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DEPARTMENT OF LAW

JOINT VENTURES

IN EUROPEAN COMMUNITY COMPETITION LAW

LL M Thesis

by

Magdalena Kouneva

B/C—D

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I. INTRODUCTION

Joint ventures raise a fundamental issue under European Community competition law in that they share features common to both contracts and mergers. Even though they have been appraised either in accordance with the rules for cartels (Article 81[1] of the EC Treaty) or the rules for mergers (the Merger Regulation) the question of which rules to apply has been intertwined with specific anti-trust analysis, in addition to the traditional anti-trust analysis of cartels and mergers. These characteristics distinguish joint ventures from both anti-competitive agreements and mergers. Even though both Article 81 of the EC Treaty and the Merger Regulation seek to achieve the fundamental goal of the maintenance of effective competition within the common market, the logic behind the two instruments varies greatly. Article 81 prohibits agreements which may have an anti-competitive object or effect. By contrast, concentrations with a Community dimension are desired as increasing the competitiveness of the European industry, improving the conditions of growth and raising the standard of living in the Community (Recital 4 of the Merger Regulation), unless they create or strengthen dominant positions as a result of which competition in the common market may be significantly impeded. Being capable of both coordination and structural effects joint ventures raise the question as to where to draw the border line between the control of concentrations and the control of anti-competitive agreements. In this respect the Commission has been looking for a balanced approach that reconciles the risks for competition with the opportunities for competitive benefits.

A specific feature of joint ventures is that there is a considerable diversity among them. The most frequent form of a joint venture is probably where the parent companies form a jointly own subsidiary. However, the joint venture's parents may acquire joint control in an already existing company, or even limit themselves just to a joint committee to decide upon common matters. On the other hand, joint ventures may develop new business activities or enter the parents' market. In the latter case joint venture's parents

[1] Formerly Article 85 of the EC Treaty. This paper adopts the new numbering of the Articles of the EC Treaty according to the Treaty of Amsterdam that entered into force on 1 May 1999. Nevertheless, reference is made to the old numeration, when analysing the treatment of joint ventures prior to 1 May 1999.

may or may not withdraw from the venture's market. Joint ventures may also operate on markets upstream, downstream or neighbouring to their parents' markets. They may be formed in all industries and for the performance of different functions, e.g. research and development, buying and selling, production etc. Finally, joint ventures may be set up merely to disguise a cartel agreement of their parents.

The varying nature of joint ventures means that a precise definition of a joint venture is difficult. For the purposes of the Merger Regulation the European Commission has defined joint ventures as undertakings which are jointly controlled by two or more other undertakings.[2] The Commission's definition focuses on the joint control as an essential characteristic.

Many authors accept the definition of a joint venture proposed by Prof. Bordley that reads as follows:

" An integration of operations between two or more separate firms in which the following conditions are present: (i) the joint venture is under the joint control of the parent firms, which are not under related control" (ii) each parent makes a substantial contribution to the joint venture; (iii) the joint venture exists as a business entity separate from its parents; (iv) the joint venture creates significant new enterprise capability in terms of new productive capacity, new technology, a new product or entry into a new market."[3]

Thus it proves difficult to express the variety of forms in which joint ventures can appear within a single definition. Some definitions focus more broadly on the economic integration between the parties while others emphasize the creation or facilitation of new enterprise capability.

The effects of joint ventures on competition are wide-ranging. On one hand, the Commission has recognized for a long time that joint ventures are capable of contributing to a number of general economic objectives of the Community, including:

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[2] See Commission Notice on the concept of full-function joint ventures under Council Regulation (EC) No 4064/89 on the control of concentrations between undertakings, [1998] OJ C66/01.

[3] Bellamy and Child, *Common Market Law of Competition* (Sweet & Maxwell, 4th edn., 1993), at 225-226, citing Brodley, "Joint Ventures and Anti-Trust Policy" (1982) 95 *Harv. L. Rev.* 1521.

"(i) integration of the internal market, especially by means of cross-border co-operation;

(ii) facilitation of risky investments;

(iii) promotion of innovation and transfer of technology;

(iv) development of new markets;

(v) improvement of the competitiveness of the Community industry;

(vi) strengthening the competitive position of small and medium-sized firms;

(vii) elimination of structural overcapacity."[4]

A strong argument in favour of joint ventures is that similar to mergers they permit greater efficiency, especially when they lead to realization of economies of scale.[5] Joint ventures can combine the complementary assets of their parents in a way that allows the development of a new product which otherwise would not have been developed. The combination of companies through joint ventures allows the participants also to share the costs and risks of undertaking joint activities. Through joint ventures companies can raise capital or overcome entry barriers to product or geographic markets.

Unlike mergers, in which case companies disappear, the creation of a joint venture means the entrance of a new competitor onto the market, i.e. the joint venture company in addition to its parent companies. However, the significance of this effect is often reduced by the fact that parent companies cease to compete in the joint venture's market. Potential competition in the market may be also significantly reduced if the most likely potential competitors decide to carry out business activities jointly rather than separately.

Even though it is difficult to generalize about the effects of joint ventures on competition three particular risks to competition can be distinguished. It has been remarked that joint ventures may lead to loss to competition between the parents in the joint venture's market. On the other hand, the creation of a joint venture can provide its

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[4] Fifteenth Report on Competition Policy (1985).

[5] See G. Werden, "Antitrust Analysis of Joint Ventures: An Overview" (1998) 66 *Antitrust Law Journal*, at 702. However, efficiency gains are deemed pro-competitive where they enable companies better to compete on the market, particularly if any cost savings are passed on to the consumers. In some circumstances joint ventures may prevent or lessen competition while succeeding in realizing efficiencies: see *United Nations Conference on Trade and Development*, "Concentration of market power through mergers, take-overs, joint ventures and other acquisitions of control, and its effects on international markets, in particular the markets of developing countries" (1993).

parents with the opportunity to coordinate their competitive behaviour in areas outside the joint venture where they remain competitors. Finally, the creation of a joint venture may have the result of markets being effectively foreclosed to third parties. However, the importance of these possible anti-competitive effects depends on the structure of the markets. They would be more significant if the market shares of the undertakings concerned are relatively high are there are relatively high barriers to entry to the market.

Against this background, complex rules have been developed under the Community competition law in order to deal with the implications of joint ventures on competition. Prior to the Merger Regulation certain joint ventures were deemed "partial concentrations" and escaped the application of Article 81 (formerly 85) of the EC Treaty. The Merger Regulation, when adopted, included only concentrative joint ventures that do not give rise to the risk of coordination in its scope of application. As a result, joint ventures were divided into two categories - cooperative and concentrative joint ventures, subject to different substantive and procedural rules. However, the fact that cooperative structural joint ventures had similar effects on market structure to concentrative joint ventures showed the limits of this approach. Finally, the 1997 amendments to the Merger Regulation appear to mark a radical change in the Commission's traditional policy in this area. All full-function joint ventures with a Community dimension were subjected to the more favourable substantive and procedural rules of the Merger Regulation. Only the coordination effects of full-function joint ventures continue to be appraised in accordance with the criteria of Article 81(1) and (3) of the EC Treaty.

This paper looks at the regime of joint ventures according to the Community competition rules. The first chapter reviews the Commission's approach in applying Article 81 of the EC Treaty and the Merger Regulation to joint ventures, before the 1997 amendments to the Merger Regulation came into force. The second chapter then focuses on the new treatment of joint ventures in the light of the amendments to the Merger Regulation. The third chapter of the paper refers to individual joint venture cases from the media and telecommunications sectors. On the basis of the conclusions from these cases, it aims to highlight current trends governing the Commission's approach towards joint ventures in general. Final conclusions on the regime of joint ventures according to

the European competition law will be drawn in the last part of the paper, which takes into account the overall development of the Commission's policy in this area.

II. CONCENTRATIVE AND COOPERATIVE JOINT VENTURES

1. The Origin of the Distinction

Neither Article 81 nor Article 82 of the EC Treaty[6] explicitly refers to concentrations. Therefore, two periods can be distinguished – before and after Regulation the Merger Regulation[7] came into force in 1990. Initially, in its 1966 Memorandum on the Problem of Industrial Concentration (the 1966 Memorandum)[8], the Commission expressed the view that Article 85 (now Article 81) could not be applied to agreements the purpose of which was the acquisition of total or partial ownership of enterprises or the reorganization of the ownership of enterprises. It was said that concentrations needed permanent authorization and not an exemption based on public policy considerations and fixed in terms of duration. Structural changes in the market were to be controlled under Article 86 (now Article 82).[9]

A change in the Commission's position towards joint ventures was visible in the Sixth Report on Competition Policy.[10] In the absence of merger control legislation, the Commission referred to the existing competition provisions of the EC Treaty. The Commission stated that it would apply Article 85(1) (now 81(1)) to joint ventures where parent companies are actual or potential competitors except (i) cases in which the parent companies transfer all their assets to the joint venture and themselves become not more than holding companies; and (ii) cases where the transfer of assets is limited to a part of the total business previously engaged in by parent companies provided the parent companies completely and irreversibly abandon business in the area covered by the joint venture and there are no spillover effects. The former situation was considered to constitute a merger. In the latter situation, where the parents transferred part of their assets to the joint venture and themselves completely withdrew from the venture's market

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[6] Formerly Articles 85 and 86.
[7] Council Regulation 4064/89, [1989] OJ L395/1, [1990] 4 CMLR 286, now amended by Reg. 1310/97, [1997] OJ L180/1, [1997] 5 CMLR 387.
[8] Commission, "The Problem of Industrial Concentration in the Common Market", *Competition Series*, Study No. 3 (1966).
[9] See e.g. Case 6/72, *Eurobemballage Corp. and Continental Can v. EC Commission*, [1973] ECR 215, [1973] CMLR 199. However, Article 86 (now 82) could not be applied to parties in oligopolistic markets because none of them was in a dominant position prior to a concentration.

and there were no spillover effects, a "partial concentration" resulted that prevented the application of Article 85 (now Article 81).

It appears that in the Sixth Report on Competition Policy the Commission for the first time clearly distinguished between joint ventures subject to Article 85(1) (now 81(1)) and joint ventures falling outside the scope of this article. The former category became known as co-operative joint ventures and the latter category as concentrative joint ventures.

The period before the adoption of the Merger Regulation is also notable with the judgement of the European Court of Justice in *BAT and Reynolds v Commission.*[11] The Court held that an agreement on the acquisition of shares between undertakings may fall within the scope of Article 85 (now Article 81) if "the investing company obtains legal or de facto control of the commercial conduct of the other company or where the agreement provides for commercial cooperation between the companies or creates a structure likely to be used for such cooperation."[12]

These developments led to a substantial degree of uncertainty. The Commission's theory of the "partial concentration" rendered Article 85 (now 81) applicable to a large amount of joint ventures. The strict requirements of the "partial concentration" test suggest that its application was considered the exception rather than the rule. If the parent companies were actual or potential competitors prior to the formation of the joint venture, the transaction could not be deemed a concentration unless the parents withdrew completely and irreversibly from the venture's market and there were no spillover effects. Given the *BAT* decision of the European Court of Justice, share acquisitions alone were deemed sufficient to infringe Article 85 (now 81), not only where this resulted in an effective control over another company, but also where this appeared to provide for commercial cooperation between companies or to create a structure likely to be used for such cooperation. These developments were primarily a result of the absence of an instrument providing for the control of concentrations in the Community.[13]

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[10] Sixth Report on Competition Policy (1976), point 55.
[11] Cases 142/84 and 156/84, *British American Tobacco Co. Ltd. and R. J. Reynolds Industries Inc. v. Commission* [1987] ECR 4487, 4476, [1988] 4 CMLR 24.
[12] *Ibid.*, para. 38.
[13] According to J. Venit, "Oedipus Rex: Recent Developments in the Structural Approach to Joint Ventures under EEC Competition Law" (1991) *World Competition* 14/03, the absence of an instrument providing for

2. The Merger Regulation

The foregoing discussion shows that it was the absence of adequate legislation to control concentrations that prompted the Commission as well as the Court of Justice to extend the scope of application of Article 85 (now 81). Consequently, the Merger Regulation[14], when finally adopted, was expected to improve the conditions under which concentrations with a Community dimension were assessed.

The Merger Regulation included certain types of joint ventures into its scope. Article 3(2) of the Regulation provided that:

> "An operation, including the creation of a joint venture, which has as its object or effect the coordination of the competitive behavior of undertakings which remain independent shall not constitute a concentration within the meaning of paragraph 1(b).
>
> The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity, which does not give rise to coordination of the competitive behaviour of the parties among themselves or between them and the joint venture, shall constitute a concentration within the meaning of paragraph 1(b)."

Thus the original approach of the Regulation was to deal with concentrative joint ventures that did not give rise to cooperative effects. The Regulation reaffirmed the division of joint ventures into two categories - concentrative and cooperative joint ventures. The Commission interpreted the two categories of joint ventures in its Notice regarding the concentrative and cooperative operations under the Merger Regulation (hereinafter the Interface Notice).[15] Most of the elements of the "partial concentration"

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the control of concentrations under the EC Treaty led the Commission to apply Article 85 (now 81) to joint ventures more broadly than would otherwise be the case. Similarly, P. Craig and G. De Burca, *EU Law: Text, Cases, and Materials* (Oxford, 2nd edn.), 978-979.

[14] See n. 7 above.

[15] Commission Notice regarding the concentrative and cooperative operations under Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1990] OJ C203/6.

test were taken into the concentrative-cooperative distinction after the Merger Regulation came into force.[16]

Given that the Merger Regulation did not deal with operations whose object or effect was the coordination of the competitive activities of the parties, structural (i.e. full-function) cooperative joint ventures fell into the scope of Article 85 (now 81). Nevertheless, the Commission undertook measures in order to improve their treatment. The so-called "fast-track" procedure was introduced in order to speed up the notification process for structural co-operative joint ventures.[17] However, the Commission was not bound to follow this procedure. It existed as an internal guidance for handling of structural cases.[18] On the other hand, the Commission clarified the concentrative-cooperative joint venture distinction by passing a new Notice concerning the assessment of cooperative joint ventures pursuant to Article 85 (now 81).[19] Moreover, in 1994 the Commission revised its 1990 Interface Notice.[20] The revised Notice shows an improvement in the Commission's view towards joint ventures. It deleted the requirement for a decision-making autonomy of the joint venture in order to qualify as an autonomous economic entity. The 1994 Notice expressly stated that coordination of competitive behaviour of the parents and the joint venture is relevant in so far as it is an instrument for coordination between the parents themselves. Thus it allowed for more joint ventures to be included within the Merger Regulation control.

3. Distinguishing Between Concentrative and Cooperative Joint Ventures

As has been said, long prior to the adoption of the Merger Regulation the Commission developed the "partial merger" test, albeit limited. Therefore, if a joint venture was considered concentrative, Article 85 (now 81) did not apply. It was also shown that most of the elements of the "partial concentration" test were taken up in the Merger Regulation to distinguish between joint ventures falling under the Regulation

[16] J. Kirkbride and T. Xiong, "The European Control of Joint Ventures: A Historic Opportunity or a Mere Continuation of Existing Practice?" (1998) 23 *ELRev.* Feb., at 42.
[17] Commission's press release IP/92/92 of 23 December 1992.
[18] [1993] 4 CMLR 238.
[19] Commission Notice concerning the assessment of cooperative joint ventures pursuant to Article 85 (now 81) [1993] OJ C43/2.

(concentrative joint ventures) and joint ventures falling outside the Regulation and therefore subject to Article 85 (now 81) (cooperative joint ventures). Only concentrative joint ventures gained the more beneficial rules of the Merger Regulation. Unlike Article 85 (now 81), which prohibits agreements having anti-competitive object or effects, the Merger Regulation presumes concentrations legal unless they result in serious damage to the structure of competition by creating or strengthening a dominant position. This basic difference in treatment required the Commission to apply strict rules in order to determine whether an operation should be considered a concentration or an anti-competitive agreement between independent undertakings. These rules will be examined in greater details below.

Distinguishing Characteristics of Concentrative Joint Ventures

The two requirements for a joint venture to fall under the Merger Regulation were known as a "positive" condition (full-function joint venture) and a "negative" condition (absence of coordination).[21] In order to be concentrative, a joint venture must perform on a lasting basis all the functions of an autonomous economic entity. Thus, the joint venture company should be able to operate on the market, performing the functions normally carried out by other undertakings operating on the same market. For this reason the joint venture should have the necessary resources, including finance, human resources and assets (tangible and intangible). Furthermore, the joint venture must be intended to operate on a lasting basis. It should have some permanence and not be merely a temporal structure. The joint venture company must be sufficiently independent form its parents and not simply undertake ancillary functions for them. A joint venture that relies almost entirely on sales to its parent companies or depends on its parents for supplies, is closer to an ancillary joint sales agency, and is therefore not a full-function joint venture.[22] The requirement that a concentrative joint venture must be a full-function entity is designed to ensure that the creation of such joint venture will give rise to a permanent structural

[20] [1994] OJ C385/1.
[21] The Interface Notice, n. 15 above, paras. 16-19, 20-36. On the positive and negative condition see e.g. J. Cook and C. Kerse, *E. C. Merger Control* (Sweet & Maxwell, 2nd edn., 1996), 48-51.
[22] The Interface Notice, para. 15.

change on the market. Before 1994 the Interface Notice required also a decision-making autonomy of the joint venture.[23] Being under joint control of its parents a joint venture does not usually have such autonomy. This was adopted in the 1994 Interface Notice.

Absence of coordination was the second condition for a joint venture to be treated as concentrative. Different situations where coordination effects could have appeared were possible.[24] Coordination could have taken place between parent companies if at least two of them had retained activities in the joint venture's market. By contrast, coordination was normally excluded where the parent companies were not active in the joint venture's market or transferred to the joint venture all their activities in this market. However, where the parents remained potential competitors of the joint venture, the operation was likely to be considered cooperative.[25]

If the joint venture parents had decided to transfer their business activities to the joint venture in one geographic area but to remain active in another geographic area and the geographic areas were likely to remain distinct, the Commission might have decided that no coordination would occur.[26] Where the parent companies were in the same geographic market, which was different from that of the joint venture, and the joint venture's activities had a substantial importance when compared with the parents' activities, coordination might have be found.[27]

Collaboration through the joint venture might have resulted in coordination between parents on markets upstream or downstream of those of the joint venture. This was likely to happen where the joint venture was the main supplier to its parents or their main customer, and thus through it the parents performed joint buying or joint selling.

[23] See e.g. Case IV/M.24, *Mitsubishi Corporation/Union Carbide Corporation* [1992] 4 CMLR M50 where the Commission attached a significant weight to the joint venture's decision making autonomy.
[24] Situations of this kind are illustrated in the Interface Notice at para. 18.
[25] A concentrative joint venture would not be found if reentry by the parents was likely. In *Apollinaris/Schweppes* [1991] OJ C203/14, [1992] 4 CMLR 1978, the Commission decided that the joint venture was not a concentrative one because the parents only partially withdrew from the venture's market. The Commission also found that Schweppes would remain a competitor of Apollinaris in Germany notwithstanding its agreement to transfer the whole of its beverage business in Germany to the joint venture. In Commission's view Schweppes continued to have a realistic option to re-enter that market.
[26] See e.g. *Mitsubishi Corporation/Union Carbide Corporation*, n. 23 above.
[27] A neighbouring market is a separate but closely related market to the market of the joint venture, both markets having common characteristics including technology, customers or competitors: the Interface Notice, para. 18.

Where there was a network of cooperative links between the parents in the joint venture's market, the object or the effect of the creation of the joint venture might have been to add another link and thereby strengthen already existing coordination of competitive behaviour.

Initially, the Commission was also concerned with the protection of competition between a joint venture and its one or more parents. Therefore, a joint venture was treated as cooperative if a parent had remained a competitor with it. Later, the Commission applied a more realistic view known as the "industrial leadership" doctrine.[28] In essence, the Commission considered that where one parent remained a significant competitor in the same market as the joint venture, and had a leading role in the management of the joint venture, the latter would be deemed to be part of the economic group of the leading partner. Finally, the 1994 Interface stated that coordination of competitive behaviour of the parents and the joint venture is relevant in so far as it is an instrument for coordination between the parents themselves.[29]

4. Principals for Assessing Cooperative Joint Ventures

Overview

Cooperative joint ventures, even those involving changes to the competitive structure, were controlled through Article 85 (now Article 81) and not through merger control. Thus such a joint venture must have the object or effect of restricting competition in the whole or in a substantial part of the common market and must affect trade between Member States, given that its effect is appreciable. Yet in the previous "partial concentration" test, the Commission had added a specific requirement - the parties to the joint venture must at least have been potential competitors.[30]

[28] For the "industrial leadership" doctrine see e.g. Case IV/M.051, *Thomson/Pilkington* [1991] OJ C279/19, [1991] 4 CMLR 897, where the joint venture was held to be concentrative even though Thomson remained active in the field of the joint venture. See also *Linde/Fiat* [1992] OJ C258/14, [1992] 5 CMLR 298; *Ericsson/Kolbe*, [1993] OJ C27/14, [1992] 4 CMLR 81. In the latter case the joint venture and Ericsson supplied a competing product to the same customer. However, Ericsson had the principal responsibility for the joint venture's commercial policy.
[29] See the Interface Notice, para. 17.
[30] Sixth Report on Competition Policy (1976), point 55.

In order to determine whether the creation of a joint venture restricted competition, the Commission carried out anti-trust analyses focusing on the following criteria. The Commission examined whether the creation of the joint venture was likely to restrict actual or potential competition between the parents (or between one of the parents and the joint venture). In this connection the Commission examined the risk of spillover effects into related markets. Furthermore, it was necessary for the Commission to examine whether the formation of the joint venture was likely to affect appreciably the competitive position of third parties. A special attention was paid to the existence of networks of inter-related joint ventures (the so-called "network" effect). On the other hand, where Article 85(1) (now 81(1)) had been found to apply to the formation of joint venture, the question of exemption under Article 85(3) (now 81(3)) arose. In addition, there was a limited possibility for application of a group exemption to some sorts of joint ventures.[31] Finally, the Commission examined the specific arrangements between the parties, accompanying the joint venture agreement, in order to decide whether they were ancillary to the joint venture.

Potential Competition

In the Thirteenth Report on Competition Policy, the Commission formulated its view on potential competition in the form of questions, as follows:

"*Input of the joint venture*

Does the investment expenditures involved substantially exceed the financial capacity of each partner? Does each partner have the necessary technical know-how and sources of supply of input products?

Production of the joint venture

Is each partner familiar with the process technology? Does each partner itself produce inputs for or products derived from the joint venture's product and does it have access to the necessary production facilities?

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[31] Block exemption regulations concerning specialisation and R & D agreements. The Commission has extended the period of validity of these block exemptions until 31 December 2000; see Commission Regulation (EC) No. 2236/97, [1997] OJ L306/12.

Sales by the joint venture

Is the actual or potential demand such that it would be feasible for each of the partners to manufacture the product on its own? Does each have access to the necessary distribution channels for the joint venture's product?

Risk factor

Could each partner bear the technical and financial risks associated with the production operations of the joint venture alone?"[32]

The fundamental question, therefore, was whether the parties were capable of independently entering the joint venture's market. The weight given to the above factors in the Commission' analysis of potential competition varied from case to case.[33]

In many earlier cases the Commission applied a very broad definition of potential competition. The Commission's decisions in *Vacuum Interrupters Ltd (No.1)* and especially *Vaccum Interrupters Ltd (No.2)* are an illustration for this.[34] In *Vacuum Interrupters Ltd (No.1)* the Commission decided that the parties were potential competitors in the field of the joint venture because of their previous R&D activities, despite the fact that each of them had abandoned work on vacuum interrupters. In the second case, the Commission considered also the new partner to the joint venture a potential competitor despite its lack of effort in developing the joint venture product. Similarly with the pre-existing parties the new parent manufactured switchgears. The Commission assumed that it could use this experience also in the manufacturing of vacuum interrupters.

In later decisions[35] the Commission introduced certain limits to the notion of potential competition. For instance, in *Optical Fibres*[36] Corning, an U.S. company that had previously invented optical fibres for telecommunications, formed a joint venture with French, German and UK cable manufactures for the development, manufacture and

[32] Thirteenth Report on Competition Policy (1983), point 55. See also the Commission's Notice concerning the assessment of cooperative joint ventures, paras. 19-20.
[33] Commission's Notice concerning the assessment of cooperative joint ventures, para. 20.
[34] *Vacuum Interrupters (No. 1)* [1977] OJ L48/32, [1977] 1 CMLR; *Vacuum Interrupters (No. 2)* [1980] OJ L383/1, [1981] 2 CMLR 217.
[35] See e.g. *Optical Fibres* [1986] OJ L236/30; *Mitchell Cotts/Sofiltra* [1986] OJ L41/31; [1988] 4 CMLR 111; *Olivetti/Canon* [1988] OJ L52/51, [1989] 4 CMLR 940.
[36] *Ibid.*

sale of optical fibres. The Commission concluded that the joint venture's parents were not potential competitors because Corning had no experience in cable manufacture, while Corning's partners had no experience in glass manufacture which could have led to an invention competitive with Corning's. Therefore, in spite of parties considerable financial resources, the entry of Corning into the optical cables market or by Corning's partners into the optical fibres market was not deemed to be a natural and reasonably foreseeable extension of their respective business activities. Thus in this case the Commission looked more realistically at the market situation and did not find parties to be potential competitors where they did not have the technology required in order to manufacture the joint venture product. A further example is the case *Olivetti/Canon* where the Commission considered the financial ability of Olivetti to bear alone the high financial risks associated with the production of the joint venture product.[37]

Restriction of Competition between Parent Companies

Once the Commission found that the parties to a joint venture were actual or potential competitors, it was almost inevitable that their agreement to cooperate would have the object or effect of restricting competition contrary to Article 85(1) (now 81(1)). An early statement of the Commission's reasoning in this respect was given in *GEC/Weir*. The Commission stated that within the field of the joint venture and in related fields the joint venture's parties "are likely to co-ordinate their conduct and be influenced in what would otherwise have been their independent decisions and activities", even in the absence of any express anti-competitive provisions in the joint venture agreement.[38] Thus in this case the mere existence of the joint venture was considered to impair competition between the parties within the field of the joint venture or in related areas.

[37] See *Olivetti/Canon*, n. 35 above.

[38] *GEC/Weir* [1977] OJ L327/26, [1978] 1 CMLR D42, para. 31.

Foreclosure Effects on Third Parties

The risk of foreclosure effects on third parties as a result of the joint venture was considered to be particularly strong where in already concentrated markets there were exclusive or preferential links between the joint venture and its parents. Given the high market shares held by the parents if they had arranged for the joint venture to handle their purchases or sales, to manufacture primary or intermediate products or to process products produced by them, the possibilities for third parties to compete would have been appreciably restricted.[39] The creation of the joint venture might even have had the effect of excluding parent's traditional suppliers and customers from the market. Thus following the joint venture, the joint venture's partners might have been in a position to deny third parties access to an important resource. The risk of foreclosure effects on third parties would have been reduced if the joint venture agreement provided for the possibility of the joint venture to sell to third parties on non-discriminatory terms or obtain supplies from third parties.[40]

Network Effect

Networks of joint ventures set up by the same parents, by one parent with different partners or by different partners in parallel were considered particularly able to restrict competition. Competition might have been reduced if competing parent companies had set up several joint ventures in the same product market but in different geographic markets or several joint ventures for related products. Moreover, competition might have been restricted even if a joint venture had been created by non-competing partners if it belonged to a network of joint ventures set up by one of the partners for the same product market with different partners.[41] This was the case in *Optical Fibres*. The Commission's analysis showed that the joint ventures set up by Corning and its partners were direct competitors in the production and marketing of optical fibres. The

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[39] Commission's Notice concerning the assessment of cooperative joint ventures, para. 24.
[40] E.g. in *Eurosport* [1991] OJ L63/32, [1991] 4 CMLR 228 the foreclosure effect of the joint venture was the main reason for the Commission to find Article 85(1) (now 81(1)) infringed and to refuse exemption under Article 85(3) (now 81(3)).

Commission also found that Corning was the single technology provider for all joint ventures and therefore it enjoyed a key position in each of them. The Commission did not find, however, any express agreements between the joint ventures' partners or between the joint ventures restricting competition. Therefore, the Commission held that the restriction of competition resulted "from the existence of the network of inter-related competing joint-ventures, within which one partner is able to influence the joint venture's behaviour on the market."[42]

Ancillary Restraints

The Merger Regulation specifically provides for ancillary restraints to be considered along with the concentration. Article 8(2) states that " the decision declaring the concentration compatible with the common market shall also cover restrictions directly related and necessary to the implementation of the concentration". The Commission has published a Notice on ancillary restraints.[43]

The ancillary restraints doctrine was also applied to exclude certain contractual provisions, which otherwise would be considered restrictive of competition, from the scope of Article 85(1) (now Article 81(1)). If Article 85(1) did not apply to the formation of the joint venture, other contractual provisions would be regarded by the Commission as non-infringing to the extent that they are ancillary to the joint venture agreement.[44] Otherwise they would be subject to a separate analysis in the sense of Article 85 (now 81). If the joint venture itself infringed Article 85(1) (now 81(1)), the ancillary restrictions would be regarded as infringing as well. Nevertheless, an exemption is possible.

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[41] See Commission's Notice concerning the assessment of cooperative joint ventures, paras. 27-31.
[42] *Optical Fibres*, n. 35 above, para. 37.
[43] Commission Notice regarding restrictions ancillary to concentration, [1990] OJ C203/5. A revised version of this notice is to be expected.

A More Realistic View Towards the Effects of Joint Ventures

A move towards a more realistic view on the effects of joint ventures on competition began during 1980s.[45] As has been said, in a number of cases after the Thirteenth Report on Competition Policy (1983) the Commission took a more realistic approach towards potential competition. The Merger Regulation, which treated a type of joint venture as a concentration within the scope of the Regulation, gave a new impulse to the Commission's attempts to rationalize its approach towards joint ventures.

A significant change in the Commission's approach towards the structural implications of joint ventures was felt when joint ventures were cleared under Article 85(1) and not exempted under Article 85(3) instead (now Articles 81(1) and 81(3)). In *Elopak/Metal Box-Odin*[46], the parties set up a joint venture to develop, manufacture and distribute a new type of aseptically filled carton packaging as well as the machinery and technology required for filling the new package. In its analysis of the case, the Commission concluded that the parents were not competitors, actual or potential, because the technology and other resources provided by each of them were complementary. The parents were not seen as likely to have entered the joint venture's field independently. Similarly, the Commission decided that the creation of Odin would not have any spillover effects, since the parents were seen as neither actual nor potential competitors in other markets. The Commission next found that the joint venture was unlikely to produce foreclosure effects on third parties, since each parent had important competitors in its own field. Finally, since only one joint venture was formed, there was no risk of a network effect.

The Commission took a realistic view towards the competitive relationship between one parent of the joint venture and the joint venture itself. Although the products developed by Odin were expected to compete to some extent with the products of one of the parents, Metal Box, the Commission viewed the situation *ex ante* and found Metal Box not to have been a realistic potential independent entrant into the joint venture's field. The Commission pointed out that each parent would obtain access to the Odin's

[44] See *Mitchell Cotts/Sofiltra* [1987] OJ L41/31. See discussion in *Odin*, n. 46 below.
[45] See e.g. the Commission's 1985 Joint Venture Guidelines, Commission Document IV/471 85.
[46] *Elopak/Metal Box-Odin* [1990] OJ L 209/15, [1991] 4 CMLR 832.

technology when it ended and parents would be able to compete in the field of the joint venture.

Another important aspect of the Commission's decision is that Article 85(1) (now 81(1)) was deemed not to apply to restrictions ancillary to the joint venture, namely the grant of an exclusive right from the parents to the joint venture to exploit their technology in the field of the joint venture as well as the obligation on the parents for a five-year period after the termination of the joint venture, not to make the other parent's technology or the technology developed by the Odin, available to a competitor of the other parent. The Commission deemed these restrictions necessary for the implementation of a risky investment such as the development of a new product by Odin. The grant to Odin of the exclusive right to exploit the proprietary know-how in the field of the agreement was considered to be a guarantee to each party that its partner would devote its full efforts to the project.[47]

Similarly, in *Konsortium ECR 900*[48] the Commission found that Article 85(1) (now 81(1)) did not catch the joint venture between AEG, Alcatel and Nokia for joint development, manufacture and distribution of a pan-European digital cellular mobile telephone system (GSM). The parties could not have undertaken the project individually due to the very high costs and risks.

On the other hand, in *GEC-Siemens/Plessey*[49] Article 85(1) (now 81(1)) was found not to apply because of the parties' relatively small market shares in sufficiently competitive markets. In Commission's view any restriction on competition would not be appreciable. Thus the Commission considered structural factors in determining whether there is an appreciable restriction of competition.

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[47] The *Odin* decision established the rule in this respect even though yet in *Mitchell Cotts/Sofiltra*, n. 44 above, the Commission found some specific provisions of the joint venture agreement to fall outside the scope of Article 85(1) (now 81(1)).

[48] *Konsortium ECR 900* [1990] OJ L228/31, [1992] 4 CMLR 54.

[49] *GEC-Siemens/Plessey* [1990] OJ C239. In this case the Commission did not adopt a formal decision granting a negative clearance but nevertheless published the letter it sent to Plessey rejecting its complaint.

Significance of the Approach

The Commission decisions in *Odin*, *Konsortium ECR 900* and *GEC-Siemens/Plessey* suggest that the Commission developed a more coherent approach to the structural implications of joint ventures that, nevertheless, could not be classified as concentrative joint ventures within the meaning of the Merger Regulation. Article 85(1) (now 81(1)) did not to apply to the creation of a joint venture whose parents were seen as neither actual nor potential competitors with each other or the venture. A possibility of potential competition between one parent and the joint venture was found to exist in *Odin*. Nevertheless, Article 85(1) (now 81(1)) was deemed not to apply because this risk would have arisen only if the joint venture were successful, and even in that case there would have been sufficient competitive safeguards. In both *Odin* and *Konsortium ECR 900* the Commission considered the situations *ex ante* and consequently applied a realistic view when deciding upon the existence of potential competition between the parents and between one parent and the joint venture.

Once Article 85(1) (now Article 81(1)) was found not to apply to the joint venture, other restrictive provisions also escaped its application because they were deemed ancillary to the joint venture. Thus based on the doctrine of ancillary restraints the Commission cleared restrictions of competition which would otherwise be caught by Article 85(1) (now 81(1)).

On the other hand, in *GEC-Siemens/Plessey*, even though parents might be actual or potential competitors, Article 85(1) (now 81(1)) did not apply because certain structural effects of the operation were found not to be appreciable in the light of a merger-like analysis. Article 85(1) (now 81(1)) would have been applied only if given the structure of the market and the parties' market shares, the arrangement had appreciable negative structural effects.[50]

The clearing of joint ventures under Article 85(1) (now 81(1)) represents the culmination of the Commission's attempts to develop a more realistic approach towards joint ventures, that were not concentrations, but whose effects were primarily structural.

[50] See J. Venit, "Oedipus Rex: Recent Developments in the Structural Approach to Joint Ventures under EEC Competition Law", n. 13 above, 7-13.

However, since *Odin* most Commission decisions were exemptions and not clearances.[51] Only risky joint ventures involving future technology were cleared on the grounds that the risk was too large for any investor to proceed individually. On this ground the Commission cleared two joint ventures providing global systems of satellite communication.

4. Conclusions

The Commission first took the view that Article 85 (now 81) did not apply to structural arrangements. In the absence of specific merger control powers, the Commission developed the "partial concentration" or "partial merger" theory to distinguish between joint ventures subject to Article 85(1) (now 81(1)) and joint ventures falling outside the scope of this article. However, partial mergers were found in exceptional cases only. Before the enactment of the Merger Regulation the tendency in the Commission practice was to bring almost all joint ventures between potential competitors under Article 85 (now 81).

The Merger Regulation included concentrative joint ventures within its scope of application. Nevertheless, structural joint ventures which did not satisfy the "risk of coordination" condition remained subject to the very different substantive and procedural rules under Article 85 (now 81).

Article 85's bifurcation into paragraphs (1) and (3) (now 81(1) and (3)) posed significant obstacles to the application of a rule of reason approach under Article 85(1) (now 81(1)) to joint ventures. Where parents were held actual or potential competitors, the joint venture was regarded as restricting competition between the parents (or between them and the joint venture) within the meaning of Article 85(1) (now 81(1)), even in the absence of express provisions to this effect. Potential competition analysis show that in many cases the Commission significantly extended the meaning of potential competition. As a result, primarily structural joint ventures that involved little risk of coordination and

[51] E.g. in *Cekacan* [1990] OJ L299/64, [1992] 4 CMLR 406, *Eirpage* 1991] OJ L306/22, [1991] 4 CMLR 233, the Commission found potential competition to be present on the basis of a "rather unsatisfactory analysis": see J. Kirkbride and T. Xiong, n. 16 above, at 41. Similarly, B. Hawk, "Joint Ventures Under EC Law", in *Fordham Corporate Law Institute*, ed. B Hawk (Fordham, 1991), ch. 23, 285-287.

did not adversely affect competitive structure or foreclose third parties were nevertheless caught by the prohibition of Article 85(1) (now 81(1)).[52]

On a second step, however, the Commission usually granted exemptions under Article 85(3) (now 81(3)) to such joint ventures taking into account the benefits of the cooperation. This situation was unsatisfactory for those involved in such operations because they were granted a time-limited and revocable exemption instead of a permanent clearance.

The Commission's decisions in *Odin*, *Konsortium ECR 900* and *GEC-Siemens/Plessey* suggest a gradual evolution of Commission's analysis under Article 85(1) (now 81(1)) towards a more realistic analysis of the joint venture's effects on competition. The Commission applied a type of rule-of-reason analysis under Article 85(1) (now 81(1)) that was a major departure from the Commission's traditional approach, namely granting an exemption under Article 85(3) (now 81(3)) rather than clearing joint ventures under Article 85(1) (now 81(1)). In addition, the Commission established the rule that where the formation of a joint venture itself falls outside Article 85(1) (now 81(1)), provisions that are ancillary to the joint venture also fall outside this article. Following Venit, the decision in *GEC-Siemens/Plessey*, was a logical consequence of the Commission's desire to apply merger-style analysis to structural cases whose cooperative elements precluded the application of the Merger Regulation.[53] However, the Commission was not consistent in the adoption of more flexible analysis of joint ventures under Article 85(1) (now 81(1)).

The concentrative-cooperative joint venture distinction under the EC law served mainly a jurisdictional function. As a jurisdictional rule, it failed to operate as a speedy and predictable test and hence increased legal uncertainty. Many similar transactions were treated from a legal point of view differently. The Commission addressed this issue by speeding up the notification period for structural cooperative joint ventures and by introducing changes in its interpretive notices concerning joint ventures. The reforms were regarded as unsatisfactory because there was no real harmonization of the

[52] See J. Venit, "Oedipus Rex: Recent Developments in the Structural Approach to Joint Ventures under EEC Competition Law", n. 13 above, at 5. Similarly, B. Hawk, "Joint Ventures Under EC Law", n. 51 above, ch. 23, at 561.
[53] *Ibid.*, at 14.

provisions applied to structural cooperative joint ventures with those applied under the Merger Regulation to concentrations. Finally, the Commission responded to the criticisms of its treatment of joint ventures, whose effects were structural, by proposing amendments to the Merger Regulation.

III. THE NEW DOCTRINE OF JOINT VENTURES

1. The 1996 Green Paper

In its 1996 Green Paper[54], the Commission outlined the significant changes that have appeared in the legal, political and economic environment of the Community since the Commission first examined the functioning of the Merger Regulation in 1993. In the context of increasing market integration in the Community and increasing globalization of the world economy, the Commission found it important that the rising number of concentrations with trans-border effect be assessed in a uniform manner at Community level and in accordance with the principles of the Merger Regulation - the principle of subsidiarity and "one-stop shop".[55]

The assessment of concentrations under Community competition rules should not unduly delay their implementation and create legal uncertainty. However, the different treatment in terms of procedural and substantial rules of cooperative joint ventures of a structural nature provided for such negative effects. The Commission explained the situation with the fact that, in the case of co-operative full-function joint ventures, the independent presence of their parent companies in the same market as that of the joint venture or in closely related markets is regarded as likely to give rise to the coordination of competitive behaviour of the parent companies.[56]

The Commission confirmed that cooperative full-function joint ventures involve a significant change in the structure of the companies concerned, and that they may have, in this respect, similar effects on market structure to concentrative joint ventures. In order to improve their treatment the Commission proposed several options – substantive and procedural.

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[54] COM(96)19final. Yet in the 24th Report on Competition Policy the Commission acknowledged the need to reduce as far as possible the analysis of substantive matters for jurisdictional purposes.
[55] *Ibid.*, paras. 26 and 28.
[56] *Ibid.*, para. 102.

2. The Amending Regulation

On June 30, 1997 the Council adopted Regulation No.1310/97 that entered into force on March 1, 1998 and amended Regulation 4064/89.[57]

The Meaning of the Amendments

The most important amendments to the Merger Regulation comprise the extension of the scope of the Regulation to smaller scale concentrations and to full-function cooperative joint ventures. The amendments extend the concept of concentration, which covers operations bringing about a lasting change in the structure of the undertakings concerned, to all full-function joint ventures. After the amendments Article 3(2) of the Merger Regulation reads as follows:

> "The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1 (b)."

It appears that the new rules eliminate the "negative" condition (absence of coordination) for a transaction to qualify as a concentration. Accordingly, the dominance test and the procedures of the Merger Regulation apply to all full-function joint ventures, regardless of their cooperative aspects. According to the new Article 2(4) of the Regulation Article 81 of the EC Treaty may apply only to coordination aspects of the operation, given that they are not ancillary to the joint venture.

Dominance

As has been said, full-function joint ventures with a Community dimension are subject to the dominance test of Article 2(1) of the Merger Regulation. It follows that the Commission will not oppose the formation of such a joint venture, where it does not give

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[57] See n. 7 above.

rise to the creation or strengthening of a dominant position on the common market or in a substantial part of it, as a result of which effective competition would be significantly impeded. In this respect, Recital 15 of the Regulation indicates that concentrations which, by virtue of the limited market share of the undertakings concerned, are not liable to impede effective competition, may be presumed to be compatible with the common market, especially where the market share of the undertakings concerned does not exceed 25% in the common market or in a substantial part of it.

The test of dominance involves two elements: first, whether the concentration creates or strengthens a dominant position, and secondly, whether this results in effective competition being significantly impeded. In this regard, Article 2(1) of the Regulation indicates the factors which the Commission should take into account in its appraisal, e.g. the market shares of the parties in the relevant markets, the potential competition from other undertakings, the alternatives available to suppliers and users, barriers to entry, technical and economic progress, etc. Since the dominance test applied to full-function joint ventures does not show any significant differences from the dominance test applied to full mergers and acquisitions, there is no need at this stage for further examination in this area.[58]

Procedure

According to the new rules, the procedures of the Merger Regulation apply to all full-function joint ventures. Even though the coordination effects of full-function joint ventures continue to be assessed under Article 81 of the EC Treaty, this will also be done within the procedure of the Merger Regulation. It follows that the Commission can open a second-stage proceedings in the event of serious doubts arising not just as regards the risk of a dominant position being created or strengthened, but also as regards the risk of the competitive behaviour of the parent companies being coordinated in a way which is incompatible with the common market.[59]

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[58] For more detailed discussion of dominance see e.g. J. Cook and C. Kerse, *EC Merger Control* (Sweet&Maxwell, 2nd edn., 1996), 130-138; Bellamy and Child, *Common Market Law of Competition* (Sweet&Maxwell, 4th edn., 1993), 336-337.
[59] 1997 Competition Report, point 154.

In essence, parties to full-function joint ventures benefit from three major procedural advantages. On one hand, under the Merger Regulation, there are fixed time limits for a Commission decision. Full-function joint venture cases are handled within the period of four or six weeks in cases of a non-opposing decision (six weeks when the parties submit undertakings) or within five months (in case of a second phase in-depth investigation). Moreover, according to Article 10(6) of the Regulation if the Commission does not take a decision within these time limits, the joint venture is deemed permitted. On the other hand, clearance granted under the Merger Regulation is permanent as a rule and can be revoked only in the exceptional circumstances specified in Article 8(5) of the Regulation. Finally, the "one-stop shop" principle of the Merger Regulation means that there is no need for a notification of the agreement with different Member States.

By contrast, there are no such legal deadlines for the conclusion of the procedures under Regulation 17/62. As has been said, the Commission introduced only internal rules in order to speed up the notification process for structural co-operative joint ventures. In contrast to the Merger Regulation, the procedure under Regulation 17/62 is often concluded by an administrative letter (which is not binding to the authorities and courts of the Member States) and not by a formal decision. Finally, in case of exemption under Article 81(3), the decision to grant an exemption is revocable and limited to a certain period of time.

However, unlike Regulation 17/62, the Merger Regulation contains mandatory requirement for prior notification, which therefore extends to all full-function joint ventures. As a result, a joint venture within the Merger Regulation can not be put into effect either before its notification or until it has been declared compatible with the common market on the basis of a formal decision or a presumption according to Article 10(6) of the Regulation.[60]

Assessment of the Amendments

The amendments to the Merger Regulation introduce a radical change in the treatment of joint ventures. The same procedural and substantive rules apply to all full-

[60] Article 7 of the Merger Regulation.

function joint ventures, except for their cooperative aspects to which Article 81 of the EC Treaty applies but within the procedure of the Merger Regulation. Thus, the amendments, on one hand, harmonize entirely the procedural aspects of the treatment of full-function joint ventures.

On the other hand, the 1997 amendments to the Merger Regulation limit the application of Article 81 to structural joint ventures in favour of the Merger Regulation. Nevertheless, in substantial terms, Article 81 may apply to certain coordination aspects of full-function joint ventures. This can even lead to a prohibition of the whole transaction, when an Article 81(3) exemption cannot be granted, even though the joint venture itself does not give rise to any negative structural effects.

Partial-function joint ventures, in particular research and development or production joint ventures without access to the market, continue not to benefit from the procedural and substantive advantages of the Merger Regulation. This raises the question whether a unified treatment of all structural joint ventures is possible. It appears that by applying Article 81 only to the coordination aspects of full-function joint ventures, the right balance between merger control and control of anti-competitive agreements has been found. On these grounds, it seems conceivable that not only full-function, but also other joint ventures of structural nature and with a Community dimension be included in the scope of the Merger Regulation. The Commission discussed this option in the 1966 Green Paper. It is remarkable that the only problem in this respect was "the problem of identifying those joint ventures to which Article 81 would remain applicable (hidden cartels)".[61] This is an issue that may be addressed in a future review of the Merger Regulation. At least the Commission did not reject this option in the 1996 Green Paper.

The amendments to the Merger Regulation respond to the need to harmonize and simplify the way full-function joint ventures are treated. Before the amendments, one of the criticisms was that the differences in treatment of similar operations influence businesses to structure their transactions so that they would fall under the Merger Regulation. This situation is no longer the case. The amended Merger Regulation provides companies with greater legal certainty

[61] See the Green Paper, n. 54 above, para. 120.

As a general conclusion, it can be said, that the amendments provide for a unified analysis of full-function joint ventures in which both behavioural and structural elements are examined, eliminating all procedural differences of treatment. However, before drawing a final conclusion in this regard, it is necessary to see how the Commission deals in practice with the cooperative aspects of full-function joint ventures.

3. Joint Ventures under the Merger Regulation

Joint Control

The concept of joint control is set out in the Commission Notice on the concept of concentration.[62] According to Article 3(3) of the Merger Regulation control amounts to a possibility of exercising decisive influence on an undertaking. Consequently, joint control exists where two or more undertakings or persons are able to exercise decisive influence over another undertaking. Decisive influence in this sense normally means the power to block actions which determine the strategic commercial behaviour of the controlled undertaking. Thus the undertakings exercising joint control have to reach an agreement on major decisions concerning the commercial policy of the joint venture. Unlike sole control, joint control is therefore characterized by the possibility of a deadlock situation resulting from the power of two or more parent companies to reject proposed strategic decisions.[63]

Joint control may be acquired by means of setting up a new company. The acquisition of joint control includes also changes from sole to joint control. The clearest situation of joint control is where there is equality between two parent companies in voting rights or appointment to decision -making bodies of the joint venture. Joint control may also exist where minority shareholders have additional rights allowing them to veto decisions which are essential for the strategic commercial behaviour of the joint venture. These are rights which go beyond the veto rights accorded to minority shareholders in

[62] Commission Notice on the concept of concentration under Council Regulation (EC) No 4064/89 on the control of concentrations between undertakings, [1998] OJ C66/02. This Notice replaces the Notice on the concept of a concentration, [1994] OJ C385/5, [1995] 4 CMLR 235.
[63] *Ibid.*, paras. 18, 19.

order to protect their financial interests as investors in the joint venture. The Commission considers that the most important veto rights are those concerning decisions on the appointment of the management as well as decisions on the budget. Other veto rights could concern the business plan, the investments by the joint venture, market-specific rights. For example, in *HarbertManagement/DB/BankersTrust/SPP/Oeman* the parties acquired joint control of Telia's undertakings Telaris and Telaris subsidiaries. The parents agreed to hold different shares in the joint venture – between 5-10 per cent, 15-25 per cent, 20-30 per cent respectively. However, the Commission found that each of the parents would acquire joint control by way of veto rights going beyond those normally accorded to minority shareholders as means of investment protection. In particular, a number of strategic business decisions concerning the joint venture required an unanimous vote by the parties, such as the approval of the business plan, some substantial investments as well as any form of business combination.[64]

There is joint control where the minority shareholders, by virtue of acting together, have the majority of the voting rights in the joint venture. The joint exercise of voting rights may result from a legally binding agreement between the minority shareholders. However, it may be also established on *de facto* basis, where there are strong common interests between the minority shareholders to the effect that they would not act against each other in exercising their rights in relation to the joint venture. This is often the case where a new joint venture is established (as oppose to the acquisition of a minority shareholding in a preexisting company). Nonetheless, the greater the number of the parent companies involved in such a joint venture, the more remote is the likelihood of this situation occurring.[65]

In the absence of strong common interests, the possibility of changing coalitions between minority shareholders normally excludes the assumption of joint control. In *Wintershall/EnBW/MVV/DEO*[66] the Commission found that there was no joint control because each of the four shareholders would own one-forth of the share capital, and decisions would be taken on the basis of simple majority. Therefore the Commission

[64] Commission decision of 31 August 1998, Case No IV/M.1289, *HarbertManagement/DB/BankersTrust/SPP/Oeman.*

[65] Commission Notice on the concept of concentration, n. 52 above, at para. 34.

[66] Commission decision of 11 December 1998, Case No IV/JV13, *Wintershall/EnBW/MVV/DEO.*

concluded that the shareholders did not exercise joint control. The veto rights concerning the appointment of the company management were not sufficient to change this conclusion because all decision concerning the strategic business behaviour of the company, including major investments as well as business plan and budget required a two-third and not a three-forth majority instead. Thus, different coalitions between the shareholders were possible and there was not a stable majority of shareholders in the company.

In conclusion, it appears that the Commission applies a broad definition of joint control. Acquisition of minority interests in the 10-25 percentage range (and even 5-10 per cent as in the above *Wintershall/EnBW/MVV/DEO* case) together with certain additional rights (e.g. a veto right over approval of the business plan) is sufficient to constitute joint control. This makes it possible for more transactions to come within the Merger Regulation.

Full-Function Joint Ventures

To be deemed a concentration, a joint venture must bring about a lasting change in the structure of the companies concerned. As has been said in relation to concentrative joint ventures, the joint venture must perform all the functions of an autonomous economic entity and operate on a lasting basis. In order to do so the joint venture must have a management dedicated to its day-to-day operations and access to sufficient resources.

Under certain circumstances, the new Commission Notice on the concept of full-function joint ventures[67] finds autonomy even though the joint venture remains dependent on its parents for the supply of inputs or the purchase or distribution of the venture's output. In the initial start-up period (normally three years) such dependence is usually regarded as necessary. Otherwise, in relation to sales from the joint venture to the parent companies, it is important whether the sales are made on the basis of the normal commercial conditions in the market. Another factor is the proportion of the sales

[67] Commission Notice on the concept of full-function joint ventures under Council Regulation (EC) No 4064/89 on the control of concentrations between undertakings, [1998] OJ C66/1, [1998] 4 CMLR 581.

compared with the total production of the joint venture. The fact that a joint venture makes use of the distribution network or outlet of one or more of its parents normally will not disqualify it as a full-function entity as long as the parents act only as agents of the joint venture.[68]

The full-function character of the joint venture can be problematic where the joint venture makes purchases from its parents on a lasting basis, especially where little value is added to the products (or services) at the level of the joint venture. This situation may mean that the parents are hiding price fixing agreement through the joint venture. However, this is certainly not the case if the joint venture operates as a trading company, and, therefore, different sources of supplies are available to it.

There is no need for a full-function joint venture to be of an unlimited or a very long duration. However, where the parties specify a period, the Commission will examine whether this period is sufficiently long in order to bring about a lasting change in the structure of the undertakings concerned. This is not likely to be the case if the joint venture is established for a short finite duration, e.g. it is established in order to construct a specific project without being later involved in the operation of the project. The joint venture will be considered to operate on a lasting basis if the parties include in the agreement a possibility for a continuation of activities beyond the initially agreed period.[69]

The Notice on the concept of full-function joint ventures suggests that the Commission will apply a broad full-function test: a joint venture is of a full-function character unless: (i) "it only takes over one specific function within the parent companies' business activities without access to the market"; (ii) it is "essentially limited to the distribution or sales of its parent companies' products and, therefore, acts principally as an ancillary sales agency".[70]

Nevertheless, since the full-function character of the joint venture determines the application of the Merger Regulation, it is to be expected that the Commission will closely examine the remaining links between the joint venture and its parent companies.

[68] *Ibid.*, paras. 12 and 13. See also Commission decision of 17 August 1999, Case No IV/JV.21, *Skandia/Storebrand/Pohjola*.
[69] *Ibid.*, para. 15.
[70] *Ibid.*, para. 13.

For instance, in the *British Interactive Broadcasting* case[71], the Commission found that the joint venture relied on its parents for a substantial part of its activities. It was set up to provide digital interactive TV services to consumers in the UK. However, one of its parents – BSkyB, had plans for digital set top boxes for its own pay-TV services. Given the close relationship between the joint venture and the parents the Commission concluded that the joint venture was not a full-function one. *MetroHoldings Limited* gives a further example for a non full-function joint venture. The joint venture will not provide telecommunications services to business customers in the UK. It will provide its entire transmission capacity to its parents for sale to end-users, and they will compete with each other.[72]

Coordination of Competitive Behaviour

Pursuant to Article 2(4) of the Regulation, to the extend that the creation of a joint venture 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 85(1) and (3) of the EC Treaty. Article 2(4) also states specific criteria, which the Commission should take into account in appraising the concentration in accordance with Article 81:

- whether two or more parent companies retain to a significant extent activities in the same market as the joint venture,
- whether two or more parent companies retain to a significant extent activities in a market which is downstream or upstream from that of the joint venture,
- whether two or more parent companies retain to a significant extent activities in a neighboring market closely related to the market of the joint venture,
- 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.

[71] Case No IV/36.539, [1998] OJ C322. The case is discussed in more detail in the next chapter.

It follows that Article 2(4) of the Regulation requires the Commission to take into account two risks to competition due to the creation of a full-function joint venture, i.e. the risk of spillover between the parents and the risk of eliminating competition.

Further guidance is to be found in the new Recital 23 of the Merger Regulation.[73] According to it, the Commission applies the criteria of Article 81(1) and (3) of the EC Treaty to full-function joint ventures, in addition to the dominance test set out in Article 2 of the Merger Regulation, to the extent that the creation of such joint ventures has as its direct consequence an appreciable restriction of competition between undertakings that remain independent.

In the light of both Article 2(4) and Recital 23 of the Merger Regulation it appears that the Commission would apply Article 81 to the coordination effects of a full-function joint venture where the restriction of the competition is a direct consequence of the formation of the joint venture, it is appreciable and occurs in the competitive relationship between the parents (not between them and the joint venture).

In 1997 the Commission adopted a new Notice on agreements of minor importance with regard to the application of Article 81(1).[74] It follows from the new Notice that the Commission will concentrate its investigations under Article 81(1) in large undertakings once they reach certain market-share thresholds. There is a significant difference with the previous Notice[75] where preference is given to a turnover threshold.[76]

According to the 1997 Notice, vertical agreements can fall within the scope of Article 81(1) if the parties thereto and the groups to which they belong do not together hold more than 10% of any of the relevant markets. In case of horizontal or mixed agreements, the market-share threshold is 5%. Nevertheless, a restriction of competition in case of price-fixing and vertical agreements conferring territorial protection on the

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[72] Commission Notice of 23.01.1999, Case No IV/37.123, *MetroHoldings Limited*, [1999] OJ C19. See also the discussion in the next chapter.

[73] See the new Recital 23 derived from the Regulation 1310/97.

[74] Commission Notice on agreements of minor importance which do not fall within the meaning of Article 85(1) (now Article 81(1)) of the Treaty establishing the European Community, [1997] OJ C 372/13.

[75] [1994] OJ C368/20.

[76] In respect to small and medium-sized undertakings, the Commission announced that it would not take an action on such agreements even if the market-share thresholds of the Notice were exceeded. Small and medium-sized are undertakings, which employ less that 250 employees and which turnover or the balance sheet do not exceed ECU 40 million or ECU 27 million (Annex to Commission Recommendation 96/280/EC).

participants is considered appreciable even if the parties do not exceed the market share thresholds. This is also the case where several undertakings set up networks of similar agreements in which case the commutative effect of these parallel networks is deemed to distort competition to an appreciable extent.

Although the Notice only concerns the application of Article 81(1) it reflects a more general view towards the enforcement of EC competition law. It confirms that horizontal agreements (and therefore horizontal joint ventures) are more likely to distort competition than vertical agreements. The adoption of a market-share test rather than a turnover test is in line with the more economic approach that the Commission has taken to the meaning of restriction of competition in the sense of Article 81 of the EC Treaty.[77]

Recital 23 of the Merger Regulation provides that if the effect of the joint venture on the market is primarily structural, Article 81(1) of the Treaty does not apply as a general rule. The structural character of the joint venture follows from its full-function nature. However, the "primarily structural" requirement also indicates that it is possible for the Commission to consider some coordination effects of the transaction minor and, therefore, not requiring a competitive assessment under Article 81. It seems that it is more likely for the Commission to reach this conclusion if the markets in question are competitive. As it will be discussed in the next chapter, the Commission is generally more positive on operations on growing markets or on markets where there are undertakings with a significant market power and the joint venture increases competition on the market.

Going back to the recent Commission Notice on agreements of minor importance, it could be concluded that in view of the Commission's powers of assessing the cooperative aspects of full-function joint ventures in the light of Article 81, the use of market share thresholds in the assessment of appreciability of the restriction of competition enables the Commission to take a realistic view to the application of Article 81(1) and, consequently, to consider a greater amount of operations "primarily structural". It is worthwhile noting that the new Commission's Notice on the definition of

[77] See Art and Van Liedekerke, "Developments in EC Competition Law in 1997: An Overview", (1998) 35 *CMLRev.*, at 1135-1182. The Commission took a further step in its policy of modernization of competition law by publishing a Communication on the application of the Community competition rules to vertical

relevant market for the purposes of Community competition law creates more certainty in relation to market definitions, and thus to the calculation of market shares.[78]

Candidate Markets for Coordination

As has been said, where a joint venture is created, of concern is the remaining competitive relationship between parents on the markets in which they remain individual competitors, the so-called candidate markets for coordination. Candidate markets for coordination among parent companies are to be found where two or more parent companies retain to a significant extent activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to the joint venture's market.

For instance, in *Telia/Telenor/Schibsted*[79] three companies – Schibsted, Telenor and Telia, set up a joint venture for the provision of Internet related services. The Commission held that the market for the provision of advertising over the Internet could not be considered as a candidate market for coordination because after the creation of the joint venture only one parent (i.e. Schibsted) would remain active on this market. Similarly, the market for the provision of subscriber content over the Internet was not a candidate market for coordination because none of the parents would remain active on this market following the operation. In the same case, the Commission also identified the upstream market for dial-up Internet access closely related to the joint venture's markets. Namely access to the Internet is a necessary prerequisite for the use of any Internet service. The market for dial-up Internet access was a candidate market for coordination because two of the joint venture's parents provided dial-up Internet access to users.

In another case, *PanAngora/DG Bank*[80], the joint venture was set up to offer asset management services to institutions in Germany, Austria, Switzerland and countries of Eastern Europe. Both PanAgora and DG Bank were active on the market for general asset

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restraints, COM(1998)544final, which is based on economic analysis of the effects of vertical restraints; see 1998 Competition Report, points 7-11.

[78] Notice on the definition of relevant market for the purposes of Community competition law, [1997] OJ C 372/03.

[79] Commission decision of 27 May 1998, Case IV/JV.1, *Telia/Telenor/Schibsted.* See also the discussion in the next chapter.

management services. Namely, PanAgora was active in the UK and in Switzerland, and DG Bank provided these services in Germany, Switzerland and Austria. The Commission concluded that the joint venture's parents are either actual or potential competitors, depending on the definition of the relevant geographic market. If the relevant geographic market were worldwide, then the parents would be competing on the same relevant market as the joint venture (world provision of asset management services). However, if the market were national, then the parents would be present on the same market as the joint venture in Switzerland, and on neighbouring markets in other countries.

In *Ericsson/Nokia/Psion*[81], the parties Ericsson, Nokia and Psion created a joint venture, Symbian Limited, for the development and marketing of EPOC operating system designed for use in wireless information devices. The Commission found three product categories to be downstream or neighbouring to that of the joint venture, namely mobile phones, wireless information devices (such as the Nokia Communicator) and handheld computers. The narrowest possible market definition regarded these three product categories as separate candidate markets for coordination. As a result, the handheld computer market, where only one parent (i.e. Psion) was present, was excluded as a candidate market. If these three products, on the other hand, were regarded as forming a single information devices market, handheld computer market would be considered as a candidate market for coordination of parents' behaviour.

In *Skandia/Storebrand/Pohjola*[82] the joint venture was established to offer non-life (P&C) insurance products in Norway, Sweden and Finland. The parents to the joint venture restricted their insurance business in these countries to the life insurance sector. Therefore, the life insurance market was regarded as a neighbouring market with regard to the non-life insurance market.

The above cases illustrate that candidate markets for coordination are those markets on which the joint venture and at least two parent companies are active, or closely related markets where at least two parent companies remain active. The Commission usually considers narrower and wider market definitions. The narrowest

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[80] Commission decision of 26 November 1998, Case No IV/JV.14, *PanAgora/DG Bank*.
[81] Commission decision of 22 December 1998, Case No IV/JV.12, *Ericsson/Nokia/Psion/Motorola*. The case is further discussed in the next chapter.
[82] See Commission decision of 17 August, Case No IV/JV.21, *Skandia/Storebrand/Pohjola*.

possible market definitions are usually the most unfavourable for the parties. On these grounds the Commission is safe in its conclusion that there is no risk of coordination of parents' behaviour as a result of the joint venture.

Likelihood of Coordination

The Commission first examines whether the creation of the joint venture has the object of coordination of the competitive behaviour of the parent companies. The full-function character of the joint venture usually excludes this possibility. In *Telia/Telenor/Schibsted* the Commission stated that there should be clear indications that the object of the creation of a joint venture is coordination of the competitive behaviour of the parent companies. In the absence of such indications, an intended coordination of the parent companies' behaviour cannot be established. Nevertheless, it is possible that coordination be the effect of the operation.

After identifying markets in which spillover effects may occur, the assessment which needs to be carried out is whether the parties together or separately have sufficient market power to make coordination worthwhile, i.e. whether they have the ability to raise prices or restrict output, behave independently of customers or eliminate competition. The Commission will examine the conditions of existing competition in the market and the possibility of new entry. If the parties have competitors of comparable size and new entry is possible and likely, the Commission is likely to conclude that the parties do not have such market power. However, even if they had the market power to make coordination worthwhile, it is necessary to examine whether the creation of the joint venture would give them the means for such coordination. In *Skandia/Storebrand/Pohjola* the Commission examined whether there is an overlap in the distribution channels for life and non-life products. As a result, it appeared to the Commission that there were no means of coordination with regard to life products, which was the candidate market for coordination.[83]

Thus an essential question is whether the market structure of the candidate market is conductive to coordination of the competitive behaviour of the parent companies. If the

[83] *Ibid.*, paras. 37-47.

market is competitive, there are low barriers to entry and the market shares of the parties are relatively small, the Commission is likely to conclude that there is no incentive for the joint venture's parents to coordinate their competitive behaviour. If the market share figures do not rule out the possibility that the parties have market power to make coordination worthwhile, the Commission needs to find out whether the creation of the joint venture gives parties sufficient means for coordination. In addition, where markets are growing the Commission usually expects a number of competitors to enter the market in the future. Therefore, even substantial market shares of the parents can be of a limited significance.[84]

An important factor in the Commission's analysis of coordination effects is the relative size of the joint venture's market compared with the relative size of the candidate markets for coordination. If the latter are substantially larger than the former, the likelihood for coordination is reduced significantly. For example, in *Ericsson/Nokia/Psion*, the Commission found that both Nokia and Ericsson held substantial market shares (25 per cent each) on the market of mobile phones. However, there appeared to the Commission to be no likelihood of coordination because the parties faced competition of major industrial competitors and could not afford to be influenced by the joint venture in the way they behave on the market.[85] In the same case, the Commission observed that the cost of the operating system developed by the joint venture would form a small part in the costs of the equipment produced by the parents. Therefore the parents would not be able to use the price of the operating system as a means of coordinating prices on the equipment market.

The likelihood of coordination is further reduced when the market is very price sensitive so that any increase in prices would result in parties loosing of market share to rival companies. In *Telia/Telenor/Schibsted*, the Commission considered that the low switching cost on the Swedish market for dial-up Internet access would prevent higher prices through coordination from being sustained.[86] In *Skandia/Storebrand/Pohjola*, the

[84] See *Telia/Telenor/Schibsted*, n. 79 above, para. 43.
[85] See *Ericsson/Nokia/Psion*, n. 81 above. The revenue that the parties expected from the joint venture would be extremely small when compared with the revenue in the market of mobile phones. In addition, there was also no direct connection between the joint venture's product and the technology used in mobile phones.
[86] *Telia/Telenor/Schibsted*, n. 79 above, para. 42.

Commission considered the presence of independent brokers acting as a disciplining force in the market. Since they are in competition with each other, they may be expected to search for the best terms on behalf of their clients and thus to resist any excessive pricing resulting from coordination between the joint venture's parents.[87]

Summarizing, in assessing the likelihood of coordination, the Commission takes into account various factors such as the existing and potential competition on the candidate markets, the barriers to entry, the size of the joint venture's market, the proportion of costs, the use of common technology, the price sensitive nature of the market, etc. Thus even though parties' market shares are an important factor, this is not the only relevant factor. Moreover, relatively high market shares can be of a limited significance given other characteristics of the market.

The Significance of Market Exit by Parents

It is also worthwhile noting that Recital 23 of the Merger Regulation is more explicit than Article 2(4) in showing the significance of the market exit by the parents. Article 81(1) may apply if two or more parent companies remain active in the market of the joint venture. However, if the restriction of competition between the parents concerns downstream, upstream or neighboring markets, Article 81 only possibly applies.

As has been discussed in relation to the treatment of cooperative joint ventures, the Commission traditionally required complete and permanent withdrawal of all parents from the venture's market and from the all neighbouring, upstream and downstream markets in order to ensure that there is no risk of coordination. The formulation of "*de minimis*" principal (there is no risk of coordination if parents retain operations in the joint venture's market or in related markets but these operations are *de minimis*) and the "industrial leadership" doctrine (where a parent retains extensive operations that directly compete in the venture's market but plays a leading role in the management of the joint venture), enable economic realities to be reflected more accurately in the Commission's

[87] See *Skandia/Storebrand/Pohjola*, n. 82 above, para. 45.

analysis. The amended Merger Regulation further clarifies this issue. When the joint venture is intended to enter a market where the parents are already present and remain active, the Commission's pre-disposition towards Article 81 is likely to be very strong. When the joint venture operates on a market that is different from its parents' markets the Commission's pre-disposition towards Article 81 application is likely to be less strong, as Recital 23 of the Merger Regulation suggests. Thus the parents' withdrawal from the joint venture's market should be viewed together with the "primarily structural" effect of the joint venture. A residual presence of the parents does not usually give rise to an appreciable restriction of competition.

Exemption under Article 81(3) of the EC Treaty

It follows from the above discussion of the coordination issues that coordination is to a great extent presumable when parent companies retain to a significant extent activities in the joint venture's market or in closely related markets. In many decisions prior to the amendments to the Merger Regulation, the Commission accepted the benefits of cooperative joint ventures and granted exemptions under Article 81(3) (formerly 85(3)) of the EC Treaty. Against this background, it could be generalized that such joint ventures are generally capable of bringing about the benefits required by Article 81(3). In this regard, the Commission is bound by the criteria laid down in Article 81(3), i.e. (i) improvement of production or distribution/promotion of technical or economic progress; (ii) fair share of benefits for users; (iii) indispensability of the restriction; (iv) no substantial elimination of competition.

After the amendments to the Merger Regulation, the formation of full-function joint ventures is no longer considered to restrict competition in the sense of Article 81(1). Thus Article 81(3) may only apply to specific restrictions on competition accompanying the joint venture agreement. They should be able to bring about the benefits required by Article 81(3). The indispensability test also applies to the coordination aspects of the joint venture asking whether the parties could have achieved the above benefits in a less restrictive way.

A significant weight is attached to the risk of elimination of competition. After identifying markets in which spillover effects may occur, Article 2(4) of the Merger Regulation requires the Commission to take into account, in particular, 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. This risk is very high when parents are competitors on markets that are already concentrated. In such markets the creation of the joint venture is likely to create or strengthen a dominant position. Therefore, Article 2(4) of the Merger Regulation underlines the risk of elimination of competition and requires the Commission to take it in particular into account even though Article 81(3) contains the same condition for an exemption to be granted.

Concluding Remarks on the New Regime of Full-Function Joint Ventures

It has been pointed out that joint ventures generally raise three possible anti-competitive concerns, i.e. loss of actual or potential competition between the parents in the market in which the joint venture operates, anti-competitive conduct of the parents in the markets in which they remain competitors (spillover effect), foreclosure of third parties. Here the Commission's traditional concerns will be discussed in the light of the recent changes in the treatment of cooperative joint ventures of structural nature.

It appears that in relation to full-function joint ventures, the Commission retains powers to apply Article 81 only where there is a risk of coordination between the parent companies in the markets in which they remain active after the creation of the joint venture (the risk of spillover effect). Excluded are restrictions on competition between the parents on the one hand and the joint venture on the other. If the Commission finds one of the parents to compete with the joint venture (e.g. as a result of establishment of a joint control over an existing company), it would apply the test of dominance of the Merger Regulation in order to assess the compatibility of the operation with the common market.

It seems that the Commission also reassessed its view on the risk of loss of potential competition. As mentioned above, the essential question when assessing loss of

potential competition is what would the parties have done but for the joint venture. It was the view of the Commission that a joint venture between potential competitors restricts competition in the sense of Article 81(1) (formerly 85(1)). It seems that the amended Merger Regulation attaches more importance to the existing market relationship between parents (whether parents retain significant activities in the joint venture's market or in closely related markets) rather than to the potential one. The evolution of the Commission's approach to potential competition reflects the more economic view that the Commission has taken to the enforcement of Article 81(1). The mere fact that the parents combine their efforts in a joint venture, for example for the development and production of a new product, is evidence that they could not have achieved the same result independently.

The above situation may change if the joint venture's parents remain present in neighbouring markets to the joint venture (in terms of technology, customers, supplies or competitors). In this case, the cooperation within the joint venture may lead to coordination of the parents' competitive behaviour on the closely related markets. However, even if the Commission finds a restriction of competition in the sense of Article 81(1), the focus in the Commission's analysis seems to be on the actual competitive relationship between the parents on the neighbouring market, rather than on the parents' resources to enter the joint venture's market individually. On the other hand, it is possible that the parents remain active in the same product market as the joint venture but in different geographic markets. If national barriers are expected to break down in the near future, the Commission is likely to conclude that there is a risk of coordination of parents' behaviour due to the joint venture. However, in this situation the parents are potential competitors at the time of the formation of the joint venture but nevertheless actual competitors in the near future. Lastly, it should be noted that future Commission's decisions might attach greater weight to possible restrictions on potential competition between parents to a joint venture.

Foreclosure in the market and network effect have been also identified as possible negative consequences of joint ventures. With respect to full-function joint ventures to which the Merger Regulation applies, the test of dominance of the Merger Regulation provides the Commission with means to cope with the above problems. The Commission

will oppose the creation of a joint venture that would foreclose access of third parties to the market. In such a situation the joint venture will inevitably lead to the creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded, unless remedies are found that prevent markets from being effectively foreclosed.

On the other hand, according to Article 2(1)(b) of the Merger Regulation when assessing the operation for the purposes of dominance, the Commission should take into account the market position of the undertakings concerned and their economic and financial powers. The Commission Notice on the concept of undertakings concerned makes it clear that this assessment includes also the groups to which the undertakings concerned belong.[88] The same is true with respect to determining jurisdiction of the Merger Regulation. The turnover of the whole group should be included in the calculation.[89] It appears, therefore, that if a parent to a proposed joint venture jointly controls a network of joint ventures with different partners, the Commission will take into account the market shares of all undertakings which, following the concentration, will be under the same control, once the operation has a Community dimension.

The Commission deals with possible anti-competitive risks also in the course of application of the full-function test. In some circumstances, the full-function character of the joint venture is questionable. This is particularly true when the joint venture remains dependent on its parents for the supply of inputs or the purchase and manufacture of the venture's output. This risk of coordination of the parents' price is visible, for example, when parents are competitors and the joint venture supplies them with an input whose cost accounts for a large share of the total cost of the parents' products. Finally, the ancillary restraints doctrine allows the Commission to deny restrictions on competition which go beyond what is necessary for the implementation of the joint venture.

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[88] See Commission Notice on the concept of undertakings concerned under Council Regulation (EC) No 4064/89 on the control of concentrations between undertakings, [1998] OJ C66/03, para. 10

[89] Article 5(4) of the Merger Regulation. See also the Commission Notice on the concept of undertakings concerned, *ibid.*, para. 9.

4. Summary

Following the abolishment of the traditional distinction between concentrative and cooperative joint ventures, all full-function joint ventures with a Community dimension are included in the scope of the Merger Regulation. The notion of a full-function joint venture with a Community dimension lies on the borderline between the Merger Regulation and Article 81 of the EC Treaty, on one hand, and between the Regulation and national merger control rules, on the other hand. Non full-function joint ventures will continue to be subject to Article 81(1) and (3) and thus to the Regulation 17/62. On the other hand, full-function joint ventures falling below the thresholds of the Merger Regulation will be dealt with according to the national competition rules. However, if there are coordination aspects, Article 81 may apply.

Nevertheless, in addition to the dominance test of the Merger Regulation, the Commission will continue to apply the criteria of Article 81(1) and (3) to the coordination aspects of full-function joint ventures with a Community dimension. Unlike the situation when the cooperative-concentrative joint venture distinction existed, under the amended Merger Regulation the application of Article 81 is limited to the risk of spillover effect on the markets where parent companies remain individual competitors. If the parent companies remain active in the market of the joint venture, the risks to anti-competitive effects is considered higher than when they are active in downstream, upstream or neighboring markets. In order for a restriction of competition in the sense of Article 81(1) of the EC Treaty to be established, it is necessary that the coordination of the parents' competitive behaviour is likely and appreciable and that it results from the creation of the joint venture, being its object or effect. After identifying whether there are markets in which spillover effects may occur the Commission should take into account, in particular, 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 amendments to the Merger Regulation provide for a unified analysis of full-function joint ventures. Both structural and behavioural considerations take place within the procedure of the Merger Regulation. Recital 23 of the Regulation states that where

the effects of the formation of the joint venture are primarily structural, Article 81 does not apply as a general rule. This statement suggests that along with the actual assessment of the concentration for the purposes of dominance, the Commission may carry out threshold analysis of the notified joint venture in order to determine whether its effects on the market are primarily structural. The Commission may find out that the operation is essentially structural despite the existence of some spillover effects. If this were the case, the Commission would solely apply the dominance test of the Merger Regulation to the transaction. If this were not the case, both the dominance test and Article 81 would apply.[90]

In assessing the likelihood of coordination, the Commission takes into account various factors such as the existing and potential competition on the candidate markets, the barriers to entry, the size of the joint venture's market, the proportion of costs, the use of common technology, the price sensitive nature of the market, etc. Thus even though parties' market shares are an important factor, this is not the only relevant factor in the Commission's analysis. Moreover, relatively high market shares can be of a limited significance given other characteristics of the market.

In the light of the above, it appears that the amendments to the Merger Regulation provide for more transparency and simplicity in the treatment of full-function joint ventures. Parties to such joint ventures benefit from the procedural and substantive advantages of the Merger Regulation. The application of the stricter substantive rules of Article 81(1) of the EC Treaty is limited only to certain aspects of the operation. Thus the amended Regulation provides parties with greater legal certainty. As a general conclusion, it could be said, that the 1997 amendments to the Merger Regulation show a more relaxed view on the effects of structural operations on competition.

However, there are questions that remain open. It is to be hoped that in the future full-function joint ventures will not be assessed under a mix of substantive rules. The Merger Regulation provides for a mechanism to avoid this risk. Specific provision is made for companies to propose commitments during the first stage of proceedings with a view to clearing up any serious concerns that could constitute grounds for the

[90] This line of reasoning is developed by G. Zonnekeyn, "The Treatment of Joint Ventures Under the Amended E.C. Merger Regulation" (1998) *ECLRev.*, at 420.

Commission to initiate second-stage proceedings. The Commission may attach conditions and obligations to its decision in order to ensure fulfillment of the parties' commitments.[91] As has been remarked, the Merger Regulation provides for the opportunity a transaction to be considered "primarily" structural even though some minor cooperative aspects exist. The Commission's more relaxed approach to full-function joint ventures, apparent from the sense of the amendments to the Merger Regulation, seems to suggest that the Commission would rather apply the general rule (the Merger Regulation) than the exception, i.e. Article 81. However, the question arises as to the weight attached to the parties' market shares in the analysis of the cooperation issue under Article 81. The Commission's decisions in individual joint venture cases can provide answers to some of these questions but also give rise to new ones.

[91] See Articles 6 and 8 of the Regulation. See also 1997 Competition Report, point 155.

IV. TRENDS IN THE COMMISSION'S DECISIONS ABOUT JOINT VENTURES

The following chapter will try to identify possible trends in the Commission's decisions about joint ventures. It looks into individual joint venture cases decided by the Commission both under Article 81 of the EC Treaty and under the Merger Regulation. Since it is common for companies to set up joint ventures in all sectors of the economy, this chapter is based on a selective analysis of joint venture cases. Since many of the joint ventures cases after the amendments to the Merger Regulation came into force concern the telecommunications sector, the analysis below will concentrate on these cases. Some media cases will be discussed as well, for reasons to be explained below. Firstly, this chapter will provide an overview of the major trends in the telecommunications and media scene. Secondly, some Commission's recent decisions in telecommunications and media cases will be discussed. The final part will refer to the interpretation given in the previous chapter of the new regime of full-function joint ventures, in trying to draw conclusions about the possible treatment of joint ventures in the future. However, the cases in this chapter will be subject to an abstract evaluation for the purposes of general competition questions. This chapter is thus not aiming to provide a detailed sectoral analysis of telecommunications and media cases.

1. Major Trends in Telecommunications and Media: An Overview

Media and telecommunications are undergoing a dramatic change. Liberalization of telecommunications is becoming a reality.[92] In the EU, the telecommunications markets have been liberalized since 1998 with the exception of only Portugal and Greece, which soon will follow the other EU Member States. On the other hand, under the framework of the WTO, a process of worldwide liberalization of basic telecommunications services is taking place.

The digital technology has radically reformed both media and telecommunications sectors. Telecommunications networks have become multi-use

[92] Directive 96/19/EC of 22 March 1996, [1996] OJ L74.

carrier systems allowing new type of services mostly directed towards business users. In the media sector, digitalization means a considerable increase in the transmission capacities for television. Consequently, digital and interactive television are expanding rapidly.

Another major trend is the on-going convergence process between the telecommunications, entertainment/media (e.g. broadcasting, books, newspapers, music recordings, etc.) and computer sectors. The Commission addressed this issue in its 1997 Convergence Green Paper.[93] It distinguished between three different levels of convergence - technology convergence, industry convergence and market convergence.

The Internet is seen as the "prime driver" of the growing convergence of the telecommunications, media and computer sectors. Its increasing importance is encouraging market entry by companies from the closely related telecommunications and media markets.

The convergence of telecommunications and electronics (in particular software) has given rise to value-added telecommunications services that address the needs of multinational companies for advanced end-to-end communications between their geographically dispersed locations around the world as well as between them and their customers or suppliers. These services include voice calling, high-speed fax, data storage and transport and video conferencing.

The sector of telecommunications is also notable with the convergence between fixed and mobile telephony. This is a part of the wider trend towards full integration of wired and wireless technologies. On the other hand, cable networks extend far beyond their traditional role as distributions systems for television. Rather they are one of the future multi-media networks in the interacting markets of television broadcasting, broadband Internet-access, telephony via Internet, and distribution of the new types of video products.[94] Finally, satellites also play a central role in the new markets resulting

[93]Commission, Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation (3 December 1997), COM(97)623 final. In the Green Paper, the Commission referred to the following definitions of convergence: "the ability of different network platforms to carry essentially similar kinds of services" as well as "the coming together of consumer devices such as the telephone, television and personal computer."

[94] See H. Ungerer, "Infrastructure, Telephony and Competition" (3 February 1999), a speech presented during the *Second World CATV Strategies Summit* (Cannes, 3 February).

out of convergence. There is a trend towards a growing integration of satellite and terrestrial networks.[95]

The opening up of the telecommunications sector to competition both within Europe and globally, the common adoption of digital technologies, the phenomenon of convergence, the new role of cable networks, the growing integration of satellite and terrestrial markets as well as fixed and mobile markets, the Internet revolution are already leading to re-positioning in the markets. In general, companies are willing to enter into business alliances in order to take advantage of the new markets.

Against this background, it appears that the Commission will increasingly deal with this type of joint venture cases in the future. Therefore these cases are particularly suitable for a survey of the trends in the Commission's assessment of joint ventures.

2. General Competition Issues

The trend towards industry convergence has lead to a growing number of joint ventures. Many of the new alliances are horizontal and include companies operating in the same part of the value chain. Nevertheless, there is also a trend towards increased vertical integration between companies operating in different parts of the value chain, which in this way try to take advantage of the opportunities offered by market convergence.

The major competition issue is keeping the markets competitive when new market structures emerge. There is a risk that undertakings with significant market power may use this power to safeguard their strong market positions in the relevant markets or to extend them into the emerging new markets. For instance, convergence of markets enables incumbent telecommunications operators to extend their activities beyond their traditional role entering the Internet service provision or the provision of value-added telecommunications services to business users. Similarly, the expansion in the number of broadcast television channels is taking place at the expense of the market shares of the existing broadcasters.

[95] See H. Ungerer, "Market restructuring, alliances, mergers" (Paris, 8 September 1998), available at <http://europa.eu.int/search97cgi/s97_cgi...Template=EC_HTML-view.hts&hlnavigate=ALL>

On the other hand, there is a risk that combination of market players in the converging markets can result in the foreclosing of markets on a lasting basis. In the Convergence Green Paper the Commission underlined access problems of third parties linked to networks, content and conditional access systems.[96] Finally, there is also a danger of a further fragmentation of national markets to the detriment of the fundamental goal of market integration.

3. Media

The analysis of the cases below will focus on competition problems connected with the introduction of digital television. Because of this other aspects of the decisions will only be dealt with very briefly.

Competition on the digital pay-TV market could be prevented by the existence of bottlenecks at each level of the vertical supply chain - content, networks for transmission, technical services for the suppliers of digital TV. The company that controls a bottleneck can try to take advantage of such control by discriminating amongst competitors using the bottleneck in favour of affiliated companies.[97] In addition, vertical operations, which involve undertakings at different level of supply chain, may have foreclosure effects.

The *Bertelsmann/Kirch/Deutsche Telekom* cases, the *Nordic Satellite Distribution* decision and the *BiB* case will highlight these issues in more detail.

MSG Media Service

The first Bertelsmann/Kirch/Deutsche Telecomm case concerned the creation of *MSG Media Service Gesellschaft (MSG)*[98]. The joint venture was intended to provide technical, business and administrative services (including decoders, conditional access services and subscriber management) to the new suppliers of pay-television in the

[96] The Commission adopted a Notice on the application of the competition rules to the access agreements in the telecommunications sector (22 August 1998) OJ C265.
[97] See P. Larouche, "EC competition law and the convergence of the telecommunications and broadcasting sectors" (1998) *Telecommunications Policy,* Vol. 22, No. 3, 219-242 at 224. According to the author bottlenecks as locations along the production chain 'through' which all competitors must pass.
[98] Case No IV/M469, *MSG Media Service*, [1994] OJ L 364/1.

German speaking markets which were expected to enter the market for pay-TV as a consequence of the introduction of digital television.

In its decision under the Merger Regulation the Commission concluded that the proposed concentration would create durable dominant positions for the parties on all three product markets, i.e. the market for administrative and technical services for suppliers of pay TV, the market for pay TV and the market for cable-TV networks.[99] The Commission's starting point was that the party to the joint venture - the only pay-TV suppliers at that time in Germany together with the only cable network operator Telekom, were the most likely potential competitors, and each of them had the resources and the interest in setting up a technical infrastructure for digital pay-TV by itself. Thus if the parties set up MSG, the most likely potential competition would be excluded already in the development phase of the market. An alternative supply of technical and administrative services for pay-TV appeared to the Commission hardly possible because the installation of an alternative infrastructure would require a large amount of investment that would be undertaken by other suppliers only if there was a chance of market penetration. However, if MSG had entered the market, any alternative supplier would have had to impose itself against the combined competitive advantages and specific strengths of Telekom and Bertelsmann/Kirch.[100] The Commission also underlined the danger that the strengthening of the dominant position of Telekom as a cable network operator would safeguard the dominance of Telekom on the cable networks market, following its liberalization.

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[99]. The Commission held that the proposed joint venture was structural in its nature and did not give rise to any coordination concerns. The fact that Bertelsmann and Kirch were already cooperating in Premiere (the joint venture between Bertelsmann, Kirch and Canal Plus) did not change that conclusion. The Commission pointed out that the competition ban imposed on Premiere's shareholders removed any chance of competition between Bertelsmann and Kirch on the pay-TV market. If therefore in future Bertelsmann and Kirch were to supply pay-TV programs independently of each other, any coordination of such independent activities would be the result of cooperation in Premiere, and not in MSG. However, it seems that in its MSG decision the Commission reassessed the competition ban between Bertelsmann and Kirch. Unlike analog television, digital television allows a significant increase in the number of TV programs. Therefore the obligation of both parties not to compete on the pay-TV market acted as a restriction of competition to a much greater extent than previously.

[100] For instance, Telekom not only held a legal monopoly over the cable TV network in Germany but also controlled the fixed telephone network that can be used as a return channel for interactive digital television. Both Bertelsmann and Kirch had preferential access to program software and, therefore, the possibility of offering additional attractive pay-TV programs. Furthermore, Bertelsmann/Kirch's program resources were complementary and allowed different program packages to be put together (tailored to the requirements of specific target groups).

The case is a good example for possible access problems. On one hand, access problems could have arisen if Telekom had taken into account the interests of Bertelsmann and Kirch as program suppliers in relation to the access to its cable network. On the other hand, all suppliers of pay-TV would have been dependent on the services provided by an undertaking controlled by the two leading pay-TV suppliers due to the expected lasting monopoly position of MSG as an operator of digital infrastructure. Thus future pay-TV competitors of Bertelsmann/Kirch would have had the choice of either accepting MSG's conditions or staying out of the market.

Against this background, the Commission rejected the parties' behavioural undertakings as insufficient to resolve the structural problems as a result of the proposed joint venture. Only the parties' undertaking on the introduction of a common interface for decoders contained a structural aspect. However, it was not enough to remove the serious harm resulting from the combination of the leading cable network operator and the leading pay-TV suppliers in the MSG joint venture. Due to the structure of shareholders, MSG would have achieved a dominant position in the market for technical and administrative services even on the basis of a common interface with an unlimited access.

The parties pointed out that the joint venture would contribute to the technical and economic progress - a criterion according to Article 2(1)(b) of the Merger Regulation. The Commission confirmed in principal that the successful spread of digital television presupposed a digital infrastructure and hence that an enterprise with the business object of MSG could have contributed to the technical and economic progress. However, the Commission made it clear that this argument is subject to the condition that no obstacles to competition are formed. Since the proposed joint venture was likely to seal off the future market for technical and administrative services and, in addition, to create durable dominant positions for the parties in the pay-TV and cable network markets, there were major obstacles to competition. Moreover, the Commission even doubted whether the establishment of a digital infrastructure for pay-TV by MSG would contribute in a positive manner to the development of technical and economic progress. The effects of the operation suggest that potential suppliers of digital pay-TV may decide not to enter the market to the same extent as would be the case with a service supplier whose

shareholders structure would ensure strict neutrality. The successful spread of digital television would, in such a situation, be hindered rather than promoted.

The New Attempt

In the recent Bertelsmann/Kirch/Deutsche Telekom decisions[101], the creation of two joint ventures, BetaDigital and BetaResearch, to supply technical services for pay-TV distributed by cable and satellite was also prohibited. BetaDigital was intended to be jointly controlled by CLT-UFA (jointly controlled by Bertelsmann) and Kirch, and BetaResearch by CLT-UFA, Deutsche Telekom and Kirch.

The Commission raised serious objections against both operations. On one hand, Premiere would have permanently become the only pay-TV broadcasting and marketing platform in Germany and would have prevented the development of an alternative broadcasting and marketing platform, since it would have been in a position to determine the conditions under which other broadcasters could enter the pay-TV market. Similarly, in regard to technical pay-TV services, the parties would have become, permanently, the dominant supplier of these services for satellite pay-TV, and the only supplier of them for cable pay-TV. BetaResearch would have been in a position to provide the access technology for pay-TV. Since the development of an alternative decoder infrastructure was not likely to happen, other service providers would depend on obtaining a license from BetaResearch. As a result, Bertelsmann, Kirch and Deutsche Telekom would have been able to act independently of competitors in all the major aspects of the supply of digital pay-TV and related services.[102]

Against this background, and in the absence of agreement with the parties on remedies, prohibition was the only alternative. The Commission made it clear that the digital pay-TV is an important market of the future with a considerable potential for growth. This potential can only be fully exploited if the market is kept open and can evolve on a competitive basis. As proposed by the parties, the operations would prevent the emergence of competitors on the digital pay-TV market, and therefore, new entries in

[101]See Commissions decisions of 27 May 1998, Case IV/M. 993, *Bertelsmann/Kirch/Premiere*, and Case IV/M. 1027, *Deutsche Telekom/BetaResearch*. See also IP/98/477.
[102] See 1998 Competition Report, points 155-157.

the technical service market. However, it should be noted that if undertakings would have been agreed in order to ensure competition on the pay-TV market, the Commission's decision could have been different.[103]

Nordic Satellite Distribution (NSD)

In this case the Commission prohibited a joint venture between Telenor, TeleDanmark and Kinnevik (a Swedish group of companies active throughout Scandinavia in cable TV, satellite broadcasting of free-access TV and pay-TV).[104] The joint venture was to provide transponder capacity and the transmission and distribution of satellite TV channels to the Nordic region. The distribution of satellite TV channels to direct-to-home users and to cable TV networks was to take place through the parents' distribution companies Viasat and Telenor CTV and cable TV operators.

The Commission identified three markets where dominant positions would have been obtained. These were the markets for the provision of satellite transponder capacity and related services to broadcasters in Denmark, Norway, Sweden and Finland, the Danish market for cable television networks, and the market for direct-to-home distribution of pay-television in Northern Europe.

In common with the MSG case, the Commission objected to the structure of shareholders in the proposed joint venture. The Commission feared that the positions of the parties in various markets would reinforce each other. On one hand, through the link to Kinnevik as a broadcaster, NSD will be able to offer some very popular Nordic TV channels on an exclusive basis. On the other hand, the dominant position on the transponder market will give NSD a strong position towards the cable TV operators and strengthen the TeleDanmark's dominant position on the Danish market. Finally, as regards the market for direct-to-home distribution of pay-TV, Viasat will also strengthen its position through the attractive package of channels that it will put on the market, and this will undermine the position of the only remaining competitor - FilmNet.

[103] See IP/98/477 where the Commission confirmed that it would have welcomed agreement with the parties.
[104] Case IV/M490, *Nordic Satellite Distribution*, [1995] OJ L53/20.

In terms of technical and economic benefits, the joint venture was intended to implement a joint Nordic encryption system, which would allow the individual TV households to use only one decoder box irrespectively whether they receive the signals from cable or via satellite. In principal, the Commission recognized that the infrastructure proposed by the parties could be highly efficient and beneficial to consumers. However, according to the Commission it lacked the characteristics of an open infrastructure accessible for all interested parties. Because of the NSD's dominant position as provider of TV channels from Nordic transponders, it appeared to the Commission that the majority of direct-to-home households and independent cable operators in the Nordic countries will be forced to use the encryption system offered by NSD. The Commission even suggested that the vertically integrated nature of the proposed operation, characterized by the participation of such a strong broadcaster as Kinnevik, was not necessary for the creation of the integrated infrastructure in question.

British Interactive Broadcasting (BiB)

British Interactive Broadcasting (BiB) is a non full-function joint venture between British Telecom (BT), BSkyB, Midland Bank and Matsushita. It aims to provide interactive shopping, services, games, etc. and interactive television programmes via a satellite signal and a telephone line linked to a set-top box. This is a case where the parties have proposed undertakings and thus agreed to modify their initial agreements. Subject to many conditions and obligations, the Commission proposed to take a favourable view to the joint venture under Article 81(3) of the EC Treaty.[105]

The changes required by the Commission are designed to ensure that the impact of the transaction on the structure of the various markets is not such as to prevent competition from emerging or developing. The Commission has therefore focused on structural rather than behavioural conditions. The Commission required legal separation of the digital interactive TV services and BiB's activities in respect of the subsidization of set top boxes. On the other hand, it has been agreed that third parties, whether operators

[105]Case IV/36.539, *British Interactive Broadcasting (BiB)*, Commission Notice pursuant to Article 19(3) of Council Regulation No 17 (21 October 1998), [1998] OJ C322.

of digital TV or digital interactive TV services, will have fair, reasonable and non-discriminatory access to the digital set top boxes.

The Commission has expressed doubts in relation to the BT's participation in BiB. BT owns the UK telecommunications customer access network that could be used in the future for the provision of broadband services in competition with BiB. It also owns cable networks. The BT's undertaking to divest its cable interests corresponds to the anticipated development in the cable sector, namely legal separation between cable and telecommunications interests where a cross-ownership exists.[106]

The case is a good illustration that even where an operation raises serious competition problems, it is still possible for the Commission to take a positive position where the parties agree to undertakings sufficient to ensure competition on the market.

Canal+/CDPQ/BankAmerica

The Commission approved the acquisition by BankAmerica of a joint control over Numericable (France) with Canal+.[107] The joint venture was created to operate cable television networks in France. However, the Commission found spillover effects of the joint venture on the upstream market for the wholesaling of TV rights in Spain. In Spain, Canal+ had joint control over Sogecable - a company with very strong market positions on the pay-TV market, a very important distributor of content. On the other hand, BankAmerica and CDPQ were also present on the Spanish pay-TV market through their Cableuropa joint venture, a licensed operator of cable pay-TV and telecommunications services.

The Commission concluded that the operation to acquire joint control over Numericable did not have the object of coordination of the competitive behaviour of the parties. Cableuropa, being a new entrant on the Spanish pay-TV market, need to compete on price with Sogecable in order to attract as many subscribers as possible. The product offered by Cableuropa is different to that offered by Sogecable in that it consists of an unbundled package of services (i.e. Internet, telephony and pay -TV).

[106] See 1997 Report on Competition Policy, point 109; 1998 Report on Competition Policy, point 86.
[107] Case IV/M.1327, see IP/98/1062 of 4 December 1998 "Commission approves acquisition of Numericable (France) by Exante (US/Canada) and Canal+ (France)".

However, the Commission held that cooperation could be the effect of the operation. Of concern was the existence of a vertical relationship between Cableuropa and Sogecable as regards content provision, and the preferential treatment that Cableuropa might receive in this respect. In order to successfully operate on the Spanish pay-TV market, other cable operators need the content owned by Canal+. Therefore, Canal+ and Sogecable have undertaken to provide fair and equal treatment of cable pay-TV operators regarding content provision.

Competitive Analysis of the Media Cases

In terms of substantial assessment, it appears that in all cases where joint ventures were prohibited, the Commission objected to the structural advantages that the parties were willing to assure for themselves through the joint ventures. The Commission underlined the strong market positions of the parties prior to the proposed joint ventures and their specific strengths such as the preferential access of Bertelsmann and Kirch to program software for pay-TV. Since the geographic markets for broadcasting are still national, the creation of new or strengthening of existing dominant positions means further partitioning of markets, contrary to the fundamental goal of market integration.

It seems that the Commission's negative attitude was due to the structure of shareholders in the proposed operations. Namely, the Commission made it clear that the structure of shareholders in the MSG or NSD joint ventures could not ensure strict neutrality of the joint venture companies (both service suppliers), and was therefore more detrimental than beneficial for the emerging competition on the new markets. The MSG, for example, would have combined the two leading program suppliers and the only network provider in Germany, which together would have supplied services for pay- TV. The parties would have been in a position to create obstacles to the free access of other competitors to the infrastructure for digital television. The mere setting up of the joint venture would have resulted in sealing off the technical service market for pay-TV to future competition. The joint venture's dominant position on the technical service market would reinforce the already strong positions of Bertelsmann and Kirch on the downstream market for pay-TV. The vertical link of the network provider for pay-TV -

Telekom, to the leading program suppliers Bertelsmann and Kirch would strengthen Telekom's dominant position on the cable network market to the detriment of the private cable network operators. The Commission's objections to the vertically integrated nature of MSG and NSD are remarkable in the light of the reassessment of the meaning of vertical restrains in EC competition policy.[108] The prohibition decisions suggest that the Commission will closely examine the vertical effects of operations which threaten to seal off the emerging new markets to future competition as well as to strengthen the parents' dominant positions on upstream or downstream markets.

The cooperation plans of Bertelsmann, Kirch and Deutsche Telekom (the MSG, BetaDigital and BetaResearch joint ventures) would have set the framework for digital pay-TV in Germany. The Commission's prohibition decisions, therefore, not only prevent the creation or strengthening of dominant positions, but also provide for the structure of the market.[109] The Commission seeks to set free the dynamism inherent in the new markets. There are two means for this. On one hand, it follows from the above cases that the Commission would favour a service supplier whose shareholders structure ensures strict neutrality towards third parties. In Commission's view, if not involved in MSG, Telekom, for example, would independently enter the market for technical and administrative services for pay-TV and would hence operate a pay-TV infrastructure that would not be controlled by Bertelsmann/Kirch. If necessary, Telekom could also undertake this task together with other partners not active in the field of pay-TV. Even more explicit in this respect is the NSD decision where the Commission stated that the participation of such a strong broadcaster as Kinnevik in the NSD joint venture is not necessary for the creation of an integrated infrastructure for the distribution of satellite TV. On the other hand, it appears from the second Kirch/Bertelsmann/Deutsche Telekom case that if the parties had provided the Commission with structural undertakings sufficient to ensure competition on the pay-TV market, it might not have prohibited the operations. Unlike Kirch, Bertelsmann and Deutsche Telekom, who did not agree upon such undertakings, BiB's parents did so and consequently the Commission granted an

[108] See the Green Paper on Vertical Restrains in EC Competition Policy, COM(96)721final. See also Commission communication on the application of the Community competition rules to vertical restraints, COM(98)544final.

exemption to the BiB joint venture under Article 81(3) of the EC Treaty.[110] As a broad conclusion, it could be said, that technical and economic benefits are not enough in order for the Commission to take a positive view to the new alliances in the media sector. The infrastructure proposed by the parties to the new ventures should be an open one. When necessary, the Commission will require structural rather than behavioural undertakings to ensure competitive structures on the markets.

Furthermore, another media case, *Canal+/CDPQ/BankAmerica,* is notable with regard to the appraisal of cooperative effects of a full-function joint venture in the light of the amendments to the Merger Regulation. The case is interesting in that the operation did not give rise to any competition problems regarding dominance, but, nevertheless, it gave rise to serious concerns regarding spillover effects. It appeared to the Commission that the acquisition of joint control by BankAmerica and Canal+ of the joint venture in France could have anti-competitive effect on the market in Spain where there was a vertical relationship between the parent companies. It follows from this case that where the parents to a proposed joint venture are vertically linked to each other outside the joint venture, the Commission is likely to question the operation because discrimination in favour of the affiliate company can take place. However, as *Canal+/CDPQ/BankAmerica* suggests, remedies can be taken to offset also this kind of possible anti-competitive effect. In this case this was the obligation of Canal+ to behave in a non-discriminatory manner towards the cable TV operators on the Spanish market as regards content provision. The obligation by Canal+ did not change any of the structural aspects of the operation.

[109] See P. Larouche, "EC competition law and the convergence of the telecommunications and broadcasting sectors", n. 97 above, at 231.

4. Telecommunications

Cases Prior to the Amendments to the Merger Regulation

First, some of the telecommunications cases before the amendments to the Merger Regulation came into force will be reviewed. These are either alliances of incumbent telecommunications operators or new entrants in the telecommunications market, set up by their parent companies to provide international value-added telecommunications services to large private companies or worldwide satellite personal communications services. Value-added telecommunications services form one of the segments of the overall telecommunications market with the biggest potential for growth in the future, taking full advantage of the ongoing process of liberalization of telecommunications and growing convergence of telecommunications and electronics.

Yet in 1993 the Commission exempted under Article 81(3) (former 85(3)) the first BT/MCI alliance – the Concert joint venture.[111] In 1997 the Commission approved two other global alliances, Unisourse and Uniworld, with conditions.[112] Meanwhile two European incumbent telecommunications operators, France Telecom and Deutsche Telekom, formed two joint ventures, Atlas and GlobalOne, to provide advanced telecommunications services to corporate users and to serve travelers and other carriers, also exempted by the Commission under Article 81(3), subject to certain conditions.[113]

On the other hand, for the first time in *International Private Satellite Partners* [114] mainly private companies not previously active in the telecommunications field decided to form a joint venture in order to provide international business telecommunications services using their own satellite system. In addition, the IPSP partners intended to

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[110] Similarly, in its Article 19(3) Notice, the Commission announced that it intends to adopt a favourable view of the creation of a new satellite-based operator in France, Television par Satellite (TPS), [1998] OJ C65.

[111] Commission decision of 27 July 1994, Case IV/34.857, *BT/MCI*, [1994] OJ L 223/36. See also Commission decision of 14 May 1997, Case IV/M.856, *BT/MCI II.*

[112] Commission Notices of 12 February 1997, Case IV/35.738, *Uniworld*, [1997] OJ C 44/4, and Case IV/35.380, *Unisource/Telefonica*, [1997] OJ C 44/15. See also Press Release IP/97/932 "Commission approves, under conditions, the creation of two telecommunications alliances, Unisource and Uniworld". The Commission approved the Unisource and Uniworld transactions without Telefonica.

[113] Decisions of 17 July 1996, Case IV/35.337, *Atlas*, [1996] OJ L 239/23 and Case IV/35.617, *Phoenix/GlobalOne*, [1996] OJ L 239/57.

[114] *International Private Satellite Partners (IPSP)*, [1994] OJ L354/75.

provide bulk transmission capacity to third parties, to the extent that the capacity of the satellites is not fully utilized by IPSP. The joint venture was to be assisted by a number of local marketing and operating companies nominated by IPSP as representative agents or distributors (normally on a non-exclusive basis).

The Commission concluded that the partners of IPSP were not actual or potential competitors on the market, and consequently the creation of IPSP fell outside the scope of Article 81(1) (formerly 85(1)). The very high barriers to entry, the substantial amount of market power in the hands of the incumbent telecommunications, the advanced technologies involved and the connected risk of failure as well as the broad geographic area covered, together with the amounts required and the bargaining power of customers (i.e. big multinational corporations), made this joint venture very risky. The Commission concluded that none of the IPSP partners could reasonably be expected to make the investment, and assume the substantial risk associated with it, and to enter the market alone.

Similarly, the Commission decided that the Iridium system, designed to provide global digital wireless communications services using a constellation of low earth orbit satellites, amounted to the introduction of a viable competitor in a completely new mobile telecommunications field and, as such, fell outside the scope of Article 81(1) (formerly 85(1)).[115] In both cases *IPSP* and *Iridium* the Commission cleared a number of ancillary restraints. For example, the Commission found the pricing guidelines issued by Iridium as well as the guidelines for service provider selection and even exclusivity rights of gateway operators directly related and necessary to the successful implementation and operation of the Iridium system.

The International Mobile Satellite Organization (Inmarsat) notified to the Commission the creation of I-CO Global Communications, to finance, construct and operate the Inmarsat-P world-wide mobile satellite-based telecommunications system.[116] In 1998 the Commission gave its approval to the Inmarsat restructuring following the transforming of the operating parts of Inmarsat into a public company.[117]

[115] Case IV/35.518, *Iridium*, [1997] OJ L 16/87.
[116] Commission Notice of 15.11.1995, Case IV/35.296, *Inmarsat-P*, [1995] OJ C304/06.
[117] See European Commission Press Release IP/98/923 "Commission gives green light to Inmarsat restructuring". An important part of the restructuring proposal is the envisaged public offering of shares.

Against this background, two different categories of telecommunications alliances can be distinguished, i.e. joint ventures of the existing national telecommunications operators and joint ventures of private companies that are new entrants in the telecommunications field. It appears that in the former situation the Commission is more likely to grant an exemption under Article 81(3) subject to conditions whereas in the latter situation it can clear the operation under Article 81(1). The Commission explained the difference in its approach emphasizing the fact that the new entrants in the telecommunications field, still characterized by high barriers to entry, increase the level of competition in the telecommunications market until recently reversed to companies holding exclusive rights.

These telecommunications cases are of interest in that the Commission took a positive position regarding dominant undertakings (i.e. the incumbent telecommunications operators) seeking to position themselves on emerging markets. Even though the Commission imposed significant conditions to its exemption decisions under Article 81(3) in order to reduce the risk for anti-competitive effects on the market, the approach is different from the approach in the media cases where the Commission prohibited joint ventures. It must be underlined, however, that in *MSG* the Commission found not only that no other competitor could possibly challenge MSG, but also that there was no other potential competitor (the market did not exist at the time of the decision). By contrast, the telecommunications sector is more fluid and the new markets resulting from convergence are already there and growing.[118] Finally, the clearing of the Inmarsat reform under Article 81 of the EC Treaty also highlights one of the Commission's policy principles. Namely, where markets are restructuring the emerging new entities should not continue to have a privileged position on the market.

New Developments

The purpose of this section is to review joint venture cases after the amendments to the Merger Regulation came into force on March 1st, 1998. These are joint venture

[118] P. Larouche, "EC competition law and the convergence of the telecommunications and broadcasting sectors", n. 97 above, at 233.

cases related to telecommunications and Internet as well as to telecommunications equipment areas. There are two types of cases - full-function joint ventures which fall into the scope of the Merger Regulation (with or without assessment under Article 2(4) of the Merger Regulation), and non full-function joint ventures which fall into the scope of Article 81 of the EC Treaty.

As has been said above, a significant trend in the telecommunications area is that companies enter the value-added segment of telecommunications, in particular the provision of advanced value-added services to business customers. This sort of services can be provided to business customers either using terrestrial facilities and establishing physical links by means of coaxial or optical-fibre cables, or using satellite facilities. It is widely accepted that satellites are particularly recommended as regards customers' locations in remote territories and in areas having a very poor terrestrial infrastructure. *IPSP* illustrates the type of joint venture created for the provision of private business telecommunications services via satellite facilities. Some of the cases below illustrate the using of terrestrial facilities.

MetroHoldings Limited

The joint venture involves DTFT Ltd, a joint venture owned by Deutsche Telekom and France Télécom, and Energis, the UK carrier formerly owned by the National Grid. The joint venture will build new local metropolitan area telecommunications networks in the UK, starting with a fibre optic network in the City of London. The creation of this non full-function joint venture will enable the parties to deliver advanced telecommunications services directly to business customers in the UK.[119]

The Commission underlined that where the telecommunications market is highly liberalized and competitive and the parties to the joint venture do not expect to gain market share in excess of 5 per cent on any relevant product markets, the joint venture can be cleared under Article 81(1) of the EC Treaty. It appears that unlike the provision

[119] Commission Notice of 23.01.1999, Case No IV/37.123, *MetroHoldings Limited*, [1999] OJ C19. See also Commission Press Release IP/99/211 of 31.03.1999.

of telecommunications services using satellites, the provision of similar services using terrestrial transmission capacity faces more competition from other providers. Therefore even a joint venture between the incumbent telecommunications operators Deutsche Telekom and France Télécom can be cleared under Article 81(1). However, the most important factor for the Commission's positive decision in this case is that the parents do not expect to gain market share in excess of 5 per cent on any relevant product markets as a result of the creation of the joint venture.

BT/AT&T

The joint venture will provide global telecommunications services to multinational companies and international carrier services to other telecommunications companies. Its parents - British Telecommunications (BT) and AT&T are two of the world's largest telecommunications operators.[120]

The Commission decided to carry out a second-phase inquiry into the effects of the joint venture on several global telecommunications markets and also some in the UK. It expressed concerns that that the operation could lead to a creation or strengthening of a dominant position due to the parties' combined market position on the global market for the provision of telecommunications services to large multinational companies, on the market for the provision of international carrier services to other operators, on the UK market for the provision of international voice telephony services on the UK-US rout as well as on the market for certain telecommunications services in the UK. However, the

[120] Case No JV.15. See also Press Release IP/99/209 of 30 of March 1999. BT is currently the fifth biggest telecommunications operator worldwide by turnover whereas AT&T is the second biggest telecommunications operator worldwide by turnover, and the first US long distance telecommunications operator. AT&T is also active in the UK where it operates a group of wholly-owned subsidiary companies including AT&T Comms UK, and ACC Long Distance UK. AT&T has also recently completed its merger with Tele-Communications, Inc. (TCI), a US corporation that owns approximately 22% in Telewest Communications, a UK cable company offering television channels, telephony services, data communications services, and Internet access. AT&T has a share in AUCS (AT&T- Unisource Communications Services). It is also a member of the WorldPartners alliance which is made up of AT&T, KDD, Singapore Telecom, Unisource and Telstra. Both AUCS and WorldPartners provide global telecommunications services to multinational corporations that AT&T distributes in the US, as well as in the UK for AUCS services. The parents will transfer their international telecommunications facilities to the joint venture, e.g. correspondent contracts, submarine cable ownership, cable landing stations and rights of use of cables.

in-depth investigation of the case showed that the state of competition in these markets offers the necessary environment for the venture to proceed. On the global telecommunications services market, the parties will have a combined market share of between 30-50 per cent. Notwithstanding this relatively high market share, the Commission found that there is no danger for the competition because this is a dynamic market with a number of competitors such as MCI WorldCom, GlobalOne and Equant as well a substantial number of potential competitors. On the international carrier services market, the parties' combined share of total international bilateral traffic will be around 18 per cent. However, there is a growing number of competitors, both at pan-European and global levels. As regards the UK-US route, the parties will have about half the traffic flows in either direction but less than 20 per cent of the capacity, with plentiful additional capacity available which is falling in price thus permitting the entry of new competitors on this already very competitive route.

On the other hand, the Commission identified possible coordination effects of the joint venture on UK market, regarding ACC (a wholly owned subsidiary of AT&T in the UK), Telewest (in which AT&T through TCI holds a jointly controlling stake) as well as regarding the distribution of AT&T/Unisource services in the UK. Accordingly, the Commission approved the joint venture only after the coordination issues had been resolved through undertakings submitted by AT&T. These undertakings include the divestment of ACC UK, the creation of a greater structural separation between AT&T and Telewest and the ability for another distributor apart from AT&T UK to be appointed to distribute AUCS services in the UK, as AT&T UK will also be wound up. Subject to full compliance with these undertakings, the Commission declared the concentration compatible with the common market.

The decision is of prime interest because of the Commission's findings on the competitive state of the above-described international markets. Against this background, it could be reasonably suggested that the Commission would be favourable to similar joint ventures in the future. The Commission already announced that it will review the submissions concerning the lifting of conditions attached to other decisions it has taken in this area, in particular the Atlas/GlobalOne decisions, in order to further foster

competition.[121] The decision is further remarkable in that it shows that where a proposed joint venture gives rise to coordination issues undertakings by the parties will be necessary.

Mobile Telecommunications Services

Three cases will illustrate competition issues in the mobile telephony sector. On one hand, in *BT/AirTouch/Airtel* the Commission authorized British Telecom, AirTouch and three other investment companies to acquire joint control over the existing Spanish mobile telephony provider Airtel, which is the second GSM mobile operator in Spain.[122] The Commission concluded that the creation of the joint venture would not create or strengthen a dominant position on the relevant market, i.e. mobile telephony using GSM and/or DCS 1800 technology, even based on the narrowest market definition. The Commission took into account the strength of the other existing mobile operator, Telefónica, and the competitive pressure following the recent award of a third mobile telephony license in Spain. However, the operation raised coordination issues since both BT and AirTouch had previously acted independently in mobile telephony whilst being non-controlling shareholders in Airtel. Nevertheless, the Commission found that the new shareholder situation in Airtel would not give rise to coordination of the competitive behaviour of BT and AirTouch.

On the other hand, in *VIAG/Orange*[123], the joint venture Orange was intended to install and operate a mobile telecommunications network in Switzerland using the DCS 1800 standard. This standard operates within the 1800 Mhz bandwidth, unlike the GSM standard operating within the 900 Mhz bandwidth. It seems that in this case, in the course of defining the relevant product market, the Commission departed from its past decisions, in which it regarded systems such as DCS 1800 as operating on a market different from the market for GSM services. The Commission pointed out the increasing convergence of the two systems leading to the formation of one market for digital mobile

[121] See IP/99/209 of 30 of March 1999.
[122] Commission decision of 8 July 1998, Case No. JV.3, *BT/AirTouch/ Airtel*. See also IP/98/656 of 13 July 1998 "Commission authorizes operation between shareholders of Spanish mobile operator".
[123] Commission decision of 11 August 1998, Case No IV/JV.4, *VIAG/Orange*.

telecommunications services, notwithstanding the standard they use. The Commission also underlined the trend towards European market for mobile telephony service provision. Apart from the market definition, the case is interesting also because of the parents' activities on the mobile telephony market outside the joint venture (in Austria and Germany). Nevertheless, the Commission decided that the joint venture did not give rise to any likelihood of coordination.

Mobile telephony together with fixed telephony was again a potential for the application of Article 2(4) of the Merger Regulation in a case involving Deutsche Telekom, France Télécom and the Italian electricity group ENEL.[124] The parents created the joint venture, *Wind Telecomunicazioni,* to provide a full range of domestic and international telecommunications services to business and residential customers in Italy, combining mobile and fixed line telecommunications activities. The Commission found that the operation would not lead to an anti-competitive cooperation between FT and DT on mobile or fixed line telephony in France and Germany, where each of them was regarded as a potential competitor to the other. The Commission was of the opinion that the absence of the two companies from each other's markets in France and Germany was a deliberate decision and was not as a result of the creation of the joint venture. However, the Commission is carrying out a separate investigation, which is taking place under Regulation 17, into the overall cooperation between France Télécom and Deutsche Telekom.[125]

The Internet

The Commission has dealt recently with a number of cases concerning the supply of Internet services. The *Telia/Telenor/Schibsted* case will be described in more detail in order to provide an illustration of the Commission's approach to Internet-related cases so far. The other Internet cases will further help to identify the Commission's policy principles in this area.

[124] Commission decision of 22 June 1998, Case IV/JV.2, *ENEL/FT/DT.*
[125] IP/98/557 of 23 June 1998

Telia/Telenor/Schibsted[126]

Telia, the incumbent telecoms operator in Sweden, Telenor the Norwegian incumbent and Schibsted, a Norwegian publishing and broadcasting company, formed a joint venture, *NewCoI* (trading as Scandinavia On-Line), for the provision of Internet gateway services and website production services mainly in Sweden. Related to the gateway services is the Internet advertising. Thus the joint venture will be active on the market for the provision of various services linked to the use of Internet. Two of its parents are major telecommunications operators. The third parent - the Norwegian Schibsted group, is involved in a range of media-related activities such as newspapers, television, films and multimedia. Telia is also an Internet service provider through Telia InfoMedia Interactive. Telenor holds 33 percent shareholding in Telenordia that is an Internet service provider on the Swedish market through its subsidiary Algonet. Schibsted and Telenor jointly own Scandinavia On-Line AB. This structure of shareholders illustrates the fact that Internet is attracting market players from the close telecommunications and media areas.

The case highlights the Commission's view on the definition of relevant markets in the Internet area. According to the Commission gateway services do not constitute a market as such, but should be taken into account in the examination of other relevant markets. The Commission made it clear that gateways are a kind of website hosting different services provided by the gateway service providers or third parties. Gateway services are generally financed through advertising and not through subscription income. The Internet service providers usually supply them free of charge to Internet subscribers as part of the access package.[127] The Commission referred to its decision in *Bertelsmann/Burda/Hos Lifeline*[128] where it found that the provision of paid-for-content (e.g. games, special news services) on Internet constitutes a separate market, distinct from the market for Internet advertising, mainly because the two activities generate revenues from different sources (advertising from the advertiser, but paid-for content from the

[126] Commission decision of 27 May 1998, Case IV/JV.1, *Telia/Telenor/Schibsted.*
[127] *Ibid.*, para. 14.
[128] Case No. IV/M.973.

subscriber). Moreover the two activities are frequently carried out by different undertakings and require substantially different inputs.

In view of the above, for the analysis of dominance, the Commission identified markets for paid-for-content on the Internet, Internet advertising and website production. Website production was also considered to be a candidate market for the analysis of coordination under Article 2(4) of the Merger Regulation as the joint venture and two of the parents were present on this market. The other candidate market for coordination was the upstream market for the provision of dial-up Internet access where the joint venture was not active, but two of its parents were. The Commission distinguished dial-up Internet access from dedicated access where the connection between the users and the Internet service providers is made by means of dedicated private line. As for the geographical markets, they are still considered to be national. However, the Commission suggested that the market for website production may well be wider and left the market definitions open.

In the course of assessing the operation for dominance, the Commission had the opportunity to state its policy principles regarding rapidly growing markets. Where the parents' market shares in a rapidly growing market with many market actors are, respectively, between 10 and 20 per cent (Telia), less then 10 per cent (Schibsted) and less then 5 per cent (Telenor), the formation of the joint venture does not create or strengthen a dominant position. The Commission reached this conclusion for the market for Internet advertising, where all three parents were present prior to the creation of the joint venture. Similarly, this was also the conclusion for the market for website production where two of the parents and the joint venture have market shares of less than 5 per cent each.

In relation to the coordination issue, the Commission had two different situations to assess. First, on the market for web site production, the combined market share of the joint venture company together with two of its parent companies was less than 10 per cent on the narrowest possible and most unfavourable market definition to the parties. Consequently, the Commission concluded that any restriction of competition would not be appreciable, even if the parents were to coordinate their activities on this market.

In the second part of its Article 2(4) reasoning, on the dial-up Internet access market in Sweden, the Commission found that the market was characterized by high growth, relatively low barriers to entry and low switching costs. The market shares which Telia and Telenordia enjoyed on this market were 25-40 per cent and 10-25 per cent respectively, but the Commission found that these market shares were of limited significance in such a growing market. Therefore, the Commission concluded that the market structure was not conductive to the coordination of competitive behaviour. In addition, the likelihood of coordination was reduced further by the relative size of the dial-up Internet access market (which accounted for over 90 % of Internet revenue in Sweden) compared with the size of the other markets on which the joint venture would be active.[129]

The other Internet-related cases also represent, on one hand, the integration between Internet, media and telecommunications. On the other hand, many of them involved an investigation under Article 2(4).

The first of these cases concerns the creation of a full-function joint venture, AOL/CIS France, between Cegetel, Canal+, America Online (AOL), and Bertelsmann for marketing, development and provision of interactive services to non-enterprise customers.[130] AOL, a corporation engaged in the provision of interactive services to individual subscribers throughout the world, already operated in France via two national joint ventures with Bertelsmann - AOL Bertelsmann Online France SNC (BAOL SNC) and CompuServe Interactive Services France SNC (CIS SNC). Both will become wholly owned subsidiaries of the new joint venture. Cegetel also operated in France prior to the joint venture. It will wind down and terminate its Internet service providers Havas Interactive On-line Services (HOL) and Cegetel Internet Grand Public. In another case, Bertelsmann Interactive Studios and Viag Interkom created a joint venture, Game Channel, to offer paid-for online games and downloadable electronic games on the Internet as well as a web-site for Internet users interested in electronic games, mainly in

[129] See 1998 Competition Report, Box 7: "Implementation of the new Article 2(4) of the Merger Regulation".

[130] Commission decision of 4 August 1998, Case No IV/JV.5, *Cegetel/Canal+/AOL/Bertelsmann*.

the German language.[131] It appears that Bertelsmann – the leading German media group, is involved in both operations - the former for the provision of interactive services to non-enterprise customers and the latter for the provision of paid-for online electronic games and related content over the Internet. Among the joint ventures' parent are also Cegetel that is active in the telecommunications sector in France and Viag Interkom, a joint venture of VIAG (Germany), British Telecommunications and the Norwegian Telenor providing telecommunications services and networks in Germany.

In both cases the Commission decided that the proposed joint ventures did not give rise to any competition problems. In the first case, on the dial-up Internet access market in France, the combined market share of AOL (through BAOL SNC and CIS SNC) and Cegetel (through HOL and Cegetel Internet Grand Public) is relatively high - between 32 per cent and 37 per cent. However, France Télécom has also a significant market share through Wanadoo Oléane. Given the financial strength of France Télécom and the economies of scope it enjoys for the provision of dial-up Internet access and the presence of other smaller competitors, the Commission concluded that the above market share will not create or strengthen a dominant position. The Commission also concluded that it is not likely that the creation of AOL/CIS France or Game Channel would have the object or effect for the parent companies to coordinate their competitive behaviour on the markets closely related to the joint venture markets. The candidate markets for coordination in *Cegetel/Canal+/AOL/Bertelsmann* were Internet advertising, paid for Internet content and network distribution services. The Commission found no appreciable restriction of competition on any of these markets.[132]

Internet advertising, paid for Internet content as well as Internet access were candidate markets for coordination also in *@Home Benelux*, a joint venture between @Home, a US based Internet service provider and two cable companies based in the Netherlands - Palet Kabelcom and Edon.[133] The joint venture was created to provide Internet access, Internet content and related services to residential customers, mainly located in the Netherlands, through cable network consisting partly of its own equipment

[131] Commission decision of 5 May 1999, Case No IV/JV.16, *Bertelsmann/VIAG/Game Channel*.
[132] See IP/99/308 of 6 May 1999.
[133] Commission decision of 15 September 1998, Case No IV/JV.11, *@Home Benelux*. See also IP/98/825 of 22 September 1998 "Commission clears joint venture @Home Benelux B.V."

and partly of the networks of the cable operators involved. According to the Commission it was not likely that the creation of the joint venture in the Netherlands would have the object or effect for the parent companies to coordinate their competitive behaviour on other markets. The Commission also found that dominance could not result from this joint venture because market shares of the participating companies remained low and there is a large number of competitors on the relevant markets.

Similarly, Internet advertising and paid for Internet content were candidate markets for coordination in *WSI Webseek.*[134] The joint venture was created by Deutsche Telekom, the German publishers and broadcasters Axel Springer and Holtzbrinck and the Internet search provider Infoseek in order to provide free search and navigation services for German-speaking Internet users. The Commission pointed out that search and navigation services provided free of charge do not in themselves constitute a relevant market. The Commission distinguished separate markets for Internet access, advertisement and remunerated content offerings. The Commission concluded that the creation of WSI Webseek does not create or strengthen a dominant position on any of these product markets, even based on the most narrowly defined geographic market. The operation will also not lead to any appreciable restriction of competition, in either of these markets.

Mobile Phones/Wireless Information Devices

As has been discussed before, Ericsson, Nokia and Psion created a joint venture for developing and marketing of operating system (EPOC) for wireless information devices.[135] In summary, the Commission found that there is no likelihood for co-ordination between Ericsson and Nokia on the markets for wireless information devices and mobile phones, because the cost of the operating system for wireless information devices was very small in comparison with the cost of the device and the operating system was not part of the mobile phones devices. In Commission's view there is no necessary link between the relatively high market shares of Nokia and Ericsson on the

[134] Commission decision of 28 September, Case No IV/JV.8, *WSI Webseek.*
[135] Commission decision of 22 December 1998, Case No IV/JV.12, *Ericsson/Nokia/Psion/Motorola.*

mobile phone market and the possibility of a high market share on the market for wireless information devices.[136] Similarly, assessing the risk of dominance, the Commission pointed out that there is no automatic translation of the parent companies' current market shares on the mobile phone market into the wireless information device market.[137]

Competitive Assessment of the Telecommunications Cases

It follows from the telecommunications cases that the convergence process is already changing market definitions. The Commission demonstrated a willingness to define relatively broad product markets. It pointed out that mobiles, wireless information devices and handheld computers are merging into a single information devices market. Similarly, the Commission underlined the formation of the product market for digital mobile telecommunications services, notwithstanding the standard they use.

Even though the number of joint venture cases under the Merger Regulation with an assessment of the coordination effects is still limited, it is possible on the basis of the above cases, which represent a significant proportion of the overall number of such joint venture cases, to identify the type of operation that would require an assessment under Article 2(4). It appears that where markets are reshaping the new joint ventures are likely to raise coordination issues because their parents are usually companies active on closely related markets.

The cases above show a more relaxed view by the Commission to the coordination issue. An important factor in the Commission's analysis appears to be the relative size of the joint venture's market. The Commission often reached the conclusion that it is not likely that the creation of a joint venture in one particular country, by parents active internationally (or even globally), would have the object or effect on the parent companies to co-ordinate their competitive behaviour also on other markets.

It seems that the Commission closely looks at the structure of the candidate markets for coordination, namely whether these markets are conductive for coordination of the parents' behaviour. Even though the parents' market shares on the relevant markets

[136] *Ibid.*, para. 32.
[137] *Ibid.*, para. 20.

are an important factor, the Commission made it clear that other factors are also decisive. For the purposes of both dominance and coordination, the Commission stated that parents' high market shares do not automatically mean high market shares on the joint venture's market as well.

Relatively high market shares are of a limited significance in growing markets with low barriers to entry. Summarizing the case *Telia/Telenor/Schibsted*, the Commission concluded that there is no likelihood of coordination between the parents on the market for dial-up Internet access because (i) it is a high growth market with relatively low barriers to entry and low switching costs, (ii) it is very price sensitive, (iii) the substantial, but falling market shares of the parent companies are of limited significance on such a growing market and (iv) it is substantially larger than the joint venture markets.

Even though the Commission has not yet prohibited a full-function joint venture because of its coordination effects, in one of the above-described cases, *BT/AT&T*, the transaction was authorized by the Commission following a second phase in-depth investigation, after the parties submitted significant undertakings. Where there are coordination problems as a result of the creation of a full-function joint venture structural undertakings, such as structural separation and even divestment of parents' activities in the candidate market for coordination, appear to be essential.

In general, the Commission seems positive on joint ventures that are new entrants on markets where none of the parent companies has been active so far. Moreover, cases such as *ENEL/FT/DT* show that even incumbent telecommunications operators can grow by investing in new markets (unless the operation gives rise to a creation of a dominant position on the relevant market).

5. Conclusions

The final part of this chapter returns to the overall regime of joint ventures after the amendments to the Merger Regulation came into force and, on the basis of the conclusions from the telecommunications/media joint venture cases, aims to highlight the current trends governing the Commission's approach towards joint ventures in general. It

is, of course, highly problematic to give exact predictions as to how the Commission will react in future joint venture cases raising significant competition issues. Subject to this caveat, the following general points may be made.

The market restructuring that is already taking place between telecommunications, entertainment/media and computer sectors as a result of the phenomenon of convergence will lead to an increasing number of media, telecommunications and Internet-related cases in the future. Being at the centre of the convergence process the Internet is attracting strong market players from closely related telecommunications and media areas. More generally, where markets disappear or integrate and new markets emerge, there is a significant increase in the number of joint venture cases. The new joint ventures range from horizontal transactions which share risk and match complimentary skills, to vertical operations where companies try to take advantage of the emerging new services.

The companies, that have the interest, and are ready to take the risk, to position themselves on the emerging new markets, are usually active on closely related markets. Therefore, where such companies set up joint ventures the operations often give rise to coordination issues. As a broad conclusion, it could be said that this is the type of operation that most often would require an assessment according to Article 2(4) of the Merger Regulation in addition to the assessment of the risk of dominance. This conclusion is supported by the fact that the telecommunications/media cases after the amendments to the Merger Regulation came into force usually include assessments of coordination issues.[138]

The Commission's first cases that included an examination of Article 2(4) effects have already displayed some common themes. The relative size of the Article 2(4) market has been important in assessing the likelihood of coordination. As the Commission pointed out, normally, the commercial incentives, and hence the risk of coordination, are smaller if the joint venture's market is significantly smaller than the Article 2(4) market. The nature of the markets themselves is also an important factor in the Commission's

[138] In 1998, 13 of the 76 joint venture cases decided under the amended Merger Regulation necessitated an analysis under Article 2(4). The most in-depth analyses were made in cases within the telecommunications and Internet areas. See 1998 Competition Report, Box 7: "Implementation of the new Article 2(4) of the Merger Regulation".

assessment. The nature of existing links between the parent companies is relevant for the determination of causality between the notified operation and the Article 2(4) effects, though their existence does not automatically imply that there is no effect.[139]

It appears that horizontal joint ventures raise more often coordination problems. Vertical transactions are more likely to bring about competition problems related to dominance than to coordination of parents' behaviour outside the joint venture.

For example, the two, linked, German digital pay-TV cases– *Bertelsmann/Kirch/Premiere* and *Deutsche Telekom/Betaresearch*, gave rise to concerns over the creation of dominance through vertical market links, rather than the traditional horizontal overlaps. In order to supply a full package of digital pay-TV services to consumers, various elements are needed, i.e. set-top box technology to decode the programs, broadcasting facilities, access to cable/satellite networks, programming content. It appeared to the Commission that the proposed operations would have brought together leading suppliers of all these elements to the German market.[140]

However, in *Canal+/BankAmerica*, the transaction did not create or strengthen the dominant position of Canal+. Rather, it gave rise to a situation where the company's commercial incentives would change so that there would be an increased risk of discrimination against other pay-TV operators in Spain. The case shows the advantages of the new treatment of joint ventures. Before the amendments to the Merger Regulation, the whole operation would have been subjected to the Article 81 rules. The amended Merger Regulation provides for the opportunity for remedies to be found which offset the possible spillover effects of the transaction, but leave the transaction structurally unchanged.[141]

Remedies could be needed in relation to both structural and coordination aspects of joint ventures. It seems that behavioural undertakings are generally regarded by the Commission as less appropriate than structural undertakings to resolve structural problems such as the emerging of lasting dominant positions. The overall impression is

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[139] See 1998 Competition Report, Box 7: "Implementation of the new Article 2(4) of the Merger Regulation".
[140] 1998 Competition Report, point 155.

that after the amendments to the Merger Regulation came into force the Commission has been more willing to resolve competition problems by attaching conditions and obligations to a positive decision rather than to prohibit a transaction outright. Even in the broadcasting sector, where joint ventures were prohibited in the past, the Commission seems ready to take a positive attitude under certain conditions. Namely, it seems that in the second *Kirch/Bertelsmann/Deutsche Telekom* case the Commission could have given authorization to the parties if they would have been able to offer sufficient pro-competitive safeguards. Unlike the parties to this joint venture, the parties in the *BT/AT&T* case were willing to agree on substantial conditions on the operation of the joint venture, including divestment of activities. By adopting parties' undertakings, the Commission guarantees the benefits of innovation following the joint venture, whilst also ensuring that competing alternatives are able to develop.

The Commission could consider as pro-competitive both full-function and non full-function joint ventures. Before the amendments to the Merger Regulation the Commission cleared under Article 81(1) telecommunications joint ventures, new entrants in the telecommunications field. The Commission pointed out as reasons for these decisions the high barriers to entry to the market, the high level of the investment required, the high commercial risk, etc. These are also factors that lead to a greater reliance of the joint venture on its parents, preventing its full-function character. Taking into account the circumstance that according to the amended Merger Regulation the full-function character of the joint venture determines the application of the Merger Regulation, it follows that similar to the above non full-function joint ventures will continue to be assessed in the light of Article 81. It is likely that the Commission would take a positive attitude, including clearing of joint ventures whose parents are new entrants in the markets. By contrast, the Commission did not clear joint ventures of the dominant telecommunications operators even though it usually granted exemptions under Article 81(3). If such sort of operations will be notified to the Commission in the future, coordination issues are also possible.

[141] In the 1998 Competition Report, Box 7: "Implementation of the new Article 2(4) of the Merger Regulation", the Commission pointed out that the *Canal+/CDPQ/BankAmerica* case shows the potential use of Article 2(4).

The advantages of parents' cooperation in the joint venture would be exhausted where the creation of the joint venture is likely to eliminate competition by foreclosing third party access. The Commission will object the creation or strengthening of dominant positions as a result of such a joint venture unless remedies can be adopted which prevent effective competition from being significantly impeded. The same is true also where the operation creates or strengthens a national dominant position because it erects barriers to entry and thus further partitions national markets contrary to the fundamental goal of market integration.[142] This reasoning clearly prevailed in the *MSG* case, where the joint venture was intended to provide services to a market that did not exist yet but was expecting to grow in the future. It appeared to the Commission that future competition would be eliminated in the developing phase of the market if the most likely potential competitors, instead of entering the market individually, set up a joint venture.

Thus where new markets emerge the Commission takes a cautious stance towards the proposed joint ventures in order to ensure a competitive structure to the markets. The Commission is likely to be concerned about transactions contributing to maintaining existing dominant positions and extending dominant positions to the new markets. By contrast, joint ventures, which will compete against the existing dominant undertaking, are generally considered by the Commission as pro-competitive.

Moreover, the Commission has tended so far not to allow dominant players to extend their dominance to the new markets even for technological benefits. The Commission has made it clear that the structure of shareholders such as in the *Kirch/Bertelsmann/Deutsche Telekom* cases (or the *NSD* case) can be more detrimental than beneficial to technological progress. Given this structure of shareholders, potential suppliers of digital pay-TV will decide not to enter the market to the same extent as would be the case with a service supplier whose shareholders structure would ensure strict neutrality. The prohibition decisions underline the Commission's determination to act where necessary to ensure that newly emerging markets are not foreclosed. Only in a competitive environment can their expected potential for growth, necessary to satisfy the increasing consumer demand, be fully realised.[143] However, where markets are global,

[142] See e.g. L. Callum, "EC Competition Law and Digital Pay Television" (1999) *Competition Policy Newsletter* Number 1 February.
[143] See 1998 Competition Report, point 141.

the Commission is likely to be more favourable to the entry of dominant players given the need to ensure the future role of Europe in the world economy.

It appears that where each of the parent companies is active on a different geographic market the creation of a joint venture between them is less likely to give rise to competition problems.[144] For example, when two national telecommunications operators, Deutsche Telekom and France Télécom, set up a joint venture for the provision of telecommunications services in Italy, the Commission found that the transaction did not give rise to the risk of dominance or coordination of parents' behaviour. Where parents are present in different geographic markets, their joint venture would contribute to the integration of European markets. However, in its Sixteenth Report on Competition Policy the Commission feared the creation of European networks of cross-border alliances. In Commission's view where, for example, all major television distributors in Europe are linked through networks of alliances, this could have an impact at European level going beyond the specific consequences for national markets.[145] Even though the Commission raised no objections when Deutsche Telekom and France Télécom entered the Italian telecommunications market it has reserved its right to investigate into the overall cooperation between them. Thus where major European players are linked through a network of alliances, there is an increased risk of partitioning of national markets and safeguarding of dominant positions.

It is likely that in dealing with joint venture cases in the future the Commission will be willing to prevent the emergence of anti-competitive gatekeeper positions. The Commission seems determine to avoid a situation where control over access devices (e.g. set top boxes) is used as a lever to create and strengthen dominant positions on a lasting basis. For example, if not prohibited NSD would have had a gatekeeper position regarding the supply of satellite TV channels to the Nordic market. In the *BiB* case, it has been agreed that third parties, whether operators of digital TV or digital interactive TV services, will have fair, reasonable and non-discriminatory access to the digital set top boxes subsidised by BiB. In *Canal+/BankAmerica*, Canal+ and Sogecable have undertaken to provide fair and equal treatment of cable pay-TV operators regarding

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[144] See Callum, n. 142 above, at 7-8.
[145] See the Sixteenth Report on Competition Policy, para. 82.

content provision on the Spanish pay-TV market. Thus the Commission have applied the competition law rules to prevent the creation of bottlenecks, or where they exist, to ensure free access to them.[146]

Finally, it is to be noted that the on-going globalization and convergence of markets is already changing market definitions. The Commission has increasingly identified worldwide relevant markets. Even where the market is identified as European, the Commission may take account of potential competition from other geographical areas when assessing a transaction.[147] However, where new markets are evolving, in defining relevant markets for the purposes of Community competition law, the Commission has the difficult task of forecasting the development of new markets at an early stage. Changes in the Commission's viewpoint regarding market definition are thus to be expected according to the direction of market developments.

[146] The Green Paper on the Convergence, n. 93 above, provides further evidence for the Commission's determination in this respect. The Commission also adopted a Notice on the application of the competition rules to access agreements in the telecommunications sector (22 August 1998) OJ C 265. See also L. Callum, "EC Competition Law and Digital Pay Television", n. 142 above.

[147] For the new developments in relation to market definition see the Commission's 1998 Report on Competition Policy, Box 5: "Globalization of markets and competition analysis".

V. CONCLUSION

The adoption of the 1997 amendments to the Merger Regulation has brought the Commission's policy towards joint ventures to a radical new stage of development. This appears to be a logical conclusion of the process of gradual harmonization of the regimes of cooperative structural and concentrative joint ventures. The move to a more realistic approach to the issue of potential competition, the Commission's more realistic and economically based analysis of joint ventures under Article 81(1) (former 85(1)) and the reliance upon ancillary restrains doctrine, the adoption of the fast track procedure and the changes in the Commission's interpretive notices concerning joint ventures, have all been attempts to provide solution to the substantive and procedural problems associated with the treatment of joint ventures under EC competition law.

It is agreed now that the concentrative-cooperative joint venture distinction failed to operate as a speedy, inexpensive and predictable jurisdictional test. Nevertheless, the reasons behind it are still important. The starting point is that anti-competitive agreements are prohibited by Article 81(1) subject to some exceptions where the benefits of the agreement outweigh its restrictive effects. In contrast, structural operations are as a rule permitted unless they create or strengthen a dominant position as a result of which competition in the common market or in a substantial part of it may be significantly impeded. On the other hand, joint ventures frequently give rise to both behavioural and structural effects, which in the EC competition law raised the issue whether to apply Article 81 (former 85) or the Merger Regulation to them. Cooperative joint ventures of structural nature were assigned to the stricter provisions of Article 81 (former 85) because the independent presence of the parent companies in the same market as that of the joint venture or in related markets was regarded as likely to give rise to the coordination of the competitive behaviour of the parent companies. This led to the application of different procedural rules to cooperative and concentrative joint ventures with different treatment in terms of timing and legal certainty.

The existence of competitive relationship between the parents in the joint venture's market or in closely related markets remains highly relevant to assessing the competitive risks associated with joint ventures. However, the Commission gradually

accepted the notion that joint ventures need a unified analysis of both their structural and behavioural elements.[148] As a result, the Commission abandoned its classificatory approach to joint ventures developed long prior to the adoption of the Merger Regulation, in the absence of an adequate instrument providing for the control of concentrations in the Community.

Under the new approach full-function joint ventures are subjected to an analysis designed to examine both their structural and behavioural effects within the procedure of the Merger Regulation. The notion of full-function joint venture with a Community dimension serves to allocate jurisdiction between the Merger Regulation and Article 81 of the EC Treaty, on one hand, and between the Regulation and national merger control rules, on the other hand. It appears that so far the Commission has applied a broad full-function test and a broad definition of joint control, which makes it possible that a greater number of joint ventures be treated in accordance with the new rules. Thus the trend in the Commission's policy is to deal with the structural implications of joint ventures under the Merger Regulation, notwithstanding their cooperative aspects.

The Commission has always been looking to strike the right balance between the market benefits of competition through the creation of joint ventures and the risk of anti-competitive effects. When this is translated to the last changes in the treatment of joint ventures, the following equilibrium appears. On one hand, the Commission has adopted a more tolerate stance towards structural joint ventures, regardless of their cooperative aspects. Before the amendments, the likelihood of spillover effects would bring the whole transaction within Article 81 rules. Given that Article 81 does not any longer apply to the formation of what was previously known as cooperative full-function joint ventures, there is a decreasing room for prohibition of these type of operations, except for the risk of dominant positions being created or strengthened. This provides greater legal certainty to parties to such transactions. They are analyzed more and more like mergers and acquisitions of sole control. There are no differences in terms of procedure. In terms of

[148] Many authors prior to the amendments to the Merger Regulation suggested that joint ventures required analysis of both their structural and behavioral implications. see e.g. J. Venit, "Oedipus Rex: Recent Developments in the Structural Approach to Joint Ventures under EEC Competition Law", n. 13 above, 30-31. Similarly, B. Hawk, "Joint Ventures Under EC Law", n. 51 above, ch. 23, 595-597.

substantive analysis, the stricter substantive rules of Article 81 apply only to the coordination issue.

Moreover, after the amendments to the Merger Regulation came into force, the analysis of the coordination issue seems to be placed primarily under Article 81(1). The new Article 2(4) of the Merger Regulation requires the Commission to take in particular into account two risks to competition due to the creation of full-function joint ventures, i.e. the risk of spillover effects between the parents and the risk of substantial elimination of competition. Appreciability of the restriction on competition is regarded as a necessary condition for the application of Article 81(1) to the coordination aspects of a full-function joint venture. Even if the parent companies were to coordinate their activities on the candidate markets for coordination, if this coordination could not lead to an appreciable restriction of competition, it is not necessary for the Commission to establish a causal link between the creation of the joint venture and the behaviour of the parent companies outside the joint venture on closely related markets. The analysis of appreciability uses market share data. Furthermore, where market shares of the parties do not in themselves rule out the possibility of restriction of competition, the question arises whether the parties together or separately have sufficient market power to make coordination worthwhile, i.e. whether they have the ability to raise prices or restrict output, behave independently of customers or eliminate competition. If the market structure of the candidate market is not conductive for coordination (in terms of conditions of competition and entry to the market) the Commission is likely to conclude that there is no risk of coordination of parents' behaviour as a result of the joint venture. However, even if the parents had the market power to make coordination worthwhile, the Commission would examine whether the creation of the joint venture would give them also the means for this. Thus with regard to spillover effects between the parents on the candidate markets for coordination, structural factors may be supplemented by other relevant factors. If the size of the candidate markets is substantially larger than the size of the joint venture's market the likelihood for coordination is reduced significantly. Summarizing, in assessing the likelihood of coordination, the Commission takes into account various factors such as the existing and potential competition on the candidate markets, the barriers to entry, the size of the joint venture's market, the proportion of costs, the use of

common technology, etc. In growing markets, even relatively high market shares can be of a limited significance given other characteristics of the market. Against this background, it appears that so far the Commission has made use of the "primarily structural" requirement of the Merger Regulation. By including structural and other factors in its assessment of the coordination issue under Article 81(1), the Commission has taken a flexible position that reflects the realities on the market.

Even though the application of Article 81 in the assessment of full-function joint ventures is limited only to the coordination issue, the role of Article 81 on the other hand is still very important. It has been seen that coordination concerns can arise even though the concentrative elements of the transaction do not create any competition problems. The Commission's decisions under the amended Merger Regulation, which include an assessment of the coordination issue, show so far a clear preference for remedies, taken either at phase I or at the in-depth phase II investigation, in order to resolve the coordination issue. The advantages of this approach appear to be that the remedies adopted - divestment of overlapping businesses, structural separation of activities, obligations to provide non-discriminatory treatment, leave the operation structurally unchanged. Lastly, the fact that the Commission has retained option to assess cooperative effects of full-function joint ventures under the substantive rules of Article 81 means that if the competition problem as identified by the Commission cannot be resolved and remedies cannot be found, then the whole transaction might be prohibited.

It appears that horizontal joint ventures raise more often coordination problems. Vertical transactions are more likely to bring about competition problems related to dominance than to coordination of parents' behaviour outside the joint venture. However, where the joint venture's parents are vertically related to each other outside the joint venture, the risk of one parent discriminating in favour of its affiliate company cannot be excluded, unless there are sufficient remedies in order to offset this effect.

It has been long recognized that join ventures contribute to increasing the competitiveness of European industry and creating a single market.[149] In many industries companies are competing in worldwide markets, and are forming new alliances of global dimensions. The analysis of competition problems take into account the increasing

[149] Sixteenth Report on Competition Policy, point 32.

globalization of markets. In general, in assessing joint ventures under the Merger Regulation, the Commission seems to be positive on operations that bring about benefits to competition. The Commission seems to draw a broad line between such transactions and defensive strategies by market operators that would have the effect of foreclosing markets or giving the parties the possibility of denying access to new entrants, even where technological benefits would have been provided. The Commission made it clear that if the single market is to work properly, especially in the run-up to economic and monetary union, its structures must continue to be flexible and open.[150] It seems convinced that only in competitive environment the expected potential for growth of the rapidly evolving new markets can be fully realized.

The development in the treatment of joint ventures of structural nature demonstrates an increasing attention in the EC competition law to the efficiencies stemming from joint ventures. This trend has some similarity with the interpretative development of the Clayton Act in the United States, which is the rough counter part of the EC Merger Regulation. The issue in the United States has not been whether the rules dealing with mergers or the rules dealing with cartels should apply to joint ventures. Both section 7 of the Clayton Act, which prohibits companies from acquiring the whole or any part of the stock of another company when the effect of such an acquisition would substantially lessen competition or tend to create a monopoly, and section 1 of the Sherman Act (the counterpart of Article 81), which prohibits combinations that have the effect of restraining trade, can apply.

In the United States, a joint venture (with its ancillary restrains) qualifies for rule of reason treatment only when it involves some potential for an efficiency-enhancing integration of the parties' resources. This is perhaps the most important feature that distinguishes joint ventures from cartels. The absence of economic integration means that the per se rule may apply. However, this threshold is quite low. Any genuine economic integration that plausibly could confer nontrivial social benefits suffices to take a joint venture outside the purview of the per se rule. The only per se illegal joint ventures are those that are merely cartels. A "quick-look" version of the rule of reason analysis is applied to joint ventures and their ancillary restrains which eliminate independent

[150] See the 1998 Competition Report, Introduction.

decision making by participants over price, output or other important competitive strategies. The quick-look analysis asks whether the economic integration among participants is likely to generate significant social benefits that could justify the elimination of independent decision making. The joint venture is usually excluded from the quick look when the only competition restrained would not have occurred absent of the joint venture.[151]

In sum, United States antitrust law is generally favourable to joint ventures. It takes into account the magnitude of the efficiencies that the joint venture brings about. Anti-competitive risks of joint ventures are mainly considered in highly concentrated markets. Where the venture and its parents together occupy a very substantial share of the market, the joint venture is seen as more likely to give rise to potential antitrust problems such as parents' coordination or access discrimination. Nevertheless, the venture can survive an antitrust attack because the efficiency gains it creates are so great as to justify a large combination.[152] Thus even though the wording of the Clayton Act in the United States is rigid, it has been interpreted in the sense that its prohibition applies when market power is involved.

Coming back to EC competition law, the Commission's more economic approach to the enforcement of Article 81(1) directly affected the treatment of joint ventures. The absence of market power is behind the decreased interest from competition's law point of view to cooperative joint ventures of structural nature. Even if such joint ventures reduced competition between the parents this would not have significant consequences on the structure of the market. The amendments to the Merger Regulation provide legal certainty to the large number of joint ventures' parties that do not possess market power.

In cases where competition concerns arose, the Commission has tended so far to issue positive decisions, accompanied with the necessary conditions and obligations rather than prohibiting joint ventures outright. The Commission adopted a prohibited decision only when it proved impossible to solve competition law problems by means of modifications to the initial agreements and undertakings by the parties. In significant

[151] See G. Werden, "Antitrust Analysis of Joint Ventures: An Overview" (1998) *Antitrust Law Journal* Vol. 66, at 735.
[152] See D. Lange, "US Antitrust Law and Joint Ventures", in *Joint Ventures in the United States*, ed. J. Forry and M. Joelson (London, Butterworths, 1988), ch. 5.

number of cases the Commission required structural rather than behavioural undertakings in order to ensure that markets remain competitive.

In conclusion, the overall sense of the amendments to the Merger Regulation signalizes a more relaxed approach to the effects of full-function joint ventures on competition. This approach is also apparent from the Commission's decisions in individual joint venture cases. Where competition concerns arise as a result of a proposed operation, the application of the test of dominance of the Merger Regulation and the substantive rules of Article 81 (if there are coordination aspects) provide the Commission with sufficient means to ensure that competition is maintained on the relevant markets. However, even in these circumstances and regardless of any cooperation issues that might arise, parties to full-function joint ventures benefit from the procedural rules of the Merger Regulation and may propose undertakings in order to address the Commission's concerns in regard to both dominance and coordination. This regime provides for clarity and consistency in the treatment of joint ventures and promotes legal certainty.

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