judicial precedents did not define the term "joint venture" as such they provided some elements that could be used to define this concept in specialized literature. It was notably the features that distinguished per se illegal cartels from those horizontal agreements capable of producing efficiencies and scrutinized under the rule of reason that were used in the various definitions that emerged in antitrust literature. An example of a detailed and rather narrow definition, which added a number of criteria that had not directly emerged from the case law, was proposed by professor *Brodley*⁴⁴⁹ in his seminal article published in 1982:

«An integration of operations between two or more separate firms in which the following conditions are present : (i) the JV is under the joint control of the parent firms, which are not under related control ; (ii) each parent makes a substantial contribution to the JV ; (iii) the JV exists as a business entity separate from its parents ; (iv) the JV creates significant new enterprise capability in terms of new productive capacity, new technology, a new product or entry into a new market. ».

This definition required not only integrative efficiencies but also a separate entity and creation of new capacity or entry to a new market.⁴⁵⁰ Besides integration of operations and existence of a separate business entity, it requires a pro-competitive element in terms of some new capacity or contribution to the market as opposed to arrangements which merely combine existing capacity.⁴⁵¹ The Department of Justice also defined the term "joint venture" in its

⁴⁴⁹BRODLEY, J. Joint Ventures and Antitrust Policy. 95 *Harv. L. Rev.* 1523, 1526 (1982). A similar description has been provided by Sullivan and Grimes, involving: 1) an undertaking between parent firms that maintain their own identities separate from that of the venture; 2) integration of resources, operations, and/or management; 3) a constitutive form (whether tight or loose) entailing more structure than a purely contractual arrangement; and 4) ongoing business activities by the venture as an entity. SULLIVAN & GRIMES (2000), at 648.

⁴⁵⁰Brodley's definition has been particularly influential in the U.S. For instance, a Circuit court refused the characterization of a horizontal agreement as a "joint venture" where the agreement in question did not meet the criteria defined by Brodley. See e.g. *Instructional Sys. Dev. Corat v Aetna Cas & Sur Co*, 817 F2nd 639, 643 n2 (10 Cir. 1987).

⁴⁵¹An interesting illustration of the narrow scope of this definition was seen in the proceedings concerning the GM-Toyota joint venture (see hereafter at xx), in which professor Brodley, consulting for a competitor challenging the agreement in question, argued that the arrangement did not qualify as a joint venture since it was

guidelines for International Operations⁴⁵² by reference to “integrational efficiencies” and to different functions carried out in common by the participants: “*a joint venture is essentially any collaborative effort of firms, short of a merger, with respect to R&D, production, distribution and/or the marketing of products or services ... that typically achieves integrational efficiencies.*” Different interpretations agree that the core integrative element consists of a business function, i.e. R&D, production, distribution or marketing to be performed jointly instead of a joint decision on how the parties will conduct their activities separately.⁴⁵³ The requisite economic integration may thus be present in a sales joint venture that does market research, makes calls on potential customers, or maintains showrooms, but not with one that merely co-ordinates the parties' decisions on price and output.⁴⁵⁴ The apparent wisdom is that cartels, involving no integration, have as their sole purpose to restrict competition between the parties, whereas through consolidation and partial integration of activities the parties normally aim at achieving legitimate business purposes and efficiencies.

The Competitor Collaboration Guidelines, issued in 2000 to clarify the antitrust approach to horizontal agreements, adopt a broad approach focused on “agreements” rather than defining a joint venture concept by reference to more limited concepts such as “entity,” “corporation,” or “partnership.” Therein, a competitor collaboration is defined to comprise “*a set of one or more agreements, other than merger agreements, between or among competitors to engage in*

not clear that any new capacity, technology or product resulted. For further discussion, see KWOKA, J. International Joint Venture: General Motors and Toyota (1983). In KWOKA, J. and WHITE, L. (eds.) *The Antitrust Revolution. The Role of Economics*. 2nd ed. Oxford University Press, 1995, at 46-73. On the effects of characterizing a collaborative effort as a new contribution to the market, see CORREIA, 66 *Antitr.L.J.* 737, 755-759 (1998).

⁴⁵² U.S. Dep't of Justice. Antitrust Enforcement Guidelines for International Operations (1988) § 3.4. These guidelines have been superseded by Antitrust Enforcement Guidelines for International Operations (1995) issued by the U.S. Dep't of Justice and FTC which do not define joint ventures. For other definitions see, e.g. MILES. 66 *Antitrust L.J.* 127, 132-135 (1997).

⁴⁵³ This requirement would be fulfilled by a sales venture involved in market research, seeking for customers, or maintaining showrooms but not by one merely fixing prices. WERDEN, at 714.

⁴⁵⁴ See, e.g. AREEDA, P. and KAPLOW, L. *Antitrust Analysis (Problems, Text, Cases)*. Boston, Little Brown, 1988, 4th ed., at 270 (the joint venture is a “combined undertaking requiring some degree of integration” that extends “beyond concerted decisions that each party can implement separately”); HOVENKAMP, H. Exclusive Joint Ventures and Antitrust Policy, 1995 *Colum. Bus. L. Rev.* 1, at 3 (a joint venture exists when “(1) two or more firms join together to produce one or more of the inputs that go into their production or distribution process, but (2) this union is something less than the formation of a single firm”); ABA, 1 Antitrust Law Developments (Fourth) 395 (1997) (“Ordinarily, the threshold issue with respect to a joint venture involving actual or potential competitors is whether it involves a sufficient integration of the economic resources of the parties to escape condemnation as a per se unlawful cartel arrangement under Section 1 of the Sherman Act”). Thomas A. Piraino, Jr., [Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures](#), 76 *MINN. L. REV.* 1, 7 (1991) (“Joint ventures are distinguished from ... cartels ... by the extent to which they integrate the resources of the partners. A cartel constitutes a naked agreement among competitors unaccompanied by any integration of resources.”); Neil E. Roberts, [Cartels and Joint Ventures](#), 57 *ANTITRUST L.J.* 849, 853 (1989) (a joint venture is not a cartel if “it does integrate assets or abilities of the parties so as to create efficiencies and new or more effective competition for the benefit of consumers”).

economic activity, and the economic activity resulting therefrom".⁴⁵⁵ Apparently drawing from case law established in BMI, "*efficiency-enhancing integration of economic activity*" is defined as the dividing line between the per se and the rule of reason approaches, hence requiring both efficiencies and integration. The concept involves collaborating to perform one or more business functions such as production, distribution or R&D, as opposed to mere coordination of decisions on price and/or output, as well as a combination of "*significant capital, technology or other complementary assets*". With regard to the type of efficiencies that can contribute to such an integration, the Guidelines do not set any specific limits other than that they must actually or potentially benefit consumers. The essential requirement appears to be that the agreement improves quality or service, reduces price or increases incentives for innovation.⁴⁵⁶

The issue of finding an adequate definition and distinguishing a category of joint ventures for the purposes of the application of the antitrust statutes has not been without debate in the United States, although some of the detailed definitions proposed in the past may no longer appropriately reflect today's business realities. The complaints about the lack of a clear definition to differentiate joint ventures from other interfirm contractual agreements⁴⁵⁷ have been rejected by other commentators explaining that there is no utility, for antitrust purposes, in attempting to draw the line between a joint venture, technical cooperation, a strategic alliance, and other forms of partial economic integration.⁴⁵⁸ A wide definition including a broad range of collaborations has been considered convenient as a similarly broad range of

⁴⁵⁵As reason for this conceptual choice, a drafter has pointed out that in a high-tech society, collaborations among competitors often amount to no more than the integration of ideas, or protection of ideas such as patents and trademarks; these are the strategic alliances that businesses turn to in order to accomplish particular functions. Joint Venture Guidelines: Views from One of the Drafters, Remarks by Robert Pitofsky, Chairman Federal Trade Commission, ABA/ Section of Antitrust Law Workshop: Joint Ventures and Strategic Alliances: The New Federal Antitrust Competitor Collaboration Guidelines , Washington, D.C. November 11 & 12, 1999, at 31.

⁴⁵⁶See "Joint Venture Guidelines: Views from One of the Drafters", Remarks by Robert Pitofsky, Chairman Federal Trade Commission, ABA/ Section of Antitrust Law Workshop: Joint Ventures and Strategic Alliances: The New Federal Antitrust Competitor Collaboration Guidelines , Washington, D.C. November 11 & 12, 1999, at 31. See also Section 1.2 of the Guidelines, which limits per se treatment to types of agreements that are "*so likely to harm competition and to have no significant pro-competitive benefit that they do not warrant the time and expense required for particularized inquiry into their effects.*"

⁴⁵⁷ BRODLEY, 95 *Harv. L. Rev.* 1523 (1982) ; PIRAINO, T. Beyond Per Se, Rule of Reason or Merger Analysis : A New Antitrust Standard for Joint Ventures. 76 *Minnesota Law Review* 1 (1991) ; PIRAINO, T. Comment on Issues Relating to Joint Venture Project. June 12, 1997. Available at www.ftc.gov/opp/jointvent/piraino.htm.

⁴⁵⁸KATTAN, J. Contemporary Antitrust Analysis of Joint Ventures : Why It Makes Sense to Stay the Course. Federal Trade Commission's Hearings on Joint Venture Project. June 5, 1997 (available at : www.ftc.gov/opp/jointvent).

arrangements are labeled as joint ventures by their participants.⁴⁵⁹ At its broadest, the concept includes also arrangements that do not involve the creation of a separate business entity, but instead consists of one or more agreements which obligate the parties to provide various operations or services on a long-term basis while retaining ownership of the tangible assets which are needed to achieve the objectives of the relationship.⁴⁶⁰ Still, in legal literature joint ventures are often treated as a separate subcategory of horizontal agreements to distinguish them from cartels.⁴⁶¹

There has also been some uncertainty on whether showing of the collaboration's ability to create efficiencies through such integration is required as a cumulative criterion or, vice versa, whether integration without proof of related efficiencies could do to save the agreement from *per se* condemnation. According to some scholarship, no demonstration of actual efficiencies is required as the test focuses on the fact of the integration rather than its effects, which would make the threshold rather low.⁴⁶² Advocates of a broader concept, in turn, prefer to inquire whether the joint venture offers a new product to consumers or creates efficiencies, for instance, through cost reductions resulting in lower prices.⁴⁶³ Certain critical views in legal literature, indeed, contest the use of the criterion of economic integration as such, at least if it is understood to include some risk sharing and non-monetary contributions to be made to the venture.⁴⁶⁴ According to *Gellhorn & Miller*, neither integration nor risk sharing can be relied on to prejudge the likelihood of efficiencies or to exclude that the joint venture is used as a

⁴⁵⁹ WERDEN, G. Antitrust Analysis of Joint Ventures : An Overview. 66 *Antitr. L. J.* 701, 712 (1998).

⁴⁶⁰ Broad definitions thus cover a vast range of joint activity, from an integrated production joint venture to a loosely integrated marketing network or a set of ethical rules regarding advertizing. See e.g. GUTTERMAN (1997), at 148.

⁴⁶¹ See e.g. SULLIVAN & GRIMES (2000), at 649, fn. 1 (“*To assign arrangements that the business community regards as having special characteristics to the more comprehensive category, horizontal arrangements, without any attention to the integration and continuity aspects of ventures that lead business people to think of them as a species, would risk failing to identify recurrent factual aspects that may have special relevance under conventional legal rules and analytical conventions.*”) See also KITCH, 53 *Antitr.L.J.* 957, 957 (1985).

⁴⁶² WERDEN, at 734.

⁴⁶³ WERDEN, at 713-714; GELLHORN & MILLER, at 854-55.

⁴⁶⁴ GELLHORN & MILLER, *Antitr.Bull.* 1997, 851, 861 (questioning the economic relevance of financial integration or risk sharing as ineffective measure of the likely purpose of the parties, arguing that these kinds of structural measures have no demonstrated relationship to marketplace competition and thus do not provide useful operational criteria for evaluating joint ventures); see also WERDEN, at 714-715 (“If a firm distributes a rival's product, thus eliminating the need for the rival to maintain a distribution system, the requisite integration is present even though the rival contributes nothing to the venture but a monthly payment for services rendered. Moreover, the requisite integration may not exist despite substantial sharing of financial risks among joint venture participants.”)

cover for a price-fixing cartel.⁴⁶⁵ In their view it would also be unsound to condemn automatically unintegrated joint ventures without regard to their possible benefits and market power. According to this line of argument, the relevant question would be whether the purpose and effect of the venture is to increase or limit output and whether efficiency gains are likely to occur.⁴⁶⁶ In the same line of reasoning, it has been suggested, based on Judge Taft's early vision, that the characterization issue between the rule of reason and per se rule be contingent on realization of genuine social benefits and not on any particular type of traditional integration of economic resources.⁴⁶⁷ This is precisely the approach chosen in the EU 2001 Guidelines concerning the application of Article 101(1) to horizontal agreements, in which the balancing exercise is reserved to "*those types of cooperation which potentially generate efficiency gains*",⁴⁶⁸ such as R&D, production and purchasing cooperation, without explicit reference to any form of integration. Even though those Guidelines do not seek to define the concept of "joint venture" as such, they refer to a category of horizontal agreements capable of achieving efficiencies, which means that they are not considered restrictions of competition "by object" (and as such "almost always prohibited" like naked cartels) but their effects on competition must be fully assessed. Such cooperation agreements can be considered as genuine joint ventures. This is why the discussion on the legal characterisation between the basic modes of analysis is relevant in this context and can serve as a basis for defining genuine joint ventures.

Overall, under Section 1 of the Sherman Act, efficiencies appear to play a double role. One may indeed speak about a kind of an efficiency defence in the context of making the initial characterisation between the rule of reason and the per se rule. To determine the threshold question whether a horizontal agreement qualifies for a rule of reason treatment in the first place, it has to involve some form of economic integration of the parties that goes beyond the

⁴⁶⁵Ibid, 855 ("If market division is the parties' object, there is nothing to prevent their partial integration to achieve that end. More significantly, there is no legal or economic theory – or case examples – demonstrating that integration changes this possibility.").

⁴⁶⁶See, *inter alia*, WERDEN, G. Antitrust Analysis of Joint Ventures : An Overview. 66 *Antitrust Law Journal* 701 (1998) n. 51 ("Competitors may feign integration, but the per se rule cannot be avoided by mere cosmetic integration with no real efficiency-enhancing potential. On the other hand, if there is a nontrivial potentially efficiency-enhancing economic integration among the participants, a joint venture ought not to be subject to second guessing about its motives."). On the other hand, he goes on stating that "The absence of economic integration means that the per se rule might apply but not that it does apply. Agreements among competitors not involving any economic integration may be competitively benign or even procompetitive".

⁴⁶⁷See, in particular, CHAVEZ, J. Joint ventures in the European Union and the U.S. 44 *Antitr. Bull.* 959, at 1005 (1999). These critics would perhaps welcome the approach suggested in the EC Horizontal Guidelines which refer merely to ability to create efficiencies for the guidelines to apply (see hereafter xxx).

⁴⁶⁸EC Horizontal Guidelines, point 10.

mere co-ordination of the parties' decisions on price and output and/or include efficiencies that would enable the parties to the agreement to increase output or lower cost, or to produce new products or services that would not otherwise be produced by a single firm. In certain circumstances the courts truncate that analysis. Under the truncated or "quick look" rule of reason analysis,⁴⁶⁹ efficiencies can play a determinative role where a restraint on its face would always or almost always tend to reduce output or increase price. If such a restraint is not reasonably related to efficiencies, it may be held unlawful without a comprehensive analysis of market conditions. However, where there are valid and plausible efficiency justifications, a full-scale rule of reason analysis is necessary.⁴⁷⁰

2.1.1.2 Actions of a single entity or a group of competitors

Another aspect that illustrates the difference in focus of legal characterisation between the U.S. and the EU competition rules relates to the question of whether or not the conduct of a joint venture, once functioning, amounts to action of a single entity on the market or actions of its parent companies. In the EU this has not appeared to attract specific judicial or doctrinal attention, whereas in the U.S. it has been the subject of several court cases and legal commentary.

The rules concerning horizontal agreements in both the EU and the United States require some degree of concertation between competitors as opposed to firms' unilateral business

⁴⁶⁹ Corresponding to the evolution of *per se* analysis to take greater account of procompetitive business justifications has been the recognition that the line between *per se* and rule of reason analysis often is not "bright." Increasingly, courts and analysts have come to understand that sometimes the rule of reason may be applied "in the twinkling of an eye." The pattern that has evolved, therefore, is "less a dichotomy than a continuum. Two general approaches for blending *per se* and rule-of-reason analyses into a "truncated" or "quick look" rule-of-reason have emerged. One preserves the *per se* rule's presumption of likely competitive harm as a basis for plaintiff's *prima facie* case unless and until defendants can demonstrate by argument and evidence a procompetitive business justification. The other employs a "flexible enquiry" examining likely anticompetitive effects, market power, and efficiencies to the degree necessary to understand a challenged restraint's competitive consequences. See FTC, III The Truncated or "quick look" Rule of Reason, available at: <http://www.ftc.gov/opp/jointvent/3Persepap.shtm>

⁴⁷⁰ See also the Statements of Antitrust Enforcement Policy in Health Care and The Department of Justice Intellectual Property Guidelines according to which efficiencies are balanced against any likely anticompetitive effects. The greater the likely anticompetitive effects, the greater must be the likely efficiencies. For further discussion of efficiency analysis, see GREANEY, T. Not for Import: Why the UE Should not Adopt the American Efficiency Defense for Analyzing Mergers and Joint Ventures. 44 *St. Louis U. L. J.* 871 (2000); Timothy Muris, The [Government and Merger Efficiencies: Still Hostile After All These Years](#), 7 *Geo. Mason L. Rev.* 729 (1999); Robert Pitofsky, [Proposals for Revised United States Merger Enforcement in a Global Economy](#), 81 *Geo. L.J.* 195 (1992); Joseph Kattan, [Efficiencies and Merger Analysis](#), 62 *Antitrust L.J.* 513 (1994). See also Joseph F. Brodley, [Proof of Efficiencies in Mergers and Joint Ventures](#), 64 *Antitrust L.J.* 575 (1996).

decisions. In fact, the same way as the concepts of agreement and concerted practice under Article 101 TFEU, the notions of a "contract" or "conspiracy" in Section 1 of the Sherman Act necessarily imply that its application is limited to agreements between more than one party. In other words, a conduct can be unlawful under Section 1 only where it is the result of a contract or conspiracy between firms. Joint ventures typically fulfil the requirement of concerted activity among two or more parties as opposed to unilateral conduct by one firm, at least with regard to their formation and collateral agreements. The conduct of the participants in forming the venture is clearly not unilateral conduct but is more appropriately viewed as joint action by competitors, which may amount to a contract or combination in restraint of trade or fall within the scope of Clayton Act as asset or share acquisition. Once the joint venture is functioning, the relevant question from the legal perspective is to what extent cooperation within the joint venture can be viewed as actions by a group of competitors, and as such collusive behaviour capable of antitrust challenge, or whether it should be viewed as unilateral conduct by a single entity on the market, and as such immune from challenge under rules targeted against concerted actions and only subject to those concerning unilateral conduct.

Clearly, in both the U.S. and the EU, when a jointly owned firm sells products in the market and has a market share on its own, it can be party to anticompetitive behaviour, be that in the form of collusion with other market participants or abuse of its market power. The legal consequence of viewing a joint venture as one entity is the same, i.e. that it would escape challenges under section 1 of the Sherman Act and Article 101 TFEU, since the participants' dealings within the joint venture could no longer constitute a violation due to the lack of plurality of actors. As such, a single entity remains capable of unilateral conduct which can be regulated under the rules concerning the antimonopolization in section 2 of the Sherman Act and the abuse of a dominant position in Article 102 TFEU.⁴⁷¹ A group of competitors, in turn, is capable of colluding among each other, making a challenge possible under section 1 of the Sherman Act and Article 101 TFEU. The key question yet to be addressed is when a joint venture becomes a single entity for the purpose of application of the antitrust statutes, which is crucial particularly in the context of challenges to a joint venture's pricing and output decisions.

⁴⁷¹For the application of § 2 of the Sherman Act in a joint venture conduct, see e.g. *Pan Am. World Airways, Inc. v. U.S.* 371 U.S. 296 (1963), reversing 193 F. Supp. 18 (S.D.N.Y. 1961) (holding an attempt of the parent in an airline joint venture to block the expansion of the venture into its market as violation of Section 2 of the Sherman Act); and *Chicago Prof'l Sports Ltd. Partnership v. NBA*, 95 F.3d 593, 599 (7th Cir. 1996).

In the U.S., in turn, the question of plurality of actors has been dealt with ex post, to rebut challenges on a joint venture's conduct as anticompetitive contract or conspiracy among its participants. Defendants have occasionally sought judicial authority in the Supreme Court's decision in *Copperweld*.⁴⁷² The fundamental principle emerging from this case is that a parent firm is not capable of conspiring with its wholly-owned subsidiary within the meaning of Section 1, provided that they have a "unity of interest".⁴⁷³ For instance in a case involving a rural electric cooperative organization consisting of some fifty separate non-competing cooperatives, the Eighth Circuit⁴⁷⁴ held that the organization constituted a single entity under *Copperweld* doctrine, as "*a conglomeration of two or more legally distinct entities cannot conspire among themselves if they 'pursue[] the common interests of the whole rather than interests separate from those of the [group] itself'*".⁴⁷⁵ Hence, Courts question whether the conduct at issue brings together the economic power of actors which were previously pursuing divergent interests and goals and thereby "*deprives the marketplace of the independent centers of decision-making that competition assumes*".⁴⁷⁶

Normally, where the members of a joint venture are actual or potential competitors, they are found to be capable of conspiring under Section 1. In *Rothery Storage & Van Co. v. Atlas Van Lines*, for example, the D.C. Circuit held that the *Copperweld* doctrine had no application to a nationwide common carrier operating through a network of independent moving companies acting as the carrier's agents.⁴⁷⁷ In this case, moving companies had formed a joint venture to offer a nationwide van line service and had adopted a policy prohibiting participants from interstate carriage on their own account. The venturers argued that the policy was exempt from Section 1 scrutiny because they were part of a single enterprise and the criterion concerning the plurality of actors required for challenge under that provision was not met.

⁴⁷²*Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), at 769-77. The *Copperweld*-doctrine is extensively discussed in American Bar Association, Section of Antitrust Law: Antitrust Law Developments (ABA-ALD CH. IV.C), Fourth Edition 1997, p. 412-415.

⁴⁷³*Id.* at 769-71. Note that *Copperweld* concerned a scenario of a parent and its wholly-owned subsidiary. Certain lower courts have judged that a conspiracy is conceivable between a parent and its less than wholly-owned subsidiary if they operate separately. *Computer Identities Corp. v. Southern Pacific Co.*, 756 F.2d 200, 204-5 (1st Cir. 1985). See also *Advanced Health-Care Services v. Radford Community Hosp.*, 910 F. 2d 139, 146 (4th Cir. 1990) (holding that sister corporations, i.e. wholly owned subsidiaries of the same parent, are not legally capable of conspiring with each other for the purposes of Section 1).

⁴⁷⁴*City of Mt. Pleasant v. Associated Electric Cooperative* 838 F.2d 268 (8th Cir. 1988), at 276-77.

⁴⁷⁵*Ibid.* at 274-275 (quoting *Copperweld*, 467 U.S. at 770-71). In that case, the Eighth Circuit found that the defendants had provided sufficient evidence that the cooperative organization was a single enterprise pursuing a common goal, the provision of low-cost electricity to its consumer-members.

⁴⁷⁶ See *Chicago Prof'l Sports*, 95 F.3d at 606 (distinguishing a single economic entity from a plurality of actors under *Copperweld*).

⁴⁷⁷ See also *Albrecht v. Herald Co.*, 390 U.S. 145, 149, 88 S.Ct. 869, 871, 19 L.Ed.2d 998 (1968); accord, *Monsanto Co. v. Spray-Rite Corp.*, *supra*, at 761, 104 S.Ct., at 1469.

The court rejected that argument because the venturers were actual or potential competitors of the venture when the challenged policy went into effect and had "agreed to a policy that restricted competition." The court therefore subjected the challenged policy to Section 1 rule of reason analysis. Nevertheless, under that analysis, the court upheld the policy as a permissible ancillary restraint reasonably necessary to make the venture more efficient. The efficiency justification was the prevention of "free riding", as the affiliated trucking companies benefited by using Atlas' national advertising, standardised equipment and scheduling services, and the rule prohibiting this free ride was considered a reasonable ancillary restraint.

The mainstream position has followed professor *Areeda's*⁴⁷⁸ line that once a joint venture is judged to have been lawful at its inception and once it is functioning, its decisions should be regarded as those of a single entity rather than the parent's daily conspiracy on every transactional choice. The issue has, nevertheless, been less clear in practice, with two notable cases reaching the Supreme Court in recent years. The most recent of these dates from May 2010 when the Supreme Court issued its decision in *American Needle, Inc. v. National Football League, et al.*⁴⁷⁹ and ruled that the National Football League ("NFL") and its 32 separately owned and operated teams do not act as a single entity when licensing team trademarks and logos but may be subject to challenges under Section 1 of the Sherman Act. In this case, NFL Properties granted Reebok a ten-year exclusive license for all club marks and logos, for uniforms, sideline apparel, headwear and fitness equipment, which prevented American Needle from manufacturing and selling headwear bearing NFL team logos, a business it had been engaged in since the late 1950s. American Needle brought an action challenging the exclusive license under Section 1 but the District Court granted the NFL defendants' summary judgment on the ground that the NFL and its member teams acted as a "single entity" in promoting NFL football, which included the licensing of their intellectual property. The Seventh Circuit affirmed that, as a single entity and a single source of economic power in the production of NFL football, the NFL defendants were immune from Section 1 liability. The Supreme Court, in turn, considered that the joint action inquiry must concentrate on whether the alleged contract, combination or conspiracy is concerted action—that is, whether it joins together separate decisionmakers that pursue separate economic interests such that the agreement deprives the marketplace of independent centers of decisionmaking and

⁴⁷⁸ 7 PHILLIP E. AREEDA, ANTITRUST LAW 348 (1986), at 355.

⁴⁷⁹ The original Seventh Circuit decision can be found at 538 F.3d 736 (Aug. 18, 2008).

therefore of diversity of entrepreneurial interests. Based on this analysis, it concluded that each NFL team is "a substantial, independently owned, and independently managed business," and their actions are guided by "separate corporate consciousnesses" with divergent objectives. Therefore, when licensing its intellectual property, a team is not pursuing the common interests of the league, but seeks to serve its own interests. Allowing the teams to jointly license their separately owned intellectual property deprives the marketplace of independent centers of decisionmaking" and therefore, of actual or potential competition. The decision does not, however, take a final position on the legality of the agreement and on the larger question of how to apply the rule of reason to the conduct at issue.

Some years earlier, in 2006, the Supreme Court had reached the opposite conclusion in case *Texaco-Shell* in which the facts differed significantly from *American Needle*. In 1998, Shell and Texaco, competitors in all aspects of the oil and gasoline markets, formed two joint ventures to refine and market gasoline products within the United States. One of these, Equilon, consolidated the companies' west coast refining operations as well as the marketing and sale of gasoline to downstream purchasers such as service stations, and the parent companies entirely withdrew from those markets and thus ceased competing separately on them. The venture continued, however, to market its refined gasoline products under both the Texaco and Shell Oil brands. Through their joint control over the venture, the parent companies agreed that Equilon would market and sell both brands of gasoline at the same price. Hence, Equilon's formation eliminated all price and non-price competition between Shell and Texaco with respect to the refining and sale of gasoline in the western United States. The parties notified the formation of Equilon to the FTC under the HSR Act as a merger of the parent companies' downstream operations. The FTC evaluated the joint venture in essentially the same way it would have analyzed the complete merger of Shell and Texaco, if they had no operations other than downstream operations.⁴⁸⁰

Nevertheless, after the joint venture began its operations, service station owners brought suit alleging that the parent firms Texaco and Shell Oil violated the Sherman Act's *per se* rule against price fixing by agreeing that the Equilon joint venture would sell Texaco and Shell Oil brands of gasoline at the same price. The essential legal question was whether an agreement between the owners of a lawful fully-integrated joint venture with respect to the pricing of the

⁴⁸⁰ FTC, *Analysis to Aid Public Comment*, 62 Fed. Reg. 67,868 (1997).

joint venture's products may be treated as a per se violation of Section 1 of the Sherman Act, when the joint venture's owners do not compete in the market for those products. The district court rejected that theory of liability but the court of appeals reversed, condemning the agreement by joint venture partners on the price at which the new venture sells its products as per se illegal price-fixing.⁴⁸¹ This casted a shadow over the mainstream position since it suggested that the joint venture's decisions could still be regarded as the product of its parents collusion although they had withdrawn from the market in question.⁴⁸² The court of appeals did not question that Shell and Texaco could lawfully form Equilon to combine their downstream operations in the western United States into a single entity that would refine and market their gasoline products. It acknowledged that Equilon was a "legitimate," efficiency-enhancing joint venture but concluded that those companies could face per se condemnation for additionally agreeing that the newly formed entity would employ a unified pricing mechanism for the two gasoline brands under its control. The court examined the pricing agreement under the ancillary restraints doctrine and concluded that the agreement to unify prices was not an ancillary but a "naked" restraint, in the absence of a showing that it was *"reasonably necessary to further the legitimate aims of the joint venture."* The per se rule applies, the court asserted, *"when the defendant fails to demonstrate a sufficient relationship between the price fixing scheme and furthering the legitimate aims of the joint venture--a relationship that justifies the otherwise prohibited price restraints."*⁴⁸³ This was, however, not upheld in the Supreme Court.

The FTC and many professionals took the view that the lower court decision wrongly equated joint ventures with price-fixing cartels and expressed concerns over a chilling effect on joint venture formation if the Supreme Court ruled that the per se prohibition applied to this case. A per se rule would indeed have interfered with the ability of joint ventures to set prices for

⁴⁸¹ See Texaco Pet. 2-5; Shell Pet. 2-7; Pet. App. 1a-33a, 46a-69a.

⁴⁸² See Brief for the United States as Amicus Curiae, FTC; available at www.usdoj.gov/atr/cases/f209200/209209.htm.

⁴⁸³ Judge Fernandez dissented, observing that the joint venture Equilon competed in the business of refining, transporting, and marketing gasoline in the western United States. Equilon "ran the refinery; it had the research facilities; it transported products; and it dealt with the station operators and other buyers. It also priced the products, and set the same price for *its* Shell and Texaco brands." In his view, "nothing more radical is afoot than the fact that an entity prices its own products."

their products.⁴⁸⁴ The essence of the argument can be derived from the FTC's intervention: "*the unified pricing of gasoline brands may be viewed as merely reflecting, but not causing, the elimination of competition*".⁴⁸⁵ The parent firms would be acting solely in their capacity as owners of a marketplace participant, not as competitors in the relevant market.⁴⁸⁶ Application of the per se rule would also appear to be inconsistent with *BMI*⁴⁸⁷ in which the Supreme Court rejected the argument that participants in a legitimate joint venture engage in price fixing when they set the price at which the venture sells its products to third parties.⁴⁸⁸

Finally, the Supreme Court reversed the Ninth Circuit's holding that the joint venture's pricing conduct was potentially subject to *per se* liability and confirmed the widely-spread understanding that "[a]s a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands under a single, unified price." Although the joint venture's "pricing policy may be price fixing in a literal sense," wrote Justice Thomas, "it is not price fixing in the antitrust sense." Moreover, because the joint venture itself eliminated all competition between petitioners' downstream operations, and the challenged agreement involved conduct that was clearly integral to the operation of the joint venture and unrelated to the separate activities of the venture's owners, the Court also rejected the Ninth Circuit's application of the "ancillary restraints doctrine," explaining that this doctrine applies only to competitive restraints on "nonventure activities." The doctrine has no application where the business practice being challenged "involves the core activity of the joint venture itself," in this case the pricing of the goods sold by the venture. The Supreme Court's decision thus provides parties with increased confidence that per se antitrust liability will apply only in rare

⁴⁸⁴See AFX International Focus, January 9, 2006: "Antitrust case could limit joint ventures" (available at: www.lexisnexis.com); and Brief for the United States as Amicus Curiae, FTC; available at www.usdoj.gov/atr/cases/f209200/209209.htm.

⁴⁸⁵Brief for the United States as Amicus Curiae, FTC; available at www.usdoj.gov/atr/cases/f209200/209209.htm. In this line of reasoning, per se treatment would be inappropriate even if, contrary to the court of appeals' premise, the parent firms' agreement to unify the pricing of the two brands occurred *after* Equilon became operational. Texaco and Shell were no longer independent participants in the downstream markets at that point and therefore were incapable of forming an agreement among competitors on the way in which they will compete with one another with respect to operations in those markets. See *NCAA v. Board of Regents*, 468 U.S. 85, 99 (1984).

⁴⁸⁶Such an approach was clearly dictated in *Maricopa*: "*partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit*" are "*regarded as a single firm competing with other sellers in the market*". See *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982).

⁴⁸⁷*BMI, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979).

⁴⁸⁸See Brief for the United States as Amicus Curiae, FTC; available at www.usdoj.gov/atr/cases/f209200/209209.htm.

cases, for instance, when the venture itself is a "sham" for unlawful price-fixing or market division, and that antitrust liability under the "ancillary restraints doctrine" will apply only to non-venture activities, not to core activities of the venture itself.

When read together, the cases *Texaco/Shell* and *American Needle* appear to suggest that where the members contribute the ownership and control of all of their respective "competitive" assets to the venture - thereby operating in that market only through the joint venture - Section 1 should not apply to the functioning of that venture.⁴⁸⁹ In such event, the contribution of assets from the members to the venture could only be subject to review under Section 7 of the Clayton Act. It would therefore be at least theoretically possible that in *American Needle*, NFL member teams could have contributed their respective intellectual property to NFL Property and, assuming that the integration itself raised no antitrust concerns, NFL Property would thereafter have been free to choose how it operated, including possible restrictions on licensing. In this case, the Court only analysed whether or not the member teams had the capacity to conspire in the licensing activity in question, and not whether a particular type of restraint violates Section 1.⁴⁹⁰

From the perspective of the comparative purpose of this work, *Texaco/Shell* reminds a typical concentrative full-function joint venture scenario in the EU, since the parents withdrew entirely from the relevant market in favour of their common firm. The formation of a joint venture of the kind at issue in this case, which in the U.S. had been notified under the HSR Act as a merger but thereafter challenged under Section 1 of the Sherman Act, would likely have been subject to the EU Merger Regulation rather than Article 101 TFEU. From a conceptual perspective, a merged entity would have been entitled to fix its own price on the market. This is actually what it is supposed to do to qualify as a full-function joint venture. The actions of the joint venture could therefore only amount to unilateral behaviour in the EU competition law, not to an agreement or concerted practice between undertakings. The issue has in fact been explicitly addressed in the relevant EU Guidelines concerning the application of Article 101 TFEU by stating that where the joint venture sells the products it has

⁴⁸⁹See e.g. KEYTE, J.A. *American Needle – A New Quick Look for Joint Ventures*, Antitrust, Vol. 25, No. 1, Fall 2010, p. 48-54.

⁴⁹⁰The Court observed, among others, that "*even if leaguewide agreements are necessary to produce football, it does not follow that concerted activity in marketing intellectual property is necessary to produce football.*" 130 S. Ct. , at 2214 n.7.

manufactured, the setting of price does not amount to price fixing between its parent firms.⁴⁹¹ If, on the other hand, the parent firms remain actual or potential competitors, they would be capable of colluding in violation of Article 101 TFEU on those markets, which in the current system would be examined ex post. This appears to be the case in the U.S. as well.

While apparently the same legal question of whether the functioning of the joint venture amounts to unilateral conduct or concertation between its parents would appear relevant in the EU as well, research into joint venture cases and literature in the EU, as conducted in Part I of this study, showed that no specific attention has been paid to this question in the EU. In the absence of any illustrative cases, one can only speculate why this is so. In case of mergers, the concept of a full-function joint venture, by definition considered a single entity on the market, would appear to imply that its own behaviour could amount only to unilateral conduct on the market or then it can participate in horizontal agreements in its own right. The case of a cooperative full-function joint venture and other cooperative scenarios in which the parent firms remain competitors outside the venture is however more complex, since the parents remain separate undertakings and as such capable of colluding. In the EU, most joint venture decisions under Article 101 TFEU were made in the ex ante exemption proceedings of the now-superseded Regulation 17/62 in which notably the fact that the parent firms remained independent undertakings after the formation of the venture justified the scrutiny under Article 101. The conclusion of a “cooperative” nature thus meant, at least implicitly, that the parents could also later be challenged for cartel behaviour as separate undertakings on the market.

2.1.2 Broader scope of the merger rules

In difference with the EU Merger Regulation, the US merger rules do not provide for any comparable definition of the concept of merger based on acquisition of control, nor do they distinguish any specific category of joint ventures subject to merger rules. Overall, Section 7 of the Clayton Act covers a broader range of transactions than the EU Merger Regulation.

⁴⁹¹ See e.g. footnote 18 in the 2000 EC Horizontal Guidelines: “*This does, however, exceptionally not apply to a production joint venture. It is inherent to the functioning of such a joint venture that decisions on output are taken jointly by the parties. If the joint venture also markets the jointly manufactured goods, then decisions on prices need to be taken jointly by the parties to such an agreement. In this case, the inclusion of provisions on prices or output does not automatically cause the agreement to fall under Article 81(1). The provisions on prices or output will have to be assessed together with the other effects of the joint venture on the market to determine the applicability of Article 101(1).*”

First, the central criteria employed in the EU for making the distinction between the Merger Regulation and Article 101 TFEU have no jurisdictional relevance in the United States (2.1.2.1). Second, it is not only the types of joint ventures covered by the merger statute that makes the scope of the U.S. merger rules broader than that of their EU counterpart but the merger standard may also be applied to what would amount to “coordination” of the parties’ competitive behaviour in the EU terminology (2.1.2.2).

2.1.2.1 Irrelevance of the conceptual criteria used in the EU

Section 7 of the Clayton Act covers stock and asset acquisitions that may lead to a substantial lessening of competition. A joint venture may fall within the scope of this law, when it is formed by an asset or stock acquisition, i.e. a firm purchases a share in another firm’s existing plant or participants create a new corporation and acquire stock in it.⁴⁹² From a technical point of view, looser-knit combinations, such as partnerships in which no acquisition occurs, are not governed by the merger statute nor do purely contractual joint ventures trigger application of Section 7. Collateral agreements, such as agreements on the price or output of products produced by separately held plants, as well as division of sales territories and agreements to exchange information about competitively sensitive subjects are evaluated under Section 1 of the Sherman Act in the light of the doctrine of ancillary restraints, like in the EU. Whether a given joint venture is assessed under Section 7 of the Clayton Act or Section 1 of the Sherman Act, or both, is thus based on simple formal criteria involving no substantive assessments. The merger statute applies to stock or asset acquisitions, whereas Section 1 applies to joint ventures amounting to contracts, combinations or conspiracies in restraint of trade.

From comparative perspective, it is interesting to note that the application of the US merger rules is not limited by any criteria concerning the specific features of a given joint venture, such as the full-functionality. As a consequence, from the perspective of determining the applicability of Section 7 of the Clayton Act and the HSR Act, it is irrelevant whether or not the joint venture is fully or partially integrated and whether it performs all the functions of an autonomous economic entity on a lasting basis. It is equally irrelevant whether or not a joint

⁴⁹² U.S. v. Colombia Pictures Corp. 189 F Supp. 153 (1960) (“As used here the words acquire and assets are not terms of art or technical legal language. In the context of this statute they are generic imprecise terms encompassing a broad spectrum of transactions whereby the acquisition by means of purchase, assignment, lease, a license or otherwise. The test is pragmatic. The final answer is not the dictionary.”)

venture becomes a market actor in its own right and is autonomous from its parents in terms of trade links. The absence of these conceptual constraints has resulted in a much broader coverage of the merger rules in the U.S. than in the EU. Section 7 of the Clayton Act has notably been applied to a number of pure production joint ventures which would have been typical examples of partial function joint ventures within the meaning of the EU concepts and thus outside the scope of the EU Merger Regulation.⁴⁹³

The first such case to reach the Supreme Court was *Penn-Olin* (1964)⁴⁹⁴, which involved the formation of a jointly owned corporation between Pennsalt Chemical Company (Pennsalt) and Olin-Mathieson Chemical Corporation (Olin) to produce sodium chlorate in the Southeast of the United States.⁴⁹⁵ Penn-Olin was a pure production joint venture without independent market access; Pennsalt operated the plant and Olin acted as an intermediary to sell the products. The Government sought to dissolve the joint venture as violating both Section 7 of the Clayton Act and Section 1 of the Sherman Act, and a possible violation had to be examined in the light of both congruently applicable statutes. The Court found no violation of Section 1 which could not reach incipient threats to competition, such as the one in question. With regard to the applicability of the merger rules to joint ventures in general, the Supreme Court plowed new ground and concluded that overall the same considerations apply to joint ventures as to mergers: “A *joint venture as organized here would be subject to the regulation of section 7 of the Clayton Act and, reaching the merits, we hold that while on the present record there is no violation of section 1 of the Sherman Act, the District Court erred in dismissing the complaint as to section 7 of the Clayton Act.*”⁴⁹⁶

⁴⁹³ Another joint production case was at issue in *United States v. Alcan Aluminium, Ltd.*, 605 F. Supp. 619 (W.D. Ky. 1985).

⁴⁹⁴ *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964). This case is discussed here only to the extent it concerns the applicability of merger rules, while the major weight of it lies in the theory of potential competition examined in the next chapter.

⁴⁹⁵ While Olin and Pennsalt were in competition in the production and sale of nonchlorate chemicals, only Pennsalt had been making sodium chlorate in the Pacific Northwest for a number of years. Prior to entering in the joint venture, it had no facilities in the southeast which was defined as the relevant geographic market by the DOJ and the Court. Olin had a patent for putting the product to certain uses but it had never engaged in the commercial production of sodium chlorate. It marketed Pennsalt's sodium chlorate in the southeast under a sales agreement. Each parent owned 50% of its stock and the officers and directors were divided equally between the parents. The plant in question was built by equal contribution of the two parents. Pennsalt operated the plant and Olin acted as an intermediary to sell the products.

⁴⁹⁶ *Ibid.*, p. 1712. On the general question of the applicability of the merger provision to joint ventures the Court stated that some aspects of the problem might have already been found in *United States v. Terminal R. Assn.*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912), and *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945), where joint ventures with great market power were subjected to control, even prior to the amendment to s 7” (at 1716). For a discussion of the problem, see Kaysen & Turner, *Antitrust Policy*, 136–141 (1959).; and Note, *Applicability of s 7 to a Joint Venture*, 11 U.S.C.L.A.L.Rev. 393, 396. The requirement that the firms involved in a merger be engaged “in commerce” created a technical problem in the

Perhaps the most spectacular joint venture case under Section 7 of the Clayton Act has been GM/Toyota⁴⁹⁷, in which the government entered into a consent agreement concerning a joint venture between the world's first and third largest car manufacturers to produce a small automobile at the closed GM plant in California. The joint venture in question, NUMMI, was a pure production venture involving a stamping plant and an assembly plant in Fremont California. Toyota and GM continued to be competitors in the United States and throughout the world. The agreements related only to manufacturing, without marketing, engineering, design or development.⁴⁹⁸ Nummi sold its products exclusively to its parent companies and retained close trade links with Toyota for its major components; it therefore lacked the essential component of a full-function entity within the meaning of the EU Merger Regulation. Following a notification under the HSR Act, the FTC examined the GM-Toyota case under section 7 of the Clayton Act, since it involved a stock acquisition. Significantly for our comparative purpose, the FTC concluded that the effect of the joint venture could be substantially to lessen competition because of the possibility of tacit or explicit collusion resulting from the venture, and the venture's effect on Toyota's incentives to enter into production in the United States, both of which would significantly increase the likelihood of non-competitive cooperation between GM and Toyota.⁴⁹⁹ In other words, the primary concern of the FTC was that the joint venture was likely to lead to spill-over collusion between the parties, which in the EU would have triggered the application of Article 101 TFEU. The FTC, in turn, did not consider the question of the applicability of Section 1 of the Sherman Act,

context of a newly created joint subsidiary which was naturally not yet engaged in commerce at the time of the formation. The Court avoided this loophole by stating that the fact that the venture was “organized to further the business of its parents, already in commerce, and the fact that it was organized specifically to engage in commerce should bring it within the coverage of [section] 7. The Court noted that failing to apply § 7 “would create a large loophole in a statute designed to close a loophole” (at 1715) with reference to *United States v. Philadelphia National Bank*, 374 U.S. 321, 343, 83 S.Ct. 1715, 1730, 10 L.Ed.2d 915 (1963).

⁴⁹⁷*General Motors Corp.*, 103 F.T.C 374 (1984) (consent order and opinions) reopened and set aside, 116 F.T.C 1276 (1993).

⁴⁹⁸The joint venture was to manufacture new automobiles designed by Toyota in consultation with GM. The vehicles produced were to be sold by the joint venture to GM for retail distribution. Toyota was to market the vehicles it would order from the venture. The major components of the car such as engines and transmissions were to be imported from Toyota in Japan.

⁴⁹⁹Finally, the parties entered into a consent agreement, under which GM and Toyota committed to safeguards limiting the venture's scope and preventing the exchange of competitively sensitive information not required to achieve the legitimate objectives of the venture, which were designed to overcome the spill-over concerns. As the venture was limited to 12 years and to production of a subcompact vehicle only. Detailed reporting requirements and restrictions were also imposed on the type of information the parties were allowed to exchange, including an absolute prohibition on the communication of all marketing plans and non-public information concerning prices, costs, sales and production forecasts relating to products not produced by the joint venture, as well as the joint venture's model and design changes, sales and production forecasts, or the price of supplies from GM or Toyota to the venture. *Id.* at 384.

which would not have been necessary in any case because the Clayton Act and FTC Act provided sufficient tools and remedies to deal with the case.⁵⁰⁰

From the comparative perspective, it is interesting to observe that the fact that the parties to a joint venture remain competitors outside the joint venture and the eventual related risk of spill-over collusion between them has never been assessed under Section 1 of the Sherman Act nor has it prevented the application of the merger rules. To the contrary, forward-looking predictions of the parties' post-merger market behaviour have always been examined as an integral part of the merger analysis. This is a notable difference in relation to the EU competition law under which it has been precisely the existence of spill-over concerns that has led to the characterisation of the venture as "cooperative" and as such to application of Article 101 TFEU. This is because of the narrow definition of the concept of concentration and the initial standard of dominance that was, at its origins, not considered appropriate to address these concerns. Under the early dichotomy between concentrative and cooperative joint ventures, coordination concerns prevented the application of the EU Merger Regulation whereas under the current merger rules Article 101 TFEU criteria are still applied through the specific provisions of Article 2(4) EUMR relating to coordination between the joint venture parties.

In this context, it is also useful to look at the relevant passages in the 2000 US Competitor Collaboration Guidelines. These Guidelines specify that a collaboration is assimilated to a full merger and analyzed pursuant to the *US Horizontal Merger Guidelines*, when the integration eliminates all competition among the participants in the relevant market on a long-term basis, which has some elements of the requirement of a permanent market exit in the previously applicable concept of a concentrative joint venture in the EU and the current requirement of a "long-lasting" basis in the concept of a full-function joint venture:

"The Agencies treat a competitor collaboration as a horizontal merger in a relevant market and analyze the collaboration pursuant to the Horizontal Merger Guidelines if appropriate, which ordinarily is when: (a) the participants are competitors in that relevant market; (b) the formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market; (c) the integration eliminates all competition among the

⁵⁰⁰ Another joint production case was at issue in *United States v. Alcan Aluminium, Ltd.*, 605 F. Supp. 619 (W.D. Ky. 1985).

participants in the relevant market; and (d) the collaboration does not terminate within a sufficiently limited period by its own specific and express terms."⁵⁰¹

This, however, in no way implies a positive connotation towards those collaborations that are analysed under the Horizontal Merger Guidelines alone. For instance, the reference to non termination "within a sufficiently limited period" does not imply that lasting structural changes, like in the traditional EU approach, would somehow be more desirable than short-term alliances. To the contrary, the Competitor Collaboration Guidelines specify that: "*In general, the shorter the duration, the more likely participants are to compete against each other and their collaboration.*"⁵⁰²

Whilst the US guidelines do not acknowledge the concept of a "fully integrated" joint venture, it is occasionally used in literature⁵⁰³ to refer to these kinds of arrangements involving a complete fusion of the parents' market power from manufacture to sales, which justifies a conventional merger analysis without any specific adjustments.⁵⁰⁴ The situation is thus similar to a concentrative full-function joint venture in the EU. The function of this distinction is, however, different in the U.S.. The definition in the US guidelines does not determine regulatory obligations arising under the HSR Act, which are based on the financial thresholds and the means of the arrangement (i.e. share and/or asset acquisition) alone. The reference to the merger guidelines concerns the substantive assessment of the joint venture, in particular as regards measuring the market power effects.⁵⁰⁵ Even where the applicable statute is Section 7 of the Clayton Act, this does not necessarily mean that collaborations would be subject to entirely identical analysis as mergers under that statute but adjustments may be necessary, in particular to take account of the potential for insider competition between the parties. These issues will be further discussed later in this work in relation to the substantive

⁵⁰¹See the 2000 US Competitor Collaborator Guidelines, p. 5. In general, the Agencies use ten years as a term indicating sufficient permanence to justify treatment of a competitor collaboration as analogous to a merger. The length of this term may vary, however, depending on industry-specific circumstances, such as technology life cycles.

⁵⁰²See the 2000 US Competitor Collaborator Guidelines, paragraph 3.34(f).

⁵⁰³See e.g. ABA-ALD, *Antitrust Law Developments*, 4th ed., 1997, Ch. IV.B.1., at 399-402; and PIRAINO (1997), at 661 (discussing joint ventures involving "complete integration" of the parents' business).

⁵⁰⁴A fully integrated joint venture between actual competitors was at issue in *United States v. Ivaco, Inc.*, 704 F. Supp. 1409 (W.D. Mich. 1989) in which the district court enjoined a proposed joint venture between two leading manufacturers of automatic railroad tampers. The collaboration would have involved a complete integration of the parties' productive assets and eliminated any future competition between them in the market in question (automatic rail tampers). For further discussion of this case, see hereafter at xxx.

⁵⁰⁵Note also that the scope of the US Merger Guidelines, as defined in its section 0, covers horizontal acquisitions and mergers that are subject to section 7 of the Clayton Act, to section 1 of the Sherman Act or to section 5 of the FTC Act; it is therefore not limited to the merger statute.

analysis, after the discussion of another difference in the scope of the merger provisions, that of the legal approach to the assessment of possible spill-over effects.

2.1.2.2 Treatment of the risk of spill-over collusion

The study of the EU system demonstrated the peculiarities of the approach to spill-over collusion (i.e. “coordination” in the EU terminology), which has proved a thorny issue from the jurisdictional perspective. As already briefly noted above, whereas a risk of coordination between the venturers in the EU is still formally subject to the specific rules of Article 2(4) EUMR which refers to the criteria of Article 101 TFEU, the U.S. has followed a different legal approach. In the U.S., spill-over effects are normally examined under the merger statute rather than Section 1 of the Sherman Act. In the EU, in turn, the legal solution has been to reserve the application of Article 101 TFEU criteria to coordination concerns even in the context of the Merger Regulation. In this respect, it was demonstrated in Part I that this approach is inheritance of the early categorical separation between structural and behavioural aspects of joint ventures, which has, at least on paper, survived and is currently incorporated in Article 2(4) EUMR. In practice, however, today this difference concerns more formal application of the rules rather than a substantive difference, since the analysis under Article 2(4) EUMR appears to have converged with merger analysis and thus contains similar interrogations into the market power of the participants and oligopolistic interdependence likely to result in tacit collusion in the market. This is also the approach that has been adopted under Article 101 TFEU to assess agreements, such as genuine joint ventures, that are capable of producing efficiencies. By the same token, the development of the substantive analysis under both statutes has therefore contributed to a further convergence with the US antitrust approach, even if on paper the applicable rules and principles are still differently worded and structured.

In the United States, the relevant case-law concerning spill-over effects is relatively old, as new cases have not emerged in this regard after the 1980’s. The courts have occasionally tackled the question whether the formation of a joint venture could be precluded under Section 1 of the Sherman Act because it potentially facilitated collusion between the owners outside the joint venture. Certain early cases involving trade associations provided some indications that an arrangement could not be held illegal, at least not per se, simply because it provided a forum for reaching an understanding and an opportunity for collusion. Interesting

cases in this respect were in particular *American Column & Lumber Co. v. U.S.*⁵⁰⁶ and *Maple Flooring Mfrs. Asso'n v. U.S.*⁵⁰⁷ in which the Supreme Court held that the fact that the trade association provided a potential forum for illegal restraint was not itself sufficient to constitute a per se violation of the Sherman Act. Rather, it was looking for an actual illegal use of the vehicle of association to find such a violation.⁵⁰⁸ The conclusion of these cases was, however, subsequently put into doubt in a joint venture context. The problem reappeared at a district court in *Minnesota Mining & Mfg. Co. (1950)*⁵⁰⁹ in which the relevant question was whether there was a risk that the cooperation in the joint venture would spill over into collateral restrictive behavior among the parent firms outside the venture simply due to their close association in the joint venture activities.⁵¹⁰ The case concerned joint European manufacturing subsidiaries between five major American coated-abrasives companies.⁵¹¹ The agreements contained territorial restrictions in form of commitments not to compete with the joint ventures in the European countries in question. The joint ownership of these foreign subsidiaries coupled with the export embargo to countries in which they manufactured locally was held a per se violation of Section 1 of the Sherman Act as a restraint on foreign commerce, since each parent could have exported from the US instead of joining to manufacture overseas. The essence of the judgment can be derived from judge Wyzanski's dictum:

*“The intimate association of the principal American producers in day-to-day manufacturing operations, their exchange of patent licenses and industrial know-how, and their common experience in marketing and fixing prices may inevitably reduce their zeal of competition inter sese in the American market ...It may, therefore, be subject to condemnation regardless of the reasonableness of the manufacturers' conduct in the foreign countries. ...”*⁵¹²

⁵⁰⁶ 257 U.S. 377 (1921).

⁵⁰⁷ 268 U.S. 563 (1925).

⁵⁰⁸ In the former case the Supreme Court found a violation but only in the collateral practices and arrangements between the association and its members.

⁵⁰⁹ *The United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950).

⁵¹⁰ *Ibid.*, at 961-62.

⁵¹¹ The US companies in question accounted for 4/5 of the domestic industry and had jointly organized and dominated the industry's export association, and thus all the principal firms of the industry were involved in cooperation in technology, manufacture, price and export policy.

⁵¹² *Ibid.* at 961-62.

In Judge Wyzanski's view, a strict per se rule was justified when there was an "inevitable" possibility of a spill-over effect in the American market.⁵¹³ Similar argument to view joint ventures as per se violations of Section 1 due to possible spill-over effects was used in the government's complaint in the Penn-Olin⁵¹⁴ case, although the case was finally assessed under the Clayton Act as a partial merger. In that case, the government attempted initially to suggest that cooperation between the joint venture's parent companies (Pennsalt and Olin Mathieson) in the manufacture and sale of sodium chlorate, the product produced by the joint venture (Penn-Olin), would lead to spill-over collusion with respect to other chemical products that the two parents continued to sell. This was, nevertheless, a mere possibility and the government offered no proof on issue, for which the argument was rejected by the District Court in the following terms:

*"Here the proof shows only an opportunity for illegal activities. That is not enough. To equate opportunity for wrongdoing with likelihood of its occurrence reflects a cynicism toward business behavior which is without warrant. Presumption of probable wrongdoing cannot be substitute for its proof."*⁵¹⁵

In Penn-Olin, the government finally receded from this concern and the argument was no longer raised before the Supreme Court in which the application of Section 7 of the Clayton Act was the only issue. Under section 1 of the Sherman Act, it became clear that a mere theoretical possibility of adverse spill-over effects was not sufficient to warrant a successful challenge. Facilitation of collusive arrangements, whether direct or indirect, must be proven and cannot be assumed or inferred simply from the fact that competing parents control a joint subsidiary.⁵¹⁶ On the other hand, opportunity to conspire may be regarded as circumstantial evidence supporting the inference of collusion, but not adequate to show collusion in itself.⁵¹⁷

⁵¹³ It was, nonetheless, questionable whether the case could be generalized as a per rule against spill-overs in joint ventures, since the facts differed from the previous cases in certain important aspects, as all the principal firms of the industry in question were involved in cooperation in technology, manufacture, price and export policy.

⁵¹⁴ See above, footnote 494 and the accompanying text.

⁵¹⁵ U.S. v. Penn-Olin Chem. Co. 217 F. Supp. 110, 134 (D. Del. 1963).

⁵¹⁶ It has been pointed out that, for instance, also the fact that the members of the boards of several competitors serve together on a Red Cross board creates a serious opportunity for discussion of certain competitively sensitive issues that may deal with price-fixing and market allocations. BOMSE, S. Joint Ventures: Practices in Search of Principles. 915 *PLI/Corp.* 781, 802 ("Somewhere between enforcement paranoia and turning a blind eye to direct evidence of collusion, a proper balance ought to be able to be struck"). DE LONE, F. The Joint Venture versus other Alternatives. 54 *Antitrust L. J.* 915, 923 ("If we're going to say that opportunity is the equivalent of a per se violation of the antitrust laws, we have probably gone too far").

⁵¹⁷ Ibid. For instance, exchange of future price intentions among parents in the context of joint venture management could be treated as circumstantial evidence of collusion.

In the EU, by comparison, until the Amendment of the Merger Regulation in 1998 which introduced the concept of full-function joint venture, it appeared that the mere presence of the parent firms on the same market as the joint venture or closely related vertical or neighboring markets was sufficient to trigger the application of Article 101 TFEU, without further inquiry to proof of facilitation of coordination or causality between the joint venture and the coordination. Since then, the decisional practice of the European Commission has evolved and today a causal link is required between the creation of the joint venture and coordination of the parties' competitive behavior. In contrast to the Penn-Olin scenario which concerned a joint venture that had already been set up, under the EU Merger Regulation this analysis is done at the formation of the joint venture when there cannot be any direct evidence of actual collusion.

So far, the GM/Toyota-case⁵¹⁸, characterized as “*one of the most intensive, thorough antitrust reviews ever conducted*”⁵¹⁹, appears to be the only case in which the Government would have opposed to the entire joint venture under Section 7 of the Clayton Act because of spill-over concerns outside the joint venture, but it finally reached a consent agreement. In that case, the Bureau of Competition had concluded that the likelihood the venture would lead to anticompetitive results was “*too uncertain to support a successful complaint*” but recommended formal, continued monitoring to prevent expansion of the venture's scope or exchanges of competitively sensitive information.⁵²⁰ The FTC, however, finally concluded that the effect of the joint venture could be substantially to lessen competition under Section 7 of the Clayton Act because of the possibility of tacit or explicit collusion resulting from the venture and the venture's effect on Toyota's incentives to enter into production in the United States, which would significantly increase the likelihood of non-competitive cooperation between GM and Toyota. The parties entered into a consent agreement, under which GM and Toyota committed to safeguards limiting the venture's scope and preventing the exchange of competitively sensitive information not required to achieve the legitimate objectives of the venture.⁵²¹

⁵¹⁸*General Motors Corp.*, 103 F.T.C 374 (1984) (consent order and opinions) reopened and set aside, 116 F.T.C 1276 (1993).

⁵¹⁹Memorandum of the Director of the Bureau of Competition of the Federal Trade Commission, FTC, p. 1. It has been estimated that over 20 000 hours of FTC professional staff time was devoted to the review of the case. See FENTON, K. GM/Toyota: Twenty years later. 72 Antitrust Law Journal 1013, 1016 (2005).

⁵²⁰FENTON, K. GM/Toyota: Twenty years later. 72 Antitrust Law Journal 1013, 1016 (2005) (quoting FTC Bureau of Competition, Memorandum to the Federal Trade Commission 2 (Dec. 16, 1983)).

⁵²¹The venture was limited to 12 years and to production of a subcompact vehicle only. Detailed reporting requirements and restrictions were also imposed on the type of information the parties were allowed to exchange,

In the United States, hence, it has been considered appropriate to address risks of spill-over collusion primarily in the forward-looking assessment under Section 7 of Clayton Act which deals with likelihoods and probabilities of anticompetitive behaviour on the market rather than under Section 1 of the Sherman Act, designed to challenge actual restraints that have already occurred. From a technical point of view, this differs from the legal approach adopted in the EU with regard to spill-over effects (i.e. "coordination" of the parties competitive behaviour) under Article 2(4) EUMR which still refers to the criteria of Article 101 TFEU. In the context of clearing a full-function joint venture under the Merger Regulation, this provision suggests that the European Commission predicts whether parties will enter into agreements or concerted practices contrary to Article 101 TFEU and whether such practices would meet the criteria of exception. However, as was shown in Part I of this study, in practice the assessment under Article 2(4) EUMR follows a similar analysis as under the conventional merger standard, with inquiry into the parties' market power and the likelihood of collusion outside the joint venture, and the individual criteria of Article 101 TFEU⁵²² are normally not referred to.

In this context, it is interesting to recall that, when the notification system was still in place in the EU, the European Commission exercised in fact *ex ante* control of the market structure with future oriented assessments under Article 101 TFEU. It applied this provision also to possible future behaviour, which it considered a direct consequence of the formation of the joint venture provided that the spill-over markets were not « technically and economically distinct from the market in which the joint venture operated and independent of that market ». ⁵²³ Under the jurisdictional dichotomy between concentrative and cooperative joint ventures, the possibility of coordination between the parent companies prevented the application of the Merger Regulation to the whole joint venture, and the only applicable provision in those cases was Article 101 TFEU. This basic approach has subsequently been

including an absolute prohibition on the communication of all marketing plans and non-public information concerning prices, costs, sales and production forecasts relating to products not produced by the joint venture, as well as the joint venture's model and design changes, sales and production forecasts, or the price of supplies from GM or Toyota to the venture. *Id.* at 384. See also the case *United States v. Alcan Aluminium, Ltd.*, 605 F. Supp. 619 (W.D. Ky. 1985) in which a production joint venture was acceptable after the incorporation of certain restrictions on the exchange of information between the parties, with prohibition to communicate future production schedules, present or future prices or other terms of sale, volume of shipments, marketing plans, sales forecasts or sales to specific customers.

⁵²²That is to say, existence of a restrictive agreement or concerted practice, effect on trade between Member States, and the four conditions for exceptions (economic or technical progress, consumer benefit, indispensability and no elimination of competition).

⁵²³Sixth Report on Competition Policy (1976) (para. 55).

transposed into the merger proceedings with the help of Article 2(4) EUMR which provides that coordination of the parties' behaviour may still be analyzed under the criteria of Article 101 TFEU, albeit within the merger proceedings.

The significance of this difference appears, however, more conceptual and technical rather than substantive. In both systems spill-over effects become an antitrust concern only when those markets are not competitive and the parties have market power. In particular, if these markets are highly concentrated, collaboration within a joint venture may give the parties an incentive to collude since they will not be faced with effective competition from other competitors, for instance, in response to their common price increases. Both systems provide for certain remedies to eliminate these concerns, including limitations on information flows and structural remedies. Hence, the differences do not concern the most important areas in pragmatic terms, that is to say determining when possible spill-over effects become a problem and how the problem is likely to be solved, which will be the focus of the next Chapter.

2.2 CONTRAST WITH THE EUROPEAN DIFFERENTIAL TREATMENT AND “CONCENTRATION PRIVILEGE”

Whilst the highly technical definitional aspects relating to joint ventures have borne some more or less significant legal, political and practical implications in the EU, as was demonstrated in the first part of this work, the same is not true for the U.S.. As we have already seen, in the U.S. – like in the EU - some joint ventures are subject to merger rules (Section 7 of the Clayton Act) and some to rules for horizontal agreements (Section 1 of the Sherman Act). But as the statutes are not mutually exclusive, both may be relied on in the same case. Unlike in the EU competition provisions in which the elements of substantive analysis have been laid down in detail, with clear discrepancies in the statutory language of the bifurcated Article 101 TFEU and the Merger Regulation, the basic ingredients of the assessment have not been defined in the U.S. statutes. Rather, they have been developed through case law and agency guidelines in a much more symmetric and neutral way so that different efficiency-enhancing transactions, whether or not they amount to mergers, have been analysed using similar methodology and criteria, be that under Section 7 of the Clayton Act or Section 1 of the Sherman Act. Significantly for our comparative purpose, this Section will highlight that mergers have never been subject to a more lenient substantive standard than genuine joint ventures, which contrasts with the earlier EU approach subjecting cooperative joint ventures to stricter rules than concentrative ones.

Comparison of the substantive analysis is far more difficult than definitional issues, not the least because the underlying economic theories have changed and the quality of the analysis in both systems has significantly evolved over time, implying that some cases decided in the past may not have much precedential value today. Clearly, however, the assessment in the U.S. has been more neutral for different types of joint ventures than in the EU. Whilst this apparently technical difference reflects certain more fundamental underlying attitudes in relation to consolidation and cooperation, it also results from a different initial interaction of the relevant rules and standards (2.2.1).

2.2.1 Different interaction of the relevant rules

There are several reasons why it has not been necessary, in the United States, to make categorical legal classifications of different joint ventures based on their specific structural and behavioural features. Indeed, the legal and political constraints that led to the adoption of a categorical approach and the conceptual dichotomies making the jurisdictional distinction between Article 101 TFEU and the Merger Regulation in the EU, have not been relevant in the United States (2.2.1.1). Moreover, in the U.S., mergers have never enjoyed any specific procedural or regulatory advantages comparable to the European "concentration privilege". This difference has, nevertheless, disappeared along with the reform of the system of implementation of Article 101 TFEU in the EU 2004 (2.1.1.2).

2.2.1.1 Absence of mutual exclusivity

Compared to the EU Merger Regulation which did not enter into force until 1990, the U.S. merger statute, Section 7 of the Clayton Act, was enacted much earlier in 1914. The U.S. legislator was not encountered with similar political obstacles as their counterpart in the European Community, where adoption of Community wide regime for mergers took several decades, the EU Member States being reluctant to cede power to the European Commission over changes in industrial structure which was considered a prerogative of national industrial policy and important for economic sovereignty.⁵²⁴ Moreover, even before the merger statute entered into force, there was never any specific obstacle to apply Section 1 of the Sherman Act to mergers or any specific category of integrated joint ventures insofar as they resulted in a contract, combination or conspiracy in restraint of trade. The applicability in principle of Section 1 of the Sherman Act to mergers was confirmed in *Northern Securities Company*⁵²⁵ in which the Supreme Court held that the formation of a holding company among three competitors that would control two large previously competing railroads was illegal under Section 1 as a direct restraint of trade.⁵²⁶ This case fuelled concerns that, as mergers put an

⁵²⁴ See e.g. SAUTER, W. *Competition Law and Industrial Policy in the EU*. Oxford, Clarendon Press, 1997, at 132-136; DUPRE (thesis), at 35.

⁵²⁵ *Northern Securities Company v. United States*, 193 U.S. 197 (1904). See discussion in FOX & SULLIVAN (1989), 738-740.

⁵²⁶ The earlier Supreme Court decisions applying Section 1 had focused on loose combinations and cartels involving price fixing schemes in *Transmissouri* (1897), *Joint Traffic* (1898) and *Addyston Pipe* (1899), discussed earlier in section 1 of this Chapter. Paradoxically, mergers and combinations into single firms remained unchallenged until 1904, although bigness was considered the major evil at the beginning of antitrust enforcement in 1890's and the early 1900's. In certain cases firms that had been operating jointly through

end to any actual or potential competition between the merging firms, a literal reading of Section 1 could have implied a prohibition of all combinations involving competitors as contracts to restrain trade. These concerns were finally removed in 1911, when the Supreme Court clarified that the per se approach was not applicable to mergers in *Standard Oil*⁵²⁷ which involved market power acquired through combination of 37 oil corporations under common management and control through a holding company. Although condemned and ordered to be dissolved for monopolization under Section 2 of the Sherman Act, this case has been cited for introducing a rule of reason for mergers under Section 1, as its reasoning focussed on the distinction between undue restraints and reasonable restraints.⁵²⁸

In contrast to the EU competition law in which mergers mostly escaped control under Article 101 TFEU before the entry into force of the Merger Regulation in 1990, there was thus no comparable legal vacuum in the United States. There was, nevertheless, a major shortcoming which constrained a general application of the Sherman Act to mergers. As a means of *ex post* control of actual market behaviour, it could do little to prevent practices which only tend to reduce competition, or which were only conducive to monopolies. In other words, if a practice was likely to lead to destruction of competition but without amounting to an actual monopoly or combination in restraint of trade, Sherman Act did not apply. It could not reach incipient threats to competition but only restraints that had already occurred, not the future effects of a merger. Mergers, in turn, required the possibility to intervene *ex ante* before their anticompetitive effects had occurred, avoiding thus the cumbersome dismantling in the event that it was found anticompetitive after consummation. The Sherman Act appeared, hence, as an insufficient instrument to check mergers, and a specific statute was judged appropriate to halt incipient monopolies and trade restraints before they reached the level required for

industrial trusts, such as Standard Oil and U.S. Steel, a merger followed a looser organizational form and cartels were converted into single firms. Indeed, the great merger wave in 1895-1904 is believed to have resulted to a large extent from the active cartel enforcement and the fear that a looser organizational form would have been held illegal. BITTLINGMAYER, G. Did Antitrust Policy Cause the Great Merger Wave? In McCHESNEY, F. and SHUGHART II (eds.) *The Causes and Consequences of Antitrust. The Public Choice Perspective*. The University of Chicago Press, 1995, at 127-145.

⁵²⁷Standard Oil Co. V. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). The development of the rule of reason has been discussed in depth e.g. in BORK, R. The Rule of Reason and the Per Se Concept : Price fixing and Market Division. I : 74 *Yale Law Review* 775 (1965) ; II : 75 *Yale Law Review* 373 (1966). See also SULLIVAN & GRIMES (2000), p. 192-199. In his comments during the congressional debates, Senator Sherman himself stated that the courts would have to "*distinguish between lawful combinations in aid of production and unlawful combinations to prevent competition and in restraint of trade.*" 21 CONG.REC. 2456 (1890) (statement of Sen. Sherman).

⁵²⁸See e.g. FOX & SULLIVAN (1989), 738-740.

finding a Sherman Act violation.⁵²⁹ In difference to the latter, the merger statute is concerned with probabilities, not certainties, and it requires prediction of its impact on competitive conditions in future. When the Clayton Act was debated in the Senate, a requirement of certainty and actuality of competitive harm was indeed considered as “*incompatible with any effort to supplement the Sherman Act by reaching incipient restraints*”.⁵³⁰

For our comparative purpose, it is also noteworthy that - in contrast to the corresponding EU rules - Section 1 of the Sherman Act and Section 7 of the Clayton Act were not designed to be mutually exclusive and therefore the entry into force of the merger statute in 1914 did not preclude the application of section 1 of Sherman Act to mergers. Both statutes can still be relied on in the same case.⁵³¹ The latter was still needed in the merger enforcement, since the original wording of Section 7 of the Clayton Act covered only certain acquisitions of stock,⁵³² which allowed companies to evade it by buying their competitors' assets instead of stock. The major consolidation cases still continued to be prosecuted under Section 1 of the Sherman Act until the asset loophole was closed in 1950 by the Celler-Kefauver Act.⁵³³ Section 7 thus currently covers stock and asset acquisitions where the effect of such acquisition may be to substantially lessen competition.⁵³⁴ Even though at least in theory nothing appears to prevent a court from concluding that a merger that would likely lead to a substantial lessening of competition within the meaning of Section 7 of the Clayton Act is also a contract or

⁵²⁹ The legislative purpose appears in Senate Report, No. 698, 63d Cong., 2d Sess. 1. ; reiterated in House and Senate Reports, H.R.Rep. No. 1191, 81st Cong., 1st Sess. 8; and S.Rep. No. 1775, 81st Cong., 2d Sess. 4-5 (stating that the intent of the Act was “to cope with monopolistic tendencies in their incipency and well before they have attained such effects as would justify a Sherman Act proceeding”). For illustrative language, see *Brown Shoe*, 370 U.S. at 318 n. 32, 82 S.Ct. at 1520 n. 32.

⁵³⁰ S. Rep. No 1775, 81st Cong., 2d Sess. 6 (specifying, however, that a mere possibility of the anticompetitive effect was not sufficient but a “reasonable probability” was required). The Supreme Court has also held that actual harm to competition need not be proved but the “*requirements of section are satisfied when tendency toward monopoly or reasonable likelihood of substantial lessening of competition in relevant market is shown*”. *Penn-Olin*, 378 U.S. 158, 84 S.Ct. 1710; see also *Hospital Corporation of America v. FTC*, 807 F.2d 1381, 1389 (7th Cir.1986) (“*Section 7 does not require proof that a merger ... has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable, is called for.*”). See also discussion in FOX (1989), p. 629.

⁵³¹ See e.g. *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964) in which the Government sought to dissolve the joint venture as violating both section 7 of the Clayton Act and section 1 of the Sherman Act. According to HAWK (Ostend), the concurring application of the statutes has not caused serious difficulties, largely because both statutes are applied by the same administrative and judicial bodies, and a more or less unified antitrust analysis is applied to mergers and joint ventures.

⁵³² 38 Stat. 730 (1914).

⁵³³ 38 Stat. 731 (1950). For a discussion of these developments, see FOX & SULLIVAN (1989), at 740-741.

⁵³⁴ The current wording of the Clayton Act is « *[n]o person engaged in commerce or in any activity affecting commerce shall acquire directly or indirectly the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce.* »

combination in unreasonable restraint of trade under Section 1 of the Sherman Act,⁵³⁵ in practice the latter appears to have become more or less superfluous in merger enforcement as a result of the jurisdiction broadening amendment.⁵³⁶ Be that as it may, the absence of mutual exclusivity has allowed for more flexibility in the operation of the relevant Guidelines for Mergers and Competitor Collaborations, which are not - unlike the EU Notices for Mergers and Horizontal Agreements – limited to one or the other applicable statute. In a joint venture case, both the merger guidelines and the competitor collaboration guidelines may be of relevance regardless of whether Section 1 of the Sherman Act or Section 7 of the Clayton Act is the applicable statute.⁵³⁷ For instance, in a joint production case under Section 7 of the Clayton Act, the market concentration and efficiencies may be analyzed according to the merger guidelines, whereas potential for competition between the parents, which may mitigate market power concerns, and restrictive collateral agreements may be analysed under competitor collaboration guidelines.⁵³⁸ Hence, where the Competitor Collaboration Guidelines allow for adjustments to market power indicators in the case of a collaboration that is not fully integrated, it does not imply that in doing so the agencies would be applying Section 1 of the Sherman Act.

Against this background it is easy to understand why the US antitrust enforcers have been much less concerned about drawing the borderline between mergers and horizontal agreements than their European counterparts, or defining specific categories of joint ventures that could be subject to one statute but not to the other. Moreover, the next section will show that whether or not the applicable statute is Section 1 of the Sherman Act or Section 7 of the Clayton Act involves no material substantive or methodological difference, apart from the timing of the assessment which is normally done *ex ante* for mergers in connection with a filing under HSR Act and *ex post* for horizontal agreements for which there is no pre-

⁵³⁵ See e.g. AREEDA & TURNER (1980), p. 22. AREEDA, § 616 et s. and SULLIVAN § 194 et s. with citations.

⁵³⁶ HOVENKAMP (1994), at 214; see also AREEDA & TURNER (1980), at 21-22 (« With the extension of §7 to asset acquisitions, the need to invoke Sherman Act §1 against mergers has largely disappeared... Thus how courts apply §1 to horizontal mergers is hardly a momentous issue. »).

⁵³⁷ See Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, August 19, 2010 (the “2010 Merger Guidelines”) found at: <http://www.ftc.gov/os/2010/08/100819hmg.pdf>, Section 1, p. 1. The Competitor Collaboration Guidelines contain numerous references to the Horizontal Merger Guidelines, in particular, for the analysis of the market conditions and efficiencies; see also footnote 2, according to which the *Horizontal Merger Guidelines*, outline the Agencies’ approach to horizontal mergers and acquisitions, and certain competitor collaborations.

⁵³⁸ See also example 1 of Section 1.3. of the Appendix of the Competitor Collaboration Guidelines which concerns a full integration of two oil companies’ refining and refined product marketing operations, which would be analysed under the Horizontal Merger Guidelines, whereas any agreement restricting competition on the upstream crude oil production would be analyzed under the Competitor Collaboration Guidelines.

screening mechanism. Any genuine joint ventures involving efficiency-enhancing integration of economic activities are analysed under a similar methodology be it under Section 1 of the Sherman Act or under Section 7 of the Clayton Act. The crucial question under both statutes is whether the venture is, on balance, anticompetitive, not whether it fulfils some pre-determined criteria concerning its structural and behavioural features, such as its autonomy or the risk of coordination between the collaborating parties.

2.2.1.2 Regulatory burden and legal certainty

It is worth noting that, at its origin, the US merger regime was not regulatory, as there was no pre-screening mechanism comparable to the obligatory notification requirement under the EU merger control.⁵³⁹ A pre-transaction filing for mergers exceeding a certain size was introduced in 1976 by the Hart-Scott-Rodino Antitrust Improvements Act (“HSR Act”) which imposes a compulsory pre-notification system and certain waiting periods prior to consummation, based on quantitative rather than qualitative criteria.⁵⁴⁰ The process provides the reviewing agency – which is either the Federal Trade Commission (FTC) or the Department of Justice (DOJ) based on their expertise - with a time-frame of thirty days during which it either allows the merger to be consummated or decides to seek an injunction in a Federal District Court to bar the transaction.⁵⁴¹ In contrast to the EU merger proceedings, the agency itself does therefore not validate or invalidate the transaction but has to take the case

⁵³⁹FOX, E. Introduction: Merger Control in the Global Economy. In *Policy Directions for Global Merger Review*. A Special Report by the Global Forum for Competition and Trade Policy (undated), at 3-4 (For this reason, in the EC “the law is merger control”).

⁵⁴⁰A participant in a corporate joint venture will be required to file a notification and report with the FTC and the DOJ prior to consummating formation of the venture if (i) the participant has annual net sales or total assets of at least \$ 100,000,000 and the joint venture will have assets of at least \$ 10,000,000, and one other participant has annual net sales or total assets of at least \$ 10,000,000 (this is commonly referred to as the « Size of the Person Test ») or (ii) the participant and at least one other participant have annual net sales or total assets of \$ 10,000,000, and the joint venture will have total assets of \$ 100,000,000 (commonly referred to as the « Size of the Transaction Test »); (iii) the party will hold 15 % or more of the joint venture’s stock or assets (or the party’s interest in the joint venture is valued at more than \$ 15 million), and (iv) the corporate joint venture entity will engage in interstate commerce in the US. The assets the joint venture will have are deemed for this purpose to include all assets that any participant has agreed to transfer in the future, as well as any credit or obligation which any participant has agreed to extend or guaranty.

⁵⁴¹The filing is made to both the Department of Justice and FTC, and they will decide in a clearance procedure which agency will review the case. The reviewing agency may grant early termination of the waiting period, or it may extend it if the agency requests additional information from the parties. Once such information has been provided, the consummation cannot take place until twenty days. Even when the joint venture is cleared, a post challenge is possible, should some additional information indicate competitive concerns. Procedures for Investigations, 65 *Antitrust & Trade Regulation Report* (BNA) 746-7 (December 9, 1993).

to court if it wishes to challenge the merger.⁵⁴² In this respect, the U.S. system is thus less interventionist than the EU merger control in which a prior approval from the European Commission is required for mergers with European dimension.⁵⁴³

Section 1 of the Sherman Act, in turn, has never involved a formal filing and pre-screening mechanism comparable to that of the now superseded notification system under EU Regulation 17/62. As with mergers, unlike the European Commission which has the power to prohibit a horizontal agreement and impose sanctions on the parties, the U.S. antitrust agencies can neither legalize nor prohibit any business arrangement. On the other hand, firms can request a Business Review Letter from the DOJ Antitrust Division to get guidance about the application of antitrust rules to a particular proposed conduct but such letters have no formal precedential value and they are not judicially reviewable, unlike the former Article 101 exemption decisions.⁵⁴⁴ There is also a voluntary filing procedure for R&D and production cooperation provided for in the National Cooperative Research Act⁵⁴⁵ (“NCRA”) enacted in 1984 and extended to joint production in 1993 by the National Cooperative Research and Production Act (“NCRPA”).⁵⁴⁶ This statute clarifies the treatment of R&D and production joint ventures and eliminates unnecessary obstacles to their formation by mandating that they be analyzed under a rule of reason standard. They do not, however, provide guidance on how a court should conduct the rule of reason analysis.⁵⁴⁷ The function of this statute is different

⁵⁴²In the latter case the merger is often called off because the only way to challenge the injunction involves costly and lengthy litigation. In practice, many firms attempt to remedy any perceived anticompetitive effects of a proposed acquisition by modifying their transaction (e.g. divest a product line) in order not to increase concentration in the market under suspicion. See e.g. CARLTON & PERLOFF (1994), at 823. The US agencies may, however enter into consent degrees with firms in exchange for commitments, implying that they will not challenge the agreement or a merger in court insofar as the firms comply with those commitments.

⁵⁴³In the U.S. the right to buy and sell private property is not limited by requiring a prior approval from the state. See FOX, E. Introduction: Merger Control in the Global Economy. In *Policy Directions for Global Merger Review*. A Special Report by the Global Forum for Competition and Trade Policy (undated), at 3-4.

⁵⁴⁴Business Review Procedure, 28 C.E.R. § 50.6. A Business Review Letter only states the agency's enforcement intention as of the date of the letter; the DOJ remains free to bring whatever action it subsequently considers appropriate. The procedure is described in detail at: <http://www.justice.gov/atr/public/busreview/letters.html>. When such a letter concludes that the DOJ does not presently intend to bring an enforcement action against the proposed conduct, they are much like the so-called "comfort letters" the European Commission used to issue in proceedings under the past Regulation 17/62 in cases that did not require formal exemption decisions. In difference to the latter, the DOJ's letters are however published..

⁵⁴⁵ 15 U.S.C. § 4301.

⁵⁴⁶ NCPRA, 15 U.S.C sections 4301-02, codified together at 15 U.S.C. § § 4301-06.

⁵⁴⁷The voluntary disclosure of the agreement to the Attorney General of the US and the FTC shields not only from claims against per se illegality but also from treble damages as only single damages are recoverable in a civil suit challenging the R&D venture. This statute is discussed in detail in FOSTER, D. et al. National Cooperative Research Act of 1984 as a Shield from the Antitrust Laws, 5 *J.L. & Com.* 347,350 (1985).

from both individual exemptions and block exemptions in the EU, as it does not involve a review of the agreements nor does it legalise or validate them.⁵⁴⁸ The bottom-line is that in the U.S. mergers have never enjoyed any specific procedural advantages as compared to horizontal collaborations, apart from the legal certainty of being considered a single entity and as such not subject to challenge under Section 1 of the Sherman Act. Even the latter has not always been that clear, as was seen in the Supreme Court case *Texaco/Shell* in which the plaintiffs challenged the pricing practices of a fully integrated joint venture that had been notified under HSC Act.

Consequently, the forum shopping towards the Merger Regulation caused by the concentration privilege in the EU has been avoided in the United States where the parties would rather seem to have an incentive to try to avoid the filing requirements of the HSR Act.⁵⁴⁹ The only disadvantage of not qualifying as a merger in the U.S. is that a competitor collaboration can be challenged during its operation if it does not form a single entity like a merger but remains a group of separate competitors.⁵⁵⁰ This appears to be the same in the EU, since any firm on the market naturally has to comply with the competition rules. To the extent that members of any collaboration remain separate undertakings - for instance the parent firms of a R&D and/or a production joint venture when selling the resulting products on the market – will be pursued if they later collude in that market. By contrast, once a merger is consummated, the firm becomes a single entity and its actions cannot thereafter be challenged as an antitrust conspiracy, which the Supreme Court recently confirmed in the *Shell-Texaco* case discussed in Subsection 2.1.1.2 above. Today, things look more similar also from the procedural perspective, as the enforcement system of the EU competition rules has moved closer to that of the U.S. rules in that horizontal agreements are subject to self-assessment and ex post enforcement, whereas mergers meeting the filing requirements are subject to an obligatory filing. In the EU, the replacement of the notification system by the legal exception system of Regulation 1/2003 has in fact turned the procedural side of the concentration

⁵⁴⁸The NCPRA does not cover all competitor collaborations involving R&D and production. It allows per se challenges in certain circumstances, including agreements to jointly market the goods or services produced or to limit the participants' independent sale of goods or services produced outside the collaboration. See also the US Competitor Collaboration Guidelines, n. 37.

⁵⁴⁹The advantages and disadvantages of choosing the route of a joint venture rather than a merger have been discussed from a pragmatic perspective in DE LONE, F. *The Joint Venture versus other Alternatives*. 54 *Antitrust L. J.* 915.

⁵⁵⁰GELLHORN E. and MILLER W.T. Competitor collaboration guidelines - a recommendation. *The Antitrust Bulletin*/Winter 1997, 851, 854. BRODLEY, J. Antitrust and Innovation Cooperation. 4 *J. Econ. Persp.* 97 (1990). Cited in KATTAN, 61 *Antitrust Law Journal* 937, 947-948 (1993).

privilege around. The only procedural advantage of the EUMR remains the legal certainty of the clearance decision, whereas otherwise its proceedings now involve a regulatory burden that is absent in the enforcement of Article 101(3) EU.

Another mechanism worth mentioning in this context is that of safe harbours. As market analysis is always fact-intensive, and proof of market power is often difficult to establish,⁵⁵¹ both the U.S. and the EU use safe harbours based on market share proxies to avoid unnecessary use of administrative or judicial resources to analyse minor agreements. Because of the differences in the basic rules, these systems rely partially on different tools and mechanisms. Whereas the EU has favoured block exemptions in the form of normative Commission regulations within the framework of Article 101 TFEU, the United States has relied on "softer" instruments of administrative guidelines to achieve the same goal of saving resources and providing legal security. For efficiency-enhancing horizontal agreements, Section 4 of the Competitor Collaboration Guidelines presents two antitrust safety zones. The first one applies to all joint ventures: the antitrust agencies will not challenge a competitor collaboration when the market shares of the collaboration and its participants collectively account for no more than 20% of each relevant market in which competition may be affected.⁵⁵² The second safety zone applies only to joint ventures in an "innovation market" as described in the Intellectual Property Guidelines: the agencies will not challenge a competitor collaboration in an innovation market where three or more independently controlled research efforts in addition to those of the collaboration possess the required specialized assets or characteristics and the incentive to engage in R&D that is a close substitute for the R&D of the collaboration.⁵⁵³

⁵⁵¹See AREEDA, P. The Changing Contours of the Per Se Rule. 54 *Antitrust Law Journal* 27, 28 (1985) (proof of market power is "difficult, complex, expensive and time-consuming"; see also MARKOVITZ, R. The American Antitrust Laws on the Centennial of the Sherman Act: A Critique of the Statutes Themselves, Their Interpretation and Their Operationalization. 38 *Buff. L. Rev.* 673, 752 (1990) ("market-oriented approaches are inevitably cost-ineffective").

⁵⁵²The 2000 US Competitor Collaboration Guidelines, section 4.2. The safety zone does naturally not apply to agreements that are per se illegal, nor does it apply to competitor collaborations to which a merger analysis is applied. Note, in this context, that the Health Care Guidelines provide safety zones of 35% and 20% market share, respectively. The former is equivalent to the presumption contained in the now superseded 1992 Horizontal Merger Guidelines for unilateral effects and the latter to the general safety zone of 20% under the Competitor Collaboration Guidelines. The differences between these safe harbours have never been explained. The explanation may relate to the general difference between unilateral behaviour and concerted behaviour which, when assessed ex post, are also subject to different standards. Note that the new 2010 Merger Guidelines removed the previous safe harbour of 35% for unilateral effects under the 1992 Horizontal Merger Guidelines.

⁵⁵³*Ibid*, section 4.2.

Sometimes higher market share thresholds have been suggested by courts. For instance, in a production joint venture case *Union Carbide Corporation v. Montell, N.V.*⁵⁵⁴, decided in 1996, the court stated in the rule of reason analysis under Section 1 of the Sherman Act that "*courts have consistently held that firms with market shares of less than 30% are presumptively incapable of exercising market power.*" In that case, in the absence of market power, the plaintiff was unable to offer any proof of an adverse effect on competition and therefore the defendant did not have the burden to justify pro-competitive virtues of the joint venture in question.

2.2.2 Implications in substantive analysis

Overall, Section 7 of the Clayton Act, together with HSR Act, does not, as such, create a generally more lenient framework for mergers than that applied to efficiency-enhancing horizontal agreements subject to the rule of reason under Section 1 of the Sherman Act. Procedurally, the merger regime with its obligatory pre-filing involves a regulatory burden that horizontal agreements do not have. The pre-screening results, however, in better legal certainty during the life of the merged entity which is no longer subject to antitrust attacks as a contract or conspiracy between the merging parties, whereas a competitor collaboration can be challenged throughout its life under Section 1 of the Sherman Act. In substantive terms, however, in so far as the collaboration in question involves efficiency-enhancing economic integration, it matters little whether the applicable statute is Section 7 of the Clayton Act or Section 1 of the Sherman Act, as the analytical paths under the SLC-test and the contemporary rule of reason are much alike. One may therefore expect that an antitrust challenge against an agreement qualifying under the rule of reason is not likely to be successful if the parties could legally merge. Under both statutes the key question today is whether a joint venture is on balance anticompetitive, not whether it contains some specific structural or behavioural features that would require a strict legal classification.

The main difference between these statutes is that the Sherman Act looks backwards to current and past behaviour whereas the Clayton Act is primarily forward-looking and focuses on future effects. This does not, however, mean that joint ventures would be subject to an identical analysis in every respect as mergers and acquisitions. Rather their more limited

⁵⁵⁴ 944 F.Supp. 1119 (S.D.N.Y. 1996).

nature may warrant a more lenient approach than that for full integrations (2.2.2.1), which requires adjustments to the analysis of market power be that under Section 7 of the Clayton Act or Section 1 of the Sherman Act (2.2.2.2).

2.2.2.1 General attitude towards cooperation vs. consolidation

In the earliest antitrust cases more than a hundred years ago the U.S. courts already flirted with the fundamental question that if competitors could lawfully eliminate competition between each other by merging, why should they not be able to accomplish the same goal by agreement?⁵⁵⁵ Some of these cases raised the concern that the Courts were permissive toward consolidation and severe toward cooperation, which arguably lead to the merger wave at the beginning of the nineteenth century. In 1933, in the period of turbulence created by the great economic depression, the Supreme Court clarified its stance in connection with the joint sales agency in case *Appalachian Coal*⁵⁵⁶ which was approved as a "crisis cartel":

"We agree that there is no ground for holding defendants' plan chosen to maintain their independent plants, seeking not to limit but rather to facilitate production. We know of no public policy, and none is suggested by the terms of the Sherman Act, that in order to comply with the law those engaged in industry should be driven to unify their properties and businesses in order to correct abuses which may be corrected by less dramatic measures."

The Supreme Court hinted towards a need to view joint ventures more leniently than full mergers in its first production joint venture case *Penn-Olin*⁵⁵⁷ in 1964. In that case, it highlighted that even though overall the same considerations applied to joint ventures as to mergers, this did not mean that the joint venture would be controlled by the same criteria as the merger or conglomeration in every respect, since the *"merger eliminates one of the participating corporations from the market while a joint venture creates a new competitive*

⁵⁵⁵This question was put forward in a number of notable early cases involving collaborations among competitors, such as *United States v. Addyson Pipe & Steel Co.*, 85 Fed. 271, 280 (6th Cir. 1898), modified and affirmed, 175 U.S. 211, 20 S.Ct. 96 (1899); *American Column & Lumber Co. V. United States*, 257 U.S. 377, 42 S. Ct. 114, 66 L.Ed. 284 (1921); *United States v. United States Steel Corp.*, 251 U.S. 417, 40 S. Ct. 293, 64 L. Ed. 343 (1920).

⁵⁵⁶ *Appalachian Coals*, 288 U.S. 344, 53 S.Ct. 471 (1933) in which 137 coal producers formed an exclusive joint selling agency to classify and market the coal.

⁵⁵⁷ *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964). This case is discussed here only to the extent it concerns the applicability of merger rules, while the major weight of it lies in the theory of potential competition examined in the next chapter.

force therein".⁵⁵⁸ The deconcentrating effect of a new entry by a collaboration was thus clearly identified as a scenario in which a more lenient treatment was warranted than for a full merger.

In 1978, i.e. in the period of the ascendancy of the Chicago School, professor *Bork* called for a general harmonization of the law concerning contract integration of productive activities and ownership integration, as both forms are capable of producing efficiency while eliminating rivalry.⁵⁵⁹ Judge Bork's language in *Rothery* is explicit in this respect:

*"A joint venture made more efficient by ancillary restraints, is a fusion of the productive capacities of the members of the venture. That, in economic terms, is the same thing as a corporate merger. Merger policy has always proceeded by drawing lines about allowable market shares and these lines are based on rough estimates of effects because that is all the nature of the problem allows. If Atlas bought the stock of all its carrier agents, the merger would not even be challenged under the Department of Justice Merger Guidelines because of inferences drawn from Atlas' market share and the structure of the market. We can think of no good reason not to apply the same inferences to Atlas' ancillary restraints."*⁵⁶⁰

Some commentators went further and argued that antitrust law should treat joint ventures more leniently than mergers because of their capability of achieving efficiencies without restricting competition as completely as mergers.⁵⁶¹ A policy statement endorsing the approach comparing a joint venture scenario to a full merger is found in the DOJ's 1988 Antitrust Enforcement Guidelines for International Operations⁵⁶²:

*"If, based on market concentration, the Department would not challenge a merger of the joint venture participants in a relevant market, the Department concludes without detailed examination of other factors that the joint venture and its individual restraints would not likely have any anticompetitive effects in that market."*⁵⁶³

⁵⁵⁸Ibid. 1712, 1716.

⁵⁵⁹BORK, R. *The Antitrust Paradox : A Policy at War with Itself*. New York, Basic Book Inc., 1978, pp. 263-279, at 264 (noting that both internal growth and horizontal mergers eliminate rivalry, but as opposed to typical cartels they do it permanently).

⁵⁶⁰792 F. 2d 210 (D.C. Cir. 1986), at 230 (emphasis added).

⁵⁶¹See e.g. PIRAINO (1997), at 643 n. 26 ("Joint ventures are less anticompetitive than mergers. They allow their partners to access each other's resources without eliminating all competition among the partners").

⁵⁶²3.42 (1988), 4 Trade Reg. Rep. (CCH), 13,109; these guidelines were replaced in 1995 and the passages specifically relating to joint ventures were removed.

⁵⁶³ Similar explicit statement no longer appears in the 2000 US Joint Venture Guidelines, which employ a more elaborate analysis of the market power effects in the joint venture context, as explained in the previous Chapter.

The 2000 US Competitor Collaboration Guidelines follow a similar approach by recognizing that the competitive effects of competitor collaborations may differ from those of mergers in that mergers typically end competition between the merging parties in the relevant markets, whereas most competitor collaborations preserve some form of competition among the participants.⁵⁶⁴ The limited duration and the potential for future competition among the joint venture participants are explicitly acknowledged as an element to require "*an antitrust scrutiny different from that required for mergers*".⁵⁶⁵ This differential scrutiny is justified because of their less permanent nature (parties may gain their competitive positions after the collaboration) and hence lower risk of harm, as stated by a representative of the FTC's Bureau of Competition:

*"[J]oint ventures may pose less threat to competition than a merger involving the same parties. The antitrust enforcement agencies have permitted some joint ventures to proceed in circumstances in which they had or would have challenged a merger of the same parties. These decisions were grounded in the belief that restrictions on the scope and duration of joint ventures limit their anticompetitive effects. Unlike mergers, joint ventures may maintain the participants' status as independent competitors outside the framework of the collaborative effort."*⁵⁶⁶

Hence, even where a full merger would be found to substantially lessen competition under section 7 of the Clayton Act, a limited joint venture between the same parties might still be acceptable due to the scope of competition that it leaves to the parent firms, which is typically the case for joint R&D, production and purchasing. It is, nevertheless, important to recall that this does normally not apply to joint sales agents and marketing collaborations between competitors, because they are capable of increasing the parties' market power as much as mergers but without necessarily involving as significant efficiencies. A joint sales operation may even amount to an outright cartel absent any significant efficiencies and integration of assets.

⁵⁶⁴ The US Competitor Collaboration Guidelines, section 1.3.

⁵⁶⁵ Ibid, section 1.3.

⁵⁶⁶ PLI Conference Explores Ins and Outs of Federal Agencies' Antitrust Enforcement, 63 Antitrust & Trade Reg. Rep. (BNA) No. 1591, at 615, 623 (Nov. 19, 1992) (statement of Joseph Kattan, Assistant Director for Policy and Evaluation in the FTC's Bureau of Competition).

A number of concrete cases illustrate how this approach is applied in practice. The case *Alcan Aluminum Ltd.*⁵⁶⁷ was particularly interesting in this regard, since the joint venture format was chosen as a solution to overcome concerns of excessive market power that would have been created by a merger or acquisition. The case was settled by agreeing to replace the originally planned acquisition by a joint venture, deemed to be an acceptable alternative. Another interesting case was a fully integrated joint venture scenario in *Ivaco*⁵⁶⁸, which was enjoined under the merger statute. In that case the court interpreted the parties' failure to consider a more limited transaction for the express purpose of developing a high-technology product as circumstantial evidence of an anticompetitive intent, suggesting thus that a limited function joint venture might have been acceptable. Based on a similar approach, the *GM/Toyota*⁵⁶⁹ production joint venture between the second and third largest automobile manufacturers in the world was upheld as a limited enterprise rather than a merger of two parents. As the FTC's Chairman put it: "[V]enture is a limited production joint venture, not a merger of GM and Toyota. The extent of continuing competition between the companies dwarfs the limited area of cooperation represented by the venture."⁵⁷⁰ Similarity in the reasoning can be found in the European Commission's case *Inco/Falconbridge*⁵⁷¹ in which an efficiency defence was rejected in a merger case on the grounds that those efficiencies could have been achieved by less restrictive means, such as a production joint venture.

From the comparative perspective, it is noteworthy that in these cases it was notably within the application of merger rules that joint ventures were assessed more leniently than full mergers. Under the U.S. antitrust policy, their distinctive features, such as remaining competitive relationship between the parents or the venture's limited functions or duration, do not lead to the application of a different statute, as is the case in the EU. Some of the cases discussed above, such as *GM/Toyota* and *Alcan Aluminium*, would clearly not have fulfilled the criteria of full-function joint venture under the current EU Merger Regulation nor the criteria of a concentrative venture under its previous version but would have been considered cooperative joint ventures subject to Article 101 TFEU. Due to the broad scope of the a priori prohibition of Article 101(1) TFEU, as construed in the 1980's and the first half of the 1990's, these cases would then have required an exemption. At that time there was still some

⁵⁶⁷ United States v. Alcan Aluminium, Ltd., 605 F. Supp. 619 (W.D. Ky. 1985).

⁵⁶⁸ United States v. Ivaco, Inc., 704 F. Supp. 1409, 1414, 1426 (W.D. Mich. 1989).

⁵⁶⁹ General Motors Corp., 103 F.T.C. 374, 386 (1984).

⁵⁷⁰ STATEMENT OF CHAIRMAN JAMES C. MILLER, annexed to the Consent Degree.

⁵⁷¹ Case M.4000. Commission Decision of 4 July 2006, available at : http://ec.europa.eu/competition/mergers/cases/decisions/m4000_20060704_20600_en.pdf.

uncertainty in Europe with regard to the effects of limited cooperation in relation to full mergers and concentrative joint ventures which were considered by many to raise less concerns than partial integrations. In other words, cooperative joint ventures were considered to merit closer scrutiny than concentrative ones due to the risk of coordination of the parents' competitive behaviour that they could entail.⁵⁷² The discussion of the more recent cases and policies of the European Commission in Part I however demonstrates that the position has evolved in this regard and the virtues of limited cooperation and especially the scope for competition that they leave between the participants are recognized in the EU as well.

2.2.2.2 Market power analysis in joint venture context

Under Section 7 of Clayton Act, a joint venture will be found unlawful if it is likely substantially to lessen competition. The underlying market power of the joint venture and each of its participants is evaluated to determine if the collaboration will enable its participants to limit output, raise prices, or otherwise tend to create monopoly. The 2010 Horizontal Merger Guidelines, which replaced the Horizontal Merger Guidelines issued in 1992 and revised in 1997, set forth the methodology for this purpose.⁵⁷³ Their main objective is to prevent mergers that create, enhance, or entrench market power or to facilitate its exercise. The Guidelines highlight that there is no uniform application of a single methodology but a merger analysis is a fact-specific process through which the Agencies apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns in a limited period of time. A merger is considered to enhance market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives. A merger can enhance market power simply by eliminating competition between the merging parties ("unilateral effects"), which can arise even if the merger causes no changes in the way other firms behave. This may alone constitute a substantial lessening of

⁵⁷² Notice on the distinction between concentrative and co-operative joint ventures under Council Regulation (EEC) No. 4064/89 of December 21, 1989, on the control of concentrations between undertakings, [1994] OJ C358/1, para 6.

⁵⁷³ Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, August 19, 2010 (the "2010 Merger Guidelines") found at: <http://www.ftc.gov/os/2010/08/100819hmg.pdf>. the 2010 Guidelines are not law and are not binding on the courts. Nevertheless, since most horizontal merger investigations are resolved at the agency level, rather than challenged in court, the Guidelines provide important insight into how best to address agency concerns.

competition.⁵⁷⁴ A merger also can enhance market power by increasing the risk of coordinated, accommodating, or interdependent behaviour among rivals (“coordinated effects”). This occurs when a merger enables or encourages post-merger coordinated interaction among firms in the relevant market, which is profitable for each of them only as a result of the accommodating reactions of the others. According to the Guidelines, coordinated interaction can involve the explicit negotiation of a common understanding of how firms will compete or refrain from competing, which implies explicit collusion prohibited by Section 1 of the Sherman Act. Coordinated interaction also can involve a similar common understanding that is not explicitly negotiated but would be enforced by the detection and punishment of deviations that would undermine the coordinated interaction, which refers to tacit collusion that cannot be caught by Section 1 of the Sherman Act in the absence of evidence of concertation. The importance of market definition is somewhat downplayed, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis.⁵⁷⁵

As compared to the 1992 Horizontal Merger Guidelines, the revised merger Guidelines emphasize direct evidence of competitive effects, raise concentration levels at which mergers are said to raise concern, highlight economic tools for analyzing unilateral effects from mergers with differentiated products, and address effects on innovation and partial acquisitions in which only a minority position in a company is acquired for the first time. The new Guidelines have been interpreted to reflect the pro-enforcement tendencies of the Obama Administration, for instance, by emphasizing the kinds of evidence that may show how transactions lessen competition and express skepticism about too quickly accepting arguments offered by merging parties to defend against antitrust concerns, such as ease of entry.⁵⁷⁶

⁵⁷⁴The new Guidelines remove the “safe harbor” provision, contained in the 1992 Guidelines, which provided that harmful unilateral effects of a horizontal merger would not arise so long as the merged firm had a market share of below 35%.

⁵⁷⁵The Guidelines specify that market definition plays two roles. First, market definition helps specify the line of commerce and section of the country in which the competitive concern arises. In any merger enforcement action, the Agencies will normally identify one or more relevant markets in which the merger may substantially lessen competition. Second, market definition allows the Agencies to identify market participants and measure market shares and market concentration. The measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger’s likely competitive effects. Some consider that downplaying market definition is in tension with legal precedent, which places much more emphasis on market definition. See e.g. comments by ABA to the draft 2010 Horizontal Merger Guidelines, found at <http://www.ftc.gov/os/comments/hmgrevisedguides/index.shtm>.

⁵⁷⁶See commentary in <http://www.cooley.com/US-antitrust-authorities-issue-new-merger-guidelines-emphasis-shifts-from-market-definition-towards-actual-competitive-acts> (“.. the Guidelines are likely to present a slightly higher hurdle for antitrust sensitive deals. They underscore the need to gather more hard data, and sooner in the process, for parties planning a strategy to efficiently overcome antitrust hurdles to closing their transactions.”)

Concentration ratios are still calculated using the Herfindahl-Hirschman Index (HHI)⁵⁷⁷ as a preliminary screening device in determining the resulting increase in market concentration. Higher concentration will lead to greater scrutiny of the evidence presented by the merging parties to show that the merger will not lead to a lessening of competition. Other variables, such as the ease and likelihood of new entry, play also an important role in the market power analysis, which always involves some degree of speculation, for example, on how market structures change over time.

A similar approach has been endorsed for efficiency-enhancing integrations in the Competitor Collaboration Guidelines.⁵⁷⁸ In this context, it is appropriate to recall that in the U.S. market power emerged as a relevant benchmark for efficiency-enhancing horizontal agreements earlier than in the EU. Like Article 101 TFEU, section 1 of the Sherman Act does not contain any specific threshold of intervention. The wording of the provision itself – referring simply to contracts, combinations and conspiracies in restraint of trade – is clearly focused on conduct rather than market structure and it does not, as such, require proof of market power for finding a violation. Rather, this structural condition has been incorporated into the contemporary rule of reason analysis with the sophistication of the economic thought, culminating in a general axiom that firms cannot affect competition adversely unless they possess market power.⁵⁷⁹ Any inquiry into market power necessarily involves market definition, assessment of market shares and concentration ratios and entry conditions the same way and using the same technical concepts as in a conventional merger analysis. In order to assess whether an agreement may create or enhance market power or facilitate its exercise, the Competitor Collaboration Guidelines therefore refer primarily to the Horizontal Merger Guidelines.⁵⁸⁰ The market share and concentration data, as indicated by the HHI, are used as a

⁵⁷⁷The HHI is determined with reference to the sum of the squares of the market shares of every firm in the relevant market. Based on their experience, the Agencies generally classify markets into three types: unconcentrated Markets when HHI is below 1500, Moderately Concentrated Markets when HHI is between 1500 and 2500 and Highly Concentrated Markets: HHI above 2500. See 2010 Horizontal Merger Guidelines, Section 5.3, which increased these thresholds from those indicated in the 1992 Horizontal Merger Guidelines, § 1.51, in which the thresholds were as follows: unconcentrated markets (post-merger HHI less than 1,000), moderately concentrated markets (post-merger HHI between 1,000 and 1,800) and highly concentrated markets (post-merger HHI greater than 1,800).

⁵⁷⁸See Competitor Collaboration Guidelines, Section 3.33, which refers to the Horizontal Merger Guidelines in this context.

⁵⁷⁹Market power has been defined as the ability of a seller to profitably “maintain prices above competitive levels for a significant period of time” and of a buyer to profitably “depress the price paid for a product below the competitive level for a significant period of time and thereby depress output” (2000 Competitor Collaboration Guidelines, n. 30). The Guidelines also recognize sellers’ ability to exercise market power “with respect to significant competitive dimensions other than price, such as quality, service, or innovation” (id.).

⁵⁸⁰Section 3.33.

preliminary screening device but they do not give sufficient indication of the competitiveness of the market, which may be largely affected by other factors, such as the ease of entry evaluated in terms of its timeliness, likelihood and sufficiency.

The Competitor Collaboration Guidelines recognize market power as a key factor of the rule or reason analysis but take a prudent approach by not erecting an absolute market power screen, in the absence of an explicit judicial endorsement.⁵⁸¹ The most authoritative endorsement for market power as an essential threshold is found in the House Report accompanying the National Cooperative Production Amendments of 1993, which affirms that *"the absence of market power among collaborating firms generally places their collaboration beyond the pale of antitrust concern."*⁵⁸²

In the context of joint ventures, specifically, the U.S. courts and agencies have followed mostly a "single-share" approach⁵⁸³ in which the parties' market shares are simply added up the same way as is done in cases involving full mergers. This is most obvious in fully integrated cases between actual competitors, in which all competition between the parties in the relevant market is eliminated the same way as in a full merger. For instance, in *United States v. Ivaco, Inc.*⁵⁸⁴ the district court applied a single-share analysis and enjoined under Section 7 of the Clayton Act a proposed joint venture between two leading manufacturers of automatic railroad tampers, concluding that *"the analysis of whether the proposed transaction will injure competition does not differ materially when the transaction is characterized as a joint venture rather than as a merger"*.⁵⁸⁵ In that case, the collaboration would have involved a complete integration of the parties' productive assets and eliminated any future competition between them in the market for automatic rail tampers. The resulting firm would have

⁵⁸¹According to the former FTC Chairman Pitofsky the Guidelines in effect reject for purposes of quick look or for rule of reason treatment the idea of an absolute market power screen. See Joint Venture Guidelines: Views from One of the Drafters, Remarks by Robert Pitofsky, Chairman Federal Trade Commission, ABA/ Section of Antitrust Law Workshop: Joint Ventures and Strategic Alliances: The New Federal Antitrust Competitor Collaboration Guidelines, Washington, D.C. November 11 & 12, 1999, at 32. *Id.* at 32 (*"We appreciate that market power is a key factor but in and of itself it should not be enough to condemn or exonerate a transaction – except in the circumstances described in the safe harbor sections of the Guidelines. Market definitions are sometimes too uncertain, and differentiation within markets may be too great, to rely on market share or concentration estimates to the exclusion of all other factors. Not only have the Courts not widely adopted market power screens, but I find no evidence that the law is moving in that direction."*). See also article by Professor Patterson concluding, after a thorough analysis of case law, that no market power screen can be derived from the Supreme Court case law.

⁵⁸²H.R.REP. No. 94, 103d Cong., 1st Sess. at 12 (May 18, 1993).

⁵⁸³The terminology derives from MCFALLS, M. The Role and Assessment of Classical Market Power in Joint Venture Analysis. 66 *Antitrust Law Journal* 651, at 664-673 (1998).

⁵⁸⁴704 F. Supp. 1409 (W.D. Mich. 1989).

⁵⁸⁵*Id.* at 1414.

controlled 70 % of the market for automatic tampers, and the concentration index for that market would have increased from HHI of 3549 to a post-transaction HHI of 5809. The court considered this sufficient to establish *prima facie* illegality of the joint venture, for it would have resulted in further concentration of an already highly concentrated market.⁵⁸⁶ The major concern was that the existing vigorous price competition between two important competitors in a highly concentrated market would have ceased. Given the fact that each firms' pricing had been responsive to the others' and that prices had remained below profitable levels for the past several years, the court reasoned that the effect, absent significant mitigating factors, would have been an increase in the price of automatic tampers.⁵⁸⁷

Similar approach is followed under Section 1 of the Sherman Act where the collaboration would end all competition between the parties in the joint venture's market. Section 1 of the Sherman Act was applied in a manufacturing partnership case *Union Carbide Corporation v. Montell, N.V.* (1996)⁵⁸⁸, in which the venture eliminated all price and output competition between Shell Oil and Montedison in the polypropylene resin market. The court granted summary judgment in favor of defendant on a claim by Union Carbide that the joint venture constituted a violation of Section 1 of the Sherman Act.⁵⁸⁹ In the rule of reason analysis, the court noted that the joint venture accounted for only twenty-seven percent of the polypropylene resin market and that "*firms with market shares of less than 30% are presumptively incapable of exercising market power.*" In the absence of market power, the plaintiff was unable to offer any proof of an adverse effect on competition.⁵⁹⁰

⁵⁸⁶ Id. 1419.

⁵⁸⁷ Id. at 1420. The court found that the procompetitive justifications advanced by the defendants, such as enhanced innovation, were insufficient to rebut the presumption of illegality created by the venture's high market share, and it interpreted the parties' failure to consider a more limited transaction for the express purpose of developing a high-technology product as circumstantial evidence of an anticompetitive intent. Id. at 1427.

⁵⁸⁸ 944 F.Supp. 1119 (S.D.N.Y. 1996).

⁵⁸⁹ The parties created a partnership known as the Seadrift Polypropylene Company ("Seadrift"). When the UNIPOL and the SHAC processes had been adequately integrated, Seadrift began operating a PP producing plant using the UNIPOL/SHAC technology. The parties also began licensing their combined technology to other PP producers. The parties shared profits and losses as well as confidential technological information.

⁵⁹⁰ See also [Citizen Publishing Co. v. United States](#), 394 U.S. 131 (1969), the combination of two newspapers' advertising and circulation functions precluded future competition. [Id. at 134.](#) In his concurring opinion, Justice Harlan noted that if the operating agreement between the two papers had provided that it would continue indefinitely "we would have had no choice but to treat the transaction in the same way we would treat a total corporate merger." [Id. at 141](#) (Harlan, J., concurring). In [United States v. Paramount Pictures, Inc.](#), 334 U.S. 131 (1948), competition was eliminated by a joint committee's pooling of the profits of formerly competitive movie theaters. [Id. at 149.](#)

Whilst it is clear that in fully integrated cases the analysis either under Section 7 of the Clayton Act or Section 1 of the Sherman Act does not differ materially when the transaction is characterized as a joint venture rather than as a merger, some adjustments to the market power analysis may be necessary when the integration is only partial.⁵⁹¹ In case-law concerning horizontal agreements, the first explicit references to market power and merger-like structural analysis of the market under Section 1 of the Sherman Act can be found in Judge Bork's opinion in *Rothery Storage*⁵⁹², which followed the adoption of the now-superseded 1984 Merger Guidelines⁵⁹³. The language of the judgement clearly suggested that no balancing test was required under the rule of reason where the defendant lacked market power and was therefore unable to harm competition by reducing output and increasing prices:

*"Analysis might begin and end with the observation that Atlas and its agents command between 5.1 and 6% of the relevant market, which is the interstate carriage of used household goods. It is impossible to believe that an agreement to eliminate competition within a group of that size can produce any of the evils of monopoly. ... If a group of Atlas' size reduced its output of services, there would be no effect upon market price because firms making up the other 94% of the market would simply take over the abandoned business. The only effect would be a loss of revenues to Atlas. Indeed, so impotent to raise prices is a firm with a market share of 5 or 6% that any attempt by it to engage in a monopolistic restriction of output would be little short of suicidal."*⁵⁹⁴

This approach is based on the logic of Chicago School - of which Judge Bork is a well-known partisan – dictating that if an agreement does not limit output, it cannot harm consumers even if it harms competitors. At the time of *Rothery* in 1986, there was still a certain amount of scepticism over the possibility to accept this approach as a general legal standard for horizontal restraints in Section 1 cases analysed under the rule of reason.⁵⁹⁵ Judge Bork's

⁵⁹¹ According to *McFalls*, a single-share analysis is useful even if the collaboration is of a limited duration and the parties have a legal right to withdraw from it. See *MCFALLS*, at 664-665.

⁵⁹² 792 F. 2d 210 (D.C. Cir. 1986).

⁵⁹³ United States Department of Justice Merger Guidelines (1984), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13.103.

⁵⁹⁴ 792 F. 2d 210 (D.C. Cir. 1986), at 217. Interestingly from the comparative perspective, this case involved minor market shares between 5% and 6%, which would have been very close to the "de minimis" threshold of 5% under which non-hardcore restraints were presumed legal under the then applicable EC Notice concerning minor agreements. For Section 1 of the Sherman Act, no such threshold had been indicated in the contemporaneous guidance, nor did it contain any qualification comparable to the EC concept of "appreciable" restriction.

⁵⁹⁵ In particular, Judge Wald – albeit concurring – disagreed with the safe harbor idea as inconsistent with Supreme Court precedent, stating that "nothing in BMI, NCAA, or Pacific Stationary supports the panel's new *per se* rule of legality" "I think it premature to construct an antitrust test that ignores all other potential

market power analysis was not limited to inferences drawn from market shares, although the latter appeared to play a dispositive role. Remarkably, the court went on to evaluate market concentration by using the same methodology as indicated for mergers in the 1984 Merger Guidelines, even when Atlas was clearly a collaboration between rivals and as such not examined under the merger rules. The court concluded that it was impossible to “*entertain any notion of market power*”, as the van line market had an HHI of only 520 which is low on the range of unconcentrated markets.⁵⁹⁶ In this assessment, the court assigned the parties a single market share to reflect all their production, purchases and sales in the relevant market, the same way it would have done in case of a full merger involving the same parties, even though the “fusion of productive capacities” of Atlas and its carrier agents was carried out through contract integration. On the other hand, in Rothery, market power seemed to be determinant primarily to the extent that the parties did not have it.⁵⁹⁷ Should the parties in Rothery have possessed market power, the approach would have been more delicate, as explicitly stated in the judgment:

“We do not mean to suggest that if the HHI were higher and within one of the more concentrated categories, the arrangement would necessarily be illegal. It must be recalled that the Guidelines apply to mergers tested under section 7 of the Clayton Act, a statute aimed at halting ‘incipient monopolies and trade restraints outside the scope of the Sherman Act,’... and which therefore applies a much more stringent test than does rule-of-reason analysis under section 1 of the Sherman Act. It must also be recalled that the Guidelines apply to mergers between firms that ordinarily have no internal competition. Here we are dealing with firms that are merely limiting internal competition and are not merging to eliminate competition between firms. Indeed, if every van line in this industry eliminated all internal

concerns of the antitrust laws except for restriction of output and price raising. ... Until the Supreme Court indicates that the only goal of antitrust law is to promote efficiency ... I think it more prudent to proceed with a pragmatic, albeit nonarithmetic and even untidy rule of reason analysis, than to adopt a market power test as the exclusive filtering-out device for all potential violators who do not command a significant market share. Under any analysis, market power is an important consideration; I am not yet willing to say it is the only one” (792 F. 2d 210 (D.C. Cir. 1986), at 230)..See also FOX & SULLIVAN (1989), at 447 (noting that Rothery was “not necessarily a bellwether for the law”). See also an article by Professor Patterson concluding, after a thorough analysis of case law, that no market power screen can be derived from the Supreme Court case law.

⁵⁹⁶ According to the 1984 Merger Guidelines, the DOJ will not challenge mergers falling below an HHI of 1000, except in extraordinary circumstances. The se Guidelines characterize a market as unconcentrated if its HHI is below 1,000, moderately concentrated if its HHI is between 1,000 and 1,800, and highly concentrated if its HHI is above 1,800. An HHI of 1,000 corresponds roughly to a four-firm concentration ratio of 50 percent. See the 1984 Merger Guidelines § 3.1.

⁵⁹⁷ See e.g. WERDEN, at 672 (“Judge Bork’s opinion thus makes market power dispositive only if the joint venture lacks it.”).

*competition and then the largest two van lines merged, the resulting HHI would be only 868, still well below the top border for "unconcentrated markets."*⁵⁹⁸

The message of Judge Bork was explicit in that even if the market concentration ratio was high enough to warrant a challenge of a merger under section 7 of the Clayton Act, a joint venture with the same ratio would not necessarily violate Section 1 of the Sherman Act.⁵⁹⁹ Consequently, in the context of non fully-integrated joint ventures, some adjustments to the market power analysis may be necessary to take account of the fact that they typically leave scope for competition between the parents and do not lead to a complete fusion of market power between the parties. For this reason, determining the market power issue in individual joint venture cases is often more complex than in connection with mergers. The parent firms are only likely to refrain from competing with each other on activities within the scope of the venture, not necessarily to discontinue competition in other markets. In any case, the outcome of merger analysis in the US may be harsher for fully integrated joint ventures than for limited ones, even where the applicable statute may be Section 7 of the Clayton Act in both cases. This is because the increase in market power in the former is not mitigated by the remaining competition among the parties. In line with the above cited cases, this competition may be considered a factor reducing market power concerns. On the other hand, the US guidelines for Competitor Collaborations admit that this may also raise questions about whether participants "have agreed" to anticompetitive restraints on this competition. This is, of course, subject to proof that such agreements have been entered into, which must be addressed separately under Section 1 of the Sherman Act.⁶⁰⁰ On the other hand, possible spill-over effects outside the collaboration, is typically assessed under the merger statute, as it involves forward-looking prediction of possible future market behaviour and not agreements already made.

⁵⁹⁸ Id. at 220.

⁵⁹⁹ As interpreted by MCFALLS, at 671-672; similar proposals have been made KITCH E. the Antitrust Economics of Joint Ventures. 53 *Antitrust Law Journal* 957, 961n. 10 (1985); and *Collaborations among Competitors, Antitrust Policy and Economics*, American Bar Association 1991, p. 865. in SCHMALENSEE, R. Agreements between competitors. In *Antitrust, Innovation and Cooperation* 112 (JORDE, T and TEECE, D. eds.,1992).

⁶⁰⁰ See the US Competitor Collaboration Guidelines, Appendix, Example 1 concerning a fully integrated joint venture in oil refinery business with separate crude oil production operations. The formation of such collaboration would be subject to merger analysis, whereas any agreements restricting competition on crude oil production would be analyzed separately under the Competitor Collaboration Guidelines.

The case GM/Toyota⁶⁰¹ is again an interesting example, since the analysis of market power under Section 7 of the Clayton Act deviated from that of a full merger due to the potential for insider competition. The joint venture in question was limited to production of the subcompact cars which were to be marketed by the parent firms, and the parents continued to compete in the manufacture and sale of other types of cars. The FTC approved a consent decree which included safeguards against possible collusive exchange of competitively sensitive information between the parties. These safeguards were designed to guarantee that GM and Toyota will not coordinate their independent activities outside the joint venture but will remain able and willing to compete against each other. For this reason, the FTC did not assign a single market share for the collaboration and its parents.

The market power analysis in *SCFC ILC, Inc. v. Visa USA, Inc.*⁶⁰² illustrates the importance of this issue to the outcome of the case. Recalling the facts of the case, Sears wanted to become a Visa USA member and also issue Visa cards but its application was rejected because it offers its own competing credit card (the Discover Card). Interestingly, as a defense against the group boycott allegations of Sears, Visa argued that Discover's admission to Visa would have increased market concentration as measured by HHI and violated section 7 of the Clayton Act. The district court rejected Visa's argument and found that HHI analysis aggregating the competitors' shares did not provide an appropriate indication of the potential anticompetitive effects in such case, because Visa and Discover would have continued to compete outside of the venture. Hence, Discover's admission would not have constituted "a complete merger of the two entities".⁶⁰³ In the analysis of the joint venture's (Visa USA) market power, in turn, the District Court aggregated the market shares of Visa's members and concluded that their 70 per cent share of the relevant market (the general-purpose credit card market) yielded market power. On appeal, the Tenth Circuit reversed, holding that Visa had no market power in card issuing market which it found "atomistic".⁶⁰⁴ This was based on the fact that each issuer bank or other entity was independent from another, and competition occurred only at the issuer level. Visa USA operates in the systems market, not the issuer market, and it was therefore inappropriate to aggregate the market shares of its members in the market power analysis. The court concluded that there was 'intersystem competition'

⁶⁰¹ *General Motors Corp.*, 103 F.T.C 374 (1984) (consent order and opinions) reopened and set aside, 116 F.T.C 1276 (1993).

⁶⁰² 36 F.3d 958, 963-65 (10th Cir. 1994), cert. denied, 115 S. Ct. 2600 (1995).

⁶⁰³ *SCFC ILC, Inc. v. Visa U.S.A., Inc.*, 819 F.Supp. 956 (D.Utah 1993).

⁶⁰⁴ 36 F.3d 958, 967.

between the card issuers within the system, since the members continued to compete with each other in issuing the cards to offer better terms or more attractive features for their individual credit card programs.⁶⁰⁵ Apparently, it considered this kind of insider competition as a check on the market power that Visa might have exercised in its ability to make collective rules.⁶⁰⁶ Referring to the above discussed Rothery case, the Tenth Circuit concluded:

*“The very existence of a joint venture in the first instance is premised on a pooling of resources to affect competition in some manner and is made functional through some form of cooperative behavior or rule-making. ... Hence, it is not the rule-making per se that should be the focus of the market power analysis, but the effect of those rules--whether they increase price, decrease output, or otherwise capitalize on barriers to entry that potential rivals cannot overcome. ...[T]here was no evidence that price had been increased, output had decreased, or other indicia of anticompetitive activity had occurred.”*⁶⁰⁷

Under the U.S. Competitor Collaboration Guidelines, even where competitive concerns would otherwise be raised, enforcement action may not be taken if the members retain the incentive and ability to compete. Where the market share and market concentration data reveal a prima facie likelihood of anticompetitive harm, the Agencies more closely examine the extent to which the participants and the collaboration have the ability and incentive to compete independent of each other. Six factors are likely to play a role in this assessment: (a) the extent to which the relevant agreement is non-exclusive in that participants are likely to continue to compete independently outside the collaboration in the market in which the collaboration operates; (b) the extent to which participants retain independent control of assets necessary to compete; (c) the nature and extent of participants’ financial interests in the collaboration or in each other; (d) the control of the collaboration’s competitively significant decision making; (e) the likelihood of anticompetitive information sharing; and (f) the duration of the collaboration. Measuring the impact of insider competition is always fact-specific, and in practice it is often difficult to judge the effectiveness and impact of possible insider competition that could prevent the venture or its parents from exercising market

⁶⁰⁵Id. at 967.

⁶⁰⁶ Nevertheless, Sears' expert, Dr. James Kearl, upon whom the district court relied to conclude the evidence was sufficient to establish Visa USA's market power, explained he looked at the collective, aggregated shares of Visa and MasterCard, because "we have a collective rule, bylaw 2.06 ... I found that the collective share was very large, and as a consequence my conclusion was that the collective rule was an exercise of market power." Id. at 967.

⁶⁰⁷ Id. 968.

power. Although it is not always possible to overcome these uncertainties, the courts and agencies incorporate the likelihood of insider competition into the analysis as a mitigating factor or an aggravating factor, where appropriate.⁶⁰⁸ The Competitor Collaboration Guidelines highlight the broad variety of scenarios that may arise:

*"Participants may continue to compete against each other and their collaboration, either through separate, independent business operations or through membership in other collaborations. Collaborations may be managed by decision makers independent of the individual participants. Control over key competitive variables may remain outside the collaboration, such as where participants independently market and set prices for the collaboration's output. Sometimes, however, competition among the participants and the collaboration may be restrained through explicit contractual terms or through financial or other provisions that reduce or eliminate the incentive to compete."*⁶⁰⁹

From the comparative perspective, it is interesting to see that in the US the control of the collaboration's competitively significant decision making (point d above), which relates to the criterion of autonomy within the meaning of full-function joint venture under the EU Merger Regulation, may be a relevant factor in the competitive assessment although it has no jurisdictional function like in the EU. In this context, the U.S. agencies notably consider the extent to which the collaboration's governance structure enables the collaboration to act as an independent decision maker. They ask, for instance, whether participants are allowed to appoint members of a board of directors for the collaboration, if incorporated, or otherwise to exercise significant control over the operations of the collaboration, questions asked in the EU as part of analysis of full-functionality to determine whether the parent firms have joint control over their venture. In general, the collaboration is less likely to compete independently as participants gain greater control over the collaboration's price, output, and other competitively significant decisions. In the U.S., this may lead to considering the parties' market shares as a whole rather than that of the joint venture separately. In other words, while the autonomy of the joint venture is irrelevant for the purpose of allocation of the cases between Section 1 of the Sherman Act and Section 7 of the Clayton Act, as we have already

⁶⁰⁸*SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 963-65 (10th Cir. 1994), cert. denied, 115 S. Ct. 2600 (1995). *McFalls* has remarkably set forth how collaboration within a joint venture can change the ability and incentive of the parties to compete (i) against each other *outside* the venture in markets affected by their collaboration; (ii) against each other *within* the venture by independently marketing its output; and (iii) against the venture as part of other collaborations.

⁶⁰⁹Competitor Collaboration Guidelines, section 3.34.

seen in the previous Chapter, it may become relevant in that if the sum of the parties' market shares and concentration data raise concerns of exercise of market power, the collaboration's autonomy may reduce these concerns, as it may justify assigning a separate market share to the collaboration instead of adding up the participants' shares.

In comparison, the current 2010 EU Guidelines for Horizontal Agreements also refer to market power as essential part of the analysis under Article 101(1), like the preceding guidelines but this time without reference to the HHI. Whilst there are clear similarities in the analysis of efficiency-enhancing joint ventures under the EU and U.S. approaches, the EU policy differs from its U.S. counterpart in that it has never explicitly recognized that partial integration in the form limited joint ventures in terms of time and functions (i.e. cooperative or non-full function joint ventures) would be of less antitrust concern than mergers and fully integrated joint ventures. Rather, the so-called "concentration privilege" favouring mergers over cooperative agreements under Article 101 TFEU appears to have been based on a belief that cooperative joint ventures merited a stricter antitrust treatment than mergers due to their potential for coordination of the parties' competitive behaviour, which was perceived as a greater harm than total elimination of competition through a merger. In the present context, however, it is difficult to judge how much – if anything – is left of the traditional concentration privilege in the EU, as at least some individual cases indicate that certain limited joint ventures may be viewed more favourably than a full integration or a merger (see discussion above in Section 1.2.2.2).

This difference is also reflected in the relevant guidelines. In contrast to the EU Guidelines concerning the application of Article 101 TFEU to horizontal agreements, the 2000 US Competitor Collaboration Guidelines devote a whole section to "distinguishing competitor collaborations from mergers" and another one to "factors relevant to the ability and incentive of the participants and the collaboration to compete".⁶¹⁰ Neither of these issues is included in the EU Guidelines on Horizontal Agreements which do not in any way address the question of how such agreements must be distinguished from full merger scenarios, nor do they tackle the impact of insider competition in the market power analysis. In fact, a long-standing approach under Article 101(1) EU, appears to have one-sidedly regarded the remaining competition between the parties as raising suspicions of collusion rather than mitigating

⁶¹⁰ The 2000 Competitor Collaboration Guidelines, section 1.3.

market power concerns. Yet, in individual exemption decisions preceding the abolition of the notification system, competition between the joint venture parties was taken into account in the assessment of the fourth condition of Article 101(3) relating to the absence of elimination of competition for a substantial part of the relevant products.⁶¹¹ The European Commission examined, in particular, whether the cooperation extended to all the parameters of competition (R&D, production and marketing) or whether it left to the parties the possibility of individual marketing and pricing. When the parties continued competition at the crucial stages of marketing and pricing, high market shares alone did not preclude exemption. At the end of the day, hence, the limited nature of cooperative and partial function joint ventures was recognized in the exemption decisions but the fact remained that full integrations benefited from a more favourable merger procedure in which a one time clearance was obtained in a much faster procedure without necessity to specifically justify efficiencies in each individual case.

2.2.2.3 The case of potential entrants

The assessment of market power becomes more complex when the parents are not yet competing but are only potential entrants on the market in question and therefore have no market share on it.⁶¹² In the US, the doctrine of potential competition requires evaluation of the anticompetitive effects of mergers and joint ventures on both present (edge effect) and

⁶¹¹See e.g. Exxon/Shell, Decision of the Commission of 18 May 1994, [1994] OJ L144/20; GEAE/P&W, Decision of the Commission of 19 September 1999 [2000] OJ 58/16; IFPI – Simulcasting, Decision of the Commission of 8 October 2002, [2003] OJ 107/58, point 120.

⁶¹²In the United States, the theory of potential competition emanated from the Celler-Kefauver Amendments to the Clayton Act in 1950, extending the scope of the latter beyond horizontal mergers involving actual competitors. The judicial analysis has include two generally intertwined branches: the theory of perceived potential entrant (the edge effect) and the theory of actual potential entrant (de novo entry effect), both more or less speculative in content. See e.g. FOX, E. Application of the Clayton Act to international mergers, acquisitions and joint ventures. 50 *Antitr. L. J.* 477, at 481; KATTAN, J. Antitrust analysis of technology joint ventures : allocative efficiency and the rewards of innovation. 61 *Antitrust Law Journal* 937, 947 (1993). The consistence of the actual potential entrant theory with the language of Section 7 of the Clayton Act is controversial. The Supreme Court has reserved the question whether Section 7 could be violated when the acquirer could have made the market more competitive by entering through internal expansion instead through the merger. See *United States v. Marine Bancorporation, Inc.* 418 U.S. 602 (1974). The theory has been severely criticized for being really directed towards the unpopularity of large conglomerate mergers. See e.g. POSNER, R. Antitrust Law: An Economic Perspective 113- 25 (1978) (stating that it is impossible to develop criteria for determining the application of the theory to specific mergers). Potential competition issues occur particularly in assessing competition in innovation markets, both before and after innovation. See also BRODLEY, J. Potential Competition Mergers: A Structural Synthesis. 87 *Yale L.J.* 1, at 13 (1977); Richard Hoerner, Innovation Markets: New Wine in Old Bottles?, [64 Antitrust L.J. 49, 50-55 \(1995\)](#).

future competition (entry effect), both of which may be relevant in joint venture context.⁶¹³ The essential question under Section 7 of the Clayton Act is whether the elimination of a potential competitor lessens competition to any meaningful extent. This is conditioned by two major assumptions emerging from a well-established case law: (i) if the market is competitive and not concentrated, elimination of a potential competitor cannot affect competition adversely, and the theory of potential competition becomes superfluous; (ii) if there are no barriers to entry and in principle anybody could easily enter the market, the fact that a potential entrant combines with a competitor cannot harm competition.⁶¹⁴ There also needs to be analysis of who the other potential competitors actually were. If there were numerous other potential competitors, then elimination of one would have a negligible effect on competition.⁶¹⁵

The Supreme Court has tested potential competition theories to a joint venture scenario only once in *Penn-Olin*⁶¹⁶. As both parents possessed the financial resources and know-how to

⁶¹³ See e.g. PITOFISKY, R. Joint Ventures under the Antitrust Laws: Some Reflections on the Significance of Penn-Olin. 82 *Harvard Law Review* 100, at 1025-26 (1969) (noting that the essential question in the analysis of both conglomerate mergers and joint ventures is whether one of the parent firms would be likely to enter by internal expansion, if the entry into the product or geographic market by acquisition or joint venture were not possible).

⁶¹⁴ SULLIVAN & GRIMES (2000), at 661 (with regard to a case in which the parents were the only or among very few potential entrants "their joint presence on the market's edge may have constrained collusion or oligopolistic interdependence more than would actual entry by the venture"). In joint venture context, if the parties do not form the joint venture, the actual potential entrant theory would imply that they would each enter individually, with the deconcentrating effect resulting from two independent entries as opposed to a single joint entry. The alternative perception would contrast the market structure consisting of two potential entrants on the edge of the market with the actual joint entry.

⁶¹⁵ But potential competition can only be applied in cases where an acquisition might be deemed anticompetitive if it results in the elimination of "the prospect of independent entry by a firm whose pre-merger presence on the fringe of the market was perceived by . . . current market participants." Mark D. Whitener, Potential Competition Theory--Forgotten But Not Gone, 5 *Antitrust* 17, 18 (1991). The Supreme Court of the United States has twice reserved judgement on whether the theory is valid at all. Very few courts validated the theory, and case law is rare. Indeed it has been condemned by the FTC as a "rather peculiar theory of competitive injury." B.A.T. Industries, 104 F.T.C. 852, 919 (1984). See also ABA Section of Antitrust Law, *Antitrust Law Developments*, Ch. IIIC (4th ed. 1997), at 347 (noting that different circuits in U.S federal courts have different standards in this regard).

⁶¹⁶ *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964). The joint venture in question, Penn-Olin Chemical Company, was a new production corporation owned jointly by Pennsalt Chemical Company and Olin-Mathieson Chemical corporation. The purpose of the joint venture was to make sodium chlorate in the southeast (Kentucky). The sodium chlorate industry was comprised by three firms, Hooker Chemical Corporation, American Potash and Chemical Corporation and Pennsalt, the first two holding over 90 per cent of the relevant market. The remaining 8.9 per cent was held by Pennsalt through a sales agreement with Olin. Prior to entering into the joint venture agreement, Pennsalt made sodium chlorate in the northwest (Oregon) and had no facilities in the southeast which was defined as the relevant geographic market by the DOJ and the Court. Olin, which had purchased and used the product and acted as an intermediary to resell it, had a patent for putting the product to certain uses but it had never engaged in the commercial production of sodium chlorate. It marketed Pennsalt's sodium chlorate in the southeast under a sales agreement. Both parents possessed the financial resources and know-how to make sodium chlorate, and both had previously considered – without totally rejecting – the possibility of entering the Southeast market independently.

make sodium chlorate, and both had previously considered – without totally rejecting - the possibility of entering the relevant geographic market independently, the DOJ challenged the agreement under both section 7 of the Clayton Act and section 1 of the Sherman Act, contending that the elimination of a potential competitor was more important than allowing a company that had less than 9 % market share to compete against two firms with a total market share of 91 %..⁶¹⁷ The Supreme Court held that the right standard under section 7 which would have required examining whether there was a “*reasonable probability that either one of the corporations would have entered the market by building a plant, while the other would have remained a significant potential competitor*”..⁶¹⁸ On remand, the joint venture was ultimately validated on the grounds that independent entry of the founders was not likely, and the ultimate question of whether the elimination of a potential competitor would have had a significant adverse effect on the market was thus not reached..⁶¹⁹

It is essential to notice that the Penn-Olin case was decided in 1964, when the antitrust thought was still influenced by the Structure-Conduct-Performance-paradigm and populist-oriented structuralism, which resulted in a strict approach. It appeared to suggest that Section 7 could be violated when a firm eliminated its own procompetitive entry and chose instead another deconcentrating vehicle – albeit less competitive - to increase competition in the market..⁶²⁰ The trend towards requiring more convincing evidence of a potential entry began during a new antitrust majority on the Supreme Court in 1974, composed of justices having tolerant views concerning industrial concentration and bigness..⁶²¹ It became clear that elimination of a potential entrant would not affect a competitive market. The threshold concentration ratios were later provided in the 1984 Merger Guidelines.

⁶¹⁷The district court found that both parents would not otherwise have entered sodium chlorate production in the southeast and concluded that there was no basis for finding that the joint venture would substantially lessen competition, based on the reasoning that one actual entrant was more valuable than two on the sidelines. *United States v. Penn-Olin*, 217 F. Supp. 110, 130 (D. Del. 1963).

⁶¹⁸ 378 U.S., at 176-77. This way entry by one firm alone would have resulted in more competition if the other venturer remained on the edge to exert competitive pressure by its threat of entry. This reasoning combined the two approaches to potential competition.

⁶¹⁹ 246 F. Supp. 917, 919 (D.Del. 1965) ; 389 U.S. 308 (1967), as discussed in AREEDA & KAPLOW (1988), p. 884-885.

⁶²⁰ For criticism of the case, see e.g. GELLHORN & KOVACIC (1994), at 390-391.

⁶²¹ See FOX & SULLIVAN (1989), at 824. Due to the change in the approach, the year 1974 is often referred to as “turning of the tide” in American antitrust. See *United States v. Marine Bancorporation, Inc.* 418 U.S. 602 (1974) in which the Court established a three-part test for the entry effect to pose Section 7 concerns: (i) high concentration within the relevant market; (ii) existence of feasible alternative methods (e.g. internal expansion or acquisition of a smaller firm) to enter other than by merger; and (iii) this entry is reasonably likely to lead to structural improvement (deconcentration) or other procompetitive effects in the target market.

The theories on potential competition have rarely led to invalidation of a joint venture. One such case was *Yamaha Motor Co. v. FTC* (1981)⁶²² in which the court affirmed a dissolution order issued by the FTC under Clayton Act Section 7 and FTC Act Section 5. The case concerned a joint venture formed in 1972 between a US manufacturer of outboard motors, Brunswick, and a Japanese manufacturer of the same products, Yamaha, to develop and produce a new line of outboard motors through a Japanese joint subsidiary. The agreement gave Brunswick the exclusive right to market the joint venture's products within the US, with Yamaha receiving exclusive rights in Japanese territory. The U.S. market was highly concentrated, four firms accounting for almost 99 per cent of the market. Brunswick was the second largest seller in the U.S. At the time of the facts Yamaha was selling the contract products only outside the United States, but it had concrete plans to enter the US market which it abandoned, however, because of the joint venture agreement.⁶²³ There was no doubt in either instance, FTC or the Eight Circuit, that the arrangement violated Section 7 of the Clayton Act by eliminating the perceived potential entry by Yamaha into the relevant US market. The court put accent primarily on structural factors relating to high industry concentration, a venture participant already holding a dominant position, and the elimination of a potentially significant new entrant who had both the capability and actual intention to enter the market without the joint venture. In sum, the main effect of the joint venture was to keep important potential entrants out of highly concentrated US markets; it was hence considered anticompetitive in essence, including also its collateral restraints.⁶²⁴

In practice, it is often very difficult to predict deconcentration and the courts have generally been reluctant to accept the government's arguments based on speculative market predictions.⁶²⁵ Hence, the principal focus of the doctrine is in the likely effects of the premerger position of the acquiring firm on the edge of the target market.⁶²⁶ The 2010 Horizontal Merger Guidelines apply to mergers between both actual and potential

⁶²² *Yamaha Motor Co. V. FTC*. 657 F.2nd 971 (8th Cir. 1981), cert. denied, 456 U.S. 915 (1982).

⁶²³ *Ibid.* at 973-74.

⁶²⁴ The parent firms were unable to persuade the court that their joint effort was procompetitive. They argued that the collaboration facilitated introduction of a new line of outboard motors in the U.S, added a new competitive force to the market and enhanced Yamaha's ability to enter *de novo* upon the termination of the joint venture agreement which was entered into for a limited period of time. The district court held, however, that the addition of the joint venture to the American market was "*not of great significance when one considers that it was controlled by Brunswick and cannot be reasonably expected to compete actively with its parent firm*". *Id.* at 980.

⁶²⁵ See e.g. *Mercantile Texas Corp. v. Board of Governors of the Federal Reserve System*, 638 F. 2nd 1255 (5th Cir. 1981), at 1269-72 (requiring ao. analysis of the profitability of independent entry); and *Tenneco, Inc. v. FTC*, 689 F. 2d at 355-58 (the court refused to enforce a cease and desist order issued by the FTC despite high market shares, oligopolistic markets, and a strong showing of proximity).

⁶²⁶ As stated by the Supreme Court in *United States c. Marine Bancorporation, Inc.* 418 U.S. 602 (1974).

competitors.⁶²⁷ They specify that in analyzing mergers between an incumbent and a recent or potential entrant, projected market shares are used, without more details. They remove the largely artificial and potentially confusing separation of the analysis between “uncommitted entrants” and “committed entrants” that was present in the 1992 Merger Guidelines. The 2000 Competitor Collaboration Guidelines, do not discuss in any depth the relevance of the potential competition doctrines in the joint venture context but specify that a company is considered a potential competitor when (i) entry by that firm is “reasonably probable” without the joint venture; or (ii) competitively sensitive decisions by incumbent firms are constrained “by concerns that anticompetitive conduct likely would induce the firm to enter”.⁶²⁸

2.2.2.4 Efficiencies

Further to the anticompetitive side, on which the antitrust agencies bear the burden of proof, possible efficiencies are examined where the rule of reason is the appropriate standard and the parties make such claims. Efficiencies may be taken into account, to a certain extent, also in the field of mergers, although the place for efficiency arguments that could persuade antitrust agencies to permit a merger that might have some potential for anticompetitive harm has been subject to a lively debate on both sides of the Atlantic. In the past, both the U.S. and the EU have had experiences in which efficiencies apparently weighed against a merger out of a fear that the efficiencies would make it difficult for other firms to compete. Whilst both systems have now officially retreated from this view, it arguably played a significant role in the EU much longer than in the US. While the EU has probably been the least sympathetic to efficiency arguments when they have been raised in the past, it should be noted that its dominance test is probably less restrictive of mergers generally than the American SLC standard. To put this another way: any merger in the U.S. that involved concentration levels and other conditions such that (under European standards) there would be a dominance situation would likely not be one in which efficiency arguments were any more warmly received than they would be in the EU. In a sense it could be said that they have incorporated efficiencies, at least to some extent, by raising the thresholds for merger review. The EU *Merger Regulation* also directs the European Commission to consider “the development of technical and economic progress, provided that it is to consumers' advantage and does not

⁶²⁷ See Section 1 of 2010 Horizontal Merger Guidelines.

⁶²⁸ The US Competitor Collaboration Guidelines, n. 6..

form an obstacle to competition" (Article 2(1)(b)). This commands the Commission to give at least some consideration to efficiencies as long as consumers benefit. Similarly, the U.S. Guidelines clearly demonstrate a willingness to consider efficiencies as part of the determination of whether there has been substantial lessening of competition. Again, however, consumers will have to benefit before they can rescue a merger that increases market power.

Under the rule of reason, the evaluation of efficiencies determines whether the restraint in question is reasonably necessary to achieve procompetitive efficiencies that outweigh the identified anticompetitive effects. The US Competitor Collaboration Guidelines provide the most detailed statement of the agencies' views on weighing efficiencies generated by joint ventures. Following generally the Merger Guidelines' approach, the Collaboration Guidelines require proof of "cognizable efficiencies" that are verifiable and reasonably necessary.⁶²⁹ The enforcement agencies assess the likelihood and magnitude of cognizable efficiencies and anticompetitive harms to determine the agreement's overall actual or likely effect on competition in the relevant market. In this analysis, the agencies consider whether cognizable efficiencies likely would be sufficient to offset the potential of the agreement to harm consumers in the relevant market, for example, by preventing price increases. The Guidelines also include an appropriate caveat that the comparison of efficiencies and anticompetitive harm entails necessarily an approximate judgment. Moreover, they provide for a general "safe harbor" for firms having combined shares of over 20% in any market, so that the balancing test is relevant only for collaborations above this ceiling.

The scope of justifications and defences allowed under the rule of reason has narrowed down with the passage of time in function of the goals and welfare standards promoted by antitrust policy in general.⁶³⁰ Certain early cases decided by the Supreme Court, such as *Appalachian*

⁶²⁹The analysis of efficiencies has been addressed in numerous legal and economic studies. Kolasky, William J. and Andrew R. Dick, « The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers », DOJ, available at : <http://www.usdoj.gov/atr/hmerger.htm>, « Celebration of the 20th anniversary of the Guidelines », 10 juin 2002; Muris, Timothy J., « The Government and Merger Efficiencies: Still Hostile after All these Years », *George Mason Law Review*, 7, 1999; Noël, Pierre-Emmanuel: « Efficiency considerations in the assessment of horizontal mergers under European and U.S. antitrust law », *European Competition Law Review*, 1997, November, vol. 18, no 8, at 498-519.

⁶³⁰ Literature concerning the evolution of antitrust ideology is abundant and well resumed in a number of comprehensive textbooks containing bibliographical references. See e.g. SULLIVAN 2000, at 1-19; HOVENKAMP (1994), at 48-74; ROSS (1992), at 1-20; and FOX & SULLIVAN (1989) (discusses the major cases in their historical, political and economic context). For a detailed analysis of the early developments see

*Coals*⁶³¹, suggested a broad approach by approving a crisis-cartel on public policy grounds. The situation was finally clarified in 1978 by the declaration of the Supreme Court that the rule of reason inquiry “*is confined to a consideration of impact on competitive conditions*”.⁶³² The sole question was, consequently, the competitive effect of the agreement under examination, and not whether it was reasonable in order to promote some other societal goal. It is thus well established today that if an agreement has anticompetitive elements, it can be justified only by outweighing pro-competitive aspects, not on any social or political grounds that are not related to competition.⁶³³ Defences based on public interest or political considerations, such as fairness, equal opportunities or protection of small business, are thus no longer admitted under the modern rule of reason in the United States. Having said this, occasional references to non-competition criteria may still be found even after the Supreme Court’s ruling in *National Society of Professional Engineers*, most remarkably in the GM/Toyota joint venture case examined under Section 7 of the Clayton Act in 1984, in which the reasons for approval under the consent decree included considerations of industrial policy and other non-competition criteria, such as learning from the Japanese efficient manufacturing methods and the demonstration for U.S. labour management relations.⁶³⁴ The decision attracted a great deal of controversy in the specialized literature,⁶³⁵ and indeed sometimes the antitrust focus was virtually lost amid debates about other policy issues, such as industrial

Herbert Hovenkamp, [The Antitrust Movement and the Rise of Industrial Organization](#), 69 *TEX. L. REV.* 105 (1989).

⁶³¹ *Appalachian Coals*, 288 U.S. 344, 53 S.Ct. 471 (1933).

⁶³² *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). See also discussion in WALLER (1992) 61 *Antit. L.J.* 55, 62; with references to *FTC v. Superior court Trial Lawyers Ass’n*, 493 U.S. 411 (1990).

⁶³³ The latter is understood in a broad sense to mean anything that allows the firms to better serve consumers by bringing better products to the market at lower prices or at an earlier stage than without cooperation, including efficiencies and technological innovation leading to lower production costs.

⁶³⁴ Note, however, that this case was examined under section 7 of the Clayton Act. These issues have been discussed in detail in FENTON, K. *GM/Toyota: Twenty years later*. 72 *Antitrust Law Journal* 1013, 1018 (2005). See also AMATO.

⁶³⁵ See e.g. KWOKA, J. *International Joint Venture : General Motors and Toyota* (1983). In KWOKA, J. and WHITE, L. (eds.) *The Antitrust Revolution. The Role of Economics*. 2nd ed. Oxford University Press, 1995, at 46-73; WEINBAUM, R. *Production Joint Ventures : The GM-Toyota Experience*. 58 *Antitrust Law Journal* 709 (1989); ORDOVER, J. and SHAPIRO, C. *The General Motors-Toyota joint venture: an economic assessment*. 31 *Wayne Law Review* 1167 (1985); WEINBAUM, R. *The General Motors-Toyota joint venture: a legally sound competitive strategy*. 31 *Wayne Law Review* 1195 (1985); CLANTON, D. *Horizontal agreements, the rule of reason, and the General Motors-Toyota joint venture*. 30 *Wayne Law Review* 1239 (1984); HOGAN, M. *The General Motors-Toyota joint venture: a General Motors perspective*. 44 *Antitrust Bulletin* 821 (1999).

WEINBAUM, R. *The General Motors-Toyota joint venture: a legally sound competitive strategy*. 31 *Wayne Law Review* 1195 (1985); CLANTON, D. *Horizontal agreements, the rule of reason, and the General Motors-Toyota joint venture*. 30 *Wayne Law Review* 1239 (1984); HOGAN, M. *The General Motors-Toyota joint venture: a General Motors perspective*. 44 *Antitrust Bulletin* 821 (1999).

policy, competitiveness of the US firms in a global economy and labour relations.⁶³⁶

In comparison to the EU rules, it must be pointed out that the rule of reason under Section 1 of the Sherman Act has never allowed a broader range of justifications than Section 7 of the Clayton Act. In the EU, in turn, there has been - and still is at least in theory - some discrepancy in the justifications available under the different rules. The range of justifications available under the test of economic balance of Article 101(3) EU has traditionally been broader than the narrow competition-based criteria under the Merger Regulation and the modern U.S. rule of reason. Expressions of public policy concerns, in principle unrelated to the protection of competition, such as restructuring of industries and rationalization of production,⁶³⁷ social and regional policy concerns,⁶³⁸ energy policy⁶³⁹, environmental policy⁶⁴⁰, as well as competitiveness of the European industry⁶⁴¹, can be found in many Commission decisions exempting joint venture cases at least until the mid-1990s even if they were ultimately decided on competition grounds.⁶⁴² Still, the 2004 Exception Guidelines explicitly stated that goals pursued by other Treaty provisions could be taken into account to

⁶³⁶It has been suggested that, from a distance of twenty years, much of the contemporaneous analysis and commentary about the GM/Toyota joint venture appear somewhat exaggerated. FENTON, K. GM/Toyota: Twenty years later. 72 *Antitrust Law Journal* 1013 (2005) ("Indeed, a whole new generation of antitrust lawyers and economists looking back on the GM/Toyota joint venture and the FTC review might well ask 'What was the big deal?'"). In this regard, the comments presented later by GM's representatives are interesting. After the first years of successful operation of the NUMMI venture, GM's general counsel submitted that the company was probably more rival to Toyota than before. The joint venture represented only a small proportion of the overall business of each parent, which at the outset made collusion difficult. As evidence of the continuing rivalry he mentioned that GM's market share over the last five years had dropped while Toyota's share had increased during the same period, which would - in any rational terms - be inconsistent with any notions of collusion. See WEINBAUM, R. Production Joint Ventures : The GM-Toyota Experience. 58 *Antitrust Law Journal* 709, 713 (1989).

⁶³⁷*Enichem/ICI*, OJ L50/18 (1988), [1989] 4 CMLR 54; see also *PBB/Shell*, OJ C189/2 (1984), reported in XVIIth Competition Report 1988, at para. 74 ; and *Montedison/Hercules* (Himont), XVIIth Competition Report 1988, at para. 69; *Stichting Baksteen* reported in XXIVth Competition Report 1994, at 111.

⁶³⁸*Ford/Volkswagen* OJ [1993] L 20/14, 4 CMLR 543.

⁶³⁹*Carbon Gas Technologie* OJ [1983] L 376/17.

⁶⁴⁰*Philips/Osram* OJ [1994] L378/37.

⁶⁴¹Joint venture cases with explicit references to the competitiveness of the European industry in the 1990's include *Ansas*, 1991 OJ, L 152, 54; *Philips/Sagem/Thomson*; *LH/SAS* [1996] L054/28. In the latter case involving the second and third largest European airlines, besides the need for the restructuring of the European air transport industry, one of the factors influencing the decision was that the alliance gave the parties a more efficient worldwide network which enabled them to compete more effectively against other, notably non-European, airlines. See XXVIth Competition Report, at 71. See also White Paper on « growth, competitiveness and employment ». The challenges and ways forward into the 21st Century, COM(93) 700 final, 5 December 1993, stressing the need to improve the overall competitiveness of the European economy.

⁶⁴²It is notably the last condition of Article 101(3) that sets the ultimate limit to any defense, implying that if an agreement led to the elimination of competition, it could not be saved on industrial policy grounds or other public interest grounds. See dissertation defended at EUI by Bouterse.

the extent that they can be subsumed under the four conditions of Article 101(3).⁶⁴³ One can therefore never entirely rule out non-competition criteria from that methodology in so far as they can be justified as promoting the broadly worded goal of technological or economic progress and do not result in the elimination of competition.

* * *

⁶⁴³Commission Notice Guidelines on the application of Article 101(3) of the Treaty (2004/C 101/08), paragraph 42. See to that effect implicitly paragraph 139 of the Matra judgment and Case 26/76, Metro (I), [1977] ECR 1875, paragraph 43.

CONCLUSIONS

Since joint ventures are perhaps the most complex phenomenon in the antitrust landscape, involving a wide variety of forms and contractual arrangements, as well as both structural and behavioural effects on competition within and outside the joint venture, it is difficult to design legal solutions that would provide sufficient legal certainty without compromising the need for a flexible assessment taking account of the specific features of each case. These underlying difficulties have been the same in both the European Union and the United States, and neither system has escaped criticism of the way of addressing them or of the uncertainties concerning enforcement action. Yet, the criticism and uncertainty has had different objects and reasons. In the EU, much of the debate has been dominated by the categorical legal classifications making the specific jurisdictional distinction between the mutually exclusive regimes of the EU Merger Regulation and Article 101 TFEU, including the controversial concentration privilege which was not based on a sound economic justification. In the US, in turn, the reason for criticism has been much less the quality of the approach or the analysis as such, and especially not the allocation of cases between the relevant statutes, but rather the lack of guidance and uncertainties concerning the application of the conventional modes of antitrust analysis to joint ventures, including the borderline between the *per se* rule and the rule of reason and the question of whether the conduct of the joint venture should be viewed as that of a single undertaking or as the result of concertation between the parent firms. Both systems have been able to remedy many of these problems.

This dissertation has demonstrated that the categorical approach to joint ventures in the EU has involved, over time, a number of specific problems and issues that have been avoided in the United States. In the EU, the concepts employed to make the jurisdictional distinction between the mutually exclusive regimes of the EU Merger Regulation or Article 101 TFEU, first the dichotomy between concentrative and cooperative joint ventures and thereafter the concept of a full-function joint venture, have raised a number of complex assessments and interpretations, and led to forum shopping as a result of the discrepancies between the applicable statutes.

The comparison between the EU and U.S. approaches towards joint ventures has had the value of helping to understand and explain the differences by a number of specific legal and political constraints that have shaped the EU approach. These constraints included notably the traditionally narrow concept of concentration coupled with the late arrival of a proper Merger Regulation and the subsequent high thresholds of its application, on the one hand, and the bifurcated structure of Article 101 TFEU with a broad scope of the prohibition of restrictive agreements in its first paragraph and the exemption mechanism embedded in the third paragraph, on the other hand. In the U.S., the absence of similar constraints and the lesser tendency towards strict legal classifications, together with at least a partially different understanding of the net competitive effects of limited cooperation as compared to full integrations, has resulted in a simpler and more flexible framework for the analysis of joint ventures under antitrust rules.

In this work, the different approaches to joint ventures have been traced down to some early developments, which go far beyond a simple finding of a stronger tendency for legal categorisation in the European legal culture, which will be further elaborated in Section 1 below. While this basic difference towards legal classification involves a high degree of legal technicality, Section 2 will bring together the findings showing that it has, over time, involved some more or less significant implications that have reflected more fundamental issues, such as the overall enforcement attitude towards industrial cooperation between competitors as compared to mergers. Section 3 thereafter reconsiders the situation in the current context and, inspiring from the insights learned by studying the US approach, concludes with a recommendation for a further clarification and simplification of the EU approach without, however, calling for a major overhaul of the relevant rules.

1. Comparative explanations

The first explanation for the contrast in the approach towards joint ventures lies on the different legal and political context in which those approaches developed. In the EU, competition rules are much younger than the U.S. antitrust rules, and it was not until 1990 that a proper instrument to control mergers entered into force within the EU. This legal vacuum was corroborated by the European Commission's policy of not applying Article 101 TFEU to mergers and concentrative joint ventures, which meant that fully integrated joint

ventures that eliminated all competition between the parties could in practice escape antitrust control, whereas more limited partial integrations involving only joint R&D and/or production were subject to strict scrutiny under Article 101 TFEU. Whilst the outspoken reasons for not applying Article 101 TFEU to mergers related primarily to legal technicalities, such as inadaptability of the time-limited and withdrawable exemption decisions and the sanction of nullity to mergers involving significant investments and sunk costs, there were also some political aspects that arguably played a role. In the early decades of EU antitrust enforcement in the 1960's and 1970s, European markets were characterized by a high degree of fragmentation, and industrial policies favoured combinations between firms to enable them to better compete against non-European rivals. Merger activity was thus encouraged rather than deterred. Some Member States were also reluctant to cede power over their industrial structures to the European Commission, which explains why it took so long in the EU to introduce a proper instrument for merger control.

On the other hand, there was the dilemma of retaining sufficient control over horizontal dealings between competitors, which led to a narrow construction of the concept of merger and concentrative joint venture to avoid that a large number of horizontal agreements would escape antitrust scrutiny. This narrow concept was then codified in the dichotomy of concentrative and cooperative joint ventures to make the distinction between the scopes of the mutually exclusive provisions of the Merger Regulation and Article 101 TFEU. Although the merger category was subsequently widened to cover all full-function joint ventures, those involving coordination aspects are still subject to the specific rules of Articles 2(4) and 2(5) of the Merger Regulation which allow to apply Article 101 TFEU criteria to possible coordination concerns.

In the United States, the legislator and antitrust enforcers were not exposed to similar considerations. First, even prior to the introduction of the Clayton Act in 1914, there was no obstacle to apply section 1 of the Sherman Act to mergers (like Standard Oil) , provided that the transaction qualified as a contract or conspiracy in restraint of trade. Second, the introduction of the merger statute did not affect the scope of Section 1 of the Sherman Act, as the US rules concerning mergers and horizontal agreements, respectively, were not designed to be mutually exclusive but both of them could be relied on in the same case. This means that whilst under the EU competition law a merger cannot be challenged under Article 101 TFEU and, vice versa, a horizontal agreement cannot be examined under the Merger Regulation

unless it is ancillary to a merger or is part of the coordination aspect of a full-function joint venture, in the United States nothing appears to prevent a court from concluding that a merger within the meaning of Section 7 of the Clayton Act constitutes also a contract, combination or conspiracy in restraint of trade under Section 1 of the Sherman Act. It has therefore not been necessary to define strict criteria or to articulate detailed concepts in order to allocate joint venture cases into the ambit of one or the other statute. Moreover, the enforcement guidelines for mergers and competitor collaborations, respectively, are not limited to one or the other statute. For instance, a production joint venture set up in a corporate form can be examined under Section 7 of the Clayton Act, applying both the merger guidelines and competitor collaboration guidelines *mutatis mutandis* in particular in the assessment of market power. Second, any genuine joint ventures involving efficiency-enhancing integration of economic activities are analysed under a similar methodology including inquiry to both market power and efficiencies, be it under Section 1 of the Sherman Act or under Section 7 of the Clayton Act, the crucial question under both statutes being whether the venture is, on balance, anticompetitive. Third, as only mergers and joint ventures formed through stock or asset acquisitions are subject to the filing under the HSR Act, firms might rather wish to avoid qualifying as mergers, which would subject them to government scrutiny. Mergers have therefore not benefited from a more lenient treatment than efficiency enhancing horizontal agreements, such as genuine joint ventures that typically involve integrative efficiencies.

In the U.S., hence, whether the assessment is done under the rule of reason of Section 1 of the Sherman Act or Section 7 of the Clayton Act does not make any meaningful difference, other than that the former is normally applied *ex post* to actual conduct that has already occurred whereas the latter involves a forward-looking assessment of mergers *ex ante*. This does not, however, mean that there would be no legal characterisation under the U.S. antitrust law. This brings us to the issue of a "dual standard", proposed by certain European scholarship as the basis for the differential treatment of concentrative and cooperative joint ventures in the EU competition law. In the U.S. one may speak about a "dual standard" as well but it is different in content and function, as legal characterisation has been primarily concerned with finding an appropriate basis for distinction between the *per se* approach and the rule of reason, not between the standards for mergers and cooperative agreements like in the EU. As early as in 1911, when there was no specific statute for mergers, the Supreme Court implied in *Standard Oil* that mergers and acquisitions should be subject to a rule of reason rather than to a *per se* prohibition. The subsequent case law thereafter gradually refined the borderline between these

modes of analysis so that efficiency-enhancing integration of economic activity became to be analysed under a lenient rule of reason standard, whereas outright cartels and naked restraints such as price fixing, market sharing and group boycott were considered per se illegal. The wisdom is that naked restraints have as their sole purpose the elimination of competition between the parties and are so blatantly illegal that there is no need to assess their purpose or effects, whereas consolidation and partial integration of activities typically aim at achieving legitimate business purposes and efficiencies, therefore meriting an effects-based analysis and prohibition only exceptionally when they result in excessive market power.

This same basic logic appears to have been at the heart of the European dual standard which, however, drew the borderline in a different place between those transactions that should be prohibited only exceptionally (i.e. mergers and concentrative joint ventures), and those falling under the a priori prohibition (i.e. horizontal agreements including cooperative joint ventures). Unlike in the U.S., the analytical emphasis was on legal classification of different clauses of commercial agreements rather than on the distinction between the prohibited forms of collusive conduct and lawful collaboration. This was because in the EU the scope of the prohibition of Article 101(1) TFEU was, until the New Approach adopted at the beginning of the 2000's, very broad including also agreements that involved significant efficiencies and often little, if any, anticompetitive harm. Until the entry into force of Regulation 1/2003 in 2004, the parties had to legalize their agreements by notifying them to the European Commission in order to obtain an exemption under Article 101(3), and it was only in this context that a full economic analysis comparable to that of rule of reason was conducted. In practice, this meant that the stricter treatment did not concern only cartels and other naked restraints but extended also to many efficient and pro-competitive agreements, including cooperative joint ventures that were limited in time and/or in functions.

It was precisely this substantive and methodological discrepancy between the basic regimes that existed in the EU at least until the early 2000's that was absent in the United States. The incorporation of economic principles into the legal standards has been more symmetric in the U.S. than in the EU where economic analysis made its breakthrough in Article 101 TFEU framework much later than in the context of the Merger Regulation. In the U.S., both Section 1 of the Sherman Act and Section 7 of the Clayton Act have been embedded in the same economic theories over time. Moreover, in the EU considerations not directly related to competition, such as competitiveness or the European industry and social arguments, were

often mentioned in exemption decisions under Article 101(3) but refused in the context of merger rules which were construed to include only narrower competition criteria. While references to non-competition considerations including industrial and other policy concerns became increasingly rare in the last exemption decisions, goals pursued by other Treaty provisions cannot be entirely excluded. This kind of internal discrepancy does not exist in the United States between the contemporary rule of reason of Section 1 of the Sherman Act and Section 7 of the Clayton Act, which are both based strictly on competition criteria. A justification or defence not available for a merger would not be acceptable under Section 1 either, and vice versa. This difference should not, however, be exaggerated, since the last condition of exemption under Article 101(3) TFEU sets the ultimate limit to any defence, implying that if an agreement leads to elimination of competition from a substantial part of the Common Market, it cannot be saved on any grounds, be it related to competition or other considerations. In the exemption practice under the now superseded Regulation 17/62, the European Commission in fact assimilated this criterion to that of dominance under the Merger Regulation, which attenuated the practical impact of this divergence.

In this context, it is also useful to note that in the EU the approach to joint ventures developed primarily through individual cases examined for the purposes of granting an exemption at the stage of the formation of the collaboration. In practice, hence, until the abolition of the notification system in 2004, Article 101 TFEU was used, not only to catch anticompetitive behaviour that had already occurred but also as an ex ante means of market structure control. As the prohibition of Article 101(1) TFEU was very broadly construed, most joint ventures between actual or potential competitors were considered contrary to that provision and had to be notified to the European Commission to be exempted. If not, the agreement was considered null and void. Section 1 of the Sherman Act, which does not have such a bifurcated structure, has never included a comparable filing mechanism involving a review of the case and a decision concerning its legality. The formation of joint ventures as such has normally not been the issue under Section 1 of the Sherman Act but the U.S. Courts have been primarily concerned about the use of the joint venture format in an attempt to disguise their cartel behaviour or to validate illegal collateral restraints under the doctrine of ancillary restraints. The bulk of the cases therefore concern these borderlines.

In the current EU system, the compliance under the first and third paragraphs of Article 101 TFEU is also a matter of self-assessment, the same way as under Section 1 of the Sherman

Act, and therefore non-full function joint ventures are no longer notified to the European Commission. In principle, the bifurcated methodology of paragraphs 1 and 3 of Article 101 TFEU still differs from Section 1 of the Sherman Act in that there are in strict law no intrinsic infringements of Article 101 TFEU. This means that any restrictive agreement that fulfils the four conditions of Article 101(3) is covered by the exception rule, without excluding, a priori, any category of agreements. In practice, however, cartels and other hardcore restrictions (restrictions “by object”) which have as their sole object to restrict competition could hardly fulfil all the conditions for exception, particularly in relation to the efficiencies and consumer benefit that they must produce to qualify for the exception. Restrictions by object can thus be prohibited without analysing their effects on the market. This methodological difference is therefore not as significant in practice, since hard-core restraints are systematically prohibited in both systems, whereas agreements capable of producing significant efficiencies (restrictions “by effect”), such as joint R&D, joint production, joint purchasing and even sometimes joint sales ventures, in turn, are analysed under the economic balance test. Yet, the European definition for hard-core is somewhat broader than that in the United States. In the case of joint ventures, specifically, this is seen, for instance, in a traditionally stricter approach to territorial restrictions in collateral agreements, which relates to the specific issue of market integration goal in the EU.

Overall, the well-known traditional differences in the legal rules and the underlying antitrust philosophy in the United States and the European Union that have had, depending on the stage of development of the relevant laws and policies, a more or less significant impact on the substantive analysis and regulatory burden to which joint ventures have been exposed in these systems. In general, with the passage of time and evolution of the EU competition law and policy, the divergence in the basic legal framework and methodology has significantly narrowed down. The relevant developments in this regard were described in Part I including, in particular, the general increase of economic analysis in the methodology of Article 101 TFEU (including approaches to market definition, potential competition and market power), the shift away from non-competition criteria, the abolition of the exemption mechanism based on the notification system of Regulation 17/62, and finally the revision of the substantive criteria of the Merger Regulation to accommodate a test of significant impediment of effective competition (SIEC) and a certain degree of efficiency considerations. Today, the basic setting for antitrust analysis in the EU is hence rather similar to that in the United States, including tools and substantive standards that are much alike regardless of their terminological

differences. Like the U.S., the EU competition law applies a kind of a "rule of reason" standard to efficiency-enhancing horizontal agreements which are not subject to a systematic formal pre-screening mechanism. Although the analysis under Article 101 TFEU is still technically separated into two paragraphs, the assessment reminds closely the American rule of reason in that the enforcer has the burden to show the anticompetitive effects of the agreement under the first paragraph whereafter the burden of prove shifts to the defendant to show that this harm is outweighed by efficiency gains which are passed on to consumers. The SIEC-test, applied to mergers and full-function joint ventures in a prior notification system, reminds closely the U.S. standard of "substantial lessening of competition" including explicitly both limbs of coordinated and non-coordinated effects, although the European Commission still appears less willing to accept efficiency claims than its American counterparts.⁶⁴⁴

The remaining divergences concern essentially the respective scopes of the applicable sets of rules, the U.S. merger statute including a much broader range of joint ventures than the EU merger control. Importantly for our comparative purpose, the approaching of the substantive assessment of efficiency-enhancing horizontal agreements with that of mergers in the EU, including a structural analysis of the market before concluding that a restriction of competition is appreciable and contrary to Article 101(1), has contributed to the overall convergence with the U.S. system. Market power has indeed gradually emerged as the relevant benchmark for efficiency-enhancing agreements also in the policy of the European Commission under Article 101(1) TFEU, by connecting the concept of "appreciable restriction" to the existence of market power, even though admittedly the European Courts in Luxembourg have not endorsed this approach. Today, regardless of whether a joint venture is considered a simple collaboration or merger-like, both the EU and the US antitrust laws evaluate the underlying market power of the joint venture and each of its participants to determine if the venture will enable its participants to restrict competition. In this context, both systems pay attention to similar variables, such as the ease and likelihood of new entry and counterweiling buyer power. Where the joint venture results in such a deterioration in the market structure that oligopolistic collusion or unilateral price leadership is likely to occur, efficiency claims are not likely to save the agreement in either system regardless of which

⁶⁴⁴In the reform of the Merger Regulation in 2004, for the first time the Commission set out levels of concentration as preliminary indicators of anti-competitive effects of mergers and explicitly indicated that, under certain restrictive conditions, efficiencies will be taken into account to counteract the anti-competitive effect of notified operations.

statute is applied. As the governing value in both the U.S. and EU competition law is consumer welfare, efficiencies cannot save an anticompetitive joint venture unless these gains are passed on to the consumer.⁶⁴⁵ Obviously, the ingredients of the applicable standards always involve certain degree of discretion and interpretation, which can lead to divergences in the reasoning and even to conflicting outcomes in individual cases, albeit presumably less frequently than in the past.

In terms comparative law, this overall tendency towards more convergence can be qualified as "spontaneous harmonisation" as opposed to a deliberate effort to achieve such convergence. It is indeed customary, in both the EU and the U.S., to look at how things are done in the other system so that both good and bad lessons can be taken into account when legal and policy reforms are planned and designed. Moreover, close cooperation and dialogue between the competition authorities - be it in individual cases or at policy level - has contributed to the general trend towards convergence. Finally, last but not least, in the field of economic law economic concepts tend to find their way into the legal methodology. These are based on economic learning and are therefore universal. It is hence normal that similar concepts (like market power and efficiencies) and assessment methods (like market definition and appraisal of potential competition) are used in different systems, though the timing for their adoption may differ. This is precisely what has occurred in the U.S. antitrust and the EU competition law and policy.

2. Implications of the differences

One of the implications of the different approaches to legal classification of joint ventures under the EU and U.S. laws is undoubtedly the different focus of antitrust analysis. Whilst the EU system has struggled with the jurisdictional question of making the distinction between the mutually exclusive rules of Article 101 TFEU and the Merger Regulation, in the U.S. the emphasis of both judicial and academic analysis has been on the substantive merits of cases, the relevant question being whether any given collaboration is anticompetitive on balance, not whether it falls within the scope of Section 1 of the Sherman Act or Section 7 of the Clayton Act or should be characterized as a merger or a horizontal agreement as such.

⁶⁴⁵ If allocative efficiency, as measured by the aggregate of both consumer and producer surpluses, were the goal, then the deadweight loss resulting from higher prices could be compensated by the increase in the producer surplus.

Another consequence relates to the scope of joint ventures examined under the merger rules. The vast majority of joint venture cases discussed in Part I of this study, including those that were examined under Article 101 TFEU, would most likely have fallen within Section 7 of the Clayton Act and the filing requirements of the HSR Act, provided naturally that the thresholds would have been passed. This concerns particularly non-full function joint ventures between competitors, such as joint production and joint R&D, formed by asset or stock acquisitions as opposed to contractual alliances. As mergers are not subject to a government approval in the U.S., they would not have been cleared or rejected by agency decisions like in the EU but could have been challenged in courts in case of substantial lessening of competition or, more likely, subjected to consent degrees in which remedies could have been imposed. Insofar as the substantive standards for mergers and cooperative agreements have approached each other in these systems, it is unlikely, however, that this difference in legal classification, as such, would ultimately result in conflicting or outcomes in the current frameworks (i.e. prohibition in one system and acceptance in the other system). This depends naturally on the substantive standards including the analysis of anticompetitive harm and efficiencies, be it under the rules concerning horizontal agreements or those concerning mergers. In both areas, there has been a clear tendency towards further convergence in the past years, which as such has been the subject of abundant literature. In both limbs of the assessment, however, conflicting outcomes may result from different interpretations of the facts and market conditions, including market definitions, but these would depend more on the scope for discretion in the analysis than the legal classification under one or the other statute.

It is, nevertheless, interesting to compare some of the illustrative cases and reflect on how they might have been treated in the other jurisdiction. More than likely, some cases which in the past required exemptions in the EU would not have been considered to require full scrutiny because of the lack of antitrust concerns in the U.S., either because they did not involve market power or because the economic analysis was otherwise not sound enough to show anticompetitive harm. This concerns for instance cases involving barely 20 % market shares on competitive markets, such as *Exxon/Shell*, or those concerning parties that were found to be potential competitors on light grounds, like many other cases decided in the 1970's and 1980's (see discussion in subsections 1.1.1.2 and 1.1.2.2). Perhaps the most interesting case in this regard was the clearly pro-competitive production joint venture in *Ford/Volkswagen* (1994), which was considered to violate Article 101(1) under the theory of

restriction of potential competition even where the minimum efficient scale was such that neither party could have realistically entered the market in question alone. It was hence questionable whether any competition was restricted in that case, involving a deconcentrating entry of a new competitive force to the multi-purpose vehicle market dominated by a firm with over a 50% market share. Nevertheless, the founders had to justify their agreement in heavy and time-consuming exemption proceedings, even though in the U.S. logic there was no proper showing of the anticompetitive harm of the joint venture to begin with.

What made the situation even more peculiar, was that at the same time mergers and concentrative joint ventures that eliminated all competition between the parties were subject to much faster and legally more certain merger proceedings. For instance, had the parties in the above cases *Exxon/Shell* or *Ford/Volkswagen* decided to extend their collaboration - and hence the restriction of competition - to the sales functions and withdrawn themselves from the market in question, adding thus to its concentration, their joint ventures might have qualified under the Merger Regulation as concentrative joint ventures (provided that the notification thresholds were met) and would have likely to be cleared in Phase I within one month, instead of over two years under Article 101 TFEU exemption proceedings.

The above described situation was an illustration of the “concentration privilege” in action. Indeed, while determining the borderline between the different types of joint ventures in the EU has always been a highly technical exercise, it has borne some significant legal, political and practical implications over time. The most interesting of these for the comparative purpose of this work relate to the substantive, procedural and institutional discrepancies that previously existed between the Merger Regulation and Article 101, which led to favoring mergers and concentrative joint ventures over more limited cooperation. Before the Merger Regulation entered into force in 1990, the situation was even more awkward because concentrative joint ventures escaped control under Article 101. For instance a pure R&D joint venture *Henkel/Golgate* was considered to violate Article 101(1) and thus required an exemption under Article 101 TFEU in onerous filing proceedings, whereas in the same period a concentrative joint venture *SHV Chevron* which eliminated all competition between the parties was not subject to any control because it fell outside the scope Article 101.

In the United States, there was no comparable discrepancy, not only because the merger statute had been enacted as early as in 1914 but also because Section 1 of the Sherman Act

was available to challenge also cases in which the parties did not remain actual or potential competitors. This occurred for instance in the case of *Union Carbide Corporation* in 1996 which was set up by a production partnership agreement and as such fell outside the merger proceedings in the U.S.. Moreover, the rule of reason analysis under Section 1 of the Sherman Act, subject to self-assessment, has never implied a stricter treatment than Section 7 of the Clayton Act. Rather, with the filing requirements of the Hart-Scott-Rodino Act, in the U.S. mergers have been subject to a heavier regulatory burden than looser-knit collaborations. Finally, because of the broader scope of the merger concept, a corporate R&D joint venture like *Henkel/Colgate* which was exempted under Article 101(3) TFEU in the EU might well have been treated as a merger case in the U.S.. If this was the case, it could of course have been challenged in court had it led to substantial lessening of competition.

The term "concentration privilege" as such is likely to attract curiosity in the United States where market concentration has not entailed a similar positive connotation, when compared to more limited efficiency-enhancing cooperation between competitors. To the contrary, U.S. courts and antitrust agencies have, since decades, highlighted the virtues of limited cooperation by giving them explicit credit for not completely ending competition between the parties like mergers do. Hence, even where a full merger could be found to substantially lessen competition under section 7 of the Clayton Act, a joint venture limited in duration and/or scope might still have been considered acceptable - be that under Section 7 of the Clayton Act or Section 1 of the Sherman Act. This was clearly stated in several individual cases under Section 7 of the Clayton Act, such as *Penn-Olin* as early as in 1964, *GM/Toyota* in 1982 and *Alcan Aluminium* in 1985, and under Section 1 of the Sherman Act, such as *Rothery* in 1986, as well as the U.S. Guidelines for International Operations of 1988 and for Competitor Collaborations of 2000. A similar line of reasoning occurred in a fully-integrated joint venture case *Ivaco* which was enjoined in the U.S. in 1989 under Section 7 of the Clayton Act because similar efficiencies could have been achieved by more limited cooperation such as joint production. Even if the European Commission has also recently used similar reasoning (e.g. *Inco/Falconbridge* in 2006), in the late 1980's when *Ivaco* was decided, this case could well have escaped control in the EU because the Merger Regulation was not yet in force and Article 101 TFEU was not applied to mergers and concentrative joint ventures, unless the parent firms were somehow found to remain potential competitors in the

market of the joint venture.⁶⁴⁶ This was the case in *Wano/Swartzpulver*, which was prohibited under Article 101 because the parents were considered to remain potential competitors and the joint venture would have led to the elimination of competition on the substantial part of the Common Market.

Clearly, the production joint ventures at issue in *Penn-Olin*, *GM/Toyota* and *Alcan Aluminium* which were examined under Section 7 of the Clayton Act but considered to involve less competition concerns than full mergers due to the scope of competition they left for the parties, would have received a different reasoning in the EU at the time these cases were decided. In fact, the very same aspects, such as the limited scope and/or duration of the agreement, that in the U.S were considered to mitigate competition concerns as opposed to mergers and full integrations, would have resulted in negative factors in the EU because they would have allowed to bring the case under Article 101 TFEU. As these cases were decided in the period where there was still no merger control in the EU and the European Commission considered that Article 101 was not applicable to mergers, the comparison with a full merger scenario would therefore have led to the opposite conclusion to subject limited cooperation to a stricter treatment. On the other hand, these cases could of course have been exempted in the EU, had they fulfilled the four conditions for exemption under 101(3). In these proceedings, particularly in the context of the assessment of the last condition relating to the lack of elimination of competition, the Commission might then have concluded that the fact that the restriction of competition did not extend to all parameters of competition, such as marketing, was actually a positive factor, like it did in some joint R&D cases (e.g. *Henkel/Colgate*, *Alcatel/ANT*) and joint production cases (e.g. *Exxon/Shell*, *GEAE/P&W*), without however making the comparison to a merger scenario. Apart from the different applicable statute, in substantive terms, the difference in these cases was therefore essentially about the timing of accepting such arguments and in the finesse of the reasoning. As to procedural aspects, especially controversial cases in the United States, such as *GM/Toyota*, also involved lengthy administrative proceedings lasting several years until the consent degree was adopted.

Be that as it may, a deeper look into the rationale behind the European concentration privilege shows that it reflected a fundamentally different understanding of the net competitive effects

⁶⁴⁶ This is without prejudice to the eventual application of Article 102 TFEU if the conduct in question amounted to abuse of dominant position (see e.g. the judgment of the European Court of Justice in case 6-72, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, judgement of 21 February 1973)

of mergers as opposed to more limited collaborations in these systems. The concentration privilege was, indeed, neither a coincidence nor an unintended consequence of the interaction of the applicable rules in the EU. The relevant Commission Notices in the 1990s indeed highlighted the virtues of permanent structural changes as expressions of dynamic market restructuring, while considering that cooperative joint ventures deserved stricter treatment due to the risk of coordination of the participants' market behavior they involved. So this risk was considered a potentially greater harm than the total elimination of that competition through a merger, even where similar efficiencies could be achieved through either form. This was also apparent in antitrust literature quoted in this work, American commentators typically advocating for more lenient treatment for joint ventures than for mergers and some European ones treating cooperative joint ventures as more suspect than mergers.

The consequences of the concentration privilege are well known. It led to forum shopping and distorted firms' organisational choices towards concentration. This is precisely what the economic literature cited in Section 5 of the Introduction cautioned against, concluding that it would not make any sense to either handicap or favor partial integrations through joint ventures over full mergers. The extension of the Merger Regulation to cover all full-function joint ventures in 1998 brought only a partial remedy, since a large group of joint ventures remained within the broad scope of the *a priori* prohibition of Article 101(1) and the slower and more cumbersome exemption proceedings of Regulation 17/62. This framework was still perceived as less favourable than the Merger Regulation at least until the early 2000's when economic analysis made its breakthrough under Article 101(1) and particularly the abolishment of the prior notification system under Article 101(3) in 2004. Hence, the full-function concept encouraged firms to contribute to their alliance a full range of activities to benefit from a fast one time clearance instead of an exemption decision which was always granted for a limited time period. It is, however, symptomatic that the Commission Notice concerning full-function joint ventures no longer referred to the need to subject cooperative joint ventures to stricter treatment than concentrations. Moreover, for instance the R&D block exemption erected a higher market share safe harbour for joint ventures limited to R&D, possibly with joint production, than for those extending to marketing stage, implying thus a more lenient stand towards joint ventures with limited functions.

Besides these implicit signs, there are more explicit indications suggesting that the EU position in relation to the concentration privilege has changed. The current EU Horizontal

Merger Guidelines require to consider whether there are less anti-competitive alternatives to achieve similar efficiencies, such as a cooperative joint venture, that are reasonably practical in the parties' business situation. This occurred concretely in *Inco/Falconbridge* in which the Commission considered that a limited function joint venture would have been capable of achieving the claimed efficiencies with lesser damage to the market structure than the proposed merger. This kind of reasoning reminds closely that of the US agencies and courts in cases such as *Ivaco*, *GM/Toyota* and *Alcan Aluminium*.

Part I of this study demonstrated how the concentration privilege has gradually lost much of its meaning along with the successive legal and policy reforms, including the extension of the scope of the Merger Regulation in 1998, the increase and improvement of economic analysis under Article 101(1) TFEU and the revision of the applicable block exemptions in the early 2000's, and, finally, the removal of the exemption mechanism of Regulation 17/62 by Regulation 1/2003 in 2004. Apart from the better legal certainty provided by the Merger Regulation, these reforms have largely eliminated the previous forum shopping incentives, which distorted organisational choices of economic actors towards concentration rather than more limited, and thus potentially less harmful, cooperation.

Whether there is still something left of the EU concentration privilege in substantive terms is, however, not entirely clear since at least on paper the double test provided for cooperative full-function joint ventures in the Merger Regulation makes the treatment stricter than that provided for concentrative scenarios to which only the merger test applies. This research did not find cases in the U.S. that would be comparable with these scenarios. Rather, the U.S. cases cited in this study have all concerned either clearly non-full function cases, such as pure production joint ventures *GM/Toyota* and *Penn-Olin*, or fully integrated ones comparable to concentrative full-function ventures like *Ivaco* and *Texaco/Shell*. The latter case is interesting because it also illustrates the only advantage that mergers actually have in relation to efficiency-enhancing collaborations that fall within the rule of reason. The behaviour of a merged entity can normally not be challenged as the product of collusion between the parent firms whereas a loose-knit alliance is not immune against such challenges during its life, as was shown in the most recent relevant case decided by the Supreme Court in *American Needles*. By comparison, whilst the behaviour of separate undertakings in *American Needle* would have been likely to fall within the scope of Article 101 TFEU in the EU, it would not have been possible to bring a case under Article 101 TFEU against the parents firms of

Texaco/Shell for the pricing decisions of the venture. The latter reminded a scenario of a typical concentrative full-function joint venture within the meaning of the EU terminology. The joint venture's pricing decisions as a single firm could clearly not have amounted to an agreement or a concerted practice between its parent companies that had withdrawn from the market in question. The Supreme Court finally drew a similar conclusion, which had already been the mainstream position in the U.S..

Today, one may, hence, legitimately conclude that the most significant consequence of the contrast between the categorical approach in the EU and the absence of comparable conceptual distinctions in the U.S. concerns primarily the level of complexity of the analysis of individual cases. In the EU, the enforcing authority and joint venture parties have to address a number of additional questions at its formation, such as joint control and the autonomy of the joint venture, to determine the applicable statute and the related filing requirement. In the U.S., whether any given joint venture has the features of a full-function joint venture, including its autonomy, or those of a partial function joint venture, is irrelevant for the purpose of determining the filing requirement under HSR Act and scrutiny under Section 7 of the Clayton Act. On the other hand, a certain degree of autonomy of a joint venture may be considered a remedy against the risk of collusion, as illustrated by the Chinese walls required in case *GM/Toyota* to prevent the exchange of information between the founders. In the same vein, when the joint venture is a market actor in its own right and its parent firms have exited the market, like in a typical full-function case, its actions can normally not amount to conspiracy between the parents. Therefore, even though these features have no jurisdictional significance, they may have some relevance during the life of the joint venture to determine whether the criterion of plurality of actors under Section 1 of the Sherman Act is met or when imposing remedies against collusion risk. In both scenarios, nevertheless, it is only when the parties have market power and are thus capable of affecting competition adversely that these issues have any bearing. In the EU, in turn, the autonomy and other characteristics of a full-function joint venture are examined in every case notified under the Merger Regulation. If not, it can be examined either by the European Commission or Member States' national authorities under Article 101 TFEU, as the latter also have the power to enforce Article 101, or by Member States' authorities under national competition laws.

3. Insights for legal policy formulation in the EU

This work is concluded when one may consider that the approaches to joint ventures in both the EU and the US are, to a large extent, well-settled and mature. Major reforms concerning specifically joint ventures are not expected in either system. In the EU, many – and the most crucial – problems identified in the past have, to a significant extent, been remedied. The most significant of these was the controversial dichotomy between concentrative and cooperative joint ventures and the contestable differential treatment between the two categories, known as the "concentration privilege". It has, nevertheless, been interesting to study joint ventures today when a certain degree of stability has been reached. It is notably the experience gained in recent years that allows to draw a number of conclusions in support of proposing further revisions of the law in this area. Based on the findings of this dissertation, the framework for the analysis of joint ventures under Article 101 TFEU and the Merger Regulation is undoubtedly more complex than its American counterpart. The EU approach indeed still leaves scope for improvement and clarification.

It is the argument of this dissertation that the U.S. approach would provide useful insights and inspiration for this purpose at least in two specific areas. These concern the fundamental issue of general comparison between limited joint ventures and merger scenarios, on the one hand, and the more technical question of specific treatment of spillover effects, on the other hand. This should not be understood as a claim that the U.S. system would in general be superior to that of the EU. The claim is only that a number of useful lessons can be learned and translated into clarifications and improvements in the analysis of joint ventures in the EU.

Let us, however, first look into the jurisdictional question concerning the allocation of joint ventures between the merger rules and those for horizontal agreements, which has been the main source of criticism in the EU approach but has not created any significant problems in the U.S.. To decide whether a given joint venture falls within the scope of the EU Merger Regulation, the European Commission addresses a number of questions that are not considered relevant in the U.S., such as whether the collaboration is autonomous, including inquiry to joint control and possible trade links with the parents, and whether it performs all the functions of a business entity on a lasting basis. While some of these elements may be taken into account in the substantive analysis (e.g. limited functions and duration as reducing possible market power concerns) or when imposing remedies to address otherwise possible

substantial lessening of competition (e.g. management autonomy of the joint venture as part fire-walls to avoid the exchange of competitively sensitive information), they do not determine the applicable statute or the filing requirement in the U.S..

The current EU system also leaves a significant number of joint ventures that often require substantial investments and sunk costs (such as production and R&D agreements) outside of any pre-screening mechanism at the EU level, which has attracted some concerns over the lack of legal certainty of the self-assessment under Article 101 TFEU. True, some of the solutions suggested in the past, such as moving all genuine joint ventures within merger control or the bright-line shareholding test proposed by professor Hawk in the early 1990's, may still sound attractive in view of these concerns. However, no strong calls for radical changes in this respect have been made in the public consultations conducted by the European Commission in connection with the periodic reviews of the Merger Regulation and the report on Regulation 1/2003 in 2009. Indeed, apart from occasional regrets concerning some interpretational issues around the concept of full-function joint venture and some uncertainties about the application of Article 101 TFEU to partial function joint ventures, this jurisdictional divide appears to be widely accepted. Moreover, any major changes touching upon the scopes of the relevant statutes or their mutual exclusivity would interfere with the vertical division of powers between the European Commission and the EU Member States. The legal characterisation of the joint venture indeed determines which authority or authorities will eventually examine the case. Any enlargement of the scope of the EU Merger Regulation would squeeze the powers of national authorities to examine these cases under their national laws or under Article 101 TFEU which they are now entitled to apply fully.

As a consequence, even if the full-function concept may not be the most efficient legal solution in terms of transaction costs, the material scope of the EU Merger Regulation is unlikely to be revisited in any foreseeable future. It would therefore not make much sense, at this point, to call for a major overhaul of a legal situation that appears to be functioning satisfactorily, albeit not perfectly, in the EU.

Need for clarification of the relation between mergers and partial function joint ventures

There are, nevertheless, some detailed aspects in the substantial analysis within both the Merger Regulation and Article 101 TFEU that would benefit from revisiting and clarification.

One of such aspects concerns the clarification of how the analysis of joint ventures under Article 101 TFEU compares with that of mergers. In the EU, the relationship of the substantive analysis under Article 101 TFEU and the Merger Regulation has indeed never been clearly spelled out and officially explained. The 2010 EU Guidelines for Horizontal Agreements do not give any explicit indications in this regard, even though they do provide detailed guidance on market power analysis. This is regrettable, particularly in view of the past debate over the concentration privilege consisting of a favourable treatment of mergers and concentrative joint ventures over cooperative ones. In comparison, the U.S. Competitor Collaboration Guidelines devote a whole section to distinguishing competitor collaborations from mergers and another one to factors relevant to the ability and incentive of the participants and the collaboration to compete, which may require some adjustments to the market power analysis as compared to a merger scenario (see Section 2.2.2.2 of this dissertation). Under the rule of reason analysis within Section 1 of the Sherman Act the first step is indeed to determine, in accordance in the U.S. Horizontal Merger Guidelines, whether an outright merger between the same parties on the joint venture market would lead to substantial lessening of competition in violation of Section 7 of Clayton Act. If not, there should be no need for further inquiry.

It is also essential to recall that the application of the Competitor Collaboration Guidelines is not limited to cases under Section 1 of the Sherman Act but they also cover, *mutatis mutandis*, cases under Section 7 of the Clayton Act to the extent that they do not result in total elimination of competition between the parties like full mergers. In other words, out of different joint ventures only fully integrated ones (rough equivalent to concentrative joint ventures within the EU terminology) are analysed under the Horizontal Merger Guidelines alone. For the rest, both sets of Guidelines may be applied simultaneously and it is the Competitor Collaboration Guidelines that define how market power analysis is adjusted to reflect the remaining competition between the parties.

In the U.S., hence, a merger scenario is used as a benchmark and, where necessary, adjustments to market power analysis are made depending on the specific features of the collaboration, including its duration, exclusivity and a number of other factors affecting the parties' ability and incentives to compete. In the range of market shares assigned to the collaboration, the high end of that range is the sum of the market shares of the collaboration and its participants where they have little incentives to compete, whereas the low end is the

share of the collaboration in isolation, which may be justified for instance where the collaboration is totally autonomous from its parents, such as a full-function joint venture within the EU terminology. In the U.S., the key question is thus whether the parties end all competition among themselves or not. If they do, no adjustment to the market power analysis is required but a single-share analysis is appropriate. The remaining scope for competition may, on the other hand, mitigate possible market power concerns, whereas the EU policy does not explicitly recognize this, at least not in the relevant Guidelines. Moreover, in the U.S., this adjusted analysis concerning market power effects can be undertaken under either the Section 7 of the Clayton Act or Section 1 of the Sherman Act. In practice, the U.S. approach implies that if a merger between given parties on a given market would pass muster, then a genuine joint venture should as well. On the other hand, if a merger would lead to substantial lessening of competition, a more limited joint venture, apart from a marketing collaboration eliminating all competition between the parties, might still be acceptable in view of the scope for competition it leaves to the parties.

In fact, *Neven et al.*⁶⁴⁷ proposed a similar approach for the EU policy already in 1998. Even if the EU policy has since then evolved, particularly in terms of economic analysis under Article 101(1) TFEU, it still lacks coherent explanation and explicit guidance on how market power is analysed in the context cooperative joint ventures as compared to mergers. The specialized literature reviewed in Sections 4 and 5 of the Introduction has indeed highlighted that limited collaborations may achieve significant efficiencies without restricting competition as completely as mergers, apart from joint sales agencies and joint marketing that are capable of extracting similar degrees of market power as mergers because of the total elimination of competition at sales level. The shorter the duration of the collaboration the less likely it is considered to cause anticompetitive harm, simply because the parties regain their competitive positions once the collaboration is terminated and therefore the market structure is not permanently damaged. Moreover, if the participants remain potential competitors during the collaboration, they are capable of exerting competitive pressure on each other and on the market, even if they are not actual competitors in the joint venture's activity during its life. In a similar vein, the less functions are vested to the joint venture the more there is scope for competition between the participants either in the upstream or downstream markets. This is true, in particular, when the joint venture is one or more steps away from the marketing stage

⁶⁴⁷ NEVEN, D, PAPANDROPOULOS, P. and SEABRIGHT, P (1998), *Trawling for Minnows*.

and the participants sell the product in question in competition, for instance in pure R&D or production joint ventures. Even if efficiency gains in limited scenarios may be smaller than in cases of full integration - as proponents of a stricter treatment for cooperative joint ventures have argued in the EU - this is compensated by the less drastic restriction of competition when the assessment is done on a sliding scale.

The above does not intend to claim that the European Commission would ignore or disagree with this mainstream position. To the contrary, in the context of its current policy concerning merger-specific efficiencies, it explicitly considers whether similar efficiencies are not achievable by less anti-competitive alternatives such as a cooperative joint venture (EU Horizontal Merger Guidelines), like it did in the case *Inco/Falconbridge*. The point emerging from this dissertation is, however, that in view of the past inconsistencies, as outlined in Section 1.2.1.2, the Commission's approach within the framework of Article 101 TFEU is still not entirely clear and would benefit from clarification. In particular, further indications would be useful on how the assessment of market power in the context of efficiency-enhancing horizontal agreements, including partial function joint ventures, compares with that of full mergers. It now appears that individual showing of efficiencies is required at a lower level of market power under Article 101 TFEU (i.e. the threshold of appreciability) and taken into account until the ceiling of elimination of competition (i.e. the last condition of exception), whereas for mergers a presumption of efficiencies is already incorporated in the general standard which is higher than that of appreciability, coupled with a strict approach to accepting efficiency defences within the SIEC-test. In the absence of clear indications in this regard, one can, however, only speculate that this may reflect the idea that efficiencies would be considered less certain for non-mergers, which would justify requiring individual proof of them at a lower level of market power, but this is far from being clear.

Need for clarification of the current scope and function of Article 2(4) EUMR

Another more technical point on which the EU approach could be improved relates to the legal approach to spill-over collusion under Articles 2(4) and 2(5) of the Merger Regulation, which may trigger the application of the criteria of Article 101 TFEU to coordination aspects of full-function joint ventures. Section 1.3.1 indeed highlighted the various issues raised by this approach, for which the interior logic and methodology of Article 101 appear ill-suited. To the extent "coordination" refers to risk of future conduct, it appears artificial to

characterize the risk of such conduct as an agreement or concerted practice *ex ante* and to apply the balancing test to it, including the condition that the future coordination of the parties' competitive behaviour outside the joint venture be indispensable for the achievement of the claimed efficiencies by the joint venture.

This approach was developed and adopted when there was no proper instrument for merger control and cooperative joint ventures were examined in the notification proceedings of Regulation 17/62. Back then, when the parties remained actual or potential competitors in the joint venture's market or a vertically related or neighbouring market, the Commission did not hesitate to apply Article 101 TFEU at the formation of the venture, unless the agreement fell below the *de minimis* threshold or was covered by a block exemption. A similar approach was followed during the first years of the implementation of the Merger Regulation, based on the dichotomy between concentrative and cooperative joint ventures. Now that all full-function joint ventures may qualify under merger control and the respective substantive standards under both sets of rules have evolved, this approach looks out-dated.

More specifically, even if the initial standard of single-firm dominance in the original Merger Regulation was considered badly suited to assess market power held collectively by the joint venture participants, the issue has subsequently been solved by the doctrine of collective dominance and oligopolistic interdependence developed in case law and administrative practice and thereafter included in the coordinated effects limb of the SIEC-test in the 2004 Amendment of the EU Merger Regulation. Under this test, nothing prevents to analyse the risk of coordination between the joint venture parties, be that in the joint venture market or outside, under the same methodology as coordination with third parties under Article 2(3). This has been proved in numerous cases discussed in Sections 1.3.2.2 and 1.3.3.1 in which the Commission's analysis of the spill-over markets was identical to that of the merger market, when it predicted whether the transaction would increase the risk of collusion on the market to the extent that effective competition would be impeded. It is difficult to see why Article 101 TFEU criteria would be needed in such context. Rather, it would appear that the function of Article 101 in full-function cases could be limited to make sure that possible collateral agreements that are not ancillary to the joint venture do not contain excessive restrictions, which has always been subject to separate analysis under Article 101 TFEU. It would also naturally remain applicable to any conduct within its scope of application between separate undertakings, once the joint venture is operating on the market.

In the U.S., it is notably the forward-looking provisions of Section 7 of the Clayton Act that have been considered appropriate to address the spill-over collusion risk between the joint venture participants, as this statute deals with likelihoods of future anticompetitive behaviour on the market rather than actual conduct. Since tacit collusion cannot be challenged *ex post* without evidence of actual concertation, merger enforcement can avoid creation of market structures that would lead to such collusion. For these reasons, the Sherman Act, as a means of *ex post* control, was considered an insufficient instrument to check mergers which require the possibility to intervene at their incipency before their anticompetitive effects occur. With regard to joint ventures, specifically, this implied that Section 1 of the Sherman Act could not be applied where the question was of a mere increased opportunity for the participants to collude in the future, which was explicitly stated by the Supreme Court in *Penn/Olin* as early as in 1964. This was also the case in the famous GM/Toyota joint venture, which was scrutinized under Section 7 of the Clayton Act and remains the only case in which the Government would have opposed to a joint venture for spill-over concerns, although it finally reached a consent agreement.

This study found no compelling reason why a similar approach could not be followed in the EU, to the extent it concerns prediction of the parties' future behaviour on the market. This implies that coordination of the competitive behaviour between full-function joint venture parties would be assessed under the conventional merger test of the EU Merger Regulation, as explained above. This test can be applied in a scenario of collective dominance regardless of whether that position is held by the joint venturers or with third parties on the market. Furthermore, in practice the coordination test appears to have converged with that of collective dominance and the SIEC-test and therefore the outcome of the substantive analysis is likely to be the same, regardless whether it is the conventional merger test of Article 2(3) or the coordination test of Article 2(4) that is applied, with or without a formal reference to the criteria of Article 101 TFEU. As a matter of fact, it was shown in Section 1.3.2 of this work that the recent trend in the Commission's decisional practice already appears to largely overlook the specific provisions for the assessment of coordination aspects of full-function joint ventures. In the light of the recent decisional practice, the amendment of Article 2(4) - at least the removal of the reference to Article 101 criteria - would therefore not appear to imply a major change to the current practice. Rather, this would remedy the current confusion and contribute to the overall coherence of the rules. The purpose is not to claim that the mere fact that a legal provision is rarely relied on or enforced in practice would mean that it would not

be needed at all, as it can still be efficient in deterring illegal practices for the sake of its existence. The point here is that this provision seems to have lost its "raison d'etre" in the current framework, at least to the extent the Commission itself uses identical methodology to predict the risk of tacit or explicit collusion among all market participants and between the joint venture parties. It would therefore be useful to get further clarification on whether this provision still has some real function, and if so, what the kind of conduct would be targeted by it.

The above should not be understood as suggesting that Article 101 TFEU should have no role in the assessment of full-function joint ventures. Regardless of the fate given to Article 2(4) EUMR, non-ancillary restrictions would continue to be subject to separate assessment under Article 101 like always, the same way as they are examined under Section 1 of the Sherman Act in merger cases in the U.S. The parties could therefore not validate for instance their market sharing or price fixing arrangements as part of their full-function joint venture, to the extent they do not qualify as directly related and reasonably necessary to the venture, in other words under the doctrine of ancillary restrictions.

This comparison has reinforced the conclusion that the reference to Article 101 criteria in Article 2(4) of the EUMR appears largely superfluous in the current system. This is because during the past decade EU competition law has gradually moved closer to its U.S. counterpart in many ways, including a similar division between *ex ante* and *ex post* interventions under the rules concerning mergers and horizontal agreements, respectively, as well as a similar analysis of market power as a threshold for predicting spill-over collusion based on the competitiveness of the market in question. In such a system, there does not appear to be any need to have distinct rules for spill-over concerns. The specific rules in the EU were designed in the latter half of the 1990's when cooperative joint ventures were still examined under the *ex ante* notification proceedings of Article 101 TFEU and the merger standard was still based on dominance, not on market power, and the theories of oligopolistic interdependence only started to gain grounds with no clear analytical framework. In that structure, it would have been difficult to apply the test of single-firm dominance to the behaviour of joint venture parties that remain separate undertakings on the market. Possible coordination between the participants had always been predicted under Article 101 TFEU exemption proceedings at the formation of the joint venture, which appeared to justify the insertion of its criteria into Article 2(4). As explained above, in the current system there do not appear to be any

compelling reasons to keep this provision, at least not in its current form. At the very least, it would be useful to clarify the scope and function of this provision.

This study concludes, hence, with a recommendation to inspire from the U.S. approach to joint ventures in two notable respects. First, the EU approach would benefit from an explanation and clarification on how the analysis of partial function joint ventures under Article 101 TFEU compares with that of mergers, particularly in relation to the assessment of market power. Second, the fate of Article 2(4) should be reconsidered. A sufficiently comprehensive framework would appear to consist of a single merger test to be applied to all effects inherent to the transaction, i.e. coordinated and non-coordinated effects on the market as well as the prediction of coordination between the joint venture parties. The role of Article 101 TFEU in these cases would then be limited to non-ancillary restrictions and possible subsequent collusive conduct between separate undertakings on the market *ex post*. This would further contribute to the convergence with the antitrust approach to joint ventures in the United States.

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